



April 23, 2014

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

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

Dear Ms. Dortch:

On April 21, 2014, Rick Kaplan, Victor Tawil, Bruce Franca and Patrick McFadden of the National Association of Broadcasters ("NAB") met with Courtney Reinhard, Senior Legal Advisor and Chief of Staff for Commissioner Michael O'Rielly, and Erin McGrath, Legal Advisor to Commissioner O'Rielly. On April 22, the same NAB representatives met with Louis Peraertz, Legal Advisor to Commissioner Mignon Clyburn. In both meetings, NAB discussed the issues outlined in the attached presentation.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Patrick McFadden", with a long, sweeping underline.

Patrick McFadden  
Vice President, Strategic Planning  
National Association of Broadcasters

cc: Erin McGrath  
Louis Peraertz  
Courtney Reinhard

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**Non-exhaustive List of Broadcaster Concerns  
Regarding the Draft Incentive Auction Order**

**Meeting with FCC Personnel  
April 22, 2014**

**Tentative Agenda**

1. Brief Introduction and Overview
  - a. The challenges of the auction to public and commercial broadcasters and their viewers across the country
  - b. Broadcasters' continued engagement in the process
  
2. Specific Issues
  - a. *TV Study* and changes to OET-69
  - b. Potential out-of-pocket costs for broadcasters that are forced to repack
  - c. Broadcaster use of wireless microphones
  - d. The fate of fill-in (and other) translators
  - e. Critical issues that have yet to be decided
  - f. Post-auction transition issues
  - g. Petitions to move from VHF to UHF
  - h. Consumer education
  
3. Additional Issues
  - a. Impact on diversity
  - b. Treatment of LPTVs
  - c. Mobile allocation in the broadcast band (and international implications)
  - d. Proposal for defining "flexible use" for broadcasters

## **Issue #1: The FCC Should Not Adopt the Proposed Changes to OET-69**

### **• Background**

- Congress addressed a core broadcaster concern regarding potential changes made to their coverage areas and populations served during the auction process by prescribing the specific method by which the FCC should calculate those areas. Congress dictated that the FCC must use the methodology in OET Bulletin No. 69 (OET-69).
- It is well understood what that language meant; OET-69 has been employed for 20 years. The few changes to it over time, including amending it to use the 2000 census, have occurred through notice and comment rulemaking.
- In a public notice issued several months after the incentive auction NPRM, OET unilaterally introduced changes to OET-69 for the auction through its new *TV Study* software.

### **• Discussion**

- The two primary reasons OET has offered for its changes (even if they were lawful) are without any merit:
  - Claim #1: *TV Study* is more accurate than OET-69
    - *TV Study* is not necessarily any more accurate than OET-69. In fact, the *TV Study* methodology has already been altered more than a dozen times in the last year alone due to *inaccuracies*.
    - If the current version is truly less accurate, why not either: (a) open up a proceeding that actually studies the issue (e.g., is Longley-Rice even appropriate); or (b) change its application universally (i.e., not just in the auction context)?
      - The FCC continues to use the allegedly inaccurate OET-69 for all other purposes, including new petitions and even in recent agreements it signed with Canada.
      - OET-69 is a hotly contested issue, so if the goal is to improve it, the FCC should open up a proceeding and examine all of its implications. Instead, all OET did was make a few changes and asked broadcasters to study their impact. Not a process really geared to getting the most “accurate” results.
  - Claim #2: The auction won’t work using OET-69

- The FCC doesn't need *TV Study* to make the auction work. In fact, the software itself allows you to do the analysis using the actual OET-69 settings. So we know it works.
- NAB also has asked repeatedly for the staff to identify exactly what changes they believed to be *necessary* to make the auction function. We have never gotten a response.

- **Broadcaster Position**

- The FCC should retain OET-69 as is, and not make any changes to it as part of the incentive auction. NAB does not oppose a separate proceeding on OET-69 in all its applications, and would affirmatively support the Commission opening up such an inquiry.
- If the staff believes some changes are *essential* to facilitate the auction process, they should identify those changes specifically, and the Commission should put those out for comment in a further notice of proposed rulemaking.
  - Following that rulemaking, if it is determined that some change is both lawful and must occur, then that change (or those changes) must be flagged and no further changes should be made outside of an OET-69 notice and comment rulemaking review.

## **Issue #2: Broadcasters Should Not Be Forced To Go Out of Pocket in Repacking**

### **• Background**

- Congress allocated a substantial sum in the TV Broadcaster Relocation Fund – \$1.75 billion – to repack broadcasters and MVPDs. Congress’s goal was to cover *all* of the broadcaster relocation costs, so that broadcasters who continue to serve their local communities are not harmed by the voluntary auction.
- Longstanding FCC policy also requires new licensees to reimburse incumbent licensees for costs associated with them having to move to accommodate the new uses.
  - The FCC’s *Emerging Technologies* policy dictates that where incumbents are voluntarily relocated following negotiations with new entrants or involuntarily relocated, the new licensee must guarantee payment of all relocation expenses.<sup>1</sup>
  - For example, in its recent H Block auction, the FCC required winning bidders to pay a pro rata share of expenses previously incurred by UTAM, Inc. and Sprint Nextel in clearing incumbents from the band.<sup>2</sup>

### **• Discussion**

- The draft order appears to have little or no constraints on the FCC’s ability to repack broadcasters, and thus will lead to significant out-of-pocket expenditures for broadcasters forced to move as a result of the auction.
  - NAB estimates that, without any constraints, the costs for broadcaster relocation could substantially exceed the \$1.75 billion figure allotted by Congress if the FCC reclaims 84 megahertz.
- The auction therefore would not only *harm* broadcasters, but it would no longer still be “voluntary,” as broadcasters may be forced to reevaluate their participation if part of their calculation must now be out-of-pocket costs imposed by the FCC as a result of a forced move.

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<sup>1</sup> See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Ninth Report and Order, 21 FCC Rcd 4473, ¶¶ 37-40 (2006); see also *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886, ¶ 24 (1992).

<sup>2</sup> *Service Rules for the Advanced Wireless Services H Block – Implementing Section 6401 of the Middle Class Tax Relief and Job Creation Act of 2012 Related to the 1915-1920 MHz and 1995-2000 MHz Bands*, Report and Order, 28 FCC Rcd 9843, ¶¶ 167-173 (2013).

- The failure to treat the repacking Fund as a repacking budget will have the most deleterious impact on stations in smaller and mid-sized markets, because they not only cannot participate in the auction (the FCC will likely not rely on their participation, as it is focused primarily on Top 30 markets), but the repacking costs will be a much greater share of their revenue than for major market stations. Public TV stations are perhaps the most vulnerable of all, relying on outside funding and not traditional revenues to operate.
- **Broadcaster Position**
  - The FCC should determine that the TV Broadcaster Relocation Fund is its *budget* for repacking, and that, if it runs out of money due to excessive repacking, the new licensees will be responsible for reimbursing incumbent licensees for any out-of-pocket costs associated with the forced relocation.
  - The FCC should pursue every means of limiting repacking. Most notably, the auction should optimize after each round of the reverse auction, and not merely at the end of the entire incentive auction. By optimizing after each round and before the forward auction, the FCC can help ensure that it does not unwittingly accept as feasible a repacking solution that will drive the FCC beyond its \$1.75 billion budget.

**Issue #3: The Public Interest Requires that the Commission Find Some Exclusive Spectrum for Wireless Microphones and It Cannot Set a Band Plan before Doing So**

• **Background**

- In January 2010, the Commission adopted an order moving wireless microphones out of the 700 MHz spectrum, and consolidating them in the 600 MHz band. The FCC also issued a further notice on the long-term plan for wireless mics.
- In September 2010, the Commission adopted the current TVWS order, which further constrained wireless microphone operation, but reserved two exclusive channels in nearly every market for licensed wireless microphone operation. The FCC recognized that some exclusive spectrum was essential, especially for TV and radio broadcasters, who rely on wireless mics to deliver on-scene breaking news and other essential information to viewers.

• **Discussion**

- The draft order almost completely ignores wireless microphones, thereby repurposing most of the spectrum on which they currently operate and eliminating all exclusive-use spectrum (in favor of wireless exclusive-use spectrum).
- The chart below illustrates how wireless mics have been handled in the recent past, currently and what the draft order would do to their operation:

**Exclusive Spectrum Available for Licensed Wireless Microphones**

Market	Exclusive Channels Prior to 1/10 Order	Exclusive Channels Post-1/10 Order (eliminating 52-59)	TV Channels Available Post-9/10 TVWS Order		Incentive Auction Proposal	
			Exclusive	Shared with Unlicensed TVWS	Exclusive	Shared
San Francisco	13	5	2	3	0	< 2 <sup>3</sup>
Los Angeles	10	2	2	0	0	< 2
New York	10	2	2	0	0	< 2
Boston	19	11	2	9	0	< 2
Chicago	13	5	2	3	0	< 2

<sup>3</sup> In order to protect wireless operations and to avoid interference from wireless, only a portion of the Duplex Gap and Guard Band spectrum can be used for wireless microphone operations. For example, we estimate that only about 40% of the duplex gap can be used. For a 6 MHz duplex gap, this means that less than 2.5 MHz could be used by wireless microphones.

- Thus, in just five years, wireless mics will have gone from having exclusive access to between 60 and 114 megahertz in major markets to *zero* if the current order is adopted.
  - FCC staff has suggested that it plans on circulating as soon as this summer an NPRM that would shorten the time TVWS devices have to check the database. While we agree that particular change is necessary, both the fact that there is no exclusive spectrum for wireless mic use and the reality that such a rulemaking may or may not happen, give broadcasters great causes for concern.
    - It is important to note that network congestion prevented devices from querying the TVWS databases during the coverage of the Boston bombing, and thus the devices could not check the database even if they were required to every 15 minutes.
- **Broadcaster Position**
  - The FCC would be derelict in its duty to regulate in the public interest if it proceeds with the draft order without any meaningful changes to the treatment of wireless microphones. There is no one service that will suffer greater harm than wireless microphones under the current draft order. The staff has essentially failed to come up with any solution for their use, and the result will be far less spectrum for mics, and no exclusive spectrum to serve the public interest.
  - Unlicensed devices simply do not need access to the duplex gap.
    - The FCC has recently allocated a large amount of spectrum to unlicensed uses (and is poised to allocate far more) but nothing to wireless microphones.
    - Unlicensed devices are far more likely to interfere with licensed operations in the duplex gap unless the gap is stretched unlawfully wide.
    - If Google and Microsoft are interested in garnering additional spectrum, they certainly have the financial means to participate in the forward auction.
  - The duplex gap should be at least 10 megahertz; there should be no plan containing a gap with less.

**Issue #4: The FCC Must Find Channels for Translators that, as of the Date of the Act, Established Broadcast Licensees' Designated Coverage Areas and People They Serve**

- **Background**

- The Spectrum Act establishes that only full power and class A stations can participate in the auction and are eligible for reimbursement from the Relocation Fund.
- At the same time, the Act requires that “the Commission shall make all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee.”
- A number of broadcast TV licensees rely on “fill-in” translators to ensure they reach all viewers in their coverage areas (and thus creating their populations served). This is especially the case for stations attempting to replicate their service post-DTV transition. The FCC expressly acknowledged the engineering and technical complexities associated with replicating analog service areas,<sup>4</sup> and approved the use of translators so broadcasters can serve viewers throughout their coverage areas.

- **Discussion**

- While the Spectrum Act does not change the status of translators (i.e., they are secondary to full-power and Class A stations), and thus their owners will not be compensated during repacking nor can their owners participate in the auction, the Act requires the FCC to preserve broadcasters' coverage areas and populations served.
- If stations can no longer cover the same areas or serve the same populations as they did as of the date of the Act, then the FCC has not fulfilled its duty to take “all reasonable efforts” to preserve those coverage areas and viewers served.
- This issue is particularly important for VHF stations that rely on fill-in UHF translators post-DTV transition. The FCC has expressly allowed them to do so in order for them to serve viewers they are supposed to serve. If the FCC does not find a replacement channel for them, they cannot continue to serve the viewers the Commission agrees they should have been serving as of the date of the Spectrum Act.

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<sup>4</sup> *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations*, Report and Order, 24 FCC Rcd 5931, ¶ 3 (2009).

- **Broadcaster Position**

- The FCC does not have to reimburse translator owners for their moves, but must find those used by TV broadcast licensees a UHF channel post-auction.
- For all other translators – those used to extend a station’s reach beyond its service contour (mainly in the Mountain West) – the FCC is not required to find them a channel but should prioritize them in repacking so they can hopefully receive a channel assignment in order to continue to serve their viewers.

**Issue #5: If the FCC Is Intent on Proceeding With the Draft Order at this Time, It Should Identify What Significant Issues Are Yet to Be Decided, When It Intends to Complete Them and Assert that the Commissioners Will Have to Approve Them**

- **Background**

- There are a number of critical incentive auction issues that have yet to be resolved, and that cannot be resolved in auction procedures and comments Public Notices.
- Those PNs are typically used in run-of-the-mill forward auctions, and include only “specific mechanisms relating to *day-to-day* auction conduct.”<sup>5</sup> Such things include “for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation.”<sup>6</sup>
- *Repacking Model*
  - Beginning in 2009, FCC staff noted that it had developed a repacking model – the “Allotment Optimization Model” – which served as its basis for determining that a nationwide repack of broadcasters in real-time was possible. In 2010, the Commission stated in an order that the model was near completion and would soon be publicly released. That model has never been released.
  - In the incentive auction NPRM, the FCC stated that it has shelved the Allotment Optimization Model and that it had begun work on a new repacking model. That model has still not been released publicly.
- *International Coordination*
  - The Spectrum Act says that the FCC can only repack broadcasters “subject to” coordination with Canada and Mexico. This is essential, because due to existing agreements with our neighbors, there are very few spaces to which the FCC could repack broadcasters within 250 miles of the Canadian border and 150 miles of the Mexican border. Thus, without coordination, broadcasters in these areas are likely to be

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<sup>5</sup> See Amendment of Part 1 of the Commission’s Rules—Competitive Bidding Procedures, WT Docket No. 97-82, Third Report and Order and Second Further Notice of Proposed Rule Making, FCC 97-413, 13 FCC Rcd 374, 447-49 ¶ 124 (1997) (emphasis added).

<sup>6</sup> *Id.* at ¶ 125.

stranded within the new 600 MHz wireless band, and the FCC will also be hampered in its ability to recover spectrum.

- To date, the FCC has not provided any information on the status of negotiations with Canada and Mexico, has not taken up industry calls for a government-industry working group and has argued repeatedly that it does not have to reach any new agreements prior to the auction.
- *Inter-service Interference*
  - Despite proposing a variable band plan in its incentive auction NPRM, the FCC did not propose any rules to mitigate nor did it even acknowledge the possibility of interference between broadcast and wireless operations on the same or adjacent channels in adjacent markets.
  - NAB first raised this issue in its opening comments in January 2013. The staff did not publicly acknowledge the issue until it issued a public notice on the topic more than one year after NAB's initial comments.
  - The ideas noted in OET's public notice demonstrated that they were only initial thoughts and not fully developed.
- **Discussion**
  - *Repacking Model*
    - It is hard to fathom how the FCC can move forward with an R&O on the framework of the auction without knowing whether it has or can even develop a workable repacking model.
    - The model has to be perfect; once the auction is conducted, it will be very hard to undo. If there are errors, new and incumbent licensees will be in disarray.
  - *International Coordination*
    - NAB understands that there may be reasons to keep negotiations strictly between the negotiating parties, but nevertheless, the outcome of these negotiations have a significant impact on the incentive auction and the broadcast industry in particular.
    - Variability is likely unnecessary if an adequate agreement is reached with our neighbors. It therefore seems premature to vote on these issues until the FCC has a better idea of when and to what extent it will reach these necessary agreements.
    - Moreover, it is unclear how the agreements governing international coordination will work during the proposed three-month CP period following the forward auction. What will happen during that period if the process breaks down? How will that impact a station's ability to get reimbursed within the following 36-month period?
  - *Inter-service Interference and Variability*

- Along with the prior two issues, this is another completely undeveloped area of the auction. The FCC staff appears only to have just begun considering the inter-service interference issue and its proposals were largely incomplete. If the FCC insists on having a variable plan, understanding how variability impacts the auction is essential.
    - The FCC has not proposed any rules and any point in this proceeding to protect broadcasters from wireless operations; just to protect wireless operations from broadcasting.
    - Another issue concerning a variable band plan is what exactly it means to have a near-nationwide plan. This is critical to ensure that the Commission does not simply repack to reclaim more spectrum in areas where it is not needed.
  - **Broadcaster Positions**
    - *Repacking Model*
      - The order must make clear that the FCC will make its model available for public testing, that it will give sufficient time for adequate testing, that it will provide the computing resources to test it (if necessary) and that it will create a stakeholder working group to ensure that the model is flawless.
    - *International Coordination*
      - The FCC should state unequivocally that it will not move forward with the auction until a meaningful agreement with our neighbors for repacking along the borders is complete. Anything short of that will result in a hodge-podge band plan and more uncertainty for everyone involved in the process.
    - *Inter-service Interference*
      - If the Commission feels the need to move forward on the R&O now, it should only approve the use of market variation tentatively. It does not yet know whether variability is workable in practice and to what extent it may affect the auction dynamics (e.g., how the FCC can determine impaired and unimpaired markets without optimizing between the reverse and forward auctions).
      - The order must also guarantee that the FCC will evaluate interference to broadcasters from wireless (as well as vice versa) and will enact the necessary rules to ensure such protection prior to the auction.
      - The Commission and not the staff should make the determination as to the best metric by which to establish its near-nationwide plan number of megahertz.

## **Issue #6: Transition Issues Require More Work, and Thus the FCC Should Be Careful about Setting Too Many Things in Stone at this Point in Time**

- **Background**

- The Spectrum Act requires that broadcasters must be reimbursed within 36 months of the close of the auction.
- The FCC commissioned a study that demonstrated that, in some cases, that deadline won't be achievable under even the most favorable circumstances.
  - Even under a "best case scenario" that does not account for scheduling issues, weather delays, or other factors, the FCC-commissioned Widelity Report estimates that it will take at least 41 months to construct the post-auction facilities at Sutro Tower, the transmission site for ten UHF stations serving the Bay Area, including San Francisco's ABC, CBS, and Fox network affiliates.

- **Discussion**

- There are many issues yet to be studied and resolved with respect to the transition. We recognize that this is appropriate at this point in time, when it is still very early in the process.
- Broadcasters' biggest concerns are the ability to transition in time (given the paucity of tower crews, etc.), and being reimbursed for all of their actual expenses. On the latter issue, broadcasters want to make sure the Commission understands that there are no one-size-fits-all solutions to reimbursement; every station, even within the same ownership group, will have different issues.
- The Statutory deadline for payment of relocation costs should not be viewed as an outside limit on the amount of time for broadcasters to complete the construction of their new facilities. Section 6403(b)(4)(D) only applies to the time by which the Commission must reimburse stations.
- Due in large part to the FCC's freeze on TV station modifications, manufacturers lack the capacity to construct the highly-customized directional antennas, transmitters, and other necessary equipment for several hundreds of television stations in time to be delivered and installed within such a short timeframe. Because broadcasters will not know their channel assignments until after the auction, manufacturers lack the necessary lead time to adjust for this lack of capacity.
- With just 14 tower crews in the country capable of installing broadcast antennas (weighing 4,000 to 12,000 pounds and located on towers ranging from 800 to 2,000 feet), there is insufficient capacity to complete all of the

affected stations within 39 months.

- **Broadcaster Position**

- The FCC must provide ample time for broadcasters to complete the post-auction transition to their new channels.
- Under no scenario should the FCC force a broadcaster off-the-air that is diligently working to complete its post-repack facility. When adopting the Spectrum Act, Congress expressed its expectation that broadcasters that choose to continue serving the public interest should not be harmed by the incentive auction and that viewers should be able to continue watching free, over-the-air television, without disruption.
- The FCC should appoint an independent administrator to administer the TV Broadcaster Relocation Fund.
- The order should recognize that one size does not fit all for broadcasters, and thus receipts will be judged individually for reasonableness, considering a set of express factors.
- Establishing a thirty-nine month deadline for broadcasters to complete their construction or go dark is arbitrary and capricious and contrary to the FCC's guiding principles of serving the public interest, convenience and necessity.
- Should the FCC, despite these concerns, insist on a fixed timeline for completion of construction, the timeline should commence from the date that a construction permit is issued. This will at least remove delays due to backlogs in engineering, consulting, and FCC processing from the equation.

**Issue #7: The FCC Should Process VHF to UHF Petitions Filed  
Before the Spectrum Act Was Signed Into Law**

- **Background**

- In the first half of 2011 (and prior to May 31, 2011), a year prior to the passage of the Spectrum Act, 10 broadcast TV stations filed petitions for rulemaking to move their allocations from VHF to UHF.
- In each instance, the stations had suffered from their DTV transition VHF allocation, and determined that the only way to serve the same viewers prior to the transition was to move to the UHF band.
- Those applications have been frozen and pending for *three years* now – and with no action in sight.

- **Discussion**

- NAB cannot discern a legitimate policy reason why the Media Bureau still refuses to process, and thus will not protect, stations that have had VHF to UHF applications sitting on ice at the FCC since well before passage of the 2012 Spectrum Act. It is fundamentally unfair to make them sit idle simply because of the auction.
- If the FCC does not process these, it is in effect demonstrating a clear preference for mobile broadband over broadcasting. The only reason not to process them in the normal course is the fear of having to account for more broadcast stations in the auction.
- Finally, the NPRM's suggestion that these stations may merely be filing to game the system (NPRM at ¶ 117 n.181) is completely without merit. There is no evidence anywhere in the record suggesting this is a legitimate concern. Each of these petitions have been filed by broadcasters who have demonstrated a continuing commitment to their local communities. They are not frivolous petitions.

- **Broadcaster Position**

- The petitions filed for channel substitutions prior to May 31, 2011, should be processed as they normally would be on the merits.

**Issue #8: To Educate Consumers about the Transition, the FCC Should Seek  
Additional Resources From Congress and Should Work Collaboratively  
with Industry Rather Than Impose Blanket Mandates**

- **Background**
  - The ARRA provided \$90 million to NTIA for consumer education and outreach for the last four months of the DTV transition. The Spectrum Act has no provision for funds for consumer outreach.
  
- **Discussion**
  - Educating broadcast viewers about channel changes will be an essential part of the overall process. At the moment, this piece is highly underdeveloped (and understandably so), as many other auction issues have taken center stage.
  - Broadcasters will have every incentive to notify their viewers about their new channel position and how to receive them.
  - The FCC does not have the resources in place or available to handle the inevitable consumer disruption.
  
- **Broadcaster Position**
  - The FCC should indicate that it will seek from Congress funding for consumer education, as it had with the DTV transition. Why would it treat this differently?
  - The FCC should not *impose* consumer education mandates on broadcasters; it should work with industry to come up with understandable, consistent messaging. Broadcasters have every incentive to educate the public.