

## FCC Releases Proposals for Broadcast Spectrum Incentive Auctions

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*The FCC released its long-awaited Notice of Proposed Rulemaking (NPRM) to begin the process of auctioning and repurposing broadcast television spectrum for mobile broadband use. Comments are due on **December 21, 2012**, and reply comments are due on **February 19, 2013**.*

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The Federal Communications Commission voted unanimously in favor of a Notice of Proposed Rulemaking that launches the incentive auction process with the hope of clearing a portion of the television band to allow for its use by mobile broadband licensees. The NPRM is very lengthy, covering many issues directly related to the auctions themselves, as well as numerous other issues that will be created by implementation of the spectrum auctions. The FCC has announced that it will be conducting a workshop on **October 26** to provide further information about issues raised in the NPRM that are particularly relevant to broadcasters considering participating in the auction, including proposed auction designs, the mechanics of participation, and station eligibility.

The variety of issues in the NPRM is far too great to summarize in this Advisory without making it as long as the NPRM. However, among the broad and critical issues raised by the NPRM for broadcasters are:

- How the FCC should interpret station “coverage areas” for the purpose of preserving existing signal coverage as directed by Congress, as well as how to measure whether service has actually been preserved;
- How the FCC should collect bids, and how it should determine which bids are accepted; and
- The methodology the FCC will use to “repack” the spectrum, which, according to the FCC, will be “part of the process for determining which broadcaster bids will be accepted” in the reverse auction.

The FCC’s NPRM is a result of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), in which Congress authorized the FCC to implement a complicated three part spectrum auction process. Specifically, Congress required the FCC to conduct (1) a “reverse auction” in which existing commercial and non-commercial full power and Class A TV stations submit bids to voluntarily relinquish spectrum in return for payment; (2) a “repacking” of the broadcast TV broadcast bands to make a portion of the UHF

band available for other uses; and (3) a traditional “forward auction” for parties to bid on licenses for flexible use of the newly freed-up broadcast spectrum. The FCC’s primary auction proposals are summarized below.

### Reverse Auction

According to the NPRM, the FCC plans to limit participation in reverse auctions to full power television stations and Class A television stations, including television stations operating on noncommercial educational reserved channels and stations operating on a noncommercial basis on non-reserved channels. Low power television stations would not be permitted to participate in the auctions. For full power and Class A TV stations interested in participating in the reverse auctions, the FCC proposes to provide such stations with three options to relinquish their spectrum and has initially concluded that these options will include:

- (1) A station going off the air completely;
- (2) A station moving to a lower broadcast television band (i.e., UHF to VHF); or
- (3) A station sharing a channel with another television station.

The FCC is also seeking comment on whether to allow stations to participate in the reverse auction by bidding to accept additional interference from other broadcast stations or by agreeing to reduce their service areas. According to the NPRM, the FCC proposes to allow existing full power and Class A stations, including those with pending license renewal applications or pending FCC enforcement actions, to participate in the auctions.

The Commission proposes to clarify its channel sharing requirements to prohibit any bids that would require a change in a station’s community of license. Therefore, a winning reverse auction bidder that relinquishes its rights with regard to a particular television channel would relinquish *all* usage rights for that channel and retain no further rights with regard to that channel. The FCC would dismiss any pending modification applications associated with the channel in question and cancel any outstanding construction permits if it decides to accept the bid.

The FCC also asks what information and certifications it should request from applicants in order to allow them to participate in the reverse auction bidding process. Specifically, the FCC is proposing to ask that parties provide the following information as part of their pre-auction submissions:

- The applicant’s name and contact information;
- The license(s) (including station and channel information, full power or Class A status, and NCE status) and the associated spectrum usage rights that may be offered in the reverse auction (including whether the applicant intends to bid to relinquish all of its spectrum usage rights, to channel share, to move from UHF to VHF frequencies, and/or to offer any other permissible relinquishments);
- Any additional information required to assess the spectrum usage rights available for the reverse auction;
- The identity of the individuals authorized to bid on the applicant’s behalf;

- The applicant's ownership information and, for NCE stations, information regarding the licensee's governing board and any educational institution or governmental entity with a controlling interest in the station, if applicable;
- For a channel sharing applicant, the channel the parties intend to share and any necessary information regarding the channel sharing agreement;
- An exhibit identifying any bidding agreements, bidding consortia, or other such arrangements to which the applicant is a party, if permitted;
- Any current delinquencies on any non-tax debt owed to any federal agency, but only if the FCC determines in this proceeding that such information is necessary in order to assess the licensee's eligibility to participate in the reverse auction; and
- Any additional information that the FCC may require.

### Repacking

With respect to repacking the spectrum of those broadcasters that do not relinquish their channels in the auction, the FCC proposes a large number of methodologies for meeting the Spectrum Act's requirement to put forth "all reasonable effort" to protect the coverage and the population served by television stations. These methodologies range from protecting existing populations from any new interference, with total interference not to exceed the current 0.5 percent *de minimis* level, to allowing up to two percent new interference to a station after the repacking. The FCC is asking for comment on these proposals.

The FCC further indicates in the NPRM that repacking will involve reorganizing the broadcast TV bands so that stations remaining on the air after the incentive auctions occupy a smaller portion of the UHF band. The NPRM is asking for comment regarding precisely how the FCC should implement this proposal and also asks how the FCC should define a station's "coverage" and "service" areas as well as issues relating to how to define the "population served" by a station. In addition, the FCC proposes that broadcasters eligible for a portion of the \$1.75 billion relocation fund authorized by the Spectrum Act have the option to either receive an advance payment based on estimated costs, or be later reimbursed for their actual out-of-pocket relocation expenses.

### Forward Auction

According to the FCC, the forward auction will resemble prior competitive bidding systems that the Commission has used to auction spectrum, but there are important differences. Specifically, given the uncertainty regarding the amount of spectrum that will become available as a result of the reverse auction, as well as the FCC not knowing in advance the specific frequencies that will be available, the FCC proposes to establish a band plan that is flexible enough to accommodate differing amounts of spectrum that might become available. In other words, instead of a single band plan with identified frequencies, a set number of spectrum blocks, and a uniform set of geographic area licenses, the FCC is proposing to adopt an auction design that is flexible enough to accommodate varying amounts of newly available spectrum in different locations.

The NPRM includes a proposed plan for the reclaimed television spectrum including dividing spectrum into 5 MHz blocks with the uplink band beginning at channel 51 (698 MHz) and extending downward, and the downlink band beginning at channel 36 (608 MHz) and also extending downward. The FCC seeks

comment on establishing 6 MHz guard bands between broadcast and mobile spectrum, which would become available for unlicensed use.

### Other Services in the UHF Band

In addition to requesting comment on issues relating directly to the auction process, the FCC is seeking comment regarding how it should handle issues relating to other services that are currently located within the UHF band. For example, the FCC is asking whether it should relocate the Radio Astronomy Service and wireless medical telemetry systems currently operating on Channel 37, or adopt other changes, including enabling increased use of Channel 37 by unlicensed services.

The FCC also seeks comment on what steps it should take regarding spectrum for broadcast auxiliary stations, low power auxiliary stations, and unlicensed wireless microphones, with an eye towards creating an efficient use of such spectrum after repacking.

### White Space and Unlicensed Operations

The FCC requests comment on how to best preserve and improve the use of unused spectrum in the broadcast television bands for unlicensed operations, including the possibility of providing for additional spectrum, on a nationwide basis, for unlicensed use in these bands. In the NPRM, the FCC proposes to continue to allow operation of white space devices on unused channels in the broadcast television spectrum as long as those channels have not been repurposed for other uses.

In addition, the Commission states that it intends to continue to allow development of devices for various applications which will operate in the broadcast television bands after the incentive auction and repacking. It asks for comment on this proposal. The FCC also asks for comment on a number of its proposals to also make guard band spectrum available for white space devices, as long as they operate on a non-interference basis.

### Auction Rules

The FCC seeks comment on proposals for a large number of newly created competitive bidding rules to govern the reverse auction and is considering other changes to the Commission's general competitive bidding rules that may be necessary to conduct the forward auction for new spectrum licenses. The proposed rules ultimately will govern how the auction process unfolds for broadcasters (i.e., what applicants need to do to participate and when; how bids are collected, how winners and incentive payments are determined and broadcast stations repacked; and how the results of the reverse auction for broadcasters will be implemented, including disbursement of incentive payments).

The FCC also proposes that all parties to any channel sharing agreement—i.e., the sharer and the sharee(s)—be required to make any necessary certifications with respect to the channel sharing agreement. The FCC seeks comment on this proposal and asks whether requiring all channel sharing parties to make any necessary certifications will encourage or discourage stations from entering into a channel sharing agreement in connection with the auction.

Finally, the FCC invites commenters to address the potential regulatory impact of the proposed auction rules and asks commenters to be as detailed as possible with respect to any costs resulting from a proposal, and to take into account any and all costs relative to the incentive auctions.

## Post-Auction Issues

According to the FCC, once the reverse and forward auctions are completed and the repacking process is implemented, it will need to reauthorize and relicense television stations that receive new channel assignments, and clear repurposed spectrum for new users. The FCC is asking for comment on how to carry out this process as expeditiously as possible while minimizing disruption to broadcast television stations and their viewers. As part of this effort, the FCC is proposing streamlined broadcast license modification procedures and a methodology for reimbursing relocation costs. It also seeks comment on a number of post-auction broadcast regulatory issues created by the spectrum incentive auction (e.g., what if termination of various station licenses in a market pursuant to the reverse auction leaves that market with too few stations to support existing duopoly arrangements under the Commission's Rules?). The FCC is proposing to grandfather any station combinations that would no longer comply with its multiple ownership rules after the auction. According to the FCC, this approach is necessary to avoid discouraging reverse auction participation.

Similarly, the FCC seeks comment on future regulations for handling the licensing and operation of new licensees in the repurposed spectrum. It is also asking for comment on deadlines for implementation of the spectrum incentive auction, including deadlines for winning license termination bidders to cease broadcasting and for stations that remain on the air to transition to any new channel assignments. The FCC invites comment on whether to establish a single unified deadline for the completion of the transition, or whether to establish earlier deadlines for winning license termination bidders, winning UHF to VHF bidders, and winning channel sharing licensees.

Under the Commission's proposal, stations choosing to receive reimbursement based on the estimated cost approach would receive their reimbursement through an advance payment, while stations choosing reimbursement based on actual costs would receive reimbursement only after paying and documenting their costs. Under the FCC's approach, eligible television licensees that are involuntarily assigned to new channels in the repacking process could elect to request an advance payment based upon a predetermined amount to cover their relocation expenses. Regardless of the reimbursement approach the Commission chooses to adopt, it seeks comment on the types of relocation costs that stations are likely to incur, and how to determine whether costs are "reasonable" for purposes of the reimbursement mandate.

As this condensed summary makes clear, the NPRM contains a great deal of information and seeks input on a large number of issues that are of great consequence to broadcasters. Broadcasters are therefore strongly encouraged to consult early and often with counsel on submitting comments in this proceeding, or to at least discuss with counsel how the proposed changes may impact a broadcaster's operations.

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If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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