



Testimony of Harold Feld
Senior Vice President
Public Knowledge

Before the
U.S. House of Representatives
Committee on the Energy and Commerce
Subcommittee on Communications and Technology

Hearing On:
The Anti-Spoofing Act, The LPTV and TV Translator Act,
and the E-LABEL Act

Washington, DC
July 24, 2014

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Chairman Walden, Ranking Member Eshoo, thank you very much for inviting me here to testify today.

I am pleased to see this Subcommittee take up both the Anti-Spoofing Act and the E-LABEL Act. The Anti-Spoofing Act closes a loophole in existing law that has allowed scammers to prey on consumers by providing deceptive caller ID information for calls made outside the United States, and clarifies the extension of the law to texting and texting services that use phone numbers. Public Knowledge is pleased to support this pro-consumer legislation and urges swift passage.

Similarly, Public Knowledge is pleased to support the E-LABELING Act. This update to the Communications Act will continue to provide needed information so that purchasers of FCC devices can be assured that these devices comply with necessary regulations, while reducing manufacturing costs.

Unfortunately, Public Knowledge cannot support the third bill under consideration, the LPTV and TV Translator Act of 2014. Public Knowledge generally agrees with the sentiments

expressed in the bill that LPTV and TV translators provide valuable service to their local community. Furthermore, as we read the pending legislation, it essentially recapitulates the existing FCC responsibility to consider the “public interest, convenience and necessity” when making decisions with regard to the assignment of licenses. Nevertheless, as I explain below, because of the delay and potential confusion that any new legislation would engender, we recommend that Congress take no further action on the Incentive Auction at this time.

The First Incentive Auction Ever Held Is Widely Recognized As One Of The Most Difficult and Complicated Challenges Ever Faced By The Federal Communications Commission

This Committee has held numerous hearings on the Incentive Auction since the FCC first proposed the concept in 2010 as part of the National Broadband Plan.¹ I have had the privilege of testifying before this Committee on several occasions as you developed the concept of the Incentive Auction, incorporated it into the Middle Class Tax Relief and Job Creation Act of 2012,² and overseen its implementation by the FCC. At all of these hearings, I and other witnesses have emphasized the enormous challenge of this undertaking. No other country in the world has ever conducted an incentive auction, which requires that the FCC run two complex and interrelated auctions simultaneously. To conduct this auction successfully, the Commission must also simultaneously calculate how full power and Class A LPTV broadcast licensees can be “repacked” post-auction.

This repacking calculation is made even more difficult by the balance struck in the legislation between maximizing spectrum for auction and protecting those full power and Class

¹ See Federal Communications Commission, “Connecting America: The National Broadband Plan” (2010), Section 5.3 at 84. Available at: <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> (last visited July 23, 2014).

² Pub. L. 112-96 §§6401-14 (“2012 Spectrum Act”).

A licensee that does not want to continue broadcasting using all or part of their existing 6 MHz spectrum allocation. These broadcasters cannot be repacked on Channels 2-6 without their express permission (and subject to compensation for migrating into the less desirable VHF bands). The FCC must make every reasonable effort to protect their existing viewing area. Finally, the FCC must seek to reduce the cost to broadcasters for their migration to, at a minimum, fit below the statutorily imposed cap of \$1.75 billion. The FCC is further incented to reduce the cost of migrating broadcasters so that auction revenue can be directed to other purposes designated by the 2012 Spectrum Act, such as FirstNet and deficit reduction.

This enormously complicated undertaking has required nearly two years of deliberation at the agency to produce the Incentive Auction framework adopted by the Commission in May.³ In the process, the FCC has consulted with thousands of stakeholders and the public. The FCC has supplemented its internationally renowned auction team with some of the most respected names in auction theory to develop the complex bidding methodologies required to run both auctions and the repacking simultaneously. The FCC has invested tremendous resources in developing and testing the new auction and repacking software that the incentive auction will require.

Finally, as if all this were not complicated enough, each variable in this equation impacts all other variables. Any change in repacking rules impacts the auction rules by potentially freeing more or less spectrum or creating the potential for unknown neighbors and additional costs. Any changes to the repacking software must be reflected in changes to the Forward Auction software and the Reverse Auction software. Potential participants on either side will adjust their

³ Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268 (Rel. June 2, 2014) (“*Incentive Auction Framework Order*”). Available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0627/FCC-14-50A1.pdf (last visited July 23, 2014).

willingness to participate and the prices they will pay (or demand) based on the availability of the spectrum subject to all these dependent variables.

Congress Should Not Introduce New Uncertainty With New Legislation

On May 15, the FCC adopted the *Incentive Auction Framework*. The framework identified further notices of proposed rulemaking to resolve outstanding issues. In addition the FCC published an anticipated timetable so that potential auction participants could begin the lengthy planning and preparation process necessary for a successful auction.⁴ As part of the *Incentive Auction Framework*, the FCC recognized the important service that LPTV licensees and TV translators provide to their local communities and committed to conducting a *Further Notice of Proposed Rulemaking* to mitigate the impacts of the auction on these services.⁵

By adopting the *Incentive Auction Framework* and the proposed timetable, the FCC has instilled confidence that the auction will move forward in a timely and successful manner. Throughout this long and complicated process, the general mood in the stakeholder community has shifted back and forth between optimism and pessimism. Too often, as the incentive auction made its journey from initial concept in the National Broadband Report to adoption of the *Incentive Auction Framework*, it appeared that the sheer number of competing interests and the unprecedented complexity of the task would cause the auction to collapse under its own weight. While not everyone was pleased with the final *Incentive Auction Framework*, virtually all stakeholders agreed it was time to make decisions and move forward. After the May meeting, the

⁴ FCC, “Estimated Timeline of Key Events Leading Up to FCC’s Broadcast Incentive Auction,” available at: http://wireless.fcc.gov/incentiveauctions/learn-program/Incentive_Auction_Timeline.pdf

⁵ *Incentive Auction Framework* at ¶237.

expectation in the stakeholder community is that we *will* have an auction and it *will* be a success. While many things could still go wrong, we finally have a roadmap to guide us and a schedule to keep us on track.

If Congress passes the proposed legislation, it will introduce significant delay and uncertainty into the auction process. The FCC will be forced to consider how the new law impacts the repacking process. Despite clear direction that the proposed bill does not alter the rights of full power broadcasters and Class As, the FCC will nevertheless need to entertain comments and arguments from stakeholders on how the new statutory language does or does not alter the FCC's previous determinations or influence how the FCC should conduct the repacking. For example, does the passage of a new law mean that Congress rejects the calculus the FCC made to minimize the cost of repacking, and that the FCC should therefore rewrite the repacking software to maximize availability of space for LPTV and translator licensees regardless of the cost to the auction or to full power broadcasters? Nothing in the statute officially requires such an outcome, but the fact that Congress passed a new law drawing attention to the importance of LPTV and translator services will give rise to such arguments.

Worse, because all the factors are interrelated, the ripple effects of reopening this part of the repacking potentially reopen other aspects of the balance struck in the *Incentive Auction Framework*. As the FCC contemplates changes, it will hear from other stakeholders concerned about the impact on related elements of the auction. As the potential issues multiply, more parties will feel the need to participate, further confusing and delaying the issue. Some stakeholders will see this as an opportunity to re-litigate even entirely unrelated issues. Stakeholders will argue that if the FCC must consider changes based on the new legislation

(regardless of whether it adopts them), why not consider other “minor” or “technical” changes as well?

Once Congress requires the FCC to revisit decisions already made, however much Congress may try to limit the inquiry, the complicated and interrelated nature of the auction ensures the scope of the inquiry will spread well beyond what Congress intended. At best, the proposed legislation would create several months of uncertainty and delay just when the auction seems to have found its footing. Even in this best-case scenario, new legislation risks undermining the confidence of stakeholders that the auction will take place in a timely and successful way. At worst, Congress’s determination to force the FCC to revisit the LPTV and TV translator issues becomes the proverbial pebble that starts the avalanche, reopening a complicated and interrelated framework to a fresh round of endless bickering that may crash the chances for a successful auction for the foreseeable future.

Congress Has No Need To Pass Legislation At This Time.

The FCC has already recognized the valuable service that LPTV and TV Translators offer to their communities. It has pledged to conduct a Further Notice of Proposed Rulemaking to alleviate the impact on these services, consistent with the *Incentive Auction Framework*. Although the FCC has not committed to consideration of a voluntary reduction in power by LPTV licensees to facilitate efficient repacking, parties such as Public Knowledge have suggested this and other innovative ways in which the FCC can ensure that the LPTV and TV

translator services continue their historic role of enhancing localism and diversity in accordance with the policies of the Communications Act and the purpose of these services.⁶

Congress can, and should, continue to exercise oversight of the FCC and to continue to review its ongoing processes. But there is no evidence at this stage that the FCC does not already plan to consider everything the pending legislation asks it to consider. To the contrary, the FCC's longstanding recognition of the value of these services, and support for licensees that serve their local communities from a broad array of stakeholders (including Public Knowledge) should provide strong reassurance that the FCC will do what it can to ameliorate the impact of the incentive auction consistent with the direction given by Congress in the 2012 Spectrum Act. Through the traditional oversight process, Congress can ensure suitable protection for these services without disrupting or delaying the Incentive Auction itself.

CONCLUSION

Last week marked the 45th Anniversary of the Apollo 11 landing on the Moon. While no one imagines that the Incentive Auction constitutes a “giant leap for mankind,” the Incentive Auction does share many characteristics of this and other “moon shots.” The Incentive Auction represents an ambitious leap forward into untested waters for spectrum policy in the same way that the Apollo program represented a new evolution in rocketry. Complicated, interrelated problems must all be solved simultaneously to ensure success. And, at times, the sheer complexity and scale of the project seems overwhelming.

⁶ See Letter of Michael Calabrese, Director, Wireless Future Project, Open Technology Institute, New America Foundation to Marlene Dortch, Secretary, Federal Communications Commission, submitted in Docket No. 12-268 at 4 (submitted July 21, 2014).

No one doubts the value of LPTV and TV Translators. To the contrary, the FCC and a broad array of stakeholders have all recognized that value. But even if the legislation is no more than an effort to re-affirm this value, now is not the time to introduce new uncertainty and potential delay into an already difficult and complex project of such scale and scope. If we want the Incentive Auction to launch successfully and on schedule, Congress should not pass this bill.

Thank you to the members of the subcommittee for your time and I look forward to the opportunity answer your questions.