

July 30, 2015

**Leighton T. Brown**  
(202) 457-7161  
Leighton.Brown@hklaw.com

**Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Notice of Ex Parte Presentation*  
GN Docket No. 12-268, AU Docket No. 14-252

Dear Ms. Dortch:

United States Cellular Corporation (“U.S. Cellular”), as well as various other carriers of all sizes, have urged the Commission not to incorporate bidding procedures into the assignment phase of the forward auction because doing so would unnecessarily risk decreasing the amount of revenue generated during the crucially important clock phase of the forward auction, and thus, could delay satisfaction of the final stage rule and cause the incentive auction to move to another stage with a lower spectrum clearing target. Although U.S. Cellular has learned that some apparently believe that the Commission lacks the authority at this stage to conduct the assignment phase without monetary bidding procedures, nothing in the *Incentive Auction R&O*<sup>1</sup> has this type of binding effect on the Commission’s subsequent decisions concerning the assignment phase.

Notably, in the *Incentive Auction R&O*, the Commission did *not* adopt any rule that requires the use of bidding procedures in the assignment phase. Rather, the Commission simply revised its rules in order to authorize auctions in which the assignment of winning bids is based on “one or more factors in addition to the submitted bid amount, *including but not limited to* the amount of bids submitted in separate competitive bidding.”<sup>2</sup> The revised rule also broadly and generally authorizes the Commission to adopt procedures “to assign specific items to bidders following bidding for quantities of generic items” or “to incorporate public interest considerations into the process for assigning winning bids.”<sup>3</sup>

Clearly, the Commission has *not* adopted a rule which requires it to incorporate bidding procedures into the assignment phase. Rather, as the Commission noted, in the *Incentive Auction R&O*, it simply “adopt[ed] rules ... that will allow subsequent determination of specific final

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<sup>1</sup> See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (“*Incentive Auction R&O*”).

<sup>2</sup> 47 C.F.R. §1.2103(b)(2)(i) (emphasis added).

<sup>3</sup> 47 C.F.R. §1.2103(b)(2)(ii) and (iii).

auction procedures.”<sup>4</sup> That process was initiated by the *Comment PN*, in response to which not a single commenter supported the Commission’s proposal to incorporate bidding procedures into the assignment phase. Notably, courts have found that an agency’s failure to include a pronouncement in its formal regulations indicates that the agency did not, in fact, adopt a rule subject to the notice requirements of the Administrative Procedure Act (“APA”).<sup>5</sup>

Although the Commission did state that the “assignment mechanism will consist of a single bidding round, or a series of separate bidding rounds, in which bidders will bid for priority in selecting bands or for a preferred frequency within a geographic area,”<sup>6</sup> this general pronouncement did not require the Commission, under the APA, to formally propose a non-monetary assignment phase mechanism in order to adopt such procedures. Moreover, the fact that a large number of potential participants in the forward auction have commented on this issue, and specifically urged the Commission not to adopt its proposed assignment phase bidding procedures, demonstrates that the Commission did, in fact, provide sufficient notice, and thus would not be in violation of the APA if it were to adopt an assignment phase mechanism that does not involve monetary bidding procedures.

Moreover, the Commission’s statement in the *Incentive Auction R&O* constitutes only a “general statement of policy,” which courts have defined as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power,”<sup>7</sup> and which the APA expressly exempts from its notice requirements.<sup>8</sup> Here, the Commission simply stated that it intended to adopt bidding procedures for the assignment phase during the pre-auction process.<sup>9</sup> As noted, the rule adopted in the *Incentive Auction R&O* did not in fact adopt such bidding procedures. And, despite the fact that the APA broadly defines the term “rule,”<sup>10</sup> courts have explained that the “general statements of policy” exception “indicates that Congress did not intend the definition of ‘rule’ to be construed so broadly.”<sup>11</sup> Moreover, even if the statement arguably constitutes a rule under the APA, courts

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<sup>4</sup> *Incentive Auction R&O*, 29 FCC Rcd at 6707; *see id.* at 6708 (“This pre-auction process will determine [] the specific final auction procedures, based on additional input... The process will be initiated by the release of the *Incentive Auction Comment PN*, which will solicit input on final incentive auction procedures...”).

<sup>5</sup> *See American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (“[A]n agency seems likely to have intended a rule to be legislative if it has the rule published in the Code of Federal Regulations.”); *State of Alaska v. U.S. Dept. of Transportation*, 868 F.2d 441, 446 (D.C. Cir. 1989) (“Publication in C.F.R. (as opposed to the Federal Register) is a probative sign that a rule is substantive.”).

<sup>6</sup> *Incentive Auction R&O*, 29 FCC Rcd at 6780.

<sup>7</sup> *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003).

<sup>8</sup> 5 U.S.C. §553(b).

<sup>9</sup> *See National Association of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. cir. 2009) (“In determining whether an agency has issued a statement of policy rather than a binding rule subject to notice-and-comment, the court looks to the effects of the agency’s action, asking whether the agency has imposed any rights and obligations or has left itself free to exercise discretion, taking into account the agency’s phrasing.”); *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“A general statement of policy ... does not establish a ‘binding norm.’ It is not finally determinative of the issues or rights to which it is addressed.”) (internal citation omitted).

<sup>10</sup> 5 U.S.C. §551(4).

<sup>11</sup> *Pacific Gas*, 506 F.2d at 37.

have noted that “agencies possess the authority in some instances to clarify or set aside existing rules without issuing a new NPRM and engaging in a new round of notice of comment.”<sup>12</sup>

Finally, U.S. Cellular notes that, if the Commission interprets its general statements in the *Incentive Auction R&O* as binding rules subject to the APA notice requirements, it could not adopt one of its central proposals with respect to the assignment phase. Specifically, while in the *Incentive Auction R&O* the Commission stated that the “frequency preferences of the bidders willing to pay the highest premiums will be honored, to the extent technically possible,”<sup>13</sup> in the *Comment PN*, it proposes that “the auction system will take into account bid amounts *as well as* other efficiency objectives, such as maximizing contiguity for winners of multiple blocks in an area.”<sup>14</sup>

This notice of ex parte presentation is being filed electronically in the above-referenced dockets pursuant to Section 1.1206 of the Commission’s rules.

Respectfully submitted,  
HOLLAND & KNIGHT LLP

/s/  
Leighton T. Brown  
*Counsel for United States Cellular Corporation*

cc (via email): Chairman Tom Wheeler (Thomas.Wheeler@fcc.gov)  
Commissioner Mignon L. Clyburn (Mignon.Clyburn@fcc.gov)  
Commissioner Jessica Rosenworcel (Jessica.Rosenworcel@fcc.gov)  
Commissioner Ajit Pai (Ajit.Pai@fcc.gov)  
Commissioner Michael O’Rielly (Michael.O’Rielly@fcc.gov)  
Jessica Almond (Jessica.Almond@fcc.gov)  
Louis Peraertz (Louis.Peraertz@fcc.gov)  
Valery Galasso (Valery.Galasso@fcc.gov)  
Brendan Carr (Brendan.Carr@fcc.gov)  
Erin McGrath (Erin.McGrath@fcc.gov)

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<sup>12</sup> *Sprint*, 315 F. 3d at 373.

<sup>13</sup> *Incentive Auction R&O*, 29 FCC Rcd at 6780.

<sup>14</sup> *Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*, Public Notice, 29 FCC Rcd 15750, 15813 (2014) (emphasis added).