Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

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I. Introduction and Summary

Congress has authorized the FCC to reassign spectrum presently used for the provision of a core communications service, broadcast television, for "flexible use."[1] The impetus for this ambitious project is a belief that America's wireless carriers are suffering from a "spectrum crunch" that, if not promptly resolved, will inconvenience consumers and harm economic growth. Implicit in the above-captioned Notice of Proposed Rulemaking,[2] and in much of the material that the FCC has published on the topic of incentive auctions since 2009, is the assumption that television broadcast spectrum is either underutilized or over-allocated (depending on one's perspective), because most households today receive their broadcast television programming via resellers.

The FCC's proposed solution, in broad terms, is to encourage broadcasters to volunteer to relinquish their licenses in exchange for payments from the government. With fewer broadcasters to accommodate, the FCC could clear a portion of the television band and auction it. Broadcasters that are displaced would be given new, equivalent channel assignments,

[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Sections 6102, 6401-03, 125 Stat. 156 (2012) ("Spectrum Act").
[2] *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions Innovation*, Notice of Proposed Rulemaking, Docket No. 12-268, FCC 12-118 (rel. Oct. 2, 2012) (the "NPRM").

protected from service degradation, and their conversion costs would be paid. Broadcasting would continue essentially unchanged, and more spectrum would be made available for "flexible use."[3]

In many ways, this is a logical undertaking, if one accepts the premises. In any case, Congress has authorized the FCC to proceed. Although Sinclair believes other possible solutions would have better served all stakeholders, broadcast incentive auctions are now the law of the land, and Sinclair is eager to cooperate with the FCC to make the process successful. We hope, too, that in the course of pursuing the incentive auctions, the FCC will be diligent in meeting its obligation to protect television broadcasters and the members of the public who rely on them. We also hope the FCC will go further, and take this opportunity to permit broadcasters to improve their service.

The National Broadband Plan,[4] which proposed the idea of incentive auctions to reassign broadcast spectrum for mobile wireless services, concluded that broadcast spectrum was economically underutilized because most American households today receive broadcast signals indirectly, through multichannel video programming of all kinds (unlicensed and licensed). But extrapolating from those facts to the conclusion that broadcast spectrum should be reallocated for subscription wireless service and otherwise be left unchanged is a leap to a solution that, at best, is suboptimal. The National Broadband Plan essentially reasons that people enjoy mobile services, that UHF frequencies are ideal for providing mobile service, and that broadcast TV is not a mobile service (and in most cases is delivered to fixed locations by an intermediary), so some of the broadcast spectrum should be freed up for subscription wireless service.

[3] NPRM at ¶ 10.
[4] Federal Communications Commission, *Connecting America: The National Broadband Plan* (March 16, 2010). Available at http://www.broadband.gov/plan/.

So the NPRM discusses a raft of processes and mechanisms to repack television broadcast stations without derogation of service, but otherwise leave it unchanged. The process envisioned will cost billions and take years. And at the end of the process, in the best possible case the FCC will have "freed up" a few dozen MHz of spectrum for mobile services. Yet dozens of additional MHz in the prized mobile band will still be occupied by a service for which the FCC neither proposed nor enabled a path that would make those core services easier for consumers to access. This seems to Sinclair to be a nearly tragic result – to expend a Herculean effort over many years and at great cost, and not even to ask how to make *both* of the core, widely deployed, consumer-oriented communications services in the lower UHF available and better for the mobile consumer who, after all, is the *raison d'être* for this proceeding.

As explained in these comments, Sinclair urges the Commission to:

- Take time to get it right. The incentive auction authority presents a rare opportunity for the FCC to make profound changes to the nation's core communications services. The FCC has expressed a preference for a remarkably short auction deadline, given the intricate complexities and many uncertainties involved. There is no need to rush here. As we discuss below, rushing the auction for no clear reason would depress auction receipts, introduce substantial risks that the entire process will fail, and squander a rare opportunity to improve service.
- Anticipate, and take this opportunity to facilitate, a more robust television broadcast service that is capable of evolving now and in the future to embrace new technology and adapt services to the demands of the market with minimal government involvement.
- Make bands auctioned for "flexible use" truly flexible.
- Diligently protect broadcasters that elect not to participate in the auction. Beyond developing and conducting an open process under clearly stated rules, this means eliminating incentives for the FCC to skew the results of the auction.

II. Discussion

a. The FCC Should Not Rush the Auction

The incentive auctions present hundreds of novel questions and myriad monumental challenges. As the FCC and its Commissioners have acknowledged many times, this is one of the most complex and challenging tasks the FCC has ever undertaken. Congress gave the FCC only one opportunity to get it right,[5] but appropriate to the complexity of the task, gave the FCC more than ten years, until the ***end of federal fiscal year 2022***, to complete the auction.[6]

Even while acknowledging the enormity of the task, the NPRM anticipates that the incentive auction can be conducted in 2014,[7] eight years before the statutory deadline and just two years after Congress granted incentive auction authority to the FCC. New auction formats are tricky beasts, and in the absence of a compelling rationale for doing otherwise, the FCC should take the time to get it right. And there is no compelling rationale to rush into the most complex spectrum auctions in history and the most complex reallocation the FCC has ever attempted. Whatever one believes about long term demand for mobile spectrum, there is no "spectrum crunch" today or on the horizon. Without immediate demand for spectrum, carriers will likely bid far less than they would in the event of actual, present demand.

A rush to auction (and a rush *in* the auction) would have other undesirable side effects. The NPRM gives so little attention to the enormously complex challenge of the post-auction transition that the Commission seems almost unconcerned about potentially widespread and lengthy disruptions in service. The FCC must confront this issue and develop a pragmatic plan

[5] Spectrum Act § 6403(e).
[6] *Id.* at § 6403(f)(3) (emphasis added).
[7] NPRM at ¶ 10.

that accounts for a wide range of variables, many of which will not be quantified until after the auction is completed.[8]

There are many difficult challenges and the auction has many potential single points of failure. As NAB explains in this proceeding, the FCC has taken longer to design and implement far less complex auctions. Congress has obliged the FCC to take all reasonable efforts to preserve the coverage area and population served of *every* broadcast television licensee. Certainly, if the FCC conducts the auction years ahead of schedule without fully addressing fundamental challenges (such as border coordination) that potentially affect service replication, it will not been seen to have met its "all reasonable efforts" obligation.

b. The FCC Should Anticipate, Facilitate and Support a Robust, Evolving Broadcast Television Service

i. Conduct the Auction and Repacking to Permit Development and Deployment of a New Broadcast Technical Standard

As the FCC contemplates another repacking of the television spectrum, it should examine what steps it can take to allow the television service to improve as part of the process. In her statement accompanying the NPRM, Commissioner Clyburn states that a "guiding principle" of the process is to make broadcasting stronger.[9] Sinclair agrees with Commissioner Clyburn that stronger broadcasting service should be a core objective. Unfortunately, that principle is absent from the NPRM. Sinclair finds the attitude of the NPRM troubling in that it aspires, at best, to do minimal harm to the broadcasting service. This aims far too low. The same NPRM touts the benefits that "flexible use" of spectrum and evolving technology have brought to consumers and the economy. Implicit, if not explicit, in the FCC's reasoning, is the recognition that consumers

[8] Sinclair supports and specifically incorporates by reference the Comments of the National Association of Broadcasters ("NAB") in this proceeding regarding inadequate attention to transition issues.
[9] *See* NPRM at 196, Separate Statement of Commissioner Clyburn.

are best served when their service providers are free to innovate, in particular, to deploy new technology and support new modes of use by consumers.

At present, the FCC's rules mandate that broadcasters use, exclusively, 6 MHz channels to transmit via 8-VSB modulation. Even if a broadcaster wished to launch a new broadcast service using a modern modulation technology that would permit access indoors without bulky, balky external antennas and to small devices while mobile, greatly improving its service to the public, it could not do so.

Beyond the mandated broadcast standard, the FCC's outdated 1999 local TV ownership rules hinder the natural, market-based evolution of the broadcast service. Those rules (which really amount to intricate and exceedingly restrictive spectrum aggregation caps) limit the scale of individual broadcasters, making it impossible for anyone to drive a service upgrade in the manner that wireless carriers have deployed 4G service. The FCC's local TV ownership rules also hinder the sort of measured, common service evolution that occurs regularly in the commercial mobile wireless industry. In contrast, providers that have access to vast swaths of spectrum can service multiple generations of technology at once, permitting them to adopt and deploy new technology without any government intervention and invisibly to consumers.[10]

Even within the constraints of the existing and needlessly restrictive local TV ownership rules, the FCC can do much through this proceeding to facilitate evolution of television broadcasting. First and foremost, if the FCC is going to oversee potentially hundreds of stations

[10] Verizon Wireless, for example, presently services several different generations of technology and protocols. The oldest technologies it services are highly inefficient by today's standards. But by having adequate spectrum and scale to service multiple generations, Verizon is able to deploy new and better services without inconveniencing consumers or seeking permission from the government. Critical to this model is the ability of the licensee to retain efficiency gains. In theory, the government could demand that Verizon pay for efficiency gains, or relinquish spectrum when it upgrades, so that the total capacity for which it was originally licensed remains constant. But that would penalize innovation. The FCC should not apply a different standard to broadcasters. FCC policies should encourage constant innovation across the board and across all technologies.

changing channels, all of the attendant cost and disruption to consumers should lead to something better than existed before. This is possible. But a rush to complete the auction and repacking years before the statutory window closes would squander the opportunity for broadcasters to deploy, at their option and to the benefit of the American public, new technology at the time of the repacking.

The Commission should adopt a transition strategy whereby some (or all) broadcasters at their option simultaneously (or otherwise) could deploy innovative strategies simultaneously and could lever the transition strategies that are developed simply for the repacking. With no clear reason to rush the auction, and many good reasons to proceed more deliberately, the FCC should consider setting the auction window closer to at least 2017, when a new standard should be ready for implementation. The FCC must also reject the NPRM's unfortunate bias for repurposing the maximum amount of broadcast spectrum. As noted above, the ability of providers to service more than one generation of technology at once by controlling enough spectrum to do so is as important to innovation as "flexible use" itself. Repacking the broadcast band more tightly than absolutely necessary to meet demand for wireless spectrum makes future improvements to the television broadcast service far more difficult. And demanding that broadcasters give over efficiency gains as the price of improving their service is antithetical to the entire premise of all contemporary thinking on spectrum management.

Regardless of when the FCC conducts the auctions, it should anticipate that the television broadcast standard, like the technologies used in all advanced, widely deployed communications services, will evolve over time to better serve consumers. The FCC should anticipate and plan for future growth and evolution of television broadcasting, and this necessarily requires some stated plan for future transitions, since the FCC's outdated local TV ownership rules prevent the

industry from upgrading on its own. Perhaps the most fundamental failure of the NPRM is its assumption that television broadcasting is static and the FCC should not consider, plan for, or even acknowledge, a better television broadcast service in the near future. Sinclair naturally does not expect the FCC to use this proceeding to permit and organize a new television broadcast standard. But to conduct this proceeding on the assumption that television broadcasting will use the existing technical standard forever would be shortsighted and inimical to the public interest.

ii. The FCC Should Define Flexible Use Waivers Broadly

Section 6403(b)(4)(B) of the Spectrum Act provides that stations may seek (and the Commission may grant), in lieu of reimbursement of relocation costs, a "waiver to make flexible use of the spectrum assigned to the licensee to provide services other than broadcast television services. . . ."[11] The NPRM asks, among other things, what types of flexible uses should be considered, how interference should be measured, whether waivers should be permanent or temporary, and how to interpret the requirement that the broadcaster provide a program stream at no cost to the public. The NPRM further asks whether technologies other than ATSC would qualify and, if so, how the licensee could ensure that the public could receive that stream.

As a general matter, Sinclair believes that a broad interpretation of Section 6403(b)(4)(B) serves the best interests of all stakeholders. There is substantial concern that the relocation fund will be insufficient to pay all relocation costs, and Sinclair believes the auction cannot close in that case. Even if the auction could close, all scenarios in which legitimate claims on the relocation fund exceed the statutory amount are unfortunate. Congress has authorized the Commission to adopt a policy that could materially curb demands on the fund. The more clear,

[11] Spectrum Act § 6402(b)(4)(B).

simple and straightforward the waiver process and standard are, the more likely it is that a material number of licensees will choose the waiver, and the more likely the auction will close.

Accordingly, the FCC should provide that (i) any licensee is entitled to the waiver simply by requesting it; (ii) the waiver is permanent; and (iii) the waiver authorizes use of any technology, subject to maintaining existing interference contours. Plainly, Congress intended to authorize standards other than ATSC, because broadcasters are already entitled to flexible use of their ATSC bitstreams. Moreover, the Commission should permit *all* licensees to choose this option before they know whether they will be repacked. This will encourage more licensees to participate and will give the FCC far more flexibility and certainty in deciding when to close an auction in a particular market.

The flexible use waiver is in the spirit of the Spectrum Act, which recognizes the superiority of licensing regimes that allow licensees to adopt new technology and adjust to the market as they see fit. Sinclair therefore encourages the FCC to define flexible use very broadly and make it perpetual.[12]

c. Make "Flexible Use" Licenses Truly Flexible

The policy of reclaiming spectrum assigned under "command and control" licensing and auctioning it for flexible use holds that the market will put the spectrum to its highest and best use. But the NPRM proposes to assign reclaimed spectrum predominantly in paired bands with low power limits, so that truly "flexible use" is a misnomer. The proposed allocations are obviously optimized for two-way commercial mobile service as provided by today's large subscription-based wireless carriers. Asserting that licensees can provide any service they want with low power paired bands is akin to calling storefronts in a new, unoccupied strip mall as

[12] A time-limited waiver is of no use, since no broadcaster could or would deploy a new technology or service offerings that it ultimately would have to withdraw.

"flexible use" space. In theory, families could move in. But the builder knows only retail tenants will show up and the builder knows what services they will offer. Truly "flexible use" would permit fundamentally different technical architectures that would realistically permit alternative modes of providing service. Sinclair urges the Commission to allocate some reclaimed bands in unpaired bands with 50kW authorized power, at a minimum, as it has done in other "flexible use" bands.

d. The FCC Must Actually Protect Broadcasters in Repacking; Predicted Protection is Not Sufficient[13]

The Spectrum Act requires the FCC to use "all reasonable efforts" to minimize population and service area loss.[14] Section 6403(b)(4)(A) of the Spectrum Act requires the Commission to reimburse relocation costs incurred by any station required to move involuntarily as a result of repacking.[15] These obligations impose on the Commission a firm obligation to conduct the auction and complete repacking with no harm to broadcasters.

As a starting point, to meet its obligation to protect broadcasters, the FCC must conduct the auction and repacking planning in an open and transparent way with clearly stated rules. But the NPRM provides no insight into what kinds of information about the repacking models themselves or what the intra-round output of those models will be. This lack of visibility into the FCC's repacking planning is a particular concern to broadcasters, because the FCC has chosen to play the role of advocate (for repurposing the most spectrum possible) rather than that of neutral umpire. It has announced, going into the process that the ultimate decision maker favors a particular outcome, and that decision maker has plenary control over the tools that will determine

[13] Sinclair supports and incorporates by reference the comments of the NAB addressing repacking issues.
[14] Spectrum Act at § 6403(a)(1).
[15] Spectrum Act § 6403(b)(4)(A).

how much spectrum can be reclaimed and how tightly broadcast stations must be repacked to permit that level of reclamation.

The best control for assuring that the right amount of spectrum is repurposed consistent with full protection of non-participating broadcasters would be clear rules, including what the FCC actually means by its "central" goal of "flexible use," a transparent process, and an unassailably neutral decision maker. But here, the FCC has defined "success" not as running an auction to discover whether mobile wireless is a higher and better use for some broadcast spectrum, and to assess marketplace demand for repurposed spectrum, but as one that results in the "maximum" amount of repurposed UHF spectrum.[16] In other words, the FCC's objective is not to test the theory, but to prove it. Rather than presenting a neutral clearinghouse for efficient reallocation of spectrum, the FCC has assumed the role of an advocate with an agenda and a breakneck schedule to implement that agenda. Since the agency running the auction has a stated bias to see it "close", and because many aspects of the auction conduct will be opaque to broadcasters, the auction rules and processes must include explicit controls to counter the FCC's incentives to close the auction by subtly or covertly allocating risk to broadcasters.

It is not possible to imagine all possible ways in which the Commission could allocate costs, burdens and risks to broadcasters in its zeal to see the auction close, but the NPRM gives some clues. The auction format proposed requires the FCC to run iterative repacking models in between each round of bidding to determine how many stations can be accommodated. Thus, the Commission plans to decide when to close the auction based on ***predictions*** that all remaining stations can be accommodated without loss of viewers or coverage area. Naturally, the bias of the advocate/arbiter will be to make optimistic (perhaps highly optimistic)

[16] NPRM at ¶ 10. Read literally, the NPRM advocates, if possible, the elimination of television broadcasting in the UHF band.

assumptions about the repacking. After all, the facilities assumed in the model would not actually be constructed until long after the FCC closed the auction, at which point the FCC would naturally contend that it cannot put the toothpaste back into the tube.

The history of the digital transition shows that even sober assessments of post-transition performance can be wildly wrong, and that substantial interference and other operational issues that were not predicted arise nonetheless. To comply with its statutory mandate, the FCC's repacking assumptions must be extremely conservative, always erring on the side of preserving greater margin to cover the many substantial errors that are certain to be encountered. Running intra-round repacking models based on overly optimistic assumptions does not meet the "all reasonable efforts" standard, when substantial errors are certain.

The FCC's announced bias to maximize the amount of repurposed spectrum creates strong incentives for the FCC to close the auctions based on overly optimistic assumptions about repacking. The FCC must take steps to offset the risk caused by this incentive. First, the FCC must release *all* information about the repacking model that will be used intra-round and allow public comment on whether the OET 69 implementation and related assumptions are valid and provide sufficient margin for error. In addition, between each round of bidding in each market, the FCC must announce the assumed repacking plan and seek public comment.[17] The Commission should also bear the risk of closing an auction when remaining broadcasters cannot be accommodated with qualifying channel assignments. If, post-closing, a broadcaster can persuasively demonstrate that it will lose service area or population coverage in repacking, the FCC should not allow the auction results to become final until the loss has been resolved.

[17] An expedited comment period would not meaningfully delay the auction.

The same types of concerns arise in the international coordination context. The NPRM acknowledges that the post-auction band plan and individual assignments must be coordinated with Canada and Mexico, but provides no insight into how the FCC will protect individual stations in the coordination process. It appears that the FCC intends, metaphorically, to move ahead and conduct auctions in just two years with its eyes closed to the considerable challenges of coordination (which almost certainly cannot be completed in that time frame). The Spectrum Act, though, strictly conditions the FCC's ability to make assignments in repacking on coordination with Canada and Mexico.[18] If the FCC chooses to close an auction in a border area coordinating the presumed new channel assignment for displaced stations, the coordination risk must be expressly assigned to the winning bidder(s) in the forward auction. The FCC does not have the authority to force a station to relocate to a non-complying replacement channel simply because it has not succeeded in coordinating a complying replacement channel.[19]

Sinclair also believes the FCC's goal to repurpose the "maximum" amount of broadcast spectrum is inconsistent with the intent of the Spectrum Act. The FCC should not reclaim spectrum where forward auction bids indicate little or no demand. This is likely to be the case in many rural areas. In particular, reclamation of spectrum in areas of low population density absent clearly demonstrated demand could force hundreds or thousands of low power facilities,[20] translators and booster stations that extend the reach of full power, network affiliated broadcast

[18] Spectrum Act at § 6403(b)(1)(B).
[19] International coordination issues are considerable and will take potentially years to resolve. If the FCC chooses to rush to auction before resolving these issues, it must assume the coordination risk or make the forward licenses expressly subject to successful coordinations that allow all post-repacking stations to operate with equivalent facilities.
[20] With respect to LPTV facilities and translator stations, Sinclair supports the Comments of the Affiliates Associations in this proceeding, at Section V.

stations into those areas.[21] Sinclair believes the intent of the Spectrum Act is that the auction for each economic area should close independently. That is, the FCC may not reclaim spectrum in an area where the forward auction revenue does not cover an allocated share of auction administration costs as well as relocation costs for stations in that area.

Similarly, the Spectrum Act prohibits the FCC from conducting a reverse auction unless at least two competing licensees participate.[22] The FCC should acknowledge that licensees "compete" only when they have substantially overlapping contours.

The FCC has many opportunities to subtly shift costs onto broadcasters in order to prevent total acknowledged costs from exceeding the $1.75 billion budget. The rules should neutralize this incentive by providing that stations that are not displaced cannot be required to accept greater interference or coverage loss as a result of repacking. And the rules should acknowledge that full reimbursement of broadcasters is a closing condition of the auction. And the FCC should state clearly that full reimbursement of repacking costs is a hard condition of closing the auction.

As Commissioner Pai has recognized,[23] the Spectrum Act provides that non-participating television broadcasters must be compensated for costs incurred during the repacking process.[24] At the same time, it limits the Broadcaster Relocation Fund to $1.75 billion.[25] The NPRM acknowledges that the fund may be insufficient to compensate broadcasters and cable operators for their reasonably incurred costs.[26] As with other measures Sinclair has proposed, doing so will

[21] The FCC appears to have accepted that a uniform, nationwide band plan is not feasible. So the use of these bands by wireless carriers will not be uniform or national, and devices will have to be agile. Therefore, there is no need to clear spectrum any specific market beyond the demand exhibited in that market by carriers.
[22] Spectrum Act § 6402.
[23] *See* NPRM, Separate Statement of Commissioner Pai.
[24] Spectrum Act § 6403(b)(4).
[25] 47 U.S.C. § 309(j)(8)(G)(iii)(I).
[26] NPRM at 346.

help to mitigate the unfortunate incentives that arise when the FCC advocates repurposing the maximum amount of spectrum. The amount of spectrum authorized to be repurposed by the Spectrum Act is the amount of spectrum the market identifies in an open and unbiased auction, capped by the amount of repacking that can be accomplished for $1.75 billion. There is no need for the FCC to prioritize reimbursements. All reimbursements are mandatory unless the broadcaster waives them in exchange for a flexible use waiver, as described herein.

III. Conclusion

Based on the foregoing, Sinclair urges the Commission to resolve this proceeding consistent with the principles set forth in these Comments.

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