

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying to Bid, and Bidding in Auctions 1001 (Reverse) and 1002 (Forward), AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269.

This proceeding is the direct result of bipartisan legislation that tasked the Commission with the responsibility of conducting an incentive auction. But today's item is yet another example of how the proceeding has been conducted in a partisan and insular manner. Approximately one month ago, I offered ten specific proposals for improving these incentive auction procedures. But each and every one of them was rejected. To scrounge up the votes to pass today's item, the members of the majority made a deal among themselves, leaving Commissioner O'Rielly and I, as well as the bipartisan leadership of the House Energy and Commerce Committee, out in the cold. There was no willingness to negotiate. No willingness to compromise. No openness to considering our ideas.

My concerns about the process leading to today's vote are not unique. Over the past few weeks, I have heard compelling criticisms from numerous stakeholders. Some have told me that the FCC did not give them enough (if any) data to independently analyze the Commission's proposals, nor even enough to verify the FCC's proffered analysis. Others told me that the Commission was breaking promises that had been made earlier in this proceeding. And then, of course, there was the last-minute data dump that was part of the ill-fated attempt to muscle this item through at the July meeting.

What has this process produced? In my view, it has left us with a mess, and with Congress, wireless carriers, broadcasters, unlicensed interests, and others dissatisfied to varying degrees. I don't know whether the incentive auction will be successful. But I do know that the FCC is making it substantially more difficult than it needs to be to have a successful auction. And I believe that we are poised to dump serious post-auction difficulties into the laps of future Commissions. As a result, I have no choice but to respectfully dissent.

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My most serious concern involves the 600 MHz band plan. Put simply, this item permits too many broadcasters to be placed in the wireless portion of the 600 MHz band. That matters for a couple of reasons. First, placing broadcasters in the wireless portion of the 600 MHz band will impair spectrum slated to be sold in the forward auction, thus decreasing revenues and the amount of spectrum cleared. It will also cause future interference between wireless and broadcast services.

The 700 MHz auction in 2008 offers a cautionary tale regarding the problem of inter-service interference. Following that auction, the Commission and industry were forced to deal for years with the difficulties created by having channel 51 television broadcast stations abutting A-block spectrum that had been sold to the wireless industry (not to mention the fact that the auction raised significantly less revenues as a result). George Santayana famously said that "those who do not remember the past are condemned to repeat it." And unfortunately, that appears to be what's happening here in terms of interference.

Under the procedures adopted today, broadcast stations will be sprinkled throughout the wireless portion of the 600 MHz band. This will lead to permanent adjacent channel *and* co-channel interference. All in all, the Commission will allow impairments equal to one paired block nationwide up to a cap of 20% weighted-pops. This is an extraordinary amount of impairment. For example, one wireless carrier calculated that the 84 MHz clearing target simulation released by the Commission would lead, in its view,

to only 8 unimpaired spectrum blocks out of 21 total blocks in our nation's three largest markets.¹ Just think about that: Only 38% of spectrum blocks in New York City, Los Angeles, and Chicago would be clean. And that's just under the cherry-picked simulation that the Commission chose to release. When I asked the staff to run additional simulations using a variety of different assumptions, I never received a response. One can only imagine what those results would have shown.

In my view, our priority should be to auction clean spectrum. That's why I proposed limiting impairments on a nationwide basis to border impairments plus 3% weighted-pops. This proposal, which recognized that there are both border impairments outside of our control and other impairments that we are creating ourselves, was supported by both wireless carriers and broadcasters. But it was rejected.

Then, in the spirit of compromise, I was willing to support a flat cap of 10% impaired weighted-pops. To be clear, such a cap would have permitted far more impairment than I would have preferred. But I was prepared to support it in order to make at least a modest improvement to the band plan. But even this compromise, which had bipartisan support in Congress, was cast aside at the eleventh hour.

And the band plan gets worse. Not only does the Commission permit far too much impairment, it concentrates those impairments in the wrong part of the wireless band. Specifically, the Commission decides to place broadcasters primarily in the downlink wireless portion of the 600 MHz band, with some inserted into the duplex gap and a smattering in the uplink.

This outcome flies in the face of the record we have compiled. Most wireless carriers have told the Commission that it is better to place broadcast stations in uplink spectrum than in downlink spectrum. Why? To begin with, as Cellular South told us, "mobile broadband providers currently require significantly more downlink than uplink spectrum to meet consumer demand."² That's why, as T-Mobile explained, placing broadcasters in the "uplink will impair the less useful—and less valuable—segment of the band pair, which will increase the utility of remaining spectrum as well as the revenue generated by the forward auction, which will increase the total amount of spectrum cleared."³

Moreover, when broadcasters are placed in the uplink rather than the downlink, carriers can more easily minimize interference through the use of filters. When TV stations are repacked into the uplink portion, Verizon informed the Commission that "wireless operators can design market-specific base station receiver filters to protect against broadcaster interference."⁴ And T-Mobile pointed out that these commercially available base station filters are "cost effective because the LTE base stations are fixed in location and limited in number."⁵ By contrast, when broadcast stations cause interference in downlink spectrum, Verizon explained that "it is not possible to use market-specific filtering methodologies in handsets that must be able to roam all areas."⁶

For all of these reasons, the Commission's decision to place broadcasters in the downlink spectrum rather than the uplink will make the spectrum sold in the forward auction less valuable. This will mean less revenue generated in the forward auction, which, in turn, will reduce the amount of

¹ See Letter from Joan Marsh, AT&T to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-168, AU Docket No. 14-252 (July 27, 2015) (Table entitled "Summary Including Full Device Impacts").

² Cellular South Comments at 4.

³ T-Mobile Comments at 14.

⁴ Verizon Comments at 18.

⁵ T-Mobile Comments at 12.

⁶ Verizon Comments at 18.

spectrum the Commission is able to clear, and ultimately, the chances of holding a successful incentive auction.

The decision to place broadcasters in the duplex gap will also cause downlink spectrum to be impaired and has engendered widespread opposition. I have been amazed by the diverse coalition that opposes putting television stations in the duplex gap. Broadcasters, wireless carriers, and unlicensed advocates have all criticized the idea.⁷ And while the Commission's vote today will be party-line, this isn't a partisan issue. For example, Democratic Senators Blumenthal, Booker, Leahy, Schumer, and Wyden,⁸ not to mention New York City Mayor Bill de Blasio,⁹ have expressed serious concern to the Commission about placing television stations in the duplex gap. But the Commission ignores this chorus and barrels ahead anyway.

I also object to the Commission's tentative conclusion to reserve two vacant channels in the repacked UHF broadcast television band for unlicensed white-space devices in those markets where broadcast television stations are placed in the duplex gap. As set forth in my statement dissenting from the *Vacant Channel NPRM*,¹⁰ it is bad enough that the Commission is proposing to set aside one vacant channel in the broadcast television band for unlicensed white-space devices. Reserving *two* vacant channels in a downsized broadcast television band is even worse.

That's because many low-power TV stations and TV translators who provide valuable service across the country will need a home after the auction. Making yet another vacant channel off-limits to broadcasters will mean that more LPTV stations and TV translators will go off the air. As one might say, you can't say that you're for LPTV stations and TV translators but then deliberately deny them spectrum within the broadcast television band.

Stepping back, it is remarkable that we have come to the point where the following statement no longer has the support of the majority of the Federal Communications Commission: "When it comes to the broadcast television band, broadcasters should have priority." Nonetheless, that remains my position. It's also the position of a large and bipartisan group of elected officials and, I daresay, the millions of Americans who rely on broadcasters each and every day.

I also disagree with the arbitrary and inconsistent manner in which the Commission will determine the size and makeup of the spectrum reserve. From the start of this proceeding, I have opposed

⁷ See, e.g., CTIA Comments at 5; Verizon Comments at 19; NAB Reply Comments at 5–6; Letter from Broadcast Networks and Their Affiliate Associations to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269 (July 15, 2015); Letter from Michael Calabrese, Open Technology Institute at New American Foundation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269 (July 7, 2015); Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269 (July 9, 2015).

⁸ See Letter from Hon. Richard Blumenthal *et al.* to Hon. Tom Wheeler, Chairman, FCC, GN Docket No. 12-268, GN Docket No. 12-269, AU Docket No. 14-252, MB Docket No. 15-146 (August 4, 2015).

⁹ See Letter from Maya Wiley, Counsel to the Mayor, New York City to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252 (July 30, 2015).

¹⁰ See *Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band for Use by White Space Devices and Wireless Microphones; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, MB Docket No. 15-146; GN Docket No. 12-268, Notice of Proposed Rulemaking, 30 FCC Rcd 6711, 6742–43 (2015) (Dissenting Statement of Commissioner Ajit Pai), available at <http://go.usa.gov/3sDq5>.

establishing any spectrum set-asides.¹¹ In my view, the Commission should not pick winners and losers. Rather, we should give all participants an equal opportunity to bid on whatever spectrum they want. Experience demonstrates that this is the best way to ensure that spectrum flows to its highest valued use, that auction revenues are maximized, and that we have the best chance of holding a successful incentive auction.

But at this point, that fight is water under the bridge. The Commission decided last year to establish a spectrum reserve and the only question on the table right now is how to implement it. And unfortunately, the internally contradictory approach set forth in this item only serves to heighten the unfairness of this misguided policy.

In particular, the Commission will determine the size of the reserve by aggregating the number of (less-impaired) Category 1 and (more-impaired) Category 2 licenses to be sold in a particular market. So in deciding how big the reserve will be, both types of licenses will contribute to expanding the size of the reserve. But at the same time, the Commission decides that only Category 1 licenses will be placed in the spectrum reserve while Category 2 licenses will be placed in the unreserved spectrum. But if Category 2 licenses cannot be placed into the reserve, then why should they factor into calculating the reserve's size? My position is simple: Spectrum that isn't of sufficient quality to go in the reserve should not serve to inflate the size of the reserve.

I suggested different approaches to fixing this problem. One proposal was to determine the size of reserve by counting only Category 1 licenses. Another was to permit Category 2 licenses to be placed in the reserve. Again, each idea was rejected.

To be sure, I do not disagree with every decision made in this item. For example, I have long opposed the use of dynamic reserve pricing,¹² and the Commission at long last abandons it today. I also support the Commission's refusal to decouple the trigger for creating reserved spectrum from the amount of money necessary to close the incentive auction. Reducing competition at any point in an auction is a mistake, but it would be a particularly colossal error to do so before we have ensured that the auction can close. It would be like a football player beginning his touchdown celebration while still on the one-yard line.¹³ We must keep focused on reaching our overriding objective, which is to have a successful auction, and we must not allow side issues to reduce our chances of achieving that goal. But at the end of the day, the positive aspects of this item are few and far between, and I cannot support it.

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Throughout this proceeding, the Commission has been plagued by the same problem. It has been absolutely convinced that it has all the right answers. As a result, there has been a stunning unwillingness to listen to what anyone else, from Republican Commissioners to Democratic Congressmen, has to say. It doesn't matter what the engineering shows, what stakeholders tell us, or what common sense suggests. The answer is always the same: "We are right, and you are wrong." That's no way for the Commission to make decisions that will impact not only the wireless and broadcast industries, but all Americans, for years to come.

I respectfully dissent.

¹¹ See *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, WT Docket No. 12-269, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6133, 6268 (2014) (Dissenting Statement of Commissioner Ajit Pai), available at <http://go.usa.gov/3fvqd>.

¹² See *Comment Sought On Competitive Bidding Procedures For Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*, AU Docket No. 14-252, GN Docket No. 12-268, Public Notice, 29 FCC Rcd 15750, 15912 (2014) (Dissenting Statement of Commissioner Ajit Pai), available at <http://go.usa.gov/3sDpB>.

¹³ National Football League, Can't-Miss Plays: Trevathan's Drop Six, <http://bit.ly/1KTbaAm>.