STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
APPROVING IN PART, DISSENTING IN PART

Re: *Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band For Use By White Space Devices and Wireless Microphones*, MB Docket No. 15-146; *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268.

In the *Incentive Auction Report and Order*,[1] the Commission announced its intention to designate a six megahertz channel in the TV band for use by wireless microphones and unlicensed devices.[2] I think my record shows my fervent support for the innovation and ingenuity of the unlicensed community. And I support seeking additional comment on ways to strike a balance among those secondary users seeking access to this valuable and limited resource. I strongly oppose, however, asking questions in this Notice of Proposed Rulemaking (NPRM) that, if pursued, would absurdly restrict the future rights of full-power television stations – the primary users in the TV band – in order to ensure that secondary, unlicensed users have priority access to six megahertz of spectrum. Doing so could put at risk all of the benefits that our nation's broadcast stations bring to the American people.

Specifically, the NPRM asks questions about whether full-power stations seeking modifications after the 39-month repacking period or new allotments should prove that their request would not eliminate the last vacant channel available to unlicensed users, referred to as the vacant channel demonstration. If such rules were adopted, it is possible that, in spectrum constrained markets, broadcasters would not be able to make future modifications or seek new stations; effectively, making full power stations secondary to unlicensed in this six megahertz. Are my colleagues really suggesting that future modifications or new full-power broadcast stations can be trumped by unlicensed services?

Simply put, secondary users should not have a superior claim over primary users for any spectrum in the TV band. This is the TV band, after all. The idea that we would even consider measures that could possibly freeze the broadcasting industry in place after the completion of the incentive auction is ludicrous. To ask questions to this effect, even though some describe these as "neutral," is like asking whether the Commission can ignore the U.S. Constitution (we cannot). From my perspective, the Commission shouldn't ask questions about things we are precluded from doing.

To rectify this, I requested that the NPRM contain additional tentative conclusions that full-power broadcasters would not have to make this vacant channel demonstration.[3] In fact, I would have preferred a clear, declaratory statement that the rights of full power stations would not be affected by vacant channels at all, but I thought seeking tentative conclusions was a reasonable compromise and a commonsense request that would be accepted by my colleagues. In fact, the Chairman has repeatedly stated that NPRMs should contain tentative conclusions so that licensees have a proposal with which they can agree or not. But, although many seemed to agree with my views, these edits were shockingly rejected.

---

[1] *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 (2014).

[2] *Id*. at 6683-84, 6701 ¶¶ 269, 309.

[3] The NPRM already contained a tentative conclusion that full-power stations would not have to preserve a vacant channel during the repacking period.

Any requirement that primary, full-power stations would have to protect unlicensed users in the TV band is neither good policy nor consistent with the Spectrum Act[4] or the more encompassing Communications Act. Nothing in the Spectrum Act authorizes the Commission to restrict the future rights or opportunities of full-power broadcast stations post Incentive Auction, nor is there language in the Spectrum Act providing the Commission with the authority to set aside spectrum in the TV band exclusively for unlicensed use.

In fact, the Spectrum Act clearly states that the Commission has the authority to reorganize the broadcast TV band "[f]or purposes of making available spectrum to carry out the forward auction. . . ."[5] Congress gave the Commission authority to conduct an auction whereby broadcasters could voluntarily surrender their spectrum in return for proceeds from the forward auction, thus reallocating this spectrum for licensed wireless use, along with the ability to repack the remaining broadcasters.[6] If it was the will of Congress for the Commission to reorganize the band in a manner to reserve six megahertz of spectrum for a class of secondary users at the expense of full-power broadcast stations or to limit the future growth of the broadcast industry by restricting station modifications or the opportunity for new stations to enter the market, Congress would have expressed such a mandate. Having worked on the statute during my time as a Congressional staffer, I can assure everyone that at no time was there such an agreement, and I am unaware of even a hint or suggestion to do so. Instead, the related conversations focused on the interactions between licensed wireless service and unlicensed service.

Finally, as I have stated in the past, in implementing the Spectrum Act and conducting the Incentive Auction, we need to treat all parties fairly. This includes those broadcasters that decide not to participate in the auction and are repacked. Instead of bringing broadcasters to the table, we keep considering actions that are likely to alienate them or, like the decision today, make it harder for the broadcast industry to compete and thrive in the modern marketplace. Apparently, localism, diversity and media ownership are really important for some people, until they are not. And all we are doing here is starting down a path towards statutory authority challenges and further litigation.

---

[4] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6401 *et seq*.

[5] *Id*. § 6401(b)(1) (codified at 47 U.S.C. § 1452(b)(1)).

[6] *Id*. § 6401, 6402 (codified at 47 U.S.C. §§ 309(j)(8), 1452).