Oral Argument Scheduled For March 12, 2015

Nos. 14-1154, 14-1179, 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
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

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STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. ***Parties***

All parties appearing in this Court are listed in petitioners' brief.

2. ***Rulings Under Review***

(a) *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567 (2014) (JA 1); (b) *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 12240 (2014) (JA 1801).

3. ***Related Cases***

The orders on review have not previously been before this Court or any other court. We are not aware of any related cases pending before this Court or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Administrative Decisions

Other Authorities

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

GLOSSARY

Declaratory Ruling	*In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 12240 (2014) (JA 1801)
DRT	digital replacement translator; *see* 47 C.F.R. § 74.787(a)(5)
LPTV	low-power television
LPTV and Translator NPRM	*In the Matter of Amendment of Parts 73 and 74 of the Commission's Rules for Digital Low Power and Television Translator Stations*, 29 FCC Rcd 12536 (2014)
MHz	megahertz – a measurement of radio waves equivalent to one million cycles per second
NPRM	*In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 27 FCC Rcd 12357 (2012) (JA 697)
OET	FCC Office of Engineering and Technology
OET-69	FCC Office of Engineering and Technology Bulletin No. 69 (JA 490)
Order	*In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567 (2014) (JA 1)
Spectrum Act	Middle Class Tax Relief and Job Creation Act of 2012, Title VI, Pub.L. No. 112-96, 125 Stat. 156 (2012)
TV Study PN	PUBLIC NOTICE, *Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software*, 28 FCC Rcd 950 (2013), 78 FED.REG. 11129 (Feb. 15, 2013) (JA 1192).

UHF	ultra-high frequency – a designated part of the radio spectrum
VHF	very-high frequency – a designated part of the radio spectrum

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BRIEF FOR RESPONDENTS

INTRODUCTION

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

Under the statute, television broadcast licensees may voluntarily relinquish their spectrum rights for a payment established in a "reverse" auction. The Commission will reorganize the relinquished spectrum – and may move television stations whose licensees do not relinquish spectrum to new channels – to make that spectrum more suitable for a variety of non-broadcast uses, including wireless telephony and wireless broadband. Wireless carriers and other bidders will participate in a "forward" auction to acquire rights to the reorganized spectrum. The proceeds from the forward auction will be used to pay the broadcasters who relinquish their spectrum rights, to reimburse the costs incurred by broadcasters who remain on the air after the auction and are required to move to different channels, and for other specific purposes identified in the statute.

The orders before the Court are part of an ongoing process to establish policies and procedures related to the conduct of the auction. The issues raised in the petitions involve narrowly focused disputes arising from the FCC's application of radio engineering principles to carry out statutory directives, as well as auction design judgments employed by the FCC to ensure an efficient process to implement the Spectrum Act's goals. Petitioners contend that certain of the procedures adopted by the *Order* are inconsistent with the statute's requirements that the agency make all reasonable efforts to preserve the coverage area and population served of

broadcasters who are required to move, using the methodology described in an FCC Bulletin, OET-69, and are otherwise arbitrary and capricious.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Both petitioners present the following issues for review:

1. Whether the Commission complied with the Spectrum Act's requirement that it use the "methodology described in OET Bulletin No. 69."

2. Whether the Commission complied with the Spectrum Act's requirement that it "make all reasonable efforts" to preserve stations' "coverage area" and "population served" in reassigning stations to different channels following the auction.

3. Whether the Commission's treatment of certain low power television translator stations was permissible under the Spectrum Act.

4. Whether the Commission acted reasonably in (a) considering alternatives; (b) explaining its action; and (c) providing notice and opportunity for parties to comment on the *TVStudy* software and related matters.

Sinclair's portion of the joint brief, which NAB does not support, presents the following issues:

1. Whether the 39-month transition period adopted by the Commission for television stations that must move to new channels following the auction was reasonable; and whether Sinclair has standing to raise this issue.

2. Whether the rules adopted by the Commission governing the number of bidders in the auctions were reasonable; and whether Sinclair has standing to raise this issue.

JURISDICTION

This Court has jurisdiction to review the FCC's orders in these cases pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), except for the issues put forth by petitioner Sinclair Broadcast Group alone, which – as we explain below – it lacks standing to raise. The *Report and Order* was released on June 2, 2014. A summary of the order was published in the Federal Register on August 15, 2014. *See* 79 Fed. Reg. 48442 (2014). The *Declaratory Ruling* was released on September 30, 2014. A summary of the *Declaratory Ruling* was published in the Federal Register on November 6, 2014. *See* 79 Fed. Reg. 65906 (2014). The petitions for review were filed within 60 days of the applicable dates established by 28 U.S.C. § 2344 and 47 C.F.R. § 1.4(b)(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Addendum to this brief.

COUNTERSTATEMENT

A. Introduction: The Rising Demand For Spectrum

Mobile broadband networks are emerging not only as the foundation for communications services in the 21st Century, but also as the infrastructure supporting economic growth and innovation in such wide-ranging areas as entertainment, health care, public safety, education, and social service. Like railroads in the 19th Century, and the electrical grid in the 20th Century, mobile broadband networks are primary economic engines for the country. Radiofrequency spectrum is a critical building block for the services they can provide. The Commission's actions in this case implement Congress's response to the dramatic increase in the demand for such spectrum resulting from the skyrocketing rise in the use of wireless networks to provide mobile broadband and other services.

Broadcast television occupies a particularly important portion of the spectrum. This country's approximately 8,400 broadcast television stations currently provide service in the very-high frequency (VHF) and ultra-high frequency (UHF) bands, which comprise 294 MHz of radiofrequency spectrum. *See* 47 C.F.R. §§ 2.106, 73.603. Each broadcast television station is allotted a 6 MHz channel within that range, covering a particular geographical area.

The propagation and penetration characteristics of spectrum in the UHF band render that spectrum especially well-suited for mobile broadband use. And

although broadcast television continues to be a vital source of local news and information for many Americans, the number of viewers of broadcast programming provided over the air has steadily declined.

Recognizing that the decreased demand for over-the-air programming compared to the pressing need for spectrum for mobile broadband had resulted in a "substantial gap" between "the market value for spectrum used for over-the-air broadcast TV" and "the market value for spectrum used for mobile broadband," the Commission's 2010 National Broadband Plan discussed a potential "incentive auction." Such an auction, the Commission explained, could enlist market forces to reallocate spectrum from broadcasting by encouraging broadcasters who choose to do so (because they have been unable to take advantage of the opportunities created by the digital television transition or otherwise) to relinquish their spectrum usage rights in return for a share of the proceeds those rights would bring at auction. Federal Communications Commission, *Connecting America: The National Broadband Plan* 88-91 (2010) available at http://www.fcc.gov/national-broadband-plan.

B. The Spectrum Act And Incentive Auctions

In the Spectrum Act, Congress authorized the Commission to "encourage a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights"

in order to permit the re-assignment of that spectrum by auction in exchange for a portion of the resulting auction proceeds. 47 U.S.C. § 309(j)(8)(G).[1]

Of specific relevance to this case, 47 U.S.C. § 1452 requires the FCC to conduct a one-time broadcast television spectrum incentive auction. First, the statute provides for a "reverse auction" that is "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). Pursuant to that provision, broadcast television licensees may bid to indicate the amount of compensation that they would accept to relinquish all or some of their spectrum usage rights. 47 U.S.C. § 1452(a)(2).

Second, Section 1452(b) provides for reorganization, or "repacking," of the broadcast television spectrum in order to clear a portion of the UHF frequency band of broadcasters to make it available for new uses. Specifically, Section 1452(b) directs the Commission to evaluate the broadcast television spectrum, including the spectrum made available through the required reverse auction, and authorizes the FCC to "make such reassignments of television channels as the Commission considers appropriate," and to "reallocate such portions of such spectrum

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[1] The Commission's orders refer generally to the original statutory sections of the Spectrum Act. Petitioners' brief refers to the different section numbers in the statutory codification. To avoid confusion here, we have referred to the codified version. In the statutory addendum to this brief we have inserted cross-references to the original Spectrum Act section numbers.

as the Commission determines are available for reallocation." 47 U.S.C. § 1452(b)(1). The Act provides that in making any reassignments or reallocations under Section 1452(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." 47 U.S.C. § 1452(b)(2).

Finally, Section 1452(c) directs the Commission to conduct a "forward auction" by which it will assign licenses for the use of the reallocated broadcast television spectrum. 47 U.S.C. § 1452(c)(1). The statute provides that no licenses may be assigned, and no reassignments or reallocations of broadcast television spectrum may become effective, unless the proceeds of the forward auction exceed the sum of (1) the total amount of compensation that the FCC must pay successful reverse auction bidders, (2) the estimated relocation costs of repacked stations, which the FCC must reimburse, and (3) the costs of conducting the incentive auction. 47 U.S.C. § 1452(c)(2).

The broadcast television spectrum incentive auction will thus be comprised of two separate but interdependent auctions – a reverse auction, which will determine the price at which broadcasters will voluntarily relinquish their spectrum usage rights, and a forward auction, which will determine the price companies are

willing to pay for flexible-use wireless licenses for the spectrum available as a result of the "repacking" process to create contiguous blocks of cleared spectrum. The repacking process is an integral part of the incentive auction, involving application of technical radio engineering principles and complex auction design judgments.

The ultimate success of the auction requires that each of its component parts work together. The reverse auction depends on forward auction bidders' willingness to pay and the forward auction depends on reverse auction bidders' willingness to relinquish spectrum rights in exchange for payments, and each of these depend on an efficient repacking of the spectrum used by the broadcasters that remain to clear a portion of the UHF band for new uses.

C. The Incentive Auction Proceeding

In October 2012, the FCC began a rulemaking proceeding to implement the authority Congress had granted in the Spectrum Act. *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 27 FCC Rcd 12357 (2012) (JA 697)(*NPRM*).

The *NPRM* sought comment on the basic elements of the incentive auction – the reverse auction for broadcasters to indicate at what price they would relinquish spectrum usage rights (*id.* ¶¶72-90 (JA 720)), the repacking process by which the Commission will reorganize the spectrum made available as a result of the reverse auction (*id.* ¶¶91-118 (JA 727)), and the proposal for conducting the forward auc-

tion that will identify prices that potential users of the available repacked spectrum would pay for new licenses to use that spectrum. *Id.* ¶¶118-185 (JA 739).

In the course of its discussion of the repacking process, the Commission set forth an illustration of how a computer program that implements the OET-69 methodology evaluates a station's signal contour. The Commission explained that the program analyzes "interference in approximately rectangular 'grid cells' into which a station's coverage or service area is divided," and produces "a set of aggregate population and area data (1) within the station's noise-limited contour, (2) not affected by terrain losses, and (3) lost to interference from other stations." *Id.* ¶95 (JA 728).

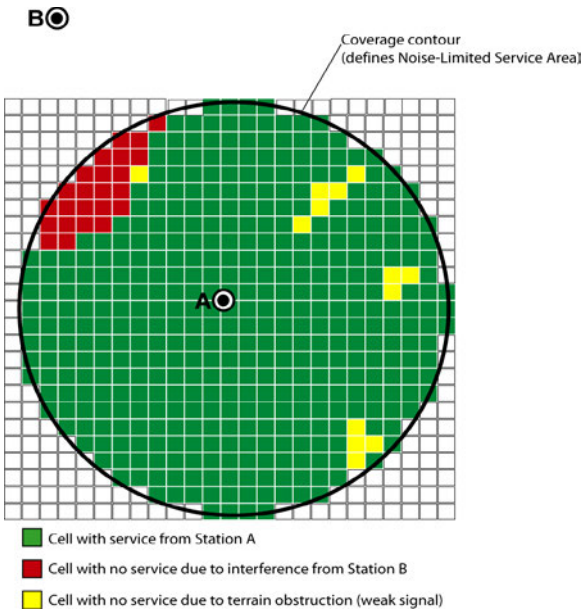

Figure 1. Illustration of OET Bulletin 69 coverage and interference

Subsequently, the FCC's Office of Engineering and Technology published public notice of proposed rules in the Federal Register "announcing that it had de-

veloped and was releasing a new computer program, called *TVStudy*, for performing interference analyses to calculate television stations' coverage areas and populations served using the methodology described in OET-69."[2] The notice sought comment on the software update generally, "as well as the identification of any errors, unexpected behaviors, or anomalous results." 28 FCC Rcd at 950 (JA 1192). The notice also sought comment on proposals to update various inputs to the computer program, such as more recent population data and more precise terrain data. Such updates, the notice explained, would serve "an important objective" of using "software with improved accuracy and that makes use of the best available data to compute estimates of the coverage area and population served of each broadcast television licensee," consistent with the Spectrum Act. *Id.* at 952 (JA 1194).

D. The Orders On Review

1. The Report And Order

In a *Report and Order* released in June 2014, the Commission adopted rules and policies for the incentive auction (while deferring certain issues, including final auction procedures, for later orders). *In the Matter of Expanding the Economic*

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[2] PUBLIC NOTICE, *Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software*, 28 FCC Rcd 950 (2013), 78 FED.REG. 11129 (Feb. 15, 2013) (*TVStudy PN*) ((JA 1192). The Commission similarly provided notice of subsequent updates to the *TVStudy* software and made the revised versions publicly available on the agency's website. *See Order* n.473 (JA 68).

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

a. The Commission devoted a substantial portion of the *Order* to explaining how it intended to implement the repacking process, *i.e.*, "reorganizing television stations in the broadcast television bands so that the stations that remain on the air after the incentive auction occupy a smaller portion of the UHF band, thereby freeing up a portion of that band for new wireless uses." *Order* ¶109 (JA 52).

i. The Commission first examined its obligation under the Spectrum Act to make "all reasonable efforts" to preserve the February 22, 2012, coverage area and population served of stations that must move to a new channel after the auction, "as determined using the methodology described in OET Bulletin No. 69 of the [FCC's] Office of Engineering and Technology." *See* 47 U.S.C. § 1452(b)(2). Recognizing the "statutory context," the Commission concluded that in interpreting what efforts are "reasonable," it should "take into account the other objectives in the Spectrum Act, including the goal of repurposing spectrum." *Order* ¶122 (JA 57). The Commission accordingly found that "the statute requires that we use all reasonable efforts to preserve each station's coverage area and population served without sacrificing the goal of using market forces to repurpose spectrum for new, flexible uses." *Id*.

ii. The Commission next rejected arguments – put forth by NAB and others – that its use of *TVStudy* software in determining how to repack broadcasters would violate the Spectrum Act's direction to "us[e] the methodology described in OET Bulletin 69." 47 U.S.C. § 1452(b)(2). The Commission explained that it "interpreted the statutory phrase 'methodology described in OET Bulletin No. 69' to refer to the particular procedures for evaluating television coverage and interference that are provided for in that bulletin," and "not the computer software or input values used to apply that methodology in any given case." *Order* ¶134 (JA 62). The Commission rejected the argument that "Congress intended us to maintain and somehow adapt an obsolete computer program that relies on inaccurate data" to implement the repacking process. *Id.* ¶137 (JA 65).

In particular, the Commission stated that it needed to use the updated *TVStudy* software because the "computer program previously used to implement OET-69 lacks the capabilities necessary to support a successful auction." *Order* ¶131 (JA 61). The new software, the Commission explained, (1) can "create and use a uniform nationwide grid for analysis of coverage area and population served," unlike the prior software, and (2) can perform that analysis much more quickly than the prior software. *Id.* ¶130 (JA 60). Both of these factors, the Commission concluded, "are essential to the timely analysis of feasible channel assignments." *Id.* ¶132 (JA 62). The older software "cannot undertake, in a timely

fashion, the volume of interference calculations necessary to ensure that all stations that will remain on the air following the auction are assigned channels in accordance with" the Spectrum Act. *Id.* ¶130 (JA 60).

The Commission also found that the proposed updates to various input values, including more recent population figures from the 2010 Census, *Order* ¶¶148-49 (JA 70) and more precise terrain data, *id.* ¶152 (JA 72), should be implemented. The updates will "allow for a more accurate analysis of each station's coverage area and population served as of the date of the enactment of the Spectrum Act and eliminate the use of input values that are now obsolete." *Id.* ¶130 (JA 60).

iii. The Commission also explained how it would preserve stations' "coverage area" and "population served" as required by the Spectrum Act. Noting that the term "coverage area" is not defined in the act, its rules or OET-69, the Commission decided to adopt the proposal in the *NPRM* to interpret the statutory term to be the same as "service area" as defined in its rules and in OET-69. *Order* ¶¶161-162 (JA 75). The Commission said that it would preserve stations' coverage area under that definition by replicating a station's signal contour on its new channel. *See id.* ¶166 (JA 78). The Commission noted, however, that because of differing propagation characteristics on different channels, "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," and there may be "signal losses due to terrain in different areas within the contour." *Order* ¶170 (JA 80).

With respect to its duty under the Act to preserve in the repacking process the "population served" by stations that remain on the air, the Commission interpreted that term "to mean the persons who reside within a station's coverage area at locations where service is not subject to interference from another station or stations" as specified in OET-69 and existing FCC rules as of February 22, 2012. *Order* ¶179 (JA 84). In particular, the Commission decided to "preserve service to the same specific viewers for each eligible station, and no individual channel reassignment, considered alone, will reduce another station's population served on February 22, 2012 by more than 0.5 percent." *Id.*

iv. The Commission also discussed the types of stations that would be protected in the repacking process. *Order* ¶¶183-245 (JA 85). The Commission noted that the Spectrum Act defines the "broadcast television licensee[s]" that are protected by the repacking process as the "licensee[s] of – (A) a full-power television station; or (B) a low-power television station that has been accorded primary status as a Class A television licensee" under the Commission's rules. *See id.* ¶185 (JA 86); 47 U.S.C. § 1401(6). The Commission therefore "decline[d] to extend re-

packing protection" to television translator stations.[3] *Order* ¶237 (JA 107); *see also id.* ¶241 (JA 109).

b. The *Order* also dealt with two other issues of relevance to this litigation.

First, the Commission adopted a 39-month window for stations that are required to change channels as the result of the repacking process to "transition to their new channel assignments" in order to clear repurposed spectrum for new uses. *Order* ¶563 (JA 232). This period is, under the *Order*, comprised of a three-month deadline for filing a construction permit application, and a 36-month period within which the station would be required to complete construction.

In so ordering, the Commission acknowledged that the record developed in response to the *NPRM* had persuaded it that its original proposed construction deadline of 18 months would be inadequate for some stations. *Id.* ¶567 (JA 234). Instead, noting that 36 months is generally "the period afforded" under FCC rules "for stations to complete construction of new or modified facilities after the grant of a construction permit, including in situations where the construction is complicated or especially challenging," the Commission found that a 36-month construc-

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[3] A TV translator station is a low power television broadcast station that receives the signal of a television station and simultaneously retransmits it on another TV channel. *See Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations*, 19 FCC Rcd 19331, 19335 ¶5 (2004).

tion period would "provide sufficient time to complete a phased transition of all stations assigned to new channels" after the incentive auction. *Id.* ¶569 (JA 235).

Second, the Commission interpreted the Spectrum Act's general requirement that the Commission may not conduct any incentive auction "unless … at least two competing licensees participate in the reverse auction." 47 U.S.C. § 309(j)(8)(G)(ii)(II). It found that "a broadcast television licensee will be a 'participant' if it has submitted a pre-auction application to be able to bid in the reverse auction that is found to be complete and in compliance with the application rules." *Order* ¶413 (JA 177). The Commission explained that "the knowledge that another party might bid will create competitive pressure for a second bidder to accept lower incentive payments than it would absent any competition." *Id.*

The Commission also concluded "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 pre-auction geographic or channel location." *Order* ¶414 (JA 177). The Commission explained that "all participants in the reverse auction will compete to receive incentive payments from the same limited source – the aggregate proceeds of the forward auction" and that "the interdependent nature of the repacking process, where repacking one station may have widespread effects across geographic areas with possible nationwide band plan

implications, means that participants will be affecting, and competing with, licensees far beyond their contour, DMA, or channel." *Id.*

2. The Declaratory Ruling

In September 2014 the Commission issued a brief declaratory ruling to clarify how it intended "to preserve the 'coverage area' as well as the 'population served' of eligible broadcasters in the repacking process associated with the" incentive auction. *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 12240 ¶1 (2014) (JA 1801) (*Declaratory Ruling*). Because of a concern that the *Order* may have "left some uncertainty as regarding how we intend to carry out the statutory preservation mandate in the repacking process," the Commission emphasized that the procedures adopted in the *Order* would "independently protect each eligible station's 'coverage area' and its 'population served' as defined in the *Incentive Auction Order*." *Declaratory Ruling* ¶5 (JA 1802), citing *Order* ¶¶164-65, 179 (JA 77, 84).

The Commission also clarified that a statement in the *Order* indicating that "the constraint files we will use during the repacking process 'will match the coverage area of a station to the degree that the area is populated.'" *Declaratory Ruling* ¶7 (JA 1803). It explained "that this statement concerns the mechanics of the repacking process, not the 'coverage area' or 'population served' that we will seek to preserve for each eligible station …." *Id*. In addition, the Commission stated,

"protecting a station's 'coverage area' from interfering signals without regard to its 'population served' would result in more expansive protection than stations received under the rules in effect at the time the Spectrum Act was enacted." *Id.* ¶9 (JA 1804).

The Commission added that it interpreted the Spectrum Act's mandate to preserve stations' population and coverage to establish a goal "to maintain the *status quo*." *Id*. Its approach would meet that goal by ensuring that a station's "signal reaches substantially the same geographic area at the same field strength after the repacking process as it did before" and "reaches the same viewers before and after the repacking process, subject only to the *de minimis* interference permitted under the Commission's rules for new or modified station facilities." *Id.*

Finally, the Commission reiterated that, "in the context of a statute with important goals other than preservation of existing television service, in particular the goal of repurposing spectrum, the 'all reasonable efforts' mandate militates against a statutory interpretation of the term 'coverage area' and 'population served' that would limit our ability to repack the television bands efficiently and thereby the auction's overall success in repurposing spectrum." *Declaratory Ruling* ¶10 (JA 1804), citing *Order* ¶123 (JA 57).

SUMMARY OF ARGUMENT

The *Order* is a reasonable exercise of the FCC's authority under the Spectrum Act to adopt rules and policies to encourage broadcast television stations to relinquish spectrum usage rights, and to repack stations that elect to remain on the air, so that broadcast spectrum can be repurposed for wireless broadband and other valuable services. The statute does not require the Commission to make the remaining broadcasters better off – instead, it requires only "reasonable efforts" to "preserve" their coverage area and population served using the methodology described in OET Bulletin 69. 47 U.S.C. § 1452(b).

Petitioners' claims that the FCC's decisions in implementing the auction violate the Spectrum Act or are arbitrary and capricious fail to overcome the agency's broad discretion to interpret and apply its statutory authority, and to draw upon its expertise in resolving technical and complex issues of auction design. There is no basis to conclude that Congress imposed limits on the Commission's authority that would pose a practical obstacle to the conduct of an effective and efficient incentive auction. Petitioners' arguments, which attempt to throw up repeated roadblocks to the Commission's execution of Congress's design, find no support in the statute or the APA, and should be rejected.

1. Petitioners' primary assertion is that the Spectrum Act's requirement that the Commission employ "the methodology described in OET Bulletin 69" in pre-

serving television stations' coverage areas and populations served requires the Commission to use a "fixed suite of software and procedures that existed on February 22, 2012." Br. 35. The Commission properly concluded that the statute does not specify precisely how the OET-69 methodology must be employed, and its interpretation of that phrase to permit it to update the computer software and use more accurate data in implementing the OET-69 methodology was a permissible interpretation of the statute's ambiguous language that is entitled to deference.

As petitioners recognize (Br. 49), simple "common sense" supports the Commission's *Order*. There is absolutely no reason under the statute for the agency to use "archaic software" or "imprecise" (and inaccurate) data, when a "better program" and "better sources" are available. *Id.*

2. The Commission also acted reasonably in carrying out the Spectrum Act's requirement that it use "all reasonable efforts" to preserve the "coverage area" and "population served" by stations that will continue to broadcast after the auction and be subject to post-auction repacking. The Commission explained that it would preserve a station's coverage area by ensuring that its signal reaches substantially the same geographic area at the same signal strength as it did before and that it would preserve a station's population served by ensuring that the station's signal reaches the same viewers before and after the repacking process.

The Commission reasonably concluded that petitioners' concerns that they would face coverage losses in the repacking process as a result of terrain obstructions were unjustified. The Commission acknowledged that some losses were inevitable but noted that gains in coverage area were more likely. Moreover the Commission took several steps to address any such problems should they arise. The Commission reasonably rejected the additional protections sought by broadcasters as beyond the Act's requirements, unnecessary, and imposing unwarranted obstacles to the successful outcome of the auction.

3. The Commission also reasonably concluded that the Spectrum Act does not require preserving the coverage and population of a type of low-power station – digital replacement translators – that are used to extend the coverage of full-power stations. The text of the Act does not include this class of station within the types of stations protected in the repacking process, and the Commission found that providing the protections petitioners seek would have a detrimental impact on the repacking process and the success of the auction.

4. Petitioners' claims that the Commission acted arbitrarily and capriciously simply restate their statutory contentions, with as little success. The Commission adequately considered reasonable alternatives and provided reasoned explanations for the choices it made. Petitioners' claim that the Commission did not provide ad-

equate notice and opportunity for parties to comment is belied by the proceedings in this case.

5. The issues raised by Sinclair, which NAB does not support, address two technical details of the auction design. At the outset, Sinclair fails to demonstrate that it faces imminent harm with respect to the Commission's action on either issue, and thus lacks standing to raise them. Its arguments are meritless in any event.

Sinclair argues that the Commission acted unreasonably when it adopted a 39-month transition period during which broadcasters that must change channels after the auction have to complete construction of their new facilities. Contrary to Sinclair's claims, the Commission's conclusion that the 39-month period was adequate was amply supported by the record. The line the Commission drew was consistent with conclusions reached in a report by a Commission consultant who studied the issue and was supported by comments of major broadcast groups, including NAB.

Sinclair also argues that the Commission erred in construing the Spectrum Act's requirement that there be "two competing participants" in the reverse auction. The statute does not define either the term "competing" or "participant." The Commission reasonably construed those terms and explained that in the context of the competitive interactions in the auction, Sinclair's differing approach would be impractical and would undermine the success of the auction.

STANDARD OF REVIEW

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

In addition, the Court reviews FCC orders "under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission's decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)). "Under this 'highly deferential' standard of review, the court presumes the validity of agency action … and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004).

ARGUMENT

In the Spectrum Act, Congress vested the Commission with the authority to conduct a multipart incentive auction to encourage broadcast television licensees voluntarily to relinquish their licenses to free up scarce spectrum for mobile broad-

band and other valuable uses. Before it can conduct the auction, the Commission must confront a host of complicated and difficult issues of auction design and radiofrequency engineering, some of first impression. The Commission's incentive auction responsibilities therefore not only are central to accomplishing Congress's goals in the Spectrum Act, they lie at the heart of the Commission's authority over "interstate and foreign commerce in communication by wire and radio." *See* 47 U.S.C. § 151.

This case involves a challenge to the specific details of an order setting forth the Commission's initial framework for the incentive auction. NAB, the broadcast industry trade association, joined by Sinclair, a broadcast television company, chiefly contend that the manner in which the Commission has decided to conduct the auction, including the software it will use and the data it will employ, violates the Spectrum Act's requirement that the agency make "all reasonable efforts" to "preserve, as of February 22, 2012, the coverage area and population served" of each television station that remains on the air, "as determined using the methodology described in OET Bulletin 69," issued by the FCC's Office of Engineering and Technology. 47 U.S.C. § 1452(b)(2). Sinclair, without NAB's support, challenges the FCC's decision to impose a 39-month deadline for repacked stations to move their operations to new channels, as well as the agency's interpretation of what will

satisfy the statute's requirement that "at least two competing licensees participate in the reverse auction." 47 U.S.C. § 309(j)(8)(G)(ii)(II).

Petitioners' contentions that the Commission's determinations violate the Spectrum Act – let alone that they do so clearly enough to overcome the Commission's broad interpretive discretion – are borne out neither by the text nor by the purpose of the Spectrum Act, and their arguments that the Commission's auction design choices are unreasonable are wholly unavailing. On the contrary, the Commission responsibly exercised the broad discretion vested in it by Congress to establish a framework for conducting the novel broadcast incentive auction in a manner that preserves the coverage area and population served by remaining broadcasters while at the same time fulfilling the statute's mandate to use market forces to repurpose spectrum for new uses.

I. THE COMMISSION ACTED CONSISTENTLY WITH THE REQUIREMENTS OF THE SPECTRUM ACT.

A. The Commission's Decision To Use The TVStudy Software And Updated Data Inputs Was Consistent With The Spectrum Act.

Petitioners contend (Br. 35) that the FCC's use of *TVStudy* is foreclosed by the Spectrum Act's requirement that, in reassigning licenses or reallocating spectrum in the course of the incentive auction, the FCC must "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).

In petitioners' view, "[t]he methodology described in OET Bulletin 69 is a fixed suite of software and procedures that existed on February 22, 2012," Br. 24, and that therefore "[t]he Commission must follow the procedures of OET Bulletin 69 as it existed when the Spectrum Act became law." Br. 35. But the Spectrum Act, by its terms, does not require the Commission to use OET Bulletin 69 *in haec verba* – instead, it directs the Commission to use the "methodology described in" that Bulletin. 47 U.S.C. § 1452(b)(2).

The statutory phrase "methodology described in OET Bulletin No. 69" is "ambiguous," as the Commission found (*Order* ¶134 (JA 62)) – the phrase does not clearly specify the details of how OET Bulletin 69 must be employed by the Commission in implementing the incentive auction. A "methodology" is "the pro-

cesses, techniques, or approaches employed in solution of a problem." *Webster's Third New International Dictionary of the English Language Unabridged* 1423 (1976). In this case, as the Commission explained, OET Bulletin 69 "provides guidance on the implementation and use of the Longley-Rice propagation methodology for evaluating television coverage and interference." *Order* ¶127 (JA 59). More specifically, "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." *Id.* n.435 (JA 63). The Commission's permissible interpretation of this phrase in the Spectrum Act is – contrary to petitioners (Br. 35) – plainly due deference. *Chevron*, 467 U.S. at 842-43.

1. Software And Data Are Not Methodology.

The Commission acknowledged that "evaluating TV coverage and interference using the methodology described in OET-69 requires a computer program and data inputs," but made clear that the software and data "are tools for applying the evaluation procedure, not the procedure itself." *Order* ¶134 (JA 62). That interpretation, which distinguishes between the OET-69 methodology, its implementing software, and the data it uses, was entirely reasonable. Just as the methodology for calculating the sum of a set of numbers does not depend on the brand of spread-

sheet employed, the methodology for calculating signal coverage and interference (with which OET-69 is concerned) does not depend on whether the software for doing so is based on FORTRAN, JAVA, or C++. Indeed, as the Commission observed, the OET-69 Bulletin itself makes clear that "the computer program for applying [it] is subject to change" – it refers to "the computer program now used by the Media Bureau to evaluate applications . . . as well as predecessors of that program," and it "provides instructions on how to use different computer programs to apply the Longley-Rice model." *Order* ¶135 (JA 63).[4] Moreover, as the Commission pointed out, its operating bureaus "have used *different* software programs to implement OET-69," with "[e]ach type of software provid[ing] a different utility that serves the purposes for which it is used (i.e., licensing, interference and international coordination)." *Id.* ¶146 (JA 69).

Likewise, although the OET-69 methodology looks to "population data, geographical terrain data, and data about stations' transmission facilities" to calculate the station's coverage area and population it serves, *Order* ¶127 (JA 59), the methodology does not mandate any particular data set for those values. As to this, petitioners agree, at least in part: "the FCC is correct that some 'inputs' are separate

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[4] *See* OET-69 at 5 (JA 496) ("Those desiring to implement the Longley-Rice model *in their own computer program* to make these calculations should consult NTIA Report 82-100, *A Guide to the Use of the ITS Irregular Terrain Model in the Area Prediction Mode*, authors G.A. Hufford, A.G. Longley and W.A. Kissick, U.S. Department of Commerce, April 1982.") (emphasis added).

from methodology." Br. 45. But they limit their concession to "broadcaster-specific information," including "station location and the frequency of transmission," and exclude "procedures and data sources common to all calculations of coverage area and population served." *Id*. There is no apparent basis in law or logic for petitioners' wholly arbitrary distinction between types of data; both are inputs upon which the methodology acts, and are not the methodology itself. [5]

Petitioners contend that the FCC's interpretation of the term "methodology" contrasts with prior Commission pronouncements that use the term to describe input sources. Br. 44 (citation omitted). But neither of the prior statements (in 2006 and 2008) involved interpretation of the Spectrum Act. Moreover, as the Commission pointed out, each used the term "colloquially" (*Order* ¶136 (JA 64) to describe an aspect of OET-69 in a manner that had no bearing on an issue in controversy.[6]

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[5] Petitioners contend that "the FCC's view of 'methodology' strips the term of all meaning." Br. 41-42. That is untrue. As the Commission has made clear, the methodology described in OET-69 looks to the calculation of a broadcast station's signal contour, taking into account the effects of interference from other stations, using the "Longley-Rice propagation model." *Order* n.435 (JA 63). At all events, the Commission's distinction between methodology on the one hand, and software and data inputs on the other, is unassailable.

[6] The use of the term "methodology" to describe a revision in the setting of rents for hydropower plants on federal land in this Court's decision in *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222 (D.C. Cir. 2011), *see* Br. 42-43, is even farther afield, as the case did not involve OET-69 or any issue under the Spectrum Act.

2. The TVStudy Software Was Necessary To Carry Out The Spectrum Act's Purposes.

Finally, even if there were any doubt that the Commission's interpretation of the statute were reasonable, petitioners' alternate construction of the statute – which would compel the Commission to rely on outdated computer software to conduct the incentive auction – is entirely unreasonable, because it would interfere with the Spectrum Act's goals of repurposing broadcast spectrum for more flexible uses. *Order* ¶134 (JA 62).

As the Commission found, "the software previously used to implement OET-69 cannot support the incentive auction because it cannot undertake, in a timely fashion, the volume of interference calculations necessary to ensure that all stations that will remain on the air following the auction are assigned channels in accordance with the provisions of the Spectrum Act." *Order* ¶130 (JA 60).

The Commission explained that the previous software, which was based on "source code and data from the 1990s and earlier," *Order* n.427 (JA 61), "create[d] a new and unique grid for each station" in calculating that station's signal strength, coverage and interference. *Id.* ¶131 (JA 61). "Because each grid is unique to each station, however, no two stations grids are typically the same, and signal strength and interference calculations for one station cannot be used to calculate coverage and interference for another station, even where they cover the same or portions of the same geographic area." *Id*. This meant that "[t]he cell-level data are not con-

sistent from one station to another." *Id.* The earlier software also "lacks the capability to save grid calculations." *Id*. These two limitations – the "lack of uniform grid cells and the inability to save calculations" – means that "the earlier computer software would have to re-create an individual station's grid each and every time it has to analyze a possible channel assignment in the repacking process," and that "an individual station's grid may have to be re-created thousands of times before a determination is made as to which channel a station may be assigned following the auction." *Id.*

"In contrast," the Commission explained, its updated *TVStudy* program can "calculate signal strength and evaluate interference using a single, common grid of cells common to all television stations." *Order* ¶132 (JA 61). And, "unlike the earlier software, much of the cell-level data produced by *TVStudy* are cached, or saved." *Id*. As a result, using *TVStudy*, "the repacking methodology need not re-create a station's unique grid each time it examines a possible channel assignment, and the numerous interference calculations can be run in a much shorter period of time." *Id*. The Commission concluded that "[t]hese attributes of *TVStudy* (i.e., the common grid and caching) are essential to the timely analysis of feasible channel assignments." *Id.*

To be sure, as petitioners point out (Br. 47), the FCC used the prior software in managing the earlier transition to over-the-air digital television. But the digital

TV transition put far fewer demands on the OET-69 calculations. As the Commission explained, "[d]uring the DTV transition, the Commission allowed most stations to select their post-transition channel." *Order* n.478 (JA 68). As a result, "[i]nterference analyses, where selectively used, only involved resolution of conflicts between individual stations." *Id*. "The DTV transition thus did not involve nearly as many interference analyses as the incentive auction," and the process "did not demand as intensive or time-consuming computer analysis." *Id*. Nor was there the "need for analytical speed" as is required by the incentive auction process. *Id*. Thus, the fact that the prior version of the implementing software was used in the DTV transition does not demonstrate its usefulness for the more complex incentive auction.[7]

3. Use Of Updated And Corrected Data Inputs Was Necessary To Carry Out The Spectrum Act's Purposes.

The Commission likewise reasonably decided to employ more accurate data inputs in order to carry out its responsibility to "preserve, as of February 22, 2012,

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[7] Petitioners contend that "even if the FCC's objections" to using outdated software "were accurate," the agency should not have "cast off OET Bulletin 69 so early" in the ten-year period Congress allowed for the auction. Br. 47. Instead, in petitioners' view, the FCC has the authority to use "a new programming language and new code" only after the agency concludes that "what Congress prescribed is not possible." *Id.* 48. But Congress prescribed the use of a methodology, not particular software, and there was no reason for the Commission to wait to make needed revisions once it became clear that the prior software was not up to the task.

the coverage area and population served of each broadcast television licensee." 47 U.S.C. § 1452(b)(2). *Order* ¶138 (JA 66). As the Commission explained, "[w]e cannot fulfill the statutory mandate using outdated data." *Id.*

a. *Population Data* The Commission's *TVStudy* software thus uses population data from the 2010 U.S. Census, rather than data from the 2000 Census, because "the 2010 U.S. Census data more accurately reflect the latest population changes, which show an increase in population nationwide of approximately 10 percent between 2000 and 2010, as well as changes in population distribution." *Order* ¶137 (JA 65). By contrast, use of 2000 Census data "would preserve television service as of [the] year 2000 rather than as of the date of the Spectrum Act." *Id*.

Petitioners contend that at the time of the Spectrum Act's adoption, "the Commission's rules required the use of 2000 census data as part of the methodology described in OET Bulletin 69." Br. 46 (citing 47 C.F.R. § 73.616(e)(1)). But the rules petitioners cite, which were adopted in 2007, govern the mechanism for interference protection in the wake of the transition to digital television; they do not implement the Spectrum Act, which was enacted in 2012. *See In the Matter of Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 23 FCC Rcd 2994 (2007). And the use of 2000 Census data was understandable in the digital television transition, unlike here, because

that transition was underway well before 2010 census data became available; indeed, it was completed (at least for full-power stations) on July 12, 2009. *See* 47 U.S.C. § 309(j)(14); DTV Delay Act, Pub. L. No.111-4, 123 Stat. 112 (2009).

b. *Terrain Data* For similar reasons, the Commission decided to use a terrain elevation dataset (in essence, an electronic topographical map) with a resolution of "one arc-second (approximately 30 meters) in most areas of the country." *Order* ¶150 (JA 71). As the Commission explained, "[t]he one arc-second dataset, which is derived from smaller scale topographic maps with more granular elevation data than datasets used by earlier implementations of the OET-69 methodology, will allow for more accurate calculation of the effect of terrain on propagation of television signals." *Id*. Moreover, the Commission pointed out, "[t]he [U.S. Geological Survey] no longer distributes, maintains, or supports a three arc-second database, which also has a history of errors and no mechanism to check the validity of those errors or to correct them." *Id*. The Commission quite rightly found "no reason to continue using an obsolete database when there is an expert federal agency [the U.S. Geological Survey] that offers up-to-date and more precise terrain data." *Id*.

To be sure, as the Commission acknowledged, "OET-69 mentions that 'the FCC computer program is linked to a terrain elevation database with values every three arc-seconds of latitude and longitude." *Order* ¶151 (JA 71). *See* Br. 39. The

Commission explained that was "a descriptive statement about an input database, however, not a prescriptive element of the OET-69 methodology." *Id*. That interpretation of OET-69 is entirely reasonable given the distinction between a "methodology" on the one hand, and the data used by that methodology on the other. And even if the matter were less than clear, the Commission's interpretation of the character of a statement in its own Bulletin is due deference. *See Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998).

c. *Other Data Inputs* Petitioners also complain in a single sentence about a number of other updates to the OET-69 methodology: "how to calculate depression angles, antenna tilt beam values, the precision of geographic coordinates, and other [unspecified] information in the database." Br. 41. As the Commission explained, the calculation of depression angles as adopted was correcting a software error which could result "in an incorrect representation of a station's coverage area and population served." *Order* ¶156 (JA 74). In adopting the antenna tilt beam values "specified by the licensees . . . instead of an across-the-board assumed downtilt figure," the Commission was "allow[ing] for a more accurate depiction of the predicted coverage of, and interference from, each television station." *Order* ¶153 (JA 73). And in discontinuing the practice of truncating or rounding geographic coordinates, the Commission took action to "eliminate rounding errors" while at the same time "provid[ing] at least three additional orders of precision." *Order* ¶155

(JA 73). Each of these revisions to the inputs to the OET-69 methodology thus sought to more accurately carry out Congress's instruction to preserve the coverage area and the population served by the repacked stations. *See* 47 U.S.C. § 1452(b)(2).

* * *

As petitioners acknowledge, the Commission's actions accord with "common sense." Br. 49. As they quite rightly ask, "[w]hy use archaic software and outdated or imprecise data when [the agency] can write a better program and draw on better sources?" *Id.* The answer is obvious. There is no reason to do so.

Petitioners' only response to their own question is to rigidly maintain that the Spectrum Act "requires the FCC to follow the Bulletin's procedures even if the agency believes them to be 'outdated or inaccurate.'" Br. 47. But as we have shown, the Spectrum Act requires the Commission to use "the methodology described in [OET-69]"; it does not shackle the agency to every word in the Bulletin, or to the particulars of overmatched software or long-stale (and no longer maintained) datasets. "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 im-

plementing that methodology and the inputs used as of that date." *Order* ¶137 (JA 65). But it did not.[8]

B. The Commission Complied With The Spectrum Act's Requirement That It "Make All Reasonable Efforts" To Preserve Stations' "Coverage Area" and "Population Served" Following The Auction.

Contrary to petitioners' argument, Br. 50-54, the Commission's interpretation of the Spectrum Act's direction to use "all reasonable efforts" to preserve the "coverage area" and "population served" by stations that will be subject to post-auction repacking was reasonable. 47 U.S.C. § 1452(b)(2).

The Commission defined the statutory term "coverage area," the meaning of which is not otherwise specified in the statute or the FCC's rules, to be the station's "service area," which is defined as the geographic area within the "noise-limited contour" of a station's signal, *i.e.*, the area in which the strength of its signal is predicted to exceed certain specified levels. *Order* ¶164 (JA 77); 47 C.F.R.

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[8] Petitioners seek to make something of the Commission's statement that the statute's preservation mandate "require[d]" it to update the software and data employed by the OET-69 methodology. Br. 48 (citing *Order* ¶130 (JA 60). By this the Commission simply explained that adopting more efficient software, and employing more accurate data, served to "further" the preservation requirement. *Id.* ¶137 (JA 65). Nothing in the *Order*, fairly read, supports petitioners' contention that the Commission considered that the "adoption of *TVStudy* was mandatory under the statute." Br. 48. Nor is there any basis for concluding that, even had the Commission considered itself unalterably bound by Congress to update the software and data inputs, it would have come to any other conclusion had its (alleged) misimpression been corrected.

§ 73.622(e). After determining a station's contour using its pre-auction facilities, the Commission stated that it would "replicate that station's contour on its new channel." *Order* ¶166 (JA 78). The Commission also interpreted the statutory term "population served" to mean "the persons who reside within the station's coverage area at locations where service is not subject to interference from another station or stations." *Order* ¶179 (JA 84). The Commission stated that in "preserv[ing] service to the same specific viewers for each eligible station," it would make sure that "no individual channel assignment, considered alone, will reduce another station's population served by more than 0.5 percent." *Id*.

The Commission also set forth its understanding of its obligation to take "all reasonable efforts" to preserve coverage area and population. 47 U.S.C. § 1452(b)(2). The Commission noted that courts have found the phrase to "require[] that a party make every reasonable effort, not every *conceivable* one," *Order* ¶123 (JA 57) (citing *Brotherhood of Maint. of Way Employees v. Union Pac. R.R. Co.*, 358 F.3d 453, 458 (7th Cir. 2004)). It also found that the standard requires "a certain level of effort rather than a particular outcome." *Id*. Drawing upon "the statutory context" in interpreting the phrase's use in the Spectrum Act, the Commission found that it should "take into account" that the Act has objectives other than the protection of broadcasters, "including the goal of repurposing spectrum – an objective which [among other things] clearly militates in favor of an ef-

ficient repacking method." *Order* ¶122 (JA 57). The Commission therefore concluded that the Spectrum Act requires it to "use all reasonable efforts to preserve each station's coverage area and population served without sacrificing the goal of using market forces to repurpose spectrum for new, flexible uses." *Id*.

1. Petitioners agree that "'all reasonable efforts' at preservation does not require complete preservation in every case." Br. 36. They nonetheless contend, for the first time in this case, that the Commission violated the statute's requirement to preserve "population served" in its treatment of "terrain loss," i.e., where terrain obstructions reduce a station's signal level below that specified for minimal reception. Br. 50-51. In a recent ruling subsequent to the *Order* here, the Commission declined to address a similar claim raised by NAB in an *ex parte* filing – that the Commission had failed to adequately consider the potential for stations to lose viewers in the repacking process as a result of terrain losses – because that claim had not previously been raised. *See In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 13071, 13082 ¶¶21 (2014).[9]

The Commission understood the arguments before it in the *Order* with respect to terrain losses to be directed to the requirement to preserve coverage areas.

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[9] The Court is precluded from considering an argument on appeal that was not raised before the Commission in the first instance. 47 U.S.C. § 405; *see American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004).

As to this Commission noted that while its goal in repacking is "the preservation of stations' pre-repacking coverage areas" (*Order* ¶170 (JA 80), "[b]ecause radio signals propagate differently on different frequencies, 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." *Id*. (emphasis added). In some cases, the Commission acknowledged, "there may be signal losses due to terrain in different areas within the contour." *Id*.

However, the Commission explained that most stations would be reassigned to lower band channels whose "superior propagation characteristics" could be expected to *decrease* the signal coverage lost due to terrain. *Order* ¶174 (JA 82). The Commission thus found "broadcasters' concerns regarding potential for substantial new terrain losses" to be "exaggerated." *Id.* In addition, the Commission adopted several measures to address circumstances where stations may experience loss in signal coverage due to terrain. *Id.* ¶175 (JA 82). These include (1) permitting stations to file applications for new facilities that might expand their coverage area by a small amount; (2) permitting stations to seek facilities on a different channel where available; and (3) permitting a station to use a distributed transmission service (DTS) using multiple transmitters to provide service in a specific area to

which it had previously provided service but lacks service on the new channel. *Id.*[10]

The Spectrum Act's requirement that the Commission "make all reasonable efforts" to preserve population and coverage area, 47 U.S.C. § 1452(b)(2), the agency found, does not guarantee broadcasters against "anything greater than a *de minimis* change in a station's coverage area." *Order* ¶171 (JA 81). As the Commission explained, "prohibit[ing] any channel reassignment that resulted in anything greater than a *de minimis* change in the geographic area served" would "significantly limit[] the Commission's flexibility to assign channels in the repacking process," thereby "increasing the potential costs of clearing the spectrum and decreasing the likelihood of a successful auction outcome." *Order* ¶173 & n.585 (JA 81, 82). However, the Commission recently stated that it intended to seek comment on using "optimization techniques to seek to avoid final channel assignments that would result in significant viewer losses due to terrain losses." 29 FCC Rcd at 13082 ¶22. In light of the potential for disruption to the auction, the alternative remedies the Commission provided for stations experiencing unexpected situations

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[10] The Commission also stated that in a future rulemaking it would "consider whether to create a new replacement translator service for stations that experience losses in their pre-auction service areas." *Id.* ¶242 (JA 110). That notice of proposed rulemaking was released recently. *See In the Matter of Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, 29 FCC Rcd 12536 (2014).

adversely affecting their signal coverage, and the limited potential for terrain loss during repacking, the Commission reasonably determined that it had made all reasonable efforts to protect against terrain loss due to repacking.

2. Petitioners also contend that the Commission has violated the statute because it "plans to preserve only 'the coverage area of a station to the degree that the area is populated.'" Br. 52 (citing *Order* n.372 (JA 54)). That is incorrect. The Commission made clear that it intends to "replicate" a station's pre-auction contour after repacking, without regard to population. *Order* ¶166 (JA 78). The footnote in the *Order* that petitioners cite discusses a detail of the repacking process, and explains that in addressing potential interference, the relevant files "will match the coverage area of a station to the degree that the area is populated." *Order* n.372 (JA 54). As the Commission made clear, this does not mean that its rules would "require a station to reduce its transmission power or otherwise modify [its] facilities to reduce [its] coverage to conform it to the area of population served." *Declaratory Ruling* ¶8 (JA 1804). On the contrary, the Commission intends to "ensure that its signal reaches substantially the same geographic area at the same field strength after the repacking process as it did before." *Declaratory Ruling* ¶9 (JA 1804).[11]

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[11] Relying on *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 2156 (2012), petitioners contend that the *Declaratory Ruling* is not entitled to deference be-

(footnote continued on following page)

Petitioners conflate the Commission's obligation to preserve coverage area, which it fulfills through the replication rule described above, with the interference protection to which a station's signal contour is entitled in the repacking process. The coverage requirement guarantees that a station may broadcast at its pre-auction power and configuration, but that requirement does not entitle the station to interference protection for portions of the contour that cover unpopulated areas. The manner in which the repacking interference protection is implemented "concerns the mechanics of the repacking process, not the 'coverage area' or 'population served'" to be protected. *Declaratory Ruling* ¶7 (JA 1803). Moreover, going beyond replicating a station's contour and "protecting a station's 'coverage area' from interference without regard to its 'population served' would result in more

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cause it was issued after this lawsuit was filed. Br. 59. But there is nothing to suggest that the Declaratory Ruling "does not reflect the agency's fair and considered judgment on the matter in question." *See Auer v. Robbins*, 519 U.S. 452, 462 (1997). Moreover, in *Christopher*, the agency's interpretation had been adopted for the "first time in an enforcement proceeding," after a "very lengthy period of conspicuous inaction," 132 S.Ct. at 2168, and under circumstances which could "impose potentially massive liability" for private party "conduct that occurred well before that interpretation was announced," *id*. at 2167. There is no similar possibility of "unfair surprise" (*id.* at 2168) here – the incentive auction is yet to take place. And even in *Christopher* the Court accorded the agency's interpretation "a measure of deference proportioned to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade.'" *Id*. at 2169 (citation omitted). *See Skidmore v. Swift & Co.*, 323 U.S. 134, 1140 (1944).

expansive protection than stations received under the rules in effect at the time the Spectrum Act was enacted." *Id.* ¶9 (JA 1804).

Additionally, interference protection to unpopulated areas would mean that "a station could not be assigned to a channel if the assignment would cause signal overlap with another station within either station's coverage, even if such overlap occurred only in geographic areas where the station does not have viewers because the areas are uninhabited [or] uninhabitable." *Declaratory Ruling* ¶10 (JA 1804). This restriction would "significantly constrain" the agency's flexibility in repacking and "impair the efficiency of the final television channel assignment scheme," thereby "substantially threaten[ing]" the chances for "overall success" of the auction. *Id.* The Commission's decision to ignore unpopulated areas in taking account of signal interference was well within the flexibility granted to the agency to take only "reasonable measures" to preserve coverage area and population served, 47 U.S.C. § 1452(b)(2), and to reject measures that would unreasonably undermine the Spectrum Act's goal of successfully repurposing spectrum for other valuable uses.[12]

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[12] Petitioners suggest that the Commission was required to protect against interference in unpopulated areas in order to ensure that stations "will continue to be able to serve viewers as new or seasonal areas within its contour become populated." Br. 52. But the Spectrum Act preserves broadcasters' coverage area and population only as of "February 22, 2012," the date of its enactment. 47 U.S.C. § 1452(b)(2). The statute by its terms does not protect a station's ability to serve

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C. The Commission's Treatment Of Translator Stations Was Consistent With The Act.

Petitioners also complain that the Commission failed to comply with the Spectrum Act because it failed to protect what it calls "fill-in translators" – stations that retransmit programming of a primary station's coverage. Br. 54. Petitioners refer to a class of low-power secondary television stations known as digital replacement translators (DRT). This class of stations was created in 2009 to allow full-power stations, following the digital television transition, to restore service to an area that lost coverage resulting from the digital television transition.[13]

The Commission reasonably concluded that the Spectrum Act did not protect these translator stations in the incentive auction repacking process. *Order* ¶¶185, 238 (JA 86, 108). The statutory requirement to preserve coverage area and population served applies only to "each broadcast television licensee," 47 U.S.C. § 1452(b)(2). As the Commission noted, *Order* ¶238 (JA 108), the term "broadcast

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areas that are not populated, but may become so in the future. Petitioners also point to the possibility that with advances in technology it may become possible to view over-the-air television on "mobile digital television." *Id*. But although petitioners point to the development of "an industry standard" for mobile TV receivers, *id*., they do not maintain that mobile television viewing is currently (or was at the time of the enactment of the Spectrum Act) of any significance, or provide a basis for concluding that protection of such viewers from potential interference is compelled by the statute.

[13] *See Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations*, 24 FCC Rcd 5931 (2009) ("*DRT R&O*").

television licensee" is defined as the "licensee of – (A) a full-power television station, or (B) a low-power television station that has been accorded primary status as a Class A television licensee" under 47 C.F.R. § 73.6001(a). 47 U.S.C. § 1401(6). Because a digital replacement translator station is neither a full-power television station nor a low-power television station that has been accorded Class A status, the licensees of such translators are excluded from the definition of "broadcast television licensee" to which the statute's preservation protection applies. Digital replacement translators, like all television translator stations, thus are not protected in the incentive auction repacking process by the Spectrum Act. This is consistent with the historic status of translator stations – including digital replacement translators – as secondary stations that are subject to interference from full power stations. *See Order* ¶239 & n.741 (JA 108); *see also DRT R&O*, 24 FCC Rcd at 5942 ¶25; 47 C.F.R. §§ 74.703, 74.707, 90.303.[14]

Petitioners do not dispute the Commission's interpretation of the statute, but contend that licensees of digital replacement translators are protected by the statute's preservation mandate – despite their exclusion from the governing definition – because "[p]art of the 'coverage area and population served' by these broadcasters comes from retransmission with fill-in translators." Br. 56. But the Spectrum

[14] Digital replacement translator stations are licensed separately from stations whose programming they retransmit, although their licenses are "associated with" the main station's license. *DRT R&O*, 24 FCC Rcd at 5941 ¶23.

Act's mandate requires the Commission to exert itself to preserve the coverage area and population served "of each broadcast television licensee," a term the statute defines to exclude licensees of such translators. The words of the statute thus give petitioners no basis for contesting the Commission's reading.

Petitioners assert that "it would be a simple matter for the FCC to protect all facilities that licensees use to reach their coverage areas and populations served." Br. 56. But the Commission reasonably explained why it would not grant protection to digital replacement translator stations, even if it had the discretion to do so. "There are approximately 150 licensed or authorized DRT facilities," the Commission pointed out, "all of which are on UHF channels separate from the primary stations whose signals they carry." *Order* ¶242 (JA 109). If the agency protected digital replacement translators, "it would have to protect a separate channel facility for each DRT operated by a full power station." *Id*. This would "significantly affect[] repacking flexibility in markets where they are licensed," *id.*, and, the Commission concluded, result in "a detrimental impact on the repacking process and on the success of the incentive auction." *Order* n.747 (JA 109).

The Commission nonetheless made provision to "mitigate the potential impact of the repacking process on DRTs by providing digital replacement translator displacement applications priority over other LPTV and TV translator stations." *Order* ¶242 (JA 109). It also stated that it would begin a proceeding to consider

creation of "a new replacement translator service for stations that experience losses in their pre-auction service areas" *Id*. Indeed in October 2014, the Commission adopted a Notice of Proposed Rulemaking that proposed the creation of a new "Digital-to-Digital Replacement Translator Service" that "will allow eligible full power television station to recover lost digital service area that results from the reverse auction and repacking process." *LPTV & Translator NPRM*, 29 FCC Rcd at 12548 ¶¶29-43 (2014).

II. THE ORDER DOES NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

In addition to their statutory arguments, petitioners also contend that the *Order* violates the APA because it fails to consider reasonable alternatives (Br. 57-60), does not contain a reasoned explanation for the Commission's choices, (Br. 60-62), and is not supported by adequate notice (Br. 62-65). As we show below, petitioners' contention that the *Order* failed to consider reasonable alternatives and contained no reasonable explanation are largely reformulations of their argument that the Commission failed to comply with the Spectrum Act, and equally unsuccessful. Petitioners' argument that the *Order* is unsupported by adequate notice is belied by the proceedings in this case.

A. The Commission Adequately Considered Reasonable Alternatives.

Petitioners claim that the Commission 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." Br. 58. But as we have shown, pp. 33-38 above, the Commission explained at length why it reasonably chose to update the population, terrain, and other data employed in the OET-69 methodology in order to improve the accuracy of the analysis. *See Order* ¶¶137, 148-61 (JA 65, 70). The Commission also explained that it had taken "care in designing and developing *TVStudy* to ensure that it faithfully implements the OET-69 methodology, provides results that closely match those of the earlier computer software (notwithstanding updates that improve accuracy) , and avoids bias that would systematically reduce broadcast stations' coverage areas and populations served." *Order* ¶140 (JA 67).

Petitioners contend that the Commission "nowhere explained why the calculated coverage area and population served should depend on the rapidity with which those values are calculated." Br. 58. On the contrary, the Commission pointed out that "[r]epacking presents a complex engineering problem that must be solved repeatedly during the course of the reverse auction bidding process," and that these complex problems must be solved "quickly and with certainty" for the incentive auction to succeed. *Order* ¶ 6 (JA 5); *see also id.* ¶111 (JA 52) ("Speed is

critical to the successful implementation of the incentive auction. If the reverse auction bidding takes an unreasonably long time to complete because of the time required to determine whether there is an appropriate channel for each station that has not relinquished its spectrum usage rights, then the viability of the auction as a whole will be threatened."); *see also NPRM*, ¶61 (JA 718).

Petitioners' argument that the Commission did not consider alternatives to the ways in which the repacking process treats terrain loss and unpopulated areas (Br. 59) is simply a rhetorical reformulation of its disagreement with the Commission's choices on those issues, which we have shown are reasonable. *See* pp. 38-45 above; *see Order* ¶¶ 174-75 (JA 82); *Declaratory Ruling*, ¶¶7-10 (JA 1803).

Lastly, petitioners contend that the Commission "never considered" the "alternative of finding a new channel for . . . translator facilities." Br. 59. But as we have noted at pp. 46-49 above, the Commission rejected that alternative because, in view of the number of such facilities, doing so would "would have a detrimental impact on the repacking process and on the success of the incentive auction." *Order* ¶ 242 & n.747 (JA 109).

B. The Commission Provided A Reasoned Explanation for Its Decisions Regarding Protection of Population Served and Coverage Areas.

Petitioners also complain that the Commission failed to provide reasoned explanations for its decisions regarding "terrain loss" (Br. 61) and "unpopulated

coverage areas" (Br. 60). As we have shown, that is incorrect. The Commission explained that (1) "exact replication of coverage within a station's contour [on a new channel] is not always attainable under the laws of physics," (2) broadcaster demands that changes in the coverage area be prohibited or remedied through expansion of contours were unreasonable, and (3) terrain loss concerns were "exaggerated." *Order* ¶174 (JA 82). It nonetheless adopted several measures to mitigate any potential impact, *Id.* ¶175 (JA 82). As for the decision not to protect unpopulated areas from interference in repacking, the Commission explained that its action was not only consistent with prior rules and practice, but avoided what would have been a significant constraint on the repacking process. *Declaratory Ruling*, ¶¶8-10 (JA 1803).

Petitioners challenge the Commission's refusal to compensate for terrain loss "by allowing broadcast television licensees to increase power to ensure they reach the same coverage area within their contours on their new channels." Br. 60. The Commission explained, however, that increasing power would be inconsistent with the statute "because it would not maintain the *status quo*." *Order* ¶172 (JA 81). In addition, it would "make it more difficult to repack stations efficiently,"

thereby "compromising the repacking process, and ultimately, the success of the auction," *Id.* ¶173 (JA 81).[15]

C. The Commission Provided Adequate APA Notice.

Petitioners maintain that with respect to several issues, the Commission failed to provide adequate notice as required by the APA. But all the APA requires is that the agency give notice that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b); *see, e.g.*, *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). The Commission did so here.

1. Petitioners contend that the Commission "provided no notice that the Commission was considering not protecting viewers against terrain loss." Br. 63. That is incorrect. The *NPRM* made clear that the issue of terrain loss was an issue the Commission would be considering in designing the repacking process. Thus, the NPRM acknowledged that "signal propagation characteristics vary from channel to channel," and that "new channel assignments may change the portions of a

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[15] Petitioners assert that "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." Br. 61. It is extremely difficult to see how that could be – expanding a station's contour means that its signal covers a larger geographic area. That additional signal coverage area would be likely to affect the relocation of other stations – a "daisy chain" effect – having just the adverse impact on the repacking process and the success of the auction that the Commission identified.

station's coverage area that are affected by terrain losses." *NPRM* ¶102 (JA 731). And it specifically asked "how should we accommodate stations whose coverage areas change as a result of new channel assignments?" *Id*.

2. Petitioners assert that the Commission "never even suggested that the Commission was considering denying protection to unpopulated areas." Br. 63. But the statute requires efforts to preserve coverage area and population served, and the Commission intends to "ensure that [a station's] signal reaches substantially the same geographic area at the same field strength after the repacking process as it did before." Coverage having been preserved through the guarantee of contour replication, the statute itself requires preserving only "population served." *Declaratory Ruling* ¶6 (JA 1803).

In any event, the Commission made clear in the *NPRM* that the question of how to implement the statutory mandate that it preserve coverage area and population served in the repacking process was a significant issue on which it sought comment, including defining coverage area to mean service area, and proposing "several approaches to preserving population served." *NPRM* ¶9 (JA 701). The specifics of whether interference protections would be afforded to unpopulated areas was a detail encompassed in that statutory question.

Petitioners recognize that under the "logical outgrowth" doctrine, the "APA does not require that an agency's final rule be identical to its initial proposal. The

rule need only be a logical outgrowth of [the agency's] notice." *Agape Church*, 738 F.3d at 411; *see* Br. 62. "[T]he 'logical outgrowth' standard does not require the agency to assiduously lay out every detail of a proposed rule." *Horsehead Resource Develop. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

3. Finally, petitioners argue that "the NPRM gave no indication that changes to OET Bulletin 69 methodology – like *TVStudy* – were on the table." Br. 64. But the FCC's Office of Engineering and Technology released a Public Notice in February 2013 announcing the development of the *TVStudy* software and soliciting comments on the "implementation of various analytical elements in the software that are not specifically addressed in OET-69." PUBLIC NOTICE, *Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software*, 28 FCC Rcd 950 (2013), 78 FED.REG. 11129 (Feb. 15, 2013).

Petitioners argue that the Public Notice issued by the Commission's Office of Engineering and Technology "cannot substitute for a proper proposal by the Commission." Br. 64. But there is nothing in the APA that prevents an agency from giving notice of a specific issue under consideration in a duly-commenced rulemaking through public announcement by one of its subordinate components. The Commission "enjoys wide discretion in fashioning its own procedures," *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir.1984); *see* 47 U.S.C. § 154(j). In this case, as the Commission observed, the "broadcasting com-

munity" – including NAB – "participated extensively in this docket" in response to that notice, filing 20 comments and participating in "several *ex parte* meetings with the Commission and its staff to discuss the issues raised in the *TVStudy*." *Order* n.489 (JA 70).

Sprint Corp. v. FCC, 315 F.3d 369 (D.C. Cir. 2003), is not to the contrary. That case involved an entirely different circumstance in which the Commission acted *solely* in reliance on a staff-issued public notice as a basis for what the Court concluded was a rule modification. The OET public notice here, published as a proposed rule in the Federal Register, was in support of this existing rulemaking proceeding that the Commission initiated by NPRM, and it clearly apprised petitioners and other interested parties of the details of the *TVStudy* software.[16]

Petitioners complain that they could not "meaningfully comment" on *TVStudy* because the "program was – and remains – a moving and concealed target." Br. 64. It is true that the Commission's staff continues to correct minor errors and improve the functionality of *TVStudy*. But the outlines and most of the details of the software have long been in public view. In short, petitioners have had ample

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[16] In any event, the APA requires that "due account" be taken of "the rule of prejudicial error." 5 U.S.C. § 706. Here petitioners were on notice that the Commission was considering updating the software and inputs underlying the OET-69 methodology, and had a full and fair opportunity to comment on that proposal, which they took. Any failure to provide a particular type of notice was "harmless error." *See, e.g., First American Discount Corp. v. CFTC*, 222 F.3d 1008, 1016 (D.C. Cir. 2000).

notice and opportunity to comment on the *TVStudy* software. In addition, the Commission directed OET "to finalize *TVStudy* no later than the release of the *Procedures PN*," i.e. , well before the auction begins. In addition, OET was directed "to release a detailed summary of baseline coverage area and population served by each television station in the repacking process, and to provide an opportunity for additional input." *Order* ¶145 (JA 69).

III. SINCLAIR LACKS STANDING TO RAISE ITS ADDITIONAL CLAIMS, WHICH ARE IN ANY EVENT WITHOUT MERIT.

Sinclair raises two separate issues, which NAB does not support, arguing that two technical details of the auction design adopted in the *Order* violate the Spectrum Act and are arbitrary and capricious. Sinclair lacks standing to raise either argument, which are in any event without merit.

A. The Commission Reasonably Adopted A 39-month Transition Period.

The *Order* adopts a 39-month transition period during which broadcasters that are required to change channels as a result of the repacking process must vacate their pre-auction channels and complete construction of the facilities necessary to operate on their new channels. *Order* ¶¶559-85 (JA 231). The 39-month period consists of (1) a three-month period after release of the Commission order identifying the channels to be reassigned for broadcasters to file construction per-

mit applications, followed by (2) up to 36 months for broadcasters to complete construction of the new facilities. *Id.* ¶559 (JA 231).

The Commission acknowledged the "complexity of the factors that may be involved in post-auction construction," *Order* ¶567 (JA 234), including the need for inter-station coordination and a potentially limited number of qualified tower construction crews. *Id.* ¶566 (JA 233). The Commission therefore concluded that the 18-month construction period it had proposed in the NPRM "would not provide sufficient time for all stations to complete the transition process." *Id.* ¶567 (JA 234).

The Commission instead found that a 36-month construction period "will provide sufficient time to complete a phased transition of all stations assigned to new channels." *Order* ¶568 (JA 234).[17] In doing so, the Commission relied in part on the fact that "many commenters" – including NAB, the Association of Public Television Stations, and the State Broadcaster Associations – "suggest[ed] that a construction period of up to 36 months will be sufficient to complete the transi-

[17] The *Order* delegated authority to the agency's Media Bureau to establish the actual deadlines that "may vary by region, by the complexity of the construction tasks, or by other factors the Media Bureau finds appropriate." *Id.* ¶563 (JA 232). The Commission added that such a "tailored approach will ensure that stations have the time they need to complete construction while making spectrum available for new uses as rapidly as possible." *Id.*

tion." *Id.*[18] The Commission also observed that "36 months is the period afforded under our rules for stations to complete construction of new or modified facilities after the grant of a construction permit, including in situations where construction is complicated or especially challenging." *Id.*; *see* 47 C.F.R. § 73.3598(a). And the Commission pointed out that the Spectrum Act provides that the Commission is to reimburse broadcasters within three years of the completion of the forward auction. *Id.* "[A]dopting a construction period that closely coincides with the three-year period established in the Spectrum Act to reimburse broadcasters for their repacking expenses," the Commission stated, "will best ensure that stations are successfully reimbursed for their reasonably incurred expenses." *Id.* Finally, the Commission explained that adopting a lengthier transition period "could depress forward-auction participation or the value of investments made by forward auction winners," and "delay the launch of innovative services and cause uncertainty both for providers and consumers." *Id.* ¶572 (JA 236).

Sinclair nonetheless contends that the Commission's 39-month post-auction transition period for repacked stations is "arbitrary and capricious." Br. 66-72.

1. At the outset, Sinclair lacks standing to raise its challenge: at this early stage, there is no way to tell whether any Sinclair station will be subject to repack-

[18] NAB and the State Broadcasters both advocated for a construction deadline of "30 months" (JA 1090, 1124). Public television commenters suggested a deadline of three years (JA 1166, 1295).

ing, and it is in any event highly speculative whether any of its stations that ultimately are forced to move channels will be unable to construct the necessary facilities within the applicable deadline. It is well settled that an injury "must be actual or imminent, not conjectural or hypothetical," to support Article III standing. *Conference Group, LLC v. FCC*, 720 F.3d 957, 962 (D.C. Cir. 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Relying on a declaration of one of its officers submitted for the first time with its opening brief to this Court, Sinclair asserts that it owns "at least 27 stations in the band most likely to face repacking." Pet. Br. 31; Aitken Decl. (Addenda Exh. C.) ¶19. But Sinclair is careful not to say that those particular stations will necessarily be repacked (it is far too early to tell); just that they are in a band that is likely to face repacking.

In any event, Sinclair's injury depends on its ability to show that it cannot meet the Commission's 39-month deadline. As to this, Sinclair asserts that "[t]here is a substantial likelihood that some of [Sinclair's] stations will be forced to cease broadcasting until construction is complete, causing irreparable injury." Pet. Br. 32. But that statement is the baldest conjecture: "Because of the inescapable challenges" of the repacking process, Sinclair's declarant pronounces, "simple logic dictates" that Sinclair stations will be unable to meet the construction deadline. Aitken Decl. ¶12.

The Commission "recognize[d] that the transition will be complex and time-consuming," *Order* ¶569 (JA 235), and for that reason made clear that it would work diligently to minimize service disruptions: first, by instructing the Media Bureau to take the special construction challenges faced by some stations into account when assigning individual construction deadlines, *id.*, and second, by permitting stations to remain on the air "by requesting authority to operate on temporary facilities." *Id.*; *see also id.* ¶584 (JA 241). The Commission also authorized the Media Bureau to "grant extensions of construction permit expiration dates of up to six months to those stations that encounter delays or unexpected challenges." *Id.*; *see also Order* ¶¶581-83 (JA 239).

In light of the ample period set for post-auction construction, where necessary, and the additional measures the Commission has taken to accommodate the unexpected, Sinclair's "wholly unsupported and conclusory allegation" of injury is mere *ipse dixit* that cannot satisfy the dictates of Article III. *See Doherty v. Rutgers School of Law*, 651 F.2d 893, 898 n.6 (3d Cir. 1981).

2. In any event, Sinclair's challenge to the length of the Commission's transition period is meritless. Sinclair claims that the 39-month period is "directly contradict[ed]" by a report (the "*Widelity Report*") that the FCC commissioned to examine "the process and costs associated with the post-incentive auction transition." *See Media Bureau Seeks Comment On Widelity Report And Catalog Of*

Potential Expenses And Estimated Costs, 29 FCC Rcd 2989 (MB 2014) (JA 1451). In doing so, Sinclair asserts that the *Widelity Report* concluded that "in the best-case scenarios, some broadcasters would require at least 41 months to complete their transition." Pet. Br. 68.

That assertion is inaccurate and misleading. In fact, the *Widelity Report* concluded only that at "super complicated sites," with "multiple channel reassignments," and where "costs are not typical," the transition could take 41 months. *See Widelity Report*, 29 FCC Rcd 2993, 3042-046 (2014) (JA 1414). In three other scenarios involving most stations, the report found that the transition could be completed in 9½-14 months. *Id.* 3037-42 (JA 1409).

The *Widelity Report* found that "[t]he post-repacking transition process will pose significant challenges to the industry," and that "[t]here are a number of potential bottlenecks in the post-repacking transition processes that may potentially extend the amount of time a station needs to complete construction of its new facilities." JA 1372. The *Report* nevertheless concluded that while "[t]he process will be complex," "the transition construction process can be achieved" for most stations in much less time than the 36-month period the Commission provided. JA 1418. Only in complex situations might more time be required, and, as discussed above, the Commission provided for those situations. The Commission thus did not "ignore the import of its own expert's findings," as Sinclair claims. Br. 71.

The Commission noted, in addition, that the period established in its rules for *new licensees* to construct a station is 36 months after a construction permit is granted. *Order* ¶568 (JA 234); *see* 47 C.F.R. § 73.3598(a). The modifications that *existing stations* will have to make to their facilities following the auction are, at worst, no more complicated than those faced by new licensees constructing new stations.

Nor did the Commission "dismiss[] out of hand" comments by some broadcasters that a 39-month deadline was infeasible. Br. 71. For example, it noted that it expected "that the equipment manufacturing and tower installation industries will respond to the greatly increased demand resulting from the post-auction transition and will take advantage of this unique opportunity to provide equipment and construction services." *Order* ¶571 (JA 236). The Commission simply came to a different conclusion, based on the record before it, as well as on its experience in addressing construction periods in similar circumstances, and taking into account the statutory interest in certainty for wireless provider bidders in the forward auction to obtain the spectrum they will have paid for without undue delay. *See Order* ¶¶559, 568-69 (JA 231, 234-35). The Commission's determination here "falls within the FCC's broad discretion , to which the courts must defer, to make such predictive judgments." *Nuvio Corp. v. FCC*, 473 F.3d 302, 306-07 (D.C. Cir. 2006)

Under the APA, a court may not disturb an agency determination where the agency "has considered [the] relevant factors and has articulated a reasoned basis for its conclusion." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)). And this Court has previously and repeatedly recognized that the Commission has "'wide discretion to determine where to draw administrative lines,'" that, as here, "invoke[e] the Commission's expertise." *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002) (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)). The Commission did not abuse its discretion on this issue.

B. The Rules That The Commission Adopted Relating To The Number Of Bidders In The Auction Were Reasonable.

Finally, Sinclair challenges the Commission's interpretation of the Spectrum Act's "two competing licensees" requirement. 47 U.S.C. § 309(j)(8)(G)(ii)(II); *see* 47 C.F.R. § 1.2207. Br. 75-81. Again, Sinclair fails to demonstrate how it will be injured by the Commission's interpretation. In any event, it cannot show that the Commission's interpretation is impermissible.

The Spectrum Act provides that "[t]he Commission 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). The statute does not define

the terms "competing" and "participate." The Commission concluded that "any broadcast television licensees that participate in the reverse auction and that are not commonly controlled will 'compete' with one another." *Order* ¶414 (JA 177). The Commission stated that a broadcast licensee will be a "participant" if it submits "a pre-auction application to be able to bid in the reverse auction that is found to be complete and in compliance with the auction rules." *Order* ¶413 (JA 177). Of course, the agency's reasonable interpretation of a statute it administers controls. *Chevron*, 467 U.S. at 843-44.

1. Sinclair does not explain how it will be harmed by the Commission's interpretation of the "two competing licensees" requirement and therefore lacks standing to challenge it. For one thing, the reverse auction has not taken place, and for all that can be known now, there may be two competing bidders in that auction in every conceivable market, however narrowly defined. More importantly, a single licensee in any specific market (as opposed to in the auction as a whole) can only benefit from the absence of a directly competing bidder, as that absence will reduce downward pressure on reverse auction payments. Sinclair plainly is not injured by an interpretation of the statute that could only result in higher, not lower, prices for the spectrum usage rights its stations control. And it is simply too early to tell whether Sinclair will be injured as an owner of stations that do not participate in the auction, but are repacked.

2. In any event, the Commission's reading of the statutory requirement is reasonable. As the Commission explained, the "fact that an applicant has the ability to submit a bid in the reverse auction, regardless of whether it ultimately chooses to do so, is sufficient to satisfy the "participation" component" because "the knowledge that another party might bid will create competitive pressure for a second bidder to accept lower incentive payments than it would absent competition." *Order* ¶413 (JA 177). The Commission also concluded that any broadcast licensees that are not commonly owned that participate in the reverse auction will compete with one another because, "regardless of their pre-auction geographic or channel location," those participants "compete to receive incentive payments from the same limited source—the aggregate proceeds of the forward auction." *Id.* ¶414 (JA 177). Indeed, the Commission observed, "[b]idders in the reverse auction would prevent the incentive auction from closing if together they were to request compensation exceeding amounts available from the forward auction proceeds." As a result, "one bidder's request for compensation affects what other bidders can be paid and, indeed, whether the final stage rule [for completing the auction] can be satisfied." *Id.*

Sinclair contends that the Commission's use of the term "participate" in describing the mechanism for determining the initial spectrum clearing target for the reverse auction undermines the agency's reading of the term "participant" in the "two competing participant" requirement. *See Order* ¶330 (JA 144). But the two

are separate matters. In determining the spectrum clearing target, the Commission must identify which broadcasters have accepted a specified opening price and thereby elected to bid in the auction. Those who have not filed an application to participate in the reverse auction at all must be assigned a new channel in the re-packing process following the auction. *Id.* ¶¶328, 330 (JA 143,144). In this context, the Commission used the term "participate" as a synonym for bidding.

The discussion of the two-competing-licensees requirement in paragraph 413 of the *Order*, by contrast, recognizes that broadcasters can create competitive pressure as participants by having the potential to bid as a result of completing a pre-auction application. *See id.* ¶413 (JA 177). There is nothing unreasonable about an agency using a word differently when addressing different subjects. "'Identical words may have different meanings where [among other things] the conditions are different.'" *Verizon Calif., Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009), quoting *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996).

Nor is the Commission's construction of the term "competing" in 47 U.S.C. § 309(j)(8)(G)(ii) unreasonable. Because, as the Commission explained, the reverse and forward auctions are linked – the money available from the forward auction goes to pay for the reverse auction – all participants in the reverse auction compete for the same limited financial resource. *Order* ¶414 (JA 177).

Sinclair maintains that stations compete with each other in the reverse auction only if they are in the "same relevant [presumably local] market," Br. 77. But as the Commission recognized —and Sinclair does not — the statute is concerned with competition in the auction, not competition between broadcast stations based on station signal contours. *See Order* ¶415 (JA 178). "Moreover, the interdependent nature of the repacking process, where repacking one station may have a widespread effect across geographic areas with possible nationwide band plan implications, means that participants will be affecting, and competing with, licensees far beyond their contour, DMA [Designated Market Area], or channel." *Id.* ¶415 (JA 178).

Finally, petitioners' interpretation focused on broadcast market competition "could mean that an otherwise willing and eligible broadcast television licensee would not be allowed to bid in the reverse auction if it is the only participant in its DMA." *Id.* ¶415 (JA 178). "Such an approach," the Commission pointed out, would not serve the Spectrum Act's broader goals, for it "would limit the Commission's ability to allow market forces to determine the highest and best use of spectrum, and to satisfy the final stage rule." *Id.*

Sinclair does not suggest any alternative to the Commission's construction of the statutory language that would serve the Act's goals at all, much less an alternative that might indicate the Commission view is unreasonable. Because the

Commission's interpretation of the "two competing licensees" requirement was reasonable, it should be upheld.

* * *

In sum, petitioners' claims fail at every turn. By updating its software and using more current data, the agency did not change the methodology described in OET-69; it implemented that methodology in order to more accurately preserve the coverage area and population served by repacked stations. The agency's auction design choices in addressing terrain loss and interference over unpopulated areas were reasonable decisions that took due account of the need to conduct the auction in an efficient and effective manner. In resolving these issues, the agency considered the available alternatives, reasonably explained its choices, and gave fair notice.

Sinclair's premature and speculative claim that the 39-month post-auction transition period is arbitrary ignores the Commission's detailed explanation of the record support for the line it drew, and fails to consider the obvious public interest in ensuring that relinquished spectrum is cleared in a timely fashion. Lastly, Sinclair's challenge to the Commission's interpretation of the statute's two competing licensees requirement (for which it cannot show injury) does not comprehend the realities of competitive interactions in the auction.

The *Order* is a responsible exercise of the Commission's broad power to establish an auction to encourage the voluntary relinquishment of broadcast spectrum for more flexible uses. It should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

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January 27, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7)(B), I hereby certify that the accompanying "Brief for the Respondents" was prepared using a proportionally spaced 14 point typeface and contains **15868** words as measured by the word count function of Microsoft Office Word 2010.

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

January 27, 2015

STATUTORY ADDENDUM

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

§ 553. Rule making

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(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

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UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 154. Federal Communications Commission

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(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

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UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority

heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS
[SPECTRUM ACT SECTION 6402]
Effective: February 22, 2012

§ 309. Application for license

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(j) Use of competitive bidding

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(8) Treatment of revenues

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(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.

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UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 13. PUBLIC SAFETY COMMUNICATIONS AND ELECTROMAGNETIC SPECTRUM AUCTIONS
Effective: February 22, 2012

§ 1401. Definitions

In this chapter:

* * * * *

(6) Broadcast television licensee

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

(A) a full-power television station; or

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

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UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 13. PUBLIC SAFETY COMMUNICATIONS AND ELECTROMAGNETIC SPECTRUM AUCTIONS
SUBCHAPTER IV. SPECTRUM AUCTION AUTHORITY
[SPECTRUM ACT SECTION 6401]
Effective: February 22, 2012

§ 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

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 13. PUBLIC SAFETY COMMUNICATIONS AND ELECTROMAGNETIC SPECTRUM AUCTIONS
SUBCHAPTER IV. SPECTRUM AUCTION AUTHORITY
[SPECTRUM ACT SECTION 6403]
Effective: February 22, 2012

§ 1452. Special requirements for incentive auction of broadcast TV spectrum

(a) Reverse auction to identify incentive amount

(1) In general

The Commission shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights in order to make spectrum available for assignment through a system of competitive bidding under subparagraph (G) of section 309(j)(8) of this title.

(2) Eligible relinquishments

A relinquishment of usage rights for purposes of paragraph (1) shall include the following:

(A) Relinquishing all usage rights with respect to a particular television channel without receiving in return any usage rights with respect to another television channel.

(B) Relinquishing all usage rights with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel.

(C) Relinquishing usage rights in order to share a television channel with another licensee.

(3) Confidentiality

The Commission shall take all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the reverse auction under paragraph (1), including withholding the identity of such licensee until the reassignments and reallocations (if any) under subsection (b)(1)(B) become effective, as described in subsection (f)(2).

(4) Protection of carriage rights of licensees sharing a channel

A broadcast television station that voluntarily relinquishes spectrum usage rights under this subsection in order to share a television channel and that possessed carriage rights under section 338, 534, or 535 of this title on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

(b) Reorganization of broadcast TV spectrum

(1) In general

For purposes of making available spectrum to carry out the forward auction under subsection (c)(1), the Commission--

(A) shall evaluate the broadcast television spectrum (including spectrum made available through the reverse auction under subsection (a)(1)); and

(B) may, subject to international coordination along the border with Mexico and Canada--

(i) make such reassignments of television channels as the Commission considers appropriate; and

(ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation.

(2) Factors for consideration

In making any reassignments or reallocations under paragraph (1)(B), the Commission shall make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.

(3) No involuntary relocation from UHF to VHF

In making any reassignments under paragraph (1)(B)(i), the Commission may not involuntarily reassign a broadcast television licensee--

(A) from an ultra high frequency television channel to a very high frequency television channel; or

(B) from a television channel between the frequencies from 174 megahertz to 216 megahertz to a television channel between the frequencies from 54 megahertz to 88 megahertz.

(4) Payment of relocation costs

(A) In general

Except as provided in subparagraph (B), from amounts made available under subsection (d)(2), the Commission shall reimburse costs reasonably incurred by--

(i) a broadcast television licensee that was reassigned under paragraph (1)(B)(i) from one ultra high frequency television channel to a different ultra high frequency television channel, from one very high frequency television channel to a different very high frequency television channel, or, in accordance with subsection (g)(1)(B), from a very high frequency television

channel to an ultra high frequency television channel, in order for the licensee to relocate its television service from one channel to the other;

(ii) a multichannel video programming distributor in order to continue to carry the signal of a broadcast television licensee that--

(I) is described in clause (i);

(II) voluntarily relinquishes spectrum usage rights under subsection (a) with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel; or

(III) voluntarily relinquishes spectrum usage rights under subsection (a) to share a television channel with another licensee; or

(iii) a channel 37 incumbent user, in order to relocate to other suitable spectrum, provided that all such users can be relocated and that the total relocation costs of such users do not exceed $300,000,000. For the purpose of this section, the spectrum made available through relocation of channel 37 incumbent users shall be deemed as spectrum reclaimed through a reverse auction under subsection (a).

(B) Regulatory relief

In lieu of reimbursement for relocation costs under subparagraph (A), a broadcast television licensee may accept, and the Commission may grant as it considers appropriate, a waiver of the service rules of the Commission to permit the licensee, subject to interference protections, to make flexible use of the spectrum assigned to the licensee to provide services other than broadcast television services. Such waiver shall only remain in effect while the licensee provides at least 1 broadcast television program stream on such spectrum at no charge to the public.

(C) Limitation

The Commission may not make reimbursements under subparagraph (A) for lost revenues.

(D) Deadline

The Commission shall make all reimbursements required by subparagraph (A) not later than the date that is 3 years after the completion of the forward auction under subsection (c)(1).

(5) Low-power television usage rights

Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.

(c) Forward auction

(1) Auction required

The Commission shall conduct a forward auction in which--

(A) the Commission assigns licenses for the use of the spectrum that the Commission reallocates under subsection (b)(1)(B)(ii); and

(B) the amount of the proceeds that the Commission shares under clause (i) of section 309(j)(8)(G) of this title with each licensee whose bid the Commission accepts in the reverse auction under subsection (a)(1) is not less than the amount of such bid.

(2) Minimum proceeds

(A) In general

If the amount of the proceeds from the forward auction under paragraph (1) is not greater than the sum described in subparagraph (B), no licenses shall be assigned through such forward auction, no reassignments or reallocations under subsection (b)(1)(B) shall become effective, and the Commission may not revoke any spectrum usage rights by reason of a bid that the Commission accepts in the reverse auction under subsection (a)(1).

(B) Sum described

The sum described in this subparagraph is the sum of--

(i) the total amount of compensation that the Commission must pay successful bidders in the reverse auction under subsection (a)(1);

(ii) the costs of conducting such forward auction that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title; and

(iii) the estimated costs for which the Commission is required to make reimbursements under subsection (b)(4)(A).

(C) Administrative costs

The amount of the proceeds from the forward auction under paragraph (1) that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title shall be sufficient to cover the costs incurred by the Commission in conducting the reverse auction under subsection (a)(1), conducting the evaluation of the broadcast television spectrum under subparagraph (A) of subsection (b)(1), and making any reassignments or reallocations under subparagraph (B) of such subsection, in addition to the costs incurred by the Commission in conducting such forward auction.

(3) Factor for consideration

In conducting the forward auction under paragraph (1), the Commission shall consider assigning licenses that cover geographic areas of a variety of different sizes.

(d) TV Broadcaster Relocation Fund

(1) Establishment

There is established in the Treasury of the United States a fund to be known as the TV Broadcaster Relocation Fund.

(2) Payment of relocation costs

Any amounts borrowed under paragraph (3)(A) and any amounts in the TV Broadcaster Relocation Fund that are not necessary for reimbursement of the general fund of the Treasury for such borrowed amounts shall be available to the Commission to make the payments required by subsection (b)(4)(A).

(3) Borrowing authority

(A) In general

Beginning on the date when any reassignments or reallocations under

subsection (b)(1)(B) become effective, as provided in subsection (f)(2), and ending when $1,000,000,000 has been

deposited in the TV Broadcaster Relocation Fund, the Commission may borrow from the Treasury of the United States an amount not to exceed $1,000,000,000 to use toward the payments required by subsection (b)(4)(A).

(B) Reimbursement

The Commission shall reimburse the general fund of the Treasury, without interest, for any amounts borrowed under subparagraph (A) as funds are deposited into the TV Broadcaster Relocation Fund.

(4) Transfer of unused funds

If any amounts remain in the TV Broadcaster Relocation Fund after the date that is 3 years after the completion of the forward auction under subsection (c)(1), the Secretary of the Treasury shall--

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

(B) after the end of fiscal year 2022, transfer such amounts to the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction.

(e) Numerical limitation on auctions and reorganization

The Commission may not complete more than one reverse auction under subsection (a)(1) or more than one reorganization of the broadcast television spectrum under subsection (b).

(f) Timing

(1) Contemporaneous auctions and reorganization permitted

The Commission may conduct the reverse auction under subsection (a)(1), any reassignments or reallocations under subsection (b)(1)(B), and the forward auction under subsection (c)(1) on a contemporaneous basis.

(2) Effectiveness of reassignments and reallocations

Notwithstanding paragraph (1), no reassignments or reallocations under subsection (b)(1)(B) shall become effective until the completion of the reverse auction under subsection (a)(1) and the forward auction under subsection (c)(1), and, to the extent practicable, all such reassignments and reallocations shall become effective simultaneously.

(3) Deadline

The Commission may not conduct the reverse auction under subsection (a)(1) or the forward auction under subsection (c)(1) after the end of fiscal year 2022.

(4) Limit on discretion regarding auction timing

Section 309(j)(15)(A) of this title shall not apply in the case of an auction conducted under this section.

(g) Limitation on reorganization authority

(1) In general

During the period described in paragraph (2), the Commission may not--

(A) involuntarily modify the spectrum usage rights of a broadcast television licensee or reassign such a licensee to another television channel except--

(i) in accordance with this section; or

(ii) in the case of a violation by such licensee of the terms of its license or a specific provision of a statute administered by the Commission, or a regulation of the Commission promulgated under any such provision; or

(B) reassign a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel, unless--

(i) such a reassignment will not decrease the total amount of ultra high frequency spectrum made available for reallocation under this section; or

(ii) a request from such licensee for the reassignment was pending at the Commission on May 31, 2011.

(2) Period described

The period described in this paragraph is the period beginning on February 22, 2012, and ending on the earliest of--

(A) the first date when the reverse auction under subsection (a)(1), the reassignments and reallocations (if any) under subsection (b)(1)(B), and the forward auction under subsection (c)(1) have been completed;

(B) the date of a determination by the Commission that the amount of the proceeds from the forward auction under subsection (c)(1) is not greater than the sum described in subsection (c)(2)(B); or

(C) September 30, 2022.

(h) Protest right inapplicable

The right of a licensee to protest a proposed order of modification of its license under section 316 of this title shall not apply in the case of a modification made under this section.

(i) Commission authority

Nothing in subsection (b) shall be construed to--

(1) expand or contract the authority of the Commission, except as otherwise expressly provided; or

(2) prevent the implementation of the Commission's “White Spaces” Second Report and Order and Memorandum Opinion and Order (FCC 08-260, adopted November 4, 2008) in the spectrum that remains allocated for broadcast television use after the reorganization required by such subsection.

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART Q. COMPETITIVE BIDDING PROCEEDINGS
BROADCAST TELEVISION SPECTRUM REVERSE AUCTION
Effective: October 14, 2014

§ 1.2207 Two competing participants required.

The Commission may not enter into an agreement for a licensee to relinquish spectrum usage rights in exchange for a share of the proceeds from the related forward auction assigning new spectrum licenses unless at least two competing licensees participate in the reverse auction.

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 73. RADIO BROADCAST SERVICES
SUBPART E. TELEVISION BROADCAST STATIONS

§ 73.603 Numerical designation of television channels.

(a)

Channel No.	Frequency band (MHz)
2	54-60
3	60-66
4	66-72
5	76-82
6	82-88
7	174-180
8	180-186
9	186-192

10	192-198
11	198-204
12	204-210
13	210-216
14	470-476
15	476-482
16	482-488
17	488-494
18	494-500
19	500-506
20	506-512
21	512-518
22	518-524
23	524-530
24	530-536
25	536-542
26	542-548
27	548-554
28	554-560
29	560-566
30	566-572
31	572-578
32	578-584
33	584-590
34	590-596
35	596-602
36	602-608
37	608-614
38	614-620
39	620-626
40	626-632
41	632-638
42	638-644
43	644-650

44	650-656
45	656-662
46	662-668
47	668-674
48	674-680
49	680-686
50	686-692
51	692-698
52	698-704
53	704-710
54	710-716
55	716-722
56	722-728
57	728-734
58	734-740
59	740-746
60	746-752
61	752-758
62	758-764
63	764-770
64	770-776
65	776-782
66	782-788
67	788-794
68	794-800
69	800-806

(b) [Reserved]

(c) Channel 37, 608–614 MHz is reserved exclusively for the radio astronomy service.

(d) In Hawaii, the frequency band 488–494 MHz is allocated for non-broadcast use. This frequency band (Channel 17) will not be assigned in Hawaii for use by television broadcast stations.

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 73. RADIO BROADCAST SERVICES
SUBPART E. TELEVISION BROADCAST STATIONS

§ 73.616 Post-transition DTV station interference protection.

(a) Applications seeking facilities that will operate prior to the end of the DTV transition must also comply with § 73.623.

(b) A petition to add a new channel to the post-transition DTV Table of Allotments contained in § 73.622(i) of this subpart will not be accepted unless it meets: the DTV–to–DTV geographic spacing requirements of § 73.623(d) with respect to all existing DTV allotments in the post-transition DTV Table; the principle community coverage requirements of § 73.625(a); the Class A TV and digital Class A TV protection requirements in paragraph (f) of this section; the land mobile protection requirements of § 73.623(e); and the FM radio protection requirement of § 73.623(f).

(c) The reference coordinates of a post-transition DTV allotment shall be the authorized transmitter site, or, where such a transmitter site is not available for use as a reference point, the coordinates as designated in the FCC order creating or modifying the post-transition DTV Table of Allotments.

(d) The protected facilities of a post-transition DTV allotment shall be the facilities (effective radiated power, antenna height and antenna directional radiation pattern, if any) authorized by a construction permit or license, or, where such an authorization is not available for establishing reference facilities, the facilities designated in the FCC order creating or modifying the post-transition DTV Table of Allotments.

(e) An application will not be accepted if it is predicted to cause interference to more than an additional 0.5 percent of the population served by another post-transition DTV station. For this purpose, the population served by the station receiving additional interference does not include portions of the population within the noise-limited service contour of that station that are predicted to receive interference from the post-transition DTV allotment facilities of the applicant or portions of that population receiving masking interference from any other station.

(1) For evaluating compliance with the requirements of this paragraph, interference to populations served is to be predicted based on the 2000 census population data and otherwise according to the procedure set forth in OET Bulletin No. 69: "Longley–Rice Methodology for Evaluating TV Coverage and Interference" (February 6, 2004) (incorporated by reference, see § 73.8000), including population served within service areas determined in accordance with § 73.622(e), consideration of whether F(50,10) undesired signals will exceed the following desired-to-undesired (D/U) signal ratios, assumed use of a directional receiving antenna, and use of the terrain dependent Longley–Rice point-to-point propagation model. Applicants may request the use of a cell size other than the default of 2.0 km per side, but only requests for cell sizes of 1.0 km per side or 0.5 km per side will be considered. The threshold levels at which interference is considered to occur are:

(i) For co-channel stations, the D/U ratio is +15 dB. This value is only valid at locations where the signal-to-noise ratio is 28 dB or greater. At the edge of the noise-limited service area, where the signal-to-noise (S/N) ratio is 16 dB, this value is +23 dB. At locations where the S/N ratio is greater than 16 dB but less than 28 dB, D/U values are computed from the following formula:

$$D/U = 15+10\log_{10}[1.0/(1.0-10^{-x/10})]$$

Where x = S/N–15.19 (minimum signal to noise ratio)

(ii) For interference from a lower first-adjacent channel, the D/U ratio is -28 dB.

(iii) For interference from an upper first-adjacent channel, the D/U ratio is -26 dB.

(2) Due to the frequency spacing that exists between Channels 4 and 5, between Channels 6 and 7, and between Channels 13 and 14, the minimum adjacent

channel technical criteria specified in this section shall not be applicable to these pairs of channels (see § 73.603(a)).

(f) A petition to add a new channel to the post-transition DTV Table or a post-transition DTV station application that proposes to expand its allotted or authorized coverage area in any direction will not be accepted if it is predicted to cause interference to a Class A TV station or to a digital Class A TV station authorized pursuant to subpart J of this part, within the protected contour defined in § 73.6010.

(1) Interference is predicted to occur if the ratio in dB of the field strength of a Class A TV station at its protected contour to the field strength resulting from the facilities proposed in the DTV application (calculated using the appropriate F(50,10) chart from Figure 9a, 10a, or 10c of § 73.699) fails to meet the D/U signal ratios for "DTV–into-analog TV" specified in § 73.623(c)(2).

(2) Interference is predicted to occur if the ratio in dB of the field strength of a digital Class A TV station at its protected contour to the field strength resulting from the facilities proposed in the DTV application (calculated using the appropriate F(50,10) chart from Figure 9a, 10a, or 10c of § 73.699) fails to meet the D/U signal ratios specified in paragraph (e) of this section.

(3) In support of a request for waiver of the interference protection requirements of this section, an applicant for a post-transition DTV broadcast station may make full use of terrain shielding and Longley–Rice terrain dependent propagation methods to demonstrate that the proposed facility would not be likely to cause interference to Class A TV stations. Guidance on using the Longley–Rice methodology is provided in OET Bulletin No. 69, which is available through the Internet at http://www.fcc.gov/oet/info/documents/bulletins/#69.

Note to § 73.616: When this rule was adopted, the filing freeze announced in an August 2004 public notice (19 FCC Rcd 14810 (MB 2004)) remained in effect. For a short period of time after the filing freeze is lifted, until a date to be announced by a Media Bureau public notice, applicants must protect Appendix B facilities in addition to any authorized facilities required to be protected pursuant to this rule section.

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 73. RADIO BROADCAST SERVICES
SUBPART E. TELEVISION BROADCAST STATIONS
Effective: November 24, 2014

§ 73.622 Digital television table of allotments.

* * * * *

(e) DTV Service Areas.

(1) The service area of a DTV station is the geographic area within the station's noise-limited F(50,90) contour where its signal strength is predicted to exceed the noise-limited service level. The noise-limited contour is the area in which the predicted F(50,90) field strength of the station's signal, in dB above 1 microvolt per meter (dBu) as determined using the method in section 73.625(b) exceeds the following levels (these are the levels at which reception of DTV service is limited by noise):

	dBu
Channels 2-6	28
Channels 7-13	36
Channels 14-69	41

(2) Within this contour, service is considered available at locations where the station's signal strength, as predicted using the terrain dependent Longley–Rice point-to-point propagation model, exceeds the levels above. Guidance for evaluating coverage areas using the Longley–Rice methodology is provided in OET Bulletin No. 69. Copies of OET Bulletin No. 69 may be inspected during normal business hours at the Federal Communications Commission, 445 12th Street, S.W, Dockets Branch (Room CY A09257), Washington, DC 20554. This document is also available through the Internet on the FCC Home Page at http://www.fcc.gov.

Note to paragraph (e)(2): During the transition, in cases where the assigned power of a UHF DTV station in the initial DTV Table is 1000 kW, the Grade B contour of the associated analog television station, as authorized on April 3, 1997, shall be used instead of the noise-limited contour of the DTV station in determining the DTV station's service area. In such cases, the DTV service area is the geographic area within the station's analog Grade B contour where its DTV signal strength is predicted to exceed the noise-limited service level, i.e., 41 dB, as determined using the Longley–Rice methodology.

(3) For purposes of determining whether interference is caused to a DTV station's service area, the maximum technical facilities, i.e., antenna height above average terrain (antenna HAAT) and effective radiated power (ERP), specified for the station's allotment are to be used in determining its service area.

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 73. RADIO BROADCAST SERVICES
SUBPART H. RULES APPLICABLE TO ALL BROADCAST STATIONS

§ 73.3598 Period of construction.

(a) Except as provided in the last two sentences of this paragraph, each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. Except as provided in the last two sentences of this paragraph, each original construction permit for the construction of a new LPFM station shall specify a period of eighteen months from the date of issuance of the construction permit within which construction shall be completed and application for license filed. A LPFM permittee unable to complete construction within the time frame specified in the original construction permit may apply for an eighteen month extension upon a showing of good cause. The LPFM permittee must file for an extension on or before the expiration of the construction deadline specified in the original construction permit. An eligible entity that acquires an issued and outstanding

construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license. For purposes of the preceding sentence, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 CFR 121 through 201, at the time the transaction is approved by the FCC, and holds

(1) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit; or

(2) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or

(2) More than 50 percent of the voting power of the corporation that will hold the construction permit if such corporation is a publicly traded company.

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

§ 74.703 Interference.

(a) An application for a new low power TV, TV translator, or TV booster station or for a change in the facilities of such an authorized station will not be granted when it is apparent that interference will be caused. Except where there is a written agreement between the affected parties to accept interference, or where it can be shown that interference will not occur due to terrain shielding and/or Longley–Rice

terrain dependent propagation methods, the licensee of a new low power TV, TV translator, or TV booster shall protect existing low power TV and TV translator stations from interference within the protected contour defined in § 74.707 and shall protect existing Class A TV and digital Class A TV stations within the protected contours defined in § 73.6010 of this chapter. Such written agreement shall accompany the application. Guidance on using the Longley–Rice methodology is provided in OET Bulletin No. 69. Copies of OET Bulletin No. 69 may be inspected during normal business hours at the: Federal Communications Commission, 445 12th Street, S.W., Reference Information Center (Room CY–A257), Washington, DC 20554. This document is also available through the Internet on the FCC Home Page at http://www.fcc.gov/oet/info/documents/bulletins/#69.

(b) It shall be the responsibility of the licensee of a low power TV, TV translator, or TV booster station to correct at its expense any condition of interference to the direct reception of the signal of any other TV broadcast analog station and DTV station operating on the same channel as that used by the low power TV, TV translator, or TV booster station or an adjacent channel which occurs as a result of the operation of the low power TV, TV translator, or TV booster station. Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the low power TV, TV translator, or TV booster station, regardless of the quality of the reception or the strength of the signal so used. If the interference cannot be promptly eliminated by the application of suitable techniques, operation of the offending low power TV, TV translator, or TV booster station shall be suspended and shall not be resumed until the interference has been eliminated. If the complainant refuses to permit the low Power TV, TV translator, or TV booster station to apply remedial techniques that demonstrably will eliminate the interference without impairment of the original reception, the licensee of the low power TV, TV translator, or TV booster station is absolved of further responsibility. TV booster stations will be exempt from the provisions of this paragraph to the extent that they may cause limited interference to their primary stations' signal subject to the conditions of paragraph (g) of this section.

(c) It shall be the responsibility of the licensee of a low power TV, TV translator, or TV booster station to correct any condition of interference which results from the radiation of radio frequency energy outside its assigned channel. Upon notice by the FCC to the station licensee or operator that such interference is caused by spurious emissions of the station, operation of the station shall be immediately suspended and not resumed until the interference has been eliminated. However,

short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

(d) When a low-power TV or TV translator station causes interference to a CATV system by radiations within its assigned channel at the cable headend or on the output channel of any system converter located at a receiver, the earlier user, whether cable system or low-power TV or TV translator station, will be given priority on the channel, and the later user will be responsible for correction of the interference. When a low-power TV or TV translator station causes interference to a BRS or EBS system by radiations within its assigned channel on the output channel of any system converter located at a receiver, the earlier user, whether BRS system or low-power TV or TV translator station, will be given priority on the channel, and the later user will be responsible for correction of the interference.

(e) Low power TV and TV translator stations are being authorized on a secondary basis to existing land mobile uses and must correct whatever interference they cause to land mobile stations or cease operation.

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

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

(1) It obtains the agreement of the wireless licensee to continue operations;

(2) The commencement or modification of wireless service is delayed beyond that period (in which case the period will be extended); or

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

(h) In each instance where suspension of operation is required, the licensee shall submit a full report to the FCC in Washington, DC, after operation is resumed, containing details of the nature of the interference, the source of the interfering signals, and the remedial steps taken to eliminate the interference.

(i) A TV booster station may not disrupt the existing service of its primary station nor may it cause interference to the signal provided by the primary station within the principal community to be served.

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

§ 74.707 Low power TV and TV translator station protection.

(a)(1) A low power TV or TV translator will be protected from interference from other low power TV or TV translator stations, or TV booster stations within the following predicted contours:

(i) 62 dBu for stations on Channels 2 through 6;

(ii) 68 dBu for stations on Channels 7 through 13; and

(iii) 74 dBu for stations on Channels 14 through 69.

Existing licensees and permittees that did not furnish sufficient data required to calculate the above contours by April 15, 1983 are assigned protected contours

having the following radii:

Up to 0.001 kW VHF/UHF–1 mile (1.6 km) from transmitter site

Up to 0.01 kW VHF; up to 0.1 k/W UHF--2 miles (3.2 km) from transmitter site

Up to 0.1 kW VHF; up to 1 kW UHF--4 miles (6.4 km) from transmitter site

New applicants must submit the required information; they cannot rely on this table.

(2) The low power TV or TV translator station protected contour is calculated from the authorized effective radiated power and antenna height above average terrain, using Figure 9, 10, or 10b of § 73.699 (F(50, 50) charts) of Part 73 of this chapter.

(b)(1) An application to construct a new low power TV, TV translator, or TV booster station or change the facilities of an existing station will not be accepted if it specifies a site which is within the protected contour of a co-channel or first adjacent channel low power TV, TV translator, or TV booster station, except that a TV booster station may be located within the protected contour of its co-channel primary station.

(2) Due to the frequency spacing which exists between TV Channels 4 and 5, between Channels 6 and 7, and between Channels 13 and 14, adjacent channel protection standards shall not be applicable to these pairs of channels. (See § 73.603(a) of Part 73 of this chapter.)

(3) A UHF low power TV, TV translator, or TV booster construction permit application will not be accepted if it specifies a site within the UHF low power TV, TV translator, or TV booster station's protected contour and proposes operation on a channel that is 15 channels above the channel in use by the low power TV, TV translator, or TV booster station.

(c) The low power TV, TV translator, or TV booster construction permit application field strength is calculated from the proposed effective radiated power (ERP) and the antenna above average terrain (HAAT) in pertinent directions.

(1) For co-channel protection, the field strength is calculated using Figure 9a,

10a, or 10c of § 73.699 (F(50,10) charts) of Part 73 of this chapter.

(2) For low power TV, TV translator, or TV booster applications that do not specify the same channel as the low power TV, TV translator, or TV booster station to be protected, the field strength is calculated using Figure 9, 10, or 10b of § 73.699 (F(50,50) charts) of Part 73 of this chapter.

(d) A low power TV, TV translator, or TV booster station application will not be accepted if the ratio in dB of its field strength to that of the authorized low power TV, TV translator, or TV booster station at its protected contour fails to meet the following:

(1) –45 dB for co-channel operations without offset carrier frequency operation or –28 dB for offset carrier frequency operation. An application requesting offset carrier frequency operation must include the following:

(i) A requested offset designation (zero, plus, or minus) identifying the proposed direction of the 10 kHz offset from the standard carrier frequencies of the requested channel. If the offset designation is not different from that of the station being protected, or if the station being protected is not maintaining its frequencies within the tolerance specified in § 74.761 for offset operation, the –45 dB ratio must be used.

(ii) A description of the means by which the low power TV, TV translator, or TV booster station's frequencies will be maintained within the tolerances specified in § 74.761 for offset operation.

(2) 6 dB when the protected low power TV or TV translator station operates on a VHF channel that is one channel above the requested channel.

(3) 12 dB when the protected low power TV or TV translator station operates on a VHF channel that is one channel below the requested channel.

(4) 15 dB when the protected low power TV or TV translator station operates on a UHF channel that is one channel above or below the requested channel.

(5) 6 dB when the protected low power TV or TV translator station operates on a UHF channel that is fifteen channels below the requested channel.

(e) As an alternative to the preceding paragraphs of § 74.707, an applicant for a

low power TV or TV translator station may make full use of terrain shielding and Longley–Rice terrain dependent propagation prediction methods to demonstrate that the proposed facility would not be likely to cause interference to low power TV, TV translator and TV booster stations. Guidance on using the Longley–Rice methodology is provided in OET Bulletin No. 69 (but also see § 74.793(d)). Copies of OET Bulletin No. 69 may be inspected during normal business hours at the: Federal Communications Commission, Room CY–C203, 445 12th Street, SW., Reference Information Center, Washington, DC 20554. This document is also available through the Internet on the FCC Home Page at http://www.fcc.gov.

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER D. SAFETY AND SPECIAL RADIO SERVICES
PART 90. PRIVATE LAND MOBILE RADIO SERVICES
SUBPART L. AUTHORIZATION IN THE BAND 470–512 MHZ (UHF–TV SHARING)

§ 90.303 Availability of frequencies.

(a) Frequencies in the band 470–512 MHz are available for assignment as described below. Note: coordinates are referenced to the North American Datum 1983 (NAD83).

(b) The following table lists frequency bands that are available for assignment in specific urban areas. The available frequencies are listed in § 90.311 of this part.

Urbanized area	Geographic center		Bands (MHz)	TV channels
	North latitude	West longitude		
Boston, MA	42°21'24.4"	71°03'23.2"	470-476, 482-488	14, 16
Chicago, IL [FN1]	41°52'28.1"	87°38'22.2"	470-476, 476-482	14, 15
Cleveland, OH [FN2]	41°29'51.2"	81°49'49.5"	470-476, 476-482	14, 15
Dallas/Fort Worth, TX	32°47'09.5"	96°47'38.0"	482-488	16

Detroit, MI [FN3]	42°19'48.1"	83°02'56.7"	476-482, 482-488	15, 16
Houston, TX	29°45'26.8"	95°21'37.8"	488-494	17
Los Angeles, CA [FN4]	34°03'15.0"	118°14'31.3"	470-476, 482-488, 506-512	14, 16, 20
Miami, FL	25°46'38.4"	80°11'31.2"	470-476	14
New York, NY/NE NJ	40°45'06.4"	73°59'37.5"	470-476, 476-482, 482-488	14, 15, 16
Philadelphia, PA	39°56'58.4"	75°09'19.6"	500-506, 506-512	19, 20
Pittsburgh, PA	40°26'19.2"	79°59'59.2"	470-476, 494-500	14, 18
San Francisco/Oakland, CA	37°46'38.7"	122°24'43.9"	482-488, 488-494	16, 17
Washington, DC/MD/VA	38°53'51.4"	77°00'31.9"	488-494, 494-500	17, 18

[FN1] In the Chicago, IL, urbanized area, channel 15 frequencies may be used for paging operations in addition to low power base/mobile usages, where applicable protection requirements for ultrahigh frequency television stations are met.

[FN2] Channels 14 and 15 are not available in Cleveland, OH, until further order from the Commission.

[FN3] Channels 15 and 16 are not available in Detroit, MI, until further order from the Commission.

[FN4] Channel 16 is available in Los Angeles, CA, for use by eligibles in the Public Safety Radio Pool.

(c) The band 482–488 MHz (TV Channel 16) is available for use by eligibles in the Public Safety Radio Pool in the following areas: New York City; Nassau, Suffolk, and Westchester counties in New York State; and Bergen County, New Jersey. All part 90 rules shall apply to said operations, except that:

(1) Location of stations. Base stations shall be located in the areas specified in this paragraph (c). Mobile stations may operate throughout the areas specified in this paragraph (c) and may additionally operate in areas not specified in this paragraph (c) provided that the distance from the Empire State Building (40° 44' 54.4" N, 73° 59' 8.4" W) does not exceed 48 kilometers (30 miles).

(2) Protection criteria. In order to provide co-channel television protection, the following height and power restrictions are required:

(i) Except as specified in paragraph (c)(2)(ii) of this section, base stations shall be limited to a maximum effective radiated power (ERP) of 225 watts at an antenna height of 152.5 meters (500 feet) above average terrain (AAT). Adjustment of the permitted power will be allowed provided it is in accordance with the "169 kilometer Distance Separation" entries specified in Table B in 47 CFR 90.309(a) or the "LM/TV Separation 110 miles (177 km)" curve in Figure B in 47 CFR 90.309(b).

(ii) For base stations located west of the Hudson River, Kill Van Kull, and Arthur Kill, the maximum ERP and antenna height shall be limited to the entries specified in Table B in 47 CFR 90.309(a) or in Figure B in 47 CFR 90.309(b) for the actual separation distance between the base station and the transmitter site of WNEP–TV in Scranton, PA (41° 10' 58.0" N, 75° 52' 20.0" W).

(iii) Mobile stations shall be limited to 100 watts ERP in areas of operation extending eastward from the Hudson River and to 10 watts ERP in areas of operation extending westward from the Hudson River.

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

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONERS,	)
	)
V.	)
	) **NO. 14-1154**
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS.	) **(consolidated with**) **NO. 14-1179, 14-1218)**

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on January 27, 2015, I electronically filed the foregoing Final Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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