

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,  
SINCLAIR BROADCAST GROUP, INC.,**

*Petitioners,*

v.

**FEDERAL COMMUNICATIONS COMMISSION and  
UNITED STATES OF AMERICA,**

*Respondents,*

\_\_\_\_\_  
ON PETITIONS FOR REVIEW OF AN ORDER OF  
THE FEDERAL COMMUNICATIONS COMMISSION  
\_\_\_\_\_

**BRIEF OF INTERVENOR  
EXPANDING OPPORTUNITIES FOR BROADCASTERS COALITION  
IN SUPPORT OF RESPONDENTS IN CASE NO. 14–1179**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND  
RELATED CASES**

Pursuant to D.C. CIR. R. 28(a)(1), Intervenor Expanding Opportunities for Broadcasters Coalition (“EOBC”) states as follows:

**(A) Parties and Amici:**

All parties, intervenors, and amici appearing in this case and the consolidated cases are listed in the Brief for Petitioners. As noted therein and in EOBC’s motion for leave to intervene, EOBC is an Intervenor only in Case No. 14–1179, *Sinclair Broadcast Group, Inc. v. FCC and United States*. See D.C. CIR. R. 15(b) (“A motion to intervene in a case before this court concerning direct review of an agency action will be deemed a motion to intervene in all cases before this court involving the same agency action or order . . . *unless the moving party specifically states otherwise.*”) (emphasis added).

**(B) Rulings under Review:**

References to the rulings under review appear in the Brief for Petitioners.

**(C) Related Cases:**

The three petitions for review that have been consolidated are listed in the Brief for Petitioners. Counsel is not aware of any other related cases.

## **RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to FED. R. APP. P. 26.1 and D.C. CIR. R. 26.1, the Expanding Opportunities for Broadcasters Coalition (“EOBC”) states that it is a non-profit, non-stock corporation organized under the laws of the District of Columbia. EOBC has no parent corporation, and no publicly-held company holds a 10% or greater ownership interest in EOBC. Insofar as relevant to this litigation, EOBC’s general nature and purpose is to advocate the positions of broadcast television stations that wish to ensure the success of the Federal Communications Commission’s planned Incentive Auction to reallocate spectrum from broadcasting to wireless broadband.

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\* No authorities are chiefly relied upon.

## GLOSSARY

EOBC:	Expanding Opportunities for Broadcasters Coalition
FCC:	Federal Communications Commission
NAB:	National Association of Broadcasters
NBP:	National Broadband Plan
NPRM:	Notice of Proposed Rulemaking
OFDM:	Orthogonal Frequency Division Multiplex (digital television technology advocated by Sinclair)
Pet. Add.:	Addendum to Petitioners' Brief
Pet. Br.:	Petitioners' Brief
Spectrum Act:	Middle Class Tax Relief and Job Creation Act of 2012
8VSB:	8-level Vestigial Sideband Modulation (digital television technology adopted by FCC)

## STATUTES AND REGULATIONS

The pertinent statutes and regulations are contained in the Addendum to the Petitioners' Brief.

## COUNTERSTATEMENT

On March 17, 2010, pursuant to a mandate from Congress, the Federal Communications Commission ("FCC") released the National Broadband Plan, *Connecting America: The National Broadband Plan* (Mar. 2010) ("NBP"), available at <http://www.broadband.gov/plan/>. It cited broadband as having the potential to transform "how we educate children, deliver health care, manage energy, ensure public safety, engage government and access, organize and disseminate knowledge." *Id.* at xi. The FCC set a goal of making 300 MHz of spectrum newly available for broadband within 5 years. *Id.* at xii. The NBP urged Congress to give the FCC the authority to conduct "Incentive Auctions." *Id.* at 81-82 (Recommendation 5.4).

On February 22, 2012, Congress implemented the recommendations of the NBP by passing the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, 126 Stat. 156, 201-55 (2012) ("Spectrum Act"). On September 28, 2012, the FCC proposed rules to conduct such an Incentive Auction. *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd. 12357 (2012) ("NPRM") (JA \_\_\_\_).

On June 2, 2014, the FCC released its Report and Order adopting some, but not all, of the rules to govern the planned auction. *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 (2014) (the “Order”) (JA \_\_\_\_). In the Order, the FCC stressed that “by making more spectrum available for mobile broadband use, the incentive auction will benefit consumers by easing congestion on the Nation’s airwaves, expediting the development of new, more robust wireless services and applications, and spurring job creation and economic growth.” *Id.* at 6570 (JA \_\_\_\_).

As discussed *infra* at pages 5-6, Petitioner Sinclair fundamentally opposes the Incentive Auction as a policy matter. It is unclear whether other broadcasters for whom Petitioner National Association of Broadcasters (“NAB”) speaks would support an Incentive Auction if their concerns about the repacking rules could be addressed to their satisfaction. No such uncertainty exists, however, with respect to the EOBC.

EOBC is comprised of more than eighty television stations open to considering the possibility of selling some, or all, of their spectrum usage rights in the Incentive Auction. EOBC’s members include numerous longtime broadcasters. After due consideration, some, perhaps many, EOBC member stations will decide not to participate in the auction and instead will be “repacked” along with other broadcasters. Other EOBC Members will participate in the auction, but not “win,”

and they also will be repacked. Still other EOBC Members will participate and win – at which point they will implement plans, currently being developed, either to exit the business or to find other means to continue broadcasting through, for example, a channel-sharing agreement with another station.

What all EOBC member stations have in common is good faith business reliance on the FCC's stated intention to move forward with the Incentive Auction on a publicly announced timetable. Because TV broadcasters have ongoing businesses, building leases, tower leases, advertising contracts, programming contracts, and other long-term business arrangements, considering participation in the auction requires extensive advance planning. Channel-sharing agreements, favored under the Incentive Auction policy, involve particularly complex legal and technical details that are challenging to negotiate.

EOBC is concerned with the possibility of efforts to delay the auction that would undermine the good faith reliance of EOBC members, particularly threatening to the extensive work already done exploring potential channel sharing, which efforts are time-sensitive and difficult to salvage if the auction is delayed. The mere pendency of this appeal has caused the FCC to postpone the start of the auction. *See Gary Epstein, Incentive Auction Progress Report, Official FCC Blog*

(Oct. 24, 2014, 10:59 am), *available at* <http://www.fcc.gov/blog/incentive-auction-progress-report>.<sup>1</sup>

### **ARGUMENT SUMMARY**

Sinclair's real complaint is with the policy choice for an Incentive Auction and not with the FCC's implementation of the choice Congress made. Sinclair's appeal is part of its longstanding advocacy neither to reallocate nor to auction broadcast spectrum. The FCC properly concluded that the two competing participants requirement in the Spectrum Act is satisfied if two independently controlled stations anywhere in the nation submit a complete and rule-compliant application evidencing that they might submit a bid to relinquish their spectrum. The post-auction transition period reasonably balances the competing public interest objectives of preserving television service and expediting the introduction of new wireless service on reclaimed spectrum.

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<sup>1</sup> For reasons of industry comity, EOBC, whose membership includes NAB members, intervened in only the Sinclair case and limits its argument to Sinclair's separate arguments. EOBC joins the arguments in Respondents' Brief addressing Sinclair's standalone issues, including Respondents' contention that Sinclair lacks standing to raise its separate claims. In the event the Court reaches the merits, EOBC briefly adds its own response, primarily for emphasis. Notwithstanding its limited argument, EOBC urges the Court to affirm, without limitation, the FCC's Order.

## ARGUMENT

### SINCLAIR'S SEPARATE CHALLENGES PRESENT NO BASIS FOR THE COURT TO INTERFERE WITH THE FCC'S INCENTIVE AUCTION

#### A. Fundamental Policy Disagreement

In 2009, the industry and the FCC agreed to transition analog television broadcasting to a new digital transmission standard called 8VSB. At the time Sinclair had a different vision. It strongly advocated for an OFDM-based digital standard rather than 8VSB. *See* Mark Ribbing, *Sinclair Tries To Change Future Of TV*, BALT. SUN, July 4, 1999, *available at* [http://articles.baltimoresun.com/1999-07-04/business/9907030311\\_1\\_tv-signals-sinclair-broadcast-group-digital-tv](http://articles.baltimoresun.com/1999-07-04/business/9907030311_1_tv-signals-sinclair-broadcast-group-digital-tv). In the current controversy, Sinclair again has a different vision – this time disagreeing with the policy choices that Congress made in the Spectrum Act.

A report that Sinclair commissioned, BUSINESS ANALYTIX, INC., THE ECONOMIC VALUE OF BROADCAST INNOVATION – IMPACT ON THE U.S. TREASURY (Nov. 2011), *available at* <http://www.sbgi.net/reports/The-Economic-Value-of-Broadcast-Innovation-1.pdf>, argued that “[r]eallocating and auctioning television broadcast spectrum [the exact policy choice Congress made in the Spectrum Act] would throttle innovation, permanently institutionalize today’s policy choices, and limit the development of a more varied and robust wireless ecosystem.” *Id.* at 1. Although it claimed that it accepted Congress’ policy choice, Sinclair continued to press its different vision below. In its initial Comments, Sinclair described the

mandate of the Spectrum Act and then stated “Sinclair believes other possible solutions would have better served all stakeholders.” Comments of Sinclair Broadcast Group, Inc., Docket No. 12-268, at 2 (filed Jan. 25, 2013) (JA \_\_). And, Sinclair described the Congressional plan as “suboptimal.” *Id.* Over and over, Sinclair argued that the FCC should delay the Congressionally-mandated auction until it could be synched up with Sinclair’s hoped-for new broadcast transmission standard. Sinclair’s goal was “a more robust television broadcast service” – a policy goal not included in the Spectrum Act. *Id.* at 3 (JA \_\_).

### **B. Two Competing Participants Interpretation**

Consistent with its fundamental opposition to an Incentive Auction as a policy matter, Sinclair argues here, and before the FCC briefly advocated for, an interpretation of the Spectrum Act’s requirement of two competing participants, under which, Sinclair claims, there must be two TV station bidders in a market before the FCC may accept bids in that market to relinquish spectrum. The FCC reasonably concluded that since all bidding stations are bidding for payments from the same nationwide pool of dollars, it would accept bids so long as there are at least two independently controlled stations in the auction, without any further requirement that these stations compete with each other in providing television service. The FCC also noted the nationwide interconnected nature of the TV station repacking process. Order, 29 FCC Rcd. at 6743 (JA \_\_).

In some markets the FCC will be able to get the needed spectrum just by repacking the existing stations. In those markets the FCC will not need to buy out any broadcast stations. In other markets the FCC will need to buy one station. In still other markets the FCC will need to buy more than one station. Sinclair's two-bidder interpretation is simply an attempt to "pour sand in the gears" of the auction process by making it harder for the FCC to clear spectrum, if not impossible – for example, in a market where there is an otherwise qualified and willing TV station bidder in the reverse auction, but it is the only such station in the market.

The FCC has protected itself against the possibility of uneconomic station bids by adopting the descending clock format for the reverse auction. In this format, it is the FCC that makes bids to the stations, including the initial bid or reserve price, rather than the stations making bids to the FCC. *Id.* at 6752-55, 6758 (JA \_\_\_-\_\_\_, \_\_\_). These reserve prices will set "the maximum amounts that will be offered to each potentially eligible broadcast licensee." *Id.*

The Spectrum Act is silent on the question whether competition should be defined by reference to competition to receive payments from the proceeds of the forward auction or by some other reference, for example, competition within a local market to provide television service. A number of parties argued below for the former interpretation. *Id.* at 6743 & n.1226 (JA \_\_\_). Sinclair argued for the

latter. *Id.* at 6743 & n.1228.<sup>2</sup> The FCC chose the interpretation it found was more conducive to the Spectrum Act's ultimate purpose – “to allow market forces to determine the highest and best use of spectrum.” *Id.* at 6743. This was a reasonable and permissible choice for the Commission to make under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

### **C. Post-Auction Transition Period**

In deciding on a post-incentive-auction transition period, the FCC had to accommodate the different public interest objectives of preserving broadcast television service with minimum disruption to viewers and allowing wireless providers to begin their new service on the reclaimed spectrum as expeditiously as possible. Order, 29 FCC Rcd. at 6796 (JA \_\_\_).

The FCC initially suggested in the NPRM an 18-month deadline after the conclusion of the incentive auction. NPRM, 27 FCC Rcd. at 12464 (JA \_\_\_); *see* Order, 29 FCC Rcd. at 6797 (JA \_\_\_). Some wireless carriers supported an 18-

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<sup>2</sup> Sinclair renews in passing (Pet. Br. 76) its further argument below that even where two licensees in the same local market submit a pre-auction application to bid in the reverse auction and those applications are complete and comply with the application rules, the auction participation requirement is not satisfied unless a licensee follows through and actually submits a bid. The Commission properly rejected Sinclair's proposed interpretation of the statutory term “participate,” concluding, instead, that it is enough that a party evidences it “might bid” because knowledge of this possibility creates “competitive pressure for a second bidder to accept lower incentive payments than it would” absent that knowledge. Order, 29 FCC Rcd. at 6742 (JA \_\_\_).

month deadline. Order, 29 FCC Rcd. at 6799 & n.1602 (JA \_\_). A number of broadcast parties, including petitioner NAB, advocated a 30-month construction deadline, and other broadcasters argued for 36 months. *Id.* at 6799-6800 & n.1604. The FCC responded by adopting a 39-month deadline after the release of the Channel Reassignment Public Notice for a station to cease operating on its pre-auction channel. *Id.* at 6796 (JA \_\_\_\_). Within that 39-month period, the Media Bureau will establish a phased construction schedule with the assignment of varying construction deadlines for the individual stations required to modify their facilities by the repacking process. *Id.* A station which is unable to meet its assigned construction deadline, despite the Media Bureau's best efforts to tailor the deadline to the station's individual circumstances, may seek an extension of up to six months. *Id.* at 6804 (JA \_\_). If construction cannot be completed by the end of the 39-month deadline for ceasing operation on a station's pre-auction channel, the station may request authority to operate on temporary facilities. *Id.* at 6800, 6806 (JA \_\_, \_\_).

The FCC noted that 36 months to complete construction after applying for a construction permit for post-auction facilities matches the time under existing rules for completing construction of new or modified facilities after a construction permit is granted, including cases "where construction is complicated or especially challenging." *Id.* at 6800. The FCC further noted that a 36-month construction

period “closely coincides” with the period specified in the Spectrum Act for reimbursing broadcasters for their expenses resulting from repacking and thus “will best ensure that stations are successfully reimbursed for their reasonably incurred expenses.” *Id.*

The foregoing demonstrates that the FCC has reasonably exercised its responsibility to consider the relevant factors and arrive at a result that, in its expert judgment, gives stations “the time they need to complete construction while making spectrum available for new uses as rapidly as possible.” *Id.* at 6797 (JA \_\_\_\_). *Motor Vehicles Mfrs. Assn. of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42-43 (1983); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002).

## CONCLUSION

For the foregoing reasons, Sinclair's petition for review should be dismissed in part, and to the extent it is not dismissed, it should be denied, and the FCC's Order affirmed.

Respectfully submitted,

/s/ Preston R. Padden

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December 23, 2014

**CERTIFICATE OF COUNSEL**

Pursuant to FED. R. APP. P. 32(a)(7)(C) and D.C. CIR. R. 32(a)(2)(C), I hereby certify:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 2169 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman typeface.

/s/ Preston R. Padden

Preston R. Padden

Attorney for Expanding Opportunities for  
Broadcasters Coalition

Dated: December 23, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on December 23, 2014, I caused the foregoing Brief of Intervenor Expanding Opportunities for Broadcasters Coalition in Support of Respondents in Case No. 14-1179 to be electronically filed with the Clerk of the U.S. Court of Appeals for the D.C. Circuit using the CM/ECF system, which will send notice of such filing to all parties that have entered an appearance in this action. I also certify that I caused five paper copies of the Brief to be hand delivered to the Clerk of the Court.

Respectfully submitted,

/s/ Preston R. Padden

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