No. 14-1154 (consolidated with Nos. 14-1179 and 14-1218)

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

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

CTIA—THE WIRELESS ASSOCIATION, *et al.*,

Intervenors for Respondents.

On Petitions For Review Of Final Rules Of The
United States Federal Communications Commission

JOINT OPENING BRIEF FOR PETITIONERS NATIONAL ASSOCIATION OF BROADCASTERS AND SINCLAIR BROADCASTING GROUP, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners state as follows:

(A) Parties and Amici:

The parties in this Court's case no. 14-1154 are Petitioner the National Association of Broadcasters ("NAB"); Respondents the Federal Communications Commission ("FCC" or "Commission") and the United States of America; and Intervenors CTIA—The Wireless Association, Competitive Carriers Association, and Consumer Electronics Association.

The parties in this Court's case no. 14-1179 are Petitioner Sinclair Broadcast Group, Inc. ("Sinclair"); Respondents the FCC and the United States of America; and Intervenor Expanding Opportunities for Broadcasters Coalition.

The parties in this Court's case no. 14-1218 are Petitioner NAB and Respondents the FCC and the United States of America.

(B) Rulings Under Review:

NAB and Sinclair (collectively, "Petitioners") seek review of the Commission's order captioned, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, FCC 14-50, GN Docket No. 12-268 (rel. June 2, 2014) ("Order"), JA__. A summary of that order was published in the Federal Register at 79 Fed. Reg. 48,442 (Aug. 15, 2014). *See* JA__.

(C) Related Cases:

The petition filed in *Sinclair Broadcast Group, Inc. v. FCC*, No. 14-1179 (Sept. 15, 2014), was consolidated with this case on September 19, 2014. On October 29, 2014, NAB filed a second petition concerning a related order of the Commission captioned *Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*, Declaratory Ruling, GN Dkt. No. 12-268 (rel. September 30, 2014) ("Declaratory Ruling"), JA__. *See* No. 14-1218 (filed Oct. 29, 2014). That challenge was consolidated with this action on October 31, 2014. Petitioners are not aware of any other cases related to this petition for review.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, Petitioners National Association of Broadcasters ("NAB") and Sinclair Broadcast Group, Inc. ("Sinclair") state as follows:

NAB is a nonprofit, incorporated association of radio and television stations. It has no parent company, and has not issued any shares or debt securities to the public; thus no publicly held company owns ten percent or more of its stock. As a continuing association of numerous organizations operated for the purpose of promoting the interests of its membership, the coalition is a trade association for purposes of D.C. Circuit Rule 26.1.

Sinclair is a Maryland corporation that is publicly traded on the NASDAQ Stock Exchange [NASDAQ: SBGI]. Sinclair operates and provides programming and sales services to television stations in various cities across the country. Sinclair has no parent company and no publicly traded company owns more than 10 percent of Sinclair's stock.

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GLOSSARY

APA	Administrative Procedure Act
Commission or FCC	Federal Communications Commission
Declaratory Ruling	*Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*, Declaratory Ruling, GN Dkt. No. 12-268 (rel. Sept. 30, 2014) (JA__)
First Digital TV Translator Order	*Amendment of Parts 73 & 74 of the Commission's Rules to Establish Rules for Digital Low Power Television*, Report and Order, 19 FCC Rcd 19331 (2004)
NAB	National Association of Broadcasters
NPRM	Notice of Proposed Rulemaking
OET	Office of Engineering and Technology
OET Bulletin 69 or Bulletin	OET Bulletin 69, *Longley-Rice Methodology for Evaluating TV Coverage and Interference* (Feb. 6, 2004) (JA__)
Order	*Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*, Report and Order, GN Dkt. No. 12-268 (rel. June 2, 2014) (JA__)
Sinclair	Sinclair Broadcast Group, Inc.
Spectrum Act	Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156, 201 (Feb. 22, 2012)
Widelity Report	Widelity, Inc., *Response to the Federal Communications Commission for the Broadcaster Transition Study Solicitation*, GN Docket No. 12-268 (Dec. 30, 2013) (JA__)

INTRODUCTION

In Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156, 201, commonly known as the Spectrum Act, Congress authorized the Federal Communications Commission ("FCC") to conduct an "incentive" auction of broadcast television spectrum, in order to make voluntarily relinquished spectrum available for other uses. These consolidated appeals stem from the FCC's refusal to follow Congress's express direction to protect over-the-air television broadcasters as it conducts the auction.

When authorizing the FCC to conduct the broadcast spectrum incentive auction, Congress plainly sought to balance its desire to reallocate spectrum for commercial wireless service with the goal of ensuring that broadcasters that choose not to participate in the auction—and their viewers—are unharmed in the process. The Spectrum Act provides that broadcasters should retain the same coverage areas (47 U.S.C. § 1452(b)(2)), serve the same viewers (*id.*), and be reimbursed for any costs associated with their forced relocation by the FCC (*id.* § 1452(b)(4)(A)). Congress even went so far as to prescribe the precise method by which the FCC must calculate broadcasters' coverage areas and populations served, to ensure that the Commission creates certainty for broadcasters and does not shrink existing areas of service in an attempt to reclaim more spectrum for the commercial wireless industry.

In keeping with these objectives, the Spectrum Act provides that broadcast television licensees may "voluntarily" relinquish their spectrum rights in exchange for compensation. 47 U.S.C. § 1452(a)(1). For broadcasters who retain their rights, "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." *Id.* § 1452(b)(2). OET Bulletin 69 has, for more than a decade, set forth the Commission's technical standard for determining the coverage area and population served by each broadcast television licensee.

The FCC has shunned its statutory obligation to protect broadcasters and viewers. In an admitted effort to make as much spectrum as possible available for wireless providers, a deeply divided Commission adopted auction procedures that will fail to preserve either "coverage area" or "population served" for each broadcast television licensee, and will disregard the FCC-authorized facilities needed to preserve the coverage area and population served for many licensees that experience interruptions in their broadcast signal due to interference, terrain, or other factors. More troubling, the Commission replaced the methodology that Congress specified for preserving coverage area and population served—OET Bulletin 69—with a new methodology created by Commission staff and first announced in a

2013 public notice. That new methodology, called *TVStudy*, effectively moves the goalposts by employing dramatically different procedures and producing significantly different calculations of broadcasters' coverage areas and populations served. As two of the five Commissioners noted in dissents from the Commission's Order, this approach contravenes the plain text of the Spectrum Act.

Moreover, the Commission utterly failed to observe the basic Administrative Procedure Act ("APA") requirements. In particular, the Commission violated the APA by:

- failing to consider reasonable alternatives to the novel procedures adopted by the Order;
- failing to provide a sufficient and reasoned explanation for its refusal to preserve coverage area and population served; and
- violating the APA's notice requirements by adopting changes that are not a logical outgrowth of any notice of proposed rulemaking and by failing to provide public notice of the software and settings that will be used in the incentive auction.

Compounding these errors, a divided Commission *sua sponte* issued a "Declaratory Ruling" on September 30, 2014—in apparent response to Petitioners' lawsuits—attempting to justify its failure to preserve broadcasters' coverage areas. As the two dissenting Commissioners noted, however, that Declaratory Ruling—

issued absent notice and comment—cannot remedy the legal errors in the Commission's incentive auction Order.

In addition, Sinclair has identified two separate Spectrum Act and APA violations concerning how the auction and repacking of television stations must occur. *First*, the Order establishes a 39-month post-auction transition period for broadcasters that are assigned to new channels during the repacking process. JA__(Order¶559). At the end of this period, broadcasters must terminate operations on their pre-auction channels. Yet the Commission's *own* expert determined that, even in the best-case scenario, a single complex transition site would require at least 41 months to complete the transition. And numerous commentators explained that even this estimate was unrealistic. The Commission has no meaningful response to these concerns. The hard deadline will force some broadcasters to cease broadcasting, and thus fails to preserve either "coverage area" or "population served" in direct contravention of the Spectrum Act and in violation of the APA.

Second, the Commission misconstrued the Spectrum Act's provision that the FCC "may not enter into an agreement for a licensee to relinquish spectrum usage rights in exchange for a share of auction proceeds … unless … at least *two competing licensees participate* in the reverse auction." 47 U.S.C. § 309(j)(8)(G)(ii) (emphasis added). This requirement was intended to ensure that the auction price reflects a competitive market valuation of the relinquished spectrum. But the FCC

determined that "two competing licensees" will "participate" in the reverse auction if any two broadcast licensees—from anywhere in the country—submit pre-auction applications. This interpretation unreasonably strains the definition of "competing" because licensees situated on opposite sides of the country obviously do not compete; and it unreasonably construes "participate" to be based on *pre-auction* activities, rather than actual participation in the auction itself.

JURISDICTIONAL STATEMENT

Petitioners seek review of a final FCC order captioned, *Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*, Report and Order, GN Dkt. No. 12-268 (rel. June 2, 2014), JA__. A summary of the Order was published in the Federal Register on August 15, 2014. *See* JA__(79.Fed.Reg.48,442). NAB and Sinclair each filed timely petitions for review on August 18, 2014 and September 15, 2014, respectively, pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a).

In addition, NAB seeks review of a *sua sponte* Declaratory Ruling of the FCC that purports to clarify the FCC's approach to preserving broadcasters' coverage area. *See Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*, Declaratory Ruling, GN Dkt. No. 12-268 (rel. Sept. 30, 2014), JA__. NAB filed its petition for review on October 29, 2014, pursuant

to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a). On October 31, 2014, this Court consolidated NAB's petitions for review.

This consolidated action concerns a final agency rule that disposes of all parties' claims, and is properly before this Court.

STATEMENT OF THE ISSUES

Petitioners jointly present the following challenges to the FCC's Order and Declaratory Ruling, which were promulgated under the Spectrum Act:

1. Whether the Commission violated the Spectrum Act by introducing a new methodology, *TVStudy*, to determine the coverage area and population served for broadcast television licensees, when the Spectrum Act expressly requires that coverage area and population served be "determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission" as of February 22, 2012. 47 U.S.C. § 1452(b)(2).

2. Whether the Commission violated the Spectrum Act by developing auction procedures that fail to protect the population served for broadcast television licensees, when the Spectrum Act requires the FCC to make "all reasonable efforts to preserve … [the] population served of each broadcast television licensee." 47 U.S.C. § 1452(b)(2).

3. Whether the Commission violated the Spectrum Act by developing auction procedures that fail to protect the coverage area for broadcast television licensees, when the Spectrum Act requires the FCC to make "all reasonable efforts to preserve … the coverage area … of each broadcast television licensee." 47 U.S.C. § 1452(b)(2).

4. Whether the Commission violated the APA by: (a) failing to consider reasonable alternatives to the auction procedures adopted in the Order; (b) providing no reasoned explanation for its refusal to preserve coverage area and population served, either in the Order or the Declaratory Ruling; (c) adopting changes that are not a logical outgrowth of the notice of proposed rulemaking, such as failing to protect viewers against terrain losses, denying protection to unpopulated areas, and using *TVStudy* in lieu of the methodology described in OET Bulletin 69; and (d) violating the APA's notice and comment requirements by releasing *TVStudy* updates through nonpublic channels.

Sinclair presents the following challenges to the FCC's Order promulgated under the Spectrum Act:

5. Whether the FCC violated the Spectrum Act and the APA by requiring broadcasters to cease broadcasting on pre-auction channels within 39 months after issuance of channel reassignments.

6. Whether the FCC violated the Spectrum Act and the APA by ignoring the "two competing participants" limit on its incentive auction authority and adopting arbitrary interpretations of "competing" and "participants."

STATUTES AND REGULATIONS

The text of relevant statutes and regulations is set forth in the Addendum to this brief.

STATEMENT OF THE CASE

A. The Spectrum Act

The Spectrum Act instructs the FCC to conduct a three-step incentive auction to reallocate certain voluntarily relinquished broadcast spectrum to wireless providers. *See* 47 U.S.C. § 1452. Congress intended to provide market-based financial incentives to repurpose existing broadcast television spectrum for the commercial wireless industry, while ensuring minimal disruption to broadcasters and their millions of viewers.

First, the Commission must hold a "reverse auction" that is purely voluntary for television broadcasters "to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights." 47 U.S.C. § 1452(a)(1). Television broadcasters then may sell their spectrum rights to the Commission for remuneration. To ensure that the price for relinquished spectrum

is established by a competitive market, the Spectrum Act provides that "at least two competing licensees [must] participate." *Id.* § 309(j)(8)(G)(ii).

Second, the Commission may reorganize the broadcast television spectrum by "repacking" remaining television broadcasters into a smaller band of the spectrum. During repacking, the Commission may make "reassignments of television channels" and "reallocat[e]" portions of the broadcast television spectrum to make bands of contiguous spectrum available for future sale to wireless providers. 47 U.S.C. § 1452(b)(1)(B). This authority, however, is expressly circumscribed in the Spectrum Act, which provides that:

> 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.

Id. § 1452(b)(2).

Third, following the repacking, the FCC will conduct a standard "forward" auction, in which the newly available spectrum will be auctioned off to bidders (including mobile broadband providers). *See* 47 U.S.C. § 1452(c).

B. OET Bulletin 69

The Spectrum Act's prescription for the repacking process incorporates a long-standing FCC methodology, "OET Bulletin 69 of the Office of Engineering and Technology of the Commission." 47 U.S.C. § 1452(b)(2) ("OET Bulletin 69"

or "Bulletin"). OET Bulletin 69 was first released in 1997 and was updated in 2004. *See* OET Bulletin 69, *Longley-Rice Methodology for Evaluating TV Coverage and Interference* (Feb. 6, 2004), JA__.

OET Bulletin 69 dictates how the FCC calculates a broadcaster's coverage area and population served. The ultimate calculations depend on an array of variables, including the location and frequency of the transmitting signal, the terrain in the area, the distribution of population, and interference from other signals. The Bulletin "provides guidance on the implementation and use of Longley-Rice methodology for evaluating TV service coverage and interference …. The Longley-Rice radio propagation model is used to make predictions of radio field strength at specific geographic points based on the elevation profile of terrain between the transmitter and each specific reception point." JA__(OET.Bulletin.69.at.1).

Under the three-step procedure laid out by the Bulletin, the FCC first draws a roughly circular "contour" around a TV station's transmitter based on the FCC's generic assumptions of signal strength over distance. *See* JA__(OET.Bulletin.69.at.1-2, 11) (citing 47 C.F.R. § 73.683); *see also* 47 C.F.R. § 73.683(a). The Bulletin next specifies a procedure for calculating the areas within that contour where broadcast television service will not be received due to terrain or interference. *See* JA__(OET.Bulletin.69.at.2). The area inside the contour is divided into a grid of square cells, and "[t]he coordinates of census blocks falling

inside each cell are retrieved along with the population of each block. From this information, the total population and the coordinates of the cell centroid are determined for each cell." JA__(OET.Bulletin.69.at.11). Finally, the Longley-Rice model is applied to the cells to account for terrain and interference from other broadcast signals, yielding the broadcaster's coverage area and population served. *See* JA__(OET.Bulletin.69.at.11-12).

The computer program that executes these steps plays a key role in the Bulletin. The first paragraph states that "[a] computer is needed to make these predictions because of the large number of reception points that must be individually examined." JA__(OET.Bulletin.69.at.1). It then directs readers to the original computer code and descriptions of subsequent modifications to that code. *Id.* The Bulletin later provides a website where the OET Bulletin 69 computer program (in Fortran code) can be downloaded. *See* JA__(OET.Bulletin.69.at.10-11). Roughly a third of the Bulletin is devoted to "provid[ing] information on implementation of the FCC's Longley-Rice Computer program." JA__(OET.Bulletin.69.at.1); *see also* JA__(OET.Bulletin.69.at.10-13). Throughout, the Bulletin explains how the computer program resolves problems and sources data. *See*, *e.g.*, JA__(OET.Bulletin.69.at.5) ("[f]or cells with population, the point chosen by the FCC computer program is the population centroid"); JA__(OET.Bulletin.69.at.6)

("The FCC computer program is linked to a terrain elevation database with values every 3 arc-seconds of latitude and longitude.").

C. The Rulemaking Process

1. The Proposed Rule

The FCC released a Notice of Proposed Rulemaking ("NPRM") for the incentive auction in late 2012. *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 77 Fed. Reg. 69,934 (Nov. 21, 2012), JA__. For the most part, the NPRM did not discuss the issues presented here. There was no suggestion that the Bulletin might be updated, that the FCC might leave unpopulated coverage areas unprotected during repacking, or that the FCC would fail to protect populations against terrain loss—that is, loss of a signal where terrain disrupts a reassigned channel in ways that did not affect the broadcaster's previous channel. *See* JA__(77.Fed.Reg.at.69,945-46).

In its comments, NAB urged the Commission to (among other things) preserve areas and populations served by "fill-in translators" during repacking. *See* JA__(NAB.NPRM.Reply.Comment.47-52(Mar.12,2013)); JA__(NAB.NPRM Comment.8-9(Jan.25,2013)); *see also* JA__(NAB.Sunshine.Comment.1-7(May.8,2014)). Broadcasters use "translator stations" to "retransmi[t] the programs and signals of a television broadcast station, without significantly altering any characteristic of the original signal other than its frequency and amplitude, for

the purpose of providing television reception to the general public." 47 C.F.R. § 74.701(a). They are "intended to provide service to areas where direct reception of full-service broadcast stations is unsatisfactory because of distance or intervening terrain obstructions." *Amendment of Parts 73 & 74 of the Commission's Rules to Establish Rules for Digital Low Power Television*, Report and Order, 19 FCC Rcd 19331, 19334 (2004) ("First Digital TV Translator Order"). "Fill-in translators" are retransmission stations expressly authorized by the Commission "to provide 'fill-in' service to terrain-obstructed areas within a full-service station's service area." *Id.*; *see also* JA__(Order¶164) (a full power station's "service area" is the same as its coverage area).

For some stations, a significant portion of the viewing audience receives its signal from a translator. *See* JA__(NAB.NPRM.Reply.Comment.49-50(Mar.12,2013)). The Commission's NPRM did not state that broadcasters would lose protection for coverage area and population served if those areas and populations were served by FCC-approved fill-in translators.

2. *TVStudy*

Ten days after opening comments were due for the NPRM, the FCC's Office of Engineering and Technology, "announce[d] the release of new software to perform interference analyses using the methodology described in its Bulletin No. 69"—called "*TVStudy*"—that the Office "plan[ned] to use … in connection with

the proposed broadcast television spectrum incentive auction." *Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software* 1, FCC Public Notice DA 13-138, ET Docket No. 13-26 (rel. Feb. 4, 2013), JA__. The Office of Engineering and Technology sought comment on "the software generally," on "the identification of any errors, unexpected behaviors, or anomalous results produced in running the software," and on "the implementation of various analytical elements in the software that are not specifically addressed in OET-69." *Id.* It did not solicit comment on whether to replace the existing OET Bulletin 69 software, the legality of these changes, or any additional suggestions of changes to the software.

The new *TVStudy* software departed in many ways from the software described by OET Bulletin 69. It used new programming languages (Java and C) and new code. It employed a single, global grid. And it altered the population and terrain data, changed the treatment of antenna beam tilt, changed the calculation of depression angles, used more precise geographic coordinates, and changed how internally "flagged" results (known as "error codes") were resolved.

NAB promptly met with the FCC staff to express "serious reservations" with the staff's proposed use of *TVStudy* in the repacking. JA__(NAB.Notice.of.Ex.Parte.Communication.1-5,ET.Dkt.No.13-26 (Feb.8,2013)). NAB further objected that using *TVStudy* during the incentive auc-

tion would violate the Spectrum Act, and that, in any event, a change of this magnitude must come from the Commission—rather than the staff—after a formal comment period with sufficient opportunity to assess the software. *See* JA__(NAB.Comment.3-19,ET.Dkt.No.13-26(Mar.21,2013)); JA__(NAB.Reply.Comment.2-5,ET.Dkt.No.13-26(Apr.5,2013)). NAB also submitted evidence showing that *TVStudy* would reduce calculated coverage area and population served for many television stations, and that the existing OET Bulletin 69 software is fully capable of generating the calculations needed for the incentive auction. *See* JA__(NAB.Comment.Ex.1(Tawil.Decl.),ET.Dkt.No.13-26 (Mar.21,2013)); JA__(NAB.Comment.Ex.2(Meintel.Decl.),ET.Dkt.No.13-26 (Mar.21,2013)); *see also* JA__(NAB.Comment.12-17, 20-21,ET.Dkt.No.13-26 (Mar.21,2013)); JA__(NAB.Reply.Comment.5-7,ET.Dkt.No.13-26(Apr.5,2013)); JA__(NAB.Sunshine.Comment.1-8.&.AttachmentsA-F, ET.Dkt.No.13-26 (May.8,2014)).

Shortly after the Public Notice announcing *TVStudy*, the FCC began "releasing" new versions of *TVStudy* via a private list-serve and a website. The newest versions of the software overwrote the previous versions, and the FCC never informed subscribers how the settings in the software should be configured. The FCC also posted approximately 90 pieces of correspondence from the e-mail user group relating to software implementation, errors, and changes—none of which, to

NAB's knowledge, constitute part of the record in this proceeding. NAB objected to this irregular procedure. *See* JA__(NAB.Comment(Apr.4,2014)).

3. Widelity Repacking Report

The FCC engaged Widelity, Inc. to assess the challenges and costs associated with the repacking process. Widelity, Inc., *Response to the Federal Communications Commission for the Broadcaster Transition Study Solicitation* at 7, GN Docket No. 12-268 (Dec. 30, 2013) ("Widelity Report"); JA__.[1] Widelity identified numerous concerns, including manufacturing and human capital resource shortages, the inability of broadcasters to prepare in advance, and substantial timing obstacles. *See* JA__(Widelity.Report.9-10); JA__(NAB.Comment.18-23 (Apr.21,2014)). Widelity's own best-case scenarios found that some broadcasters would require at least 41 months to complete their transition to a new channel following the auction. *See* JA__(Widelity.Report.44, 50-53) (discussing a single site involving five broadcasters). Many commenters noted that Widelity overlooked additional factors likely to delay repacking, including concerns about manufacturers' production constraints, the availability of skilled tower crews, and other design

[1] This report was released in connection with the public notice captioned *Media Bureau Seeks Comment on Widelity Report and Catalog of Potential Expenses and Estimated Costs*, GN Docket No. 12-268 (Mar. 20, 2014), 79 Fed. Reg. 18,026 (Mar. 31, 2014).

and construction bottlenecks. *See, e.g.*, JA__(GatesAir.Comment.4-8 (Apr.21,2014)).

D. The Final Rule

In a 3-2 decision, the FCC adopted OET's proposal to use *TVStudy* during the incentive auction. *See* JA__(Order¶¶127-61). The lone proposal rejected was a change in the resolution of internally "flagged" results. *See* JA__(Order¶¶158-60).

1. While acknowledging that reassigning a broadcast station to a new channel may create new terrain losses for that station, JA__(Order¶163), the Commission decided not to recognize such population and coverage losses, and instead to protect only against population (but not coverage area) losses due to new interference caused by other broadcast television stations, *see* JA__(Order¶¶176-82). The Commission also refused to protect fill-in translators, even though they are the only way for certain broadcasters to continue serving their existing viewers. *See* JA__(Order¶¶236-44, 164 n.553).

The Commission also unexpectedly announced that it would preserve only "the coverage area of a station to the degree that the area is populated." JA__(Order¶114 n.372); *see also* JA__(Order¶¶162-66). No explanation was given for this change.

The Commission discussed no possible alternatives to *TVStudy* that would have avoided changes in broadcasters' coverage areas and populations served. Nor did the Commission discuss the possibility of protecting against terrain loss, preserving currently unpopulated coverage areas, or ensuring that fill-in translators have a channel on which to operate. And the Commission never explained why its desired changes to data inputs—including population data, terrain data, treatment of antenna beam tilt, calculation of depression angles, and geographic coordinates—were necessary.

The Order also established a 39-month post-auction transition period for broadcasters assigned to new channels. JA__(Order¶559). This period commences on the FCC's announcement of the final channel assignments and includes (1) three months during which broadcasters will submit permit applications, immediately followed by (2) 36 months of construction deadlines for transitioning broadcasters. JA__(Order¶¶525, 559-60). Significantly, the 39-month period is shorter than the transition time that the FCC's own expert (and numerous commenters) concluded would be needed for some broadcasters. *See Reassignment Costs Report PN* (Dec. 30, 2013) ("Widelity Report"), *released for public comment on* Mar. 20, 2014, 79 Fed. Reg. 18,026, at 44, 50-53, JA__; *see also* JA__(GatesAir.Comment.4-6(Apr.21,2014)); JA__(Stainless.Comment.2 (Apr.21,2014)); JA__(Dielectric.Comment.3(Apr.21,2014)); JA__(American Tow-

er.Corp.Comment.1-7(Apr.21,2014)). While acknowledging "the need for a post-incentive auction transition timetable that is flexible for broadcasters," the FCC expressly rejected any exceptions to the 39-month deadline. JA__(Order¶¶559-61, 573).

Finally, the Order determined that the statutory requirement for participation by "two competing licensees" as a prerequisite for the reverse auction would be satisfied "if the pre-auction application" of more than one licensee "is found to be complete and in compliance with the application rules, and if at least two such licensees are not commonly controlled." JA__(Order¶413). The Commission concluded that all participants in the auction, regardless of location, compete with each other because they all seek to "receive incentive payments from the same limited source—the aggregate proceeds of the forward auction." JA__(Order¶414). Emphasizing its perceived need to increase the amount of spectrum reallocated, the Commission argued that any other interpretation would "limit the Commission's ability to allow market forces to determine the highest and best use of spectrum." JA__(Order¶415).

2. Commissioners Pai and O'Rielly dissented.

Commissioner Pai described the Order's violation of the Spectrum Act at length, saying that ultimately the Order is "trying to fit a square peg into a round hole." JA__(Order.p.478). He particularly complained that *TVStudy* "departs in

several respects from the methodology described in OET-69." *Id.* He also objected to the process by which *TVStudy* was adopted, explaining that "[t]hese changes should have been the subject of a notice-and-comment rulemaking." JA__(Order.p.480). Nor was it clear to him "what today's vote means," since the Commission does not know what version of *TVStudy* will be used: "OET has been regularly releasing updated versions of the software and apparently will continue to do so even after today." JA__(Order.p.481).

Commissioner O'Rielly likewise warned that the Order "skid[s] across the line," because "Congress was abundantly clear that it wanted to hold harmless non-participating broadcasters in their ability to serve their over-the-air viewers." JA__(Order.p.484).

3. The Order was released on June 2, 2014, and published in the *Federal Register* on August 15. *See* JA__(79.Fed.Reg.48,442). Also on June 2, 2014, OET released a new version of *TVStudy* through a private list-serve. NAB filed its petition for review on August 18, 2014, and Sinclair filed a separate petition challenging the Order on September 15, 2014. This Court consolidated the petitions on September 29, 2014.

On September 30, 2014, more than a month after NAB filed its petition for review, and almost four months after adopting the Order, the Commission *sua sponte* adopted a Declaratory Ruling purporting to "clarify how [it] intend[s] to

preserve the 'coverage area' as well as the 'population served' of eligible broadcasters in the repacking process." JA__(*Expanding.the.Economic and. Innovation.Opportunities.of.Spectrum.Through.Incentive.Auctions*,Declaratory. Ruling.1(Sept.30,2014)). In the Declaratory Ruling, which was released without notice and comment, the Commission confirmed that it will attempt only to "'replicat[e] the area within a station's existing contour'"—the first step of the OET Bulletin 69 procedure for calculating coverage area and population served—but "will not protect" unpopulated cells within that contour "from new interference in the repacking process." JA__(Declaratory.Ruling.3) (alteration in original; internal quotation marks omitted). This decision not to protect broadcasters' existing coverage areas was justified, in the Commission's view, because "'population served' by definition excludes unpopulated areas and areas where a station's signal cannot be received due to existing interference from other stations." *Id.* The FCC did not explain why the statute used both "coverage area" and "population served" as opposed to simply "population served" alone.

Commissioners Pai and O'Rielly again dissented. Commissioner Pai noted that the Declaratory Ruling's purported clarification was "unnecessary" because the FCC's incentive auction Order "was quite clear" that the Commission will "not protect unpopulated areas from interference," and "the deadline for its reconsideration has expired." JA__(Declaratory.Ruling.6 &n.32). Commissioner O'Rielly

observed that, in issuing the Declaratory Ruling, the FCC was "attempting to strengthen its litigation position" in this matter by "sidestep[ping] normal Commission procedures for questionable gain." JA__(Declaratory.Ruling.8).

NAB filed a petition for review of the Declaratory Ruling on October 29, 2014, along with a motion to consolidate that challenge with this appeal. The Court granted that motion on October 31, 2014.

STANDARD OF REVIEW

Administrative agencies "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *see also Chevron*, 467 U.S. at 843-44. An agency's interpretation of a statute can survive only if it is not contrary to the statutory text and the agency reasonably fills any interpretative gaps. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Moreover, "[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *Am. Library*

Ass'n v. FCC, 406 F.3d 689, 691 (D.C. Cir. 2005). If the Commission acts *ultra vires*, its "regulations cannot survive judicial review." *Id.* at 699.

Under the APA, this Court will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] in excess of statutory jurisdiction." 5 U.S.C. § 706(2)(A) & (C). An agency acts arbitrarily and capriciously if it "'entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or [if it] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014) (quoting *Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). During a rulemaking, an agency "must respond in a reasoned manner to [comments] that raise significant problems." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (internal quotation marks omitted). Agencies must also "consider significant alternatives to the course it ultimately chooses." *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000).

SUMMARY OF ARGUMENT

The Commission's Order and Declaratory Ruling violate the Spectrum Act and the APA in numerous respects. Those portions of the Order (and specifically sections noted below), as well as the Declaratory Ruling, should be vacated.

I. The Order violates the Spectrum Act in at least four ways. Sections III.B.2 and III.B.3.d.iii of the Order should be vacated.

A. The Commission's decision to replace the methodology described in OET Bulletin 69 with a new methodology devised by FCC staff during the rule-making is patently unlawful. The Spectrum Act unambiguously requires the Commission to "us[e] the methodology described in OET Bulletin 69" in determining the coverage area and population served to be protected for each broadcast television licensee in the repacking. 47 U.S.C. § 1452(b)(2). The methodology described in OET Bulletin 69 is a fixed suite of software and procedures that existed on February 22, 2012 and had been used by the FCC for years to calculate interference between broadcast signals. *That* is the methodology specified in the Spectrum Act—not *TVStudy*, which did not exist in 2012. Yet the Commission's new *TVStudy* methodology produces vastly different calculations for coverage area and population served than would have been calculated under OET Bulletin 69. The Commission cannot properly use a methodology that differs from the one required by Congress.

B. The Commission also failed to preserve population served for more than 1,000 television stations that likely will be relocated in the repacking process. Congress directed the FCC to "make all reasonable efforts to preserve … the population served" by each broadcast television licensee as of February 22, 2012 (47

U.S.C. § 1452(b)(2)), yet the Commission decided *not* to protect against terrain losses that will occur to the signals of reassigned licensees. Such terrain losses mean that, *ex ante*, the FCC will not protect broadcasters' coverage areas and populations served. As the Commission itself acknowledged, such losses are a foreseeable consequence of the repacking, and thus its decision to protect *only* against new interference from other broadcast television stations plainly violates the Spectrum Act's preservation mandate.

C. The Commission's decision not to protect broadcasters' coverage areas that are unpopulated cannot be squared with the statute's explicit command that *both* population served *and* coverage area be preserved for each licensee. By protecting only geographic areas having a "population served," the Commission reads "coverage area" out of the statute. While the Order attempts this statutory revision *sub silentio*, the Declaratory Ruling removes any doubt that the Commission "will not protect" unpopulated areas. JA__(Declaratory.Ruling¶6). The ability to serve such areas is a valuable right for broadcasters and an invaluable service to the public, as mobile service is increasingly essential to consumers and because populations shift and grow over time. That is why Congress directed the Commission to protect such areas in the repacking, and why the Commission's refusal to do so violates the Spectrum Act.

D. The Commission also violated the Spectrum Act's preservation mandate by failing to preserve the coverage areas and populations that broadcast television licensees serve with fill-in translators. Viewers who receive television signals from fill-in translators are no less served by broadcast television licensees than viewers who receive the main signals directly. The FCC cannot preserve each licensee's coverage area and population served without accounting for these expressly authorized translators.

II. In addition to violating the plain text of the Spectrum Act, the Commission's irregular actions in issuing the Order violate several requirements of the APA.

A. An agency always "must consider reasonably obvious alternative rules and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 797 (D.C. Cir. 1984) (alteration and internal quotation marks omitted). That precept applies with special force here, where the Spectrum Act directs that the Commission "shall make all reasonable efforts" to preserve coverage area and population served for broadcast television licensees in the repacking. 47 U.S.C. § 1452(b)(2). But the Commission failed to consider and provide adequate reasons for rejecting numerous reasonable alternatives for conducting the repacking that would be far less prejudicial to broadcasters' rights—and far more faithful to the Spectrum Act's

preservation mandate—than the methodology adopted in the Order. Such unconsidered alternatives and unexplained decisionmaking are the hallmarks of arbitrary and capricious agency action.

B. The Commission also failed to provide a reasoned explanation for its determination not to preserve coverage areas that are currently unpopulated. Instead, it attempted to supply that explanation after this lawsuit was filed by releasing a *sua sponte* Declaratory Ruling. But once the period for reconsideration has lapsed and litigation is filed, such gratuitous pronouncements are nothing more than "a *post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (alteration in original; internal quotation marks omitted). And the Declaratory Ruling merely reaffirms what was already clear: The Commission "will not protect" unpopulated areas within a broadcast licensee's contour in the repacking process. JA__(Declaratory.Ruling.3). Missing is a reasoned explanation for *why* the Commission refuses to protect these areas, and *how* its decision comports with the Spectrum Act's mandate to protect both population served *and* coverage area. Similarly, the Commission provided no reasoned explanation for its failure to protect viewers against terrain losses, despite acknowledging in the NPRM that such losses must be rectified to comply with the statutory preservation mandate.

C. Moreover, the Commission adopted the Order in a bait-and-switch that flatly contravenes the APA's notice requirements. There is no hint in the NPRM that the Commission was considering making comprehensive changes to the OET Bulletin 69 methodology mandated by the Spectrum Act. Indeed, not until *after* opening comments were due did the FCC's *staff*—via public notice—announce that the Commission would use a new methodology in the repacking. Those dramatic changes are not a logical outgrowth of the NPRM. Even worse, the Commission *to this day* continues to "release" updated versions of *TVStudy* through private channels, thus precluding meaningful testing and depriving the public of its right to notice and comment. The Spectrum Act states that the Commission has until 2022 to conduct the incentive auction, so there is no looming deadline to blame for these transgressions. Such chicanery is not tolerable under the APA, and the relevant portions of the Order should be vacated.

III. In addition to the above arguments presented on behalf of both Petitioners, Sinclair contends that the Commission's Order contravenes the Spectrum Act and the APA in two additional respects. Sections V.C.2 and IV.B.1.d of the Order should also be vacated.

A. The Order requires repacked broadcasters to cease operations on their pre-auction channels within 39 months following the release of channel reassignments. Yet the evidence before the Commission is clear that some broadcasters

cannot construct replacement facilities by that deadline, even under ideal conditions. The record contains unrebutted evidence that many broadcasters will be unable to meet the 39-month deadline due to critical shortages in material and human resources, as well as delays caused by weather, local permitting issues, and judicial review. Indeed, the FCC's own expert reported that, in the "best case scenario[]," assuming "no glitches" and not accounting for resource shortages, a single highly complex site would require at least 41 months to transition. JA__(Widelity.Report.44, 53). The Order thus violates the statutory requirement that the Commission "make all reasonable efforts to preserve" the broadcast services provided by broadcasters that cannot meet the deadline. 47 U.S.C. § 1452(b)(2). The Commission's failure to address and refute this record evidence renders its decision arbitrary, capricious, and contrary to law.

B. In setting its reverse auction rules, the FCC also ignores a fundamental statutory requirement for the incentive auction. Its decision to permit broadcasters in single-bidder markets to participate in the reverse auction violates the Spectrum Act's requirement that "two competing licensees participate" in each reverse auction buyout. 47 U.S.C. § 309(j)(8)(G)(ii). The Order adopts an impossibly strained interpretation in which this statutory requirement is satisfied if as few as *two stations nationwide qualify to participate* in the reverse auction, regardless of whether either actually bids. This not only defies the plain language and com-

mon-sense reading of the statute, but also is contrary to the FCC's own auction procedures, which recognize that, to participate in the auction, a licensee must actually bid, and that reverse auction bidders compete only with other bidders within their geographic areas, not on a nationwide basis. The FCC's interpretation sidesteps a key statutory purpose of the reverse auction: to determine the market value of the spectrum rights relinquished by means of competitive bidding. The FCC's rule is thus *ultra vires*, arbitrary, capricious, and contrary to law.

STANDING

A. NAB

NAB has standing to sue on behalf of its members because "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The second and third requirements are clearly satisfied here: NAB is a nonprofit trade association that advocates for free local television stations and broadcast networks before Congress, agencies, and the courts; and none of its claims requires the participation of an individual member.

NAB likewise satisfies the first requirement because its members would have standing to sue in their own right. Because NAB's members are "object[s] of

the action" under review, there is "little question" that they satisfy this requirement. *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (citation omitted). In any event, the attached declarations establish standing. *See* Ex. A (Decl. of Perry Sook (Aug. 25, 2014)); Ex. B (Decl. of Raycom Media, Inc. (Aug. 22, 2014)). The Order's failure to preserve coverage area and population served will likely lead to decreased viewership and revenue for NAB members. *See* Ex. A(Sook.Decl.) ¶¶ 4-6; Ex. B(Raycom.Decl.) ¶¶ 4-6. A drop in viewership will also decrease retransmission fees from cable, satellite, and other telecommunications providers, *see* Ex. A(Sook.Decl.) ¶ 10; Ex. B(Raycom.Decl.) ¶ 6, and make stations less competitive in their local markets, *see* Ex. A(Sook.Decl.) ¶¶ 8-10; Ex. B(Raycom.Decl.) ¶¶ 8-10. The declarations thus establish that the Order's failure to preserve coverage area and population served create a substantial risk of harm for NAB's members, which would be redressed by vacating the Order.

B. Sinclair

Sinclair also has standing to challenge the FCC's Order. *First*, Sinclair has standing to challenge the FCC's 39-month "go-dark" deadline because this mandate will force multiple Sinclair stations to cease all operations 39 months after new channel assignments are issued. *See* Ex. C (Decl. of Mark A. Aitken (Nov. 7, 2014)) ¶¶ 5-15, 17-19. Sinclair owns at least 27 stations in the band most likely to face repacking. *Id.* ¶ 19. Many of Sinclair's stations will be repacked, forcing

Sinclair to redesign their facilities or construct new facilities to begin broadcasting on newly assigned frequencies. *Id.* ¶¶ 10, 17-19. There is a substantial likelihood that some of these stations will be forced to cease broadcasting until construction is complete, causing irreparable injury. *Id.* ¶¶ 7-15, 17-20. This injury is directly traceable to the FCC's 39-month go-dark mandate and would be redressed by a favorable decision of this Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Second, the Order creates a legally invalid procurement process. A bidder or potential bidder in a government auction "has a right to a legally valid procurement process; a party allegedly deprived of this right asserts a cognizable injury." *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) (internal quotation omitted). The fact that the bidder has not participated in the auction or that the auction has not yet occurred does not defeat standing. *See Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 7 (D.C. Cir. 2009) (injury in fact despite withdrawing from auction); *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829-30 (D.C. Cir. 1997) (unlawful process prevented participation). Although the reverse auction has not yet commenced, the auction process established by the Order is invalid, creating an injury in fact to Sinclair. Also, the invalid process will cause more of Sinclair's more than 100 stations to be involuntarily repacked, incurring greater expense, disrupting Sinclair's operations and imposing millions of dollars in costs and lost reve-

nue.[2] Ex. C ¶¶ 5, 17-20. These injuries are "obviously … traceable to the alleged illegality in [the auction] and redressable by any remedy that eliminates the alleged illegality." *DIRECTV*, 110 F.3d at 829 (second alteration in original; internal quotation marks omitted). Here, Sinclair's injuries are redressable because the auction process can be amended to meet statutory requirements and Sinclair is "ready, and willing, and able to participate" in a valid incentive auction. *See High Plains*, 276 F.3d at 605 (citation omitted); Ex. C ¶ 16.

ARGUMENT

I. The Commission's Rule Violates The Spectrum Act

In the Order, the Commission managed to violate the key 45 words—"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"—in three distinct ways. It revised the "methodology described in OET Bulletin 69." 47 U.S.C. § 1452(b)(2). It refused to preserve "coverage area" alongside "population served." *Id.* And it disregarded the translators that establish the "coverage area and population served" for a large number of broadcast television licensees. *Id.*

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[2] The FCC seeks to repurpose as much of the broadcast spectrum as possible, within a generally consistent nationwide band plan. *See* JA__(Order¶82-83). By engaging in transactions precluded by the statute, the FCC is able to recover more spectrum, which leads to more repacking.

Not coincidentally, all of these decisions weaken the ability of broadcasters who choose not to "voluntarily relinquis[h]" their spectrum usage rights to continue to serve their current viewers. Despite Congress's clear direction to provide additional spectrum for mobile broadband only to the extent it can be achieved while protecting broadcasters and their viewers, the FCC made clear that its overriding goal is the former. *See*, *e.g.*, JA__(Order¶122). But even if "repurposing spectrum" (*id.*) were *a* purpose of the Spectrum Act, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's … objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Here, Congress quite clearly spelled out safeguards for broadcasters on how statutory purposes will be achieved, which the Commission is not free to disregard in its freewheeling search for purpose. In attempting to turn the "voluntary" process into one that steamrolls broadcasters into relinquishing their spectrum usage rights, the FCC ignores the Spectrum Act's rival purpose: to protect broadcasters who choose not to tender their spectrum usage rights.

A. The Spectrum Act Directs The FCC To Use The Methodology Described In OET Bulletin 69, Not *TVStudy*

1. The Spectrum Act Unambiguously Forecloses *TVStudy*

Section 6403(b)(2) of the Spectrum Act requires the FCC, when reassigning or reallocating spectrum, to 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*." 47 U.S.C. § 1452(b)(2) (emphasis added). The Spectrum Act thus addresses the nitty-gritty that other statutes sometimes leave for administrative agencies. It specifies not only what the agency should do ("preserve … the coverage area and population served") but also the means to measure the agency's success—both when ("as of February 22, 2012") and how ("as determined using the methodology described in OET Bulletin 69"). *Id.* Because "there is no gap for the agency to fill," administrative deference is not warranted. *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994).

The statute is exceptionally straightforward in how the FCC should preserve broadcasters' coverage areas and populations served: The Commission must follow the procedures of OET Bulletin 69 as it existed when the Spectrum Act became law. (The FCC does not dispute this command, yet repeatedly departs from it.) First, the Commission must input the necessary transmission-specific information (frequency, location of antenna, antenna height, etc.) to determine each station's coverage area and population served as of February 22, 2012. Second, for each proposed channel reassignment, the Commission must repeat these steps to determine the station's *new* coverage area and population served on the new channel. Third, the Commission "shall make all reasonable efforts" to make every broadcast licensee's coverage area and population served, after repacking, match

that licensee's coverage area and population served, as they existed on February 22, 2012. 47 U.S.C. § 1452(b)(2).

Only on the third step does the FCC have some limited flexibility. "All reasonable efforts" at preservation does not require complete preservation in every case. But the FCC's "efforts" still must aim for the right target: preserving the coverage area and population served, as they existed on February 22, 2012, as determined by the procedures in the then-existing Bulletin.

Congress's command to preserve coverage area and population served for each broadcast television licensee using the OET Bulletin 69 methodology serves at least two related purposes critical for a successful incentive auction. *First*, the preservation mandate ensures that the Commission does not coerce broadcasters or harm viewers by shrinking broadcasters' coverage areas and populations served in the name of repurposing spectrum. The preservation mandate thus is designed to provide the certainty needed for broadcasters' *voluntary* participation in an incentive auction based on market principles. *See* FCC, *2010 National Broadband Plan: Broadband Action Agenda* 1 n.3 (success in repurposing spectrum for mobile broadband "depends on … voluntary participation of broadcasters in an auction"), http://www.broadband.gov/plan/broadband-action-agenda.html. *Second*, the preservation mandate allows potential sellers to make informed decisions about what exactly they would be selling. If the scope of licensees' spectrum usage

rights were determined using a shifting and untested methodology to calculate mutable values for coverage area and population served, licensees are handicapped in their ability to judge whether it makes economic sense to participate in the reverse auction.

Here, in contrast, the FCC introduced a new computer program that changed many of the procedures that the Bulletin discussed. The FCC admits that *TVStudy* "is not designed to"—and "necessarily does not"—"produce the identical results produced by earlier software." JA__(Order¶161). That admission is dispositive. Because the FCC did not "make all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69," the relevant portions of the Order must be set aside.

2. The FCC's Hunt For Ambiguity Comes Up Short

Despite clear statutory language, the FCC strains to find ambiguity.

The FCC's central argument is that the word "methodology" is ambiguous. *See* JA__(Order¶¶133-36). It agrees that the "common meaning" of "methodology" is "the processes, techniques, or approaches employed in the solution of a problem or in doing something: a particular procedure or set of procedures." JA__(Order¶134 n.436) (indirectly quoting *Webster's Third New International Dictionary of the English Language Unabridged* 1423 (1st ed. 1976)). But the

agency contends that "methodology" includes only "the particular procedures for evaluating television coverage and interference that are provided for in [OET Bulletin 69], *not the computer software or input values used to apply that methodology in any given case*." JA__(Order¶134) (emphasis added). So, according to the FCC, changes to the computer program and data sources fall outside of the Bulletin's "methodology."

An examination of what the (excruciatingly detailed) Bulletin actually "describe[s]" makes clear that the procedures it sets forth explicitly include the key "processes, techniques, and approaches" that the FCC now wants to change:

- *Station-specific grid:* In its "outline of evaluation procedure," OET Bulletin 69 describes building a "coordinate box" around the broadcast station that "is divided into square cells of a chosen size which should be 2 km on a side or smaller, adjusting the coordinate box to be slightly larger if necessary to accommodate an integer number of cells." JA__(OET.Bulletin.69.at.11) (underlining and capitalization omitted). Nonetheless, the FCC now seeks to replace those "station-specific grid[s]" with "a single, common grid of cells common to all television stations." JA__(Order¶¶131-32). This change alone will reduce the population served for 42.6 percent of stations. JA__(NAB.Comment.12, Ex.1(Tawil.Decl.)¶18,ET.Dkt.No.13-26(Mar.21,2013)).

- *Terrain data:* Noting that "terrain elevation data … must be provided," the Bulletin explained its approach to terrain data as follows: "The FCC computer program is linked to a terrain elevation database with values every 3 arc-seconds of latitude and longitude. The program retrieves elevations from this database at regular intervals with a spacing increment which is chosen at the time the program is compiled …." JA__(OET.Bulletin.69.at.6). For the incentive auction, however, the FCC plans to eliminate both the database and the measurement. JA__(Order¶150 & n.500). Instead, the FCC will substitute U.S. Geological Survey data with a resolution of one arc-second. JA__(Order¶150). This change will reduce the population served for 85 percent of stations. JA__(NAB.Comment.13 n.50, Ex.1(Tawil.Decl.)¶14,ET.Dkt.No.13-26 (Mar.21,2013)).
- *Computer program:* OET Bulletin 69 expressly refers to the "[c]omputer code for the Longley-Rice point-to-point radio propagation model," which was "referred to as Version 1.2.2 of the Longley-Rice model" and "used by the FCC for its evaluations." JA__(OET.Bulletin.69.at.1). Further, the Bulletin explained that "[t]he FCC computer program is available as Fortran code," and "[t]he Fortran code currently used by the Media Bureau to evaluate new proposals is available for downloading from the

FCC Internet site at http://www.fcc.gov/oet/dtv." JA__(OET.Bulletin.69.at.10-11). "It is complex, and many of its options are available only by recompilation for each case of interest." JA__(OET.Bulletin.69.at.10). Yet the FCC now seeks to use the completely new *TVStudy*, with fresh code, languages, and compilation techniques. *See* JA__(Order¶¶131 n.427, 132 & n.430, 135 n.441); *see also* JA__(OET.Notice.3(Feb.4,2013)) (*TVStudy* uses Java and C). The latest version of *TVStudy* will reduce coverage area for between 52.3 and 88 percent of stations, and will reduce population served for between 45 and 52.1 percent of stations. JA__(NAB.Sunshine.Comment.3-7, Attachments.C,D, F ,ET.Dkt.No.13-26(May.8,2014)).

- *Population data:* While the Bulletin itself said only that the coordinates and population of census blocks "are retrieved," *see* JA__(OET.Bulletin.69.at.11), the FCC *itself* has characterized changes in the census data as a change in "methodology." The FCC's rulemaking on digital television "revise[d] the OET 69 interference analysis methodology" by "adopt[ing] the use of 2000 census data." Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television (Third Periodic Review), 73 Fed. Reg. 5634, 5668-

69 (Jan. 30, 2008), JA__. For the auction, however, the FCC intends to substitute 2010 census data. *See* JA__(Order¶148).

The other processes, techniques, and approaches that the FCC seeks to change—including how to calculate depression angles, the antenna beam tilt values, the precision of geographic coordinates, and other information in the database—are all part of Version 1.2.2, the computer program discussed by the Bulletin. *See* JA__(Order¶¶153, 155-57). And the Bulletin incorporates that program by reference. As the FCC acknowledges twice, "OET-69 specifically states that a computer program is necessary to implement the methodology." JA__(Order¶127); *accord* JA__(Order¶135); *see also* JA__(OET.Bulletin.69.at.1) (same). Moreover, the Bulletin comprehensively describes the processes, techniques, and approaches taken by its computer program, and explains where to find the code and software. By "updating" the program to eliminate these procedures, the FCC abandons the "methodology described in OET Bulletin 69."

Indeed, the FCC's view of "methodology" strips the term of all meaning. In a footnote reproduced below,[3] the FCC explains what methodology it believes the

[3] Under our interpretation, the OET-69 methodology comprises (1) a specification for determining a contour that defines the boundaries of a station's coverage area, and (2) an algorithm for evaluating the availability of service within that contour, including the effects of interference from neighboring stations. The evaluation of service involves the use of the Longley-Rice propagation model, certain planning factors, electromagnetic properties of the environment, and parameters for describ-

Spectrum Act protects. But almost any approach that complies with the laws of physics will satisfy the FCC's interpretation. As Commissioner Pai recognized, "replac[ing] a terrain elevation database of the United States with a database where terrain elevations were randomly generated" would satisfy the FCC's construction of the Spectrum Act (although it would violate the APA). JA__(Order.p.480).

This Court has rejected similar endeavors to detach the "methodology" from the underlying data inputs. The issue arose in two different ways in *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222 (D.C. Cir. 2011). In that case, FERC had long relied on a Forest Service fee schedule to determine how much rent to charge hydropower plants on federal land. *See id.* at 224. The Forest Service, in turn, used its own survey data to construct the fee schedule. *See id.* at 223-24. But in 2008, the Forest Service (and another agency) changed course and began to rely on an outside source. As this Court explained, in language directly relevant here: "The *methodology* the BLM and the Forest Service used to set rates in this revised

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> ing a television station's transmission system. Planning factors describe television reception; for example, planning factors include antenna gain information for specific frequency bands, thermal noise levels, and system noise figure by band, etc. *See* OET-69 at 3, Table 3. Electromagnetic properties include the dielectric properties of earth and surface refractivity. The parameters that describe a television station's transmission system include effective radiated power, antenna pattern, antenna polarization and height of the radiation center above ground. *See* OET-69 At 6, Table 4.

JA__(Order¶134 n.435).

schedule differed in several significant ways from their previous *methodology, with each input in the agencies' calculation formula changing in some respect*." *Id.* at 225 (emphases added). This Court thus recognized that changing an "input in the … calculation formula" constitutes a change in "methodology."

Moreover, the Forest Service's change in methodology in *City of Idaho Falls* gave rise to the agency action at issue in the case—FERC's decision to continue to follow the Forest Service's fee schedule:

> The key issue before us is this: in promulgating the 2009 Update [that relied on the revised Forest Service fee schedule], did FERC change its *methodology* for setting rental fees charged to hydropower licensees from the *methodology* it had adopted in Order No. 469 and Regulation 11.2? If the answer is yes, then FERC violated APA section 553. Having established through public rulemaking in Regulation 11.2 a legally-binding *methodology* for setting future rates for licensees, FERC may modify that *methodology* only after notice and comment.

629 F.3d at 227 (emphases added). Overturning FERC's interpretation of its own regulation, the Court found that FERC had changed its methodology. *See id.* at 227-31. In other words, even though FERC was still relying on the Forest Service fee schedule, changes to that fee schedule meant that FERC had changed its own "methodology."

The lone case that the FCC cites in support of its distinction, by contrast, is inapposite. *See* JA__(Order¶134 n.438) (citing *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001)). In *Qwest*, the Tenth Circuit reviewed two FCC orders. In

the first order—described in one place as a "methodology"—the FCC finalized a two-part method to determine state funding, relying in part on a cost model. *See Qwest*, 258 F.3d at 1197-98. In the other order, the FCC "selected input values for its cost model, thereby completing the model." *Id.* at 1198. The Tenth Circuit struck down the first order as inadequately explained but upheld the second. *See id.* at 1205-07. Nothing in the opinion bears on whether underlying data and implementing computer programs are part of the "methodology."

In addition, as Commissioner Pai recognized, the FCC's interpretation of "methodology" "stands in stark contrast to prior Commission pronouncements." JA__(Order.p.478). In 2008, the FCC decreed: "We will revise the OET 69 interference analysis *methodology* to make the results more accurate and ensure consistent *methodology*. Specifically, we adopt the use of 2000 census data for use in all applications and we adopt a limited set of cell sizes, which include 2 km, 1 km, and 0.5 km." 73 Fed. Reg. at 5668 (emphases added); *see also id.* at 5669-70) (similar). The FCC's response is to claim—implausibly—that it was using "methodology" here "colloquially." JA__(Order¶136). Yet elsewhere, too, the FCC has recognized that what it now seeks to change is part of the Bulletin's "methodology." *See*, *e.g.*, *In re Qualcomm Inc. Petition for Declaratory Ruling*, 21 FCC Rcd. 11683, 11690 (2006) ("As for the vertical antenna patterns that Qualcomm will actually use, compared with *the default vertical antenna patterns inherent in the*

OET-69 methodology, Qualcomm asserts that it re-computed its sample analyses using the actual MediaFLO antenna patterns and the results are identical under either condition." (emphasis added)).

In fact, in offering alternative statutory language in the very Order at issue here, the FCC could not avoid the term "methodology": "Had Congress intended to prevent any updates to the software and input values used to implement the OET-69 methodology, it could have expressly directed the FCC *to use the methodology described in OET-69, including* the February 6, 2004 version of one of the Commission's computer programs implementing that methodology and the inputs used as of that date." JA__(Order¶137) (emphasis added).

It bears mention that the FCC is correct that some "inputs" are separate from methodology—namely, the broadcaster-specific information that OET Bulletin 69 contemplates each licensee providing. These include the station location and the frequency of transmission, user inputs that define the specific licensee that is the subject of the calculation. But they do not include procedures and data sources common to all calculations of coverage area and population served, like using 3 arc-second terrain data or 2000 census data. Nor can the FCC now create new broadcaster-specific inputs (like antenna angle) that were not "described" in OET Bulletin 69 when Congress enacted the Spectrum Act.

Beyond manipulating the definition of "methodology," the FCC tries other maneuvers to support its action. It first argues that by "more accurately reflect[ing] the latest population changes" and incorporating other changes, its interpretation "furthers the statutory requirement to 'make all reasonable efforts to preserve … the coverage area and population served of each broadcast television licensee.'" JA__(Order¶137). But this argument ignores the measure of preservation decreed by statute: preservation must be "determined using the methodology described in OET Bulletin 69." When Congress enacted the Spectrum Act, the Commission's rules required the use of 2000 census data as part of the methodology described in OET Bulletin 69. 47 C.F.R. § 73.616(e)(1). The statute does not give the FCC a freestanding mandate to ignore its own rules or preserve its chosen measures of coverage and population.

The FCC next cites its "well-established duty under the [APA] to 'analyze … new data' when faced with existing data that 'are either outdated or inaccurate.'" JA__(Order¶138) (omission in original) (quoting *Dow Agrosciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 473 (4th Cir. 2013)). And the agency criticizes NAB's interpretation for bringing a "direct conflict" with that duty. Once again, however, the FCC ignores Congress's directive to "determin[e]" the coverage and population "using the methodology described in OET Bulletin 69" *as of a specific date*. 47 U.S.C. § 1452(b)(2). *TVStudy* is plainly different from the

tools that existed on February 22, 2012 to calculate coverage area and population served, yet those are the only tools that Congress could have anticipated. Congress fixed a specific benchmark, and the statute requires the FCC to follow the Bulletin's procedures even if the agency believes them to be "outdated or inaccurate." An agency does not violate the APA when it follows a congressional command to use specific procedures and data.

Finally, the FCC suggests that the software described in the Bulletin is incapable of handling the Spectrum Act's demands. *See*, *e.g.*, JA__(Order¶¶132, 143 n.478). Not so. The FCC recently used the OET Bulletin 69 software successfully in the nationwide transition from analog to digital broadcasts. *See* JA__(NAB.Comment.4, Ex.2(Meintel.Decl.)¶¶4,12, ET.Dkt.No.13-26 (Mar.21,2013)). And the FCC today continues to use that software for those purposes for which it was already in use on the date of the Spectrum Act—namely, "processing applications for new or modified stations." JA__(OET.Bulletin.69.at.1). In adopting OET Bulletin 69 for the incentive auction, Congress picked a methodology that existed on a date certain for a specific purpose—and the Commission continues to use the methodology for *that* purpose while changing it *here*, which surely meets any definition of arbitrary.

Yet even if the FCC's objections were accurate, the solution is not to cast off OET Bulletin 69 so early in the ten-year period for conducting the incentive auc-

tion. The statute requires that the FCC make "all reasonable efforts" to preserve the coverage area and population served, as determined by the methodology in the Bulletin. If the FCC concludes (after good faith efforts not attempted here) that what Congress prescribed is not possible, only then can it fix the bottleneck—presumably with a new programming language and new code. But unlike the current software, the FCC's substitute program must be, as much as possible, "designed to produce the identical results produced by earlier software." JA__(Order¶161).

3. The FCC Misconstrued The Statute's Preservation Mandate

An independent error also requires vacatur here: The FCC repeatedly states that "the Spectrum Act not only permits us to use [the new computer program], but—because the statute requires the Commission to make all reasonable efforts to preserve broadcast stations' coverage areas and populations served as of February 2012—*requires* us to update the software and data inputs necessary to implement the methodology set forth in OET-69 to predict coverage as of that date as accurately as possible." JA__(Order¶130) (emphasis added); *see also* JA__(Order¶¶137-39) (same). In other words, the Commission asserts that its adoption of *TVStudy* was mandatory under the statute.

Putting aside any argument that the Spectrum Act *permits* the new procedures, it certainly does not *mandate* them. This Court has made clear that

"[d]eference to an agency's statutory interpretation is only appropriate when the agency has exercised its *own* judgment, not when it believes that its interpretation is compelled by Congress." *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (internal quotation marks omitted). When an agency wrongly believes that the statute compelled its action, the action "must … be set aside and the case remanded." *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004).

There is nothing in the Spectrum Act that would require the Commission to alter its methodology for calculating coverage area and population served; to the contrary, the references to a specific date (February 22, 2012) and a specific, existing methodology (OET Bulletin 69) foreclose any assertion that Congress envisioned a new methodology. Because the FCC mistakenly believed that the statute's preservation mandate obliged the agency to update the computer program and data, the Order should be set aside.

* * *

Much of the FCC's Order is an appeal to common sense: Why use archaic software and outdated or imprecise data, when we can write a better program and draw on better sources? *See*, *e.g.*, JA__(Order¶¶134, 137-39, 149-50). As a matter of policy, there may be some sense to the FCC's argument. But there is sense, too, in Congress's judgment that the certainty that comes with a familiar standard is critical to achieving a successful, voluntary incentive auction. It does not well

serve the auction or the millions of over-the-air television viewers to have a shifting standard, let alone one that is different in the auction context than any other. That is the policy behind the preservation mandate, and "[t]he role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 878 (2014) (internal quotation marks omitted). The Spectrum Act clearly forecloses the FCC's "updates" to OET Bulletin 69.

B. The FCC Has Not Made All Reasonable Efforts To Preserve All Populations Served

In addition to unlawfully adopting a new methodology for preserving coverage area and population served, the Commission has quietly declined to protect the populations served by broadcasters who are reassigned in the repacking.

The Spectrum Act's mandate to preserve "population served" protects against two types of long-recognized signal loss that broadcasters reassigned during repacking will experience. The first is loss caused by new interference from other broadcast facilities. JA__(Order¶179). The second is loss caused when a broadcaster's new frequency travels over, and interacts with, terrain features in different ways than its old frequency—so-called "terrain loss." JA__(Order¶163). The Commission has declared that it will only protect against interference loss, not terrain loss. *See* JA__(Order¶¶176-82).

No explanation is offered for the Commission's startling decision to ignore terrain loss, an admitted and inevitable harm that will befall reassigned broadcasters. *See* JA__(Order¶163) (acknowledging loss of coverage "due to the varying propagation characteristics of different channels, which can change the degree to which areas within a station's contour are affected by terrain loss"). This is plainly unlawful: The Commission has not made "all reasonable efforts" to preserve population served if it has made *no* effort to protect against terrain loss. 47 U.S.C. § 1452(b)(2). Nor is it adequate that a reassigned broadcaster "may seek alternative transmission facilities" as a self-remedy for terrain loss. JA__(Order¶175). As the Commission admits, such relief would be possible only "provided a channel is available and the alternative facilities meet all existing technical and interference requirements and serve the public interest," as determined in the Commission's discretion. *Id.* Even apart from the unlikely possibility of relocation, however, the FCC cannot invoke this speculative possibility to salvage the Order: Complying with the Spectrum Act's preservation mandate is not a discretionary choice by the Commission.

C. The FCC Has Not Made All Reasonable Efforts To Preserve All Coverage Areas, Including Unpopulated Ones

Other violations of the Spectrum Act are simpler to understand, but no less jarring. The Act demands preservation of "the coverage area *and* population served." 47 U.S.C. § 1452(b)(2) (emphasis added). The conjunction "and" makes

clear that the FCC must preserve both population served and coverage area. *See*, *e.g.*, *Loving v. IRS*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (discussing the "conjunctive 'and'").

At least two reasons animate the need to preserve coverage area in addition to population served. *First*, populations shift and grow over time, as the Commission explains in attempting to justify the use of different census data. JA__(Order¶137). Preserving a licensee's coverage area ensures that it will continue to be able to serve viewers as new or seasonal areas within its contour become populated. *Second*, mobile communications are an increasingly important means of consuming information. Broadcasters have developed an industry standard for mobile digital television, the success of which depends on the availability of broadcast television in coverage areas outside of people's homes. *See* Advanced Television Sys. Comm., Inc., *ATSC-Mobile DTV Standard, Part 1 – ATSC Mobile Digital Television System* (2011), http://www.atsc.org/cms/standards/a153/a_153-Part-1-2011.pdf. As Congress plainly recognized in the statute, the world has changed such that serving households alone is insufficient.

Nonetheless, the Commission plans to preserve only "the coverage area of a station to the degree that the area is populated." JA__(Order¶114 n.372); *see also* JA__(Order¶¶162-66). Following that decision, the FCC has now shifted its focus solely to preserving populated areas (and only for stations that do not change chan-

nels, *see supra* Part I.B). *See*, *e.g.*, JA__(Order¶451 n.1303) (acknowledging only the requirement of preserving broadcasters' population served); Incentive Auction Task Force Seeks Comment on Staff Analysis Regarding Pairwise Approach to Preserving Population Served, 79 Fed. Reg. 37,705 (July 2, 2014) (same), JA__. This departure from the statute leaves no protection for broadcasts in areas where people may stay temporarily or seasonally, move in the future, or wish to use mobile television or any other services provided over a broadcaster's signal.

The Commission acknowledges that the Spectrum Act requires protecting both population served and coverage area. JA__(Order¶119). It asserts, however, that it can satisfy this requirement by matching a station's existing contour—without accounting for interference or terrain losses on the newly assigned channel. JA__(Order¶166). Under this construction, a station's coverage area could be wiped out entirely due to new interference or terrain loss, yet the Commission supposedly would have "preserved" the coverage area by *beginning* with the station's contour. But calculating a licensee's contour is only a preliminary step for calculating coverage area and population served under the OET Bulletin 69 methodology, and the Commission cannot preserve coverage area if the second step eradicates it with new interference and terrain loss. Indeed, the Commission's approach is flatly contrary to the methodology in OET Bulletin 69, which is concerned with

determining the areas within a contour where service can be received *after* terrain losses and interference are considered. *See* JA__(OET.Bulletin.69.at.5-12).

The Declaratory Ruling merely affirms the Commission's decision not to protect all coverage areas. Despite proclaiming to "independently protect" coverage area and population served, the Commission's only effort to protect coverage area is to *start* with a station's existing contour. JA__(Declaratory.Ruling¶¶5, 8-9). The Commission itself admits that this does not mean that all areas within the contour will be protected in the repacking. Quite the contrary, many areas within a station's contour "will not be protected"—including "unpopulated areas." JA__(Declaratory.Ruling¶¶6-7). Thus, simply starting with a licensee's existing contour cannot satisfy the Spectrum Act's mandate to *preserve* coverage area in the repacking. Because the Declaratory Ruling fails to preserve broadcast licensees' coverage areas *and* population served, it, too, violates the Spectrum Act.

D. The FCC Failed To Protect Facilities That Licensees Use To Serve Viewers

The Spectrum Act demands that the Commission "make all reasonable efforts to preserve" the "coverage area and population served of each broadcast television licensee." 47 U.S.C. § 1452(b)(2). Because this preservation right attaches to the "licensee," rather than the station or type of facility used, it should protect areas and populations that the licensee serves with fill-in translators—the retransmission stations that fill holes in coverage within the licensed area.

These facilities are inextricably linked with the primary broadcast facility. As part of the nation's transition to digital television, the FCC expressly permitted certain broadcast television licensees to use additional facilities to ensure they could continue to reach viewers they served before the transition. According to the FCC, it was "the Commission's goal that, following the digital transition, all Americans continue to receive the television broadcast service that they are accustomed to receiving to the greatest extent feasible." *In re Amendment of Parts 73 & 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations*, Report and Order, 24 FCC Rcd. 5931, 5933 (2009). To that end, the Commission established "a new, 'replacement' digital television translator service for the purpose of maintaining broadcast service that the public has come to depend upon and enjoy." *Id.* Because translators merely "maintai[n]" service to a licensee's existing coverage area and population, many translators have the same FCC-issued station identifier, and the same call letters, as the licensee's primary facility.

In the Order, however, the Commission refused to protect these additional facilities. *See* JA__(Order¶¶236-44, 164 n.553). Despite "recogniz[ing] that [its] decision will result in some viewers losing the services of these stations," the FCC "conclude[d] that these concerns are outweighed by the detrimental impact that protecting … TV translator stations would have on the repacking process and on

the success of the incentive auction." JA__(Order¶237). The Order's denial of coverage rested entirely on the definition of "broadcast television licensee," which the Spectrum Act defines to mean "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." 47 U.S.C. § 1401(6); *see* JA__(Order¶238). After quoting that definition, the Commission declared: "There is no basis in the text of section 6403(b)(2) or the pertinent statutory definitions to conclude that low power stations that have not been accorded Class A status are entitled to the protections afforded by section 6403(b)(2)." JA__(Order¶238).

The FCC missed the point. The relevant question is not whether standalone TV translator stations qualify for the same protections as full power or Class A broadcasters. It is whether broadcast television licensees should *lose* protection because they use authorized facilities "to provide 'fill-in' service to terrain-obstructed areas within a full-service station's service area." First Digital TV Translator Order, 19 FCC Rcd at 19334. Such licensees are undoubtedly protected by the statute's preservation mandate. Part of the "coverage area and population served" by these broadcasters comes from retransmissions with fill-in translators. It would be a simple matter for the FCC to protect all facilities that licensees use to reach their coverage areas and populations served. The FCC could meet its statutory obligation simply by finding replacement channels for these facilities that li-

censees could use to serve viewers and areas within their contours. By failing to do so, the FCC violated the Spectrum Act once more.

II. The Commission's Order Violates The APA

In addition to violating the Spectrum Act, the Order violates the APA in several ways. The Commission ignored obvious alternative solutions. It gave no explanation—reasoned or otherwise—for refusing to protect unpopulated coverage areas. And it made changes that were never mentioned in the NPRM and frustrated attempts to comment. Accordingly, even aside from the Spectrum Act, the Order cannot stand.

A. The FCC Failed To Consider Reasonable Alternatives

Under the APA, "an agency must consider reasonably obvious alternative rules and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 797 (D.C. Cir. 1984) (internal quotation marks and alteration omitted); *see also Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-51 (1983); *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013). "[T]he failure of an agency to consider obvious alternatives has led uniformly to reversal." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (internal quotation marks omitted).

The APA's mandate to consider all reasonable alternatives carries special force here because it is underscored by the Spectrum Act. Congress expressly directed that the Commission "shall make all reasonable efforts" to preserve licensees' coverage areas and populations served, 47 U.S.C. § 1452(b)(2), and gave the Commission a generous ten-year period to do so, *id.* § 1452(f)(3).

Repeatedly, however, the Commission ignored or brushed aside obvious alternatives that comply with the Spectrum Act en route to its favored, unlawful approaches. Take, for example, the Commission's adoption of *TVStudy*. Despite its claims to the contrary, JA__(Order¶¶130, 131 n.427), the Commission's existing OET Bulletin 69 software is perfectly capable of performing in the repacking stage of the incentive auction; indeed, the Commission recently used it successfully in the transition from analog to digital broadcasts. Even assuming that the OET Bulletin 69 software operates more slowly than more modern programs, the Commission has failed to consider alternatives that use the same data sources and yield the same results as the OET Bulletin 69 software, but with the added speed and efficiency of more modern computer programs, and it has nowhere explained why the calculated coverage area and population served should depend on the rapidity with which those values are calculated.

The FCC also failed to consider reasonable alternatives for preserving population served. For example, while the FCC adopted a benchmark for population

lost due to new interference (*see* JA__(Order¶179)), it did not consider establishing a similar benchmark for protecting viewers against terrain loss on a licensee's new channel. The FCC also never considered calculating population served for each licensee on each channel as of February 22, 2012, and then simply excluding those channel reassignments that would result in more than a specified percentage change in a given licensee's population served. The Commission simply ignored terrain losses and made no effort to compensate for them.

So, too, with coverage area. The FCC never considered the possibility of maintaining protection for unpopulated coverage areas—that is, not until this petition was filed. The Declaratory Ruling's *post hoc* justifications bear guilty testimony to the Commission's failure to consider obvious measures to preserve licensees' coverage areas. Of course, an agency's decision commands no deference "when it appears that the interpretation is nothing more than a convenient litigating position, or a *post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (internal quotation marks and citations omitted; alteration in original).

Similarly, the Commission never considered preserving licensees' coverage areas and populations served through the obvious alternative of finding a new channel for the translator facilities that licensees use to serve viewers. Here, as

elsewhere, the Commission simply raced headlong toward its foreordained outcomes instead of using the ample time Congress provided to craft an auction plan that complies with the Spectrum Act and protects the rights of stakeholders. Its actions are arbitrary and capricious.

B. The FCC Failed To Provide A Reasoned Explanation For Its Refusal To Preserve Population Served And Coverage Area

"When an administrative agency sets policy, it must provide a reasoned explanation for its action." *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011). And a court "must reverse an agency policy when [the court] cannot discern a reason for it." *Id.* at 490.

1. The Commission failed to provide a reasoned explanation for its refusal to protect populations that will lose broadcast television service due to terrain loss. The Commission admits that "radio signals propagate differently on different frequencies" and thus "the signal of a station reassigned to a different channel will generally not be receivable in precisely the same locations within a station's contour as it was in its original channel." JA__(Order¶170). Nonetheless, the Commission refused to compensate for this loss by allowing broadcast television licensees to increase power to ensure they reach the same coverage area within their contours on their new channels, JA__(Order¶172)—as they did in the conversion to digital television, *see supra* at 47. The Commission argued that expanding a licensee's contours would "expand the geographic area that a station actually

serves" (JA__(Order¶172))—a factually inaccurate statement that conflates "contour" with "coverage area." The coverage area that a station serves, as measured by OET Bulletin 69, is the area within a contour where terrain and interference allow reception. *See* JA__(Order¶164) (interpreting the statutory term "coverage area" consistent with the term "service area" as defined in OET Bulletin 69 and 47 C.F.R. § 73.622(e)). Thus, expanding a licensee's contour would not necessarily increase coverage area; rather, it might allow a broadcaster to preserve its coverage area by overcoming terrain losses on its new channel.

The Commission claims that the Spectrum Act requires the Commission only to preserve the status quo, and that allowing broadcasters to expand their contours could result in a "windfall" in the form of new viewers. JA__(Order¶172). But the Spectrum Act uses "preserve" to mean the prevention of *losses*, not the prevention of increases. It is thus not inconsistent with the Spectrum Act that licensees could potentially experience *de minimis* gains in viewership if that result is necessary to prevent losses of service to existing viewers. At the very least, it is certainly not a reason to ensure losses.[4]

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[4] In a footnote, the Declaratory Ruling cites the Commission's regulation for determining digital television service areas. *See* JA__(Declaratory.Ruling¶5 n.20) (citing 47 C.F.R. § 73.622(e)(1)-(2)). The citation is instructive for what it omits—namely, the subsection of the regulation that explains that interference must be taken into account when calculating service area. *See* 47 C.F.R. § 73.622(e)(3). The Commission ignores this part of the regulation to avoid admitting that interference must be taken into account when preserving a licensee's cov-

2. The Commission also gave no reason for refusing to protect unpopulated coverage areas. It never explained how that decision conforms with its statutory obligation to make all reasonable efforts to preserve "the coverage area *and* population served." 47 U.S.C. § 1452(b)(2) (emphasis added). Nor did it say why divesting unpopulated areas of protection makes sense as a policy matter. Indeed, the Order does all that it can to conceal the FCC's decision not to protect all coverage areas—the decision to deny coverage is barely acknowledged, buried in a footnote. *See* JA__(Order¶114 n.372). Such an unexplained, covert ruling in an "obscurely placed nugget" cannot qualify as reasoned decisionmaking. *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1361 (D.C. Cir. 1993).

C. The Rule Violated The APA's Notice Requirements

The APA requires an agency to publish a "notice of proposed rulemaking … in the Federal Register," and then "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). "Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). In addition, an agency must "reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary so that a

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erage area. *See* JA__(Declaratory.Ruling¶5) (stating that coverage area will be preserved "without regard to interference").

genuine interchange occurs rather than allowing an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008) (brackets and internal quotation marks omitted).

The NPRM failed to meet those requirements. Three of the four Spectrum Act violations described above were improperly noticed, preventing NAB (and other members of the public) from filing meaningful comments.

First, the NPRM provided no notice that the Commission was considering not protecting viewers against terrain loss. To the contrary, it identified the problem of terrain loss and invited "comment on a repacking methodology that takes in account all of these impacts in order to carry out Congress's mandate in section 6403(b)(2)." JA__(77 Fed. Reg. at 69,945). The NPRM thus admits that failure to protect viewers from terrain loss violates the Spectrum Act's preservation mandate, without providing any indication that the Commission might decline to account for terrain loss.

Second, the NPRM never even suggested that the Commission was considering denying protection to unpopulated areas. Since "[s]omething is not a logical outgrowth of nothing," that silence in the proposed rulemaking prohibits the final rule. *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

Third, the NPRM gave no indication that changes to OET Bulletin 69 methodology—like *TVStudy*—were on the table. And a "public notice" by OET cannot substitute for a proper proposal by the Commission. This Court rejected a similar attempt to evade the APA in *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003). Like OET, *see* 47 C.F.R. § 0.31, the Common Carrier Bureau has no authority to propose rulemakings, *see Sprint*, 315 F.3d at 375-76. Such proposals must come from the Commission. *See id.* at 374, 376. Thus, this Court held that a "public notice" by the Common Carrier Bureau could not provide the foundation for a new FCC rule. *See id.* at 375-76. The same is true here.

Nor could NAB meaningfully comment on *TVStudy*. The program was—and remains—a moving and concealed target. The staff repeatedly modified *TVStudy* and posted revised versions on a "list-serve," with little information about what had changed. *See* JA__(NAB.Reply.Comment.Attachment(Franca.Decl.)¶13, Ex.A,ET.Dkt.No.13-26(Apr.5,2013)); JA__(NAB.Sunshine.Comment.Attachment.C(Tawil.Decl.)¶7,ET.Dkt.No.13-26(May8,2014)); *see also* JA__(Order¶¶143, 145); JA__(NAB.Reply.Comment.14-16,ET.Dkt.No.13-26(Apr.5,2013)); JA__(NAB.Sunshine.Comment.7,ET.Dkt.No.13-26(May.8,2014)). To this day, *TVStudy* continues to be revised. *See* JA__(Order¶145). Moreover, *TVStudy* has a number of internal settings for the user to select, called "soft switches." But when

distributing the program, the staff released little information about what settings they planned to use during the incentive auction. *See* JA__(NAB.Sunshine.Comment.Attachment.C(Tawil.Decl.)¶9,ET.Dkt.No.13-26 (May8,2014)). So even if NAB obtained the most recent version of *TVStudy*, it still could not ascertain precisely how the staff planned to calculate coverage area and population served. And when NAB attempted to comment on the particulars of *TVStudy*, the FCC discounted or rejected NAB's analysis for using the wrong settings. *See*, *e.g.*, JA__(Order¶¶140-141, 161). By making commenters "play hunt the peanut" with *TVStudy*, the Commission thwarted the APA's mandatory notice and comment.

III. The Commission's Order Also Violates The Spectrum Act And The APA On Two Additional Grounds

In addition to the numerous flaws discussed above, Sinclair has identified two additional respects in which the Order contravenes the Spectrum Act and the APA: its requirement that broadcasters cease operations on their pre-auction channels within 39 months of reassignment, and its determination that the auction could proceed in all markets based simply on the submission of a pre-auction application to participate by any two broadcasters nationwide.

A. The Commission's Rule Requiring Broadcasters To Cease Operations On Pre-Auction Channels Within 39 Months Following Reassignment Is Arbitrary And Capricious And Violates The FCC's Statutory Obligations

The FCC has general authority to modify licenses subject to the licensee's formal protest rights. *See* 47 U.S.C. § 316(a). Congress recognized that a case-by-case approach would be unworkable in the face of hundreds of simultaneous license modifications resulting from the auction. Thus, for the reverse auction only, Congress suspended broadcasters' statutory right to protest license modifications, while simultaneously imposing specific safeguards to limit the FCC's discretion to modify broadcast licenses. *Id.* § 1452(h). Most importantly, Congress ensured that any modified licenses resulting from the repacking would "make all reasonable efforts to preserve … the coverage area and population served of each broadcast television licensee." *Id.* § 1452(b)(2). Recognizing the magnitude of this endeavor, Congress afforded the FCC ample time to repack the broadcast band consistent with this limitation—allowing the FCC ten years, until 2022, to complete the auction. Congress placed no time limit on broadcasters' transition to repacked channels. *See id.* §1452(f)(3).

The FCC, however, has arbitrarily and capriciously provided broadcasters with only three months to obtain construction permits from the FCC and a maximum of 36 months thereafter to construct new facilities after any channel reassignment—after which, without exception, all displaced broadcasters must cease

broadcasting on their pre-auction channels. It did so despite record evidence that plainly and conclusively shows that many stations will be unable to complete construction during this timeframe. By selecting these arbitrary and capricious time horizons, the Commission guarantees that some displaced broadcasters will lose all of their coverage for a period of time, and perhaps permanently, in violation of Section 6403(b)(2) of the Spectrum Act.

The FCC's 39-month "go-dark" deadline is not supported by the relevant data, compelled by the statute, or rooted in necessity. Because the FCC failed to articulate a rational explanation for its decision, failed to consider an important aspect of the problem, and failed to honor its statutory obligations, its rule is arbitrary and capricious, an abuse of discretion, contrary to law, and exceeds its statutory authority. *See*, *e.g.*, *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005).

1. The 39-Month "Go-Dark" Requirement Conflicts With Unrebutted Record Evidence

The record evidence, including the report of the FCC's own expert, Wideli-ty, directly contradicts the FCC's determination that 39 months "will provide sufficient time to complete a phased transition of all stations assigned to new channels." JA__(Order¶568).

The FCC engaged Widelity to examine the challenges and costs associated with the repacking process. JA__(Widelity.Report.7). Widelity identified a number of concerns based on interviews with "key industry members," *see* JA__(Widelity.Report.9-10), including a shortage of critical resources, the inability of broadcasters to prepare in advance, and substantial timing obstacles, *see* JA__(NAB.Comment.18-23(Apr.21,2014)). Although Widelity estimated the time needed for certain phases, its estimates did not consider the cumulative effect of delays resulting from resource shortages, weather, permitting, and other issues. *See id.* Even so, Widelity concluded that, in the best-case scenarios some broadcasters would require at least 41 months to complete their transition. *See* JA__(Widelity.Report.44, 50-53).

But key industry players cautioned that the Widelity Report failed to adequately consider the combined effects of unprecedented demand coupled with unprecedented resource shortages and logistical challenges. The world's leading transmitter manufacturer explained that 39 months is "woefully insufficient" because manufacturers "lack both the existing capacity and the ability to ramp up production" to meet the schedules suggested by Widelity and cautioned that "[t]here simply is no way to rebuild the facilities of several hundred stations nationwide" in 39 months and possibly even within a year of that target.

JA__(GatesAir.Comment.4-6(Apr.21,2014)).[5] The leading supplier of broadcast antennas similarly noted that the Report "grossly underestimates the magnitude of the potential bottlenecks." JA__(Dielectric.Comment.3(Apr.21,2014)). Critical suppliers warned that industry capacity, already reduced after the completion of the 2009 transition to digital broadcasting, had diminished further after the FCC imposed a "freeze" on television station modifications in 2013, and might decline further before the auction. *See*, *e.g.*, *id.*; JA__(GatesAir.Comment.6(Apr.21,2014)).

Similarly, many broadcasters expressed concerns that Widelity's proposed solutions were insufficient to meet the FCC's 39-month deadline. *See*, *e.g.*, JA__(Public.Broadcasting.Service;Corp.for.Public.Broadcasting;&Assoc.of.Public .Television.Stations.("PTV").Reply.to.Comments.9-10(May.6,2014)) ("no amount of 'cooperation as well as patience, creative problem solving, and guidance from the FCC and industry groups' can guarantee that the repacking will be completed") (quoting JA__(Widelity.Report.7)); JA__(Sinclair.Comment.2-6(Apr.21,2014)) (summarizing issues); JA__(NAB.Comment.18-25(Apr.21,2014) (summarizing issues)). Sinclair warned that Widelity did not "account either for further declines in capacity resulting from the application freeze or for the impact of a sudden and dramatic increase in demand for products and services that simply are not being

[5] *Accord* JA__(Stainless.Comment.2-3(Apr.21,2014)) (noting timing and safety concerns raised by current shortage of experienced tower crews; observing replacing hundreds of towers might take several years); JA__(Dielectric.Comment.2-5(Apr.21,2014)) (similar).

produced and provided in the ordinary course today." JA__(Sinclair.Comment.3(Apr.21,2014)).

But the FCC brushed aside the warnings of the very suppliers and broadcasters that will have to complete the transition, saying it "expect[s] that the equipment manufacturing and tower installation industries will respond to the greatly increased demand." JA__(Order¶571). It also concluded that the deadline was not "infeasible for a large proportion of stations" (JA__(Order¶569)), thus conceding that it *is* infeasible for many stations. Although the FCC acknowledged that "some stations will face significant challenges" (JA__(Order¶569)), it did not explain how these obstacles could be overcome, other than saying that it would stagger construction schedules in an attempt to reduce simultaneous demand. *See* JA__(Order¶¶566, 571). In other words, in the face of clear evidence that many stations will require more than 36 months to construct, the FCC's solution is to give some broadcasters *fewer* than 36 months to build.

The Commission also disingenuously claims that "[m]any commenters suggest that a construction period of up to 36 months will be sufficient to complete the transition." *See* JA__(Order¶568). But the FCC cites earlier comments made in response to its initial proposed 18-month transition period. All of these comments

predate the Widelity Report,[6] which detailed the significant resource shortages, bottlenecks, and other potential delays in the repacking process. Many of the same commenters later responded to the Widelity Report and expressed serious doubt that the transition could be completed within 36 months.[7] Broadcasters also emphasized the need for flexibility to ensure that broadcast services were not interrupted due to difficulties in the transition process. *See*, *e.g.*, JA__(NAB.Notice.of.Ex.Parte.Communication.14(Apr.23,2014)) ("Under no scenario should the FCC force a broadcaster off-the-air that is diligently working to complete its post-repack facility."). None of the comments responding to the Widelity Report suggested that stations should be forced off the air.[8]

By ignoring the import of its own expert's findings and dismissing out of hand industry warnings that a hard 39-month "go-dark" deadline was infeasible, the FCC acted arbitrarily and capriciously. *See*, *e.g.*, *Sorenson Commc'ns*, 755 F.3d at 707; *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Ad-*

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[6] *See* JA__(Order¶568 n.1604) (citing JA__(Named.State.Broadcaster Assns.Comment.15(Jan.25,2013)); JA__(Belo.Corp.Comment.6(Jan.25,2013)); JA__(LIN.Television.Corp.Comment.7(Jan.25,2013)); JA__(NAB.Comment.50(Jan.25,2013); JA__(PTV.Comment.24-27(Jan.25,2013)); JA__(PTV.Reply.to.Comments.16(Mar.12,2013))).

[7] *See*, *e.g.*, JA__(PTV.Reply.to.Comments.9-10(May.6,2014)).

[8] *See*, *e.g.*, JA__(Named.State.Broadcaster.Assns.Comment.15(Jan.25,2013)) (FCC "should allow at least thirty (30) months for a 'repacked' station to complete the required modifications, subject to exceptions where, despite the vigorous efforts of a station, the station's licensee has not been able to secure all necessary governmental and non-governmental permits and consents.").

min., 741 F.3d 1309, 1312 (D.C. Cir. 2014) (failure to respond to relevant and significant public comments generally demonstrates that agency's decision was not based on consideration of relevant factors).

2. The FCC Ignored Its Statutory Obligation To Protect Displaced Broadcasters And Justified Its Decision By Relying On Factors That Congress Did Not Intend It To Consider

Congress understood that repacking a thousand-plus broadcasters while preserving their coverage area and population served would be challenging. *See* 47 U.S.C. § 1452(b)(2). Indeed, the complexity of this unique auction process is precisely what prompted Congress to give the FCC until 2022 to complete the auction process, without any deadline by which spectrum must be transitioned. *See id.* §1452(f)(3).[9]

And Congress was clear in its command to the FCC to use "all reasonable efforts" to preserve licensees' coverage areas and populations served. In light of the clear evidence that a 39 month timeframe is wildly unrealistic, the FCC's decision to enforce a hard 39-month go-dark deadline—causing affected stations to lose *all* of their coverage area and population served—contravenes the statute. And "[t]he role of this Court is to apply the statute as it is written—even if [it]

[9] In contrast, Congress set three-year deadlines for two other, less complex auctions that did not require the FCC to use "all reasonable efforts" in repacking. *See* 47 U.S.C. § 1451(b)(1).

think[s] some other approach might accord with good policy." *Sandifer*, 134 S. Ct. at 878.

Moreover, the Order anticipates that some of the modified licenses may not be useable before the go-dark period for reasons beyond the control of the licensee. *See* JA__(Order¶¶546 n.1551, ¶550, ¶554 n.1571). Offering no assurances that its new channel assignments can even be built at all, the FCC nonetheless warned broadcasters that, under the Communications Act, stations that remain dark a year after the 39 month go-dark deadline are subject to cancellation of their licenses. JA__(Order¶585). In other words, broadcasters that receive unworkable assignments, or face construction delays beyond their control, may simply lose their licenses altogether.

Congress has not authorized the FCC to employ such draconian tactics in the repacking process; rather, it has proscribed such actions. Because the Commission's Order violates a critical limitation on the power delegated to it under the Spectrum Act, the Order is outside the FCC's statutory authority, and cannot survive judicial review. *See Am. Library Ass'n*, 406 F.3d at 699.

The FCC claims a hard deadline is needed to provide forward action winners with certainty, which it says is essential to a successful auction. See JA__(Order¶¶559-60, 572-73). But the choice is not so stark. The FCC could do more up-front work to determine which assignments might be most problematic to

implement post-auction and simply eliminate those from consideration. Instead, the FCC will make channel assignments based on theoretical feasibility that does not consider easily discoverable conditions (like insufficient tower strength) that could delay or prohibit use of those assignments. Alternatively, the FCC could have set a "certain" deadline far enough out to accommodate foreseeable delays. Surely some homework up front, or some flexibility on the back end, constitutes "reasonable efforts" given the mandate of the Act and the ten-year timeframe.

Instead, the FCC elevated its own policy objectives over its statutory obligations to use "all reasonable efforts" to protect broadcasters and viewers. *See* JA__(Order¶¶569, 571-73). Indeed, the Order imposed a transition deadline that it knew some broadcasters could not meet to "provide certainty to wireless providers" and to complete the transition "as expeditiously as possible." JA__(Order¶559). The Commission's desire to conduct the auction many years before the statutory deadline cannot supersede Congress's direction to use all reasonable efforts to protect viewers from loss of broadcast services resulting from repacking.[10]

[10] The FCC also argues that a construction period that "closely coincides" with the three-year statutory reimbursement period for broadcasters' repacking expenses "will best ensure that stations are successfully reimbursed." JA__(Order¶568); *see also* 47 U.S.C. § 1452(b)(4)(D). In fact, the deadline is unnecessary for this purpose, given the FCC's decision that broadcasters may be reimbursed based on estimated expenses. *See* JA__(Order¶617).

The FCC's go-dark rule is a "policy preferenc[e]" that "cannot trump the words of the statute." *Dep't of the Treasury*, 739 F.3d at 21 (internal quotation marks omitted); *see also Sandifer*, 134 S. Ct. at 878; *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011). Because the go-dark rule ignores the FCC's statutory obligation to make all reasonable efforts to preserve broadcast services, it must be set aside as arbitrary and capricious and not in accordance with law. *See Sorenson Commc'ns*, 755 F.3d at 707; *see also* 5 U.S.C. § 706(2)(A).

B. The Commission's Determination That The Existence Of Any Two Qualified Bidders Satisfies The Spectrum Act Is Inconsistent With The Spectrum Act And Violates The APA

1. The FCC's Interpretation Of The "Two Competing Licensees" Requirement Is Contrary To The Plain Language Of The Spectrum Act

The plain language of the Spectrum Act prohibits the FCC from paying a licensee to relinquish its spectrum usage rights unless it first conducts a reverse auction to determine the price and "at least two competing licensees participate" in the auction. 47 U.S.C. § 309(j)(8)(G)(ii). This is an express limitation on the FCC's incentive auction authority that requires the price of any licensee buyout to be determined by bidding competition. But the FCC did not consider the need for competitive price discovery when deciding how to apply the requirement that two competing bidders participate. Instead, the FCC defined "participate" and "competing" in ways that make these statutory limitations meaningless.

The Commission defines a "participant" in the reverse auction as a licensee that submits a compliant pre-auction application to participate, regardless of whether the licensee accepts any bid. JA__(Order¶413). But elsewhere in the Order, the FCC admits that a station "participates" only if it accepts the FCC's first bid, describing an applicant declining to accept an opening price as "declining to *participate* in the reverse auction." JA__(Order¶330) (emphasis added). Completing an application cannot equate to *participation* in the reverse auction because *bidding* is what creates competition.[11] The FCC's implausible construction of "participate" renders the statutory limitation altogether meaningless. *See*, *e.g.*, *NRDC v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) ("'a court will not uphold [an agency's] interpretation that diverges from any realistic meaning of the statute'") (citation omitted; alteration in original).

The FCC also construes "competing" in a way that makes the term meaningless. The Commission maintains that "any broadcast television licensees that participate in the reverse auction and that are not commonly controlled will 'compete' with one another," regardless of their geographic location. JA__(Order¶414). Under the FCC's definition, stations in Anchorage "compete" with stations in Miami. But common sense dictates that if the FCC needs a license relinquishment in Mi-

[11] In other auctions, the FCC has required that bidders remain "active" or risk being prohibited from continued auction participation. *See Auction of 700 MHz Band Licenses Scheduled for January 16, 2008*, ¶ 36, FCC Public Notice, DA 07-3415, AU Docket No. 07-157 (rel. Aug. 17, 2007).

ami, it must obtain it in or near Miami. No broadcaster in Alaska or Maine can meet that need, regardless of the price, and therefore cannot possibly underbid a Miami station. Stations in distant cities are selling unique, non-fungible spectrum rights.[12] The FCC must have bidders in the same relevant market if the auction is to determine the "value of the relinquished rights." 47 U.S.C. § 309(j)(8)(G)(i).

In fact, the FCC's own reverse auction design does not contemplate competition between stations nationwide. Everywhere *except* the section discussing the "two competing participants" requirement, the Order acknowledges that for purposes of recovering broadcast spectrum, the entire country is not a single market. For example, the Order allows for recovery of different amounts of spectrum in different "markets" because this will "ensure broadcasters have the opportunity to participate in the reverse auction in markets where interest is high." JA__(Order¶82). Again, in discussing "dynamic reserve pric[ing]" the FCC acknowledges that during the reverse auction, bidding competition may exist in some *areas* but not others, noting that "bidders would be asked if they are willing to accept lower prices in *areas without bidding competition*." JA__(Order¶335) (emphasis added). If some areas can have bidding competition while others do not, plainly, the entire country is not a single market. And again, in setting the opening

[12] The FCC recently acknowledged in another context that it is the substitutability of a product that creates price competition for the benefit of buyers. *See In re Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Proposed Rulemaking, ¶ 13, 29 FCC Rcd 3351 (2014).

prices for the reverse auction, the FCC acknowledges that competition and values are based on local supply and demand for spectrum:

> [E]ach station will see a price that takes into account objective factors, such as location and potential for interference with other stations, that affect the availability of channels in the repacking process and, therefore, the value of a station's bid to voluntarily relinquish spectrum usage rights.

JA__(Order¶450).

The FCC nevertheless claims that stations in distant markets "compete" in the sense that they "compete to receive incentive payments from the same limited source—the aggregate proceeds of the forward auction." JA__(Order¶414). Not so. The forward auction follows the reverse auction. The amount of the forward-auction proceeds will not be known until after the reverse auction has closed, so those proceeds cannot possibly inform any station's bidding strategy. *See* JA__(Order¶118). The forward-auction proceeds will impact the FCC's *budget* for the reverse auction, and may determine whether the FCC can pay the prices determined earlier by competitive bidding. JA__(Order¶469). But a budget is not a substitute for the competitive price determination required by the Spectrum Act.

The FCC's position would allow it to claim that it had conducted a reverse "auction" if only two stations anywhere in the country establish eligibility to participate, even if only one accepts a bid. Of course, it is possible to structure an auction, such as a simple reserve price auction, that can close with only one bidder.

The FCC's general authority to assign spectrum licenses via auction gives the FCC broad discretion to design auctions and does not require two competing participants. *See* 47 U.S.C. § 309(j). But Congress placed an express limitation on reverse auctions, requiring that at least two *competing* licensees actually *participate* to determine the value of the rights. The Order reads this limitation out of the statute and is therefore facially invalid. The FCC's definitions of "participate" and "competing" "def[y] the plain language of [the] statute" and are also "utterly unreasonable and thus impermissible," and therefore *ultra vires*. *Am. Library Ass'n*, 406 F.3d at 699 (internal quotation marks omitted); *see also Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

2. The FCC's Rule Is Arbitrary And Capricious Because The FCC Relies On Inappropriate Factors, Offers An Implausible Explanation, And Is Internally Inconsistent

Congress required two competing licensees to participate in the incentive auction to ensure that each reverse auction transaction reflects the value of the spectrum rights being relinquished as determined by competitive bidding. *See* 47 U.S.C. § 309(j)(8)(G); 158 Cong. Rec. E237-38 (daily ed. Feb. 17, 2012) (extended remarks of Rep. Upton) (incentive auctions "must have competition on the 'reverse' side—the portion of the auction that sets the buy-out price. To do otherwise would provide insufficient market competition to minimize costs and would create little more than a substitute for a license transfer."). Yet the FCC defied the stat-

ute's mandate for value determination in favor of recovering the greatest amount of spectrum possible through its "commit[ment] to removing barriers to … voluntary participation" in the reverse auction. JA__(Order¶2). In other words, the FCC decided that complying with the two competing participant requirement might limit the amount of spectrum that it could reallocate. *See* JA__(Order¶415) (requiring two bidders in a market could preclude an "otherwise willing and eligible broadcast television licensee" from bidding). So the Commission adopted an implausibly broad interpretation of "participation" and "competing" that allows the Commission to pay a broadcaster to relinquish its spectrum rights even if it is the only bidder in the market or the country. *See* JA__(Order¶¶413-14).

The Commission reads Congress's limitations on the FCC's incentive auction authority out of existence. While this may serve the FCC's own objectives, it violates the plain terms of the Spectrum Act and the APA. *See Dep't of the Treasury*, 739 F.3d at 21; *Oceana*, 670 F.3d at 1243; *see also Sandifer*, 134 S. Ct. at 878. Moreover, as discussed above, the FCC's proffered explanation for its interpretation of "participation" and "competing," *see* JA__(Order¶¶414-15), is entirely unreasonable.

The FCC has simply rationalized a way around a fundamental limit on its reverse auction authority. And it is plainly a rationalization: everywhere *except* the section of the Order discussing the "two competing licensees" requirement, the

FCC recognizes that a station must actually bid to participate and that there is *not* a single, unified national market because price competition is local. Yet the Order contemplates FCC payments to stations in single-bidder markets. This cannot meet any reasonable interpretation of the requirement that "two competing licensees participate" in the reverse auctions in those markets. The reverse auction process is therefore arbitrary and capricious and unlawful under the APA. *See Sorenson Commc'ns*, 755 F.3d at 707; 5 U.S.C. § 706(2)(A).

IV. The Order's Deficiencies Require Vacatur

Under the APA, this Court "shall" vacate agency action that is arbitrary and capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. § 706(2)(A); *see also NRDC v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (Randolph, J., concurring). "[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated …." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation and alteration omitted); *see also Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (same).

This Court sometimes determines whether to vacate by weighing "the seriousness of the … deficiencies" of the agency's action and the "the disruptive consequences" of vacatur. *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993) (internal quotation marks omitted). Even applying those factors, vacatur

would be required here. The FCC's violations of the statute cannot be fixed or explained away. *See id.* And since the FCC can still use the methodology that OET Bulletin 69 describes and otherwise comply with the Spectrum Act, vacating the new method for calculating coverage area and population served, the 39-month go-dark deadline, and the Commission's interpretation of the "two competing licensees" requirement will cause no meaningful disruption or delay.

CONCLUSION

For the foregoing reasons, NAB and Sinclair request that this Court grant the petitions for review and vacate so much of the Order as adopts *TVStudy* and its modified data sources, fails to protect against terrain losses, denies protection to areas that are currently unpopulated, and fails to protect populations served by fill-in translators (and specifically sections III.B.2 and III.B.3.d.iii of the Order), as well as the Declaratory Ruling in its entirety. Sinclair further requests that this Court vacate so much of the Order as: (i) requires stations to cease broadcasting on their pre-auction channels no later than 39 months after the release of channel reassignments, without exception, as specifically addressed in section V.C.2 of the Order; and (ii) allows the FCC to complete reverse auction transactions in single-bidder markets, as specifically addressed in section IV.B.1.d of the Order.

Dated: November 7, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 17,972 words, as determined by the word-count function of Microsoft Word 2003, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2014, I electronically filed the foregoing Joint Opening Brief for Petitioners National Association of Broadcasters and Sinclair Broadcasting Group, Inc. with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I also hereby certify that I caused 5 copies to be hand delivered to the Clerk's Office pursuant to Circuit Rule 31(b).

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

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

CTIA—THE WIRELESS ASSOCIATION, *et al.*,

Intervenors for Respondents.

On Petitions For Review Of Final Rules Of The
United States Federal Communications Commission

ADDENDA TO THE JOINT OPENING BRIEF FOR PETITIONERS NATIONAL ASSOCIATION OF BROADCASTERS AND SINCLAIR BROADCASTING GROUP, INC.

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Statutory Addendum

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 309

§ 309. Application for license

* * *

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission—

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of

such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed—

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services; and

(F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation or sharing costs as provided to the Commission pursuant to section 923(g)(4) of this title.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and

necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraphs (B), (D), (E), (F), and (G), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding—

(i) the deposits of successful bidders shall be paid to the Treasury, except as otherwise provided in subparagraphs (D)(ii), (E)(ii), (F), and (G);

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be deposited in the general fund of the Treasury, where such amount shall be dedicated for the sole purpose of deficit reduction.

(D) Proceeds from reallocated Federal spectrum

(i) In general

Except as provided in clause (ii), cash proceeds attributable to the auction of any eligible frequencies described in section 923(g)(2) of this title shall be deposited in the Spectrum Relocation Fund established under section 928 of this title, and shall be available in accordance with that section.

(ii) Certain other proceeds

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), in the case of proceeds (including deposits and upfront payments from successful bidders) attributable to the auction of eligible frequencies described in paragraph (2) of section 923(g) of this title that are required to be auctioned by section 1451(b)(1)(B) of this title, such portion of such proceeds as is necessary to cover the relocation or sharing costs (as defined in paragraph (3) of such section 113(g)) of Federal entities relocated from such eligible frequencies shall be deposited in the Spectrum Relocation Fund. The remainder of such proceeds shall be deposited in the Public Safety Trust Fund established by section 1457(a)(1) of this title.

(E) Transfer of receipts

(i) Establishment of Fund

There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

(ii) Proceeds for funds

Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

(iii) Transfer of amount to Treasury

On September 30, 2009, the Secretary shall transfer $7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treasury.

(iv) Recovered analog spectrum

For purposes of clause (i), the term "recovered analog spectrum" has the meaning provided in paragraph (15)(C)(vi).

(F) Certain proceeds designated for Public Safety Trust Fund

Notwithstanding subparagraph (A) and except as provided in subparagraphs (B) and (D)(ii), the proceeds (including deposits and upfront payments from successful bidders) from the use of a system of competitive bidding under this subsection pursuant to section 1451(b)(1)(B) of this title shall be deposited in the Public Safety Trust Fund established by section 1457(a)(1) of this title.

(G) Incentive auctions

(i) In general

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), the Commission may encourage a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights in order to permit the assignment of new initial licenses subject to flexible-use service rules by sharing with such licensee a portion, based on the value of the relinquished rights as determined in the reverse auction required by clause (ii)(I), of the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection.

(ii) Limitations

The Commission may not enter into an agreement for a licensee to relinquish spectrum usage rights in exchange for a share of auction proceeds under clause (i) unless—

(I) the Commission conducts a reverse auction to determine the amount of compensation that licensees would accept in return for voluntarily relinquishing spectrum usage rights; and

(II) at least two competing licensees participate in the reverse auction.

(iii) Treatment of revenues

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), the proceeds (including deposits and upfront payments from successful bidders) from any auction, prior to the end of fiscal year 2022, of spectrum usage rights made available under clause (i) that are not shared with licensees under such clause shall be deposited as follows:

(I) $1,750,000,000 of the proceeds from the incentive auction of broadcast television spectrum required by section 1452 of this title shall be deposited in the TV Broadcaster Relocation Fund established by subsection (d)(1) of such section.

(II) All other proceeds shall be deposited—

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

(bb) after the end of fiscal year 2022, in the general fund of the Treasury, where such proceeds shall be dedicated for the sole purpose of deficit reduction.

(iv) Congressional notification

At least 3 months before any incentive auction conducted under this subparagraph, the Chairman of the Commission, in consultation with the Director of the Office of Management and Budget, shall notify the appropriate committees of Congress of the methodology for calculating the amounts that will be shared with licensees under clause (i).

(v) Definition

In this subparagraph, the term "appropriate committees of Congress" means—

(I) the Committee on Commerce, Science, and Transportation of the Senate;

(II) the Committee on Appropriations of the Senate;

(III) the Committee on Energy and Commerce of the House of Representatives; and

(IV) the Committee on Appropriations of the House of Representatives.

(9) Use of former Government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that—

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 921 et. seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless—

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C.A. § 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if—

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C.A. § 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C.A. § 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2022.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report—

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent—

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommu-

nications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall—

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and veri-

fication by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)—

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to—

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no

such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond June 12, 2009.

(B) Spectrum reversion and resale

(i) The Commission shall—

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection.

(C) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (B)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not—

(i) preclude any party from being a qualified bidder for such spectrum on the basis of—

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

(15) Commission to determine timing of auctions

(A) Commission authority

Subject to the provisions of this subsection (including paragraph (11)), but notwithstanding any other provision of law, the Commission shall determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding; conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.

(B) Termination of portions of auctions 31 and 44

Except as provided in subparagraph (C), the Commission shall not commence or conduct auctions 31 and 44 on June 19, 2002, as specified in the public notices of March 19, 2002, and March 20, 2002 (DA 02-659 and DA 02-563).

(C) Exception

(i) Blocks excepted

Subparagraph (B) shall not apply to the auction of—

(I) the C-block of licenses on the bands of frequencies located at 710-716 megahertz, and 740-746 megahertz; or

(II) the D-block of licenses on the bands of frequencies located at 716-722 megahertz.

(ii) Eligible bidders

The entities that shall be eligible to bid in the auction of the C-block and D-block licenses described in clause (i) shall be those entities that were qualified entities, and that submitted applications to participate in auction 44, by May 8, 2002, as part of the original auction 44 short form filing deadline.

(iii) Auction deadlines for excepted blocks

Notwithstanding subparagraph (B), the auction of the C-block and D-block licenses described in clause (i) shall be commenced no earlier than August 19, 2002, and no later than September 19, 2002, and the proceeds of such auction shall be deposited in accordance with paragraph (8) not later than December 31, 2002.

(iv) Report

Within one year after June 19, 2002, the Commission shall submit a report to Congress—

(I) specifying when the Commission intends to reschedule auctions 31 and 44 (other than the blocks excepted by clause (i)); and

(II) describing the progress made by the Commission in the digital television transition and in the assignment and allocation of additional spectrum for advanced mobile communications services that warrants the scheduling of such auctions.

(v) Additional deadlines for recovered analog spectrum

Notwithstanding subparagraph (B), the Commission shall conduct the auction of the licenses for recovered analog spectrum by commencing the bidding not later than January 28, 2008, and shall deposit the proceeds of such auction in accordance with paragraph (8)(E)(ii) not later than June 30, 2008.

(vi) Recovered analog spectrum

For purposes of clause (v), the term "recovered analog spectrum" means the spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting under paragraph (14), other than—

(I) the spectrum required by section 337 of this title to be made available for public safety services; and

(II) the spectrum auctioned prior to February 8, 2006.

(D) Return of payments

Within one month after June 19, 2002, the Commission shall return to the bidders for licenses in the A-block, B-block, and E-block of auction 44 the full amount of all upfront payments made by such bidders for such licenses.

(16) Special auction provisions for eligible frequencies

(A) Special regulations

The Commission shall revise the regulations prescribed under paragraph (4)(F) of this subsection to prescribe methods by which the total cash proceeds from any auction of eligible frequencies described in section 923(g)(2) of this title shall at least equal 110 percent of the total estimated relocation or sharing costs provided to the Commission pursuant to section 923(g)(4) of this title.

(B) Conclusion of auctions contingent on minimum proceeds

The Commission shall not conclude any auction of eligible frequencies described in section 923(g)(2) of this title if the total cash proceeds attributable to such spectrum are less than 110 percent of the total estimated relocation or sharing costs provided to the Commission pursuant to section 923(g)(4) of this title. If the Commission is unable to conclude an auction for the foregoing reason, the Commission shall cancel the auction, return within 45 days after the auction cancellation date any deposits from participating bidders held

in escrow, and absolve such bidders from any obligation to the United States to bid in any subsequent reauction of such spectrum.

(C) Authority to issue prior to deauthorization

In any auction conducted under the regulations required by subparagraph (A), the Commission may grant a license assigned for the use of eligible frequencies prior to the termination of an eligible Federal entity's authorization. However, the Commission shall condition such license by requiring that the licensee cannot cause harmful interference to such Federal entity until such entity's authorization has been terminated by the National Telecommunications and Information Administration.

(17) Certain conditions on auction participation prohibited

(A) In general

Notwithstanding any other provision of law, the Commission may not prevent a person from participating in a system of competitive bidding under this subsection if such person—

(i) complies with all the auction procedures and other requirements to protect the auction process established by the Commission; and

(ii) either—

(I) meets the technical, financial, character, and citizenship qualifications that the Commission may require under section 303(l)(1), 308(b), or 310 of this title to hold a license; or

(II) would meet such license qualifications by means approved by the Commission prior to the grant of the license.

(B) Clarification of authority

Nothing in subparagraph (A) affects any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition.

* * *

47 U.S.C. § 316

§ 316. Modification by Commission of station licenses or construction permits; burden of proof

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

(2) Any other licensee or permittee who believes its license or permit would be modified by the proposed action may also protest the proposed action before its effective date.

(3) A protest filed pursuant to this subsection shall be subject to the requirements of section 309 of this title for petitions to deny.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission; except that, with respect to any issue that addresses the question of whether the proposed action would modify the license or permit of a person described in subsection (a)(2) of this section, such burdens shall be as determined by the Commission.

47 U.S.C. § 1451

§ 1451. Deadlines for auction of certain spectrum

(a) Clearing certain Federal spectrum

(1) In general

The President shall—

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

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

(2) Spectrum described

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

(3) Identification by Secretary of Commerce

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

(b) Reallocation and auction

(1) In general

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

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

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

(2) Spectrum described

The spectrum described in this paragraph is the following:

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

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

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

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

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

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

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

(4) Determination by Commission

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

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

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

(c) Omitted

47 U.S.C. § 1452 (excerpts)

§ 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.

* * *

(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.

* * *

(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.

* * *

(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.

* * *

Exhibits Addendum

Exhibit A

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

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	No.

DECLARATION OF PERRY SOOK IN SUPPORT OF EMERGENCY MOTION BY THE NATIONAL ASSOCIATION OF BROADCASTERS FOR EXPEDITED CONSIDERATION OF PETITION FOR REVIEW AND AN EXPEDITED BRIEFING SCHEDULE

1. I am the Chief Executive Officer, President and Chairman of the Board of Nexstar Broadcasting, Inc. The following is within my personal knowledge, and, if called and sworn as a witness, I could and would competently testify thereto.

2. Nexstar Broadcasting, Inc. ("Nexstar") is a member of the National Association of Broadcasters. Nexstar currently holds broadcast television spectrum usage rights.

3. Nexstar has a substantial interest in obtaining an expedited decision by this Court regarding the validity of the new methodology adopted by the Federal Communications Commission ("FCC") for determining coverage area and population served by its television stations in order to preserve those values in the repacking of broadcast spectrum pursuant to the FCC's incentive auction.

4. As explained below, the FCC's new methodology produces reduced values for Nexstar's stations coverage area and population served. Those reductions will lead to decreased viewership and decreased revenue, and in once instance, will cause the station to become wholly unviable. Even if the auction results are subsequently vacated by this Court, Nexstar will be harmed in the interim. Because there are significant costs associated either with being repacked or with winding down a business in order to participate in the reverse auction, Nexstar will bear the burden of paying such costs twice—whether or not it chooses to participate in the reverse auction.

Reduced Coverage Area and Population Served

5. As compared with the version of OET Bulletin No. 69 that applied until the FCC order at issue in this case, the methodology adopted by the FCC in the order published at 79 Fed. Reg. 48,442 predicts reductions in coverage area and population served for one of Nexstar's broadcast television stations, with losses of 1.1 percent of coverage area and 3.6 percent of population served; and for another,

will result in a 97.8 percent population loss – essentially, the loss of nearly its entire population served. Nexstar estimates that, following the channel reassignment and repacking process, those reductions will lead to fewer viewers.

6. Fewer viewers means less revenue for Nexstar. For a broadcaster like Nexstar, advertising is the principal source of revenue. And the primary determinant of advertising revenue is the number of viewers.

Auction Expenses

7. Nexstar estimates that it will spend approximately $200,000-250,000 to prepare for the auction. Before the auction, for example, Nexstar plans to engage engineering consultants to conduct a complete, independent review of the auction and repacking impact on its television stations; work with an expert in spectrum valuation to determine Nexstar's strategy for participation or non-participation in the auction; and engage legal services as necessary. If the auction is initially held pursuant to the parameters set forth in the FCC's order, and that auction is vacated by this Court, Nexstar will have to bear those same auction expenses a second time. Such costs will include either the costs associated with winding down business in order to participate in the reverse auction or the cost of preparing for (and adapting to) any repacking.

Preparation for Auction

8. In order to either prepare to wind down its business to relinquish spectrum in the reverse auction or prepare for new competitive risks that will attend the incentive auction for those broadcasters that are repacked, Nexstar needs to know how much of its protected population and coverage area will remain and be protected well in advance of the auction.

9. As a result of the repacking process, some viewers may need to invest in new equipment or subscription services to continue receiving broadcast television signals. But the burden and expense of these investments may be too great for many low-income families that rely exclusively on over-the-air broadcast television. In order to determine which viewers are most at risk of having their broadcast television service disrupted by repacking, and to develop strategies to maintain service to these populations where possible, Nexstar needs advance notice of the protected population served and coverage area. Disruption of service to viewers will mean lower viewership for Nexstar, which (as explained above) means lower revenue. In addition, many viewers will likely blame Nexstar for the service disruption, damaging Nexstar's goodwill.

10. When Nexstar loses viewership and advertising revenue for its original broadcasts, it also is disadvantaged in negotiating retransmission consent

agreements with cable, satellite, and other telecommunications providers. As a result, Nexstar's revenue from retransmission fees will also decrease.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed this 25th day of August, 2014.

Perry A. Sook

Exhibit B

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

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	No.

DECLARATION OF RAYCOM MEDIA, INC. IN SUPPORT OF EMERGENCY MOTION BY THE NATIONAL ASSOCIATION OF BROADCASTERS FOR EXPEDITED CONSIDERATION OF PETITION FOR REVIEW AND AN EXPEDITED BRIEFING SCHEDULE

1. I am the Chief Technology Officer of Raycom Media, Inc. ("Raycom"). My job responsibilities include the engineering, installation and support of transmission facilities for the Raycom stations. The following is within my personal knowledge, and, if called and sworn as a witness, I could and would competently testify thereto.

2. Raycom is a member of the National Association of Broadcasters. Raycom currently holds broadcast television spectrum usage rights.

3. Raycom has a substantial interest in obtaining an expedited decision by this Court regarding the validity of the new methodology adopted by the Federal Communications Commission ("FCC") for determining coverage area and population served in order to preserve those values in the repacking of broadcast spectrum pursuant to the FCC's incentive auction.

4. As explained below, the FCC's new methodology produces reduced values for Raycom's coverage area and population served. Those reductions will lead to decreased viewership and decreased revenue. Even if the auction results were subsequently vacated by this Court, Raycom will be harmed in the interim. Because there are significant costs associated either with being repacked or with winding down a business in order to participate in the reverse auction, Raycom will bear the burden of paying such costs twice—whether or not it chooses to participate in the reverse auction.

Reduced Coverage Area and Population Served

5. As compared with the version of OET Bulletin No. 69 that applied until the FCC order at issue in this case, the methodology adopted by the FCC in the order published at 79 Fed. Reg. 48,442 predicts reductions in coverage area and population served for two of Raycom's broadcast television stations, with losses of up to 10.6 percent of coverage area and 4.7 percent of population served. Raycom estimates that, following the channel reassignment and repacking process, those reductions will lead to fewer viewers.

6. Fewer viewers means less revenue for Raycom. For a broadcaster like Raycom, advertising is the principal source of revenue. And the primary determinant of advertising revenue is the number of viewers.

Auction Expenses

7. Raycom estimates that it will spend $500,000 to prepare for the auction. Before the auction, for example, Raycom plans to prepare coverage studies and interference scenarios. If the auction is initially held pursuant to the parameters set forth in the FCC's order, and that auction is vacated by this Court, Raycom will have to bear those same auction expenses a second time. Such costs will include either the costs associated with winding down business in order to

participate in the reverse auction or the cost of preparing for (and adapting to) any repacking.

Preparation for Auction

8. In order to either prepare to wind down its business to relinquish spectrum in the reverse auction or prepare for new competitive risks that will attend the incentive auction for those broadcasters that are repacked, Raycom needs to know how much of its protected population and coverage area will remain and be protected well in advance of the auction.

9. As a result of the repacking process, some viewers may need to invest in new equipment or subscription services to continue receiving broadcast television signals. But the burden and expense of these investments may be too great for many low-income families that rely exclusively on over-the-air broadcast television. In order to determine which viewers are most at risk of having their broadcast television service disrupted by repacking, and to develop strategies to maintain service to these populations where possible, Raycom needs advance notice of the protected population served and coverage area. Disruption of service to viewers will mean lower viewership for Raycom, which (as explained above)

means lower revenue. In addition, many viewers will likely blame Raycom for the service disruption, damaging Raycom's goodwill.

10. When Raycom loses viewership and advertising revenue for its original broadcasts, it also is disadvantaged in negotiating retransmission consent agreements with cable, satellite, and other telecommunications providers. As a result, Raycom's revenue from retransmission fees will also decrease.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed this 22nd day of August, 2014, in Montgomery, Alabama

Dave Folsom
Chief Technology Officer
Raycom Media, Inc.

Exhibit C

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

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*, Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents. CTIA—THE WIRELESS ASSOCIATION, *et al.*, Intervenors for Respondents.	No. 14-1154 (consolidated with Nos. 14-1179 and 14-1218)

DECLARATION OF MARK A. AITKEN

I, Mark A. Aitken, hereby state as follows:

1. I am over the age of 18 years, and I make this declaration based on my personal knowledge of the matters stated herein.

2. I am the Vice President of Advanced Technology of Sinclair Broadcast Group, Inc. ("Sinclair"). I have been employed and engaged within the television broadcast industry for more than 40 years. I am a member in good standing and active in the Institute of Electrical and Electronics Engineers, the Society of Motion Picture & Television Engineers and the Association of Federal Communications Consulting Engineers.

3. During my professional career I have been responsible for the engineering, development, construction scheduling and deployment of hundreds of television stations globally. From 1975 to 1999, I was employed by COMARK/Thomson, then one of the world's largest suppliers to the global broadcast market. I held various positions including that of Director of RF (Radio Frequency) Engineering, responsible for all RF product development, manufacturing, assembly, and documentation and testing. As well, I served as the Director of Sales Engineering, responsible for definition of every aspect of transmission system development, costing, installation and commissioning. This encompassed microwave systems, transmitters, RF systems, transmission line systems, towers and antennae.

4. I have been an employee of Sinclair since 1999, responsible in my early employment for planning and development of digital television infrastructure during the company's transition to digital television. In my role as Vice President of Advanced Technology, I have been and continue to be responsible for long range preparation, including planning for new broadcast technologies, infrastructure, and transition of operations when building and commissioning operations of new broadcast facilities. In my position I have been the primary Sinclair executive overseeing the company's analysis of, and planning with respect to, the broadcast incentive auction described below.

5. Sinclair is one of the largest and most diversified television broadcasting companies in the United States, operating and providing programming and sales services to television stations in various cities across the country. After closing of pending transactions, Sinclair will own and operate, or provide services to, 162 television stations in 79 markets. Sinclair and its subsidiaries are the licensees and owners of 118 of these stations, and provide services for 44 additional stations. Sinclair's television group reaches approximately 37.5% of U.S. television households and includes FOX, ABC, MyTV, CW, CBS, NBC, Univision and Azteca affiliates.

6. The Federal Communications Commission (the "FCC") has issued a Report and Order, GN Dkt. No. 12-268 (rel. June 2, 2014) (the "Order"), that details an incentive auction process by which broadcast spectrum usage rights will be purchased from television broadcasters (the "reverse auction") and re-sold for wireless uses (the "forward auction").

7. The incentive auction will result in "repacking" of possibly 1,000 or more television stations nationwide. Repacked stations will be required to change channels and therefore change their operating facilities. The Order provides all repacked stations with no more than 39 months to perform their transitions to their new frequencies after the FCC announces new channel assignments. After 39 months, all repacked stations must cease broadcasting on their pre-auction channels, regardless of whether the new facilities have been built and are operational, and regardless of whether the failure to complete construction was beyond the licensee's control.

8. There are currently severe human and material resource shortages in the manufacturing and service industries necessary to plan and implement the changes to broadcast operations that the repacking process will require. The capacity of all essential suppliers to the television broadcast industry – transmitter, transmission line and antenna manufacturers, broadcast consulting engineers, tower crews capable of working on tall and complex

tower sites typical of many broadcast facilities, and others – has declined dramatically in the last five years, because of a near cessation of demand. First, the broadcast television supplier and service industries contracted greatly after the end of the transition to digital broadcasting in 2009. Then, in 2013, the FCC imposed a "freeze" on applications for new television facilities and modifications to existing facilities, which has resulted in a near complete cessation of work for these same suppliers.

9. As a result of the dramatically decreased demand, many suppliers (for example, Acrodyne, Axcera, Modulation Sciences, and Larcan) have gone bankrupt, closed down, or simply stopped making television broadcast equipment. Remaining suppliers have reduced staff, manufacturing capabilities, and facility resources. Sinclair recently purchased Dielectric to prevent it from closing its operations altogether, but Dielectric remains in business with a massively scaled down workforce. The industry's capacity to make major changes to broadcast stations is the lowest it has been in decades. The FCC's failure to lift the "freeze" on television applications for new facilities and modifications to allow broadcasters to better serve the public has created shortages which will be even more acute by the time repacking commences.

10. Depending on the amount of spectrum that is repurposed for wireless broadband in the incentive auction, as many as 1,000 or more television stations may be required to repack and change their facilities. While some changes may be relatively minor, the majority of others will be extremely complex and expansive. And all changes, major and minor, will require broadcasters to turn to the same small, dwindling pool of consultants, engineers, and manufacturers – which in turn must rely upon an increasingly limited pool of specialized raw material and component suppliers. This will create an unprecedented amount of simultaneous demand at a time when capacity to meet that demand is at an all-time low. The industry cannot easily make up for this resource gap because these jobs require very specific skills and experience.

11. Beyond inadequate supply, the massive simultaneous demand will also create substantial logistical problems. Stations and towers are spread across the 50 states. Each facility modification has a specific workflow, and problems with executing a single facility modification in one place (due to weather, permitting, crew issues, accidents, defects, errors resulting from inadequately trained or inexperienced workers, etc.) can have great "ripple" effects for other projects. For example, tower crews cannot be in two places at once, so if an antenna arrives late, is damaged or is otherwise deemed

defective, or if a needed permit has not been issued, the crew may be sidelined, and the next project may be delayed, impacting manufacturers, consultants and, of course, broadcasters. This will inevitably result in resource bottlenecks that will adversely impact affect the construction schedules of most, if not all, repacked stations. This reflects simply one of many 'supply line' related issues that will impact schedules.

12. Because of the inescapable challenges associated with simultaneously modifying or building hundreds of broadcast facilities during this unprecedented nationwide repacking effort, simple logic dictates that Sinclair will be unable to complete construction of new facilities for all of its repacked stations within the 39 months established by the Order. As a result, multiple Sinclair stations would be forced to cease broadcasting until construction of new facilities is complete.

13. Temporary facilities are unlikely to be a viable option for a station to avoid being forced off the air in most cases. In particular, the work involved in deploying such temporary facilities, utilizing the same dwindling engineering, manufacturing and labor forces, would only *increase* demand on the limited resources that are already in too-short supply. And even if equipment, towers, and personnel were available to deploy temporary facilities, in many or most cases there will be no available channels for

temporary operations. Even where temporary operations are possible, they will almost certainly provide severely limited coverage area. Operation with temporary facilities would also cause a loss of viewership and therefore revenue, because revenue is directly tied to viewership.

14. Also, many cable and satellite operators receive the signals of our stations for retransmission via our stations' over-the-air signals. If the temporary facilities do not reach those pick-up points – or if the station is not able to continue broadcasting at all – subscribers to those services will also lose our signals, also causing a loss of revenue. In some cases, it may be possible to arrange alternative delivery of our signals to cable and satellite operators, for example, by fiber, but that can be very costly (more than $100,000 to install and often thousands of dollars per month in service fees for a single fiber connection to a single cable or satellite provider). In many cases, however, fiber or other delivery methods are not even viable options.

15. As a result, after the 39 month deadline, many Sinclair stations, perhaps dozens, would to be forced out of operation altogether, or to operate with greatly reduced coverage, for an indefinite period of time. This will impose significant operational and financial burdens on Sinclair. Stations will have severely limited revenue when they are not operating. Costs, however, will

continue to accrue. Ceasing to broadcast could also put television stations in violation of their programming agreements and retransmission agreements.

16. Sinclair is ready, willing, and able to participate in a valid incentive auction that complies with the plain language of the Spectrum Act.

17. Not all Sinclair stations will participate in the reverse auction. If the FCC conducts the auction without observing the two competing licensees limitation, Sinclair's non-participating stations will also be harmed by the invalid auction process. The amount of spectrum that the FCC can reclaim from broadcasters is directly tied to the number of stations it is able to pay to relinquish their spectrum usage rights through the reverse auction. If the FCC is permitted to purchase broadcast spectrum from stations in markets in which two competing bidders do not participate, it will be able to reclaim more spectrum in the reverse auction. The FCC's ability to recover this additional spectrum will result in more stations being subject to repacking. Each additional repacked Sinclair station will incur significant unreimbursed costs and each will face the risk of being required to cease operations after 39 months if replacement facilities have not been constructed.

18. Sinclair can easily determine the minimum number of its stations that would be repacked if the FCC reaches certain "clearing targets." For example, if the FCC clears 84MHz of spectrum, all stations that currently operate

between Channels 38 and 51 would be moved by necessity. Table 1 below identifies the number of stations that Sinclair owns (in bold), and notes in parenthesis a total which includes those it provides services for. The indicated station count would necessarily be repacked if certain amounts of broadcast spectrum are repurposed. Including the stations we provide services for, you will note that the numbers increase ~ 50% (those in parenthesis).

Table 1	
Spectrum Cleared	**Sinclair Stations Repacked**
144MHz	**66** / (*96*)
126MHz	**51** / (*74*)
96MHz	**34** / (*49*)
84MHz	**32** / (*46*)
60MHz	**27** / (*39*)
42MHz	**18** / (*26*)
30MHz	**14** / (*21*)

19. Sinclair owns at least 27 stations in the portion of the television broadcast band that is most likely to be cleared and repacked in the auction (46 stations if those Sinclair provides services to are included). Based on various optimization "runs" the FCC has supplied to the industry, it is possible that the number of Sinclair channels impacted could be far greater than those

shown in the chart above. Any stations that relinquish their spectrum usage rights in the auction would not be repacked, but those that do not relinquish such rights are subject to involuntary repacking.

20. As explained above, the lack of television construction activity occasioned by the FCC's "freeze" has resulted in a near complete cessation of work for the needed support industries. The little activity that is occurring thus reflects a "buyer's market," as the support industries have little work. Yet even in this environment the costs of channel changes are significant. Based on recent channel changes, the cost to Sinclair for a relatively straightforward change of a single channel at a single station is estimated to be roughly $3.4 million on average. In a period of excessively high demand, such as during incentive auction repacking, that cost would likely be at least 50% higher. Complex changes could cost far more. Although some of these costs may be reimbursable in whole or in part under the Spectrum Act, many of them are not reimbursable as defined by the FCC. Sinclair's current estimated "buyer's market" costs are summarized in Table 2 below.

Table 2	
Estimates for two-tube 60kW IOT Transmitter Channel change	
	SBG Estimate
Technical costs from Acrodyne Services Retuning transmitter/ Filter	$650,000.00
Transmitter building electrical / Building modifications	$35,000.00
New Ch-XX Antenna - Top mounted / with strengthened support pole	$375,000.00
Replace transmission line with Digit 6" broadband line.	$275,000.00
Low power transmitter - For transition period during rework and channel change	$75,000.00
Side-mount antenna and line transmission line--- Transition antenna system	$150,000.00
Tower Strengthening - Revised required tower modifications TIA G Spec for new Antenna	$225,000.00
Tower work / Antenna installation	$325,000.00
Technical contingency	$210,000.00
FCC required Healthcare Notifications	$4,000.00
FCC Applications Fees, Engineering Consultant Fees	$40,000.00
FCC Attorney fees	$40,000.00
Lost Income during transition in DMA	$400,000.00
WXXX Channel Change First Round Advertising Costs	$225,000.00
WXXX Second Round of Advertising Costs	$225,000.00
SBG Engineering/ Project management	$125,000.00
Total Estimated Ch-XX Relocation Costs	**$3,379,000.00**

I declare under penalty of perjury under the laws of the United States of America (28 U.S.C. § 1746) that the foregoing is true and correct.

Executed on November 7, 2014

Mark A. Aitken

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2014, I electronically filed the foregoing Addenda to the Joint Brief for Petitioners National Association of Broadcasters and Sinclair Broadcasting Group, Inc. with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I also hereby certify that I caused 5 copies to be hand delivered to the Clerk's Office pursuant to Circuit Rule 31(b).

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