

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

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

Substantively, there is merit to the reasoning in this declaratory ruling. In the repacking process, protecting the unpopulated areas covered by a broadcast station's signal makes little sense. In fact, under current procedures, a broadcast station does not receive interference protection in these unpopulated areas. Whether this entire issue is consistent with the statute, OET-69, and Commission precedent is now in the hands of the D.C. Circuit Court.

Procedurally, I have problems with the process used to generate the item. Therefore, I dissent to this declaratory ruling. During consideration of the incentive auction item earlier this year, I raised deep concerns that the speed by which we were moving left the Commission exposed to legal challenges. Now, the Commission attempts to clarify a portion of the previous item posthaste. In doing so, it sidesteps normal Commission procedures for questionable gain.

Originally circulated as part of a larger item, this declaratory ruling was split off to expedite consideration. What is the rush? The answer is that the Commission is attempting to strengthen its litigation position in the D.C. Circuit Court over a recent challenge of certain incentive auction rules posed by the National Association of Broadcasters (NAB). More specifically, this item is in response to a filing by NAB and some now are scrambling to address their arguments, even though others believe the existing language is sufficiently clear.

To justify this process, here are the mental hurdles you need have to overcome: the current language is not sufficiently clear, the item is truly a clarification, this is not in fact an untimely *sua sponte* order on reconsideration, using a declaratory ruling in this manner is prudent, and modifying the reasoning of the order without public input is the proper approach. And to explain expediting this vote you would have to be convinced that: the Commission needs to do this now or its risk of losing in court increases, the Commission will prevail on the merits of the other challenged parts of the incentive auction, and there won't be other legal challenges to delay the incentive auction. You also have to believe that the auction is going to happen next summer as previously outlined. That's a heavy lift.

I reiterate my desire to have the incentive auction as soon as possible. But getting it right is more important than getting it done fast. The Commission would be wise to slow down and conduct this proceeding more thoughtfully.