

Oral Argument Not Yet Scheduled

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

On Petitions For Review Of Orders Of
The Federal Communications Commission

**MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE
OF THE
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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**MOTION FOR LEAVE TO PARTICIPATE
AS AMICUS CURIAE**

Pursuant to Federal Rule of Appellate Procedure 29(b) and Circuit Rule 29(b), the Telecommunications Industry Association (“TIA”) respectfully moves the Court to grant this Motion for Leave to Participate as *Amicus Curiae* (“Motion”) in support of Respondents in the above-captioned matters, and to consider the accompanying *amicus curiae* brief.

Petitioners National Association of Broadcasters (“NAB”) and Sinclair Broadcast Group, Inc. (“Sinclair”) have not consented to TIA’s participation as *amicus curiae*. Furthermore, at NAB’s request, TIA advises the Court that NAB plans to file a response opposing this Motion.

A. TIA’s Interest in the Matters Under Review

TIA is the leading trade association representing the manufacturers and suppliers of information communications technology (“ICT”) products and services. TIA member companies develop, manufacture, and supply routers, data switches, cabling, cell phones, tablets, and other products to individual consumers, communications service providers, corporations, and governments. TIA and its members work regularly with various agencies, most notably the Federal Communications Commission (“FCC”) and its Office of Engineering and Technology (“OET”), on issues regarding rules and standards for ICT equipment.

TIA is concerned that the relief sought by Petitioners would substantially delay or disrupt the FCC's plans to conduct the voluntary incentive auction. Since demand for wireless broadband is growing rapidly – and since ICT products and services will be used to deploy new wireless networks and services following the auction – American consumers, the ICT industry, and broadband innovation generally would all be harmed by any such delay or disruption. TIA is also concerned that Petitioners' misreading of the Administrative Procedure Act ("APA") and the specific statute governing the auction would prevent the Commission from performing the routine and necessary software updates which are essential to successfully conducting the auction.

B. TIA's Accompanying Brief Will Assist the Court and Provide Context Not Addressed in Either Principal Brief.

In its accompanying brief, TIA addresses three main issues not addressed by either principal brief. *First*, TIA provides context for the Court regarding the broader importance of the voluntary incentive auction that is the subject of the Petitions for Review. TIA explains the urgent need for more commercial mobile spectrum, discusses very recent developments in the spectrum marketplace reflecting that urgency, and the importance of the voluntary incentive auction to the telecommunications marketplace and American consumer. TIA describes the FCC's work thus far in implementing this first-of-its kind auction, and explains why any delay in conducting the voluntary incentive auction – as would result if

the Court grants Petitioners the relief they request or if the Court delays resolving the issues in this case – would have significant harmful effects for consumers and for industry.

Second, TIA's brief provides contextual details regarding the Longley-Rice methodology that is the subject of the key statutory provision at issue in this case. TIA explains why the use of radio propagation modeling is necessary as a matter of engineering, provides historical context demonstrating the Longley-Rice methodology is an algorithm that exists independently of any particular software implementation, and addresses the history of the specific OET bulletin at issue in this case.

Third, TIA's brief provides the Court with context regarding the process OET used to seek input on the *TVStudy* software to which Petitioners object. TIA argues that when an agency acts as a software developer, software revisions that merely implement a prescribed methodology are not subject to APA notice-and-comment requirements. TIA further explains why the processes that OET actually used for obtaining public feedback regarding *TVStudy* were appropriate.

The issues above are not addressed, or insufficiently addressed, in the principal briefs. First, petitioners do not address marketplace developments at all, and Respondents address the topic only briefly (Resp. Br. at 5). Second, neither principal brief provides information explaining the general need for computer-

based radio propagation modeling, nor offers any relevant history of the Longley-Rice methodology at issue here. Third, while Respondents do briefly address Petitioner's APA notice claim regarding *TVStudy* (Resp. Br. at 55-56), TIA's brief provides significant additional context regarding revisions to software that implements a prescribed methodology.

C. Petitioners Will Not Be Prejudiced if the Motion is Granted.

First, TIA is filing this Motion and the accompanying brief timely and in conformity with Federal Rule of Appellate Procedure 29(e). The Motion and accompanying brief are being filed on December 23, one day before the briefs for Intervenors are due under the Court's scheduling order, so there will be no material change regarding Petitioners' ability to promptly consider and respond to issues and arguments raised in the accompanying brief. Petitioners' reply brief is not due until January 20, four weeks after the filing of this Motion.

Second, the accompanying brief is significantly shorter than what is authorized under the rules. Federal Rule of Appellate Procedure 29(d) authorizes an *amicus* brief of up to 7,000 words, but the accompanying brief is just 3,988 words. Moreover, significant portions of the accompanying brief are devoted to providing additional factual context to help inform the Court's review, and TIA does not anticipate that any party would devote significant space towards rebutting any or all of the factual information presented by TIA.

Third, TIA is unaware that any other amicus briefs will be filed. Therefore, granting this Motion will not open the floodgates to other *amicus* briefs that may simply be repetitive of the arguments raised in briefs already filed.

Fourth, all parties agree on the importance of expediting this matter, and the Court has entered orders to that effect. But granting this Motion would in no way delay the proceedings. Petitioners' Reply Brief is not due until January 20, and the Court can presumably adjudicate this Motion quickly even if a response is filed.

CONCLUSION

For the foregoing reasons, TIA respectfully moves the Court to grant this Motion. Even if the Motion is not granted, TIA nevertheless urges the Court to schedule oral argument and to adjudicate the underlying Petitions for Review as quickly as possible following the submission of final briefs on January 27.

Respectfully submitted,

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici: The parties in these consolidated cases (No. 14-1154, 14-1179, and 14-1218) are Petitioners the National Association of Broadcasters (“NAB”) and Sinclair Broadcast Group, Inc. (“Sinclair”); Respondents the Federal Communications Commission (“FCC” or “Commission”) and the United States of America; and Intervenors CTIA – The Wireless Association, the Competitive Carriers Association, and the Consumer Electronics Association.

There are no *amici* currently participating in these cases. In the foregoing Motion, the Telecommunications Industry Association (“TIA”) requests leave to participate as *amicus curiae*.

Rulings Under Review:

- (1) Report and Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd. 6567 (2014) [JA __]
- (2) Declaratory Ruling, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 12,240 (2014) [JA __]

Related Cases: Three cases (listed above) have been consolidated in this Court. TIA is not aware of any other related cases pending before this Court or any other Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, the Telecommunications Industry Association ("TIA") states as follows:

TIA is a nonprofit, incorporated association of manufacturers and suppliers of information communications technology ("ICT") products and services. It has no parent company, and has not issued any shares or debt securities to the public; thus no publicly held company owns ten percent or more of its stock. As a continuing association of numerous organizations operated for the purpose of promoting the interests of its membership, TIA is a trade association for purposes of D.C. Circuit Rule 26.1.

CERTIFICATE REGARDING AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), TIA certifies that no party's counsel authored this Motion or the accompanying brief, in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting this Motion or the accompanying brief; and that no person other than TIA contributed money that was intended to fund preparing or submitting this Motion or the accompanying brief.

CERTIFICATE OF SERVICE

I, Dileep S. Srihari, hereby certify that on December 23, 2014, I electronically filed the foregoing Motion for Leave to Participate as *Amicus Curiae* of the Telecommunications Industry Association, along with the accompanying proposed brief, with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM / ECF system. I also hereby certify that I caused 5 copies of this Motion to be hand delivered to the Clerk's Office pursuant to Circuit Rule 27(b). Participants in the case who are registered CM / ECF users will be served by the CM/ECF system:

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