

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *In re Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*, AU Docket No. 14-252; *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268

When it comes to spectrum auctions, we know what works. Keep it simple. Don't restrict participation. And let the outcome be driven by market forces, not centralized planning. We stayed true to these principles in the AWS-3 auction and the results are obvious. We've already raised approximately \$43 billion, more than twice as much as the most optimistic predictions.

What does that mean? Over \$5 billion in additional funds for FirstNet to construct a nationwide, interoperable public safety broadband network, hundreds of millions of dollars for Next-Generation 911 implementation and public safety research, over \$20 billion for deficit reduction, and 65 MHz of new spectrum for mobile broadband.

If we want to maximize the chances that the broadcast incentive auction will succeed, we should stick to these proven principles. That's why I was disappointed by the rules that the Commission adopted on a party-line vote back in May. These rules introduce unnecessary complexity into the incentive auction. They restrict participation in the forward auction. Instead of allowing market forces to govern, they attempt to manipulate the results through the blunt levers of command and control. And they unnecessarily provoked litigation—now the incentive auction won't start until at least 2016.

But what's done is done. So while I voted against the incentive auction rules, I approached today's Public Notice with an open mind. I did not expect that it would propose to reverse any of the decisions made back in May. Instead, I accepted those decisions as a given and hoped that the Commission would seek comment on a set of auction procedures that would implement the incentive auction rules in the best manner possible.

It was in that spirit that I offered twelve proposed edits to this item. I did not expect all of them to be accepted. But I did hope that we could come together and reach a compromise. That hope was dashed when I received the response. The answers were “no,” “no,” “no,” “no,” “no,” “no,” “no,” “no,” “no,” “no,” and “no” to eleven of my suggestions—and “maybe” to the twelfth.

Could we give stakeholders more time to digest these exceedingly complicated proposals and provide more meaningful feedback to the Commission, with the auction well over a year away? No. Instead of arbitrarily proposing, with no real explanation, a 20 percent threshold for the amount of spectrum that could be impaired in our “near-nationwide” band plan, could we just seek comment on what the appropriate percentage would be? No. Rather than proposing to use a single, sealed round bid for the assignment round in the forward auction, could we seek comment on different approaches, including a single, sealed round bid and a traditional multiple round auction process? No. I could go on, but you get the point.

I have no idea why these relatively modest asks—a short extension of comment deadlines for what's acknowledged to be a “complex undertaking”¹?—should have divided Republicans and

¹ “The Path to a Successful Incentive Auction” (Dec. 6, 2013), *available at* <http://www.fcc.gov/blog/path-successful-incentive-auction-0>. The refusal to compromise on even a modest increase in the comment cycle today is puzzling to say the least. Just this week, the Wireless Telecommunications Bureau granted, on its own motion, an extension of the comment cycle for the competitive bidding rules that will apply in the incentive auction. *See Updating Part 1 Competitive Bidding Rules*, Order, WT Docket No. 14-170, DA 14-1784 (Dec. 8, 2014), <http://go.usa.gov/FBUw>. It did so to give the public a chance to reflect on the results of the AWS-3 auction and thus provide the Commission with a more comprehensive record. That reasoning would suggest (notwithstanding the fact that I proposed it) that additional time is needed here as well.

Democrats. But that seems to happen a lot around here these days. Edmund Burke said in 1775 that “[a]ll government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise.” Needless to say, Burke hadn’t seen the FCC of 2014.

Today’s Public Notice contains proposals that unnecessarily layer even more complexity on top of the already complicated rules we adopted in May. I wish stakeholders that plan to comment on them the best of luck; they will need it as they try to decipher what these proposals mean and how they are supposed to work. Today’s Public Notice includes proposals that would discourage broadcasters from participating in the reverse auction. And it also contains proposals that would further manipulate the forward auction for the benefit of favored companies and further restrict the participation of disfavored ones. For these reasons, I dissent.

I.

Let’s start with the reverse auction. Although I have a number of disagreements with the proposed reverse auction procedures, two are the most critical.

First, I cannot support the Commission’s proposal to implement dynamic reserve prices. Instead of allowing the prices paid to broadcasters in the reverse auction to be determined by the laws of supply and demand, the Commission intends to intervene in the reverse auction process. Specifically, for certain television stations, the Commission will continue to lower the price offered “even when the station cannot feasibly be assigned a channel in its pre-auction band.”² Essentially, it will try to get away with paying some broadcasters a below-market price. What happens if the broadcaster will not accept that lower price and instead drops out of the reverse auction? The Commission will have to change the band plan and assign that broadcaster a channel that will create more impaired spectrum.

It is easy to see why dynamic reserve prices are bad for broadcasters. They mean lower compensation and thus could discourage broadcaster participation. But dynamic reserve prices are bad for other stakeholders as well. For wireless carriers, they would produce less cleared spectrum for purchase in the forward auction, and more of the spectrum that *is* made available would be impaired. And for unlicensed advocates, it could lead to less spectrum for unlicensed use. After all, the television stations that drop out of the auction due to dynamic reserve prices could end up being placed in the duplex gap or guard bands, limiting the entry points for unlicensed operations.

The purpose of dynamic reserve prices, as I understand it, is to try to save the Commission money by reducing payments to broadcasters that some might think are too high. But the proposal, in my view, is penny-wise and pound foolish. Less cleared spectrum and more impaired spectrum will mean lower revenues in the forward auction. And policies that discourage broadcaster participation in the reverse auction jeopardize the entire auction’s success.

Speaking of policies that discourage broadcaster participation, my second principal objection to the proposed reverse auction procedures involves the opening price methodology. To be sure, my preference would have been for the Commission not to get involved in the business of setting opening prices at all and instead to leave that function to the market. But that ship sailed in May, so now we should focus on formulating the best possible methodology.

To calculate the prices that will be offered to each station at the beginning of the reverse auction, the Commission proposes a formula that relies substantially on the population of a station’s interference-free service area. Indeed, the formula only has two factors, one of which is population served. The formula does *not* take into account such things as the population of the markets where a station blocks other stations from being repacked. These omissions matter.

Consider the example of College Station, Texas. The television station serving Aggieland has an

² Public Notice at para. 107.

interference-free service area covering about 330,000 people. That isn't large in the grand scheme of things. But College Station is located within driving distance of Dallas, Houston, Austin, and San Antonio. If the College Station television station does not relinquish its spectrum rights during the spectrum auction, it will preclude certain stations in each of those large Texas markets from being repacked. And rest assured, the population of Texas's four largest metropolitan areas is a big deal in the grand scheme of things.

The Commission's proposed opening price methodology therefore will undervalue the spectrum rights offered by stations in markets like College Station. My view is that the prices that we offer broadcasters in the reverse auction should be based on a station's preclusive effect in preventing the clearing of spectrum. Obviously, one factor in determining a station's preclusive effect is likely to be its interference-free service area. That factor, however, is a relatively minor one and certainly shouldn't be responsible for 50% of a station's opening price. Once again, I worry that the Commission's proposal is motivated by a desire to underpay broadcasters—this time, those in smaller markets. And once again, I worry that our proposal could ultimately jeopardize the success of the auction.

II.

I have serious concerns with the Commission's proposals with respect to the forward auction as well. Let's start with its implementation of our spectrum set-asides. Back in May, I dissented from the Commission's decision to create "reserved" and "unreserved" spectrum blocks based on the low-band holdings of particular providers.³ I said at the time that attempting to manipulate the market by reducing competition in the forward auction would inject needless complexity into the auction process, reduce auction revenues, and result in less spectrum repurposed for mobile broadband.

But again, I recognize that I was on the losing end of our May order. So I approached this issue with the goal of finding the best way forward given the existing framework. Unfortunately, my suggestions again were rejected. As a result, at nearly every turn, the Commission's proposals forsake simplicity for unnecessary complexity, all for the purpose of rewarding certain companies and punishing others.

How so? Well, to start, the Commission proposes to further skew the auction by setting aside only clean, unimpaired spectrum for bidding by preferred providers. And it proposes to do so by arbitrarily dividing the spectrum into "Category 1" and "Category 2" buckets based on whether a license is more or less than 15% impaired. Here's how this would work (or not). Let's say in a given market we are auctioning 7 blocks of spectrum. It could be the case that 3 blocks of unimpaired spectrum would be set aside for certain companies while their competitors would only be allowed to bid on 4 blocks of spectrum that are 49% impaired. To state the obvious, this puts an even heavier thumb on the scale than our May decision, shaping outcomes and depressing revenues.

The Public Notice's efforts to engineer particular results don't end there. For example, when determining the number of blocks that the Commission will set aside, it proposes to count both the number of impaired and unimpaired blocks available in a market. But when it comes to deciding which blocks would actually be set aside, the Commission shifts course, recognizes that the blocks are not at all equal, and proposes to reserve only unimpaired blocks. This just skews the auction in favor of creating more reserved spectrum.⁴ If spectrum isn't good enough to set aside as reserved spectrum, then it

³ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 7038, 7040, 4073 (2014) (*Incentive Auction R&O*) (Dissenting Statement of Commissioner Ajit Pai); see also *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd 6133, 6268-74 (2014) (*Mobile Spectrum Holdings R&O*) (Dissenting Statement of Commissioner Ajit Pai).

⁴ I am also disappointed that the Public Notice continues down the path of making a disproportionate amount of spectrum off limits to free and open competition. It would propose to continue to allow 50%, 60%, or even 75% of

shouldn't be counted for purposes of determining how much spectrum should be set aside.

Other proposals being made today would simply add unnecessary layers of complexity to the auction. For example, the Public Notice proposes that one (but not both) of the two categories of licenses in the forward auction may (or may not) be split into two sub-categories of licenses. Thus, we would create three different categories of licenses for providers to bid on in some (but not all) markets. And how would providers express those bids? Not in a straightforward way, to say the least. The Public Notice's approach would require providers to select from a complicated mix of "switch bids," "all-or-nothing bids," and/or "simple bids," all of which could be implemented fully, partially, or not at all, depending on the circumstances.

And that's just the clock round of the forward auction. The Public Notice's proposals for implementing the extended and assignments rounds suffer from many of the same flaws. For instance, the proposed assignment round process gives companies zero certainty that they could obtain their preferred blocks of spectrum, regardless of how much they bid.

Stepping back from each particular proposal, it's important to look at the big picture. From the start of this proceeding, we've been sold a vision of a simple forward auction where companies would be bidding on generic spectrum blocks. Anyone reading today's Public Notice should now realize that this vision was nothing but a mirage.

The spectrum blocks offered in the forward auction are not going to be generic. They will have different levels of impairments and may be divided into three categories in the same geographic area. Instead of making one type of bid, as is standard in our auctions, companies will have to choose from among three types of bids without knowing how the Commission will process them. And the clock phase of our auction is just the first part. It might be followed by an extended round and will be followed by an assignment round. If this is the Commission's idea of simplicity, I would hate to see its idea of complexity.

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At the end of the day, I hope that the Commission will be more receptive to feedback from outside parties than it was to my input. Otherwise, I fear that we will continue heading down the wrong path—one that leads to further delays, less broadcaster participation, less participation by wireless carriers, less revenue for the federal government, and less cleared spectrum for mobile broadband.

The shame is that we could have easily had a unanimous vote on today's Public Notice. But there was no interest in working towards consensus. Virtually every line drawn in the item was painted a single color: red. As a result, I dissent.

the available spectrum in a market to be reserved for select bidders since, under the Commission's approach, the amount of reserved spectrum could remain 30 MHz at the 60 MHz, 50 MHz, and 40 MHz clearing targets. *See* Public Notice at para. 23; *see also Mobile Spectrum Holdings R&O*, 29 FCC at 6208 para. 184. At a minimum, the maximum amount of reserved spectrum should never exceed the levels the Commission specified in the *Mobile Spectrum Holdings R&O*, regardless of the Commission's initial spectrum clearing target.