



NEWS

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See *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974).

FOR IMMEDIATE RELEASE:
May 17, 2013

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**STATEMENT OF COMMISSIONER AJIT PAI
ON THE PUBLIC NOTICE OF THE WIRELESS TELECOMMUNICATIONS BUREAU
TO SUPPLEMENT THE RECORD ON THE 600 MHz BAND PLAN**

GN Docket No. 12-268

Yesterday, after carefully reviewing the Public Notice that the Commission's Wireless Telecommunications Bureau circulated the day before, I registered an objection with my colleagues. I believed then and believe now that the Public Notice, presented to us 48 hours ago without any prior consultation, has substantive and procedural infirmities that I fear will lead the incentive auction rulemaking astray. Here's why.

To begin with, I have serious concerns with the substance of today's Public Notice. These concerns stem primarily from the document's neglect of the growing consensus on the basic contours of the band plan. The record contains overwhelming support for a band plan that starts at Channel 51 with uplink, that does not contemplate broadcast operations in the duplex gap, and that accommodates frequency-division duplexing (FDD). And in a particularly remarkable development, broadcasters, major wireless carriers, and prominent equipment manufacturers, working together in a cooperative manner, have submitted to the Commission a joint accord on a "Down from 51" band plan.¹ These parties have told us (among other things) that such a band plan should begin with uplink at the top (*i.e.*, at 698 MHz).² They have told us that the Commission should "[a]void broadcast television stations in the duplex gap."³ And they have told us we should "[p]reclude any operations in the duplex gap or guard bands that would result in harmful interference to adjacent licensed services."⁴

¹ See Letter from Joan Marsh, AT&T, Peter Pitsch, Intel Corp., Rick Kaplan, National Association of Broadcasters, Dean Brenner, Qualcomm, Kathleen Ham, T-Mobile, and Charla Rath, Verizon Wireless, to Gary Epstein, Chair, Incentive Auction Task Force, and Ruth Milkman, Chief, Wireless Telecommunications Bureau, GN Docket No. 12-268 (Jan. 24, 2013), *available at* http://www.nab.org/documents/newsRoom/pdfs/012413_Core_600MHz_Band_Plan_Principles.pdf.

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

Instead of taking this consensus framework and trying to flesh out further its advantages and disadvantages, today's Public Notice seeks input on band plans that start with downlink at Channel 51, that permit broadcast television operations in the duplex gap, and that are based on time-division duplexing (TDD). In short, it refocuses the agency's and the public's attention on a variety of band plans with little or no support in the record. This quixotic enterprise has us tilting at windmills, at serious cost. If the Commission still aims to hold the incentive auction in 2014, we have neither the time nor the resources to focus on band plans that we are highly unlikely to ever adopt.⁵

Moreover, even if the right questions were posed, this is the wrong way to pose them. Under our rules, the Wireless Telecommunications Bureau (Bureau) "shall not have the authority to act upon notices of proposed rulemaking . . . except . . . where novel questions of fact, law, or policy are not involved."⁶ It follows inexorably that the Bureau should not seek comment on new 600 MHz band plans on delegated authority. The Public Notice presents several novel questions of policy, novel enough that I had not even seen most of the band plans contained therein until 48 hours ago.⁷ This is precisely the sort of decision that the full Commission should make. Any short-term administrative convenience gained by this course of action is outweighed by the sacrifice of Commissioners' input and accountability,⁸ as well as litigation risk.⁹

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We have one chance to get this right. Congress granted the Commission the authority to conduct one broadcast incentive auction—an auction that each of us has recognized is unprecedented in concept and complexity.¹⁰ Mindful of this challenge, I make this statement

⁵ In particular, I am perplexed by the decision to seek comment on the "Down from 51 Reversed" band plan variation. Unlike the straightforward "Down from 51" band plan, the "Reversed" variation requires *two* guard bands above channel 37, not one.

⁶ 47 C.F.R. § 0.331(d).

⁷ The implication in the Public Notice that the NPRM contemplated this exercise, *see* Public Notice at 2 & n.15, is in error. In the NPRM, the Commission "invite[d] commenters to offer variations on our proposed band plan, address the alternative band plans we discuss[ed] below, or propose their own band plan." *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Notice of Proposed Rulemaking, 27 FCC Rcd 12357, 12420, para. 177 (2012) (*Incentive Auctions NPRM*). It did not delegate freestanding authority to the Bureau to seek comment on band plans or "variations" thereof, most of which the NPRM never mentions.

⁸ Unfortunately, this is not the first time in this proceeding when Commissioners have been sidelined. For example, certain items issued on delegated authority were only shown to Commissioners after they were released. *See, e.g., Media Bureau Announces Limitations on the Filing and Processing of Full Power and Class A Television Station Modification Applications, Effective Immediately, and Reminds Stations of Spectrum Act Preservation Mandate*, DA 13-618 (Apr. 5, 2013), available at <http://go.usa.gov/TJMQ>.

⁹ Adoption of a band plan proposed in the Public Notice could give rise to a claim that the Commission failed to abide by the notice-and-comment requirements of the Administrative Procedure Act. 5 U.S.C. § 553.

¹⁰ *See Incentive Auctions NPRM*, 27 FCC Rcd at 12546 (Statement of Chairman Julius Genachowski) (calling the incentive auction an "extremely complex policy initiative"), available at <http://go.usa.gov/TJd3>; *id.* at 12550 (Statement of Commissioner Robert McDowell) (referring to incentive auction as "literally [] the most complex spectrum auction in world history"), available at <http://go.usa.gov/TJdJ>; *id.* at 12552 (Statement of Commissioner Mignon Clyburn) ("The incentive auction authority Congress gave us also presents novel challenges."), available at <http://go.usa.gov/TJdT>; *id.* at 12554 (Statement of Commissioner Jessica Rosenworcel) ("Incentive auctions are an undeniably complex undertaking."), available at <http://go.usa.gov/TJd9>; *id.* at 12557 (Statement of Commissioner Ajit Pai, Approving in Part and Concurring in Part) ("It has often been said that this will be the most complicated set

because I share the goals of “engaging with all stakeholders, learning from the public record we’ll be building, aiming for simplicity, and adjusting our proposals as necessary to ensure the auction succeeds.”¹¹ Accomplishing these goals requires transparency. It requires collaboration. It requires accountability. And it requires due regard for public input. In the time to come, I stand ready to work with the Commission’s new leadership to achieve these goals and to conduct a successful incentive auction.

of spectrum auctions ever held by any country.”), available at <http://go.usa.gov/TJdm>; see also Brooks Boliek, “FCC’s McDowell reflects on how he left his mark,” *Politico* (May 17, 2013) (“There’s still plenty of time to keep things simple, but the general thrust of things thus far starting with the [notice of proposed rule-making] is to make things more complicated than they need to be.”), available at <http://www.politico.com/story/2013/05/fcc-robert-mcdowell-91435.html>.

¹¹ *Incentive Auctions NPRM*, 27 FCC Rcd at 12547 (Statement of Chairman Julius Genachowski).