



Virginia Association of Broadcasters Legal Review



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SPECIAL REPORT

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October 22, 2012

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FCC SEEKS COMMENT ON SPECTRUM AUCTION PROPOSALS

The FCC has adopted a *Notice of Proposed Rulemaking* (the “*Notice*”) seeking comment on long-awaited proposals for implementation of television spectrum incentive auctions. The *Notice* seeks comment on important issues for broadcast stations, including the bidding process and the methodology for “repacking” the broadcast television bands.

The Commission has scheduled a public workshop for broadcasters for October 26, 2012, at 1:30 pm ET. Stations will be able to view the workshop online at the following URL: <http://www.fcc.gov/live>.

What follows is an overview of the spectrum auction proceeding and the important issues raised in the *Notice*.

I. Background

In February 2012, legislation was enacted to authorize the FCC to reallocate TV spectrum for wireless use. The legislation authorizes the FCC to conduct “voluntary” incentive auctions of television spectrum and to “repack” stations that remain on the air. Under the law, no television station will be forced to relinquish its spectrum rights, but some stations may be forced to relocate to a different channel. For example, if a station’s frequency is on a channel that is auctioned off and the FCC repacks stations out of that spectrum, the station will be forced to move to another channel, subject to certain limits established by the law. Stations with high channel numbers are especially likely to be

subject to relocation, depending on how many broadcasters are willing to give up their spectrum.

The broadcast industry successfully lobbied for and obtained inclusion of several protective measures in the law, including protections for a station's existing coverage area and protections against interference. The law also provides that stations will be reimbursed for relocation costs, up to an aggregate amount of \$1.75 billion.

It will be important to broadcasters for the FCC to interpret these protections favorably to fulfill the intended "voluntary" nature of the auctions. In the *Notice*, the FCC has released the first round of proposals regarding the design of the auction process and the protections afforded for broadcasters.

Under the law, only full power and Class A television stations (both commercial and noncommercial) will be eligible to participate as "bidders" to relinquish spectrum. Low power television stations will not be eligible. Similarly, only full power and Class A television licensees are eligible for reimbursement of their relocation costs. The law promises no protection to low power television stations against interference during the repacking process. For many stations, the implications of repacking will be the most important issues in the proceeding. At this stage, the FCC has offered few specifics on its proposed plan for repacking, but it invites comment on the potential costs to broadcasters.

The *Notice*—in more than 200 pages—is long on questions and short on answers regarding the auction design, and comments from the broadcast industry will be especially important to influence this proceeding. As many questions as the *Notice* asks, Commissioners McDowell and Pai found it to be lacking on certain other topics, including future opportunities for comment, how much spectrum to reserve for unlicensed use, and how to ensure that the auction's proceeds exceed its costs.

II. Proposed Auction Design

Spectrum incentive auctions will consist of three essential components: (1) a "reverse auction" in which stations submit bids to voluntarily relinquish spectrum usage rights in exchange for payments; (2) "repacking" of the broadcast television bands in order to free up portions of the UHF band for other uses; and (3) a "forward auction" of licenses for use of the newly available spectrum.

The *Notice* explains that these three components are interdependent: the amount of spectrum available in the forward auction will depend on reverse auction bids and repacking, winning reverse auction bidders will be paid from the forward auction proceeds, and the repacking methodology will determine which reverse auction bids are accepted and what channels are assigned to the stations that remain on air.

Here are the key proposals and questions posed for comment with respect to the auction design.

A. Reverse Auction For Broadcasters

In the reverse auction, broadcast television licensees may submit bids to voluntarily relinquish spectrum usage rights in exchange for payments at a certain price. It is up to stations whether they wish to participate, what they are willing to give up, and what price they are willing to accept in exchange for relinquishment of their rights. The viability of the auctions will depend on how many volunteers agree to relinquish their spectrum and participate in the auctions.

Three Categories Of Bids. For a participating station, relinquishment will fall in one of three categories of bids: (1) the station relinquishes all spectrum rights and goes off the air (a license termination bid), (2) a UHF station agrees to move to a VHF channel (UHF to VHF bid), or (3) the station agrees to relinquish all spectrum to share a channel with another station (channel sharing bid). The *Notice* invites comment on whether to establish additional bid options for participants in the reverse auction. For example, should the FCC permit stations to participate in the reverse auction by bidding to accept additional interference from other broadcast stations or reduce their service area or population covered by a set amount? The *Notice* also asks whether to allow UHF-to-VHF bidders to limit their bids to high VHF channels, or whether additional stations should be able to participate by agreeing to relinquish a high VHF channel for a lower VHF channel.

The proposed design of the reverse auction raises fundamental issues on which the *Notice* seeks comment: the processes of bid collection, determination of which bids are accepted, and determination of payment amounts to winners. On the first issue, the Commission has proposed two methods for collecting bids from broadcasters.

Single-Round Sealed Bidding. The simpler proposed method is a single-round sealed bid procedure. By this method, broadcasters would specify, in a single submission during a single bidding round, the payment they would be willing to accept in exchange for giving up spectrum rights. The Commission would either accept or refuse the bid based on the cost and the flexibility to repack based on the other bids it receives.

Descending Clock Bidding. The second proposed method, which the *Notice* suggests the Commission staff favors, is a “descending clock” approach through multiple rounds of bidding. By this process, broadcasters would indicate their willingness to accept iteratively lower payments in exchange for giving up spectrum rights. So, in a descending clock format, prices would start high and decline over time. As the price ticks down, stations indicate whether they would still be willing to relinquish certain spectrum rights at the current price. Stations would stay in the game until the price drops too low, when they would permanently exit the auction. A decision to exit the auction would be irreversible. The *Notice* proposes that the Commission could also offer the

option of a single “proxy bid” in advance of the clock auction indicating the minimum payment they would be willing to accept.

The potential advantage to broadcasters of the “descending clock” auction would be that they do not need to commit to a single bid price at the start of the auction. Stations may be able to auction spectrum for a higher price than their “lowest” bid if other bidders exit the auction first. The *Notice* invites comment on whether a bidder should be paid the “threshold price” (the highest point at which no other bids would be accepted) or the actual bid price. On the other hand, the single-round option may be more straightforward and simpler to administer. The Commission seeks comment on these proposed options and any other bid collection procedures that commenters wish to suggest. The *Notice* asks commenters to address the advantages and disadvantages of the proposed auction design options, including costs to bidders. Further, it asks what limits on bids or bidding increments should be imposed in the reverse auction.

Eligibility. The *Notice* proposes that full power and Class A television licensees with expired, cancelled, or revoked licenses would be ineligible to participate in the reverse auction. For full power stations, all spectrum rights would be determined based on the status of a license as of February 22, 2012 (i.e., the date the law was enacted). According to the *Notice*, Class A stations that have not completed their digital transition would be assessed as of the date of commencement of the reverse auction process. Pending license renewal applications or enforcement actions will not disqualify a licensee under the FCC’s proposals.

Pre-Auction Application. The *Notice* proposes that, before the auctions begin, licensees would submit pre-auction applications to identify, among other things, the licensee, station and channel information, type of bid that may be offered (of the categories discussed above), ownership information, and channel sharing arrangements, if relevant. The licensee would also be required to make certain certifications that it is eligible to participate in the auction. The FCC invites comment on the proposed content and purpose of the pre-auction application, as well as the confidentiality of the identity of and information submitted by applicants. The law requires that the FCC “take all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the reverse auction,” including “withholding the identity of such licensee until any reassignments and reallocations become effective.”

Irrevocability. Regardless of the type of bid, once a broadcaster submits a bid in the reverse auction, the Commission proposes that the bid would be an “irrevocable, binding offer to relinquish spectrum usage rights.” If the bid is accepted, the rights would have to be relinquished by an FCC-imposed deadline.

Timing Of Incentive Payments. Neither Congress nor the FCC has yet proposed the timing of incentive payments to winning broadcasters whose bids in the reverse auction are ultimately accepted by the Commission. The amounts of these payments would not be less than the station’s winning bid. The *Notice* asks if the FCC should

identify a date by which the Commission should make all reasonable efforts to complete incentive payments, and, if so, whether payment should occur before or after the licensee relinquishes spectrum usage rights. What impact would the timing of the incentive payments have on a station's decision to participate in the reverse auction?

The remaining issues—how the Commission will determine which bids are accepted and the payment amounts to winners—will depend upon the methodology for repacking the newly available spectrum. The proposed methodologies for repacking are discussed below.

B. Repacking Methods And Interference Protection

In the “repacking” component of the auction, the FCC will reorganize the broadcast television bands so that the television stations that remain on the air after the incentive auction occupy a smaller portion of the UHF band, subject to interference protection and other constraints in the law. The Commission's goal will be to configure a portion of the UHF band into contiguous blocks of spectrum suitable for flexible use by forward auction bidders (e.g., wireless broadband providers). The *Notice* compares this process to packing boxes into a trunk when the boxes have different sizes and values.

Band Plan. The Commission's so-called “band plan” proposes to repack spectrum into 5 MHz blocks in certain bandwidths, to be sold at the forward auction. The proposed uplink band would begin at Channel 51 (698 MHz) and expand downward toward Channel 37 based on the amount of reclaimed spectrum resulting from the reverse auction. The proposed downlink band would begin at Channel 36 (608 MHz) and likewise expand downward. The FCC has proposed to continue Channel 37's reservation for non-broadband and non-television use. The FCC also proposes to create 6 MHz guard bands between the newly-available spectrum for mobile broadband use and the spectrum for broadcast use; thus, stations would have the equivalent of a full channel buffer to help prevent interference from wireless operations. Television white spaces would continue to be available for unlicensed use in the repacked television band, including within the guard bands and Channel 37. The *Notice* seeks comment on the proposed plan and a number of alternative band plan approaches.

Protection Of Coverage Area. The law requires the FCC to make “all reasonable efforts” to preserve the “coverage area and population served” of television stations as of the date it was enacted—February 22, 2012. According to the *Notice*, the FCC proposes to interpret “coverage area” to mean a full power television station's service area and a Class A television station's protected contour. This is an important provision for broadcasters—the legislation prevents the FCC from marginalizing the coverage of stations and forcing them off the air. The *Notice* proposes to preserve each station's coverage area, as measured by the total square kilometers of the service area. The Commission also may not involuntarily relocate a station from a UHF to a VHF channel or from a high VHF (channels 7-13) to a low VHF (channels 2-6) channel.

Protection Of Population Served. In addition to the guard bands described above, the *Notice* proposes additional interference protection for stations during repacking. To preserve “population served,” the *Notice* first proposes to disallow reassignments of stations that would reduce the total population served by more than 0.5% in the aggregate, even if new areas of interference are created, so that service is preserved to approximately the same total number of viewers. Alternatively, the *Notice* asks if the requirement should instead apply to preserve specific viewers of each station within the 0.5% margin. As a third option, the *Notice* proposes preserving interference levels as measured between two stations. In other words, any interference between two individual stations would continue to be allowed regardless of whether the stations are assigned to different channels; for stations that did not previously interfere with one another, the FCC proposes to permit up to two percent interference between stations. The *Notice* seeks comment on the costs and benefits of each of these options, including quantitative estimates, as well as alternative approaches.

With these protections in place, the *Notice* proposes two alternative procedures for accepting bids and assigning stations to new channels during repacking.

Integer Algorithm Repacking. First, the FCC proposes to use a computer-driven integer programming algorithm, which would determine mathematically a feasible combination based on the costs of accepting bids and relocating other stations. So, the computer would, for a specified amount of spectrum to be cleared, minimize the sum of the reverse auction bids and the relocation costs of stations that would be assigned to new channels.

Sequential Algorithm Repacking. A second alternative approach, called a sequential algorithm, would assess repacking options at each phase of the reverse auction. The sequential algorithm would evaluate the potential repacking feasibility of each bid at each stage of a dynamic auction, or at each price point of a sealed-bid auction. As a result, the repacking potential would become another factor in whether a bid is accepted. For example, in a dynamic “descending clock auction,” prior to each auction round, the auction software would determine for each station that has not exited whether it can feasibly be assigned to its pre-auction band, given the assignments of other stations. If a station cannot feasibly be assigned to its pre-auction band, its compensation would be set at the last price offer it accepted for its last preferred relinquishment options. The rounds would continue until every station has either exited the auction or can no longer be assigned to its pre-auction band.

It is important to note that the Commission has not described the actual parameters and methodology of the repacking algorithms. At this point, the repacking methodology remains a “black box.”

Auxiliary Services. The FCC also proposes that fixed BAS stations (such as studio transmitter links) operating as a secondary service in the UHF band would be required to cease operating and relocate, at their own expense, if a BAS station’s

operation is within “interference range” of a primary licensee, which may be more likely to occur in a more closely packed band after repacking. The *Notice* invites comment on these and other related issues affecting broadcasters with BAS licenses in the UHF band.

Deadline For Repacking. The FCC seeks comment on reasonable deadlines for repacked stations to transition off the air or to new channel assignments, including a proposed 18-month deadline for repacked stations to transition to a newly assigned channel. According to the *Notice*, the 18-month deadline would be a date certain for all repacked stations after the auction concludes, or, alternatively, the 18-month deadline would be triggered by the grant of an individual station’s construction permit for the new channel. The *Notice* asks for comment on these alternative proposals.

The *Notice* explains that the “repacking” phase of relocating broadcasters to new channels will be modeled after the digital transition for television stations. The timeline for this process will be more constrained than the digital transition, as noted above, and stations will not be able to choose their new channels. But, unlike the digital transition, in which stations had to bear all of their own construction costs, the law provides that stations will share in the proceeds of the incentive auction or have access to reimbursements of relocation costs.

The *Notice* invites comment on these proposed repacking and assignment procedures, as well as the potential costs to broadcasters.

C. Forward Auction Structure

The final piece of the auction—the forward auction—will depend on the results of the first two phases: the amount of spectrum, the frequencies available, and the geographic location of the frequencies will be determined by the outcome of the reverse auction and repacking. In the forward auction, the Commission will identify the prices that potential users of the cleared spectrum would pay for new licenses to use the spectrum. The “winners” in the forward auction would be awarded new flexible licenses at that price to use the spectrum.

The law is clear that no licenses will be assigned, and no reassignments or reallocations of broadcast television spectrum will become effective, unless the proceeds of the forward auction exceed the sum of the total amount of compensation that the FCC must pay reverse auction bidders, the relocation costs the FCC must reimburse (up to \$1.75 billion), and the costs of conducting the auction. In other words, there will be no reallocation of spectrum unless the projected revenues from the forward auction are greater than the amounts the government must pay to the TV stations willing to relinquish their spectrum and the estimated costs of relocating other stations.

Format Of Forward Auctions. The FCC proposes to format forward auction bidding in a multi-round, dynamic auction design format, as the Commission has done in prior spectrum license auctions. The *Notice* suggests two options: a simultaneous

multiple round ascending (SMR) auction and an ascending clock auction. These options differ slightly in the actions required for forward-bidders. The FCC also invites comment on whether to permit “package bidding,” by which bidders would offer a single, all-or-nothing bid amount that would apply to a group of licenses, such as more than one block in a geographic area or the same block in multiple geographic areas.

The *Notice* asks for comment on what it calls “integration” of the reverse and forward auctions to ensure that the reallocation is economically viable. The *Notice* proposes, for example, to run the reverse and forward auctions concurrently in a series of stages. Ideally, at each stage of the process, it would be clear whether the auctions would generate enough revenue to cover the costs of the bids, the administrative costs, and relocation expenses. The Commission seeks comment on this and other means to implement the auctions to ensure that the auctions produce enough revenue.

III. Relocation Costs And Other Issues

A. Reimbursement Of Relocation Costs

The law requires the FCC to reimburse costs reasonably incurred by broadcast television licensees that are reassigned to new channels (as well as to MVPDs that incur costs in order to carry the signals of reassigned licensees). The maximum amount that may be available for reimbursements is \$1.75 billion. The Commission is required to make reimbursements within three years of completing the forward auction.

Importantly, the *Notice* proposes to allow repacked stations to elect between actual cost-based payments *after* the fact or estimated cost-based payment in *advance*. The Commission seeks comment on this approach, including the types of relocation costs stations are likely to incur, how the FCC would estimate those costs, how to determine whether costs are “reasonable,” whether and how stations receiving estimated- or actual costs-based payments would be required to document their costs, and whether stations receiving advance payments would have to return any unused funds.

Other important questions regarding reimbursements for broadcasters remain unanswered by the Commission’s proposals. For example, will funds also be available for broadcasters who are affected by another station’s relocation? Will temporary relocation transmitter costs be reimbursed? What happens if the proceeds from the auction are not enough to cover relocation costs?

B. Pending Enforcement Actions

The Commission also seeks comment on how to resolve pending enforcement actions against a station whose bid is accepted. The *Notice* asks whether the FCC should require license termination bidders to enter into escrow arrangements to cover potential costs of forfeitures, either before bidding or after being selected as a winning bidder in

the reverse auction. As an alternative, the Commission seeks comment on the option to settle any pending enforcement proceedings at a fixed amount based on the nature of the alleged violation. The *Notice* asks what other approaches would enable the FCC to dispose of pending cases quickly without overburdening the auction process.

C. Channel Sharing

The FCC previously released an Order implementing rules for stations to voluntarily “share” channels in the context of the spectrum auction. That Order is discussed in more detail in our legal memorandum dated July 3, 2012. In sum, the new channel sharing rules will permit stations to relinquish or surrender their 6 MHz channel and work out an arrangement with another station to share one 6 MHz channel (with each station having enough spectrum to offer one SD channel at all times, though the 6 MHz channel does not have to be split 50-50). The channel sharing provisions will only apply to stations who are relinquishing spectrum in the reverse auction, and these rules will operate in tandem with the spectrum auction rules proposed in the *Notice*.

According to the *Notice*, the FCC does not propose to allow channel sharing bids that would require changes in a station’s community of license or DMA. The *Notice* proposes that, in order to maintain its community of license, a channel sharing station must continue to place a signal of a certain strength over its community of license from the new, shared facility. The FCC has also asked for comment on whether it should grant an exception to the ordinary prohibition on communications among auction applicants for licensees agreeing to share a channel. The *Notice* invites comment on these and other issues related to channel sharing arrangements.

D. More Information For Broadcasters

The *Notice* promises that the FCC will issue a series of public notices that will provide additional opportunities for comment. The Commission has also established a web-based educational program for broadcasters, known as LEARN, that will deliver materials to inform broadcasters on auction design issues to assist in the comment process and in evaluating prospectively their participation in the reverse auction. The Broadcaster LEARN website is available at the following URL: <http://www.fcc.gov/LEARNprogram>. The first public workshop for broadcasters is scheduled for October 26, 2012, at 1:30 pm ET. Stations will be able to view the workshop online at the following URL: <http://www.fcc.gov/live>.

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Comments in this important proceeding are due December 21, 2012, and reply comments are due February 19, 2013.

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

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