

FCC Releases Notice of Proposed Rulemaking for Broadcast Incentive Auctions

October 3, 2012

As indicated in our previous client alert, the Federal Communications Commission (FCC or Commission) has adopted a Notice of Proposed Rulemaking (NPRM) seeking comment on issues related to the implementation of voluntary incentive auctions aimed at repurposing certain spectrum in the broadcast bands. On October 2, 2012, the FCC released the full text of the NPRM, which provides additional details about the Commission's proposal for voluntary incentive auctions. A detailed Executive Summary of the NPRM can be found [here](#), and highlights of the Commission's incentive auction proposals follow. Comments and reply comments are due December 21, 2012 and February 19, 2013, respectively.

Reverse Auction

The FCC proposes to conduct a reverse auction that will be open to all commercial and non-commercial full power and Class A television stations, including television licensees operating on non-commercial educational (NCE) reserved channels and licensees operating with NCE status on non-reserved channels. Low power television (LPTV) stations and Class A television stations whose status has been changed from Class A to LPTV, regardless of whether the modification order is final and unappealable, would not be eligible to participate.

Broadcasters interested in participating in the reverse auction 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 moving from a high VHF channel to a low VHF channel, or

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maintaining the same 6 MHz channel but accepting additional interference. The FCC proposes that winning reverse auction bidders would relinquish all spectrum rights with respect to that channel (including modification applications and outstanding construction permits).

The NPRM seeks comment on how to structure the reverse auction, and proposes two alternatives. In the first "Single Sealed Bid" option, bidders would specify, in a single round, the payment they would be willing to accept in exchange for relinquishing spectrum rights. In the second "Multiple Round/Dynamic Bidding" option, bidders would indicate their willingness "to accept iteratively lower payments" in exchange for relinquishing spectrum rights. The Multiple Round/Dynamic Bidding auction could proceed as a "descending clock auction where prices would start high and decline over time." As the price goes down, licensees would drop out of the auction if the price to relinquish became too low for them. The decision to drop out would be irreversible. The NPRM seeks comment on whether the Commission should offer the option of submitting a proxy bid before the descending clock auction. The proxy bid would allow a broadcaster to indicate the minimum payment it would accept to relinquish spectrum rights. Bids would then be generated and submitted dynamically on the bidder's behalf.

The NPRM also proposes certain competitive bidding procedures. Of particular note to broadcasters seeking to assess the value of their spectrum, the Commission seeks comment on how to implement Section 6403(a)(3) of the Spectrum Act, which requires the Commission to "take all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in a reverse auction," including withholding the identity of such licensee until the spectrum reassignments and reallocations "become effective." The FCC asks for input on the types of information the agency should withhold and whether it should, or practically can, prohibit participants from announcing their participation publicly or privately, and the implications of any such announcement on the confidentiality requirements. The FCC further proposes to prohibit reverse auction applicants from communicating directly or indirectly with forward auction applicants regarding the substance of their bids.

To formally close the reverse auction, the Commission proposes issuing a public notice identifying the winning bidders and setting the deadline for spectrum relinquishment. The FCC further proposes that payments from the auction be distributed directly to the applicant, even in the case of channel sharing agreements, and seeks comment on the timing of the incentive payments.

Repacking

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. In the NPRM, the agency makes clear that the manner in which spectrum can be repacked will drive which bids are accepted in the reverse auction. Accordingly, the NPRM asks whether the FCC should weigh or score bids to account for factors directly impacting spectrum repacking, such as the station's coverage area and service population.

The Spectrum Act mandates that Congress make "all reasonable efforts" to preserve the "coverage area and population served" of remaining television stations. The NPRM proposes to interpret "coverage area" to mean a full power TV station's "service area" as defined in section 73.622(e) of the Commission's rules—the geographic area within the station's noise-limited F(50,90) contour. Because the rules governing Class A stations do not define a "service area," the Commission proposes using a Class A station's "protected contour" as its "coverage area" for purposes of repacking.

In addition, the Commission proposes three alternative approaches to fulfilling the statutory requirement to make all reasonable efforts to preserve population served in the repacking process. The first "flexible" approach would prohibit reassignment causing interference that would reduce a station's total population served as of February 22, 2012 by greater than 0.5%. This approach would preserve service to roughly the same number of viewers, but not necessarily the same viewers. The second "fixed" approach would prohibit reassignment causing interference that would reduce a station's specific population served as of February 22, 2012 by greater than 0.5%. This approach would preserve service to the same viewers stations currently serve. Finally, the third approach would permit any interference between two individual stations that existed on February 22, 2012 and establish a separate interference standard of up to two percent for stations that did not interfere with one another as of February 22, 2012.

Relocation Costs

The Commission proposes certain procedures for administering the \$1.75 billion fund established in the Spectrum Act to reimburse broadcasters and multichannel video programming distributors (MVPDs) for costs incurred due to repacking. Broadcasters would have the option to elect reimbursement for their relocation costs based on their estimated costs or their actual out-of-pocket expenditures. Stations choosing to receive reimbursement based on their estimated costs would receive their reimbursement through an advance payment, while stations choosing reimbursement based on actual costs would receive reimbursement only after paying and documenting their costs. The Commission also seeks comment on the types of relocation costs that stations are likely to incur and which are "reasonable" costs to be reimbursed. Additionally, the NPRM asks how to prioritize requests should the total costs exceed the \$1.75 billion limit. Instead of accepting reimbursement, a television licensee may elect to accept a waiver of certain of the Commission's service rules to permit more flexible use of its spectrum.

The FCC proposes to reimburse MVPDs only on an actual cost basis and asks what types of costs MVPDs are likely to incur.

Other Broadcast Issues

The FCC recognizes that the incentive auction could affect its multiple ownership rules and proposes to grandfather any station combinations that would no longer comply with its multiple ownership rules as a result of the incentive auction. The NPRM also seeks comment on measures to address any impact the incentive auctions may have on diversity.

Recognizing that low power and translator stations may be displaced in the repacking, the Commission asks how it can preserve "important programming provided by low power television and television translator stations," such as permitting channel sharing by these stations and opening a new filing window for low power and television translator stations to file displacement applications.

The FCC also asks several questions about how to implement channel sharing between broadcast stations.

Forward Auction

The NPRM also seeks comment on issues related to the forward auction, including the Commission's proposal to divide spectrum in the 600MHz band 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 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.