

May 14, 2015

**FILED VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Attn: Chief, Incentive Auction Task Force

*Re: Docket No. 12-268, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*

Dear Ms. Dortch:

On behalf of the Mass Media Practice Committee of the Federal Communications Bar Association (the “Committee”),<sup>1</sup> this letter will set forth the Committee’s understanding of the role legal counsel can play under the anti-collusion rules for the “reverse” portion of the incentive auction adopted in the above-referenced proceeding.<sup>2</sup> After review of the anti-collusion rule and interpretations of anti-collusion rules in previous auctions, the Committee believes that an attorney or law firm may represent more than one “Covered Licensee” in the upcoming “reverse” auction, and may be informed by those clients of their bids or bidding strategies, so long as those attorneys do not reveal information provided by one client about bidding decisions or strategies to anyone else, including to any other Covered Licensee participating or not participating in the auction.

Our reasons for reaching this conclusion are described below. Given the practical impossibility as described below of making a unique qualified attorney available to each Covered Licensee, the Committee believes that many – if not most – firms representing television broadcasters intend to proceed along these lines.

In the *Incentive Auction R&O*, the Commission adopted an anti-collusion rule for the reverse part of the incentive auction that built on its prior anti-collusion rules, but with

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<sup>1</sup> FCC staff who are either on the Executive Committee of the Federal Communications Bar Association or serve as a co-chair of the Mass Media Practice Committee have recused themselves from participation in the discussions or decisions leading up to this submission.

<sup>2</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, ¶¶ 399-411 (2014)(hereinafter *Incentive Auction R&O*).

significant differences. Among those differences are that the prohibition on communications concerning bids or bidding strategies in the reverse auction:

- Applies to all television stations and their controlling owners and officers, whether or not the television station in question actually applies to participate in the auction, since they are all deemed to be a “Covered Licensee;”<sup>3</sup> and
- Applies nationwide, thus barring almost any communications relating to the auction among Covered Licensees, no matter where they are located.<sup>4</sup>

And unlike previous auctions and the “forward” part of the reverse auction, participants in the reverse auction cannot (with the exception of channel-sharing agreements) reach agreements prior to the auction, even those relating to bids or bidding strategies, and reveal those agreements in their auction applications in order to be able to continue to discuss them during the auction.<sup>5</sup>

The Committee, after consultation with attorneys in law firms which together represent a significant majority of television stations before the Commission, is concerned that the anti-collusion rule might be interpreted to prevent one attorney or one law firm from representing more than one Covered Licensee during the reverse auction if, in the course of that representation, a client revealed its bids or bidding strategy to its attorney. Most of the television stations that may participate in the reverse auction have not previously been involved with any spectrum auction.<sup>6</sup> Further, many television licensees are small entities – certainly as compared to many of the wireless licensees who will participate in the forward auction – and will not have internal staff and counsel to advise them during the auction. We therefore believe that many participating television stations will wish to consult with their FCC counsel as the auction proceeds, even as to matters that the Commission might consider to be bids, bidding strategies, or issues affecting the post-auction market structure.

We also believe that, if attorneys are effectively permitted to represent only one television ownership group nationwide, there will not be a sufficient number of competent attorneys available to assist the large number of Covered Licensees. Even in larger firms, which might be able to employ an ethical “wall,” the number of clients will be larger than the number of senior attorneys, and thus those firms and their clients will be in much the same difficult position as smaller firms and sole practitioners and their clients. BIA/Kelsey estimates that there are 630 separate owners of full-power and Class A television stations in the United States and Puerto Rico. Since each of those owners is a Covered Licensee whether or not they participate in

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<sup>3</sup> *Id.* ¶¶ 399-400.

<sup>4</sup> *Id.* ¶ 400.

<sup>5</sup> *Id.* ¶¶ 407-08.

<sup>6</sup> The Commission acknowledged this point in Paragraph 411 of the *Incentive Auction R&O*: “We recognize that many broadcasters are new to auction processes, and that all are new to the reverse auction process.”

the reverse auction, an interpretation of the anti-collusion rule limiting an attorney to representing only one Covered Licensee will necessarily leave many television owners without access to experienced counsel.

Although the Commission has endeavored to make the auction process sufficiently simple that stations may be able to navigate their choices on their own, the choices presented to stations in the auction – which may involve their entire future – are the type of decisions on which auction participants may seek counsel about their choices. Advising clients on making judgments about complex business decisions is among the traditional roles of legal counsel. Permitting television stations to continue to seek advice from their trusted advisors through the auction process serves both the objectives of the legal ethics rules;<sup>7</sup> and the Commission’s goal of facilitating television stations’ participation in the auction, for if stations cannot seek the advice and counsel of their FCC attorneys, some stations may then choose not to participate in the auction.<sup>8</sup>

The broad definition of “Covered Licensee” for purposes of the reverse auction anti-collusion rule, in the Committee’s view, means that it is highly likely, if not certain, that attorneys will represent more than one Covered Licensee, whether or not a particular station has chosen to participate in the auction. In the course of representing those stations, attorneys may come into possession of information relating to one or more stations’ bids or bidding strategies, which would be “restricted information” under the rule. We acknowledge that communication of such information to another Covered Licensee would violate the anti-collusion rule.

However, the Committee does not believe that the mere *possession* of restricted information concerning more than one Covered Licensee by an attorney or law firm would violate the anti-collusion rule. Instead, a violation only would occur if the attorney or law firm acts as a conduit of restricted information between two or more Covered Licensees. Thus, if attorneys do not disclose the bids or bidding strategies of one Covered Licensee to a different client, the fact that more than one client has confided in them or sought advice relating to the auction would not result in a violation of the anti-collusion rule. Indeed, in the *Incentive Auction R&O*, the Commission focused on *communication* of bidding information, stating that “a covered television licensee may not use agents or other conduits *to convey information to any other*

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<sup>7</sup> See D.C. Legal Ethics Op. 356 (2010), recognizing the “policy of protecting the ability of clients to obtain lawyers of their own choosing,” and further acknowledging that in “a specialized industry served by few lawyers, those lawyers will often represent multiple business competitors.”

<sup>8</sup> Even if attorneys could provide sufficient guidance prior to the auction filing date to permit broadcasters to participate in the initial stage of the reverse auction, it is possible that the first stage will fail and that the Commission will then move to a second stage with a lower clearing target. If the auction moves to a second stage, we believe most television owners would at least want to discuss with counsel whether the bidding strategy they adopted in the first stage should still apply, notwithstanding the fact that the bar on communication of bids or bidding strategies would remain in effect.

*covered television licensee . . . that would otherwise be prohibited if communicated by the covered television licensee.”*<sup>9</sup>

The canons of ethics applicable to members of the bar already prohibit communication of confidential information about a client to other clients or entities or its use for the benefit of other clients,<sup>10</sup> and there can be no doubt that stations’ decisions concerning bids or bidding strategies would be viewed as such confidential information.

Two prior interpretations of the auction anti-collusion rules support the view that no violation occurs unless confidential information is *communicated* to more than one participating entity. In a 1998 *Public Notice*,<sup>11</sup> the Wireless Bureau answered a question about whether one individual (or two individuals employed by the same organization) could act as authorized bidders for competing entities. The Bureau responded: “A violation of the anti-collusion rule could occur if an individual . . . *conveys information concerning the substance of bids or bidding strategies between the bidders he/she is authorized to represent in the auction.*”<sup>12</sup> The gravamen of the Bureau’s concern was the risk that information about one bidder might be conveyed to a competing bidder, not the mere possession by an attorney of information concerning two bidders.

That knowledge of two entities’ bids or bidding strategies alone would not violate the anti-collusion rule was confirmed by the Bureau later that year. In *Nevada Wireless*, 13 FCC Rcd 11973 (WTB 1998), a successful bid was challenged because two attorneys in one law firm were authorized bidders for two competing entities. The Bureau denied the petition to deny, holding that a “party alleging collusion between bidders in an auction is required to show some evidence that the bidders *actually did communicate bidding strategy.*”<sup>13</sup> Thus, the mere fact that two attorneys in one firm possessed information about competing bidders’ bids or bidding strategies did not establish a violation of the anti-collusion rule, unless that information was in fact communicated from one bidder to another. The Bureau, in rejecting the complaint, further

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<sup>9</sup> *Incentive Auction R&O* ¶ 404 (emphasis supplied).

<sup>10</sup> For example, members of the District of Columbia Bar are subject to Rule 1.6(a) which provides:

- (a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:
  - (1) reveal a confidence or secret of the lawyer’s client;
  - (2) use a confidence or secret of the lawyer’s client to the disadvantage of the client;
  - (3) use a confidence or secret of the lawyer’s client for the advantage of the lawyer or of a third person.

<sup>11</sup> *Public Notice, Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction*, 13 FCC Rcd 341 (WTB 1998).

<sup>12</sup> *Id.* at 348 (emphasis supplied).

<sup>13</sup> 13 FCC Rcd at 11978 (emphasis supplied).

relied on uncontested statements from the two bidding entities and their attorneys that they were not privy to any information concerning the other entity's bids or bidding strategy.<sup>14</sup>

The *Nevada Wireless* decision points to another reason why we believe the representation of more than one station in the reverse auction would not result, absent a prohibited communication, in a violation of the anti-collusion rule. The Bureau in that decision, while not requiring disclosure of steps taken to prevent communication between bidders, "strongly recommend[ed] that parties certify in their application what measures have been taken to prevent" such communication.<sup>15</sup> In contrast to previous auctions and indeed the forward part of the incentive auction, however, the Commission apparently does not intend to permit participants in the reverse auction to disclose any pre-auction arrangements other than channel-sharing agreements.<sup>16</sup> Thus, attorneys or firms with more than one Covered Licensee client may have no mechanism to acknowledge that they will not disclose bids or bidding strategies to other clients or to identify any other steps they have taken to further assure compliance with the anti-collusion rule.

Our view of how the anti-collusion rule will operate applies only to attorneys who are subject to the canons of ethics. Whether other professionals who might advise auction participants could by agreement establish similar levels of protection for confidential information that would provide the Commission with sufficient comfort that the effectiveness of its anti-collusion rule would not be compromised would be an entirely separate issue. The Committee has, however, considered the question of whether an attorney representing more than one Covered Licensee could retain outside consultants to advise the attorney in connection with multiple clients. Our conclusion is that a client in this situation who wants advice from such other professionals should contract with those professionals directly.

While the Committee believes that its understanding of the anti-collusion rule is correct, we also recognize that the potential consequences of a violation of the anti-collusion rule on our clients could be severe. Further, if clients will not be able to continue to obtain advice and counsel from their regular FCC counsel, the Committee believe that they should be made aware of that fact well in advance of the auction participation deadline so that they may make

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<sup>14</sup> *Id.* at 11979-80. We do not read the decision in *Colby M. May, TCCSA, Inc. d/b/a Trinity Broadcasting Network*, 20 FCC Rcd 14648 (Media Bur. 2005), as reaching any different conclusion. There one individual was an officer and director of two competing bidders, and in addition proposed acting as the authorized bidder for one of the two companies. Because that individual was a decision-maker with respect to both applicants, his participation for two competitors necessitated the conclusion that "the bidding strategies of one applicant are necessarily conveyed to the other applicant." *Id.* Outside counsel will not be decision-makers, and if the bidding strategies of one client are not "conveyed" to another client, *Trinity* is consistent with the two 1998 decisions in focusing the Commission's concern on information being shared, not on whether or not a non-decision-maker possesses it.

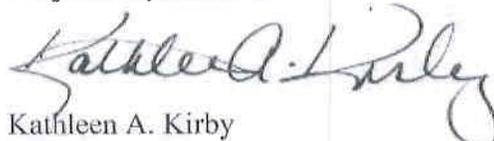
<sup>15</sup> *Id.* at 11978.

<sup>16</sup> *Incentive Auction R&O* ¶ 408.

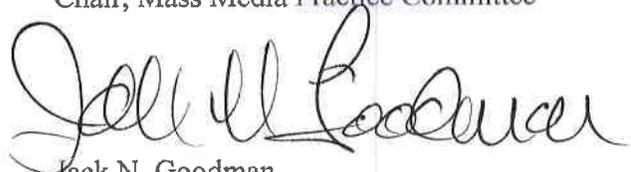
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appropriate choices. Therefore, if the Commission believes that an attorney who advises more than one Covered Licensee during the reverse auction but does not communicate any client's bids or bidding strategies to any other client will *prima facie* violate the anti-collusion rule, we would appreciate being so advised promptly.

Respectfully submitted,



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Chair, Mass Media Practice Committee



Jack N. Goodman  
Co-Chair, Mass Media Practice Committee