

**STATEMENT OF COMMISSIONER AJIT PAI,
APPROVING IN PART AND CONCURRING IN PART**

Re: *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Docket No. 12-268, Notice of Proposed Rulemaking

In 1939, Winston Churchill famously described Russia as “a riddle, wrapped in a mystery, inside an enigma.” Seventy-three years later, I believe that this is an apt description of the challenges we confront in implementing our legal obligation to hold incentive auctions. It has often been said that this will be the most complicated set of spectrum auctions ever held by any country. In fact, it has been repeated so often that it has probably become a cliché. But this Notice of Proposed Rulemaking (NPRM) makes clear the magnitude of the task in front of us.

There are many pieces of the puzzle that have to fit together for this enterprise to end in success, including a reverse auction, a forward auction and a repacking plan. Doing any one of these things individually would be a significant undertaking for the Commission. Doing all of them in conjunction is a daunting proposition indeed.

If we at the Commission make the right decisions, each piece of the puzzle will fit together seamlessly. We will free up badly needed spectrum for mobile broadband, which will promote infrastructure investment, economic growth, and job creation. We will preserve a vibrant and free, over-the-air broadcast service, including by providing needed funding for those that wish to stay in broadcasting but choose to channel share or move to Very High Frequency (VHF) spectrum. And we will raise financial resources to help build a nationwide public safety broadband network, reduce the federal budget deficit, and advance next-generation 911 service. If, on the other hand, we do not get this right, we could end up with a Rube Goldberg contraption that will produce a failed auction.

Fortunately, the Commission has assembled an immensely talented team to work on this proceeding. They have put in long hours to produce this NPRM, and I would like to thank each of them for their service. In particular, given my past work in the Office of General Counsel, I would like to recognize Bill Scher of OGC for his leadership on this project. Based on my prior experience with Bill, I am not surprised that he has conducted himself with such distinction working on this item.

But yeoman staff effort alone will not be enough to produce rules that will lead to a successful incentive auction. Rather, it is critical that we receive a wide range of input from all affected stakeholders. Given the complexity and prominence of this matter, rarely has the “comment” part of “notice and comment” rulemaking been more important. How will the proposals that we are making today work in the real world? Are there alternatives that will lead to a more successful outcome? You need to tell us. And we need to listen.

This morning, I will vote to approve in part and concur in part with this NPRM. As that suggests, I agree with some proposals contained in this item and not necessarily with others. But I think we all agree that today’s NPRM serves as an invaluable starting point for an important public conversation. It frames numerous issues for discussion and commences a rulemaking process that we are compelled, by law and by the marketplace, to launch.

Unfortunately, this NPRM does not ask all of the questions that need to be asked. While I appreciate the willingness to include some of my suggestions in the NPRM, I am disappointed

that this item does not include other critical questions that I believe we must pose. I will therefore ask them here, in the hope that parties will respond to them in the record.

First, the forward auction as proposed stops as soon as it generates proceeds sufficient to pay successful bidders in the reverse auction, cover the Commission's administrative costs, and cover the estimated costs of reimbursements required by the statute.¹ This is essentially like ending a traditional auction as soon as the reserve price is met. In other words, the NPRM envisions an auction with no net revenues. This means no money for the First Responder Network Authority (FirstNet) to build out a nationwide, interoperable public safety broadband network;² no money for state and local first responders;³ no money for public safety research;⁴ no money for deficit reduction;⁵ and no money for next-generation 911 implementation.⁶ Congress mentioned each of these items in the Spectrum Act, which makes it difficult to square that legislation with an auction that yields no net revenues. I thus ask stakeholders how we can amend the auction design and incorporate closing conditions that might maximize the net revenues raised by the auction. For example, traditional auction theory suggests that an auction should remain open until no bidders come forward. This is because ending an auction while there are still willing bidders may allocate spectrum to bidders that value it less and leave revenues on the table. How can we design the auction so that it does not close prematurely?

Second, the Spectrum Act provides that non-participating television broadcasters and cable operators must be compensated for costs incurred during the repacking process.⁷ At the same time, it limits the Broadcaster Relocation Fund to \$1.75 billion.⁸ The NPRM acknowledges that this fund may be insufficient to compensate broadcasters and cable operators for their reasonably incurred costs,⁹ but it does not seek comment on how this limitation affects when we close the auction. So I will ask: Does the Spectrum Act require us to include this limitation as a closing condition? If not, should we require that the estimated costs of repacking television broadcasters and cable operators be less than that sum as a closing condition? Either way, what impact, if any, would such a condition have on the efficiency of the broadcast incentive auction?

Third, I hope stakeholders will help us flesh out the appropriate size of guard bands. I agree with the NPRM that six megahertz guard bands are sufficient to shield against interference between television broadcasting and the Long Term Evolution (LTE)-based services likely to be offered using the newly licensed spectrum. But it also may be *more* than sufficient given the power and out-of-band emission limits we place on this newly licensed spectrum, not to mention the availability of improved filters. Because the Spectrum Act directs that "guard bands shall be

¹ NPRM at paras. 67–69.

² Spectrum Act § 6413(b)(1), (3).

³ Spectrum Act § 6413(b)(2).

⁴ Spectrum Act § 6413(b)(4), (7).

⁵ Spectrum Act § 6413(b)(5).

⁶ Spectrum Act § 6413(b)(6).

⁷ Spectrum Act § 6403(b)(4).

⁸ 47 U.S.C. § 309(j)(8)(G)(iii)(I).

⁹ NPRM at para. 345.

no larger than is technically reasonable to prevent harmful interference between licensed services outside the guard bands,”¹⁰ I think we must ask the obvious question of whether a smaller guard band would be “technically reasonable.” For example, would a five megahertz or four megahertz guard band suffice? And if so, would adopting six megahertz guard bands run afoul of the Spectrum Act?

Fourth, the NPRM assumes that we need not license and auction the guard bands,¹¹ but I am not sure this is consistent with the Spectrum Act. At several points, the Spectrum Act appears to contemplate that all reallocated spectrum will be licensed and auctioned. Our general incentive auction authority, for example, only lets the Commission “encourage a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights *in order to permit the assignment of new initial licenses.*”¹² Our broadcast incentive auction authority is a subset of that authority and allows us to share proceeds with broadcast licensees “in order to make spectrum available for assignment through a system of competitive bidding.”¹³ Similarly, the Spectrum Act requires a forward auction in which “the Commission assigns licenses for the use of the spectrum that the Commission reallocates.”¹⁴ Do these provisions require the Commission to license and auction all spectrum reallocated from the television broadcasting service, including guard band spectrum? What would the value of the guard band spectrum be if licensed and auctioned?¹⁵

On the other hand, the Spectrum Act also states that we “may permit the use of such guard bands for unlicensed use.”¹⁶ Is that provision best read as allowing the Commission to authorize unlicensed use of guard bands instead of licensed use (as the NPRM seems to assume)? Or is there another way to reconcile these provisions, perhaps by licensing and auctioning the guard bands but allowing unlicensed use therein on a non-interfering basis?¹⁷ Could we license the guard bands and auction it to a band manager for unlicensed use?¹⁸ If we must comply with

¹⁰ Spectrum Act § 6407(a).

¹¹ To be clear, I am pleased that the NPRM seeks comment on other approaches to guard band spectrum, including whether we should license and auction it. But my primary concern is fulfilling Congressional intent, and thus I believe questions addressing our legal authority under the Spectrum Act are necessary.

¹² 47 U.S.C. § 309(j)(8)(G) (emphasis added).

¹³ Spectrum Act § 6403(a)(1).

¹⁴ Spectrum Act § 6403(c).

¹⁵ In Auction 33, six megahertz of non-contiguous guard band spectrum raised more than \$500 million at auction. See FCC, Auction 33, Upper 700 MHz Guard Bands, <http://go.usa.gov/YatQ>. Here, the Commission would likely have two six megahertz guard bands available for auction, which could also be paired to create a 6 + 6 pairing in each market. What value would bidders likely place on these guard bands, paired or unpaired?

¹⁶ Spectrum Act § 6407(c).

¹⁷ Notably, in discussing guard bands and unlicensed use, the Spectrum Act specifically requires that unlicensed service use a database to ensure non-interference with licensed services. Spectrum Act §§ 6407(d), (e).

¹⁸ *Cf.* Spectrum Policy Task Force Report, ET Docket 02-135, at 63 (Nov. 2002) (suggesting that the FCC make unlicensed spectrum available through a band manager or frequency coordinator).

a license-and-auction requirement, are there other means to encourage flexible unlicensed use of the guard bands?¹⁹

Fifth, I hope stakeholders will help us explore alternative approaches to channel sharing. For example, should we require all parties to a channel-sharing arrangement to file pre-auction applications and participate in the auction? This would allow each party to submit its bids for sharing, which may reduce the need for pre-auction negotiations on the precise value of sharing for each party (negotiations that may be difficult under the Commission's normal prohibited-communications rule). And since reverse-auction participants could be expected to incorporate any relocation costs into their bids, it may increase the transparency of the repacking process by allowing the Commission to better understand the total cost of a particular channel-sharing arrangement. On the other hand, requiring both parties to participate (with potentially differing bids) may make a descending clock auction more difficult to implement. What are the costs and benefits of this option? Are there any other issues that we should consider regarding channel sharing agreements that may affect who should apply to participate in the reverse auction?

Similarly, I wish the NPRM had raised the question of whether we might encourage channel sharing by low-power broadcast stations in markets where they are likely to be displaced. Although such sharing may not be an option if, for example, two low-power broadcasters operate in different geographic areas, it seems like a worthy question to ask.

Sixth, I would have preferred that the NPRM more directly address the unique situation that translators face. These low-power television stations convey broadcasts to rural communities that would otherwise be unserved. What we can do within the constraints of the Spectrum Act so that this vital communications link for rural America is not broken?

Seventh, I am disappointed that the NPRM does not seek input on a realistic schedule for completing this proceeding. For example, in order to begin the incentive auction by June 30, 2014, which I believe should be our goal, by when do we need to issue final rules and auction procedures? If we develop a timetable for completing each of the steps that must be taken prior to the incentive auction, there is a much greater chance that we will make progress in a timely fashion.

These are just some of the questions that I wish had been asked. But I would be remiss not to mention items I proposed that the NPRM does include, most notably questions about relocating channel 51 broadcasters,²⁰ bidding on specific frequencies,²¹ prioritizing paired spectrum,²² and generally simplifying the incentive auction. I view all these questions as part of a larger challenge: How do we ensure that all wireless providers—including small businesses with limited experience in complicated auctions—have a full and fair opportunity to participate?

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¹⁹ See, e.g., A Market-Based Approach to Establishing Licensing Rules: Licensed versus Unlicensed Use of Spectrum, FCC Office of Strategic Planning Working Paper 43 (Feb. 2008).

²⁰ See NPRM at para. 165.

²¹ See *id.* at para. 64.

²² See *id.* at para. 182.

In the final analysis, the questions that we pose and the proposals that we make in today's NPRM are important. But they are not as important as the feedback we will receive. If the incentive auction is going to be a success, we need to listen to the input of stakeholders, and we can't be afraid of asking the hard questions.

While there are plenty of challenges in front of us, I remain optimistic that we can conduct a successful incentive auction. And as we go forward in this proceeding, I believe that there are four principles that will be critical to our success. First, we must be faithful to the statute passed by Congress. It is our job to implement this legislation, not to rewrite it to conform to our policy preferences. Second, we must implement the law in a manner that is fair to all stakeholders. This is especially important because the incentive auctions will fail unless both broadcasters and wireless carriers choose to participate. Third, we need to keep our rules as simple as possible. The incentive auction is inherently complicated; we don't need to introduce unnecessary complexities. Rules that are perfect in theory may turn out to be disastrous in the real world if market participants don't understand them or don't like them. And fourth, we need to complete this proceeding in a reasonable timeframe. We haven't conducted a major spectrum auction since 2008, and there is an urgent need to make additional spectrum available for mobile broadband. Prolonging uncertainty for broadcasters isn't in their interest either. So it is my hope that we will be able to conduct a successful incentive auction in mid-2014.

I will end as I began, with a quote from Churchill, one that sums up where we find ourselves today. "[T]his is not the end. It is not even the beginning of the end. But it is . . . the end of the beginning." With this morning's vote, we complete the first step in the rulemaking process. This is a significant accomplishment, but the hardest work remains ahead of us. I look forward to joining with my colleagues and the diligent Commission staff in the time to come in pursuit of our common goal.