

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Expanding the Economic and Innovation
Opportunities of Spectrum Through Incentive
Auctions
GN Docket No. 12-268

DECLARATORY RULING

Adopted: September 30, 2014

Released: September 30, 2014

By the Commission: Commissioners Pai and O'Reilly dissenting and issuing separate statements.

I. INTRODUCTION

1. In this Declaratory Ruling, we clarify how we intend to preserve the "coverage area" as well as the "population served" of eligible broadcasters in the repacking process associated with the broadcast television spectrum incentive auction.

II. BACKGROUND

2. The Spectrum Act requires the Commission, in repacking the television bands to repurpose spectrum through the incentive auction, to "make all reasonable efforts to preserve, as of the date of the enactment of the Act [February 22, 2012], the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69."

1 Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(b)(2) (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (Spectrum Act). See generally id. at § 6403.

2 See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, Report and Order, 29 FCC Rcd. 6567 (2014) (Incentive Auctions R&O). See 47 C.F.R. § 1.2(a) (FCC may, inter alia, on its own motion issue a declaratory ruling removing uncertainty).

3 Spectrum Act § 6403(b)(2).

4 Id.

5 Incentive Auction R&O, 29 FCC Rcd at 6643, paras. 164-65. Notably, the term "coverage area" is not defined in the Spectrum Act, OET-69, or our rules. Id. at 6642, para. 162. Unlike full power stations, Class A stations do not have noise-limited contours that are protected under FCC rules. See id. at 6644, para. 165.

consistent with OET-69 and 47 C.F.R § 73.616(e), to mean persons who reside within a station's "coverage area" at locations where the signal is not subject to interference from other stations.⁶

3. Section 6403(b)(2) requires that we determine each eligible station's "coverage area" and "population served" using "the methodology described in OET Bulletin 69."⁷ The OET-69 methodology has two major steps. First, "service area or coverage"—the area within a station's relevant contour where the signal strength is predicted to exceed a specified level—is determined using 2-kilometer spacing increments or "cells."⁸ Second, interference from other stations is evaluated on a cell-by-cell basis within that area.⁹ The result of the interference analysis is data that indicate the population and area (in square kilometers) within the "coverage area" lost to interference from other stations.¹⁰

4. While OET-69 does not provide standards for preserving a television station's coverage area or population served, the Commission's rules provide that applications for new or modified digital television station facilities are acceptable if they are not predicted to cause interference "to more than an additional 0.5 percent of the population served ... by another DTV station."¹¹ In other words, the rules protect from interference populated portions of a station's coverage area that are not lost to existing interference from other stations. Consistent with this standard, we adopted a 0.5 percent interference threshold in the *Incentive Auction R&O*.¹² We also determined that preserving service for the specific viewers who had access to a station's signal as of February 22, 2012, would best comport with the "all reasonable efforts" mandate.¹³ However, we rejected arguments that section 6403(b)(2) "is a 'hold harmless' provision that requires the Commission to identify 'extraordinary' or 'truly exceptional' circumstances before altering a station's coverage area and population served."¹⁴

III. DISCUSSION

5. We are concerned that the *Incentive Auction R&O* left some uncertainty regarding how we intend to carry out the statutory preservation mandate in the repacking process.¹⁵ We now clarify that we will independently protect each eligible station's "coverage area" and its "population served" as defined in the *Incentive Auction R&O*.¹⁶ In doing so, we will seek to preserve each station's coverage

⁶ *Id.* at 6649-50, para. 179.

⁷ Spectrum Act § 6403(b)(2). OET-69 "provides guidance on the implementation and use of Longley-Rice methodology for evaluating TV service coverage and interference in accordance with Sections 73.622, 73.623 and 74.704 of the FCC rules." OET Bulletin No. 69 at 1 (Feb. 6, 2004), available at http://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet69/oet69.pdf.

⁸ *See* OET-69 at 1-7 ("Part 1: Evaluation of Service").

⁹ *See* OET-69 at 7-10 ("Part 2: Evaluation of Interference"). More specifically, the computer software for applying OET-69 retrieves "[t]he coordinates of census blocks falling inside each cell ... along with the population of each block. From this information the total population and the coordinates of the cell centroid [the population (for cells with population) or geometric center of the cell] are determined for each cell." OET-69 at 11. Then "[r]adio paths between undesired TV transmitters and the point representing each cell" are analyzed. OET-69 at 7. "A cell is counted as having interference if the ratio of the desired [signal] to that of any one of the possible interference sources is less than a certain critical minimum value." *Id.*

¹⁰ *See* OET-69 at 12.

¹¹ 47 C.F.R. § 73.616 (e).

¹² *See Incentive Auction R&O*, 29 FCC Rcd at 6649-50, para. 179.

¹³ *See Incentive Auction R&O*, 29 FCC Rcd at 6650, para. 180.

¹⁴ *See Incentive Auction R&O*, 29 FCC Rcd at 6623, paras. 123-124.

¹⁵ Spectrum Act § 6403(b)(2). *See* NAB Emergency Motion for Expedited Consideration, Case No. 14-1154 (filed with the U.S. Court of Appeals for the D.C. Circuit August 27, 2014), at 9-10.

¹⁶ *Incentive Auction R&O*, 29 FCC Rcd at 6643-44, paras. 164-65, 6649-50, para. 179.

area as determined using the methodology described in OET-69.¹⁷ If the station is reassigned to a different channel, its coverage area on its original channel will be replicated as closely as possible, using the same antenna pattern and other technical parameters and allowing power adjustments as necessary to enable the signal to reach the same geographic area at the same field strength as before the repacking process.¹⁸ As we explained in the *Incentive Auction R&O*, this “equal area” approach will enable a station to “replicat[e] the area within the station’s existing contour as closely as possible using the station’s existing antenna pattern.”¹⁹ Consistent with OET-69 and our rules, we will seek to preserve coverage area without regard to interference from other stations or population.²⁰

6. Independent of our efforts to preserve each station’s “coverage area,” we also will seek to preserve its population served, again as determined using the methodology described in OET-69, by prohibiting any channel assignment in the repacking process that would cause one station to interfere with 0.5 percent or more of another station’s population served. As “population served” by definition excludes unpopulated areas and areas where a station’s signal cannot be received due to existing interference from other stations, we will not protect such areas from new interference in the repacking process.²¹

7. The *Incentive Auction R&O* stated that the constraint files we will use during the repacking process “will match the coverage area of a station to the degree that the area is populated.”²² We clarify that this statement concerns the mechanics of the repacking process, not the “coverage area” or “population served” that we will seek to preserve for each eligible station as set forth above. We further clarify that areas where a station’s signal is lost to existing interference from other stations, as determined using the methodology in OET-69, will *not* be protected in the repacking process.

8. Our approach is consistent with the statutory preservation mandate. First, as indicated above, our approach comports with OET-69 and FCC rules.²³ “Congress is presumed to be cognizant of, and legislate against the background of, existing interpretations of law.”²⁴ Although the statutory terms “coverage area” and “population served” are related—in particular, “population served” is limited by the boundaries of “coverage area”—they have independent significance under OET-69 and our rules. “Coverage area” defines the geographic region within which a signal is predicted to have a specified field strength, whereas “population served” represents the populated areas within that region where the signal

¹⁷ See *Incentive Auction R&O*, 29 FCC Rcd at 6619-20, para. 114, 6626-42, paras. 130-61.

¹⁸ See *Incentive Auction R&O*, 29 FCC Rcd at 6644-45, para. 166. See *id.* at 6645, para. 167.

¹⁹ See *Incentive Auction R&O*, 29 FCC Rcd at 6644-45, para. 166. As noted there, “This approach will allow stations to preserve their existing coverage areas using antennas that are practical to build . . .” *Id.*

²⁰ *Incentive Auction R&O* at 6643-44, paras. 164-65; see OET-69 at 1-7 (“Part 1: Evaluation of Service”); 47 C.F.R. § 73.622(e). See also 47 C.F.R. §§ 73.622(e)(1)-(2), 73.625(a)(2) (“For the purposes of this section, coverage is to be determined in accordance with paragraph (b) [field strength contours] of this section. Further, the actual extent of service will usually be less than indicated by these estimates due to interference from other stations”), 73.684(a) (“All predictions of coverage pursuant to this section shall be made without regard to interference and only on the basis of estimated field strengths.”).

²¹ See *Incentive Auction R&O*, 29 FCC Rcd at 6649-50, para. 179; OET-69 at 7-10.

²² See *Incentive Auction R&O*, 29 FCC Rcd at 6619, para. 114 n. 372. The “constraint files” will consist of an “interference-paired file” that identifies, for each television station, the other stations that could *not* be assigned to operate on the same channel or an adjacent channel, and a “domain file” that identifies the channels to which the station could be assigned considering fixed constraints, that is, incumbents in the television bands other than domestic television stations that are entitled to interference protection at fixed geographic locations and on specific channels. See *Incentive Auction R&O*, 29 FCC Rcd at 6619-20, para. 114.

²³ See *Incentive Auction R&O*, 29 FCC Rcd at 6643-44, paras. 164-65, 6649-50, para. 179; *supra*, para. 3.

²⁴ *Hernstadt v. FCC*, 677 F.2d 893, n. 22 (D.C. Cir. 1980).

is not subject to existing interference from other stations.²⁵ We fulfill the statutory obligation to “preserve” a station’s coverage area in our repacking process by ensuring that they can continue to operate at technical parameters sufficient to maintain their coverage areas as of February 22, 2012. We “preserve” the station’s population served by protecting it from interference from other stations in areas where viewers received the station’s signal as of that date.²⁶ Our interpretation does not negate the statutory mandate for preservation of a station’s coverage area — as would arguably be the case, for instance, if we required a station to reduce its transmission power or otherwise modify their facilities to reduce their coverage area to conform it to the area of population served. By contrast, according interference protection to “coverage area” without regard to “population served” would depart from OET-69 and our rules.²⁷

9. Second, our interpretation is consistent with Congress’s mandate to “preserve” service as of the statutory enactment date,²⁸ which we observed in the *Incentive Auction R&O* “suggests that the goal is to maintain the *status quo*,” consistent with the Commission’s historical concern “with avoiding disruption of service to existing viewers.”²⁹ By seeking to preserve each station’s “coverage area” as set forth above, we will ensure that its signal reaches substantially the same geographic area at the same field strength after the repacking process as it did before. By independently protecting each station’s “population served” from interfering signals, we will ensure that its signal reaches the same viewers before and after the repacking process, subject only to the *de minimis* interference permitted under the Commission’s rules for new or modified station facilities. In contrast, protecting a station’s “coverage area” from interfering signals without regard to its “population served” would result in more expansive protection than stations received under the rules in effect at the time the Spectrum Act was enacted.

10. Third, our interpretation is consistent with Congress’s “all reasonable efforts” mandate. As we explained in the *Incentive Auction R&O*, in the context of a statute with important goals other than preservation of existing television service, in particular the goal of repurposing spectrum, the “all reasonable efforts” mandate militates against a statutory interpretation that would limit our ability to repack the television bands efficiently and thereby threaten the auction’s overall success in repurposing spectrum.³⁰ Expanding the interference protection provided in the repacking process beyond that provided under the pre-Spectrum Act rules to unpopulated or unserved (due to existing interference from other stations) portions of each station’s coverage area would significantly constrain our flexibility in the repacking process and impair the efficiency of the final television channel assignment scheme: a station could not be assigned to a channel if the assignment would cause signal overlap with another station within either station’s coverage area, even if such overlap occurred only in geographic areas where the stations do not have viewers because the areas are uninhabited, uninhabitable, or service was unavailable in the areas due to existing interference from other stations. As a result of such inefficiency, the prospects for the auction’s overall success would be substantially threatened.

²⁵ See *Incentive Auction R&O*, 29 FCC Rcd at 6643, paras. 164-65 (defining “coverage area,” citing 47 C.F.R. § 73.622(e) and OET-69 at 1, 3-5, 7); *id.* at 6649-50, para. 179 (defining “population served,” citing 47 C.F.R. § 73.616(e) and OET-69 at 5).

²⁶ 47 C.F.R. § 73.616(e). See *supra*, paras. 5-6.

²⁷ We also note that the processing software currently used by the Media Bureau to evaluate applications for and modifications to DTV television facilities does not routinely provide an indication of interference to unpopulated areas. The Bureau does not consider interference in unpopulated areas in making licensing decisions.

²⁸ Spectrum Act § 6403(b)(2) (requiring efforts to “preserve” coverage area and population served “as of the date of the enactment of this statute [February 22, 2012]”).

²⁹ *Incentive Auction R&O*, 29 FCC Rcd at 6650 para. 180, quoting Spectrum Act § 6403(b)(2). See also *id.* (“we agree with NAB and other broadcasters that section 6403(b)(2) . . . directs us to protect service to the specific viewers who had access to a station’s signal as of February 22, 2012.”).

³⁰ See *Incentive Auction R&O*, 29 FCC Rcd at 6623-24, para. 123.

IV. ORDERING CLAUSES

11. The actions in this Declaratory Ruling have not changed our Final Regulatory Flexibility Analysis (FRFA), which was set forth in the *Incentive Auction R&O*. Thus, no supplemental FRFA is necessary. In addition, the action contained herein does not change the information collection requirements subject to the Paperwork Reduction Act of 1995 (“PRA”), Public Law 104-13, contained in the *Incentive Auction R&O*. As a result, no new submission to the Office of Management and Budget is necessary to comply with the PRA requirements.

12. **IT IS ORDERED**, pursuant to the authority found in Sections 1, 4, 301, 303, and 307 of the Communications Act of 1934, as amended, and sections 6402 and 6403 of Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, 47 U.S.C. §§ 151, 154, 301, 303, and 307, and section 1.2 of the Commission’s rules, 47 C.F.R. § 1.2, the *Declaratory Ruling IS ADOPTED*.

13. **IT IS FURTHER ORDERED** that the Declaratory Ruling adopted herein shall be effective upon release.

14. **IT IS FURTHER ORDERED** that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Declaratory Ruling* in GN Docket No. 12-268 to the Chief Counsel for Advocacy of the Small Business Administration.

15. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Declaratory Ruling* in GN Docket No. 12-268 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*

TV's Columbo, as played by Peter Falk, was a master of the false exit. After interviewing a suspect, he would begin to leave the room. But just before he was out the door, he would turn around and ask an astute question that would reveal an inconsistency in the suspect's story. That question would be prefaced by his famous catchphrase: "Just one more thing."

Today, the Commission tries to pull a Columbo. In the *Incentive Auction Order*, the FCC established rules purporting to implement the congressional directive that we "make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69."³¹ The National Association of Broadcasters challenged those rules in court; that case is now pending in the D.C. Circuit. And the time for the Commission to reconsider those rules on its own motion has passed.

But with this item, the Commission turns back to the parties to the incentive auction proceeding and says, in effect: "Just one more thing." Apparently worried about its chances of prevailing in court, the Commission decides at this late date to offer up additional arguments for its already-made decision not to protect the unpopulated portions of stations' coverage areas against interference when repacking.³²

I must respectfully dissent from this highly unusual procedural maneuver. Unlike Columbo, the FCC must comply with the dictates of administrative law. And at this point, the FCC cannot legally change its prior decision other than through notice-and-comment rulemaking. Once an FCC order has been challenged in court and the deadline for its reconsideration has expired, the time for deliberation is over. Rather, the Commission should exit stage right and allow its able litigators to defend its position.

Once we start down this path, where will it end? Will we issue an order that responds to parties' D.C. Circuit briefs? If oral arguments do not go well for the Commission, will we issue an order to answer the court's questions and allay its doubts? Courts don't countenance such shenanigans, and the Commission should not try to play these games.

Four months ago, I warned that we would find ourselves in this exact position, confronted by litigation that might delay the incentive auction—litigation that the Commission might lose.³³ Today's Declaratory Ruling may only compound the problem. It could set off a new round of procedural wrangling at the D.C. Circuit that could delay the resolution of the litigation and thus the start of the auction. This is all the more unfortunate because the issues here aren't critical to the incentive auction's success.

³¹ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(b)(2), 126 Stat. 156 (2012); *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6621–51, paras. 119–82 (2014) (*Incentive Auction Order*).

³² In addition to advancing new arguments in support of its decision, the Commission purports to clarify in the Declaratory Ruling that it will: (1) preserve stations' coverage areas during the repack through an "equal areas" approach; and (2) not protect unpopulated areas from interference. I do not dispute that the Commission's interpretation of the *Incentive Auction Order* is accurate. Indeed, the *Incentive Auction Order* was quite clear on these topics, thus rendering today's Declaratory Ruling unnecessary. With respect to both of these points, there was no uncertainty for the Commission to remove. See 47 C.F.R. § 1.2. Indeed, the only uncertainty with respect to these points is whether the Commission's decision passes legal muster, and only a court can resolve that uncertainty.

³³ *Incentive Auction Order*, 29 FCC Rcd at 7045 (Dissenting Statement of Commissioner Ajit Pai).

Because I don't want to end this statement on a down note, I will add, with a tip of the hat³⁴ to Columbo . . . just one more thing. It's still not too late to turn things around. Even after today's vote, the Commission and broadcasters can still rise above the disputes of the past, set aside the ill will that has built up over the past year, and meet each other halfway. Most importantly, if the parties were to settle the litigation, we would take a big step towards holding a timely and successful incentive auction. I hope that happens soon.

³⁴ In this case, a fedora.

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*

Substantively, there is merit to the reasoning in this declaratory ruling. In the repacking process, protecting the unpopulated areas covered by a broadcast station's signal makes little sense. In fact, under current procedures, a broadcast station does not receive interference protection in these unpopulated areas. Whether this entire issue is consistent with the statute, OET-69, and Commission precedent is now in the hands of the D.C. Circuit Court.

Procedurally, I have problems with the process used to generate the item. Therefore, I dissent to this declaratory ruling. During consideration of the incentive auction item earlier this year, I raised deep concerns that the speed by which we were moving left the Commission exposed to legal challenges. Now, the Commission attempts to clarify a portion of the previous item posthaste. In doing so, it sidesteps normal Commission procedures for questionable gain.

Originally circulated as part of a larger item, this declaratory ruling was split off to expedite consideration. What is the rush? The answer is that the Commission is attempting to strengthen its litigation position in the D.C. Circuit Court over a recent challenge of certain incentive auction rules posed by the National Association of Broadcasters (NAB). More specifically, this item is in response to a filing by NAB and some now are scrambling to address their arguments, even though others believe the existing language is sufficiently clear.

To justify this process, here are the mental hurdles you need have to overcome: the current language is not sufficiently clear, the item is truly a clarification, this is not in fact an untimely *sua sponte* order on reconsideration, using a declaratory ruling in this manner is prudent, and modifying the reasoning of the order without public input is the proper approach. And to explain expediting this vote you would have to be convinced that: the Commission needs to do this now or its risk of losing in court increases, the Commission will prevail on the merits of the other challenged parts of the incentive auction, and there won't be other legal challenges to delay the incentive auction. You also have to believe that the auction is going to happen next summer as previously outlined. That's a heavy lift.

I reiterate my desire to have the incentive auction as soon as possible. But getting it right is more important than getting it done fast. The Commission would be wise to slow down and conduct this proceeding more thoughtfully.