



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

January 12 Spectrum Auction Application Deadline for TV Stations Is Here; “Quiet Period” Begins at 6 p.m. Eastern Time

All broadcasters should be aware of important non-disclosure requirements that apply to participation (and non-participation) in the FCC’s spectrum auction. Of course, the **deadline for filing reverse auction applications in the FCC’s spectrum auction is 5:59 p.m. Eastern Time today, January 12, 2016.** In connection with the spectrum auction, the FCC has adopted rules (referred to as the “anti-collusion” rules) prohibiting certain communications during the FCC designated “quiet period,” which **begins promptly at 6 p.m. Eastern Time on January 12, 2016.** In an effort to educate broadcasters and other parties about the anti-collusion rules, the FCC has released a [Public Notice](#) providing guidelines for applying the anti-collusion rules. Together with its previous orders, the *Public Notice* outlines the restrictions on communications, internally and externally, concerning bids and bidding strategies in the upcoming spectrum auctions. In addition, federal “bid rigging” and antitrust laws apply to communications affecting the FCC’s spectrum auctions.

Actions which may violate the anti-collusion rules may also constitute violations of state and federal antitrust laws related to “bid rigging.” Accordingly, the U.S. Department of Justice is not bound in terms of time periods by the FCC’s so-called “quiet period” in its enforcement of the nation’s antitrust and “bid rigging” laws.

The consequences for violation of the anti-collusion rules can be severe, including disqualification from the auction, financial penalties that could range in the millions, loss of broadcast license, and potential civil and criminal liability under federal antitrust laws. It is, therefore, imperative that broadcasters understand the rule and have procedures in place to ensure compliance. For the convenience of Association members, here are a few “Questions and Answers” that summarize the key requirements of the anti-collusion rules applicable to broadcasters. Please understand that this memorandum necessarily addresses these issues at a very high level of generality. **It is critically important that broadcasters consult with and obtain**

advice regarding these rules from their own legal counsel and that they do not rely exclusively on this memorandum nor on the FCC's [Public Notice](#) for compliance guidance.

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A Few Questions and Answers Concerning FCC Broadcast Incentive Auction Anti-Collusion Rule

- **When do the anti-collusion rules apply?**

Technically, the FCC's anti-collusion rules apply to communications during the spectrum auction's "quiet period." The quiet period begins on the deadline by which television licensees must file applications to participate in the auction, which is **6:00 p.m. Eastern Time, January 12, 2016**, and ends with the FCC's announcement of the auction results, which is expected to occur during the summer of 2016. However, prudence suggests that licensees observe the anti-collusion rule at all times—not just during the "quiet period"—since the U.S. Department of Justice is not restricted by the FCC's "quiet period" in its enforcement of antitrust and "bid rigging" laws.

- **Who is covered by the rules?**

The "anti-collusion" rules apply both (a) to stations that elect to file an application to participate in the so-called "reverse auction," which is the broadcast station auction, and (b) to stations that *do not elect* to file an application to participate in the broadcast station spectrum auction. (The anti-collusion rules will also apply to participants in the forward auction.) Therefore, *every* broadcaster needs to be conversant with the anti-collusion rules. Obviously, stations that file an application to participate will have greater burdens in terms of compliance, but all stations are affected.

- **What do the anti-collusion rules prohibit?**

With the exceptions noted in the next section, during the "quiet period," the rules prohibit all covered entities and persons from communicating directly or indirectly with another incentive auction participant concerning "bids or bidding strategies," which are terms that have not been defined with precision by the FCC. Generally, the prohibition applies to any information that has the potential to impact bids or bidding strategies, including without limitation, the bid options, bidding strategies, or bidding actions that have been or will be selected or taken. Given that this is somewhat of an "eye of the beholder" test, any communication (whether public or private) concerning a station's or broadcaster's potential participation in the auction bears some risk.

- **Are there exceptions to the anti-collusion rules?**

Yes. Among the exceptions are these: *First*, internal communications relating to commonly owned stations are permissible. *Second*, communications about bids or bidding strategies between broadcast licensees that are parties to a channel sharing agreement are permissible—if the sharing agreement (a) was executed prior to the deadline for submitting applications to participate in the reverse auction (*i.e.*, 6:00 P.M., January 12, 2016), and (b) the channel sharing arrangement was disclosed in the application to participate in the reverse auction. *Third*, communications between a television license applicant and an applicant in the wireless company auction are permissible if a controlling interest, director, officer, or governing board

member of the television applicant, as of the deadline for applying to participate in the reverse auction, is also a controlling interest, director, officer, or holder of 10% or greater ownership interest in the applicant in the wireless company auction, as of the deadline for submitting an application to participate in the broadcast station auction.

The FCC has stated that these exceptions are not cumulative. That is, information obtained from a third party channel sharing partner where the licensee is the potential “host” station cannot be shared with other stations owned or controlled by the licensee. Stated another way, while parties to a channel sharing agreement that is submitted with the auction application may communicate with each other about the bids or bidding strategies of the stations covered by their agreement, they may not communicate regarding the bids or bidding strategies of any commonly owned stations of a party to the agreement that are not subject to the agreement. This restriction creates obvious structural problems for licensees with multiple stations regarding how information is shared internally. If a licensee is a party to a channel sharing agreement as a “host” station, it would need to create internal controls and procedures to ensure that persons receiving bidding information from a third-party channel-sharing partner do not share that information with other personnel involved in the bidding process for any other owned station(s) that may be participating in the auction.

- **Does a communication indicating whether a licensee has or has not submitted an application to participate in the auction violate the rules?**

No. Significantly, in its *Public Notice* the FCC clarified that merely stating that a licensee has or has not applied (i.e., submitted an application) to participate in the auction will not violate the anti-collusion rules. Prior to this clarification, many commenters had questioned whether merely stating that you are or are not an “applicant” in the auction could be deemed to convey a broadcaster’s “bidding strategy.” Filing an application is a prerequisite to *bidding* in the auction, but the mere fact that an application has been filed does not require the applicant to bid, nor does it reveal an applicant’s specific bids or bidding strategies, *e.g.*, the applicant’s selected bid options, an applicant’s decision to switch bid options during the course of the bidding, or an applicant’s decision to drop out of the bidding.

- **Can a licensee publicly or privately state that it is “not bidding” in the auction or it has “ceased bidding”?**

No. The FCC has stated that the word “bid” or any derivation thereof is prohibited in any external communication during the “quiet period.” Although communications regarding whether a licensee has applied to participate in the auction are permissible under the rules, the FCC has stated that a communication that a licensee “is not bidding” in the auction—in contrast to “is not an applicant”—could constitute an apparent violation of the rules as it could be construed as disclosing bidding strategy.

- **What impact do the anti-collusion rules have on communications involving routine business and operational matters?**

The Commission has stressed that the rules are “limited in scope” and do not prohibit business or operational discussions and negotiations that are unrelated to auction bids or bidding strategies and that do not convey information about bids or bidding strategies. The Commission acknowledges that broadcast licensees routinely engage in business arrangements with one another

and other entities that are unrelated to bids or bidding strategies in the auction, including network affiliation, program and talent agreements, and retransmission consent agreements, as well as tower and studio leases and other agreements for equipment and other business matters. The FCC has also acknowledged that broadcasters routinely engage in financial undertakings that may be affected by their auction activities, such as raising funds from lenders or, in the case of noncommercial broadcasters, from the public and underwriters.

The FCC has advised broadcasters, where possible, to structure their ongoing business and operational negotiations in such a way as to avoid the “quiet period,” for example, by entering into short-term renewals of agreements where possible. However, where avoidance is not an option, the Commission, in its *Public Notice*, provided several examples of “normal course” communications that would not violate the anti-collusion rule, and we recommend that you review those examples [available here](#).

- **Are all communications about bids or bidding strategies to third parties such as vendors and consultants prohibited?**

It depends. The anti-collusion rules prohibit only communications among or between eligible broadcast television licensees, not necessarily communications to third parties—so long as those third parties are not “conduits” of information to covered parties. The FCC acknowledges that, during the “quiet period,” eligible broadcast television licensees may want or need to communicate bids or bidding strategies to third parties such as counsel, consultants, accountants, and lenders. The anti-collusion rules do not prohibit such communications, so long as the licensee takes appropriate steps to prevent the third party from becoming a conduit for communicating bids or bidding strategies to other covered parties.

- **What should a person do if he or she is the recipient of a prohibited communication?**

The FCC’s rules require anyone who makes or receives a communication that may violate the anti-collusion rule to report it to the FCC in writing “immediately, and in no case later than five days after which the communication occurs.” Failure to make a timely report is itself a continuing violation. The FCC also can investigate specific allegations of collusion or refer them to the Department of Justice. Consultation with legal counsel is strongly recommended.

- **What are the penalties for violation of the anti-collusion rule?**

The penalties for non-compliance can be severe. In past auctions, the FCC has imposed monetary fines for rule violations, ranging from a few thousand dollars to millions of dollars. Penalties also have included the imposition of compliance program requirements and, in egregious cases, disqualifications from participation in future auctions. The FCC also has authority to revoke licenses for anti-collusion rule violations.

It should also be recognized that the FCC’s anti-collusion rules are not the only federal requirement in play. In addition, as noted above, federal antitrust and anti-bid rigging principles also apply to the auction. These principles generally apply to concerted conduct that is anticompetitive in nature, including the submission of collusive, non-competitive or rigged bids. The FCC may refer potential violations to the U.S. Department of Justice for enforcement. In addition, as noted above, federal antitrust and “bid rigging” laws apply in the context of the

spectrum auction. Any conduct rising to the level of an antitrust violation could also be subject to standard antitrust remedies and penalties, both civil and criminal.

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If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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