



# Virginia Association of Broadcasters Legal Review



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November 13, 2015

## Legal Memorandum: TV Spectrum Auction Application Procedures Edition

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*In this issue, link to information about*

*Events:*                    [November 17 Tutorial on Reverse Auction Application Process](#)

*Deadlines:*            [File Auction Application \(FCC Form 177\) by January 12, 2016](#)

*Developments:*      [Brief Overview of Reverse Auction Application Procedures](#)

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### On Tuesday, November 17, the FCC Will Conduct a Tutorial Workshop on the Reverse Auction Application Process

The FCC has scheduled a tutorial workshop for November 17, 2015, on the Incentive Auction's reverse auction application process. According to a [Public Notice](#) (a copy of which is attached to this memorandum), the workshop is scheduled for Tuesday, November 17, from 10 a.m. to 1 p.m. eastern time. (**Please Note:** the reverse auction application window discussed in the aforementioned Public Notice has been changed. The new dates for the reverse auction application window are discussed further below in this memorandum.) The details of the reverse auction application process were provided in the FCC's [Application Procedures Public Notice](#), a summary of which is provided further below in this memorandum.

The tutorial will be streamed live over the Internet and may be accessed in real-time at [www.fcc.gov/live](http://www.fcc.gov/live). Registration is not required to watch the workshop online, but interested parties are encouraged to tune in before the designated 10 a.m. start time. Those watching the live video stream may email event-related questions to [auction1001@fcc.gov](mailto:auction1001@fcc.gov).

For interested parties that cannot attend the workshop in person or online in real-time, the FCC will make a recording of the live event available for viewing online after the event.

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## A Brief Overview of the Reverse Auction Application Procedures; Applications Due to Be Filed By 6 p.m. ET on January 12, 2016

While we do not know precisely what the FCC's Incentive Auction Staff will cover in the November 17 tutorial workshop, the material below covers a few of the highlights of the FCC's [Application Procedures Public Notice](#) ("Application Procedures PN"). The Application Procedures PN is a lengthy document with numerous appendices containing technical data. In an effort to highlight a few of the most relevant points about the reverse auction application procedures for television licensees who are considering participating in the Incentive Auction, we have distilled the following points from the nearly-300-page Application Procedures PN. Of course, these few pages are no substitute for vetting your auction options with engineers and legal counsel, and no station, licensee, or executive should rely exclusively on the information below to make any auction-related decisions nor as a "how to" manual for the application and participation processes. Not all issues that are relevant to the decision-making process, the application process, or bidding strategies are discussed below, and it is imperative that interested broadcasters consult with qualified professionals.

*Deadline to Apply to Participate in Reverse Auction.* Television broadcasters interested in participating in the reverse auction must file the reverse auction application form (FCC Form 177) during the filing window announced by the FCC. Submission of the Form 177 is the first of two steps that broadcasters must take in order to be eligible to participate in the reverse auction (the second step is to make an "initial commitment," which is described further below).

According to a [Public Notice](#) issued November 12, 2015, the FCC Form 177 filing window will open at **12 noon Eastern Time ("ET") on December 8, 2015, and close at 6 p.m. ET on January 12, 2016.** Applications must be filed prior to the closing of the filing window. Stations are strongly encouraged to file prior to January 12. (The filing window was originally scheduled from December 1 – December 18, 2015, but was changed in order to give broadcasters time to evaluate [new data](#) and [revised opening bid prices](#) that were also released on November 12.)

There are no limits or restrictions on the number of times an application can be updated or amended until the filing deadline on January 12, 2016 (but, as discussed below, there are significant restrictions on the types of changes that can be made for Form 177 thereafter).

When ready to file Form 177, applicants must always click on the SUBMIT button on the "Certify & Submit" screen to successfully submit its FCC Form 177 and any modifications; otherwise the application or changes to the application will not be received or reviewed by the

FCC. Additional information about accessing, completing, and viewing the FCC Form 177 will be included in the FCC Form 177 Instructions. FCC Auctions Technical Support is available at (877) 480-3201, option nine; (202) 414-1250; hours of service are Monday through Friday, from 8:00 a.m. to 6:00 p.m. ET.

*Other Significant Dates Relating to Reverse Auction Process.* In addition to the reverse auction application window dates, here are some additional dates for potential reverse auction participants to know:

<b>Reverse Auction Dates and Deadlines</b>	
Application Process Tutorial (via Internet)	November 17, 2015
FCC Form 177 Filing Window Opens	December 8, 2015 at 12 noon ET
Form 177 Filing Window Deadline	January 12, 2016 at 6 p.m. ET
Bidding and Post-Auction Process Tutorial Available (via Internet)	February 29, 2016
Initial Commitment Deadline	March 29, 2016 at 6 p.m. ET
Initial Clearing Target and Band Plan Announced	Three to four weeks after the initial commitment deadline
Mock Auction(s)	Specific date to be provided to each applicant that is qualified to bid by confidential status letter after the initial clearing target is announced (Each bidder qualified to bid in the clock rounds will have an opportunity to participate in at least one mock auction.)
Bidding in the Clock Rounds Begins	Specific date to be provided to each applicant that is qualified to bid by confidential status letter after the initial clearing target is announced

*The Reverse Auction Application Form (FCC Form 177) Is Not Yet Available.* FCC Form 177 is not yet publicly available in its final form, and the form’s instructions are also not yet available. In late October 2015, the FCC submitted the form to the Office of Management and Budget (“OMB”) for review and approval. The FCC requested that OMB approve the form by November 18, 2015. Until the form is made publicly available with its instructions, the only version available is a series of screen shots of the form taken from the FCC’s online Auction System. Screen shots of sections of FCC Form 177 can be viewed by clicking [here](#), [here](#), and [here](#).

*Applicants Must Select Bidding Options in Form 177.* Each applicant will have up to three bid options from which to select on the application, depending on its pre-auction band: (1) go off-air (available to all stations); (2) move to a Low-VHF channel (available to UHF or High-VHF stations); and (3) move to a High-VHF channel (available only to UHF stations). Applicants that intend to channel share as a “sharee” station following the auction will bid to go off-air. Any bid option not selected by the applicant will not be an available option to that applicant during the clock rounds (e.g., an applicant that only selects “go off-air” will not be able to change its mind during the clock rounds and, instead, bid to move from a UHF channel to a High-VHF channel).

*What Else Must Applicants Provide in Form 177?* Among other things, Form 177 will require applicants to:

- Submit certain ownership information (i.e., the real party- or parties-in-interest and the ownership structure of the applicant, including both direct and indirect ownership interests of 10 percent or more);
- Identify at least one, but no more than three, persons authorized to place bids in the auction;
- Identify a contact person and a certifying official who will be the only person(s) to whom the FCC will send application-related correspondence and with whom the FCC will communicate. (Only by notifying the FCC in writing by email sent to [auCTION1001@fcc.gov](mailto:auCTION1001@fcc.gov) will an applicant's counsel or other representative be authorized to speak on the applicant's behalf.) Significantly, the FCC will send reverse auction registration materials and related communications only to the contact person listed on Form 177);
- Make a series of certifications including, among others (this is not a complete list of all Form 177 certifications)—
  - That any bid submitted is an irrevocable, binding offer by the applicant to relinquish the relevant spectrum usage rights at the offered price,
  - Acknowledgement that the applicant accepts responsibility for its bids and will not attempt to place the responsibility for its bids on either the FCC or the information provided by third parties as part of the FCC's outreach and education efforts,
  - Agreement that the applicant has the sole responsibility for investigating and evaluating all technical and marketplace factors that may have a bearing on the bids it submits in the reverse auction,
  - A National Security Certification which states that the applicant and all of the related individuals and entities required to be disclosed on the application are not persons who have been, for reasons of national security, barred by any agency of the federal government from bidding on a contract, participating in an auction or receiving a grant and thereby prohibited from participating in the auction,
  - A special certification for each Class A applicant that the station is and will remain in compliance with the ongoing statutory eligibility requirements to remain a Class A station,
  - Special certifications for entities that plan to engage in channel-sharing arrangements, and

- The individual certifying the application is authorized to do so on behalf of the applicant, he or she has read the form's instructions and certifications, and that the contents of the application, its certifications, and any attachments are true and correct.

*Opportunities to Amend Applications Are Extremely Limited.* Once an applicant has filed Form 177, only minor changes will be allowed to be made to Form 177. Here are a few examples of application changes which are considered minor (other types of changes may also be considered "minor," and applicants should consult with legal counsel before making any changes to their application(s)):

- Change of authorized bidders
- Revision of addresses and telephone numbers of the applicant
- Change of the participant's bidding preference (i.e., Internet or telephonic)

Major changes, examples of which are listed below, will not be accepted and may result in the dismissal of the application with no opportunity for refiling (other types of changes may also be considered "major," and applicants should consult with legal counsel before making any changes to their application(s)):

- Changes in ownership that would constitute an assignment or transfer of control
- Change in the certifying official
- Addition of a new Channel Sharing Agreement ("CSA") or change in a party to a CSA
- Addition or removal of a license identified for relinquishment

Changing the filed Form 177 is a complex and cumbersome process, and the process for doing so must be strictly followed.

*What Happens to Form 177 Applications After They Are Filed?* The FCC Staff will review each application to determine if it is complete. Then, the FCC will send confidential letters to the contact person listed on the Form 177 identifying whether the application (1) is complete, (2) has been rejected, or (3) is incomplete or deficient because of minor defects that may be corrected. The letter will include the deadline for resubmitting corrected applications. Applicants that fail to correct defects in their applications to participate by the deadline will have their applications dismissed with no opportunity for resubmission.

Applicants will be provided a limited opportunity to cure specified defects and to resubmit a corrected application. (Note, however, that any Form 177 that does not contain all of the required certifications cannot be corrected after 6 p.m. ET on January 12, 2016, and will be dismissed.) During the resubmission period for curing defects, Form 177 may be amended or modified to cure identified defects or to make minor amendments or modifications. After the resubmission filing deadline, the FCC will determine whether a resubmitted application is complete for each station covered by the application. The FCC will send a confidential letter to the contact person listed in the Form 177 notifying him or her of the final status of its application to participate in the reverse auction. If the application is complete for one or more stations, the letter will contain information

about how to submit an initial commitment for those complete stations, which as discussed below, is the second step in qualifying to bid in the clock rounds of the reverse auction.

During this process, the FCC will communicate only with an applicant's contact person or certifying official, as designated in form 177, **unless the applicant's certifying official or contact person notifies the commission in writing that the applicant's counsel or other representative is authorized to speak on its behalf.** Such authorizations must be sent by e-mail to [auction1001@fcc.gov](mailto:auction1001@fcc.gov).

In no event, however, will the FCC send auction registration materials to anyone other than the contact person listed on the Form 177 or respond to a request for replacement registration materials from anyone other than the authorized bidder, contact person, or certifying official listed on the applicant's FCC Form 177. Thus, applicants will want to be deliberate and careful about the individuals identified for these purposes.

*Initial Commitment Due By 6 p.m. ET March 29, 2016.* As the second step to qualify to bid in the reverse auction, each applicant must commit, at the opening price, to a preferred relinquishment option for each station prior to 6:00 p.m. ET on March 29, 2016. The FCC will provide instructions on how to submit an initial commitment in a confidential letter. An applicant may only commit to a relinquishment option(s) that it identified for that station when initially submitting its auction application. Thus, to maintain maximal flexibility for as long as possible, applicants may wish to consider identifying multiple relinquishment options in Form 177.

An applicant's initial commitment to a relinquishment option constitutes an initial bid, and as such, is an irrevocable offer by the applicant to relinquish the relevant spectrum usage rights in exchange for the opening price offer for that bid option if that station is selected to be a winning station. Failure to timely commit to an initial relinquishment option renders the applicant ineligible to bid in the clock rounds of the auction for that station.

Based on the initial commitments from applicants, the FCC will determine an initial clearing target. Subsequently, the FCC will send a confidential letter to each applicant to inform it of its status with respect to the clock rounds of the reverse auction. The letter will be sent to the contact address provided in the Form 177. These letters will notify the applicant one of the following:

- (1) the station is qualified to participate in the clock rounds of the reverse auction;
- (2) the station is not qualified because no initial commitment was made, and therefore, that station will be designated to be repacked in its pre-auction band;
- (3) the commitment(s) made by the applicant for the station could not be accommodated, and therefore, that station is not qualified and will be designated to be repacked in its pre-auction band; or

- (4) the station is not needed to meet the initial or any subsequent clearing target, and therefore, the station is not qualified and will be designated to be repacked in its pre-auction band.

*Qualified Bidder Registration Materials Will Be Distributed By the FCC.* All qualified bidders in the reverse auction are automatically registered for the auction. The materials needed to participate in the clock rounds of the reverse auction will be distributed by overnight mail. The mailing will be sent to the contact person at the contact address listed in the FCC Form 177 and will include the SecurID® tokens that each authorized bidder will need to place bids, a copy of the “Reverse Auction System Bidder’s Guide,” and the Auction Bidder Line phone number. Receipt of this registration mailing is critical to participating in the auction, and each applicant is responsible for ensuring it has received all of the registration materials. Thus, each applicant will want to choose carefully the contact person and the address to which these materials should be sent.

*What if Bidder Registration Materials Don’t Arrive in Time?* Bidders qualified to bid in the reverse auction clock rounds that do not receive the overnight registration mailing will not be able to submit bids. Therefore, if this mailing is not received by an applicant by noon on the date that is five days prior to the mock auction, the applicant must call the Auctions Hotline at (717) 338-2868. (In the event that SecurID® tokens are lost or damaged, only a person who has been designated as an authorized bidder, the contact person, or the certifying official on Form 177 may request replacements. To request replacement of these items, call Technical Support at (877) 480-3201, option nine; (202) 414-1250.)

*Bidding Will Be Done By Internet or By Telephone.* Bidding in the reverse auction may be done over the Internet or by telephone. Only qualified bidders are permitted to bid. Each applicant must indicate its bidding preference—Internet or telephone—on its FCC Form 177 application. In either case, each authorized bidder must have his or her own designated SecurID® token, which the FCC provides. Each authorized bidder will be issued a unique SecurID® token. As noted above, for security purposes, the SecurID® tokens, the telephonic bidding telephone number, and the “Reverse Auction System Bidder’s Guide” are only mailed to the contact person at the contact address listed on the Form 177. Each SecurID® token is tailored to a specific auction and designated authorized bidder.

*Mock Auctions.* All applicants qualified to bid in the clock rounds will be able to participate in a mock reverse auction prior to the start of the bidding, which will enable bidders to obtain hands-on experience with the FCC’s Auction System. The mock auction will enable bidders to become familiar with the Auction System prior to the auction. The FCC strongly recommends that all bidders participate in the mock auction. The FCC will tell qualified bidders in the final confidential letter of the date of the mock auction to which it has been assigned.

*Additional Thoughts and Information.* The decision whether to participate, the preparation of the reverse auction application, and the development of a bidding strategy are all momentous undertakings. Television broadcasters should already be discussing these issues with engineers, economic consultants, and legal counsel, among others. Highly nuanced issues relating to channel-sharing agreements and the FCC’s anti-collusion rules are not discussed in this memorandum but need to be thoroughly understood by relevant parties. No broadcaster should undertake to

participate in the reverse auction without engaging the assistance of legal counsel and other advisors.

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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.

*Stephen Hartzell, Editor*

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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# PUBLIC NOTICE

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## THE INCENTIVE AUCTION TASK FORCE ANNOUNCES DATE FOR WORKSHOP ON REVERSE AUCTION APPLICATION PROCESS

On October 15, 2015, the Wireless Telecommunications Bureau released the *Auction 1000 Application Procedures Public Notice*<sup>1</sup> for the Broadcast Incentive Auction scheduled to begin on March 29, 2016.<sup>2</sup> The *Auction 1000 Application Procedures Public Notice* provides detailed information, instructions, and deadlines for filing applications for the reverse and forward auctions (Auctions 1001 and 1002, respectively). Additional instructions related to the electronic filing procedures for the reverse auction will be provided in a separate public notice to be released prior to November 17, 2015.

On **Tuesday, November 17, 2015, from 10:00 a.m. to 1:00 p.m.**, the Commission's Incentive Auction Task Force, in conjunction with the Media and Wireless Telecommunications Bureaus, will host a public workshop on the reverse auction application process. Specific topics to be covered include a review of the pre-auction process and guidance on how to complete and submit the Form 177, including an overview of ownership requirements, channel sharing agreements, and the red light rule.

We remind potential auction participants that **the period for filing an application to participate in the reverse portion of the Broadcast Incentive Auction will begin at noon on December 1, 2015, and close on December 18, 2015 at 6:00 p.m. ET.** Applications must be submitted **prior** to the close of the filing period.

The workshop will be held in the Commission Meeting Room at FCC Headquarters in Washington, DC, and is open to the public. All attendees are advised to arrive approximately 30 minutes prior to the start of the workshop to allow time to go through the security process for admission to FCC Headquarters. Attendees are encouraged to pre-register by submitting their

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<sup>1</sup> *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, DA 15-1183 (WTB rel. Oct. 15, 2015) (*Auction 1000 Application Procedures PN*).

<sup>2</sup> *See Broadcast Auction Scheduled to Begin March 29, 2016; Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying to Bid, and Bidding in Auctions 1001 (Reverse) and 1002 (Forward)*, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, Public Notice, 30 FCC Rcd 8975 (2015) (*Auction 1000 Bidding Procedures PN*).

names and company affiliations via email to [auction1001@fcc.gov](mailto:auction1001@fcc.gov) in order to expedite the check-in process the day of the event. Please use “Reverse Auction Workshop” as the subject line in your email.

The workshop will also be streamed live with open captioning over the Internet from the FCC’s web page at [www.fcc.gov/live](http://www.fcc.gov/live). During the event, those watching the live video stream of the event may email event-related questions to [auction1001@fcc.gov](mailto:auction1001@fcc.gov). After the event, a recording of the workshop will be available for streaming. The email address [auction1001@fcc.gov](mailto:auction1001@fcc.gov) will remain available for questions. Attendance at the workshop is not a pre-requisite for applying, but we strongly encourage potential applicants to attend or view the recorded version of the event.

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need and tell us how to contact you if we need more information. Make your request as early as possible. Last minute requests will be accepted, but may be impossible to fill. Send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

For general auction questions contact Linda Sanderson, [Linda.Sanderson@fcc.gov](mailto:Linda.Sanderson@fcc.gov), (717) 338-2868. For reverse auction legal questions contact Erin Griffith, [Erin.Griffith@fcc.gov](mailto:Erin.Griffith@fcc.gov), (202) 418-0660, or Kathryn Hinton, [Kathryn.Hinton@fcc.gov](mailto:Kathryn.Hinton@fcc.gov), (202) 418-0660. Press contact: Charles Meisch, [Charles.Meisch@fcc.gov](mailto:Charles.Meisch@fcc.gov), (202) 418-2943. Additional information for potential Broadcast Incentive Auction participants is available at the Auction 1000 webpage (<http://www.fcc.gov/auctions/1000>).

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