

January 23, 2014

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

Re: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions (Docket No. 12-268)

Dear Ms. Dortch:

The Association of Public Television Stations (“APTS”) submits this *ex parte* letter in connection with the Federal Communications Commission’s (the “Commission”) Notice of Proposed Rulemaking on *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions* (the “Notice”).¹ APTS, in collaboration with our colleagues at CPB and PBS, submitted initial comments to the Notice on January 25, 2013 and reply comments on March 12, 2013.² In these comments, we recommended that the Commission not accept bids in the reverse auction that would result in “white areas” where no public television station would remain on-air to serve viewers in any given market. We discussed this proposal with Commission staff in *ex parte* meetings on April 30, 2013 and on September 13, 2013.³ Based on those conversations, we submit this letter to provide additional detail on specifically how the proposal to prevent the creation of “white areas” could be implemented.

The Commission should adopt the following additions to the proposed rules in Appendix A of the Notice:

47 C.F.R. § 1.22002(b)(2)(iii) – Competitive Bidding Design Options.

Procedures to incorporate public interest considerations into the process for assigning winning bids. These procedures will ensure that at least one qualified noncommercial educational television station continues to be licensed in each Designated Market Area as defined by Nielsen Media Research as of February 22, 2012.

47 C.F.R. § 73.3700(a)(9) – Definitions. Qualified Noncommercial Education Television Station.

The term ‘qualified noncommercial educational television station’ means any full-power television broadcast station that—

¹ *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”].

² Incentive Auction NPRM, Comments of the Association of Public Television Stations, et al., 15-17 (Jan. 25, 2013); Incentive Auction NPRM, Reply Comments of the Association of Public Television Stations, et al. (Mar. 12, 2013).

³ Incentive Auction NPRM, *Ex Parte* Letters, Association of Public Television Stations (May 2, 2013; Sept. 17, 2013).

- (A) under the rules and regulations of the Commission in effect on February 22, 2012, is licensed by the Commission as a noncommercial educational broadcast station and is owned and operated by a public agency, non-profit foundation, non-profit corporation, or non-profit association; and
- (B) 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, on the basis of the formula set forth in 47 U.S.C. § 396(k)(6)(B).

These additions to the rules are fully warranted pursuant to the Commission’s longstanding policies to both strongly disfavor modification of a station’s facilities that would create unserved “white areas” and strongly disfavor dereservation of noncommercial educational channels. The Commission reiterated these well-established policies in the latest Notice.⁴

The Commission “has historically sought to reserve approximately twenty-five percent of television channels for noncommercial use.”⁵ Furthermore, 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.”⁶ The Commission has consistently worked to support and further the statutory universal service mandate of public television for decades and can continue to do so through prudent design of the upcoming incentive auction.⁷

The procedures for ensuring that at least one qualified noncommercial educational television station continues to be licensed in each Designated Market Area could be implemented through the existing *TVStudy* software. The Commission’s Office of Engineering and Technology (“OET”) announced the release of the *TVStudy* software on February 4, 2013 to provide analysis of coverage and interference of full-power and Class A television stations.⁸ The OET released a Public Notice on July 22, 2013 describing the ability of *TVStudy* to be used during reverse auction bidding to check the feasibility of assigning channels without violating any applicable constraints.⁹ The Public Notice highlighted that the software could be used for a “feasibility check” if given sets of reverse auction bids from broadcasters

⁴ Incentive Auction NPRM, ¶ 48 n.88, ¶ 370 n.557.

⁵ 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).

⁶ *Id.* at ¶ 18. Through 1996 the Commission notes that it had “never dereserved a noncommercial channel without substituting another reserved channel.” *Id.*

⁷ *See, e.g.*, In the Matter of Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania, *Report and Order*, MM Docket No. 01-276, ¶ 42 (rel. July 18, 2002) (granting the exceptional relief of dereservation to WQEX in 2002 due to the fact that it would “not cause a reduction in public television’s coverage area” as “every viewer in WQEX(TV)’s coverage area will continue to receive educational service from WQED(TV)”).

⁸ Public Notice, Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software, DA 13-138, ET Docket No. 13-26, GN Docket No. 12-268 (rel. Feb. 4, 2013).

⁹ Public Notice, Incentive Auction Task Force Releases Information Related to Incentive Auction Repacking, DA 13-1613, ET Docket No. 13-26, GN Docket No. 12-268 (rel. July 22, 2013).

were to be accepted and that such checks could be “conducted rapidly during the course of bidding.”¹⁰ APTS urges the Commission to adopt the preservation of at least one qualified noncommercial educational television station in each Designated Market Area as an applicable constraint. The Commission can use the existing software and the constraint files generation process described in the Technical Appendix of the July 22, 2013 Public Notice to include this important public interest consideration in its procedures for determining acceptable winning bids in the reverse auction.

In the event that the Commission adopts a “descending clock” auction design as proposed in the Notice and all of the qualified noncommercial educational television stations in a given Designated Market Area bid to fully relinquish their spectrum usage rights, the Commission should select among the competing bids based on price. This would ensure that the lowest bids are accepted and the revenues to the interoperable public safety network and U.S. Treasury deficit reduction are maximized. In the unlikely event that the lowest competing bids in a given market are the same price, the Commission should accept the bid from the tied station with the smaller unique population coverage.

APTS notes that Congress distinguished between qualified noncommercial educational television stations and other noncommercial educational television stations in this way when it enacted the Satellite Television Extension and Localism Act of 2010 (“STELA”), in which Congress required that certain satellite television providers accelerate the timetable for carrying such qualified stations in high-definition format.¹¹ The distinction based on STELA’s definition was upheld under First Amendment scrutiny in a case decided by the United States Court of Appeals for the Ninth Circuit.¹²

The proposal described above is not intended to prevent any qualified noncommercial educational television station from participating in the auction through bids to channel share or relocate to the Very High Frequency band. The Commission should certainly permit such stations to voluntarily participate in the incentive auction, but this should be balanced with the longstanding Congressionally-mandated mission of universal service and the Commission’s public interest objectives.

Sincerely,

Lonna Thompson
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¹⁰ *Id.* at 2.

¹¹ Satellite Television Extension and Localism Act of 2010, Pub. L. 111-175, Sec. 207, 47 U.S.C. § 338(a)(5).

¹² *DISH Network Corp. v. Federal Communications Commission*, 653 F.3d 771 (9th Cir. 2011), cert. denied 132 S. Ct. 1162 (2012).