

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

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.

As I have repeatedly stated, the success of the auction depends on the Commission's ability to bring certainty and a fair process to all interested parties. Broadcasters must be sufficiently incentivized to participate, and the rules and processes must entice the wireless industry to freely bid the necessary sums to cover the costs to buy the broadcast stations. Simplicity and transparency are key to ensuring that stakeholders can make the necessary business plans to enable and promote participation allowing for the efficient allocation of spectrum. Unfortunately, this proceeding continues to proceed down a path – both substantively and procedurally – that I fear places the success of the auction at risk.

My foremost concern is the item's handling of market variation. I acknowledge that some market variation is unavoidable to protect Canadian and Mexican stations. But, we must always keep in mind that with market variation comes impaired wireless licenses. The flawed and incredibly complex dynamic reserve price model and ridiculously high 20 percent impairment (by weighted pops) benchmark, both of which I advocated against from the very beginning, have been abandoned. Although this is good news, the not-so-good news is that the 20 percent impairment rate has been replaced by graduated percentages specific to the particular clearing target, a concept first introduced in the Simulations Public Notice.¹ These permitted impairment levels, although lower than 20 percent in most instances, are still too high, especially for the most likely clearing thresholds.

For instance, at the 84 megahertz clearing target, the Commission will permit a 14 percent impairment rate. In light of the agreement that was reached with Mexico and the indications of a promising deal with Canada, a 14 percent impairment rate provides too much variation that could lead to unnecessary impairments, including in the largest and most desired markets. To ensure that the wireless industry has the opportunity and willingness to participate fully, the Commission should ensure that impairments are as minimal as possible. Accordingly, I would have preferred that the only impairments permitted were those caused by border stations, but the industry proposal to permit border impairments along with an additional three percent for flexibility was a good compromise. Unfortunately, this was rejected.

The permitted impairment rate is particularly important because it provides the flexibility to place additional broadcasters in the 600 MHz Band, which is likely to cause significant impairment to the spectrum allocated for wireless downlinks. If broadcasters are placed into the new 600 MHz Band, the stations will be placed in the duplex gap first, downlink next and then the uplink. Placing stations in the downlink and even the duplex gap will cause significant impairments to the downlink spectrum. This is very worrisome because the downlink spectrum is more valuable to wireless providers, and therefore this decision could have a disproportionate effect on the amount that forward auction bidders are willing to bid at auction. Therefore, I cannot support any plan that would unnecessarily increase impairments to the downlink, including the placement of broadcasters in the downlink and duplex gap. Placing stations in

¹ *Incentive Auction Task Force Releases Initial Clearing Target Optimization Simulations*, AU Docket No. 14-252, GN Docket No. 12-268, Public Notice, DA 15-606 (May 20, 2015).

the duplex gap is equally troubling as it unnecessarily harms broadcaster wireless microphones used to do live and breaking news reports to the American people.

I am also concerned that the decision to favor the placement of broadcasters in the downlink, instead of the uplink, was influenced by outside factors that were not revealed to the Commissioners until very late in the game. It appears that, as part of negotiations with the Canadian government, a deal may have been struck to keep broadcast stations out of the uplink at any expense.² This decision, which was clearly on an issue of importance to the industry and can affect the overall success of the auction, should have been made by the Commissioners. And the Commissioners should not have been in a position to decide such an important issue with a threat being held over their heads that protecting the downlink could tank border negotiations with Canada.

I also have serious concerns about the compromise that is in the works to provide a second vacant channel to the unlicensed community in those markets where a broadcast station is placed in the duplex gap. I am a fervent supporter of the innovation and opportunities provided by unlicensed technologies, but, as I have said before, I cannot support any action that would have the effect of making secondary users primary to full-power stations in the TV Band. This is not consistent with the Spectrum Act, and I am unlikely to support any efforts to provide unlicensed users priority access to broadcast spectrum at the expense of full-power broadcasters.

Procedurally, the trend of failing to provide sufficient information to industry, and in many cases to Commissioners, in a timely manner continues. The focus on placing broadcasters in the duplex gap and downlink – and the effect of a potential deal with Canada – came to light after staff released a letter with supplemental information on July 10th.³ This untimely release of additional information, which industry had been requesting since the release of the Simulations Public Notice, was a process violation of the highest order. And since then, little additional information has been forthcoming.

For this reason, I cannot agree to the language in the order that states that it is unnecessary to release additional simulations, along with any data and assumptions underlying these simulations. The Commission should share all of the information it has and specify the assumptions it is making so that interested parties who have the ability and want to run simulations can do so. Although it is outrageous that this data and stakeholder analyses were not available to inform our decision today, it would still be useful for potential auction participants to have this data to assist in their preparation of business plans and bidding strategies for the auction.

I also have concerns about how the Commission is administering the reverse auction. Although I am supportive of eliminating intra-round bidding to simplify the auction process, a five percent decrement in price per round equates to a substantial differential in price. For instance, a license that starts at \$900 million will have a \$45 million dollar drop in one round. This could cause broadcasters to drop out of the auction prematurely. We need to incentivize broadcasters to remain in the auction for as long as possible, instead of potentially swaying their decision to drop out and be repacked as they see the value of their

² Letter from Tom Wheeler, Chairman, Federal Communications Commission, to the Honorable Fred Upton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives, and the Honorable Greg Walden, Chairman, Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives (July 15, 2015) (“If we are unable to use the duplex gap in a handful of instances, however, the positive impact of agreements we reach could be significantly reduced.”).

³ Letter from Gary M. Epstein, Chair, Incentive Auction Task Force, Federal Communications Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 10, 2015).

stations drop by millions of dollars per round. The idea that the reverse auction may take a little bit longer and that participating broadcasters would be inconvenienced rings hollow. Considering the importance of this auction, what is a little more time? For those unwilling to sit before a computer all day, the Commission has implemented a proxy bid system where they can indicate the lowest amount at which they are willing to relinquish their spectrum. For this reason, I suggested that the decrement should be reduced from five percent to one percent.

Additionally, I continue to object to the spectrum reserve. The Commission should not favor certain auction participants, facilitate their acquisition of spectrum at a reduced price at the expense of the American taxpayer, and compensate for the past business decisions of existing large wireless providers. And the existence of the reserve spectrum does not stop there, it exacerbates the problem that the spectrum is being offered in non-generic generic blocks. The licenses with the most impairments will be offered as unreserved licenses, while the licenses with the fewest impairments will be reserved licenses. This means that the nation's largest wireless providers will be bidding on impaired licenses, reducing the overall auction revenues.

Finally, the Commission should be able to vote on the technical formulas regarding the initial clearing target determination procedure, the final television assignment plan, and the assignment of licenses to forward auction winning bidders, along with algorithms for bid processing. I also cannot support the delegation to the Media Bureau to modify the optimization procedure for determining final channel assignments. Any changes, including the consideration of additional factors that could result in minimizing expenses and the disruption to broadcasters, should be voted on by the Commission.

In the end, the Commission majority has made clear that no suggestions to their auction design were acceptable or welcome. They dismissed every effort for compromise and are now left hoping the auction is a success based on an artificial deadline and a deeply flawed process. And while I came to the Commission willing to do the hard work to make the auction workable, I am left on the outside praying it is not a failure. At this point, I can see only one way for success: if the insatiable need for licensed spectrum far exceeds the roadblocks imposed by wrong-headed decisions.

For all of these reasons, I must dissent to today's item.