

FCC Initiates Broadcast Incentive Auction Process

September 28, 2012

On September 28, 2012, the Federal Communications Commission (FCC or Commission) approved a Notice of Proposed Rulemaking (NPRM) to begin the process of reallocating certain spectrum in the broadcast bands. The NPRM offers proposals to implement the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act), which involves a three-part auction process that will include a voluntary reverse auction for existing commercial and non-commercial full power and Class A television stations, repacking of the broadcast television bands and a more traditional forward auction for flexible use of the newly available spectrum.

The FCC plans to release the text of the approximately 150 page item within the next week. In the meantime, the Commission issued a three page news release and outline summarizing many of the NPRM's key terms.

Under the FCC's proposal, the reverse auction will be open to all commercial and non-commercial full power and Class A television stations, as specified in the Spectrum Act. Broadcasters interested in participating will have three options: (1) to relinquish their full 6 MHz of spectrum and go off the air; (2) to "channel share" with another licensed station and relinquish only one of the channels; or (3) to relocate from a UHF channel to a VHF channel. The NPRM asks for comment on whether there should be additional options for broadcaster participation, such as maintaining the same 6 MHz channel but accepting additional interference. As to the structure of the reverse auction, the NPRM does not propose a specific option, but rather, raises several questions, including whether to collect sealed bids or use a "descending clock" format where bidders join the auction at an initial potential payment amount and decide

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whether to participate in subsequent rounds with declining values.

Through repacking, the Commission proposes to reorganize the broadcast television bands so television stations that remain on the air occupy a smaller portion of the UHF band. The Spectrum Act mandates that Congress make "all reasonable efforts" to preserve the "coverage area and population served" of remaining television stations. The NPRM asks how to implement this requirement and proposes to define a television station's "coverage area" as a full power television station's "service area" as defined in the FCC's rules. The NPRM also asks about how to complete the repacking in a timely manner without interrupting over-the-air broadcast service to viewers. Additionally, the NPRM proposes that broadcasters eligible for a portion of the \$1.75 billion relocation fund have the option of an advance payment based on estimated costs or a subsequent payment of actual costs.

To facilitate the forward auction, the NPRM includes a proposed 600 MHz band plan for the reclaimed television spectrum. Under the proposed plan, spectrum would be divided into 5 MHz blocks, with the uplink band starting at channel 51 (698 MHz) and expanding downward toward channel 37 and the downlink band starting at channel 36 (608 MHz) and expanding downward. The Commission's proposal would establish 6 MHz guard bands between mobile spectrum and broadcast spectrum, which would be available for unlicensed use. In addition, television white spaces would continue to be available, and the FCC would no longer protect two channels for wireless microphone use. Finally, the NPRM seeks comment on the possibility of relocating channel 37 systems (radio astronomy and wireless medical telemetry) to increase the availability of unlicensed spectrum.

The Commission has announced a goal of issuing a Report and Order in 2013 and commencing the incentive auctions by June 30, 2014.

In their statements, all of the commissioners acknowledged the complexity of incentive auctions, with Robert McDowell, the FCC's longest-serving commissioner, calling it "the most difficult undertaking the Commission has embarked upon" since he joined the Commission. One of the key concerns raised by several of the commissioners is how to facilitate participation by broadcasters. Chairman Julius Genachowski declared, "The success of the incentive auction depends on broadcaster participation," and stated that he expects input from broadcasters on how to maximize their participation. To facilitate that process, the Commission announced the establishment of the Broadcaster LEARN (Learn Everything About Reverse-Auctions Now) Program to educate broadcasters about the reverse auction process. The FCC will hold its first Broadcast LEARN program workshop on Friday, October 26, 2012.

Commissioner Jessica Rosenworcel, who served as Senior Communications Counsel to the Senate Committee on Commerce, Science, and Transportation during the passage of the Spectrum Act, identified four "building blocks" for a successful auction: simplicity; fairness (especially as to broadcasters who do not participate in the reverse auction); balance (congressional mandates vs. flexible auction design, licensed spectrum vs. unlicensed spectrum); and public safety.

Commissioner Ajit Pai, meanwhile, stated that while the NPRM is an important step, it ignores several important questions upon which he independently solicited comment:

- Whether the auction design should include closing conditions to ensure sufficient funding for FirstNet, state and local first responders, public safety research, deficit reduction and next generation 911;
- How the FCC should handle a scenario where the \$1.75 billion Broadcaster Relocation Fund is insufficient to cover the relocation costs incurred by broadcasters and cable operators;
- Whether a guard band smaller than 6 MHz is "technically reasonable" and thus required by the Spectrum Act;
- Whether the Spectrum Act requires the licensing of guard bands rather than making them available for unlicensed use;
- Whether both parties to a channel sharing agreement should have to file pre-auction applications and participate in the incentive auction;
- Whether channel sharing should be permitted for low power television station in markets where they are likely to be displaced;
- How to accommodate TV translators, which enhance service to rural areas; and
- What is the appropriate timeline for the issuance of final rules and auction procedures such that the incentive auction can begin by the June 30, 2014 target date.

We will provide a detailed summary of the NPRM upon its release. If you have any questions about broadcast incentive auctions, please contact one of the following attorneys or the Wiley Rein attorney who regularly handles your FCC matters.