

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Comment Sought on Competitive Bidding)	
Procedures for Broadcast Incentive Auction)	AU Docket No. 14-252
1000, Including Auctions 1001 and 1002)	
Expanding the Economic and Innovation)	
Opportunities of Spectrum Through)	GN Docket No 12-268
Incentive Auctions)	

COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

Sinclair Broadcast Group, Inc. (“Sinclair”) submits these comments in response to the Wireless Telecommunications Bureau’s (“WTB”) December 17, 2015, Public Notice seeking comment on certain issues related to possible 600 MHz band plan configurations.¹

I. The Comment PN’s Proposed Approaches to Market Variation and the Initial Clearing Target Will Hinder a Successful Auction and Are Inconsistent with the Spectrum Act.

Sinclair has opposed market variation from the outset,² and continues to oppose market variation. The National Association of Broadcasters’ (“NAB”) numerous filings addressing this issue explain why market variation is problematic for virtually all stakeholders.³ Market variation introduces enormous uncertainty for prospective reverse and forward auction participants alike, and will inevitably depress participation on both

¹ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*, Public Notice, GN Docket No. 12-268, AU Docket No. 14-252, FCC 14-191 (rel. Dec. 17, 2014) (“*Comment PN*”).

² See Comments of Sinclair Broadcast Group, Inc., GN Docket No. 12-268 (filed June 14, 2013).

³ See, e.g., Reply Comments of NAB, GN Docket No. 12-268 (filed Mar. 12, 2013); Comments of NAB, GN Docket No. 12-268 (filed June 14, 2013); Reply Comments of NAB, GN Docket No. 12-268 (filed June 28, 2013); Comments of the NAB, GN Docket No. 12-268, ET Docket No. 13-26, ET Docket No, 14-14 (filed Jan. 21, 2015); Reply Comments of NAB, GN Docket No. 12-268, ET Docket No. 13-26, ET Docket No. 14-14 (filed Feb. 5, 2015).

sides. It will likely lead to encumbered guard bands (including, potentially, the duplex gap), making those bands useless for unlicensed service in some of the very markets that are most critical to achieving economies of scale and a seamless user experience, and where additional unlicensed spectrum is most needed. It will introduce unnecessary interference between and among wireless, broadcast, and unlicensed users, limiting the full service potential of the 600 MHz band and setting the stage for a new era of complex interference disputes. And critically, it will lead to hundreds of LPTV and translator stations being displaced, and likely put out of service altogether, in thinly populated areas where there is *no* need for additional wireless spectrum and no replacement for the local broadcast services that will be extinguished. As Sinclair has explained, the net effect is the elimination of services that people rely on today in order to provide more wireless capacity where it is not needed at all.⁴

Thus Sinclair has always believed that market variation is a bad policy choice. But if used at all, market variation should be applied to the limited scenario it was intended to address: the possibility that lack of broadcaster participation in one market could unduly constrain the amount of spectrum that could otherwise be repurposed nationally.⁵ The FCC refers to this as the “least common denominator” problem. In deciding to resort to market variation, the Commission nevertheless committed to using it sparingly so as to create a band plan that is at least “near nationwide.”

But the *Comment PN* proposes to reverse course. Market variation is no longer a tactical tool for addressing the “least common denominator” problem, if that problem

⁴ See Comments of Sinclair at 3.

⁵ See, e.g., *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6593 ¶ 29 (2014) (“*Incentive Auction R&O*”).

should even emerge after initial broadcaster participation is tallied. Instead, it is a critical element in a sweeping strategy to clear the largest amount of broadcast spectrum possible without regard to the consequences. Rather than establishing an initial clearing target rationally based on all available information prior to the first stage of the auction, and then resorting to market variation if the need is indicated because of a short market, the FCC has skewed everything towards setting the clearing target as high as possible and without regard to whether that amount of spectrum can be cleared “near nationwide.”

No longer a pragmatic solution to a potential outlier short market, the FCC now proposes to use “market variation” as a moniker for a mathematical trick. After the FCC tallies initial broadcaster participation, it proposes to set the most aggressive clearing target based on that participation, and then juice up that target even further with its “market variation” allowance. It will achieve that target by systematically placing broadcasters in the post-auction wireless band, beyond the protection of OET-69.

This is a far cry from a tool to prevent one market from constraining the national band plan. And while a near nationwide band plan is one possible outcome of the FCC’s proposed approach, a national (or near national) band plan has plainly been discarded as a priority.⁶ The extent of market variation under the FCC’s formula, which values people in some cities far more than those in others, is potentially vast, and far more likely to yield a “Swiss cheese” plan than a near national one. Large areas of the country and spectrum covering far more than 20% of the population could be “impaired.”

This should be highly problematic from the perspective of would-be forward auction bidders. But they, at least, have the option of sitting out the auction, simply not

⁶ The FCC has reserved the option to reclaim large amounts of spectrum in markets even where demand is low, but cannot now assert it is doing so in pursuit of a nationwide band plan.

bidding for impaired blocks, or offering little for them. It is infinitely more problematic, and potentially catastrophic, for broadcasters that end up assigned to the wireless band because of the FCC's over-reaching market variation formula. Market variation has morphed from a targeted solution to a specific, potential problem into a form of clearing target alchemy that will wreak havoc on dozens or hundreds of broadcast and wireless licensees and the people they serve, while casually eliminating hundreds of LPTV and translator stations.

Market variation in the form proposed in the *Comment PN* does not comply with the FCC's obligation under the Spectrum Act to use all reasonable efforts to preserve broadcast coverage area and population served as determined by OET-69. It is one thing for the FCC to provide for repacking of stations in or adjacent to the wireless bands in extraordinary or unforeseeable cases.⁷ It is quite another thing for the FCC to design an auction that institutionalizes stranded broadcast stations – stations whose present and future coverage cannot be determined according to OET-69 – as fixtures of the spectrum landscape. This simply does not comply with the Spectrum Act's "all reasonable efforts" mandate.

The FCC must reject the proposed approach to market variation. And having apparently abandoned the "least common denominator" concern used to justify market variation in the first place,⁸ the Commission should reject market variation altogether.

The logic that supported market variation in the first place is no longer valid. If the goal

⁷ After all, the auction is complex and some predictions will not pan out in the real world. It is for precisely this reason that Sinclair urged the Commission to include some margin for error when running repacking scenarios, because some errors in prediction are inevitable, and the FCC will need margin to address them. Comments of Sinclair Broadcast Group, Inc., GN Docket No. 12-268 (filed Jan. 25, 2013).

⁸ If the FCC's market variation approach ends up correcting for a short market, it will only do so fortuitously and incidentally to the main task of exaggerating the clearing target.

is now to maximize the clearing target rather than to have a failsafe for a short market, the FCC *must* consider reasonable alternatives to achieving that goal – alternatives that do not place broadcast stations beyond the protection of OET-69.⁹

The FCC should not set a higher clearing target than the market itself would dictate or otherwise resort to measures that would result in the systematic placement of broadcasters in the wireless band. Certainly, it is not permitted to do so unless and until it has ruled out other alternatives. And even then, it must use all reasonable efforts to minimize the number of stations that are forced to operate out of band. For all of these reasons the FCC should reject the proposed approaches to market variation and setting the clearing target.

II. The FCC’s Proposal to Use Dynamic Reserve Pricing and Hide All Information About Bidding Competition Puts the Auction at Risk and Is Inconsistent with the Spectrum Act.

At the outset we note that it is impossible to discern from the face of the *Comment PN* what real and legitimate purpose the FCC intends Dynamic Reserve Pricing (“DRP”) to serve. The FCC’s explanation is inconsistent. For example, paragraph 106 suggests that DRP might provide higher winning payments to broadcasters while simultaneously saying DRP would lead to a “reduction in payments to broadcasters.”

Whatever the rationale (and Sinclair submits that the FCC cannot adopt a DRP rule without first providing a clear rationale), DRP is inconsistent with the FCC’s

⁹ To date, the FCC has not done so. It is indisputable that many factors beyond variability in broadcaster participation affect what is a reasonable nationwide clearing target. These include, among other things, many factors directly within the FCC’s control (e.g., the decision to pair all forward auction blocks, the amount of non-yielding spectrum (guard bands and the duplex gap), the timing of the auction) and other factors the FCC can influence, or at least ascertain and account for, in advance of the auction (i.e., border coordination). The FCC can also mitigate the “problem” of unequal supply in other ways, including by offering greater incentives in constrained markets to increase the supply. (We discuss below how Dynamic Reserve Pricing creates exactly the wrong incentives.)

obligation under the Spectrum Act to conduct a competitive auction. The problems with DRP are greatly compounded by the FCC's decision not to release *any* information to reverse auction participants other than the bid the FCC is then proposing – a bid that can evaporate even after being accepted. And the problems are compounded further by the FCC's previous decision that it can purchase broadcast spectrum rights via the “auction” from one broadcaster even when no other broadcaster with substitutable spectrum is participating.

In adopting the Spectrum Act, Congress authorized the FCC to conduct incentive auctions if, and only if, two competing licensees participate.¹⁰ The express purpose of this requirement is price discovery: Congress wanted the market, not the FCC (or bargaining between the FCC and a licensee) to establish the price for relinquishment incentive payments. Notably, Congress was not writing on a blank slate when it adopted the Spectrum Act. It was modifying the statute under which Congress had already given the FCC authority to conduct spectrum auctions. Unlike the FCC's reverse auction authority, its general auction authority does not expressly prohibit the FCC from closing auction transactions when only one bidder participates. The FCC is permitted to conduct reserve price spectrum auctions and close the auction when the reserve price is met, regardless of whether two or more bidders are participating.

But Congress foreclosed that authority with respect to reverse auctions. The FCC's reverse auction authority is specifically constrained by Congress to ensure that the market, not an arbitrary reserve price established by the FCC, sets the value of the

¹⁰ 47 U.S.C. § 309(j)(8)(G)(ii).

transaction.¹¹ No reasonable construction of the Spectrum Act permits the FCC to pay a licensee to relinquish spectrum usage rights at an arbitrary price set by the FCC itself, rather than by a competitive market. The so-called “Dynamic Reserve Price” is not a reserve price at all. It is a euphemism for one-off offers to individual stations at prices the FCC sets *with the intention of closing transactions at those FCC-established prices rather than at the price of a reverse bid that might be accepted by any qualified bidder.* When the FCC makes a one-off offer, by definition, the price is not set by an “auction” at all – even if an “auction” is underway with respect to other spectrum transactions.¹² The prospect of the FCC making a one-off offer that by definition is lower than the market price (established by the “market” the FCC itself designed!) to an individual station, under threat of banishing that station to the wireless band should it reject the offer, should set off alarms for all stakeholders who are counting on a successful, and legal, auction.¹³

Although the FCC’s approach to the incentive auction is complex, the agency cannot lose sight of fundamentals. It must conduct an auction. Reverse auction prices must be established by actual competition, not by “dynamic reserve” prices the FCC dictates (without accountability). The FCC does not have authority to negotiate prices for spectrum relinquishment.

¹¹ To be clear, we do not suggest that the FCC may not establish a reserve price in a competitive reverse auction. But it must be an actual, published reserve price and the auction itself must be competitive. Under the process proposed in the *Comment PN*, the FCC would not actually adopt a reserve price – it simply reserves the right to reject a transaction after the FCC’s own bid has been accepted. In a true reserve price auction, once the reserve price has been met, the transaction closes at the final bid price that is accepted.

¹² By pointing out that a DRP offer is plainly not made pursuant to an auction, we do not concede that the procedures outlined in the *Comment PN* would constitute a competitive auction as intended by Congress, even without DRP.

¹³ The language the FCC uses to describe DRP is telling. DRP means that after a bid is accepted, the FCC will present the station with a “*price offer* that is lower than the opening price it committed to accept and *ask if it is willing to accept the lower price.*” The station may then “*accept the offered price*” *Comment PN* ¶ 112 (emphasis added). This is classic bilateral offer and acceptance, not an auction.

The Report and Order adopted a construction of “two competing participants” that does not require actual price competition between competing sellers.¹⁴ The *Comment PN* goes much further, proposing to hide from participating broadcasters the very information that helps competitors find the market price.¹⁵ No broadcaster knows if any other broadcaster is willing to sell, or at what price. Each bidder will see the price the FCC is notionally offering to that broadcaster at that point in time, and nothing else at all. And the FCC is not bound to that bid, even if that bid is accepted and the Final Stage Rule is satisfied. The FCC can reject what would otherwise be a provisionally winning bid – a bid the FCC itself offered in the first instance. In other words, the FCC will offer broadcasters prices, which they can accept or reject, and the FCC can still lower the offered price.

For all of its complexity, what the FCC proposes in the *Comment PN* is not an auction at all. It is a highly complex system for the FCC to use in managing hundreds of simultaneous, private, one-on-one negotiations. The proposed approach cannot possibly yield a market price, because the FCC is determined to hide *all* information needed for a market to function and to close transactions at FCC-dictated “take it or leave it” prices offered to individual stations. The FCC does not have authority to close transactions based on such offers. In fact, Congress specifically proscribed that power. Congress intended for *market competition* to hold the FCC (and other auction participants) accountable. But the FCC previously rejected any obligation to have actual competition.

¹⁴ See *Incentive Auction R&O* ¶¶ 413-415.

¹⁵ Information about competing bids is key feature of electronic reverse auctions and a primary factor in finding the market price in such auctions. See Moshe E. Shalev and Stee Asbjornsen, *Electronic Reverse Auctions and the Public Sector: Factors of Success*, JOURNAL OF PUBLIC PROCUREMENT, Vol. 10, Issue 3 at 430 (2010) (“By revealing the competing bids in real time to each participating supplier, [electronic reverse auctions] promote ‘information transparency’. This, coupled with the dynamic bidding process, improves the chances of reaching the fair market value of the purchase.”).

The *Comment PN* proposes now to entirely eliminate the notion of a “market”. The FCC will conduct private negotiations and even then reserves the right to coerce stations with an offer they cannot refuse: accept a price lower than the negotiated price, or be stranded by the FCC in the far reaches of the wireless band.

Even if DRP were permitted under the Spectrum Act, it is a bad idea. It sows distrust among broadcasters who are already rightfully wary of the auction. It will result in stations avoiding participation in the auction for the very legitimate fear of having a higher risk of being assigned to the wireless band in repacking. As discussed above, it will exacerbate market variation, creating an unstable band plan that harms broadcasters, wireless operators, unlicensed device providers, and the hundreds of millions of people who rely on these services. The FCC should reject DRP, and should ensure a competitive auction that reflects market prices by giving reverse auction bidders at least the same information regarding the market as is made available to forward auction bidders.¹⁶

III. The FCC Must Adopt Auction and Repacking Rules That Ensure Basic Fairness.

The proposed closeted, non-market approach to the process that is an “auction” in name only should be rejected out of hand. But should the FCC pursue any process that involves (i) one-on-one transactions; (ii) no release of information about competition, bidding or prices needed to create a market, and (iii) the coercion of banishment to the wireless band for stations that spurn the FCC’s entreaties to participate in the first place, or that refuse to allow the FCC to renege on a deal, it must consider and address the likely and possible consequences of those choices. The FCC should seek public

¹⁶ No one would argue that the FCC should conduct the forward auction without providing any market information to the bidders, while reserving the right to reject winning bids if forward auctions bidders refuse to pay a higher reserve price the FCC determines in its sole discretion.

comment on appropriate protections. But they should include at least the two protections described below.

First, if the FCC intends to place broadcast stations in the wireless band, it must expressly require that all television receivers continue to be capable of receiving any channel used by any broadcaster in those bands with the same performance applicable to in-band stations. Second, the FCC must adopt auction rules that prevent commonly owned stations (broadcast groups) from disproportionate harm in repacking. Under the process proposed, broadcasters must accept on blind faith that the FCC will conduct a fair and honest “auction”, even knowing that broadcasters do not have the right to challenge license modifications. The FCC should thus adopt rules that will ensure objective fairness. For example, the FCC should take steps (such as modifying the constraint files, or some other means) to ensure that no broadcast group has a significantly disproportionate number of stations repacked into the wireless band, or a disproportionate number of stations otherwise repacked post-auction.

For the reasons explained above, the FCC should reject the proposed approaches to market variation, the clearing target, and Dynamic Reserve Pricing, and must adopt auction rules to ensure basic fairness.

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