

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Expanding the Economic and Innovation)	
Opportunities of Spectrum)	GN Docket No. 12-268
Through Incentive Auctions)	

**COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS,
CORPORATION FOR PUBLIC BROADCASTING, AND
PUBLIC BROADCASTING SERVICE**

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EXECUTIVE SUMMARY

Public television stations have embraced both broadcasting and mobile broadband communications platforms in order to reach the public on a wide range of devices in the home and on the go. Nevertheless, broadcasting remains the predominant way in which viewers access public television's preeminent news, public affairs, and educational children's programming.

Informed by the needs of these viewers, the Association of Public Television Stations ("APTS"), Corporation for Public Broadcasting ("CPB"), and Public Broadcasting Service ("PBS") (collectively, "PTV") are concerned that some of the proposals raised in the *Notice of Proposed Rulemaking* ("NPRM"), if adopted, would fail to balance the otherwise complementary goals of preserving a healthy, diverse broadcast television service while promoting the deployment of robust mobile broadband networks. PTV accordingly files these comments to urge adoption of rules based upon three key principles.

First, the incentive auction rules should preserve the public's universal access to the important services that public television stations provide. To apply this principle, the Commission should:

- **Preserve Coverage Area and Population Served** – The auction rules should preserve the existing coverage area and population served by each public television station. Viewers are not interchangeable, so the same specific population should be protected, not just the total amount of population.
- **Minimize Disruption to Translators** – Public television stations rely on hundreds of translators to reach remote and rural areas. The Commission should take steps to limit the impact of the repacking on viewers who receive a signal from television translators, including by (i) accommodating rural translators in the post-auction band plan, (ii) allowing out-of-core translator operation until a forward auction winner is ready to commence service, and (iii) providing selection priority for the displacement applications of public television stations.
- **Reject Bids that Would Result in White Areas** – The Commission should not accept bids in the reverse auction that would create "white areas" where no public television station would remain on-air to serve viewers in a particular market, although such

stations should be able to participate in the incentive auction in other ways, such as by making channel sharing or VHF bids.

- Provide Robust Confidentiality Protections – The Commission should not disclose the identity, or any information that could lead to disclosing the identity, of applicants or participants in the incentive auction who do not submit winning bids. This protection should not end at the conclusion of the incentive auction process, and the Commission should treat this information as “privileged or confidential” for FOIA purposes.

Second, the rules should minimize any disruptions to the nation’s public

television service as a result of the repacking, and in particular:

- Adopt a Minimum Three-Year Timeframe for Repacking – Stations should have at least three years to complete the transition to new channel assignments. The eighteen-month timeframe proposed in the NPRM is insufficient due to manufacturing, weather, and tower crew limitations as well as other unexpected challenges that could arise.
- Make Repacking Funding Available in Advance – Stations should receive an advance reimbursement payment based on estimated costs, which subsequently may be adjusted through a true-up process after expenditures are completed. If the relocation fund is insufficient, noncommercial stations should be prioritized ahead of other stations, given the public’s significant investment in these important television services as well as unique funding challenges.
- Avoid Off-Air Time – The Commission should take every reasonable step to avoid off-air time for stations that are forced to relocate after the auction.
- Provide Consumer Education – The Commission should seek additional funds from Congress to implement a nationwide consumer education campaign.

Third, the Commission should create a simple and transparent auction design so

that all participants and non-participants understand the potential impact these undertakings will have on their business operations and ability to serve the public.

- Provide Clear, Tailored Anti-Collusion Rules – The anti-collusion rules must be clear and account for the unique circumstances of the incentive auction by permitting channel sharing discussions and not construing members of the governing boards of noncommercial stations to be auction “applicants.”
- Accommodate Flexible Bidding Options – The auction rules should permit licensees to design bids that meet their specific operational and business needs by allowing, for example, UHF to VHF bidders to limit their bids to the high VHF band. In addition,

existing VHF stations should be permitted to make channel sharing arrangements to move into the UHF band.

- Provide Separate Allocations for Broadcasting and Mobile Broadband – Any rules for amending the Table of Allocations should be specific and transparent to prevent an erosion of broadcast television services and to allow for future innovation by broadcasters.

PTV also applauds the Commission for recognizing that this NPRM is just the first of many steps in ensuring a successful incentive auction and subsequent repacking. The Commission can help ensure that the process is transparent and fair by developing more detailed proposals through a series of public notices and providing the public additional opportunities to comment, particularly with respect to the anti-collusion rules, channel sharing arrangements, and the repacking and reimbursement process. We look forward to working closely with the Commission throughout this process.

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The Association of Public Television Stations (“APTS”),¹ the Corporation for Public Broadcasting (“CPB”),² and the Public Broadcasting Service (“PBS”)³ (collectively, “PTV”) submit these comments in response to the Commission’s October 2, 2012 *Notice of Proposed Rulemaking* (“NPRM”), which proposes rules for (1) a reverse auction in which broadcasters may voluntarily return their spectrum rights in exchange for a share of auction proceeds; (2) a forward auction wherein wireless carriers may bid on the spectrum that is

¹ APTS is a non-profit organization whose membership comprises the licensees of nearly all of the nation’s 364 CPB-qualified noncommercial educational television stations. The APTS mission is to support the continued growth and development of a strong and financially sound noncommercial television service for the American public.

² CPB is a private, non-profit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. Pursuant to its authority, CPB has provided millions of dollars in grant monies for support and development of public broadcasting stations and programming.

³ PBS, with its nearly 360 member stations, offers all Americans — from every walk of life — the opportunity to explore new ideas and new worlds through television and online content. Each month, PBS reaches 124 million people through television and 20 million people online, inviting them to experience the worlds of science, history, nature, and public affairs; to hear diverse viewpoints; and to take front row seats to world-class drama and performances.

reclaimed; and (3) the involuntary repacking of the remaining broadcast television transmitters and translators into a smaller portion of the spectrum band.⁴

This proceeding is of particular interest to PTV because, as explained below, noncommercial educational broadcast stations that are eligible to receive a community service grant from the Corporation for Public Broadcasting (“CPB-Qualified Stations”)⁵ have long used their spectrum to serve the public interest in unique and important ways. Consequently, as the Commission moves forward with the task of completing “the most complicated set of spectrum auctions ever held by any country,”⁶ PTV urges the Commission to adopt rules that: (1) maintain universal access to the critical television services that public television stations provide, (2) minimize any disruptions to the nation’s public television service as a result of the repacking, and (3) promote a simple and transparent auction design.

⁴ *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118, 27 FCC Rcd. 12357 (rel. Oct. 2, 2012) [hereinafter “Incentive Auction NPRM”].

⁵ Congress distinguished between CPB-Qualified Stations and other noncommercial educational television stations when it enacted the Satellite Television Extension and Localism Act of 2010 (“STELA”), in which Congress required that certain satellite television providers accelerate their timetable for carrying CPB-Qualified Stations in high-definition format. *See* 47 U.S.C. § 338(k)(6) (defining a “qualified noncommercial educational television station” to mean “any full-power television broadcast station that . . . is licensed by the Commission as a noncommercial educational broadcast station and is owned and operated by a public agency, nonprofit foundation, nonprofit corporation, or nonprofit association; and . . . has as its licensee an entity that is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto”). The distinction based on STELA’s definition survived First Amendment scrutiny in a recent case decided by the United States Court of Appeals for the Ninth Circuit. *See DISH Network Corp. v. Fed. Comm’n’s Comm’n*, 653 F.3d 771 (9th Cir. 2011), cert. denied 132 S. Ct. 1162 (2012).

⁶ Incentive Auction NPRM, at p. 201 (Statement of Commissioner Ajit Pai).

I. INTRODUCTION

PTV agrees with the Commission that, throughout the incentive auction and repacking process, the Commission should be guided by the complementary goals of preserving a healthy, diverse broadcast television service while promoting the deployment of robust mobile broadband networks.⁷ CPB-Qualified Stations have embraced *both* broadcasting and mobile broadband communications platforms in order to reach the public on a wide range of devices in the home and on the go. Local CPB-Qualified Stations develop and distribute content and services with both on-air and online components.⁸ For example, CPB-Qualified Stations use the Internet to enhance the impact of their over-the-air programming, and they use their broadcast television programming as a gateway to lead viewers to Internet resources and enriching mobile applications. PBS's and local stations' extensive, award-winning programming also has fueled the creation of comprehensive online content systems that give educators free access to research-based educational video content and games, both for their own development and for use in educating students.⁹

PTV is concerned, however, that some of the NPRM's proposals fall short in balancing the need to preserve a vibrant, free over-the-air television service while promoting increased mobile broadband deployment. Some of these proposals could fail to make stations that are forced to move to new channels in the repacking whole, both financially and in terms of

⁷ *Id.* ¶ 10.

⁸ See, e.g., *In the Matter of Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Dkt. No. 02-6, GN Dkt. No. 09-51, Comments of the Public Broadcasting Service (July 9, 2010).

⁹ *In the Matter of Broadband Needs in Education, A National Broadband Plan for Our Future*, Public Notice #15, GN Dkt. Nos. 09-47, 09-51, 09-137, Comments of the Public Broadcasting Service, 4-5 (Dec. 11, 2009).

their coverage area and population served—ultimately harming viewers who depend upon these stations for unique, noncommercial programming and services. Other proposals unfairly prioritize a desire to maximize the return of broadcast spectrum, even where doing so would be unlikely to increase mobile broadband deployment and could jeopardize the viability of the public’s broadcast television services. A key objective of the Commission in this process should be protecting viewers, and the Commission should balance its desire to maximize the return of broadcast spectrum against this critical public interest objective.

Notwithstanding CPB-Qualified Stations’ robust online offerings, broadcasting remains the predominant way in which viewers access public television’s preeminent news, public affairs, and educational children’s programming.¹⁰ These stations broadcast award-winning arts, culture, sciences, and technology programming that cannot be found anywhere else on television. And given their longstanding commitment to locally-produced programming, ethnic and regional diversity, and accessibility, CPB-Qualified Stations’ schedules include programming that reflects the needs of all viewers in every community across the nation. Since the transition to digital-only broadcasting, CPB-Qualified Stations have expanded these important services by offering high-definition programming, multicast channels, and other innovative services to deliver video programming and emergency alerts to a wide variety of platforms, including smartphones and other mobile devices. The Commission should avoid adopting proposals that would significantly disrupt or impede CPB-Qualified Stations’ ability to continue offering these important services.

¹⁰ Press Release, Public Broadcasting Service, “PBS and Member Stations Are Named #1 in Public Trust and an ‘Excellent’ Use of Tax Dollars for Ninth Consecutive Year” (Feb. 27, 2012), <http://www.pbs.org/about/news/archive/2012/pbs-most-trusted/>.

PTV applauds the Commission for recognizing that this NPRM is just the first of many steps in ensuring a successful incentive auction and subsequent repacking.¹¹ The NPRM asks numerous questions on a wide variety of complicated and interrelated topics vital to this first-of-its-kind process.¹² By developing more detailed proposals through a series of public notices and providing the public additional opportunities to comment on the planned design of the forward auction, reverse auction, and repacking, the Commission will help ensure that the process is transparent and fair.¹³ In particular, more detailed proposals would be helpful on the issues of channel sharing arrangements, rules prohibiting certain communications related to the incentive auction, and the repacking and reimbursement process and rules.

We look forward to working closely with the Commission throughout this process, and we file these comments today to focus on three key principles that should guide the Commission's adoption of final incentive auction and repacking rules: (1) maintaining the public's universal access to the critical television services that CPB-Qualified Stations provide, (2) minimizing any disruptions to the public's television service as a result of the repacking, and (3) promoting a simple and transparent approach for auction design. The remaining sections of these comments discuss each of these principles in turn.

¹¹ *See, e.g.*, Incentive Auction NPRM ¶ 36.

¹² *See, e.g., id.* ¶ 268 (this paragraph alone has seven questions specific to the anti-collusion rules).

¹³ *Id.* ¶¶ 36, 241.

II. THE INCENTIVE AUCTION RULES SHOULD PRESERVE THE PUBLIC'S UNIVERSAL ACCESS TO THE CRITICAL TELEVISION SERVICES THAT CPB-QUALIFIED STATIONS PROVIDE.

As the digital television transition demonstrated, replication of television stations' coverage area and population served is not a simple task and can involve a number of unexpected technical challenges.¹⁴ These difficulties are compounded by the fact that digital signals suffer from "cliff effects" where a viewer can experience a complete loss of service as a result of increased interference. Given these challenges, PTV encourages the Commission to take care that the repacking process does not cause undue disruption to the nation's public television system.

Specifically, to ensure that viewers continue to have free and universal access to the high-quality news and information, weather and emergency alerts, and other critical services that CPB-Qualified Stations provide to the public, PTV urges the Commission to develop simple, transparent incentive auction rules that (A) preserve CPB-Qualified Stations' existing coverage areas and population served, (B) take additional steps to limit the impact of the repacking on viewers who receive their television signals from television translators, (C) reject bids that would create "white areas" where no CPB-Qualified Station would be left to serve the station's designated market area at the conclusion of the incentive auction and repacking, (D) ensure that channel sharing arrangements are, in fact, a viable mechanism for stations to stay on air following the incentive auction, and (E) afford robust confidentiality protections that are critical to avoid discouraging broadcasters' participation.

¹⁴ See, e.g., Kim Hart, "2 D.C. Stations Lost to Viewers in Digital TV Transition," WASHINGTON POST (June 17, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/16/AR2009061603381.html>; Howard Berkes, "Digital TV Goes Dark For Some Rural Viewers," *National Public Radio Special Series on the Digital TV Transition* (Mar. 9, 2009), <http://www.npr.org/templates/story/story.php?storyId=101541768>.

A. The Incentive Auction Rules Must Preserve CPB-Qualified Stations' Coverage Areas and Population Served.

Consistent with the Public Broadcasting Act's mandate to facilitate "telecommunications services for all the citizens of the Nation"¹⁵ and the Commission's decades-long policy of promoting universal public television service,¹⁶ the core of every CPB-Qualified Station's operations is a commitment to ensuring that, regardless of a household's financial resources or geographic location, it can receive vibrant, diverse, and free noncommercial television services of the highest quality. The nation's public television system is built on this

¹⁵ 47 U.S.C. § 396(a)(5) (2004) ("[I]t furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation."); *id.* § 396(a)(7) ("[I]t is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States.").

¹⁶ The Commission adopted a policy of setting aside spectrum for noncommercial use in 1938. *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Further Notice of Proposed Rulemaking, 17 FCC Rcd. 3833, 3834 n.3 (rel. Feb. 25, 2002), citing 3 Fed. Reg. 364 (Feb. 9, 1938) (selecting channels in the 41–42 MHz band for noncommercial educational radio stations); *see also, e.g., In the Matter of Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania*, Memorandum Opinion and Order, 11 FCC Rcd. 11700, ¶¶ 17-19 (rel. Aug. 1, 1996) (detailing the Commission's policy of disfavoring dereservation of noncommercial educational television station channels). Since that time, the Commission has made a number of additional efforts to support the nation's public broadcasting service. For example, local noncommercial educational television stations may require a cable operator, satellite carrier, or other MVPD that serves the station's local market to retransmit its signal so long as the station meets certain technical obligations, such as the delivery of a good-quality signal to the carrier's receive facility. *See* 47 C.F.R. §§ 76.56, 76.66. The Commission also permits stations or translators operating on channels other than those reserved for noncommercial educational use to be granted noncommercial status for purposes of this must-carry right. *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd. 2965, ¶ 6 (rel. Mar. 29, 1993); *see also* Steve Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, 31 Non Profit Media, at pp. 314-25 (July 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307406A1.pdf (discussing Commission policies supporting noncommercial educational television station licensees).

mission of universal service—using a combination of full-power broadcast stations and television translators to provide services that, in the aggregate, work to blanket the entire population of the United States. By maximizing CPB-Qualified Stations’ coverage area and population served, especially in remote, rural areas, CPB-Qualified Stations currently are able to reach nearly all of the nation’s population—including tribal and other underserved populations that rely on over-the-air access in disproportionately large numbers.

The suggestion in the NPRM that the loss of over-the-air coverage could be discounted in geographic areas with high cable, satellite, or other multichannel video programming distributor (“MVPD”) penetration rates¹⁷ would directly conflict with this universal service mission and the Public Broadcasting Act. Moreover, such an approach fails to recognize that most MVPDs receive their local television station feeds over the air, rather than via fiber or other distribution methods. CPB-Qualified Stations commonly deliver to many MVPD headends using an over-the-air signal. For example, using over-the-air signals Blue Ridge PBS in Roanoke, Virginia feeds 190 MVPD headends, Wisconsin Public Television in Madison, Wisconsin feeds nearly 140 MVPD headends, and UNC-TV in North Carolina feeds over 160 MVPD headends.¹⁸

The Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), which requires the Commission to “make all reasonable efforts to preserve . . . the coverage area *and* population served” by each broadcast television licensee as of February 22, 2012, recognizes that no American should lose access to his or her existing broadcast television signals as a result of the incentive auction and subsequent repacking, regardless of whether that viewer receives

¹⁷ Incentive Auction NPRM ¶ 110.

¹⁸ PBS Engineering & Technology Advisory Committee survey, 2011-12.

these signals for free, over-the-air or through pay-television services.¹⁹ Rather than forcing a trade-off between broadcast television and mobile broadband services, the Act properly limits the Commission’s authority to reclaim broadcast television spectrum to those circumstances where a true “win-win” of increasing mobile broadband access *and* preserving existing broadcast television service can be achieved.

Only one of the interference standards proposed in the NPRM—the approach that is described as option two and that would preserve service to the same specific viewers that were served as of February 22, 2012 for each eligible station, on a station-by-station basis²⁰—meets this statutory standard. This option is likely to cause the least amount of disruption to viewers and to preserve the principle of universal service because it does not treat viewers as fungible. Because some CPB-Qualified Stations have a mandate to serve, for example, specific school districts or universities, it would be inappropriate for the Commission to treat viewers as interchangeable. Instead, it is critical that both before and after the repacking, CPB-Qualified Stations are able to serve the same viewers, subject to a relatively small amount of permitted increased interference.

PTV opposes the two other approaches proposed in the NPRM. The first option—which would hold steady the *total* population served but could result in some viewers losing access—is contrary to the statutory language. The term “preserve” is not defined in the Spectrum Act and thus should be given its common and ordinary meaning. To “preserve” is “to

¹⁹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(b)(2), 125 Stat. 156, codified at 47 U.S.C. §1452 (2012) [hereinafter “Spectrum Act”].

²⁰ Incentive Auction NPRM ¶ 106.

keep in its original or existing state” and “to continue without physical or chemical change.”²¹ Because the first option would permit some viewers to be replaced with other viewers, the first option does not maintain the station’s population served as of February 22, 2012 throughout the coverage area or keep the current population served in its original or existing state. The third option—which would increase the 0.5 percent *de minimis* interference standard to 2.0 percent—could disenfranchise a large number of rural communities or counties that would lose access to their existing television services. One example of this potential result is demonstrated in the maps attached as Appendix A. This significant reduction in existing television services would be contrary to the public interest and the statutory standard directing the Commission to “preserve” a station’s population served.

B. The Commission Should Take Additional Steps To Limit the Impact of the Repacking on Viewers Who Receive Their Television Signals from Television Translators.

CPB-Qualified Stations rely on hundreds of translators operating in remote, rural areas to provide viewers in these areas television programming, to transmit emergency alerts, and to provide other important informational and programming services. For example:

- Idaho Public Television relies on 43 translators to provide public television services to viewers across the state of Idaho;
- KNPB in Reno, Nevada uses 28 translators to reach 423,000 of its 845,000 viewers, including 27 tribal communities with about 32,400 residents;
- Approximately 50 percent of New Mexico public television viewers are reached by 31 CPB-Qualified Stations’ translators. The Navajo Nation in New Mexico would be disproportionately affected by loss of translator service;

²¹ OXFORD ENGLISH DICTIONARY (3d ed. 2007); *see also* WEBSTER’S 1913 DICTIONARY, <http://www.webster-dictionary.org/definition/preserve> (defining “preserve” to mean “to maintain throughout; to keep intact” and “to keep or save from injury or destruction”).

- KBYU in Utah uses approximately 90 translators to reach communities throughout the state; and
- In Wyoming, translators provide service to 69 percent of the public television stations' coverage area.

Viewers who receive these CPB-Qualified Stations' signals for free over-the-air would not be the only ones left in the dark if translator service is lost. Viewers who subscribe to cable, satellite, and other pay-television programming services also would lose access to these CPB-Qualified Stations' signals because many of these stations use translators to deliver a good-quality signal to MVPDs' receive facilities, consistent with the Commission's must-carry rules.²²

The fact that translators are secondary services without interference protection would be of little consolation to any viewers who lose service if translators are forced off air due to increased interference or a complete loss of spectrum access. As the Commission learned in the digital television transition, the transition "definitely would have been better if the Commission had been able to address this issue more comprehensively earlier in the process."²³ In light of this experience, the Notice appropriately considers whether the Commission can take steps to avoid or at least minimize the impact of the repacking on viewers who receive their television signals from television translators. Specifically, the Commission proposes to permit translators to engage in voluntary channel sharing arrangements in order to stay on air after the repacking. Channel sharing is not a panacea, however. Channel sharing would prevent certain translators from continuing to offer multicast channels and high-definition programming. In addition, translators are designed to repeat the station's signal from one channel to another

²² See 47 C.F.R. § 76.66.

²³ Howard Berkes, "Digital TV Goes Dark For Some Rural Viewers," *National Public Radio Special Series on the Digital TV Transition* (Mar. 9, 2009), <http://www.npr.org/templates/story/story.php?storyId=101541768> (quoting Robert Ratcliffe, Media Bureau, Federal Communications Commission).

channel. Consequently, as currently configured, translator networks that rely on over-the-air reception would not be able to share channels. To address this issue, translator operators would need to install more sophisticated equipment. Because this equipment is very expensive (in some cases, costing more than the translator itself), channel sharing is unlikely to be viable for translator stations in most cases.

Given that channel sharing will not be a realistic alternative for many translator operators, the Commission should take three additional steps to limit the impact of the repacking on viewers who receive their television signals from television translators, consistent with the Spectrum Act's intent to preserve television stations' coverage area and population served:²⁴

- First, the Commission should avoid condensing the band more in rural areas than in urban areas. Just because it might be *possible* to reclaim more spectrum in remote, rural areas does not mean that it must or should be done. To the contrary, accommodating translator service in these rural areas, where they are needed the most to maintain universal service, is consistent with congressional intent that low power television stations not be involuntarily forced to cease broadcasting.²⁵ This is especially true given that there is less bandwidth demand on mobile broadband networks in these geographic areas.

- Second, translators should be permitted to operate out-of-core indefinitely until they are displaced by a winning bidder that actually builds out and makes use of the spectrum acquired in the forward auction for mobile broadband service. Under this approach, a number of CPB-Qualified Station translators could continue operating for years after the

²⁴ These steps also would help address the challenging, but important, issue of ensuring that there is sufficient television spectrum available after the repacking to accommodate wireless microphone operations.

²⁵ See *Keeping the New Broadband Spectrum Law on Track, Before the H. Energy & Commerce Committee*, 112th Cong. (Dec. 12, 2012) (statement of Rep. Barton, Chair *emeritus*).

repacking, because mobile broadband buildout in these areas is likely to be slow while wireless providers focus on more densely populated areas. In addition, this approach would provide translator operators sufficient time to investigate alternative spectrum options to ensure that service to the public is not disrupted.

This proposed approach is similar to that originally taken by the Commission in connection with the transition to all-digital operations.²⁶ At first, the Commission permitted low power television stations, including translators, to operate out-of-core until the winning bidder entered the band. It subsequently reversed course, however, directing all low power television stations to cease operations (whether analog or digital) on channels 52-69 even if no auction winner had proceeded to put the spectrum to use.²⁷ Some of the spectrum vacated by low power television stations in this clearing remains unused to this day.

An even worse result could occur in the repacking, since it is possible that some of these translators could be forced off the air entirely where there is insufficient spectrum remaining in which they could be reassigned. To prevent this public interest harm, the Commission should avoid allowing spectrum that could be put to public use to lie fallow²⁸ and,

²⁶ See *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Report and Order, 19 FCC Rcd. 19331, 19337 (rel. Sept. 30, 2004).

²⁷ *In the Matter of Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Report and Order, FCC 11-110, 26 FCC Rcd. 10732 (rel. July 15, 2011).

²⁸ See, e.g., *In the Matter of Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures*, Third Report and Order, 26 FCC Rcd. 17642, ¶ 13 (Dec. 29, 2011) (noting policy of “disfavoring the practice of allowing spectrum to lie fallow for indefinite periods”); *In the Matter of Mobilcom Pittsburg, Inc. For Renewal of License*, Memorandum Opinion and Order, 8 FCC Rcd. 351, ¶ 6 (Jan. 12, 1993) (“This policy reflects our

instead, wait to displace translators until a winning forward auction bidder is in a position to build out and make use of the spectrum that is reallocated through the incentive auction process.

- *Third*, CPB-Qualified Station translators should be eligible for a selection priority over other low power television stations in the displacement relief process after the repacking.²⁹ More so than other television stations, CPB-Qualified Stations have an obligation to provide universal service to the public. Over forty years ago when the nation’s public television system was formed, Congress recognized that “it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for *all* the citizens of the Nation.”³⁰ Because of the unique role that CPB-Qualified Stations play in ensuring universal service, the Commission should, when choosing among displacement applications filed by low power television and translator stations within the proposed window, prioritize a CPB-Qualified Station’s application before that of all other television stations.

Each of these steps is appropriate given CPB-Qualified Stations’ unique mission of public service and the strong preference of Congress to promote the nation’s public television system. In addition, each of these steps is necessary given the NPRM’s conclusion that translators will not be eligible for reimbursement of relocation costs resulting from the

conviction that spectrum should not lie fallow when there are applicants ready and willing to use it.”).

²⁹ Incentive Auction NPRM ¶ 361.

³⁰ The Public Broadcasting Act of 1967, 47 U.S.C. § 396(a)(5) (emphasis added); *see also* 47 U.S.C. § 307(b).

repacking.³¹ These costs, which could reach up to \$27 million,³² will be borne in a number of cases by the cash-strapped state and local governments and noncommercial community foundations that operate these translators. Even if a translator can find a displacement channel in the new core broadcast television band, the licensee may be unable to bear the relocation cost, leaving viewers in the dark. The Commission therefore should take the steps described above to minimize—especially in rural areas—the likelihood that translators will be displaced in the repacking.

C. The Commission Should Not Accept Bids That Would Create “White Areas” Where No CPB-Qualified Station Would Remain On-Air To Serve A Particular Designated Market Area.

In general, PTV agrees that CPB-Qualified Stations should have the opportunity to participate in the auction. Yet this should not come at the expense of the Congressionally-mandated mission of universal service. To avoid diminishing the universal reach of the nation’s public television system, the Commission should not accept a proposed bid by a CPB-Qualified Station if its acceptance would result in a “white area” where a designated market area would

³¹ Incentive Auction NPRM, p.160 (Proposed Rules at 47 C.F.R. § 73.3572).

³² In 2007, the Corporation for Public Broadcasting engaged Hammett & Edison Inc. to conduct a study of the costs to upgrade 503 television translators or low power television facilities for digital television operations. The report estimated these costs to total more than \$27.5 million. See Hammett & Edison, Inc., *Audit of FM and TV Secondary Services Operated by CPB-Affiliated Broadcasting Stations in Preparation for Conversion to Digital Broadcasting*, Executive Summary (Nov. 19, 2007). Although these estimates were specific to the conversion from analog to digital operations, PTV’s engineers expect that similar costs are likely to be incurred in the repacking because in many cases, like where the translator continues operations through channel sharing, translator operators will need to replace the entire facility, thereby resulting in comparable equipment and labor costs.

lose all local CPB-Qualified Station service.³³ A designated market area could become a white area in one of two ways: (1) if a single CPB-Qualified Station serves the market and that station submits a winning bid to surrender its full 6 MHz channel and does not enter into a channel sharing arrangement with a non-surrendering station, or (2) if a designated market area has more than one CPB-Qualified Station and all of these stations submit winning bids to surrender their full 6 MHz channels and no such station enters into a channel sharing arrangement with a non-surrendering station. In both of these scenarios, the Commission should reject a station's bid if it would result in a white area, consistent with the statutory directive to "provide a fair, efficient, and equitable distribution of radio service" across every community in the United States.³⁴

This approach would be consistent with the Commission's longstanding policy of disfavoring modification applications of broadcast television station facilities that would create unserved white areas.³⁵ Given CPB-Qualified Stations' universal service mission and the longstanding goal of Congress and the Commission to promote this mission, the policy against white areas is even stronger with respect to public television services.³⁶

However, this approach does *not* mean that a CPB-Qualified Station that falls within one of the two categories identified above would be precluded from participating in the incentive auction. To the contrary, such stations could surrender all or a portion of their spectrum in other ways that would not result in a total loss of public television service in the station's designated market area. For example, if a station currently operates in the UHF band, it could voluntarily submit a bid to move to the VHF band. In addition, both UHF and VHF

³³ See 47 U.S.C. § 338(k)(6).

³⁴ *Id.* § 307(b).

³⁵ Incentive Auction NPRM ¶ 48 n.88.

³⁶ See, e.g., The Public Broadcasting Act of 1967, 47 U.S.C. § 396(a)(5).

stations could participate by entering into a channel sharing arrangement with another television station in the market.

D. The Commission Should Take Steps To Make Channel Sharing Arrangements a Viable Option For Stations To Continue Their Broadcast Television Station Operations.

As explained in PTV's March 2011 comments filed in the channel sharing proceeding, it may be appropriate for CPB-Qualified Stations to enter into channel sharing arrangements in certain circumstances.³⁷ For example, CPB-Qualified Stations should have the flexibility to enter into channel sharing arrangements with commercial stations, as long as the Commission ensures that these arrangements do not result in the dereservation of a noncommercial educational station's channel consistent with the Commission's longstanding policy against de-reservation. Historically, the Commission has sought to reserve approximately a quarter of the available television channels for noncommercial use and has refused to dereserve a noncommercial channel without substituting another reserved channel.³⁸ In addition, the Commission has repeatedly denied requests to delete reserved channels, citing as a principal reason for doing so the need to preserve the future availability of the channels.³⁹ The Commission should apply a similar policy here.

³⁷ *In the Matter of Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Dkt. 10-235, Comments of the Association of Public Television Stations, National Public Radio, Corporation for Public Broadcasting, and Public Broadcasting Service, 8-13 (Mar. 18, 2011).

³⁸ *In the Matter of Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania*, Memorandum Opinion and Order, 11 FCC Rcd. 11700, ¶ 17 (rel. Aug. 1, 1996).

³⁹ *Id.*

Moreover, the Commission should take steps to make channel sharing arrangements a viable option for stations to continue their broadcast television station operations, rather than a house of cards that unexpectedly falls apart months, or even years, into the arrangement to the unfair disadvantage of an innocent party. PTV agrees with the Commission's general premise that channel sharing agreements should be left to marketplace negotiations.⁴⁰ With respect to certain limited issues, however, public interest considerations may require some baseline requirements to ensure that one channel sharing participant's actions would not unduly disrupt viewers' ability to continue receiving the broadcast television services of other stations.⁴¹ For example, if a CPB-Qualified Station participates in the incentive auction but enters into a channel sharing arrangement to stay on-air, and that arrangement subsequently is terminated due to, for instance, a bankruptcy or other change in control of another channel sharing party, viewers could be left without public television service if there are not proper procedures in place to allow the CPB-Qualified Station to continue operations. In such circumstances where the channel sharing agreement is terminated and there is a change in control, the Commission should consider the willingness of the transferee to abide by the terms of the existing channel sharing agreement when deciding whether to grant the application to transfer control.

E. Robust Confidentiality Protections Are Critical To Avoid Discouraging Participation In The Incentive Auction.

The Spectrum Act requires the Commission to “take all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the

⁴⁰ See, e.g., Channel Sharing NPRM ¶ 15.

⁴¹ Incentive Auction NPRM ¶¶ 363-64.

reverse auction.”⁴² In implementing this statutory provision, the Commission should prevent disclosing the identity, or any information that could lead to disclosing the identity, of applicants or participants in the incentive auction who do not submit winning bids by amending its rules providing for public inspection of records.⁴³

The Commission aptly recognizes how dependent the success of the incentive auction is on this important statutory provision, and PTV supports the Commission’s proposal to notify applicants individually as to whether they are qualified bidders, rather than to use its typical spectrum auction procedure of releasing a public notice identifying all qualified and non-qualified applicants.⁴⁴ PTV also appreciates the Commission’s understanding of the complexity of this issue. For example, the Commission recognizes in the NPRM that, unlike previous spectrum auctions, the results of this incentive auction could remain unresolved for a prolonged period due to the complexity introduced by the various eligible relinquishments and potential contingent bidding available to reverse auction participants.⁴⁵ Releasing the identities of participating licensees, or of data that could be used to determine the identities of those who participate, could harm competition in the marketplace and be devastating to the continued operation of licensees who submit bids to surrender their spectrum but whose bids are unsuccessful. Consequently, if the identities of unsuccessful bidders are disclosed, licensees may be far less likely to participate in the incentive auction.

⁴² Spectrum Act, § 6403(a)(3).

⁴³ 47 C.F.R. § 0.457. Of course, stations should be permitted to waive these protections where, for example, they are required to disclose such information under law, including state open records laws and laws governing the disposition of station assets.

⁴⁴ Incentive Auction NPRM ¶ 255.

⁴⁵ *Id.* ¶ 257.

The NPRM asks many detailed questions about who should be protected from disclosure, how they should be protected, and what information should be protected and for how long.⁴⁶ PTV encourages the Commission to protect the identities of all participants who do not submit winning bids from disclosure. Specifically, the identities of both (1) reverse auction bidders whose applications are not accepted and are unable to submit bids and (2) those licensees whose applications are accepted but whose bids are unsuccessful should not be disclosed to other participants or the public. Any information that does not directly identify these licensees' identity but could lead to disclosure of their identity should be protected from disclosure as well.⁴⁷

These confidentiality protections for unsuccessful participants (as opposed to winning bidders) should not end at the conclusion of the incentive auction process.⁴⁸ Although the Spectrum Act directs the Commission to “withhold[] the identity of [licensees who participate in the reverse auction] until the reassignments and reallocations . . . become effective,” the language does not *require* that this information be disclosed for all bidders and should be interpreted as the minimum, not the maximum, period in which Commission-held data of a participating licensee must be kept in confidence.⁴⁹

Rather, as the NPRM proposes, confidentiality protections should be extended in some circumstances to protect confidential licensee data beyond the date of effectiveness of any

⁴⁶ *Id.* ¶¶ 257-63.

⁴⁷ *Id.* ¶ 258.

⁴⁸ *Id.* ¶ 260.

⁴⁹ Spectrum Act, § 6403(a)(3).

reassignments or reallocations of broadcast television spectrum.⁵⁰ After the repacking is complete is the most important time for broadcasters who submitted unsuccessful bids and who subsequently might be faced with an unanticipated new channel assignment to return to their business as quickly and effectively as possible. Disclosing their identity at that time would only threaten their ability to survive and thrive, and may discourage broadcasters from participating in the first place.

The protection of this information before and after reallocation and reassignments are finalized can be resolved most efficiently and effectively by amending the Commission's rules providing for public inspection of records pursuant to the Freedom of Information Act ("FOIA").⁵¹ FOIA provides the Commission with broad authority to make "rules of procedure" and "substantive rules of general applicability."⁵² Under FOIA, agencies may prevent disclosure of "trade secrets and commercial or financial information obtained by an agency from a private entity that is privileged or confidential."⁵³

Pursuant to this authority, the Commission promulgated Section 0.457(d)(1) of its rules, which protects from public disclosure certain trade secrets and commercial or financial information and privileged or confidential information if accepted by the Commission on a confidential basis. To be afforded that protection, the regulations either can list that the material is accepted by the Commission as confidential automatically *or* a person can request confidential

⁵⁰ Incentive Auction NPRM ¶ 261.

⁵¹ *Id.* ¶ 261.

⁵² 5 U.S.C. § 552(a)(1)(C)-(D).

⁵³ *Id.* § 552(b)(4).

treatment pursuant to FOIA.⁵⁴ Complicating the issue is that the Commission's typical process for requesting confidential treatment pursuant to FOIA is inadequate here.⁵⁵ The very act of requesting confidential treatment would disclose the licensee's identity and the fact that the licensee plans to participate in the incentive auction, thereby publicly disclosing the very information that must remain confidential.

Although the Commission regularly issues a blanket protective order at the outset of a proceeding to provide for the confidentiality of certain information submitted in the proceeding,⁵⁶ a protective order does not provide sufficient protection in this case because protective orders allow certain parties participating in the proceeding to view the protected materials.⁵⁷ Therefore, given the statutory mandate for the Commission to keep licensees' bidding information confidential, the confidential and commercial nature of the information being submitted, and the Commission's broad authority to adopt flexible rules implementing FOIA's exceptions, the Commission should revise its public disclosure rules to protect from disclosure any information submitted by a licensee that does not submit a winning bid in the

⁵⁴ See 47 C.F.R. §§ 0.457(d)(1), 0.459.

⁵⁵ *Id.* § 0.459(a)(1).

⁵⁶ For example, the Commission recently granted a blanket protective order preventing disclosure of certain reports to be filed by carriers engaged in the provision of wireless telecommunications services and certain disaggregated, carrier specific data. See *In the Matter of Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc.*, NRUF/LNP Protective Order, WT Dkt. No. 12-301 (Nov. 30, 2012); *AT&T Inc. and Deutsche Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations*, WT Dkt. 11-65, Protective Order, 26 FCC Rcd. 6031 (Apr. 18, 2011); *AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, Protective Order, 24 FCC Rcd. 13915 (Nov. 5, 2009).

⁵⁷ See *In the Matter of Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc.*, NRUF/LNP Protective Order, WT Dkt. No. 12-301 (Nov. 30, 2012) (allowing access to participants in the proceeding through their Outside Counsel of Record and Outside Consultants whom they retain to assist them in the proceeding).

incentive auction. Specifically, PTV encourages the Commission to add to the list of materials listed in Section § 0.457(d)(1) of its rules as automatically accepted by the Commission on a confidential basis, “the identities of participants (non-qualifying and qualifying) who do not submit winning bids in the 600 MHz Reverse Auction pursuant to [citation for new incentive auction rules], as well as all identifying and non-identifying information provided therein.” Given the complexities of the proceeding, and the fact that broadcaster participation in the auction is dependent upon the Commission’s assurances of confidentiality, the approach outlined above is both reasonable and necessary.

III. IN IMPLEMENTING THE REPACKED BAND PLAN, THE COMMISSION SHOULD MINIMIZE ANY DISRUPTION TO THE PUBLIC’S TELEVISION SERVICE THAT MAY RESULT FROM THE REPACKING.

The repacking process will be complicated by multiple factors, including the number of stations, translators, wireless microphones, and other services involved; potential weather challenges and tower crew or equipment shortages; and the incredibly short timeframe in which the Commission expects to complete the transition. PTV encourages the Commission to take the following steps to help minimize any disruption to the nation’s public television service that may result from the repacking: (A) afford stations at least three years to complete the transition to new channel assignments; (B) ensure that the reimbursement process is efficient and fair; (C) avoid any extended off-air time for repacked television stations; and (D) undertake a nationwide consumer education campaign that informs viewers of the steps they must take to retain access to their broadcast television services.

A. Licensees Should Have At Least Three Years To Complete The Transition To New Channel Assignments.

In the NPRM, the Commission proposes to require stations to complete their transition to new channel assignments within eighteen months.⁵⁸ This timeframe is unrealistic. Past is prologue, and previous spectrum clearing experiences, including the digital television transition and Broadcast Auxiliary Service (“BAS”) relocation, have proven that transitions to new channel assignments take longer than the timetable initially proposed by the Commission.

The digital television transition occurred gradually over the course of several years. An initial target deadline for ceasing analog television broadcasting was set by statute in 1996.⁵⁹ However, this target was extended in 2005 to a deadline of February 17, 2009,⁶⁰ and again in February 2009 to June 12, 2009.⁶¹ These delays were caused by a number of factors, including equipment manufacturing limitations, tower crew limitations, severe weather and regional emergencies, channel occupancy dependencies, and the need to educate consumers about the transition from analog to digital broadcasting and provide consumers additional time to prepare. Following the conclusion of the digital transition, manufacturers have not had reason to

⁵⁸ Incentive Auction NPRM ¶ 322.

⁵⁹ The Balanced Budget Act of 1996, Pub. L. 104-99 (Jan. 26, 1996) (setting the deadline for December 31, 2006, with some exceptions); *see also In the Matter of Advanced Television and Their Impact Upon the Existing Broadcast Service*, Memorandum Opinion and Order, Third Report and Order, Third Further Notice of Proposed Rulemaking, FCC 92-438, 7 FCC Rcd. 6924, 6937-38 (October 16, 1992) (extending stations’ application deadlines from two to three years and providing for a total six year application and construction period in light of economic considerations, such as stations raising the capital necessary to invest in new technology, and logistical issues, such as locating a new transmitter site).

⁶⁰ Deficit Reduction Act of 2005, Title III: Digital Television Transition and Public Safety Act, Pub. L. No., 109-171 (codified at 47 U.S.C. § 309) (Feb. 8, 2006).

⁶¹ DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (Feb. 11, 2009); *see also In re Implementation of the DTV Delay Act, Third Report and Order on Reconsideration*, 24 FCC Rcd. 3399, 3400 (rel. Mar. 13, 2009) (implementing the DTV Delay Act).

maintain the same level of capacity that existed in 2009—meaning that the ability to obtain the custom equipment that will be required to achieve the repacking assignments is limited.

In a number of respects, the digital television transition was less complicated than this transition is likely to be. In the digital television transition, for example, the Commission implemented procedures to allow a number of stations to transition early, thereby alleviating some of the challenges involved with potentially thousands of stations seeking the same equipment and support at once.⁶² Moreover, stations could operate simultaneously on digital and analog channels for a period of time before analog transmissions ceased, making it less likely that viewers would experience significant disruptions in their television services. In addition, the digital television transition did not involve the complicating factor of some stations entering into channel sharing arrangements.

Similarly, the clearing of BAS licensees in the 1.9 GHz band involved repeated and prolonged delays.⁶³ In 2000, 35 MHz of BAS spectrum in the 1.9 GHz band was reallocated, and the new Mobile Satellite Service entrants in the band were required to begin relocation of BAS licensees.⁶⁴ In 2003, a 5 MHz portion of this recovered spectrum was reallocated for the Fixed and Mobile Services. A year later, this portion was assigned to Nextel (later known as the post-merger Sprint Nextel), which committed to the relocation of certain

⁶² See, e.g., *In re Implementation of the DTV Delay Act*, Third Report and Order on Reconsideration, 24 FCC Rcd. 3399, 3400 (rel. March 13, 2009); *FCC Announces Procedures Regarding Termination of Analog Television Service On or After February 17, 2009*, Public Notice, FCC 09-6 (rel. Feb. 5, 2009).

⁶³ See, e.g., *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, Order, 25 FCC Rcd. 1294 (rel. Feb. 5, 2010).

⁶⁴ *Id.*

BAS incumbents by 2007.⁶⁵ This BAS relocation benefitted from an administrator that determined the appropriateness of the equipment being requested in each case. Nevertheless, due to a number of significant, unpredicted complications—such as installer constraints, weather conditions, manufacturer limitations, license modification delays, international coordination requirements, and system complexities—the Commission waived various impending relocation deadlines, ultimately extending the transition timetable an *additional* three years beyond that originally planned.⁶⁶ Many of the same challenges that arose in the BAS transition, including weather conditions and international coordination, are likely to be present in the upcoming repacking, and these challenges may be exacerbated given that the repacking will not benefit from having a transition administrator like in the BAS relocation. In addition, due to significant technical differences between the UHF and VHF bands, licensees who move from UHF to VHF may face particularly daunting challenges.

A phased-in relocation timetable based on region, which would at least take into account weather and seasonal issues, is one practical way to help minimize the risk of transition delays. However, based on past experience gained in the transitions described above, a number of stations still would need well over 18 months to complete construction of their facilities. In contrast, the examples provided by the Commission in support of an 18-month timetable—namely, the experiences of a handful of stations that made further channel changes

⁶⁵ *Id.*

⁶⁶ *Id.*; see also *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, Report and Order and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 7904 (June 12, 2009); *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 4393 (Mar. 5, 2008) (granting a waiver of the BAS transition deadline for 18 months, finding that the process for relocating BAS near international borders, equipment inventory issues, and equipment supply issues required further delays).

after the completion of the DTV transition—provide little guidance, as the small number of changes involved there did not strain manufacturer or installer resources, entail difficult international coordination negotiations, or run into unexpected or otherwise daunting weather challenges. Consequently, three years is the bare minimum time needed for broadcast television licensees to complete the construction of their new facilities and transition to their new channel assignments.

B. Licensees Should Receive An Advance Reimbursement Payment That Is Adjusted Through A True-Up Process That Addresses Both Over- and Under-Payments.

The Spectrum Act directs the Commission to “reimburse costs reasonably incurred” by licensees that are reassigned to new channels.⁶⁷ An efficient and fair reimbursement process is critical to minimizing disruptions to the public’s television service by ensuring that stations choosing not to participate in the incentive auction, but forced to involuntarily switch channels in the repacking, are made whole and have the financial resources to continue normal operations.

PTV agrees with the Commission’s interpretation that the statutory directive to “reimburse costs reasonably *incurred*” pertains to a liability to pay, and not an actual out-of-pocket expenditure,⁶⁸ and that, consequently, stations should receive an advance payment based on estimated costs. In addition to being consistent with the statutory language, this approach is the most efficient and fair way to reimburse stations and better allows the Commission to meet

⁶⁷ Spectrum Act § 6403(b)(4)(A).

⁶⁸ Incentive Auction NPRM ¶ 338 (quoting Spectrum Act § 6403(b)(4)(A)) (emphasis added). *See also id.* ¶ 338 n.516 (citing *Quarles Petroleum Co. v. United States*, 551 F.2d 1201, 1205 (Fed. Cl. 1977), *et al.*).

the statutory mandate to make all payments within three years of completion of the reverse and forward auctions.⁶⁹ Stations should be provided the option of either providing their own estimates directly to the Commission or relying on the Commission's tiered estimate. To the extent the Commission provides an estimate, however, there should be a simple process by which a station could dispute the accuracy of the estimate or cost tier to which the station is assigned. In no event should the Commission's estimates be the same for all eligible stations.⁷⁰ Rather, tiers of fixed rates or customized estimates are appropriate because relocation costs are likely to vary significantly—from approximately \$1.1 to \$2.6 million per transmitter⁷¹—between markets and even among stations within the same market.

PTV supports the Commission's proposal to require stations receiving advance payment to return any unused funds;⁷² however, the Commission should clarify that the true-up also will ensure that stations that ultimately require more relocation funds than estimated will be made whole. Unexpected challenges, such as severe weather events, disruptions in equipment manufacturing, and tower crew shortages, can significantly increase costs and make it difficult to accurately estimate a station's relocation costs.

As directed by the Spectrum Act, all television station licensees should be made whole in the repacking; however, because noncommercial educational television stations not only play a critical role in ensuring that the public has universal access to robust, commercial-free television services, but also face unique financial challenges that increase the risk of

⁶⁹ Spectrum Act § 6403(b)(4)(A).

⁷⁰ Incentive Auction NPRM ¶ 340.

⁷¹ Jay Adrick, Vice President Broadcast Technology, Harris Broadcast, *Broadcaster Relocation Fund Workshop Expanded Presentation*, at 15-16 (June 25, 2012).

⁷² Incentive Auction NPRM ¶ 340.

disruption as a result of the repacking, it is particularly important that such stations be reimbursed fully in the event that the relocation fund is exhausted. Over the last 45 years, the government and the public have invested heavily in the nation's public television system to ensure that viewers across the country can access important public interest programming and services. Unlike commercial entities, noncommercial educational stations depend on direct financial support from private donations and limited funding from the federal government.⁷³ The depressed economic climate that has persisted over the last several years, however, has placed severe financial constraints on noncommercial educational stations.⁷⁴ In addition, because noncommercial stations are less able to access credit markets to gain access to funds that can be used to cover the costs of transitioning to new channels, full reimbursement for the relocation costs of noncommercial stations is critical to ensuring that these stations can continue to serve the public after the transition. Consequently, PTV encourages the Commission to prioritize noncommercial educational licensees in the event that the reimbursement fund is insufficient.⁷⁵

C. **The Commission Should Take Every Reasonable Step To Avoid Off-Air Time.**

The Commission seems to assume in the NPRM that some stations could be forced to suffer significant downtime due to the technical modifications required in the

⁷³ *In the Matter of The Future of Media and Information Needs of Communities in a Digital Age*, GN Dkt. 10-25, Comments of the Public Broadcasting Service, at 4, 17-18 (May 7, 2010).

⁷⁴ *Id.* at 17-18.

⁷⁵ Based on cost estimates prepared by experienced PTV engineers, the repacking costs for the entire broadcast television industry could very well reach just over \$3 billion, including over \$600 million for public television stations alone.

transition.⁷⁶ PTV is concerned that the NPRM does not fully appreciate the extent to which significant off-air time could occur, such as where a station must take down an existing antenna to install a new one, replace transmission lines, or modify transmitters.

PTV strongly urges the Commission to take every reasonable step to prevent any off-air time for CPB-Qualified Stations, including by allowing additional time for the transition as discussed above, facilitating timely coordination along the borders with Mexico and Canada, and promoting rapid solutions to cross-market coordination issues. To address the issue of potential off-air time, the Commission encourages stations to use temporary facilities while their final facilities are being completed.⁷⁷ Temporary facilities are not a viable option for avoiding off-air time. Temporary facilities would significantly increase the station's relocation costs, placing additional strain on the \$1.75 billion cap on relocation funds. Temporary facilities also would result in viewer confusion and require a longer transition time, making the proposed 18 month transition deadline even more unrealistic. Finally, there may be limited room for temporary facilities on towers. Consequently, although stations should have the option of using temporary facilities, this option is unlikely to be a realistic solution for the vast majority of stations.

D. The Commission Should Seek Additional Funds From Congress To Implement A Nationwide Consumer Education Campaign.

The transition of television stations to new channels as a result of the repacking could result in a tremendous amount of public confusion that rivals or exceeds that of the digital television transition. Because the repacking is expected to occur over the course of many

⁷⁶ Incentive Auction NPRM ¶ 312.

⁷⁷ *Id.*

months, or possibly even years, viewers likely will need to run a channel scan on their televisions multiple times after the incentive auction is complete in order to continue receiving all of their television channels. And because no station will have the opportunity to operate on a companion channel as it transitions to its new facilities, there will be some period of off-air time while stations complete their transition to new channel assignments.

To minimize public confusion and the disruption in services that could result, the Commission should launch a comprehensive, nationwide consumer education campaign.⁷⁸ The digital television transition proved that a robust consumer education campaign is a critical component to ensuring a successful transition of television station licensees to new channel assignments. As the Commission explained, realizing the benefits of the digital television transition was “dependent upon widespread consumer understanding of the benefit and mechanics of the transition.”⁷⁹ Because the Spectrum Act does not anticipate any of the incentive auction proceeds to be used for consumer education, however, the Commission should seek additional funding from Congress to cover the costs of this important initiative, similar to the efforts it took in seeking additional funding for consumer education in connection with the digital television transition.⁸⁰

⁷⁸ *Id.* ¶¶ 330-32.

⁷⁹ *In the Matter of DTV Consumer Education Initiative*, Notice of Proposed Rulemaking, 22 FCC Rcd. 14091, ¶ 2 (rel. July 30, 2007); *see also* U.S. Dep’t of Comm., *Outside the Box: The Digital TV Converter Box Coupon Program*, at 3, 13 (Dec. 2009), http://www.ntia.doc.gov/files/ntia/publications/dtvreport_outsidethebox.pdf (discussing the critical role the Commission’s consumer education initiatives played in the success of the digital television transition).

⁸⁰ American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (Feb. 17, 2009); *see also* Consumer Education Plan, U.S. Dep’t of Commerce, December 4, 2007, http://www.ntia.doc.gov/legacy/dtvcoupon/DTV_ConsumerEducation_120607.pdf; Consumer Education Plan, Addendum,

IV. THE INCENTIVE AUCTION RULES SHOULD PROMOTE A SIMPLE AND TRANSPARENT AUCTION DESIGN.

The incentive auction process should be simple and transparent so that all participants and non-participants understand the potential impact these undertakings will have on their business operations and ability to serve the public. In particular, the Commission should: (A) adopt clear anti-collusion rules that prevent anticompetitive behavior without needlessly discouraging participation in the incentive auction; (B) afford licensees broad flexibility in designing their bids; and (C) ensure that any rules amending the Table of Allocations are specific and transparent.

A. The Anti-Collusion Rules Must Be Clear And Account For The Unique Circumstances Presented By The Incentive Auction.

The NPRM recognizes, correctly, that the incentive auction rules must be transparent and clear in their application in order to avoid uncertainty that could discourage participation in the incentive auction.⁸¹ Unlike past spectrum auctions, the incentive auction will involve channel sharing arrangements that may require ongoing collaboration, even after the applications are filed and the bidding begins. For example, two bidders may wish to enter into a contingent channel sharing arrangement in which one bidder may withdraw its individual bid and engage in a channel sharing arrangement with the other bidder if the price goes below a certain amount. In addition, because the auction could occur in multiple stages over an extended period

http://www.ntia.doc.gov/legacy/dtvcoupon/IBM_NTIA_DTVConsumerEd_Addendum_090423.pdf; *Outside the Box: The Digital TV Converter Box Coupon Program*, U.S. Dep't of Comm. (Dec. 2009), http://www.ntia.doc.gov/files/ntia/publications/dtvreport_outsidethebox.pdf.

⁸¹ Incentive Auction NPRM ¶ 10.

of time, inflexible anti-collusion rules could discourage an unsuccessful bidder from beginning channel sharing discussions.

To avoid chilling good faith discussions regarding channel sharing arrangements, the Commission's anti-collusion rules should not be unduly stringent and should explicitly identify prohibited communications. Specifically, PTV encourages the Commission to adopt anti-collusion rules that, at minimum, meet the following three criteria:

- *First*, consistent with the Commission's existing anti-collusion rules, the baseline position should be that participants may communicate, as long as there is disclosure. To this end, the Commission should interpret its rules—which permit parties to communicate (to the extent permissible under the antitrust laws) so long as they have entered into a partnership, joint venture, consortium, or other arrangement relating to the spectrum usage rights being offered in the reverse auction and have disclosed the existence of the relationship to the Commission⁸²—to cover communications related to channel sharing arrangements.

- *Second*, the anti-collusion rules should not be extended to members of a CPB-Qualified Station's governing board.⁸³ CPB-Qualified Stations are operated by universities, government entities, and non-profit community foundations.⁸⁴ And the governing boards of CPB-Qualified Stations consist of volunteers who serve in their capacity as university employees, government officials, and members of the community.⁸⁵ CPB-Qualified Stations benefit greatly from having these individuals, who volunteer their time and represent a diverse

⁸² *Id.* ¶ 267.

⁸³ *Id.* ¶ 265.

⁸⁴ *See* 47 C.F.R. § 73.621(a)-(b) (specifying eligibility requirements for noncommercial educational station licensees).

⁸⁵ Incentive Auction NPRM ¶ 265.

cross-section of the community, serve on their boards. While these individuals take their service to the public television system seriously, they understandably may conclude that compliance with the Commission's anti-collusion rules (which are strict, complicated, and carry serious penalties) is too heavy a burden. Consequently, subjecting the governing boards of CPB-Qualified Stations to the anti-collusion rules could result unintentionally in encouraging these volunteer members to resign, rather than risk unintended noncompliance. Because the antitrust rules would continue to apply and officers for each CPB-Qualified Station would still be subject to the Commission's anti-collusion rules, not including individual members of the governing boards for noncommercial educational stations is unlikely to impede the goals of ensuring fairness and maximizing competition.⁸⁶

- *Third*, in order to facilitate channel sharing discussions with unsuccessful bidders, the anti-collusion rules should no longer apply once a participant exits the auction. For instance, if a station initially participates in the incentive auction by offering to relinquish its entire 6 MHz, but ultimately opts out during the descending clock process, then this station should be able to enter into channel sharing negotiations with another auction participant. If the anti-collusion rules were to continue to apply even after participants exit the incentive auction, such conversations would be discouraged and the opportunities for channel sharing would be inhibited.

In addition, because the anti-collusion rules and the application of the antitrust laws could significantly affect broadcasters' willingness to participate in the incentive auction, PTV encourages the Commission to issue a further notice of proposed rulemaking that proposes specific language for the anti-collusion rules and provides clearer guidance on how they might be

⁸⁶ *Id.* ¶ 264.

applied. The Commission also should work closely with the Department of Justice to issue guidance on how the antitrust laws will apply in the context of the incentive auction. If the Commission instead fails to ensure that stations have an understanding of how the antitrust rules may apply, the result will be diminished participation in the incentive auction.

B. The Incentive Auction Rules Should Be Simple To Permit Licensees To Design Bids That Meet Their Specific Operational and Business Needs.

The Commission should provide licensees broad flexibility to design their bids. For example, because man-made and celestial noise problems make the low VHF band unsuitable for digital television transmissions, the Commission should permit UHF to VHF bidders to limit their bids to a high VHF channel (7-13).⁸⁷ Likewise, UHF to VHF bidders should be allowed to submit bids that request waivers of the VHF power and height limits or that propose other non-monetary incentives to complement the auction proceeds that these stations would receive.⁸⁸

In addition, although Appendix C to the NPRM appears to propose limiting the “permissible bands” for a station with an upper VHF channel to the upper VHF band,⁸⁹ a VHF station should be able to relinquish its spectrum in the auction and enter into a channel sharing arrangement with a station in the UHF band in order to become a licensee in the UHF band. This approach would permit more UHF stations to voluntarily move to the upper VHF spectrum, thereby freeing up more UHF spectrum for mobile broadband.

⁸⁷ *Id.* ¶ 85.

⁸⁸ *Id.*

⁸⁹ *Id.*, App. C at p. 9.

These options are consistent with the Commission's general goal of increasing the overall amount of spectrum available for mobile broadband and could have the effect of increasing voluntary participation in the incentive auction by broadcast television stations.

C. Any Rules Amending The Table Of Allocations Must Be Specific And Transparent To Prevent An Erosion Of Broadcast Television Services And To Facilitate Further Innovation By Broadcasters.

As explained in comments that PTV previously filed in connection with the Commission's channel sharing proceeding, proposals to amend the Table of Allocations to add new allocations for mobile broadband services to be co-primary with broadcast television services in the entire range of the UHF and VHF bands are overbroad because the Commission intends to make only a portion of the UHF band available for mobile broadband services.⁹⁰ The intervening passage of the Spectrum Act does not change this conclusion. To the contrary, the fact that Congress explicitly limited the Commission's authority to holding a single incentive auction reinforces the argument that adding new allocations for mobile broadband services throughout the UHF and VHF bands would go too far.

PTV agrees with NAB's March 2011 comments in the channel sharing proceeding that the Commission's proposal is not clear on specific steps or consequences, on how new allocations would affect opportunities for broadcasters to innovate in the future, or on

⁹⁰ *In the Matter of Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Dkt. 10-235, Comments of the Association of Public Television Stations, National Public Radio, Corporation for Public Broadcasting, and Public Broadcasting Service, 18 (Mar. 18, 2011).

broadcasters' interference rights vis-à-vis mobile broadband operations.⁹¹ And allowing broadcast television and mobile broadband licensees to coexist in the same portions of the band could potentially result in further erosion of the nation's broadcast television services. Consequently, we strongly urge the Commission to allocate separate bands for broadcast television and mobile broadband use.

V. CONCLUSION

PTV urges the Commission to recognize the vital role that CPB-Qualified Stations play in the life of the American public. In its efforts to promote robust mobile broadband networks while preserving healthy, diverse broadcast television services, the Commission should maintain the public's universal access to the critical television services that CPB-Qualified Stations provide, minimize any disruptions to the nation's television services as a result of the repacking, and promote a simple and transparent auction design. We look forward to working closely with the Commission as it finalizes rules for this first-of-its kind incentive auction and repacking process.

⁹¹ *In the Matter of Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Dkt. 10-235, Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., 15 (Mar. 18, 2011).

Respectfully submitted,

/s/

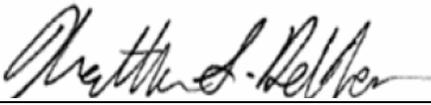
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0.5 PERCENT NEW INTERFERENCE EXAMPLE

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