ORAL ARGUMENT SCHEDULED FOR MARCH 12, 2015

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

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

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

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

Intervenors for Respondents.

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

JOINT REPLY BRIEF FOR PETITIONERS NATIONAL ASSOCIATION OF BROADCASTERS AND SINCLAIR BROADCAST GROUP, INC.

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GLOSSARY

Add.	Addenda To The Joint Opening Brief For Petitioners National Association of Broadcasters And Sinclair Broadcast Group, Inc. (Nov. 7, 2014)
APA	Administrative Procedure Act
Commission or FCC	Federal Communications Commission
CTIA Br.	Brief for Intervenors CTIA—The Wireless Association®, Competitive Carriers Association, and Consumers Electronics Association in Support of Respondents (Dec. 23, 2014)
Declaratory Ruling	*Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Declaratory Ruling, GN Dkt. No. 12-268 (rel. Sept. 30, 2014) (JA__)
First Digital TV Translator Order	*Amendment of Parts 73 & 74 of the Commission's Rules to Establish Rules for Digital Low Power Television*, Report and Order, 19 FCC Rcd 19331 (2004) (JA__)
Longley-Rice	A.G. Longley & P.L. Rice, Environmental Science Services Administration Technical Report ERL 79-ITS 67, *Prediction of Tropospheric Radio Transmission Loss over Irregular Terrain – A Computer Method* (1968)
NAB	National Association of Broadcasters
NPRM	Notice of Proposed Rulemaking, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 77 Fed. Reg. 69,934 (Nov. 21, 2012) (JA__)
OET	Office of Engineering and Technology

OET Bulletin 69 or Bulletin	OET Bulletin 69, *Longley-Rice Methodology for Evaluating TV Coverage and Interference* (Feb. 6, 2004) (JA__)
Order	*Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, GN Dkt. No. 12-268 (rel. June 2, 2014) (JA__)
Pets. Br.	Joint Opening Brief for Petitioners National Association of Broadcasters and Sinclair Broadcast Group (Nov. 7, 2014)
Resps. Br.	Brief for Respondents (Dec. 16, 2014)
Sinclair	Sinclair Broadcast Group, Inc.
Spectrum Act	Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156, 201 (Feb. 22, 2012)
TIA Br.	Brief for Amicus Curiae Telecommunications Industry Association Supporting Respondents and Affirmance of the Orders Below (Dec. 23, 2014)
Widelity Report	Widelity, Inc., *Response to the Federal Communications Commission for the Broadcaster Transition Study Solicitation*, GN Docket No. 12-268 (Dec. 30, 2013) (JA__)

INTRODUCTION

Congress directed the FCC, in repacking broadcasters who retain their spectrum rights in the incentive auction, to "make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69." 47 U.S.C. § 1452(b)(2). Yet the FCC repeatedly treats that unambiguous preservation mandate as an inconvenience to be minimized or ignored in the Commission's myopic quest to transfer spectrum to wireless companies.

Take, for example, Congress's mandated methodology. As of February 22, 2012, the FCC required applicants for new or modified broadcast licenses to use OET Bulletin 69—including its software and data sources—to determine their coverage areas and populations served. Today, the FCC requires that the same Bulletin, software, and data sources be used for that purpose. But to preserve stations' coverage areas and populations served in the repacking—the lone FCC function for which Congress mandated the use of OET Bulletin 69—the FCC has abandoned that methodology for *TVStudy* and its host of novel data sources. Contrary to the FCC's litigating position, "improv[ing] accuracy" (Resps. Br. 11) and "analytical speed" (*id.* at 33) does not justify changing stations' coverage areas and populations served. The FCC cannot move the Spectrum Act's goalposts while claiming to have kicked a field goal.

The FCC apparently hopes that invoking "technical radio engineering principles" and "complex auction design judgments" (Resps. Br. 9) will cause the Court to defer to unlawful agency action. But preserving the *status quo* does not merit deference to agency "expertise." CTIA Br. 4. The FCC must do only what it did on February 22, 2012 to calculate coverage areas and populations served; Congress left no interpretive "gap" to do otherwise. *See Ry. Labor Execs.' Ass'n v. FCC*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

The FCC's refusal to preserve stations' coverage areas is particularly egregious. Given Congress's clear command to preserve *both* "coverage area *and* population served," 47 U.S.C. § 1452(b)(2) (emphasis added), there is no basis for the FCC's decision to preserve only populated areas "not subject to interference" (Resps. Br. 39)—a euphemism for "population served." The FCC likewise declines to account for terrain losses and refuses to protect fill-in translators, thus ensuring that licensees will lose even more coverage and viewers, in violation of the Spectrum Act.

The FCC also has no discretion to require stations to stop broadcasting 39 months after the auction simply to provide "certainty for wireless provider bidders." Resps. Br. 63. The unrefuted record, including the FCC's own expert's report, establishes that under a best-case scenario some broadcasters cannot meet this deadline and will be forced off the air, and that real-world repacking conditions

will force many others to go dark. The FCC's choice to set an unnecessary hard deadline despite this evidence violates its obligation to "make all reasonable efforts" to ensure that broadcast coverage is preserved, and is arbitrary and capricious.

Nor can the FCC's interpretation of the requirement that each reverse auction transaction result from competition between at least two competing participants (47 U.S.C. § 309(j)(8)(G)(ii)) be considered "reasonable." Indeed, the FCC admits that its interpretation—contrary to the statute's plain text—allows auction transactions with stations in single-bidder markets. Resps. Br. 68. The FCC argues that its interpretation "serve[s] the Spectrum Act's broader goals" by allowing the FCC to recover more spectrum. *Id.* But the statute does not state such "broader goals." It expressly requires the FCC to preserve broadcast service.

At bottom, the FCC and its wireless company intervenors recast congressional intent as being solely about reallocating as much spectrum as possible to wireless providers, while minimizing the FCC's unambiguous statutory obligation to protect broadcasters. *See* Resps. Br. 20, 31, 42, 45. But the Spectrum Act is not about how the FCC can best serve the wireless industry. Rather, it is about how to determine the market price for a limited resource—broadcast spectrum—by faithfully applying an established methodology that Congress specified by name, as it existed on the date Congress prescribed, to preserve broadcasters' coverage areas

and populations served. Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The FCC's adoption of *TVStudy* and different data sources, its express refusal to preserve broadcaster coverage areas as well as populations served, and its adoption of a 39-month "go-dark" deadline and interpretation of the "two competing licensees" requirement, are contrary to the statute and should be vacated.

ARGUMENT

I. The FCC's Interpretation Contravenes The Spectrum Act's Plain Text And Is Not Entitled To Deference

The crux of the FCC's and CTIA's[1] untenable statutory argument is that the phrase "methodology described in OET Bulletin 69 of the Office of Engineering and Technology" is actually a veiled reference to the "Longley-Rice" model (Resps. Br. 28, 29 n.5; CTIA Br. 2-5)—which another government office published in 1968—and that the phrase is sufficiently ambiguous to accommodate the FCC's own interpretation (Resps. Br. 27-28; CTIA Br. 10-12). But the FCC's present reliance on purported ambiguity is undermined by its contrary representation in the Order that the Spectrum Act "*requires* us to update the software and data inputs." JA__(Order¶130) (emphasis added). The Commission's about-face gives

[1] In this brief, "CTIA" refers collectively to CTIA—The Wireless Association®, Competitive Carriers Association, and Consumer Electronics Association.

the lie to its present litigating position.[2]

The FCC now touts phrases like "technical radio engineering principles" and "auction design judgments" in a transparent ploy to cloak unlawful action in the mantle of agency "expertise." *See* Resps. Br. 20. But administrative expertise under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), is not a talisman that insulates agency action from congressional mandates. There is no deference without statutory ambiguity—a determination to which courts do not defer, *see ABA v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005)—and the Spectrum Act unambiguously directs the FCC to use the methodology described in OET Bulletin 69, as that methodology was applied on February 22, 2012, to calculate each station's coverage area and population served. That mandate tethers the methodology to the outputs it produced on a specific date—and therefore cannot be divorced from the implementing software and data sources.

A. The FCC Must Use The Methodology, Implementing Software, And Data Sources Used On February 22, 2012

Despite the Spectrum Act's crystal-clear preservation mandate, the FCC and CTIA argue that "the methodology described in OET Bulletin 69" is only a loose

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[2] *Cf. Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("*Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face."); *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (where agency "believes [its] interpretation is compelled by Congress," deference is inappropriate); *compare with* Resps. Br. 21; CTIA Br. 10-12.

guideline because it does not "clearly specify the details of how OET Bulletin 69 must be employed" in the incentive auction. Resps. Br. 27; *see also* CTIA Br. 11-12. Quite the contrary, nothing in the Spectrum Act permits the FCC to adopt *TVStudy* and modify the data sources described in OET Bulletin 69.

1. Congress Did Not Direct The FCC To Use "Longley-Rice"

The FCC and its intervenors argue that "the methodology described in OET Bulletin 69" means the "Longley-Rice" radio propagation model—a 47-year old engineering model adumbrated in Parts I-II of the Bulletin—rather than the Bulletin's *entire* contents. Resps. Br. 30 n.5; CTIA Br. 6-9; *see also* TIA Br. 8. They are wrong.[3]

When Congress wishes to mandate use of the well-known "Longley-Rice" model, it says so. In the Satellite Home Viewer Improvement Act of 1999, for example, Congress mandated use of "the Individual Location Longley-Rice model set forth by the [FCC] in Docket No. 98-201." 17 U.S.C. § 119(a)(2)(B)(ii)(I). Similarly, in the Satellite Television Extension and Localism Act of 2010, Congress directed the FCC to develop a predictive model that "rel[ies] on the Individual Location Longley-Rice model." 47 U.S.C. § 339(c)(3)(A). Congress thus knows how

[3] Petitioners address the Telecommunications Industry Association's arguments here in the event its motion to participate as *amicus curiae* is granted. Nevertheless, NAB preserves its objection that TIA's motion should be denied.

to identify "Longley-Rice" by name when it wishes to require application of that model.

It strains credulity that for a proceeding as consequential as the incentive auction, Congress would depart from past practice and resort to legislating by misdirection. Congress directed the FCC to measure stations' coverage areas and populations using, not the "Longley-Rice" model, but "the methodology described in OET Bulletin 69" (47 U.S.C. § 1452(b)(2))—obviously meaning *all* of that Bulletin, not merely those portions that the FCC opts to employ. *See Conn. Nat'l Bank*, 503 U.S. at 253-54. Had Congress authorized the FCC to employ Longley-Rice principles to the exclusion of the Bulletin's other contents, it would have simply said "Longley-Rice." Instead, Congress made clear that the FCC must employ *all* of the specific processes, techniques, or approaches that "OET Bulletin 69" describes to calculate broadcasters' coverage areas and populations served (*see* Pets. Br. 37)—including, *inter alia*, the use of the implementing software and 3 arc-second gradations.

The correctness of Petitioners' plain reading is confirmed by OET Bulletin 69 itself, which directs users wishing to employ different software to *documents other than OET Bulletin 69*. *See* Resps. Br. 29 n.4. Indeed, Longley-Rice is not set forth in OET Bulletin 69 at all, but in prior documents published by other agencies. *See* JA__(Order¶135.n.443).

Adopting the FCC's characterization of the Bulletin's methodology as the "Longley-Rice model" is also improper because it would render much of the preservation mandate "mere surplusage." *See NRDC v. EPA*, 489 F.3d 1364, 1373 (D.C. Cir. 2007). Had Congress sought nothing more than to require the FCC to use any conceivable methodology based loosely on Longley-Rice, there would be no need to refer to the outputs determined by the Bulletin's methodology ("coverage area and population served") or the date of enactment ("as of February 22, 2012"). Those references confirm that the required methodology must mean more than simply "Longley-Rice."

2. OET Bulletin 69's Methodology Includes The Implementing Software And Data Sources

Straying further from the statute, the FCC insists it is reasonable to view the Bulletin's methodology as distinct from the software and data sources also described in the Bulletin because "methodology" is ambiguous. Resps. Br. 28-29. But the FCC's argument fails because "methodology described in OET Bulletin 69" must be read in context, not in isolation. *See*, *e.g.*, *Victor v. Nebraska*, 511 U.S. 1, 20 (1994) (words must be construed "in the context of the sentence in which [they] appear"); *Deal v. United States*, 508 U.S. 129, 131-32 (1993) (context usually excludes most interpretive alternatives).

The Spectrum Act refers not merely to a methodology, but to the *outputs* of that methodology—namely "the coverage area and population served of each

broadcast licensee"—*as they were calculated on February 22, 2012*. 47 U.S.C. § 1452(b)(2). Had the FCC calculated coverage area and population served for each broadcaster on February 22, 2012, it unquestionably would have used all of the procedures specified in OET Bulletin 69, including the then-existing software and data sources (which it continues to use today)—not *TVStudy* and its different data sources. *See* Pets. Br. 46-47; *see also* CTIA Br. 10 (conceding that February 22, 2012 "modifies 'the coverage area and population served'"). Congress's reference to the date of enactment is a directive to preserve the outputs of the methodology on that date; thus, preservation necessarily entails retaining the software and data sources that produced those results. By resisting this conclusion and focusing only on perceived ambiguity in a single word, the FCC impermissibly construes words "in isolation." *Smith v. United States*, 508 U.S. 223, 233 (1993).

The FCC also erroneously conflates "inputs"—information that a user must enter into the OET Bulletin 69 software to obtain coverage area and population served for a specified station—with data sources that the methodology draws upon for every calculation. *See* Resps. Br. 30. Each time the software calculates coverage area and population served, the majority of the data sources—population data, terrain data, method for calculating antenna height, default beam tilt—are the same. These sources are described in OET Bulletin 69 and thus are part of its "methodology." Other information, by contrast, identifies the specific station in

question—information that the user supplies and that changes from station to station. To calculate a station's coverage area and population served, for example, a user must provide the station's location, frequency, and power at which it will broadcast. *TVStudy*'s failing is not in changing those "inputs," but in changing the specified *sources of data* that the software draws on whenever it runs.

The FCC and its intervenors also fail to distinguish *City of Idaho Falls v. FERC*, 629 F.3d 222 (D.C. Cir. 2011). The FCC notes only that the case "did not involve OET-69 or any issue under the Spectrum Act" (Resps. Br. 30 n.6)—a wholly inadequate distinction where the Court made clear that changing an "input in the . . . calculation formula" constitutes a change in "methodology." 629 F.3d at 225. CTIA's distinction (CTIA Br. 9) equally misses the mark: By its logic, the "methodology" in *City of Idaho Falls* should have been the use of the Forest Service's fee schedule, not the underlying data comprising that schedule—yet this Court held that the data were part of the methodology. Here, as in *City of Idaho Falls*, the methodology includes the underlying data sources (and software used to employ them).

The FCC's litigating position is particularly indefensible given its own prior statements describing these data sources as part of the OET Bulletin 69 "methodology." Pets. Br. 44. Forced to acknowledge these assertions, the FCC weakly contends that it was speaking "colloquially" at the time. Resps. Br. 30. One of

those "colloquial" uses, for example, came in a rulemaking to change the census data source (*see* Pets. Br. 44)—the type of formal agency proceeding in which the FCC would be expected to speak carefully. The *Federal Register* is the home of precise jargon, not slang, and the FCC's litigating position is an implausible, "*post hoc* rationalizatio[n]" of the type courts routinely reject. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quotation marks omitted). In any event, statutes import the ordinary meaning of a term. Given that the FCC had itself described these data sources as part of OET Bulletin 69's "methodology," legislators would have intended that same meaning for the term "methodology" in the Spectrum Act. *See FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012).

The FCC's effort to analogize *TVStudy* to a new "brand of spreadsheet" for adding a series of numbers is wholly inapposite. Resps. Br. 28-29. Different spreadsheet brands should not produce different results, as *TVStudy* indisputably does. Moreover, if the instructions specify using a certain methodology as of a certain date, and those employing that methodology on that date used a specific spreadsheet brand, then that brand is, in fact, part of the methodology. *See also* TIA Br. 16-17.

Ultimately, the FCC and its wireless company intervenors are peddling a myopic view of the Spectrum Act, ignoring that the Act refers both to "methodology" and specific outputs as of February 22, 2012. Read as a whole,

"the methodology described in OET Bulletin 69" plainly includes the implementing software and data sources used to generate each station's coverage area and population served as of February 22, 2012.

3. The FCC May Not Alter OET Bulletin 69's Methodology For "Accuracy"

Nor does Congress's directive to use "all reasonable efforts" to preserve coverage areas and populations served using the specified methodology somehow authorize the FCC to change that methodology in the name of "accuracy." *But see* Resps. Br. 33-37; CTIA Br. 8-9.

When Congress mandates a technical standard and wishes to grant discretion to update that standard over time, it says so. In the Satellite Home Viewer Improvement Act of 1999, for example, Congress specified the use of a predictive model that "may be amended by the Commission over time . . . to increase the accuracy of that model." 17 U.S.C. § 119(a)(2)(B)(ii)(I). Similarly, in the Satellite Television Extension and Localism Act of 2010, Congress directed the FCC to develop a predictive model based on the Longley-Rice model and provided that the FCC "shall establish procedures for the continued refinement in the application of the model by the use of additional data as it becomes available." 47 U.S.C. § 339(c)(3)(A). Congress omitted similar language from the Spectrum Act; the FCC cannot, through fanciful interpretation, usurp the discretion that Congress withheld.

CTIA's claim that the existing methodology produces "demonstrably wrong" results (CTIA Br. 9) likewise rests on the fallacious assumption that the repacking methodology should aim for some metaphysical notion of "accuracy," rather than to "preserve, as of February 22, the 2012, coverage area and population served" by each station. 47 U.S.C. § 1452(b)(2). The Spectrum Act does not call for increasing accuracy, as the statutes described above do. Thus, the FCC's "accuracy" rationale for changing the specified methodology—and stations' calculated coverage areas and populations served—is unreasonable.

Notably, the FCC never denies that it continues to use the Bulletin's methodology—including its supposedly outdated software and data sources—for *other* Commission business. *See* Pets. Br. 47. Indeed, the FCC continues to use that methodology for all of the ends for which it was used on February 22, 2012. *See id.*; *see also* JA__(NAB.Comment.10(Mar.21,2013)) &Meintel.Decl.¶¶4-5). The FCC cannot credibly claim that "accuracy" requires changing the Bulletin's methodology for purposes of the incentive auction, when applicants for broadcast licenses still must use the same software and inputs that the FCC derides here as "inaccurate."

4. The Policy Arguments Of The FCC And Its Wireless Allies Are Unavailing

The FCC and its wireless company intervenors suggest that the Order is reasonable because it serves the Spectrum Act's purpose of benefitting wireless pro-

viders. *See* Resps. Br. 5; CTIA Br. 1; *see also* TIA Br. 3-5. But even if that were *one* of Congress's purposes, the statute *also* unquestionably aims to protect broadcasters from suffering involuntary injury. Congress struck a carefully calibrated balance by guaranteeing broadcasters whose reverse auction bids were not accepted or who did not participate that they would retain their populations served and coverage areas, as measured by the prevailing gauge at the time of enactment—"the methodology described in OET Bulletin 69." 47 U.S.C. § 1452(b)(2). That the statute also aims to make spectrum available to wireless providers says little, if anything, about how to interpret this statutory preservation mandate and, above all, does not permit the FCC to ignore the statute's unambiguous language. *See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp*., 474 U.S. 361, 373 (1986) (general "purpose" of legislation cannot be invoked "at the expense of specific provisions" of a statute).

CTIA, predictably, emphasizes the interests of wireless providers, exaggerating a "spectrum crunch" and the economic benefits that supposedly will flow from repurposing broadcast spectrum. *See* CTIA Br. 1-2; *see also* TIA Br. 6. But the incentive auction is merely Congress's chosen mechanism for determining the correct market price for broadcast television spectrum; it is not an emergency measure for transferring spectrum from broadcasters to wireless companies. Indeed, Congress provided the FCC with ten years to conduct a deliberate and orderly auction.

See 47 U.S.C. § 1452(f)(3). The FCC cannot shirk its duty to protect existing coverage areas and populations served by feigning urgency.

In any event, "no legislation pursues its purposes at all costs." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (citation omitted). Presumably any statutory purpose of repurposing spectrum could not justify the FCC simply confiscating the spectrum. But if it would not permit the FCC to do that, it is because Congress specified limits on how to obtain spectrum. The problem here is that the FCC ignored those limits. Thus, even assuming Congress sought to "free up scarce spectrum" (Resps. Br. 24), the FCC is not excused from complying with the statute's preservation mandate.

B. The Existing Software Is Fully Capable Of Calculating Stations' Coverage Areas And Populations Served As Of February 22, 2012

Both the FCC and CTIA assert that *TVStudy* is "necessary" (Resps. Br. 31; CTIA Br. 18) because existing software supposedly cannot perform the calculations that repacking will entail. *See* Resps. Br. 21, 31-33; CTIA Br. 15-20; *see also* TIA Br. 6-7. They contend that it would be unreasonable to require the FCC to use the software it used on February 22, 2012—and continues to use for various applications—in the incentive auction. *See* Resps. Br. 31-33; *see also* CTIA Br. 15 (asserting that using "legacy software" in the repacking "would be impossible"). That argument fails for several reasons.

Significantly, there is simply *no evidence*—only "unsupported assertions" (*Kristin Brooks Hope Ctr. v. FCC*, 626 F.3d 586, 589 (D.C. Cir. 2010))—that the existing software is incapable of supporting the auction. The FCC made no record of how long it would take to use that software in the auction—and apparently it has never even tried. *See* Resps. Br. 33 n.7. In fact, the record shows that the existing software is fully capable of supporting the auction. *See* JA__(NAB.Comment.21(Mar.21,2013)&Meintel.Decl.¶¶12-13); JA__(NAB. Comment.5-7(Apr.5,2013) &Franca.Decl.¶17).

Nor has the FCC shown why computational speed—a mantra echoed throughout the FCC's brief—is critical. Under the FCC's auction plan, the supposed need for analytical speed is illogical: The FCC preserves coverage and population in the repacking by building so-called "constraint files"—which limit repacking options based on interference calculations made using the required methodology—*before* the auction. *See* JA__(Order¶114). Even if the existing software were slow, the FCC has not shown why interference calculations that will be performed before the auction would have any impact on the auction itself.

More fundamentally, the FCC's feasibility argument erroneously confuses the repacking process with the Spectrum Act's preservation standard. The statute mandates use of the existing software not to carry out the repacking, but as the yardstick against which to measure the results of the repacking. Even if that soft-

ware were not up to the task of implementing the auction (and it is), it indisputably can calculate the coverage area and population served for each station as of February 22, 2012—the values that must be preserved—because that software was exactly what the FCC used for that purpose on that date (and continues to use today for that purpose).

Of course, the Spectrum Act provides a safety valve if the FCC's concerns actually materialize: The Commission need only make "all reasonable efforts" to replicate the calculations produced by the Bulletin's methodology. That command does not categorically bar the FCC from using modified software with different programming language in the repacking. It does, however, require the FCC to use the existing software and data sources to calculate the *benchmark* for all stations in the repacking, and then to make all reasonable efforts in the repacking to attain that benchmark.[4]

The FCC made *no* effort to use the existing software—either in calculating the benchmark or in testing its utility for the repacking—much less "all reasonable efforts." Indeed, the FCC argues that it could substitute a different methodology even before "it became clear that the prior software was not up to the task" (Resps.

[4] The FCC hints that the phrase "all reasonable efforts" somehow provides authority to alter the methodology. *See* Resps. Br. 19, 39-40. That phrase might permit the FCC to make some changes *if* it demonstrated that they were necessary, but the phrase is an obligation linked to the duty to "preserve," not an escape hatch from OET Bulletin 69.

Br. 33 n.7)—an admission that "all reasonable efforts" were *not* made. The staff created *TVStudy* to produce different coverage and population targets for the repacking; but moving the Spectrum Act's bulls-eye is a far cry from making all reasonable efforts to preserve stations' existing coverage area and population served.

Even assuming *arguendo* that using the software specified by the Bulletin's methodology would present logistical difficulties, the FCC made no attempt to limit its changes to the minimum features needed to make the auction technologically feasible, such as adding the ability to "cache[]" or "save[]" data (Resps. Br. 32), while preserving the predictions of coverage area and population served produced by the existing software. If, for example, a uniform grid is necessary to allow for rapid calculations in the repacking (a finding the FCC has neither made nor explained, *see* Resps. Br. 50), then the FCC could write a new program with a uniform grid, as long as it still makes "all reasonable efforts" to replicate the results of the existing software, as of February 22, 2012. (Notably, the FCC never quite explains why changing data sources is "necessary.") Instead, the FCC resorts to epithets like "archaic" and "obsolete" as a pretext for smuggling in substantial changes, such as an alternative methodology for determining antenna height and beam tilt. Such changes are prohibited.

C. The FCC Ignored The Independent Statutory Mandate To Preserve "Coverage Area"

In a strained argument that not even the wireless intervenors join, the FCC maintains that the statute does not require it to preserve unpopulated "coverage area." Resps. Br. 44. The FCC contends that it may construe the term "coverage area" as equivalent to a station's "contour," *id*. at 14, and that it need only preserve that area to the extent it is populated and unencumbered by interference, *id.* at 44-45. Not so.

The FCC's position, repeated in its Declaratory Ruling, is tantamount to a concession that the Commission does not intend to preserve "coverage area" at all. Indeed, by vowing to preserve only populated areas unaffected by interference—and, then, only by using a methodology different from that described in OET Bulletin 69—the Commission makes clear that it will preserve, at most, "population served," thus rendering the statute's "coverage area" mandate mere surplusage and defying its unambiguous, *conjunctive* command. *See NRDC*, 489 F.3d at 1373.

The FCC further argues that its duty to preserve coverage area is discharged by replicating a station's signal contour on its new channel, and does not require protecting the area against new interference. *See* Resps. Br. 38-39, 43-45. But this argument confuses coverage *area* with coverage *perimeter*. While replicating the contour might maintain the prior broadcasting boundary, it does not protect the "area" inside of that boundary.

Moreover, the undisputed purpose of OET Bulletin 69 is to calculate *interference*. *See* Resps. Br. 29 (conceding that the Bulletin is "concerned" with calculating "interference"). Figure 1 of the Bulletin, for example, illustrates the methodology's "output"—including an "[e]valuation of [i]nterference"—and expresses results both as "POPULATION" and "AREA." JA__(OET.Bulletin.69.at.11-12). Indeed, the Bulletin itself contemplates that not every cell in the cell-by-cell interference analysis will have population—thus showing that the methodology requires interference calculations even for cells with no population. *See* JA__(OET.Bulletin.69.at.5) ("For cells with population, the point chosen by the FCC computer program is the population centroid; otherwise it is the geometric center; and the point so determined represents the cell in all subsequent service and interference calculations."). The FCC does not explain why the Bulletin's methodology would calculate interference for cells with no population if that interference is not considered. The upshot of the Order is to irrationally protect "population served" but not "coverage area" against interference—even though the statute's preservation mandate applies equally to both.[5]

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[5] The Declaratory Ruling attempts to justify this result by citing 47 C.F.R. § 73.622(e)(1)-(2), pertaining to "DTV Service Areas." But it omits paragraph (3), which discusses interference. As the FCC has repeatedly acknowledged, interference cannot be divorced from the calculation of DTV Service Areas. *See*, *e.g.*, *In re Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.*, Sixth Report and Order, 12 FCC Rcd 14588, 14607, 14655 n.266, 14678 (1997); *In re Advanced Television Sys. and Their Impact Upon the Existing Televi-*

D. The FCC Has Not Made "All Reasonable Efforts" To Preserve Stations' Coverage Areas And Populations Served

The FCC's decision to redefine the statutory preservation standard and ignore both the methodology and coverage area preservation mandates is all the more inexplicable given the FCC's admission that the Spectrum Act requires it "to maintain the *status quo*" for stations that undergo repacking. Resps. Br. 19 (quoting JA__(Order¶180)). As NAB's data show, *TVStudy* changes—often dramatically—population and coverage area for most stations. *See* Pets. Br. 38-40; *see also id.* at 50-54. Substantial losses of coverage area and viewership obviously do not "maintain the *status quo*."

CTIA argues that the FCC "found as a fact" that the results of NAB's experimental testing of *TVStudy* were "flawed." CTIA Br. 13-14. Critically, however, the FCC itself has forfeited that argument by failing to invoke any agency "finding" that NAB's data were unreliable. *See Verizon v. FCC*, 740 F.3d 623, 656 (D.C. Cir. 2014); *see also Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) (intervenor "may join issue only on a matter that has been brought before the court by another party"). In any event, the FCC acknowledges (as CTIA admits) that its changes to the Bulletin's methodology alter coverage area and population

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sion Broad. Serv., Seventh Further Notice of Proposed Rulemaking, 21 FCC Rcd 12100, 12106 (2007); *In re Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.*, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order, 23 FCC Rcd 4220, app. B (2008).

served for most stations and decrease those values for at least half of all stations. *See* CTIA Br. 14. That hardly maintains the *status quo*.

Not only has the FCC failed to make "all reasonable efforts" to *preserve* coverage area and population served, but it has taken actions that will invariably *reduce* coverage area and population served. In particular, the FCC still has no coherent explanation for why it plans to ignore terrain losses and fill-in translator stations. *See* Resps. Br. 40-43, 46-49; *see also* Pets. Br. 50-54. These problems go hand in hand: Translators provide service to areas within a station's contour that are terrain-obstructed. By allowing significant new losses in coverage from terrain obstacles and refusing to protect existing replacements of coverage provided by translators, the FCC impermissibly ensures that repacked stations in the hills or mountains will reach a reduced area and fewer viewers.

1. The FCC's Terrain-Loss Arguments Fail

The FCC defends its refusal to protect viewers against terrain losses primarily on procedural grounds, claiming that this Court is "precluded" from addressing the argument because NAB never raised the issue in the administrative proceedings. *See* Resps. Br. 40 & n.9. But "it is not necessary that the issue of fact or law be presented to the Commission by the petitioner itself"—only that the FCC get a "fair opportunity to pass on it." *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998) (interpreting 47 U.S.C. § 405). Here, Harris Corporation made

clear in its comments below that the FCC must consider terrain losses in preserving populations served. *See* JA__-__(Harris.Comment.5-10(Jan.25,2013)) (identifying "different propagation characteristics associated with new frequencies" as one of two scenarios through which current viewers could lose signal). The FCC thus had a "fair opportunity" to pass on the issue.

On the merits, the FCC's sole justifications for ignoring terrain loss—both in preserving population served and coverage area—are that (a) *most* losses are likely to be small and (b) there *may* be alternative remedies available after repacking. *See* Resps. Br. 41-43. Even accepting the FCC's unsupported speculation that no terrain will be lost in the "majority" of cases (JA__(Order¶174)), a minority may still face large terrain losses. *All* broadcasters are protected from losses in population and area in repacking, not just those given favorable channel reassignments. And the theoretical possibility of later remedies offers no aid, since the statute requires preservation of coverage area "[*i*]*n making any reassignments or reallocations*"—not afterward.

2. The FCC's Translator Arguments Fail

The FCC fares no better in attempting to exclude fill-in translator stations from the preservation mandate. According to the agency, because fill-in translators fall outside the statute's definition of a "broadcast television licensee," the FCC need not preserve the areas and populations they serve. Resps. Br. 47-48. There is

no relevant difference, however, between areas and populations served by full power (or Class A) stations and those served by translators that "provide 'fill-in' service to terrain-obstructed areas within a full-service station's service area." *First Digital TV Translator Order*, 19 FCC Rcd at 19334. Preserving the former—which the statute indisputably requires—necessarily means protecting the latter.

It is no answer to say that fill-in translators "are licensed separately from stations whose programming they retransmit." Resps. Br. 47 n.14. The Spectrum Act directs the FCC to protect *licensees*, not licenses. 47 U.S.C. § 1452(b)(2). The licensee of a full-power station uses fill-in translators to cover areas and serve populations within its contour. The protected licensee thus unquestionably would be harmed if it lost the ability to serve these areas and populations with fill-in translators.

The FCC's assertion that protecting translators would be "detrimental" to the auction (Resps. Br. 48) is pure *ipse dixit*. The FCC never states how much of an impact would result, how the FCC reached this conclusion, or what (if any) efforts were made to protect the areas and populations that stations serve with translators.

The FCC states that it will "consider" post-auction steps to "mitigate" the loss of translators (Resps. Br. 48), noting that it initiated a rulemaking to explore options for replacing translators *after* the repacking (*id.* at 48-49). But coverage area and population served must be conserved "[i]n making any reassignments or

reallocations," 47 U.S.C. § 1452(b)(2)—that is, in repacking. Theoretical *post hoc* fixes cannot substitute for complying with the statute.

II. The FCC Violated The APA

A. The FCC Provided Inadequate Notice

Not only is the FCC unable to point to notice in the NPRM that viewers would not be protected against terrain loss, but it admits that "[t]he *NPRM* made clear that the issue of terrain loss was an issue the Commission would be considering in designing the repacking process." Resps. Br. 53. By asking how to "accommodate stations whose coverage areas change as a result of a new channel assignment," *id.*, the NPRM signaled that (a) terrain losses (from new channel assignments) *are* considered changes in "coverage area," and (b) the FCC planned to guard against those changes. There was no warning that the FCC might reverse both positions in the final Order. *Cf. Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1260 (D.C. Cir. 2005) (rule limiting maximum velocity not logical outgrowth of proposal to require minimum velocity).

For notice that the Order might deny protection to unpopulated areas, the FCC first points to the Declaratory Ruling. *See* Resps. Br. 54. But a ruling issued *after* the Order simply cannot provide the required notice. The FCC also asserts that "the question of how to implement the statutory mandate that it preserve cov-

erage area and population served in the repacking process was a significant issue on which it sought comment." *Id.* That will not do: Notice-and-comment rulemaking requires more than reprinting the statute and asking how to comply—particularly when the agency adopts a surprising interpretation, like reading the mandate "preserve . . . the coverage area" out of the statute.

The FCC admits that the NPRM did not indicate that the agency was contemplating changes to the Bulletin's software. *See* Resps. Br. 55-56. Instead, the FCC relies on *OET's* public notice. But, as in *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003), that notice came from an FCC subordinate "which lacks the authority under the Commission's regulations to issue notices of proposed rulemaking." *Id.* at 376. The FCC seeks to distinguish *Sprint* here because OET's notice was issued during an open rulemaking. *See* Resps. Br. 56. That distinction is a red herring: As its name suggests, proper notice must come from a notice of proposed rulemaking. The FCC points to nothing in the NPRM hinting at the *TVStudy* changes. Since "there can be no 'logical outgrowth' of a proposal that the agency has not properly noticed," *Sprint*, 315 F.3d at 376, the adoption of *TVStudy* cannot satisfy APA notice-and-comment requirements.

Even if OET had authority to issue a notice, its notice here fell short. As the FCC admits (*see* Resps. Br. 56), *TVStudy* remains a work-in-progress, frustrating Petitioners' attempts to offer meaningful comment. The FCC feebly responds that

"the outlines and most of the details of the software have long been in public view." *Id.* But for a computer program like *TVStudy*, where each adjustment can mean fewer viewers, "outlines" and "most of the details" are insufficient. The fact that even now the program is undergoing revisions confirms that the FCC is "play[ing] hunt the peanut with technical information, hiding or disguising the information that it employs." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008).

B. The FCC Failed To Consider Reasonable Alternatives

The FCC's defense of the reasonable alternatives it purportedly considered consists largely of *non sequiturs*. *See* Resps. Br. 49-51. The relevant question is whether the FCC considered alternatives that would preserve coverage area and population served for each station, not whether it explained how changes might "improve the accuracy of the analysis." *Id.* at 50. The statute mandates preservation and a fixed standard, not evolving notions of accuracy and improvement.

Similarly, the FCC argues that it explained why computational speed is critical to a successful auction. *See* Resps. Br. 50-51. But it has not explained why improving speed necessitates changing the data sources and altering the software to produce significantly different results for each broadcaster—2010 Census data are faster than 2000 Census data. In rushing to rewrite the statutory standard in the first year of the ten-year auction period, the FCC apparently never considered pro-

ceeding deliberately and using the existing methodology unless "it became clear that the prior software was not up to the task." *Id.* at 33 n.7.

Petitioners have identified two reasonable alternatives for protecting viewers against terrain losses. *See* Pets. Br. 58-59. Apart from dismissing these alternatives as "rhetorical" (Resps. Br. 51), the FCC offers no substantive response. Similarly, with respect to fill-in translators, the FCC points only to a footnote in which it asserted without elaboration that protecting viewers served by those facilities "would have a detrimental impact on the repacking process and on the success of the incentive auction." *Id.* (citing JA__(Order¶242.n.747)). But refusing to protect translators has a detrimental impact on stations' coverage areas and populations served, and the FCC failed to identify any options it considered for protecting those viewers in the repacking.

C. The FCC Failed To Provide Reasoned Explanation For Failing To Preserve All Coverage Areas And Populations Served

The FCC falters in attempting to unearth reasoned explanations in the Order for its refusals to prevent terrain losses and protect unpopulated areas. *See* Resps. Br. 51-52.

On terrain loss, the FCC can only cite to its insistence that broadcasters' concerns are exaggerated and preventing terrain loss would make repacking more difficult. *See* Resps. Br. 51-52. But neither point explains why the Commission chose to minimize new interference while allowing unlimited terrain loss, when

both interference and terrain loss thwart preservation of coverage area and population served.

On unpopulated areas, the FCC's lone attempt to sneak a reasoned explanation into the Order is to cite the Declaratory Ruling. *See* Resps. Br. 51. But that Ruling, issued during this lawsuit, is a transparent attempt "to defend past agency action against attack" and commands no deference. *Christopher*, 132 S. Ct. at 2166. The FCC's response misunderstands *Christopher*. *See* Resps. Br. 43 n.11. The Declaratory Ruling is irrelevant not because it was inadequately considered but because it is not part of the Order, and agency action must be judged "solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

III. The Objections To Sinclair's Arguments Are Unavailing

A. Sinclair's Challenge To The FCC's 39-Month "Go-Dark" Deadline Is Properly Before The Court And Meritorious

1. Sinclair's Challenge Is Justiciable

The FCC and CTIA claim that Sinclair lacks standing to challenge the 39-month "go-dark" deadline because no channel reassignments have yet occurred. Resps. Br. 59; CTIA Br. 21. But, for standing purposes, injury-in-fact need only be "imminent." *Conference Grp., LLC v. FCC*, 720 F.3d 957, 962 (D.C. Cir. 2013). It is certain that some of Sinclair's 162 stations will be repacked and therefore subject to the go-dark deadline. Indeed, Sinclair has determined the minimum

number of its stations that will face repacking if the auction closes. Even at the lowest level of spectrum recovery, at least 14 of Sinclair's stations will be repacked. *See* Add. 45-47.

Given the critical resource shortages identified in the Widelity Report and industry comments, Sinclair cannot complete construction for all of these stations within 39 months. *See Comcast Corp. v. FCC*, 579 F.3d 1, 5-6 (D.C. Cir. 2009) (sufficient injury when FCC unduly restricted opportunity to grow and make economically efficient acquisitions). This is not conjecture, but a certain and imminent injury that will result from the Order. *See New England Pub. Commc'ns Council v. FCC*, 334 F.3d 69, 73-74 (D.C. Cir. 2003) (standing where petitioners "will almost certainly have to modify" rates); *cf. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) (insufficient injury from "highly speculative fear" based on unsupported and unlikely chain of events).[6]

CTIA claims that Sinclair's challenge is unripe—and that Sinclair will have "more than enough time" to challenge the go-dark deadline after the auction. CTIA Br. 21-22. But the Spectrum Act expressly precludes broadcasters from challenging license modifications made in the repacking process. *See* 47 U.S.C.

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[6] The FCC falsely claims that Sinclair's declaration contains "unsupported and conclusory allegation[s]" of injury that cannot establish standing. Resps. Br. 61. But the FCC misrepresents the purported authority, which held only that a court may reject a *complaint's* conclusory allegation where the plaintiff failed to "submit affidavits or other materials in support of the allegation." *Doherty v. Rutgers Sch. of Law*, 651 F.2d 893, 898 n.6 (3d Cir. 1981).

§ 1452(h). Thus, Sinclair *must* raise its challenge now because it cannot do so later. *See Shays v. FEC*, 414 F.3d 76, 95 (D.C. Cir. 2005) (standing where no future opportunity to raise a challenge "will ever occur"). The inability to challenge the go-dark deadline later "pose[s] a significant hardship," that overcomes any "institutional reason" for delay. *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996).

2. The 39-Month "Go-Dark" Deadline Is Arbitrary And Capricious And Violates The Spectrum Act

The FCC and CTIA misrepresent Sinclair's challenge as a general disagreement that 39 months is insufficient for *any* station to complete the transition. Resps. Br. 61-63; CTIA Br. 24. But that is not the point. Here the FCC requires shutdown of existing facilities, knowing that many stations cannot build new facilities within 39 months. This will force many stations off the air, violating both the FCC's duty to "make all reasonable efforts" to preserve coverage areas and populations served for each station whose license is involuntarily modified and the APA. 47 U.S.C. § 1452(b)(2); *see also Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

The FCC acknowledges that even under ideal conditions some stations will be unable to build new facilities within 39 months. Resps. Br. 61-62. But the FCC and CTIA downplay the significance of the deadline, contending the FCC has "provided for those situations" and otherwise "accommodate[d] the unexpected."

Id. at 60-62; *see also* CTIA Br. 22-23. It has not. The Order only allows stations to *apply for* construction permit extensions or temporary facilities, if available, under limited circumstances. JA__(Order¶¶580, 584). But construction extensions do not allow stations to continue broadcasting past 39 months. JA__(Order¶580). And in the unlikely event spectrum is available for temporary facilities, building them requires the same scarce resources that make the deadline unachievable in the first place. *See* Add. 43-44.

Furthermore, the record shows that the 39-month go-dark deadline will impact more than a few highly-complex sites.[7] Widelity identified critical resource shortages and substantial timing obstacles that impact *all* repacked stations. *See* Pets. Br. 68. Indeed, the Report cautions that "the timelines provided are, in our opinion, "best case scenarios" which "do not account for scheduling issues, weather delays or other factors that would possibly impede the completion of each scenario in a timely manner." JA__(Widelity.Report.44.(3037)). The Report did not conclude or imply that the transition can be completed "for most stations in much less time" than 36 months, as the FCC contends. Resps. Br. 62.

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[7] Widelity's complex site case study addressed five stations serving the San Francisco Bay area and concluded that site would take 41 months under a best-case scenario. JA__(Widelity.Report.50-53(3043-46)). This would result in millions of viewers losing over-the-air service from five stations for a minimum of two months.

Moreover, essential suppliers—including the world's leading transmitter manufacturer—warned the FCC that insufficient skilled workers and limits on the ability to quickly ramp up production meant that 39 months was "woefully insufficient" to transition hundreds of broadcast stations. Pets. Br. 68-69. Broadcasters (including Sinclair) echoed those concerns. There was *no* counter-evidence from any manufacturer or supplier, or in the Widelity Report itself, that the timelines presented in Widelity's "case studies" were reasonable estimates of transition timeframes under real-world repacking conditions.

Nonetheless, the FCC argues that it "simply came to a different conclusion" on the evidence and its "predictive judgment" is entitled to deference. Resps. Br. 63 (misquoting *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006)). In *Nuvio*, however, the court deferred to the FCC's chosen deadline when the record plainly showed that a technical solution to meet the deadline already existed. 473 F.3d at 305. The FCC was not requiring parties to do the impossible. Here, the FCC's "predictive judgment" warrants no deference because all of the evidence—from the very industries critical to the transition—shows that the deadline is unachievable. Pets. Br. 68-69. The FCC cannot "escape the requirements that its action not 'run[] counter to the evidence before it' and that it provide a reasoned explanation for its action." *Sinclair Broad. Grp. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002)

(quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Sorenson*, 755 F.3d at 707.

Because the FCC lacks substantial evidence that all stations can transition within 39 months—and admits that at least some stations cannot do so—it fails to meet both requirements. And because the Order compounds this error by forcing broadcasters that cannot meet the FCC's unreasonable transition deadline off the air, the FCC's decision is both arbitrary and capricious and contrary to law. *Id.*; *see also* 47 U.S.C. § 1452(b)(2).

B. Sinclair's Challenge To The FCC's Interpretation Of The "Two Competing Licensees" Requirement Is Properly Before The Court And Supported By The Law And Record

1. Sinclair's Challenge Is Justiciable

In objecting to Sinclair's standing, the FCC cites no legal authority; it simply asserts that "for all that can be known now, there may be two competing bidders in that auction in every conceivable market, however narrowly defined." Resps. Br. 65. But Congress required the FCC to make license-relinquishment payments only when at least two licensees compete, not simply because the possibility of competing bids might exist. Moreover, the FCC will not release the full list of participants until two years after the auction, when no practical remedy for illegal relinquishment payments will exist. JA__(Order¶386).

For purposes of standing, the Court must assume that Sinclair would prevail on the merits of its claim that the FCC's interpretation creates an invalid procurement process. *See Conference Grp.*, 720 F.3d at 962. The invalid process itself creates the cognizable injury. *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002); *see also U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000).

Moreover, Sinclair has standing because the Order inevitably would force repacking of more of Sinclair's stations. Pets. Br. 32-33. CTIA attributes this effect to Congress. CTIA Br. 25-26. Unlike situations where Congress mandates action in the absence of agency action, however (*see Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1133 (D.C. Cir. 2007)), the Spectrum Act does not authorize, much less require, the FCC to expand the scope of repacking by ignoring the Act's limitations, *see* 47 U.S.C. § 1452(b). Sinclair would be harmed as a bidder because non-competitive payments in some markets might prevent the auction from closing, or lead the FCC to not purchase stations in competitive markets. This is precisely why bidders have a justiciable stake in the integrity of an auction. *U.S. AirWaves*, 232 F.3d at 232.

2. Sinclair's Challenge Is Fully Preserved

CTIA argues that Sinclair's challenge is barred by 47 U.S.C. § 405 because Sinclair did not raise it before the Commission. CTIA Br. 26. Not so. CTIA ad-

mits that Sinclair expressly commented on the meaning of "competing licensees." *Id.* Yet CTIA claims that Sinclair's comments were too brief to be considered. *Id.* But even the FCC has not joined that argument. All that is required is that the issue be "teed up" and the FCC afforded a "fair opportunity" to consider the issue. *Time Warner*, 144 F.3d at 79-81. The FCC does not dispute that it was.

Even had Sinclair said nothing, "the FCC's independent contemplation of the issue satisfies § 405's mandate." *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 996 (D.C. Cir. 2013). The FCC *itself raised the issue* by requesting "comment on what constitutes 'competing' for purposes of this requirement"—specifically, whether any two bidders nationwide could be considered to be competing. JA__(NPRM.12446¶256). Sinclair and others responded to this request, and the FCC directly addressed Sinclair's comment in a subsection of the Order discussing the "two competing bidders" requirement. JA__(Order¶415). Thus, Sinclair's challenge is preserved.

3. The FCC's Interpretation Violates The Spectrum Act And The APA

The FCC defends using the same word—"participate"—differently in different contexts. *See* Resps. Br. 66-67. But its cited authority, *Verizon California, Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009), stands only for the proposition that an agency may apply different interpretations to an imprecise word that appears in

two statutory sections with different purposes. That is not the case here. *See id.* (FCC refrained from addressing potentially contradictory interpretation).

The FCC ignores Sinclair's argument that the FCC's interpretation renders "participation" meaningless. Pets. Br. 75-76. CTIA, in contrast, attempts to address this point with an analogy to a Sotheby's auction (CTIA Br. 28) that is nonsensical at best. By CTIA's logic, a man bidding on a vase at Sotheby's "competes" with a woman in another room bidding on a Picasso because both have a budget for art. That is not an auction.

The presence of other potential bidders can only impact competition when bidders know that other potential bidders for the *same item* actually exist. *See* 7A C.J.S. *Auctions & Auctioneers* § 1 (West 2014) ("While . . . there may be instances where only one person actually bids on the property, *to construe such a sale as an auction, the bid must be made in the presence of other potential bidders*.") (emphasis added). Under the reverse auction, in contrast, broadcasters will not know whether they have competition or how much other bidders have offered. And other bidders (if they exist) need not be bidding for the same transaction.

The FCC asserts that "the statute is concerned with competition in the auction, not competition between broadcast stations." Resps. Br. 67. And CTIA contends that licensees do not compete with other licensees in a specific area, but for the proceeds of the forward auction. CTIA Br. 28. But licensees compete to be

selected by the FCC to relinquish spectrum *in a given area, where the FCC needs relinquishments*. They compete only against other licensees that might relinquish spectrum that the FCC could purchase instead. As Sinclair has explained (Pets. Br 76-77), the FCC's interpretation of competition eviscerates this common sense understanding and instead posits that Station A's spectrum in Miami competes with Station B's spectrum in Pittsburgh. The FCC maintains that its (unknown) budget creates price pressure because broadcasters know the FCC cannot afford to buy every station. Resps. Br. 66; *see also* Pets. Br. 78. But a budget is not competition. The FCC's interpretation would allow the auction to proceed if only two stations in the entire country submit compliant applications and only one station accepts a bid.

Finally, the FCC complains that Sinclair has not suggested an alternative construction with which the FCC agrees. *See* Resps. Br. 68. But Sinclair is not tasked with the implementation of Congress's directives; the FCC is. The FCC must design an auction that complies with the Act. If it cannot, it should seek additional authority from Congress. It cannot simply ignore Congress's clear directive as it did here.

CONCLUSION

For these reasons, Petitioners request that this Court grant the petitions for review and vacate so much of the Order as identified in their Opening Brief, as well as the Declaratory Ruling in its entirety.

Dated: January 20, 2015

Respectfully submitted,

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

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7), as modified by this Court's Order dated October 22, 2014, because this brief contains 8,969 words, as determined by the word-count function of Microsoft Word 2003, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2015, I electronically filed the foregoing Joint Reply Brief for Petitioners National Association of Broadcasters and Sinclair Broadcast Group, Inc. with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I also hereby certify that I caused 5 copies to be hand delivered to the Clerk's Office pursuant to Circuit Rule 31(b).

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