

June 9, 2015

VIA ECFS AND EMAIL

Howard J. Symons
Vice Chair, Incentive Auction Task Force
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through
Incentive Auctions, GN Docket No. 12-268
Written Ex Parte Communication and Notice of Oral Ex Parte Communication*

Dear Howard:

LocusPoint Networks, LLC (“LPN”) appreciates the time you took to speak with us on June 5, 2015 regarding the Commission’s proposed methodology for determining the opening prices to be offered to broadcasters considering whether or not to participate in the upcoming reverse auction.¹ As you know, LPN welcomes the unique opportunity that the incentive auction presents, and we fully support the decision to move ahead to conduct the auction in early 2016. We feel compelled, however, to write to you because we fear that the Commission’s current path regarding this crucial issue could derail the progress made to date. Indeed, without a change of course by the Commission, the proposed methodology poses a threat to the legal validity of the incentive auction itself.

Opening price offers will be perhaps the most significant factor broadcasters will consider in deciding whether or not to apply to relinquish their spectrum usage rights. As the record clearly shows, however, the Commission’s proposed formula for determining a station’s “volume” – the key component in determining the amount of its opening price offer – is creating uncertainty rather than fostering confidence. Broadcasters need to be assured that, no matter how high the level the Commission sets opening price offers, these offers have been determined in a fair and rational way. The proposed formula fails this test. The incentive auction cannot succeed without sufficient broadcaster participation, but in addition to this practical concern, the Commission’s station volume proposal, which bases opening prices in equal parts on a station’s preclusive effect on the repacking process and the population served by that station, represents a change in course that would be not only unwarranted but also unlawful. If adopted, it would subject the Commission to allegations of discrimination between stations that are similar in all respects relevant to the auction and of a failure to engage in reasoned decision making, raising the very real risk that well-founded litigation could delay the incentive auction.

In its *Incentive Auction R&O*, the Commission established a clear, rational policy framework to guide the calculation of opening prices for the reverse auction. Specifically, the Commission stated that prices should be determined according to factors “that affect the availability of channels in the repacking

¹ On June 5, 2015, the following members of the Commission’s Incentive Auction Task Force discussed the matters detailed in this letter by telephone with the undersigned principals of LPN: Howard Symons, William Scher, Dorann Bunkin, Mary Margaret Jackson, and Sasha Javid. LPN counsel Jonathan Cohen attended the meeting in person.

process and, therefore, the value of a station's bid to voluntarily relinquish spectrum usage rights."² Thus, "a station with a high potential for interference will be offered a price that is higher than a station with less potential for interference to other stations."³ The Commission "emphasize[d]," moreover, that it "d[id] not intend to set prices to reflect the potential market or enterprise value of stations, as opposed to their impact on the repacking process."⁴

As LPN and others have pointed out, the pricing formula proposed in the December 2014 *Comment PN* would contradict the policy choices made in the *Incentive Auction R&O*.⁵ The "Station Volume Formula" – calculated as $(\text{Interference})^{0.5} * (\text{Population})^{0.5}$ – appropriately includes the number of interference constraints that a station's continued operation would place on the repacking process, but it inappropriately assigns weight to the population that station covers, which is irrelevant to the station impact on the repacking process. Commission adoption of this formula could be found unlawful in a number of ways.

Differential Treatment of Similarly-Situated Stations. Under the *Comment PN*'s proposed Station Volume Formula, the Commission would make vastly different opening price offers to stations with virtually the same number of interference constraints – the only metric relevant to the repacking. This would violate core norms of reasoned decision-making. It is axiomatic that "agency action must be based on non-arbitrary, relevant factors."⁶ Distinctions based on irrelevant factors are inherently suspect. As the D.C. Circuit has emphasized, "[d]eference to agency authority or expertise . . . 'is not a license to . . . treat like cases differently,'"⁷ and "[a]gency action is arbitrary and capricious if the agency offers insufficient reasons for treating similar situations differently."⁸ Thus, for example, when the National Labor Relations Board ("NLRB") "repeatedly reached diametrically opposite conclusions on the basis of virtually identical situations," the D.C. Circuit found that those conclusions were due no deference, noting that an agency "cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly."⁹ The Second Circuit has likewise held that an agency may not "grant to one person the right to do that which it denies to another

² *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6753 ¶ 450 (2014) ("*Incentive Auction R&O*") (citation omitted).

³ *Id.*

⁴ *Id.* at 6754 ¶ 451.

⁵ See *Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*, Public Notice, 29 FCC Rcd 15750, 15783-84 ¶ 96 (2014) ("*Comment PN*"); see also Comments of LocusPoint Networks, LLC, AU Docket No. 14-252 & GN Docket No. 12-268, at 5-7 (filed Feb. 20, 2015); Comments of Expanding Opportunities for Broadcasters Coalition, AU Docket No. 14-252 & GN Docket No. 12-268, at 18-23 (filed Feb. 19, 2015).

⁶ *Judulang v. Holder*, 132 S. Ct. 476, 485 (2011) (internal quotation and citation omitted) ("*Judulang*").

⁷ *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985) (quoting *United States v. Diapulse Corp. of America*, 748 F.2d 56, 62 (2d Cir. 1984)).

⁸ *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013) (internal quotations and citations omitted).

⁹ *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 869, 872 (D.C. Cir. 1978). See also *id.* at 870 n.22 (NLRB reached "essentially a different decision on essentially the same facts").

similarly situated.”¹⁰ Indeed, the core issue considered by courts reviewing agency action is “whether the decision was based on a consideration of the relevant factors.”¹¹

Here, the Commission has correctly determined that opening prices for the reverse auction should be based on factors “that affect the availability of channels in the repacking process and, therefore, the value of a station’s bid to voluntarily relinquish spectrum usage rights.”¹² The injection of a population factor, which does not bear at all on the repacking process, would accord stations that were equivalent in all relevant respects disparate treatment based on irrelevant factors, and would therefore be unlawful. The Expanding Opportunities for Broadcasters Coalition already has demonstrated that this discrimination is real, not hypothetical, presenting a list of some 1,100 cases in which stations would be undervalued under the proposed formula.¹³ That outcome would confer an advantage on stations in highly populated urban areas over those in rural or other low-population regions and undermine the ultimate success of the auction, even though this factor has no bearing on repacking issues.¹⁴ This would, under the well-settled precedent discussed above, be unlawful.

Violation of Congressional Intent. The Commission would contravene Congress’s explicit intentions, as expressed in the Spectrum Act, if it adopts the proposed Station Volume Formula, and would otherwise undercut sound policy. Section 6001 of the Spectrum Act defines “reverse auction” as:

“the portion of an incentive auction of broadcast television spectrum under section 6403(a), in which a broadcast television licensee may submit bids stating the amount it would accept for voluntarily relinquishing some or all of its broadcast television spectrum usage rights.”¹⁵

Since the Commission made public the data necessary for any television station to calculate its opening price offer under the proposed Station Volume Formula, licensees have paid increasing attention to the discrepancies between stations with similar “potential for interference.” It is logical to assume that a station would only be willing to accept, in exchange for relinquishing spectrum usage rights, an amount that is commensurate with that being offered to other stations with similar potential for interference. The population component of the proposed Station Volume Formula, however, artificially suppresses opening price offers to some stations. Those stations therefore would never be offered the opportunity to state the amount they would be willing to accept, in direct contravention of the intent of the Spectrum Act. Congress reinforced its intent in Section 6403(a), where it said that the purpose of the reverse auction is “to determine the amount of compensation that *each broadcast television licensee* would accept in return for voluntarily

¹⁰ *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971) (quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring), *rev’d on other grounds*, 382 U.S. 46 (1965)).

¹¹ *Judulang*, 132 S. Ct. at 484.

¹² *Incentive Auction R&O*, 29 FCC Rcd at 6753 ¶ 450 (citation omitted).

¹³ See, e.g., Letter from Preston Padden, Executive Director, Expanding Opportunities for Broadcasters Coalition, to Marlene H. Dortch, Secretary, FCC, AU Docket No. 14-252 & GN Docket No. 12-268 (filed Apr. 29, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001045181> (“Coalition Ex Parte”).

¹⁴ Interestingly, in the Commission’s proposed repacking feasibility checking process, no consideration whatsoever is given to a station’s covered population; consideration is given only to whether, given interference constraints, a participating station could be assigned a channel in its pre-auction band.

¹⁵ Title VI of the Middle Class Tax Relief and Job Creation Act (“Spectrum Act”), Pub. L. 112-96, § 6001(3), *codified at* 47 U.S.C. § 1401(30).

relinquishing some or all of its broadcast television spectrum usage rights.”¹⁶ The Commission must not institute an opening price formula that, because of its transparent discrimination between similarly situated stations, will deny some broadcasters the ability to express the amount they would accept.

In addition, by discouraging some stations from participating in the reverse auction, the proposed formula would ensure that the auction will not clear as much spectrum as it should. This outcome clearly impedes the underlying policy goal of the Spectrum Act – clearing as much broadcast spectrum as possible through a market-based mechanism so that it can be put more efficiently to other uses. The proposed Station Volume Formula is the Commission’s attempt to reduce the amount it may have to pay some stations, but it will actually have the perverse effect of impeding the central goal of the incentive auction itself. It is well settled that an agency may not implement a statute in a manner that is “contrary to clear congressional intent or that frustrate[s] the policy that Congress sought to implement.”¹⁷

The *Comment PN* seeks to sidestep this statutory problem by inventing from whole cloth a *new* objective that was not articulated by Congress and that, if pursued, would undercut the objectives that Congress *did* cite. The *Comment PN* contends that use of population to set opening prices will serve the Commission’s “statutory obligation to promote the interests of taxpayers in getting a portion of the value of the spectrum sold at the forward auction.”¹⁸ This language suggests that the Commission believes that Section 309(j)(3)(C) obligates it to seek to minimize payments made to broadcasters in the reverse auction. This proposition is flawed in three different respects:

- *First*, Section 309(j)(3) describes the objectives the Commission must pursue for the *grant* of licenses, not for determining the compensation that broadcasters should receive for the relinquishment of spectrum usage rights. Indeed, Section 309(j)(3)(C) explicitly refers to “the methods employed to award uses of [the spectrum] resource.”¹⁹ The compensation to be paid broadcasters serves the more specific goal of the Spectrum Act – to clear spectrum now allocated for broadcasting so that it can be put to more efficient and more highly valued uses.²⁰
- *Second*, use of the proposed population component to reduce opening price offers for some stations would lead to lower participation in the reverse auction, frustrating the Spectrum Act’s goal of clearing the maximum amount of spectrum and in turn actually impeding the “value recovery” goal of Section 309(j)(3)(C).²¹

¹⁶ Spectrum Act § 6403(a)(1), *codified at* 47 U.S.C. § 1452(a)(1) (emphasis added).

¹⁷ *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) and *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1297 (9th Cir.1992)).

¹⁸ *Comment PN*, 29 FCC Rcd at 15785 ¶ 98 (citing 47 U.S.C. § 309(j)(3)(C)).

¹⁹ 47 U.S.C. § 309(j)(3)(C).

²⁰ Even if Section 309(j)(3)(c) could somehow be read to apply to the reverse auction, it cannot trump the more recent – and more specific – congressional objectives for the incentive auction. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”); *see also, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

²¹ The objectives of the Spectrum Act are not in tension with Section 309(j)(3)(C). A well-designed incentive auction would attract sufficient broadcaster participation to ultimately generate more than enough forward auction revenue to first meet Congress’s specific goals and then also deliver additional funds to the U.S. Treasury. Moreover, in authorizing the incentive auction, Congress effectively has decided that taxpayers will obtain the “a portion of the value of the public spectrum resource” through increased access to spectrum dedicated to two-way communications

- *Third*, the population served by a station relinquishing the spectrum in the reverse auction simply bears no relationship to the value of licenses to be offered in the forward auction, so no linkage can be drawn between the population component of the proposed Station Volume Formula and the goal of Section 309(j)(3)(C). The Commission has claimed that the proposed population component will enable it to “clear more spectrum in markets where the forward auction value of relinquished spectrum usage rights is apt to be higher.”²² It is generally true that a POP in some markets is worth more than a POP in other markets.²³ However, the proposed Station Volume Formula would treat each POP equally regardless of market, and thus cannot be rationally expected to promote that objective.

In short, including a population component in the Station Volume Formula appears to be a mechanism purely to reduce payments to certain broadcasters, which not only would dissuade the goals of the Spectrum Act, but also would preclude spectrum reallocations that would otherwise take place, affirmatively undercutting Congress’s aims.

Reversal of Prior Determinations. Even if it were otherwise permissible (which, as described above, it is not), adoption of the proposed Station Volume Formula would constitute an unlawful *sub silentio* reversal of the *Incentive Auction R&O*’s determinations. The Administrative Procedure Act (“APA”) requires that an agency seeking to modify substantive requirements publish in the Federal Register a “[g]eneral notice of proposed rule making” setting out the proposed change and the legal basis for the new approach.²⁴ The agency must then “give interested persons an opportunity to participate in the rule making,” and, upon adopting the new approach, “incorporate in the rules adopted a concise general statement of their basis and purpose.”²⁵ While “[a]n agency’s view of what is in the public interest may change,” “an agency changing its course must supply a reasoned analysis” supporting that change.²⁶ At the very least, “the requirement that an agency provide reasoned explanation for its action would ordinarily

uses. The repurposed spectrum will allow members of the public to tailor uses of the new 600 MHz band to meet their own specific needs, rather than passively accepting content chosen by TV broadcasters. *See Incentive Auction R&O*, 29 FCC Rcd at 6570 ¶ 1 (“[B]y 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.”).

²² *Comment PN*, 29 FCC Rcd at 15785 ¶ 98.

²³ For example, spectrum auctioned for use in New York City will, even on a per-POP basis, elicit far higher bids than otherwise similar spectrum auctioned for use in rural parts of the Midwest. This truism played out most recently in Auction 97, where the winning bid for the G-Block in New York City was \$7.07 per MHz/POP, whereas the same frequencies in Pierce, Wisconsin fetched \$0.20 per MHz/POP. *See* Federal Communications Commission, FCC AWS-3 Auction ID: 97 Winning Bids (rel. Jan. 29, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-131A2.pdf (reporting winning bid amounts in licensed areas); Federal Communications Commission, Auction 97 - Advanced Wireless Services (AWS-3), DA 14-1018, available at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1018A2.pdf (reporting population of licensed areas).

²⁴ 5 U.S.C. § 553(b).

²⁵ *Id.* § 553(c).

²⁶ *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 57 (1983), quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (1970) (citation omitted), *cert. denied*, 403 U.S. 923 (1971).

demand that it display awareness that it is changing position. *An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.*²⁷

Implementation of the Station Volume Formula *would* “depart *sub silentio* or simply disregard” decisions rendered in the *Incentive Auction R&O*. Make no mistake: the proposed Station Volume Formula reflects a clear reversal of that Order’s conclusion that “a station with a high potential for interference will be offered a price that is higher than a station with less potential for interference to other stations” – a conclusion that the Commission correctly recognized would “encourage stations with more interference potential to remain active in the reverse auction bidding longer, increasing the efficiency of the repacking process by reducing the likelihood that such stations will have to be assigned channels, thereby blocking other stations with less interference potential.”²⁸ In the *Incentive Auction R&O*, the Commission “emphasize[d] that we do not intend to set prices to reflect the potential market or enterprise value of stations, as opposed to their impact on the repacking process.”²⁹ The equal weighting given to the population component in the proposed Station Volume Formula appears to do exactly that.

After unambiguously assuring the public in the *Incentive Auction R&O* that stations with greater interference impact on the repacking would be offered higher prices than those with lesser impact, in the *Comment PN* the Commission claimed that the proposed population component of the Station Volume Formula would allow more spectrum to be cleared in higher value forward auction markets, stating that it is consistent with forward auction procedures that use population as a factor.³⁰ The Commission gave no hint, however, of either (1) the basis for its belief that the proposed formula would result in more spectrum being cleared in more valuable markets, or (2) the relevance to its opening price methodology of forward auction procedures that propose to use population as a factor. The Commission therefore failed to afford a reasonable opportunity for public comment. As the courts have made clear, “[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”³¹

As others have emphasized in the record already, the *Comment PN*’s proposal would in many cases lead to circumstances in which “a station with a high potential for interference w[ould] be offered a price that is” *lower* “than a station with less potential for interference to other stations.”³² Moreover, the Station

²⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As used here, the term “rule” is defined to mean “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,” irrespective of whether that statement has been codified in the Code of Federal Regulations. 5 U.S.C. § 551(4) (providing APA definition of “rule”).

²⁸ *Incentive Auction R&O*, 29 FCC Rcd at 6753-54 ¶ 450.

²⁹ *Id.* at 6754 ¶ 451.

³⁰ *Comment PN*, 29 FCC Rcd at 15785 ¶ 98.

³¹ *Conn. Light & Power Co. v. Nuclear Regulatory Comm 'n*, 673 F.2d 525, 530-531 (D.C. Cir. 1982); *see also Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (“Among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies.”) (internal quotations omitted); *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986) (“It is clear that it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or on data that, [in] critical degree is known only to the agency.”) (internal quotations and emphasis omitted); *Air Transit Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (“[E]ven in the informal rulemaking context, we have cautioned that the most critical factual material that is used to support the agency’s position on review must have been made public in the proceeding and exposed to refutation.”) (citation omitted).

³² *See, e.g., Coalition Ex Parte.*

Volume Formula approach would not reliably “encourage stations with more interference potential to remain active in the reverse auction bidding longer.” It is not enough for the Commission to seek comment on the Station Volume Formula while purporting to remain true to the *Incentive Auction R&O*’s conclusions. To the extent the Commission proposes to reverse itself, the APA and well-settled judicial precedent demand that it provide sufficient notice that the proposed formula would reflect a change of course, offer the public the opportunity to make meaningful comment on the matter, and issue an order justifying its about-face. The Commission has not satisfied these demands, and thus could not provide a legally sustainable justification for reversing its earlier position and adopting the proposed formula.

* * *

Use of the proposed Station Volume Formula would unjustifiably skew the reverse auction process, ignore Congress’s intentions, and discriminate against some stations in an arbitrary and capricious manner. Adoption of the proposed formula also would fail the test of reasoned decision making, and would subject the incentive auction to unacceptable legal risks. LPN strongly urges the Commission to change course.

Sincerely,

/s/ William D. deKay
William D. deKay, CEO & Co-Founder

/s/ Ravi Potharlanka
Ravi Potharlanka, President & Co-Founder

cc (by email): William Scher
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