



# PUBLIC NOTICE

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## WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON WAYS TO FACILITATE ACCESS TO CURRENTLY UNASSIGNED AUCTION INVENTORY SPECTRUM FOR WIRELESS RADIO SERVICES IN LIGHT OF THE ONGOING LAPSE OF AUCTION AUTHORITY

WT Docket No. 24-72

Comments Due: April 8, 2024  
Reply Comments Due: April 22, 2024

### I. INTRODUCTION

1. This *Public Notice* seeks comment on how the Commission should fulfill its responsibility to make spectrum resources available for use in the public interest,<sup>1</sup> in light of the ongoing lapse of the Commission's auction authority.<sup>2</sup> The Commission typically uses exclusive, geographic-area licensing to facilitate nationwide wireless broadband coverage, and auctions have been the most effective mechanism to resolve mutually exclusive applications for geographic-area licenses in a manner that yields the most benefits to the public. Given the ongoing lapse of the Commission's auction authority, the Commission now faces a unique and historic challenge of how to facilitate the deployment of advanced wireless services across the country without using auctions to resolve mutually exclusive applications.

2. To that end, unless and until Congress decides to restore the Commission's auction authority, the Wireless Telecommunications Bureau (WTB) is compelled to explore how its existing regulatory tools could be used to provide the public with access to spectrum that would otherwise lie fallow. Specifically, in this *Public Notice*, WTB seeks comment on how the Commission, if necessary, could use its current statutory authority to provide the public with access to its inventory of currently unassigned spectrum in bands previously licensed for wireless services through auctions (hereafter, Inventory Spectrum). The record compiled in this proceeding will help WTB, in coordination with the Office of Economics and Analytics and the Office of Engineering and Technology, to develop options for Commission consideration of these issues. We note that additional spectrum may also be affected by the

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<sup>1</sup> See, e.g., 47 U.S.C. §§ 151, 301, 303(g), 309(a), 1507.

<sup>2</sup> On March 9, 2023, the Commission's authority to issue licenses through systems of competitive bidding (i.e., auction authority) expired. 47 U.S.C. § 309(j)(11) ("The authority of the Commission to grant a license or permit under this subsection shall expire March 9, 2023, except that, with respect to the electromagnetic spectrum identified under section 1004(a) of the Spectrum Pipeline Act of 2015, such authority shall expire on September 30, 2025, and with respect to the electromagnetic spectrum identified under section 90008(b)(2)(A)(ii) of the Infrastructure Investment and Jobs Act, such authority shall expire on the date that is 7 years after November 15, 2021."). Since the lapse of general authority on March 9, 2023, Congress has provided a 90-day window for the Commission to grant licenses "in the band of frequencies between 2496 megahertz and 2690 megahertz, inclusive" not granted prior to the 5G SALE Act and applied for based on competitive bidding held prior to March 9, 2023. See 5G Spectrum Authority Licensing Enforcement Act (5G SALE Act), P.L. 118-27, 137 Stat. 132 (2023). Congress has not otherwise changed the Commission's auction authority since it lapsed.

lack of auction authority where, but for the current statutory limitations, the Commission might otherwise adopt rules for geographic area licensing and auctions to resolve mutual exclusivity.

3. This *Public Notice* identifies three broad approaches that the Commission could use to make Inventory Spectrum available for public use in the absence of auction authority. These options include: (1) providing access through dynamic spectrum sharing techniques; (2) providing access through non-exclusive site-based licensing; and (3) leasing spectrum inventory licenses. We seek comment on each approach, as well as combinations of approaches (e.g., leasing inventory licenses and dynamic spectrum sharing) and any other methods that could be used to make Inventory Spectrum available to the public.

## II. BACKGROUND

4. The Commission uses a wide variety of frameworks to authorize the use of spectrum resources throughout the country. For example, the Commission may provide for the initial licensing of spectrum through geographic-area licensing, site-based licensing, and license-by-rule mechanisms, or may provide for unlicensed access to spectrum. The Commission's secondary market policies permit the assignment, transfer, partitioning, or disaggregation of geographic-area or site-based licenses.

5. In developing frameworks for assigning licenses for spectrum access, the Commission must address the potential for mutually exclusive applications for the licensed use of that spectrum, either by designing an authorization framework that avoids mutual exclusivity or by exercising its statutory authority to resolve mutually exclusive applications.<sup>3</sup> With respect to resolving mutually exclusive applications, the statutory options available to the Commission have evolved over time.

6. The Commission previously used comparative hearings to assign licenses subject to mutually exclusive applications.<sup>4</sup> Comparative hearings were highly cumbersome processes that required the Commission to evaluate applicants' competing claims regarding the value of their spectrum use to the public interest. These proceedings tended to result in numerous appeals, which delayed assignment of the licenses. As a result of these deficiencies, Congress authorized random selection as an alternative to comparative hearings for the assignment of licenses.<sup>5</sup> However, random selection oftentimes resulted in windfalls for speculators and the Commission's authority to conduct assignment by random selection was subsequently terminated.<sup>6</sup> Congress' subsequent grant of auction authority to the FCC in 1993 provided a substantially more effective mechanism for resolving mutually exclusive applications for spectrum licenses. Since the first spectrum auction in July 1994, over 3,300 winning bidders (of over 5,700

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<sup>3</sup> Generally, the Commission "shall grant" an application for a license "when the public interest convenience and necessity would be served by granting" the application. 47 U.S.C. § 309(a). The Communications Act originally provided that, when the Commission did not grant an application, the Commission "shall afford such applicant an opportunity to be heard." U.S.C. § 309(a) (1934). The United States Supreme Court subsequently determined that when there are mutually exclusive applications pending, this statutory right to a hearing required that an applicant must be given an opportunity for a hearing prior to action on its application because "the grant of one [application] effectively precludes the other." *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945). Though Congress subsequently limited the right to a hearing to circumstances in which "a substantial and material question of fact is presented," 47 U.S.C. § 309(e), it seems likely that mutually exclusive applications often will give rise to such questions, given that the grant is to be determined by whether granting the respective applications will service "the public interest, convenience and necessity." 47 U.S.C. § 309(a). Of course, the Commission retains its authority to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity. See generally 47 U.S.C. § 309(j)(6)(E).

<sup>4</sup> See generally *Ashbacker Radio Corp.*, 326 U.S. 327.

<sup>5</sup> Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 736-37, *amended*, Communications Amendment Act of 1982, Pub. L. No. 97-259 § 115, 96 Stat. 1087, 1094-95.

<sup>6</sup> See Balanced Budget Act of 1997, Pub. L. No. 105-33 § 3002, 111 Stat. 251, 260 (1997) (amending 47 U.S.C. § 309(i)).

qualified bidders) have won nearly 103,000 licenses or permits in 100 spectrum auctions.<sup>7</sup> The Commission has raised over \$233.5 billion for statutorily mandated uses, including: \$39.8 billion for the Public Safety Trust Fund; \$45.2 billion to the Spectrum Relocation Fund; and over \$100 billion for the General Fund. These auctions have helped to fuel competition, to provide consumers with a vast array of wireless technologies and services, and to increase the likelihood that the Nation's scarce spectrum resources are put to their highest and best use.

7. The Commission's current Inventory Spectrum includes numerous exclusive-use, geographic area-based licenses across multiple wireless services that were previously made available via competitive bidding but were either not acquired at auction or returned to the Commission after issuance. These include licenses capable of supporting broadband services (e.g., 600 MHz, 700 MHz, 800 MHz Cellular, AWS-3, PCS, BRS, MVDDS) as well as those supporting narrowband services (e.g., 220 MHz, VHF/UHF Paging, 800 MHz SMR). As a result of the ongoing lapse of the Commission's auction authority, the Commission has limited statutory mechanisms to resolve mutually exclusive applications for Inventory Spectrum. Accordingly, in developing frameworks for assigning Inventory Spectrum, the Commission could explore options that would avoid mutual exclusivity, or could resolve mutual exclusivity through a suboptimal mechanism like comparative hearings. Notwithstanding this unique challenge, the Commission nonetheless has an obligation to consider opportunities for making Inventory Spectrum available for wireless communications through alternative means consistent with its current statutory authority.

### III. DISCUSSION

#### A. Potential Approaches for Making Inventory Spectrum Available to the Public

8. *Dynamic Spectrum Sharing.* In recent years, the Commission has successfully used dynamic spectrum sharing frameworks to make spectrum available for flexible wireless use across multiple bands, including licensed use in the Citizens Broadband Radio Service in the 3.55–3.7 GHz band (3.5 GHz band) and unlicensed use in portions of the 5.925–7.125 GHz band (6 GHz band).<sup>8</sup> WTB seeks comment on whether similar dynamic spectrum sharing approaches could be used to facilitate access to Inventory Spectrum. For example, one or more dynamic frequency coordinators could facilitate access to Inventory Spectrum for multiple users within particular spectrum bands and geographic areas. These dynamic systems could be used to minimize harmful interference between operators and promote co-existence between and among various spectrum users. Access to these bands and geographic areas could

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<sup>7</sup> See Federal Communications Commission, *Auctions Summary*, <https://www.fcc.gov/auctions-summary> (last visited Mar. 5, 2024).

<sup>8</sup> The Commission has deployed dynamic frequency coordination models in certain contexts, including Spectrum Access Systems (SAS) for the 3.5 GHz band, and Automated Frequency Coordination (AFC) Systems for the 6 GHz band. See *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550–3650 MHz Band*, GN Docket No. 12-354, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959, 4048–69, paras. 301–78 (2015) (*3.5 GHz Report and Order*) (adopting requirements for SAS and SAS Administrators); *Unlicensed Use of the 6 GHz Band*, ET Docket No. 18-295, Report and Order and Further Notice of Proposed Rulemaking, 35 FCC Rcd 3852 (2020) (*6 GHz Report and Order*). SASs coordinate operations between three tiers of authorized users (Incumbents, Priority Access Licensees, and General Authorized Access users) in the 3.5 GHz band. *3.5 GHz Report and Order*, 30 FCC Rcd at 4051, para. 311. They set and enforce maximum permissible power levels in accordance with the applicable rules, and SASs must act quickly as needed to ensure co-existence between the various categories of authorized users. *Id.* at 4052, paras. 314–15. For standard-power operations, standard-power access points and fixed client devices operate under the control of AFC systems in two portions of the 6 GHz band—the U-NII-5 band (5.925–6.425 GHz) and the U-NII-7 band (6.525–6.875 GHz). 47 CFR § 15.407(k)(1); *6 GHz Report and Order*, 35 FCC Rcd at 3860, 3862, 3923, paras. 17–18, 22, 192. AFCs establish exclusion zones in the 6 GHz band, and they permit unlicensed access to the band only on frequencies and in locations that AFCs determine will protect incumbent operations—including fixed microwave operations and radio astronomy observatories—from harmful interference. *6 GHz Report and Order*, 35 FCC Rcd at 3862, para. 22.

be driven by the existing service rules for the bands to protect existing users and provide a predictable framework for new entrants to the band. Guidelines, optimized for each band, could be developed to help dynamic frequency coordinators facilitate co-existence among a variety of stakeholders and use cases. Are there aspects of the SAS or AFC models that could be incorporated into a dynamic spectrum sharing system to provide access to Inventory Spectrum? How could the Commission leverage existing frequency coordination capabilities to more rapidly implement a dynamic spectrum sharing approach in these bands? What would be the expected time and resources required to develop both the sensing and end-user equipment necessary to implement such dynamic sharing? We also encourage commenters to address the specific questions posed in subpart B, below.

9. *Non-Exclusive Site-Based Licensing.* For decades, the Commission has issued non-exclusive wireless radio service licenses to entities to use spectrum in specific locations, consistent with existing allocations and service rules governing wireless services in those spectrum bands.<sup>9</sup> Non-exclusive site-based licensees are typically required to coordinate with one another—either licensee-to-licensee or via a third-party frequency coordinator—to minimize harmful interference between operators in the band. WTB seeks comment on whether such a non-exclusive site-based licensing approach—with or without a third-party spectrum coordinator—could be used to provide the public with access to Inventory Spectrum. Under such an approach, stakeholders could seek individual, non-exclusive authorizations and promote co-existence through either a spectrum coordinator or licensee-to-licensee coordination of technical parameters. In addition, to facilitate co-existence in a shared-use environment, the Commission could issue guidelines to promote licensee best practices in coordinating frequency use between and among licensees to avoid harmful interference. Are there situations where the relatively simple non-exclusive site-based licensing approach would be preferable to a dynamic spectrum sharing approach? If so, under what circumstances, and in which bands, would such an approach be advantageous? Commenters should also address the questions posed in subpart B, below.

10. *Leasing Spectrum Inventory Licenses.* In recent years, the Commission has taken steps to implement innovative approaches to spectrum leasing to facilitate more flexible and efficient access to spectrum resources.<sup>10</sup> Could the Commission position Inventory Spectrum licenses so that they could be leased to the public, even if they have not yet been initially licensed? If so, what guidelines could the Commission develop to govern lessee selection, leasing arrangements, resolution of mutually exclusive applications, and other parameters? Are there benefits to such a leasing approach as compared to making spectrum available using either dynamic spectrum sharing techniques or site-based licensing as described above? As with the other approaches, we invite commenters to respond to the questions in subpart B, below.

11. *Special Temporary Authority (STA).* We also note that the public already has access to Inventory Spectrum under limited circumstances and for limited purposes, specifically via grants of STAs.<sup>11</sup> For example, WTB issued over 165,000 new licenses last year, of which more than 1,000 were

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<sup>9</sup> See, e.g., 47 CFR § 1.907 (defining “Covered Site-based Licenses”); 47 CFR § 90.173(b) (“All applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference and make the most effective use of the authorized facilities. . . . [T]he use of any frequency may be restricted as to specified geographical areas, maximum power, or such other operating conditions, contained in this part or in the station authorization.”).

<sup>10</sup> See, e.g., *Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550–3650 MHz Band*, GN Docket No. 12-354, Order on Reconsideration and Second Report and Order, 31 FCC Rcd 5011, 5066–74, paras. 199–223 (2016); *Amendment of Part 90 of the Commission’s Rules*, WP Docket No. 07-100, Seventh Report and Order and Ninth Further Notice of Proposed Rulemaking, 38 FCC Rcd 704, 721–23, 737–45, paras. 44–49, 94–134 (2023).

<sup>11</sup> The Commission may grant applications for Special Temporary Authority (STA) in certain circumstances (including emergency requests), and for periods of up to 180 days. Applications for STA are typically granted to permit immediate, temporary operation of certain radio facilities during emergencies or other temporary circumstances where warranted. See 47 CFR § 1.931.

STAs. Given that this well-established access mechanism provides for non-interfering use of the spectrum, it will remain available to users irrespective of any other approaches that the Commission might propose in the future. Are there changes to STA that might serve the public interest during this period of lapsed auction authority? As with the other approaches, we invite commenters to respond to the questions in subpart B, below.

12. *Other Options.* We invite commenters to consider other assignment options for providing access to the Commission's spectrum inventory. For example, would it be advantageous to create experimental innovation zones in some or all geographic areas where the Commission has Inventory Spectrum? Under such an approach, users could experiment with different technical approaches, especially as it relates to dynamic spectrum sharing techniques, and information gained could then be applied to other geographic areas and spectrum bands to facilitate public access to Inventory Spectrum. We also seek comment on whether aspects of any of the approaches discussed above could be combined to take advantage of the unique benefits of each access mechanism.

### **B. General Questions Regarding Access to Inventory Spectrum**

13. To facilitate the consideration of alternative approaches to providing the public with access to Inventory Spectrum, WTB seeks comment on the questions below. These questions apply to each of the approaches discussed herein, as well as any alternative approaches proposed by commenters. Commenters are encouraged to address these questions for each approach and are also encouraged to provide appropriate technical and cost benefit analyses in support of their proposals. This valuable stakeholder input will inform the Bureau as it develops access options for Commission consideration.

- What are the potential benefits and drawbacks for each spectrum access mechanism? For each access mechanism, what framework or guidelines could the Commission provide to ensure robust and efficient spectrum use, ensure a level playing field, prevent harmful interference, and promote co-existence among spectrum users?
- To the extent that any of these mechanisms results in a change in the use of spectrum or in the service or technical rules for the spectrum, how should these mechanisms address potential co-channel and adjacent band interference issues?
- How might the Commission adjust any of the mechanisms to better incentivize network investment and robust use of the Inventory Spectrum in the public interest?
- Are any of these mechanisms more appropriate for use in particular Inventory Spectrum bands? If so, what factors should we consider in studying whether to use a particular approach in a particular band?
- For what term should access allowed under these mechanisms remain valid? Should authorizations have a defined expiration? Should the mechanisms authorize service only until auction authority is restored and, if so, how could these mechanisms facilitate the transition to use of the spectrum by entities who ultimately are assigned licenses through auction?
- How might the Commission address issues related to mutually exclusive applications, including its statutory authority to “use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity” to facilitate access to Inventory Spectrum?<sup>12</sup>
- What, if any, impact would each mechanism have on the Commission's Mobile Spectrum Holdings policies? How would the Mobile Spectrum Holdings policies be applied in the applicable bands for each proposed mechanism?

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<sup>12</sup> See 47 U.S.C. § 309(j)(6)(E).

#### IV. PROCEDURAL MATTERS

14. *Ex Parte Rules.* Pursuant to the provisions of 47 CFR § 1.1200(a) of the Commission's rules, this proceeding is deemed an exempt proceeding.<sup>13</sup> *Ex parte* presentations to or from Commission decision-making personnel are permissible and need not be disclosed.

15. *Filing Requirements.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

- Electronic Filers: Comments may be filed electronically using the internet by accessing ECFS: <https://www.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service First-Class, Express, and Priority Mail must be addressed to 45 L Street NE, Washington, D.C. 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals and to mitigate the transmission of COVID-19.<sup>14</sup>

16. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Government Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

17. *Additional Information.* For further information regarding this *Public Notice*, please contact Andrew McArdell, Mobility Division, Wireless Telecommunications Bureau, at [Andrew.McArdell@fcc.gov](mailto:Andrew.McArdell@fcc.gov).

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<sup>13</sup> 47 CFR § 1.1200(a) ("Where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules by order, letter, or public notice."); *see also* 47 CFR § 1.1204(b)(1) (providing that *ex parte* presentations in notice of inquiry proceedings are presumptively exempt from disclosure).

<sup>14</sup> *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, DA 20-304 (Mar. 19, 2020), <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.