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WASHINGTON, DC

April 4, 2014

***Via ECFS and Electronic Mail***

The Honorable Tom Wheeler, Chairman  
The Honorable Mignon Clyburn, Commissioner  
The Honorable Jessica Rosenworcel, Commissioner  
The Honorable Ajit Pai, Commissioner  
The Honorable Michael O’Rielly, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

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

Dear Chairman and Commissioners:

I am writing on behalf of a group of fifteen companies, licensed to operate approximately 300 full power television stations in the United States (the “Television Licensee Coalition” or “TLC”), to address one discrete aspect of a Federal Communications Commission (“FCC” or “Commission”) staff report released in January of this year relating to the historic TV spectrum incentive auction currently in the planning stages. Television stations located in markets of all sizes throughout this country comprise the Television Licensee Coalition. Their identities are here being withheld due to the sensitive nature of the issues discussed below.

At the threshold, TLC wishes to make clear that, as a general proposition, it supports overall FCC efforts to design and conduct a balanced, equitable, and successful incentive auction pursuant to the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156 § 6401 et seq. (Feb. 22, 2012) (codified at 47 U.S.C. §1451 et seq.) (the “Spectrum Act”). The purpose of this letter is simply to articulate TLC concerns about the intention of FCC regulators to conduct one-on-one targeted outreach in advance of the incentive auction in order to encourage greater participation by stations in the “reverse” portion of that auction (“Targeted Outreach”). See Incentive Auction Task Force Open Meeting Presentation, “The Path to a Successful Incentive Auction,” January 30, 2014, *available at* <http://www.fcc.gov/document/incentive-auction-task-force-open-meeting-presentation>, and the resultant staff/FCC Commissioner colloquy, *available at* <http://www.fcc.gov/events/open-commission-meeting-january-2014>.



TLC emphasizes its understanding that the nascent proposal to conduct Targeted Outreach grows out of larger ongoing Commission efforts to conduct a successful incentive auction, which requires robust participation in all auction phases, including the reverse auction by which interested incumbent TV stations will voluntarily agree to relinquish rights to spectrum they utilize in return for monetary compensation. To that end, TLC notes that the FCC has quite properly embarked on a process of generally educating TV stations about this opportunity by means of FCC webinars, workshops, conferences, etc., open to all interested parties, as well as the FCC LEARN program on the FCC website.<sup>1</sup> In that same vein, TLC endorses any clarification from the FCC that its door is open to any station that elects to approach the agency for more information about the incentive auction, including its prospects for reverse auction compensation. TLC applauds such efforts and ideas and urges their continuation, even their expansion, perhaps through regional meetings which all area stations are invited to attend. But with its recent announcement of plans to conduct Targeted Outreach, the Commission risks tipping the delicate balance it is required to effectuate between a truly “voluntary” auction and one in which the government, by overreaching, undermines that statutory dictate. Accordingly, TLC urges the FCC to refrain from placing itself on a regulatory tightrope through implementation of Targeted Outreach.

Because the Spectrum Act mandates a *voluntary* incentive auction (*see* 47 U.S.C. § 6401(a)(1)), TLC respectfully suggests that the FCC resist taking any action that might be interpreted as instead introducing an element of compulsion into the process. TLC believes that Targeted Outreach potentially crosses the line. Indeed, Targeted Outreach implicates a number of sensitive issues relating to the FCC’s role as the primary government regulator of television stations. The FCC is broadly empowered by statute to issue and renew (or not) TV stations’ basic operating authorizations. The FCC also is tasked with enforcing a wide variety of statutory and regulatory obligations imposed on TV stations. Exercise of that enforcement power takes many forms, prominently including station visits by personnel from the agency’s largest bureau, the Enforcement Bureau, that can result in agency action ranging from the imposition of monetary forfeitures to, in the most extreme cases, license revocation. The FCC truly carries a “big stick,” and direct interaction with TV stations by result-oriented FCC personnel can create a collateral impression of possible FCC enforcement activity for non-cooperation.

This general concern is sharpened here because Targeted Outreach by definition “targets” a particular TV station’s spectrum for government acquisition. Given the FCC’s broad powers, a station receiving such attention could justifiably believe that it would turn down an agency request for a one-on-one conversation or closed-door visit at its peril. More significantly, no matter how cordial the FCC’s request and behavior during any such interaction, its underlying purpose would be unmistakable – the agency’s concerted effort to convince the station to relinquish spectrum in the reverse auction and either shut down that station or find a spectrum sharing partner. That reality risks creating an appearance of impropriety – that the agency is providing the targeted station with a “Hobson’s Choice” – acquiesce or reject the solicitation and risk incurring the government’s displeasure going forward. Long-established precedent strongly counsels that the FCC refrain from placing its regulated entities in such a compromised position.

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<sup>1</sup> FCC Learn Everything About Reverse-Auctions Now Program (LEARN) available at <http://www.fcc.gov/learn>.



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For example, in *Writer's Guild of America, West, Inc. v. American Broadcasting Co.*, 609 F.2d 355, 365 (9th Cir. 1979), the Ninth Circuit reviewed a U.S. District Court decision that had struck down FCC regulation by a type of informal pressure known as "jawboning" that helped lead to the addition of the so-called "family viewing hour" to the then-extant NAB Code. The Court remanded the case to the FCC on primary jurisdiction grounds but recognized the "serious issues" presented by FCC jawboning. Other jurists have expressed apprehension about the FCC's use of the so-called "raised eyebrow" technique to regulate. See David L. Bazelon, *FCC Regulation of the Telecommunications Press*, Duke L.J. (1975). See also Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873 (1997). Such viewpoints are anchored in concerns over the outsized influence informal agency pressure can exert on regulated entities. Here, informal pressure could lead to a much more dramatic and draconian result than the industry code change at issue in *Writer's Guild* – the complete silencing of a particular station through targeted government action.

Another factor weighing against Targeted Outreach is the disproportionate impact it could have on niche television stations that serve specialized constituencies, such as minority viewers. Such smaller stations may prove to be particularly vulnerable to any pressure they perceive from FCC personnel effectively inviting themselves "inside their building" through Targeted Outreach.

For all of these reasons, the Television Licensee Coalition respectfully urges the Commission to shelve the idea of conducting Targeted Outreach in advance of the incentive auction, in favor of renewed reliance on generalized educational efforts that "get the word out" while carefully safeguarding the statutorily-mandated voluntary nature of the incentive auction.

Should you have any concerns or questions about the matters addressed in this letter, please contact the undersigned.

Sincerely,

Dennis P. Corbett

cc: The Honorable Mark Pryor, Chairman  
The Honorable Roger Wicker, Ranking Member  
Subcommittee on Communications, Technology and the Internet  
United States Senate  
Washington, DC 20510

The Honorable Greg Walden, Chairman  
The Honorable Anna G. Eshoo, Ranking Member  
Subcommittee on Communications and Technology  
United States House of Representatives  
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