DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* Report and Order, WT Docket No. 12-269, Docket No. 12-268.

When the Commission launched this proceeding, I held out the hope that we would remedy the widely acknowledged defects in our approach to evaluating spectrum holdings.[1] There are a few flashes of that in this order. One critical flaw was that our previous spectrum screen consistently understated competition in the wireless marketplace by failing to account for all spectrum suitable and available for mobile broadband. So I welcome our decision in this order to include in that screen the Broadband Radio Service and Educational Broadband Service spectrum that is being used today to provide 4G service across the country. I also appreciate the order's determination that there is no basis for imposing bidding restrictions in the upcoming AWS-3 auction.

But these narrow acknowledgements of marketplace realities are exceptions rather than the rule. The primary objective of this decision seems to be reengineering the wireless market to reflect the Commission's vision of how it should be structured. Rather than choosing competition, we restrict it. Rather than embracing the free market, which has sparked constant innovation in wireless services over the last two decades, the Commission places its faith in centralized economic planning. Rather than relying on private carriers to decide which spectrum is most suited to their needs (or business models), the Commission decides for them.

This order also represents a missed opportunity. We adopted the Notice of Proposed Rulemaking with the promise of providing needed transparency and predictability to secondary market transactions. But here, we offer only a black box. Indeed, we make the problem worse than before by adopting a vague and undefined "enhanced review" standard for transactions involving below 1 GHz spectrum.

This begs the question: Of the 2,100 transfers of low-frequency spectrum that have occurred since 2007, how many would have survived this "enhanced review"? How many would have been proposed in the first place had the prospect of "enhanced review" been lurking? No one knows. And that's a problem for all players in the market, big and small, because everyone from Coase to Congress knows that we all benefit from a vibrant secondary market. It allows spectrum to flow to its highest valued use, thereby maximizing consumer welfare.

Moreover, this order takes the unprecedented step of specifically warning against any major transactions among the top four national carriers. It goes so far as to ham-handedly state that if any such transactions are even *proposed*—and I know, you know, we all know what the item has in mind here—then the Commission might declare "no soup for you!" and retract any and all preferences being handed out. That's not letting consumer preferences drive the marketplace or objectively reviewing the specific facts of a particular deal. That's not even leveraging the power of the government to regulate by "raised eyebrow." That's the public sector preemptively deciding who in the private sector should be able to compete and on what terms, whatever the marketplace realities.

Perhaps worst of all, this order endangers the success of the broadcast incentive auction. As I stated when we launched this proceeding, the FCC should not limit competitors' ability to compete. We should not pick winners and losers. The inevitable effect of a policy that restricts participation is less spectrum repurposed for mobile broadband, less funding for national priorities, a higher budget deficit, and an increased chance of a failed incentive auction.

[1] *See Policies Regarding Mobile Spectrum Holdings*, Notice of Proposed Rulemaking, 27 FCC Rcd 12357 (2012) (Concurring Statement of Commissioner Ajit Pai), *available at* http://go.usa.gov/8x4w.

That last point bears further explanation: Restricting participation in the incentive auction needlessly jeopardizes its success. The Spectrum Act sets out the twin goals of repurposing spectrum for commercial broadband and raising $27.95 billion for critical national priorities—namely public safety and deficit reduction.[2] One key to achieving these goals is to maximize participation in the forward auction. This would incentivize broadcasters to relinquish spectrum voluntarily, and it would drive revenue towards Congress's funding priorities. Restricting bidding puts all of this at risk. Remember, for our upcoming auctions, we need bidders to bring *billions* of dollars to the table. We can't afford to engage in ideologically-motivated experiments.

This is not a partisan view. Seventy-eight Democrats in the U.S. House of Representatives recently wrote the Commission and made these same points. As they put it, "For the auction to be a success, the Commission should maximize participation by both broadcasters incented to relinquish their spectrum rights and bidders seeking to buy those rights."[3] "In fact," they went on to say, "inviting as many bidders as possible to compete in an open and fair auction *on equal terms* will allow for the full market price for spectrum to be realized and, in turn, lead to higher compensation to incent greater broadcaster participation resulting in more spectrum for the auction." Republican leaders of the House Committee on Energy and Commerce similarly wrote that bidding restrictions operate "to the detriment of auction participation, [and] revenue" and "distort the outcome."[4]

On the other side of Capitol Hill, a bipartisan group of Senators—including Senators John Cornyn, Charles Schumer, John Thune, and Sherrod Brown—recently wrote to the Commission.[5] They urged us to "reconsider any rules that will limit participation." They wrote that "bidding restrictions will have the effect of disincentivizing broadcaster participation because of concerns about reduced returns" and "could result not only in less spectrum being put back into the market to be used efficiently, but also less revenue generated by the auction."

Indeed, there has long been a bipartisan consensus that the FCC should maximize net revenues and let market forces sort out who wins and who loses. Senator Schumer has urged the FCC to "maximize participation by broadcasters and bidders alike" and stated that "limit[ing] participation . . . would simply . . . reduce the amount of spectrum offered for auction as well as the revenue that would be generated in return."[6] Senator Thune has told the FCC that "its primary focus needs to be on how to maximize participation in the upcoming incentive auction . . . not how to limit . . . participation."[7] Representative John Dingell and others have written that "[a]ll carriers should have a meaningful opportunity to bid for spectrum" and have urged the FCC to reject policies "that will jeopardize the ability

[2] A successful auction will deliver not just the $7 billion in funding Congress specified for the First Responder Network Authority but also the $135 million it marked for state and local public safety officials, the $300 million it identified for the research and development of wireless public safety communications, the $115 million it sought for the deployment of Next Generation 911, and over $20 billion to pay down the national debt. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6413, 126 Stat. 156, 236 (2012) (Spectrum Act).

[3] Letter from Representative John Barrow et al. to Honorable Thomas Wheeler, Chairman, FCC (Apr. 11, 2014), *available at* http://go.usa.gov/83ee.

[4] Letter from Representative Fred Upton et al. to Honorable Thomas Wheeler, Chairman, FCC (May 2, 2014), *available at* http://go.usa.gov/83tx.

[5] Letter from Senator John Cornyn et al. to Honorable Thomas Wheeler, Chairman, FCC (May 14, 2014).

[6] Letter from Senator Charles Schumer to Honorable Thomas Wheeler, Chairman, FCC (Nov. 20, 2013).

[7] Statement of Senator John Thune before the U.S. Senate Committee on Commerce, Science, and Transportation, "Crafting a Successful Incentive Auction: Stakeholders' Perspectives" (Dec. 10, 2013), *available at* http://go.usa.gov/84eP.

of the auction to generate winning bids" to fund national priorities.[8]

Others outside of Congress have reached the same conclusion. The Communications Workers of America has argued that "an open competition is the best way to serve the public interest" and "maximize[] auction proceeds."[9] The Rainbow PUSH Coalition urges the Commission to adopt "rules that allow for full, unrestricted participation by all interested companies willing to bid for spectrum needed to provide mobile broadband to consumers."[10] The National Urban League similarly advocates for rules that "maximize participation."[11]

But the Commission rejects all of this counsel. In so doing, there is little doubt that the restrictions imposed will substantially reduce the revenues raised by the incentive auction. Congress itself recognized, when it first authorized the Commission to conduct spectrum auctions, that "limit[ing] participation in any given competitive bidding procedure" creates "a significant possibility that licenses will be issued for bids that fall short of the true market value of the license."[12]

Experience confirms this intuition. Studies show that the FCC's prior decisions to impose bidding restrictions have substantially reduced revenues, led to significant delays in spectrum being put to use by consumers, and, perhaps worst of all, imposed these costs without producing any long-term benefits for wireless competition.[13] Indeed, analyses have concluded that our previous experiments with bidding restrictions "were ineffective in achieving the FCC's social policy goals."[14] According to the Congressional Budget Office, previous bidding restrictions delayed the deployment of up to 20 percent of the auctioned spectrum by up to a decade.[15] Data also show that our previous restrictions reduced auction revenues by up to 61 percent,[16] and the losses in consumer welfare were calculated to be $70 billion.[17]

The international experience reveals a similar story. Studies of bidding restrictions imposed by governments around the world show that those efforts failed to achieve the goal of creating a utopian

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[8] Letter from Honorable John Dingell to Honorable Mignon Clyburn, Acting Chairwoman, FCC (July 16, 2013).

[9] Letter from Larry Cohen, President, CWA, to Honorable Mignon Clyburn, Chairwoman, FCC (Oct. 29, 2013), *available at* http://go.usa.gov/84vj.

[10] Letter from Reverend Jesse L. Jackson, Sr., Founder & President, Rainbow Push Coalition, to Honorable Thomas Wheeler, Chairman, FCC (May 6, 2014).

[11] Letter from Mark H. Morial, President and CEO, National Urban League, to Honorable Thomas Wheeler, Chairman, FCC (May 7, 2014), *available at* http://go.usa.gov/8xsW.

[12] *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, at 257 (May 25, 1993) (OBRA Report).

[13] *See, e.g.*, Robert Earle, Ph.D. and David W. Sosa, Ph.D., Spectrum Auctions Around the World: An Assessment of International Experiences with Auction Restrictions (July 2013) (Spectrum Auctions Around the World), *available at* http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/2013_Earle_Sosa_SpectrumAuctionsWorldwide.pdf; *see also* Fred B. Campbell, Maximizing the Success of the Incentive Auction (Nov. 2013) (Maximizing the Success of the Incentive Auction), *available at* http://cbit.org/wp-content/uploads/2014/01/auction-whitepaper-10-31-2013-FINAL.pdf.

[14] Spectrum Auctions Around the World at 9.

[15] *See* Congressional Budget Office, Small Bidders in License Auctions for Wireless Personal Communications Services (Oct. 2005), *available at* http://go.usa.gov/82qT.

[16] *See, e.g.*, Maximizing the Success of the Incentive Auction at i, iii, 13.

[17] *See, e.g.*, Thomas W. Hazlett, Roberto E. Muñoz, and Diego B. Avanzini, What Really Matters in Spectrum Allocation Design, 10 Nw. J. Tech. & Intell. Prop. 93 (2012).

wireless marketplace and imposed severe costs along the way, including reduced auction revenues, swaths of fallow spectrum, and delayed deployments of new services to consumers.[18] For example, analyses of bidding restrictions and set-asides imposed in the U.K., Germany, Canada, and India, to name just a few, resulted in the spectrum selling for 27 to 75 percent less than expected.[19] But at least those licenses sold. Restrictions have also resulted in up to 58 percent of available spectrum going unsold,[20] with numerous legislatures launching inquiries into the disappointing results.

But we now trod down this same path,[21] and we do so with arbitrary restrictions that are sure to produce anomalous results. Here are just a few examples.

First, the order will permit one of any number of companies to acquire every single 600 MHz license in every market, even though the order claims that the restrictions are needed to prevent any one firm from running the table.[22]

Second, the restrictions set forth in the order are not rationally related to the purported objective of "ensur[ing] against excessive concentration in holdings of low-band spectrum."[23] For example, let's assume that 70 MHz of spectrum will be sold through the incentive auction. A company that holds 40 MHz of low-band spectrum in a given market ("Company A") would be able to purchase all 70 MHz in that market, thus increasing its total holdings to 110 MHz. On the other hand, a company that holds 45 MHz of spectrum ("Company B") would only be able to purchase 40 MHz in that market, thus increasing its total holdings to 85 MHz. This raises the basic question: does allowing one company to hold 110 MHz of low-band spectrum constitute "excessive concentration"? If the answer to this question is yes, then Company A should not be allowed to hold that much spectrum. And if the answer to this question is no, then Company B should be permitted to hold 110 MHz of spectrum, not just Company A.

Third, and relatedly, the order permits a provider to participate in the 600 MHz auction and acquire far more than 1/3 of all low-band spectrum. Yet, if that same provider attempts to acquire that same amount of low-band spectrum in the secondary market, the order subjects the acquisition to "enhanced scrutiny" and case-by-case review. What rational basis is there for applying an enhanced level of review to one of those acquisitions and no scrutiny to the other?

Fourth, the order's set-asides ignore high-band spectrum altogether. This means that a company that holds 44 MHz of low-band spectrum and large swaths of high-band holdings in the same market can acquire as much additional low-band spectrum as it wants. But a competitor that has just 45 MHz of low-band spectrum and no high-band holdings in that market would be restricted from bidding for certain blocks of spectrum. Would anyone seriously maintain that the latter company's spectrum position poses a greater competitive threat than the former's?

Fifth, the order leans heavily on the need to spur deployment in rural areas as a justification for

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[18] *See, e.g.*, Spectrum Auctions Around the World; Mobile Future, The Case for Inclusive Spectrum Auction Rules (Sept. 2013) (The Case for Inclusive Spectrum Auction Rules), *available at* http://mobilefuture.org/wp-content/uploads/2013/09/Website-The-Case-for-Inclusive-Spectrum-Auction-Rules-Refile.pdf; Paul Beaudry and Martin Masse, Lessons Learned: Canada's Experience with Set-Asides and Caps in Spectrum Auctions (Apr. 2014).

[19] *See, e.g.*, The Case for Inclusive Spectrum Auction Rules (explaining that restrictions reduced revenues below projections by 30 percent in the U.K., 27 to 45 percent in Germany, 30 percent in Canada, and 75 percent in India).

[20] *See, e.g.*, *id*. (discussing how auction restrictions resulted in only 130 MHz of 190 MHz of available spectrum being sold in the Netherlands, and only 42 percent of the available spectrum in India).

[21] *Cf*. George Santayana, *The Life of Reason* at 284 (1905) ("Those who cannot remember the past are condemned to repeat it.").

[22] *See, e.g.*, *Report and Order* at para. 60.

[23] *Report and Order* at para. 4.

these restrictions. But the rules we adopt aren't tailored to that goal. They will take effect in a number of urban markets (where capacity, not coverage, is most needed) and will not even apply in large swaths of rural America.[24]

Finally, the order's broad prohibition on the transfer of 600 MHz spectrum only compounds these errors.[25] By prohibiting anyone from transferring a 600 MHz license to someone with more than a certain amount of low-band holdings for *six years* (remember—six years ago we were just getting used to smartphones), the item depresses the value of all 600 MHz licenses. It forces bidders to factor in the risk that their business plans, or consumer preferences, may change, and it restricts the chance that spectrum will flow to its highest and best use.

The arbitrariness of these results dovetails with the caprice evident from piecing the rules together. The item contains a lengthy discussion of how the 45-MHz line is the "threshold basis for determining" whether a provider qualifies to bid on reserved spectrum and is an "effective line of demarcation."[26] It also posits that such a threshold is necessary "to ensure that multiple providers are able to access a sufficient amount of low-band spectrum."[27] But all that analysis is simply tossed aside when it might apply to any carrier other than AT&T or Verizon. Apparently non-nationwide providers offer the unique ability to "offer consumers additional choices" and "provide some constraint on the ability of nationwide providers to act in anticompetitive ways"[28]—rather tepid assertions that lack evidentiary support and are undercut by the order's implicit acknowledgment that the record simply does not support a finding of market power for *any* carrier.

So what compels the Commission to adopt these rules? Certainly not the Spectrum Act, which left the FCC's authority to adopt "rules of general applicability" regarding spectrum aggregation limits intact but warned us not to "prevent a person from participating" in an auction.[29] In fact, I have serious doubts that this order complies with this provision. We target two specific companies and made late changes to our rules—I was not provided a final version of the item until 11:50 p.m. the night before the vote and it was a substantially different document with substantively revised reasoning than the one that was previously circulated—to ensure that the rules do not apply to a single company other than those two. I doubt a court would hesitate to call this anything other than "individual action . . . masquerading as a general rule."[30]

Nor does the Communications Act require us to adopt such limits. The Act requires us to promote the "efficient and intensive use of the electromagnetic spectrum,"[31] which the Commission has

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[24] To be sure, the order attempts to bolster the proffered rural justification by determining that "access to a sufficient amount of low-band spectrum is a threshold requirement for extending and improving service in rural as well as urban areas." *Report and Order* at note 197; *see also id.* at para. 3. But the Commission's novel theory about the "threshold" nature of this spectrum cannot be squared with real world experience, which shows that carriers are deploying networks and competing both in the United States and in countries such as Germany, Italy, Spain, and France with little or no low-band spectrum. *See, e.g.*, The Case for Inclusive Spectrum Auction Rules at 14-15 (discussing providers that are competing around the world using high-band spectrum and concluding that these deployments "undercut the assertions in this country that holding sub-1 GHz spectrum is a competitive necessity").

[25] *See Report and Order* at paras. 196–200.

[26] *See id.* at paras. 174, 176.

[27] *See id.* at para. 176.

[28] *See id.* at para. 179.

[29] *See* Spectrum Act § 6404(a) (amending the Communications Act by adding 47 U.S.C. § 309(j)(17)(A)).

[30] *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1320 (D.C. Cir. 1995) (quotation marks omitted).

[31] 47 U.S.C. § 309(j)(3)(D).

repeatedly interpreted to mean that "Congress intended 'to ensure that scarce spectrum is put to its highest and best use.'"[32] Or as the FCC has explained in the past: "[C]ompetitive markets are the most direct and reliable means for ensuring that consumers receive the benefits described in the Communications Act."[33] And while Congress wanted the FCC to remain "sensitive to the need to maintain opportunities for small business," it was not concerned with protecting "well-heeled firms" and did "not intend that this objective dominate the Commission's decision-making," as it does here.[34]

Nor does our precedent drive us in this direction. Our cases state that we restrict participation in an auction "only when open eligibility would pose a significant likelihood of substantial harm to competition in specific markets and when an eligibility restriction would be effective in eliminating that harm."[35]

How does this order satisfy this standard? It doesn't. And it doesn't even try. For good reason: The Commission could never meet that standard here. The evidence shows that no providers have been foreclosed from access to low-frequency spectrum.[36] To the contrary, the two national providers that benefit most from these new set-asides chose to sit out the FCC's last low-band auction altogether, while more than one hundred bidders actively participated and acquired substantial sub-1 GHz holdings. When these two providers have chosen to participate, they've proven that they are large, well-funded corporations and savvy competitors that can dominate the bidding.[37] For the Commission to so aggressively tilt the playing field in the absence of market failure is caprice classic.[38]

Indeed, rather than face this fact, the *Incentive Auction Order* asserts that restricting participation *is* the same thing as open eligibility;[39] that can't be right. Just last year, the FCC said that under open

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[32] *See Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands*, Notice of Proposed Rulemaking, 19 FCC Rcd 8232, 8237, n.29 (2004) (quoting H.R. Conf. Rep. No. 105-217, 143 Cong. Rec. H6173 (daily ed. July 29, 1997)).

[33] *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band*, 12 FCC Rcd 12545, 12614, para. 157 (1997); *cf. Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services*, GN Dkt. No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1420, para. 1994 ("Success in the marketplace . . . should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs—and not by strategies in the regulatory arena.").

[34] *See* OBRA Report at 254–55.

[35] *See, e.g.*, *Service Rules for Advanced Wireless Services in the 2000–2020 MHz and 2180–2200 MHz Bands*, WT Dkt. Nos. 12-70, 04-356, ET Dkt. No. 10-142, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102, 16193, para. 241 (2012); *see also Service Rules for the 698–746, 747–762 and 777–792 MHz Bands*, WT Dkt. No. 06-150, Second Report and Order, 22 FCC Rcd 15289, 15383-84, para. 256 (2007) (*700 MHz Second Report and Order*).

[36] During our last auction of low-band spectrum, the Commission carefully considered and rejected the theory that large carriers would foreclose access to low-band spectrum in the absence of restrictions. *See 700 MHz Second Report and Order*, 22 FCC Rcd at 15384, paras. 256–57. That determination proved correct, and this order offers no basis for distinguishing that precedent.

[37] *See* FCC Advanced Wireless Services Auction No. 66, Summary, http://go.usa.gov/8jbC.

[38] *See, e.g.*, *Home Box Office Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" (quoting *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971)); *see also National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) ("Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision-making." (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983)).

[39] *Expanding Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Dkt. No. 12-268, Report and Order, FCC 14-50, at paras. 748–53 (2014) (*Incentive Auction Order*).

eligibility "the Commission does not exclude any potential applicants because of the amount of spectrum they already control."[40] The order tries to brush this precedent aside by saying that our words "might not have been precise."[41] But there's nothing imprecise about such precedents.[42] They're just not consistent with what the Commission chooses to do here. Both law and policy require us to acknowledge and justify our change of heart.[43]

Nor does sound economic theory compel this result. The order contains no finding of anticompetitive practices or market failure. And it does not even attempt to show that competitors would be unable to obtain low-band spectrum in an open auction.

In fact, the only basis the order offers for imposing restrictions is the Commission's "predictive judgment." That raises the question: When it comes to spectrum policy, how predictive has our judgment been? About as accurate as Dionne Warwick's psychic friends. The ledger in this regard includes the PCS bankruptcies in the 1990s; the belief that we could lure a new national provider into the market if we tailored our 700 MHz Upper C Block open platform requirements to a particular business model; and numerous other auctions where we were wrong about such basic facts as who would show up, how much participants would bid, or both. I don't take much comfort in this type of predictive judgment, and neither have the courts.[44]

In the end, I hope that these errors will be harmless, and that they won't undermine the success of the incentive auction or impede pro-consumer secondary market transactions. There are ways we can and should promote competition in the wireless market, including removing barriers to infrastructure deployment and freeing up additional spectrum for commercial use. I look forward to continuing to work with my colleagues on those issues. But on this item, I must respectfully dissent.

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[40] *Expanding Access to Broadband and Encouraging Innovation through Establishment of an Air-to-Ground Mobile Broadband Secondary Service for Passengers Aboard Aircraft in the 14.0-14.5 GHz Band*, GN Dkt. No. 13-114, Notice of Proposed Rulemaking, 28 FCC Rcd 6765, 6785, para. 67, n.101 (2013); *see also 700 MHz Second Report and Order*, 22 FCC Rcd at 15382–85, paras. 252–59 (applying the "significant likelihood of substantial competitive harm" test when determining whether the Commission should prevent, not just closed classes of entities, but "large wireless carriers" from participating); *Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162, 25188–90, paras. 64–68 (2003) (discussing "eligibility restrictions" and "spectrum aggregation limits" without drawing any substantive distinction between the two).

[41] *Incentive Auction Order* at para. 752.

[42] Notably, the item does not cite to any prior auction where the Commission has adopted auction-specific bidding restrictions yet claimed that it was adopting an open eligibility standard.

[43] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio*[.]").

[44] *See, e.g.*, *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995) (declining to defer to the FCC's "'predictive judgment' as to the possible future behavior of future marketplace entrants").