

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*

TV's Columbo, as played by Peter Falk, was a master of the false exit. After interviewing a suspect, he would begin to leave the room. But just before he was out the door, he would turn around and ask an astute question that would reveal an inconsistency in the suspect's story. That question would be prefaced by his famous catchphrase: "Just one more thing."

Today, the Commission tries to pull a Columbo. In the *Incentive Auction Order*, the FCC established rules purporting to implement the congressional directive that we "make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69."¹ The National Association of Broadcasters challenged those rules in court; that case is now pending in the D.C. Circuit. And the time for the Commission to reconsider those rules on its own motion has passed.

But with this item, the Commission turns back to the parties to the incentive auction proceeding and says, in effect: "Just one more thing." Apparently worried about its chances of prevailing in court, the Commission decides at this late date to offer up additional arguments for its already-made decision not to protect the unpopulated portions of stations' coverage areas against interference when repacking.²

I must respectfully dissent from this highly unusual procedural maneuver. Unlike Columbo, the FCC must comply with the dictates of administrative law. And at this point, the FCC cannot legally change its prior decision other than through notice-and-comment rulemaking. Once an FCC order has been challenged in court and the deadline for its reconsideration has expired, the time for deliberation is over. Rather, the Commission should exit stage right and allow its able litigators to defend its position.

Once we start down this path, where will it end? Will we issue an order that responds to parties' D.C. Circuit briefs? If oral arguments do not go well for the Commission, will we issue an order to answer the court's questions and allay its doubts? Courts don't countenance such shenanigans, and the Commission should not try to play these games.

Four months ago, I warned that we would find ourselves in this exact position, confronted by litigation that might delay the incentive auction—litigation that the Commission might lose.³ Today's Declaratory Ruling may only compound the problem. It could set off a new round of procedural wrangling at the D.C. Circuit that could delay the resolution of the litigation and thus the start of the auction. This is all the more unfortunate because the issues here aren't critical to the incentive auction's success.

¹ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(b)(2), 126 Stat. 156 (2012); *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6621–51, paras. 119–82 (2014) (*Incentive Auction Order*).

² In addition to advancing new arguments in support of its decision, the Commission purports to clarify in the Declaratory Ruling that it will: (1) preserve stations' coverage areas during the repack through an "equal areas" approach; and (2) not protect unpopulated areas from interference. I do not dispute that the Commission's interpretation of the *Incentive Auction Order* is accurate. Indeed, the *Incentive Auction Order* was quite clear on these topics, thus rendering today's Declaratory Ruling unnecessary. With respect to both of these points, there was no uncertainty for the Commission to remove. See 47 C.F.R. § 1.2. Indeed, the only uncertainty with respect to these points is whether the Commission's decision passes legal muster, and only a court can resolve that uncertainty.

³ *Incentive Auction Order*, 29 FCC Rcd at 7045 (Dissenting Statement of Commissioner Ajit Pai).

Because I don't want to end this statement on a down note, I will add, with a tip of the hat⁴ to Columbo . . . just one more thing. It's still not too late to turn things around. Even after today's vote, the Commission and broadcasters can still rise above the disputes of the past, set aside the ill will that has built up over the past year, and meet each other halfway. Most importantly, if the parties were to settle the litigation, we would take a big step towards holding a timely and successful incentive auction. I hope that happens soon.

⁴ In this case, a fedora.

