



July 10, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

On July 9, 2015, the undersigned of the National Association of Broadcasters (NAB) met with Commissioner Mignon Clyburn and her acting wireless advisor, David Strickland, to discuss the problems associated with Chairman Wheeler's proposal to abandon the Commission's commitment to continue to provide some nationwide exclusive spectrum for licensed wireless microphones in the 600 MHz band.

It has yet to be explained exactly why the Commission must hastily roll back its commitment to provide 4 MHz nationwide for licensed wireless microphone operations in the 600 MHz band. At no point in the incentive auction proceeding has the Commission indicated that it was imperative to place TV stations in the duplex gap. If anything, a general consensus had emerged that it would be a *mistake* to place stations there.¹

Even if the Commission happened to stumble upon new information suggesting that it was important, let alone critical, to place TV stations in the duplex gap, it has kept the public in the dark. The lone indication that a new approach to the duplex gap was being seriously considered was in the form of limited simulations the incentive auction task force released

¹ The late-breaking changes of heart on the part of one or two stakeholders, reportedly as a result of Commission staff arm-twisting, does little to undermine the substance of the unified opposition. See Howard Buskirk, *FCC Staff Pushing Carriers To Support Plan To Locate TV Stations in 600 MHz Duplex Gap*, Communications Daily (Jul. 10, 2015) at 1-2.

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in a May 20 Public Notice.² However, as NAB noted at that time, the staff did not provide enough information to seriously assess the implications of the simulations:

The Public Notice also provides little information concerning the simulations and the results themselves. For example, how many simulations did the staff run? Are the results presented averages across all simulations, or selected cases? What assumptions were built into the simulations? Do the stated participation levels reflect the required levels of national participation, or merely the required levels of participation in certain challenging markets?³

NAB was not alone in this view.⁴ It is incumbent upon the Commission to allow the public to fully evaluate the information on which the FCC is basing its critical decisions.

Along the same lines, new eleventh hour proposals at the close of the ex parte period should not be considered.⁵ Late on the eve of the Sunshine Period, former Congressman Henry Waxman, now a representative for a national wireless carrier, filed an ex parte letter recommending for the first time a completely new impairment framework, which includes placing TV stations in the duplex gap.⁶ This proposal has not been publicly vetted, and in fact cannot be, as it was submitted into the record with no time for parties to meaningfully respond.

² *Incentive Auction Task Force Releases Initial Clearing Target Optimization Simulations*, Public Notice, AU Docket No. 14-252, GN Docket No. 12-268 (rel. May 20, 2015) (Public Notice).

³ Comments of NAB in GN Docket No. 12-268, AU Docket No. 14-252 (Jun. 3, 2015).

⁴ Many parties that filed in response to the Public Notice indicated that the information provided was not sufficient to perform the kinds of analyses necessary to truly understand the impacts of impairments in the 600 MHz band. See, e.g., Comments of CTIA-The Wireless Association in GN Docket No. 12-268, AU Docket No. 14-252 (Jun. 3, 2015) at 3 (“[T]he information provided still requires additional clarification to allow for a complete understanding of the assumptions used by the Commission to determine impairments.”); Comments of Sprint Corporation in GN Docket No. 12-268, AU Docket No. 14-252 (Jun. 3, 2015) at 2 (“[T]he Task Force should move forward with a wider range of simulations that include adjustments to various procedures and parameters, including clearing targets, impairment placements, broadcaster participation levels, and bidding category definitions.”); Comments of T-Mobile USA, Inc. in GN Docket No. 12-268, AU Docket No. 14-252 (Jun. 3, 2015) at 2 (“The Public Notice is transparent about the limitations of the current simulations.”).

⁵ Under Section §553(b) of the Administrative Procedure Act, agencies must afford a meaningful opportunity for comment on a proposed rulemaking. See, e.g., 5 U.S.C. 553(b); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) quoting *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101, 388 U.S. App. D.C. 421 (D.C. Cir. 2009) (“In sum, ‘[t]he opportunity for comment must be a meaningful opportunity.’ That means enough time with enough information to comment and for the agency to consider and respond to the comments”).

⁶ Letter from Henry A. Waxman of Waxman Strategies to The Hon. Tom Wheeler, Chairman, FCC in GN Docket No. 12-268, WT Docket No. 12-269 and AU Docket No. 14-252 (Jul. 9, 2015).

NAB also noted that none of these late-inning fireworks would be necessary if the Commission would adopt a more sensible approach to market variability. If the Commission had attempted to avoid, rather than willingly accept, variability, these conversations about in what space to shoehorn repacked television stations would be unnecessary. The Commission's proposal to still allow a whopping 20 percent variability compounds those problems. And more specifically, the staff's proposal that treats domestic and international impairments as interchangeable is likely to lead to a very poor band plan that will not only be unworkable domestically, but also shunned internationally. A renewed focus on actually reducing, rather than encouraging variability is essential if the Commission is serious about the United States continuing to lead the world in mobile and broadcasting.

NAB expressed its thanks for Commissioner Clyburn's continued leadership on this issue and for her integral role along with Commissioner Rosenworcel in helping to craft the original compromise on which industry relied. We look forward to working with her and her staff to ensure that her vision is realized.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
General Counsel and Executive Vice President,
Legal and Regulatory Affairs
National Association of Broadcasters

cc: Chanelle Hardy
David Strickland