



The Committee on Energy and Commerce

Memorandum

July 19, 2013

To: Members, Subcommittee on Communications and Technology

From: Majority Committee Staff

Subject: Hearing on “Oversight of Incentive Auction Implementation”

I. Overview

The Subcommittee on Communications and Technology will hold a hearing Tuesday, July 23, 2013, at 10:30 a.m. in 2322 Rayburn House Office Building on “Oversight of Incentive Auction Implementation.” One panel of witnesses will testify:

1. Gary Epstein, Senior Advisor and Co-Lead, Incentive Auction Task Force, Federal Communications Commission
2. Harold Feld, Senior Vice President, Public Knowledge
3. Kathleen Ham, Vice President, Federal Regulatory Affairs, T-Mobile
4. Rick Kaplan, Executive Vice President, Strategic Planning, National Association of Broadcasters
5. Joan Marsh, Vice President, Federal Regulatory, AT&T
6. Preston Padden, Executive Director, Expanding Opportunities for Broadcasters Coalition

Although the broadcast incentive auction legislation was enacted into law last year as part of the Middle Class Tax Relief and Job Creation Act and the Federal Communications Commission has begun to implement the provision, Congress’s job is not over. As part of the Subcommittee’s oversight role, it is vital to keep implementation on track at the Commission and make sure that the provisions are carried out appropriately. Implemented well, the broadcast incentive auction could raise well in excess of the \$7 billion Congress has identified for building a nationwide public safety network while helping meet demand for mobile broadband services and making a meaningful down payment on the country’s debt.

Several implementation questions remain unanswered at the Commission. How will the Commission determine the value of the assets in the reverse auction? What steps need to be taken to coordinate at our borders? What characteristics of a 600 MHz band plan maximize the spectrum utility and auction proceeds? How does the Commission intend to craft auction rules that comport with the new changes to the Communications Act?

II. Background

Congress passed legislation last year to help meet wireless carriers' growing need for spectrum while at the same time generating funds for a nationwide, broadband public safety network. Originating in the House Communications and Technology Subcommittee and passing as part of the Middle Class Tax Relief and Job Creation Act of 2012, the law allows the FCC to share spectrum auction proceeds with television broadcasters that voluntarily return some or all of their airwaves. The FCC will package those airwaves with additional spectrum, relocating other broadcasters so that it can auction desirable blocks for wireless broadband use. Some of the proceeds would help implement the still unfulfilled 9/11 Commission recommendation of building an interoperable communications system for First Responders.

If implemented effectively, the legislation could clear 120 megahertz of spectrum, a substantial down payment towards the FCC National Broadband Plan goal of making 300 megahertz available by 2015 and a total of 500 MHz available by 2020. The legislation also could raise billions to help pay for the FirstNet public safety network and reduce the deficit. For that to happen, however, the FCC must encourage as many broadcasters as possible to participate, since without broadcasters there is no spectrum to auction. The FCC must also maximize the amount of money it raises, since the FCC will need to compensate the broadcasters that relinquish spectrum and reimburse broadcasters that relocate, in addition to other funding priorities.

In the broadcast incentive auction, television stations may place "reverse bids" on how much compensation they would require: 1) to return all their spectrum; 2) to move from an ultra high frequency (UHF) channel to a very high frequency (VHF) channel, which typically has less desirable propagation characteristics for digital television broadcasting; or, 3) to relinquish some of their spectrum and share a channel with another station. The act further grants the FCC special authority in connection with the broadcast incentive auction to reorganize television stations that remain on air, so that the FCC can better package for auction the spectrum that stations vacate.

To ensure that the FCC and broadcasters put their best feet forward, the act allows the FCC to conduct only one broadcast incentive auction and reorganization. The FCC must conduct the broadcast incentive auction and any general incentive auctions by September 30, 2022. The Commission began the implementation process in September 2012 with a Notice of Proposed Rulemaking to initiate the proceeding and develop a record. The initial round of public comment ended in December 2012, with a second round ending February 2013. The Commission also has sought comment on the software used to perform interference analyses for repacking broadcast stations. And in May 2013 the Commission issued a Public Notice seeking comment on several possible band plans for the reclaimed television spectrum.

III. Discussion

A. Reverse Auction and Repacking

Broadcast Station Valuation. In the reverse portion of the incentive auction process, broadcasters will be asked to identify through a bidding process the price at which they would be willing to participate in the auction. According to the statute, the FCC may decide which station

bids to accept, so long as the revenues from the sale of the television spectrum exceed the amount it pays stations relinquishing spectrum, the cost of the auction, and the reimbursements to broadcasters for relocation costs. The Commission's September 28, 2012, Notice of Proposed Rulemaking proposes procedures for assigning winning bids. One such proposal includes "scoring bids by factors in addition to bid amount, such as population coverage or geographic contour, or other relevant measurable factors." The Commission's rationale for "scoring" stations in this manner is that because no two television stations are identical, incorporating these factors may reduce the cost of clearing broadcast television spectrum. Broadcasters, however, have expressed concerns with auction mechanisms that would permit the FCC to adjust the perceived value of their station. They assert that because the FCC is purchasing a 6 MHz license, not a television station as a going venture, scoring stations would be inappropriate and harm broadcaster participation in the reverse auction.

Border Coordination. Section 6403(b)(1)(B) of the act states that "subject to international coordination along the border with Mexico and Canada," the Commission can "make such reassignments of television channels as the Commission considers appropriate" to make available spectrum to carry out the forward auction. Border coordination impacts television stations in states along the borders with Mexico and Canada and is necessary to prevent interference between U.S. and foreign television broadcasts. Because the act requires the Commission to accommodate broadcast stations that wish to remain on the air after the incentive auction, a failure to coordinate could result in the Commission being unable to repack a sufficient number of stations in the affected areas to yield spectrum for commercial use.

In March 2013, Chairman Upton and the Michigan delegation sent a letter to the FCC seeking answers to a number of questions on the FCC's border coordination plans and progress. And, broadcasters have expressed concerns that the Commission may conduct the incentive auction without first having completed the border coordination process. Citing a similar process in the DTV transition, Acting FCC Chairwoman Clyburn confirmed in a July 2013 letter that the FCC reads the act to permit the Commission to move forward with the auction prior to finalizing the international coordination process. Chairwoman Clyburn also indicated in her letter that the Commission has not yet made a determination how it will handle auction timing with respect to border coordination.

OET Bulletin 69. The incentive auction legislation directs the Commission to make all reasonable efforts to preserve the coverage area and population served of broadcast licensees, as determined by the methodology described in OET Bulletin 69. The Commission sought comment on an updated version of the software used to implement the OET-69 methodology in February 2013. Broadcasters contend that the statute intended for the Commission to apply the methodology as it existed at the time of enactment and that doing otherwise would create uncertainty for broadcast licensees. Wireless providers assert that the Commission has the authority to update the software and data inputs and that such an update will result in more accurate assessments of station coverage and repack possibilities.

B. Forward Auction

Band Plan. In its September 2012, Notice of Proposed Rulemaking, the FCC proposed auctioning reclaimed broadcast spectrum in 5 MHz blocks. The plan, dubbed "down from 51," would create uplink channels for sending signals from users to the network beginning at

broadcast channel 51 and expanding downward and downlink channels for sending signals from the network to the user at channel 36, also expanding downward. The band plan also called for broadcast licenses in the “duplex gap” – the space between uplink and downlink pairs, as well as several guard bands.

After receiving significant comment on the original band proposal, the Commission issued a Public Notice in May 2013 seeking comment on variations of the initial band plan proposal. Among the additional proposals were options to accommodate different amounts of uplink spectrum availability in the different geographic areas and an option that would auction spectrum for time division duplex (TDD) technologies – an alternative to pairing spectrum. Both broadcasters and commercial wireless providers have expressed concerns about these variant band plans. As an alternative, a number of broadcasters, commercial mobile wireless providers, and device manufacturers supported, in a joint letter, adoption of a down from 51 framework that maximizes paired allocations while building guard bands only when necessary.

Auction Eligibility. Section 6404 of the Middle Class Tax Relief and Job Creation Act of 2012 created new section 309(j)(17) of the Communications Act, which forbids the FCC, “[n]otwithstanding any other provision of law,” to “prevent a person from participating in [an FCC auction]” if that person “complies with all the auction procedures and other requirements to protect the auction process established by the Commission” and “meets the technical, financial, character, and citizenship qualifications [established by the Commission.]” Nonetheless, some commenters at the FCC are advocating for auction rules that would restrict the ability of certain bidders to participate in aspects of the incentive auction based on the amount of spectrum that is currently licensed to the bidder.

Advocates of restrictions on bidders in the incentive auction cite additional language in the act that notes that none of the eligibility language “affects any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition.” In May 2013, the Department of Justice submitted an *ex parte* letter to the Commission urging it to take certain competitive and technical considerations into account when designing auctions, including the relative concentration of spectrum licenses below 1 GHz. In response, Chairman Upton, Subcommittee on Communications and Technology Chairman Greg Walden and others sent a letter to the Commission urging the FCC to follow the language of the act and to ensure that spectrum vacated by broadcasters is “available to any qualified bidder.”

If you need more information, please call David Redl or Kelsey Guyselman at (202) 225-2927.