



# PUBLIC NOTICE

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## GUIDANCE REGARDING THE PROHIBITION OF CERTAIN COMMUNICATIONS DURING THE AUCTION OF LICENSES IN THE 3.45–3.55 GHz BAND (AUCTION 110)

### AU Docket No. 21-62

1. By this Public Notice, the Office of Economics and Analytics (OEA) and the Wireless Telecommunications Bureau (WTB) jointly address application of the Commission's rules prohibiting certain communications during the upcoming auction of flexible-use licenses in the 3.45–3.55 GHz band (Auction 110).<sup>1</sup> This guidance supplements the *Auction 110 Procedures Public Notice*, which addresses the general application of these and other Commission rules governing Auction 110.<sup>2</sup> Specifically, this supplemental guidance addresses application of the rules for communications between parties interested in 3.45 GHz Service licenses and the National Telecommunications and Information Administration (NTIA) and the Department of Defense (DoD) regarding cooperative sharing requirements applicable to particular licenses in the auction. When properly applied, the Commission's rules protect the auction against potentially anticompetitive communications while enabling interested parties to obtain available information regarding cooperative sharing requirements, and thereby facilitate a competitive auction process and successful license coordination.

2. *Coordination Requirements in Auction 110.* As described in the *Auction 110 Procedures Public Notice*, Auction 110 will offer 4,060 new flexible-use licenses for spectrum in the 3.45–3.55 GHz band throughout the contiguous United States.<sup>3</sup> Particular licenses are subject to cooperative sharing requirements described in the *3.45 GHz Second Report and Order*<sup>4</sup> and in the *Auction 110 Procedures Public Notice*.<sup>5</sup> Interested parties will be able to find additional information about the cooperative sharing requirements, including information about the encumbrances in specific PEAs, on the NTIA's 3450-3550 MHz webpage at <https://www.ntia.doc.gov/category/3450-3550-mhz>. The public notice issued jointly by NTIA and the Commission's WTB provides further guidance and information on federal/non-federal

<sup>1</sup> 47 CFR § 1.2105(c) (prohibition of certain communications); see 47 CFR §§ 0.21(m), 0.331(c) (granting the Office of Economics and Analytics and the Wireless Telecommunications Bureau authority over auction design and implementation issues).

<sup>2</sup> See *Auction of Flexible Use Licenses in the 3.45–3.55 GHz Band For Next Generation Wireless Services; Notice and Filing Requirement, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 110; Bidding in Auction 110 Scheduled to Begin October 5, 2021*, AU Docket No. 21-62, Public Notice, FCC 21-655, at 17-23, paras. 43-68, Section II.G (Prohibited Communications and Compliance with Antitrust Laws) (rel. June 9, 2021) (*Auction 110 Procedures Public Notice*).

<sup>3</sup> *Auction 110 Procedures Public Notice* at 5-6, paras. 7-9, Section I.C (Description of Licenses to be Offered in Auction 110).

<sup>4</sup> See *Facilitating Shared Use in the 3100-3550 MHz Band*, WT Docket No. 19-348, Second Report and Order, Order on Reconsideration, and Order of Proposed Modification, FCC 21-32, at 5-6, 11-14, paras. 8-9, 21, 23-25 (rel. Mar. 18, 2021) (*3.45 GHz Second Report & Order*).

<sup>5</sup> See *Auction 110 Procedures Public Notice* at 40, para. 116, Section III.B.1.a (Cooperative Sharing in the 3.45–3.55 GHz Band).

coordination procedures.<sup>6</sup> As anticipated in the *3.45 GHz Second Report and Order*, the DoD held a workshop on July 12, 2021, to provide further information on transition and coordination plans, and its process for sharing sensitive information.<sup>7</sup>

3. *The Commission's Rules Prohibiting Certain Communications.* The Commission's rule section 1.2105(c)(1) provides that, subject to specified exceptions, after the deadline for filing applications to participate in Auction 110,

all applicants are prohibited from cooperating or collaborating with respect to, communicating with or disclosing, to each other or any nationwide provider [of communications services] that is not an applicant, or, if the applicant is a nationwide provider, any non-nationwide provider that is not an applicant, in any manner the substance of their own, or each other's, or any other applicants' bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after the down payment deadline[.]<sup>8</sup>

4. "Applicant" for purposes of this rule includes the officers and directors of the applicant, "all controlling interests in the entity" applying to participate in the auction, as well as all holders of interests amounting to 10 percent or more of the entity.<sup>9</sup> Each party that is an "applicant" under the rule, i.e., that is a party covered by the prohibition at the application deadline, retains that status for the duration of the prohibition; that status does not change based on subsequent developments.<sup>10</sup> Thus an "applicant" at the application deadline remains an "applicant" for purposes of the rule regardless of whether the relevant application is ever deemed complete, or an upfront payment is submitted that qualifies the applicant, and/or no bid is submitted on behalf of the applicant.

5. The prohibition covers a communication conveying "bids or bidding strategies (including post-auction market structure)" relating to the "licenses being auctioned."<sup>11</sup> While broad, the prohibition does not apply to all communications between or among covered parties or even to all auction-related communications among covered parties.

[C]ommunicating merely whether a party has or has not applied to participate in Auction 110 will not violate the rule. In contrast, communicating, among other things, how a

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<sup>6</sup> See *The Federal Communications Commission and the National Telecommunications and Information Administration: Coordination Procedures in the 3.45–3.55 Band*, WT Docket No. 19-348, Public Notice, DA 21-645 (WTB Jun. 2, 2021) (*Joint Coordination Public Notice*).

<sup>7</sup> See National Telecommunications and Information Administration, *07/12/2021 DOD Workshop Information*, <https://www.ntia.doc.gov/page/07122021-dod-workshop-information> (last visited July 15, 2021); *3.45 GHz Second Report & Order* at 23, para. 56. As anticipated in the *3.45 GHz Second Report & Order* and noted at the July 12<sup>th</sup> DOD workshop, DoD provided guidance on anticipated received power levels from the DoD's high-powered operations and descriptions of potential national emergency scenarios, as well as other methods and means for handling controlled unclassified information.

<sup>8</sup> 47 CFR § 1.2105(c)(1). The Commission set the current scope of the prohibition in 2015. See *generally Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, AU Docket No. 14-252, GN Docket No. 12-269, WT Docket No. 12-269, 30 FCC Rcd 10794 (WTB 2015) (*Prohibited Communications Guidance Public Notice*). Since that time, the prohibition has applied to certain communications between any applicants in an auction regardless of what licenses each applicant seeks. For the same period, the rule has applied to communications by applicants with non-applicant nationwide providers of communications services; by nationwide applicants with non-applicant non-nationwide providers; and by all applicants with covered television broadcasters.

<sup>9</sup> 47 CFR § 1.2105(c)(8)(iii).

<sup>10</sup> See *Star Wireless, LLC v. FCC*, 522 F.3d 469 (D.C. Cir. 2008).

<sup>11</sup> *Auction 110 Procedures Public Notice* at 19, para. 50 (citing *Prohibited Communications Guidance Public Notice*, 30 FCC Rcd at 10806, para. 33).

party will participate, including specific geographic areas selected, specific bid amounts and/or whether or not the party is placing bids, would convey bids or bidding strategies and would be prohibited.<sup>12</sup>

6. Moreover, absent communication both relating to the licenses being auctioned and communicating or addressing bids or bidding strategies or post-auction market structure, broad industry discussions regarding setting technical standards for the spectrum band for which licenses will be auctioned do not constitute communications prohibited by Section 1.2105(c). Though the technical standards may be applied to the licenses after the auction, such discussion does not by itself raise post-auction market structure issues within the rule's concern in the absence of discussion relating to which parties may or may not obtain particular licenses through the auction.<sup>13</sup>

7. Section 1.2105(c) does not prohibit an applicant from communicating bids or bidding strategies to a third party, such as a consultant or consulting firm, counsel, or lender.<sup>14</sup> However, as noted in the *Auction 110 Procedures Public Notice*, a covered party's communications with a third party may violate the rule in the event the communications result in disclosures to other covered parties.<sup>15</sup> The prohibition against communicating "in any manner" includes public disclosures as well as private communications and indirect or implicit communications in addition to express statements of bids and bidding strategies. Consequently, a covered party must take care to determine whether its auction-related communications to parties that are not covered by the prohibition may reach another applicant.

8. Covered parties are encouraged to protect against communications with third parties becoming a conduit for prohibited communications to other covered parties, as that would violate the rule.<sup>16</sup> Importantly, such procedures do not insulate a covered party from the consequences of a violation in the event a prohibited communication in fact occurs.<sup>17</sup> Hence, while protective measures may mitigate the risk of a violation, adopting such protections—or not, whether due to inability or choice—does not determine whether the covered party can communicate with a third party or whether such communications result in a violation.

9. *Applying the Rules to Communications Regarding Coordination Requirements in Auction 110.* Compliance with the Commission's rules will not preclude needed communication with NTIA and/or DOD regarding the coordination requirements for 3.45 GHz Service licenses in Auction 110. The deadline for filing applications to participate in Auction 110 is 6 p.m., ET on July 21, 2021.<sup>18</sup> Only communications after that deadline may violate the rule with respect to Auction 110. We note that NTIA and DoD are not covered parties subject to the Commission's rule. Therefore, an applicant's communications with NTIA or DoD that are not disclosed to other covered parties should not violate the rule, even if made after the application deadline, regardless of whether the communications would violate the rule if made to a covered party. To the extent that DOD determines that there is additional information that can be shared, NTIA and/or DOD could establish a process to receive and answer questions from covered parties directly that could safeguard against disseminating information about a covered party to another covered party.

10. Coordination requirements that are applicable to all licenses in the 3.45 GHz band would be analogous to technical standards for the band. Accordingly, communications regarding uniformly

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<sup>12</sup> *Id.* at 19, para. 51.

<sup>13</sup> *Prohibited Communications Guidance Public Notice*, 30 FCC Rcd at 10807, para. 35 (footnote omitted).

<sup>14</sup> *Auction 110 Procedures Public Notice* at 20, para. 56.

<sup>15</sup> *Id.* at 20-21, paras. 56-59, Section II.G.4 (Communicating with Third Parties).

<sup>16</sup> *Id.* at 20, para. 56.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 8, para. 13, Section I.D.2 (Auction Dates and Deadlines).

applicable coordination requirements would not fall within the rule's prohibition. Nevertheless, communications regarding coordination requirements that apply only to particular geographic areas may violate the prohibition if they disclose to other covered parties one applicant's bidding interests with respect to particular licenses being auctioned.

11. Care still must be taken regarding communications *among covered parties* regarding coordination requirements for particular 3.45 GHz Service licenses in Auction 110. Such communications might enable some covered parties to make strong inferences regarding bids or bidding strategies of others, depending on the particular circumstances.<sup>19</sup> As already noted, communications with NTIA or DoD should not violate the rule unless the communication results in a conduit for communication to a covered party. Furthermore, as with any communication, all of the surrounding facts and circumstances must be considered when determining whether a particular communication violates the rule.

12. We remind all parties that applicants are responsible for their compliance with the Commission's rules. As noted in the *Auction 110 Procedures Public Notice*:

any applicant that makes or receives a communication that appears to violate section 1.2105(c) must report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs. Each applicant's obligation to report any such communication continues beyond the five-day period after the communication is made, even if the report is not made within the five-day period.<sup>20</sup>

The *Auction 110 Procedures Public Notice* details the procedures for making such reports.<sup>21</sup>

13. Interested parties should continue to monitor the Auction 110 webpage ([www.fcc.gov/auction/110](http://www.fcc.gov/auction/110)) for any future announcements regarding the auction schedule and other important auction information. For further information, contact Mary Lovejoy or Andrew McArdell of the Office of Economics and Analytics, Auctions Division at (202) 418-0660 or [auCTION110@fcc.gov](mailto:auCTION110@fcc.gov). To request materials in accessible formats (Braille, large print, electronic files, audio format) for people with disabilities, send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 or (202) 418-0432 (TTY).

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<sup>19</sup> Others may speculate about an applicant's bids or bidding strategy based on available information without the information constituting a prohibited communication. "Thus, for instance, a capital call that does not expressly communicate bids or bidding strategies and that, after consideration of all the facts and circumstances, does not strongly support an inference of specific bids or bidding strategies likely would not violate the rule." *Prohibited Communication Guidance Public Notice*, 30 FCC Rcd at 10808, para. 40. Nevertheless, should an applicant *attempt to use* inferences or other indirect communication to convey information regarding bids or bidding strategy, the applicant's communications could constitute an apparent violation of the rule. *See id.* at 10796-98, paras. 8-11.

<sup>20</sup> *Auction 110 Procedures Public Notice* at 21, para. 61.

<sup>21</sup> *Id.* at 22, paras. 62-64.