

# Memorandum to Clients



Inside the Incentive Auction NPRM (Part 1)

## The Overall Design of the Incentive Auction Process

*Editor's Note: This issue of the Memo to Clients is devoted in large measure to the FCC's Incentive Auction Notice of Proposed Rulemaking, with six separate articles each addressing a distinct aspect of the FCC's proposal. Contributors to this six-article series include Dan Kirkpatrick, Rob Schill, Don Evans and Harry Cole.*

### SERIES INTRODUCTION

The Incentive Auctions are coming. No doubt about it. TV and Class A licensees will be given the opportunity to cash in in return for making some or all of their spectrum available for repurposing (the beneficiaries of the repurposing being wireless broadband operators). The innovative concept floated out two years ago in the National Broadband Plan is now targeted for implementation in 2014 . . . if about a million different moving parts all happen to align just right.

Recently, Commission officials (including Commissioner Rosenworcel and Incentive Auction Task Force co-leader Gary Epstein) have emphasized the importance of making the auction process understandable and easy to participate in. As Rosenworcel put it, “[s]implicity is key . . . [A]t every structural juncture [of the auction design], a bias toward simplicity is crucial”.

Perhaps. But that brings us to the Commission's Notice of



Proposed Rulemaking (NPRM) in which it lays out – over 140 pages of single-spaced text plus 26 pages of proposed rules plus 22 pages of additional appendices plus 15 pages of separate statements by the Commissioners plus a 20-page “Incentive Auction Rules Option and Discussion” – the agency's thoughts on the Incentive Auctions' design.

“Ease” and “simplicity” do not spring to mind as the reader slogs through the dense, highly technical NPRM.

Of course, the design phase of the Incentive Auctions is necessarily complex because of the extraordinary complexity of the ultimate goal. That goal includes encouraging as many TV and Class A licensees as possible to surrender their spectrum for repurposing in the most efficient manner possible while what's left of the TV industry is repacked into less spectrum. And then there's also the goal of reconfiguring the freed-up spectrum and selling it to wireless providers. The NPRM provides all interested parties an opportunity to attempt to shape the auctions' final design.

With that in mind, we devote the lion's share of this issue of the *Memo to Clients* to six articles describing various elements of the NPRM. Our goal is *not* to try to address *all* of the NPRM. Rather, we are trying to highlight aspects that appear to us to be particularly prominent and worthy of consideration by folks likely to be affected by the process. Comments in response to the NPRM are currently set to be filed by **January 25, 2013**; reply comments are due by **March 12, 2013**. We encourage all parties interested in the Incentive Auction program to take a careful look at the NPRM and weigh in with their thoughts.

### Auction Design Overview – A chicken-and-egg problem, on steroids, in three dimensions

The Incentive Auction process will include two separate-but-interrelated auctions: a “reverse” auction in which TV and Class A licensees will agree to relinquish some or all of their spectrum rights in return for cash, and a “forward” auction, in which prospective mobile licensees will bid for the right to use portions of the spectrum freed up by the “reverse” auction.

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*Reasonable access . . . to where?*

## Predicted NLSC Determines a TV Station's Service Area For Political Advertising Purposes

By Peter Tannenwald  
 tannenwald@fhhlaw.com  
 703-812-0404

**W**ith less than a week to go before Election Day, the Media Bureau ordered Station WUSA(TV), the CBS affiliate here in Washington, to sell time to pro-life presidential candidate Randall Terry. But Terry wasn't on the ballot in Washington. Nor was he on the ballot in adjacent Maryland or Virginia. No problem, said the Bureau, because he **was** on the ballot in West Virginia. And despite WUSA's claims to the contrary, the Bureau concluded that WUSA's predicted signal contour covers enough of West Virginia to subject the station to the statutory requirement to provide "reasonable access" to any qualified candidate for federal office.

This decision is of particular importance to stations whose predicted signals may extend into multiple states, because it could result in "reasonable access" burdens beyond what such stations might otherwise expect. Just ask WUSA.

Section 312(a)(7) of the Communications Act requires broadcast stations "to allow reasonable access to or to permit the purchase of reasonable amounts of time for the use of a broadcast station . . . by a legally qualified candidate for federal elective office." A candidate seeking air time must meet two requirements: (1) the candidate must be qualified to be on the ballot, and (2) the station's service area must cover the area where the candidate is qualified. Terry demonstrated that he was qualified to be on the ballot in West Virginia, but not Maryland, Virginia, or the District of Columbia. So the question boiled down to whether WUSA serves West Virginia.

In the old analog TV days, the FCC held that a station's Grade B service contour determined the area it serves for political access purposes. In the digital world, the noise-limited service contour (NLSC) has replaced the Grade B contour. According to the FCC's standard prediction method, WUSA's predicted NLSC contour covers about 3% of the population of West Virginia.

Wait a minute, cried WUSA. The "predicted NLSC" that Terry was relying on was just that – a prediction – and it did not (according to WUSA) accurately predict the station's actual reception capability. To bolster that claim, WUSA submitted a Longley-Rice terrain-limited coverage study showing that, sure enough, the station's signal gets blocked by intervening mountains before it can get into West Virginia. Since the FCC routinely relies on Longley-Rice analyses for a wide range of engineering showings, WUSA argued, the Commission should do the same for political access purposes, too.

The Bureau was not persuaded. As it sees it, the Commission's own website provides a depiction of WUSA's NLSC as part of WUSA's Station Profile, and that's what everyone is going to have to use. That NLSC demonstrates that WUSA covers nearly 3% of the population of West Virginia. That's too much to qualify for the *de minimis* exception to the political access statute. WUSA had to cough up the time to Terry's campaign.

Importantly, the Bureau's decision was issued under the time pressure of the fast-approaching election. The Bureau acknowledged that its decision was influenced by the "short time remaining before the election" and the need to issue a "prompt decision". Whether a more extended deliberative process – with public comment and plenty of time to really knock the issue around – would have led to the same result is not clear. What is clear is that, unless this decision is reconsidered or reverse, for future elections the predicted NLSC will determine the extent of a station's signal for purposes of determining "reasonable access" obligations.

One intriguing sidenote: the Bureau acknowledged that WUSA itself distributed a "Media Kit" in which it asserted that the Washington, D.C. DMA includes more than 100,000 viewers in West Virginia. The Bureau saw this as "WUSA market[ing] the fact that it has a service presence in West Virginia." While the Bureau does not appear to have relied on this factoid in reaching its decision, it's reasonable to assume that the WUSA Media Kit didn't do much to bolster WUSA's claims that it doesn't serve West Virginia at all.

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### FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor  
 Arlington, Virginia 22209  
**Tel:** (703) 812-0400  
**Fax:** (703) 812-0486  
**E-Mail:** Office@fhhlaw.com  
**Website:** fhhlaw.com  
*Blog site:* www.commlawblog.com

#### Co-Editors

Howard M. Weiss  
 Harry F. Cole

#### Contributing Writers

Anne Goodwin Crump, Don Evans,  
 Dan Kirkpatrick, R.J. Quianzon  
 Rob Schill and Peter Tannenwald

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Getting' down to bid-ness – Spring, 2013

## FM Auction 94 - The Dates Are Set

By R. J. Quianzon  
quianzon@fhhlaw.com  
703-812-042



**T**he FCC has released a notice setting the procedures for Auction 94, the FM bid-fest set for next Spring. Get out your checkbooks . . . and your calendars – since, as we predicted in the September *Memo to Clients*, the schedule of events initially announced back then has been changed.

The auction will look much the same as previous sales conducted by the FCC, at least in terms of the procedures. But be prepared for disappointment if, based on the Commission's initial listing of channels up for bids, you had your heart set on getting a station in: Newark, Maryland (*not* New Jersey, or even Delaware); or Arlington, Oregon (*not* Texas or even Virginia); or Rocksprings, Texas, Chincoteague, Virginia, or Baggs, Wyoming. All five of those channels have been pulled from this year's auction because they had been inadvertently omitted from a 2006 version of the Table of FM Allotments. Oops. No problem, though – they'll all presumably be available in a future auction. And anyway, you've still got 112 channels to bid on this time around.

Anybody looking to set up shop in the Great Northwest should be pleased, because the minimum opening bids on three Washington State channels have been slashed dramatically. Class A channels at Oak Harbor, Sequim and Sedro-Wooley (presumably not to be confused with Sheb Wooley of "Purple People Eater" fame) initially commanded minimum bids of \$25,000, \$20,000 and \$45,000, respectively. Forget all that. Bidding for Oak Harbor will now be starting at a paltry \$15,000 – that's a 40% reduction! But wait, there's more. Sequim and Sedro-Wooley have both been slashed by nearly 90%. The opening – and potentially only – bid for Sequim is a mere \$1,500, and Sedro-Wooley, originally listed at \$45,000, is now down to \$5,000.

All of the remaining 109 permits will start with the same prices proposed by the FCC back in September.

Potential bidders should mark their calendars with the following important dates – and note that there has been a change in one of those important dates since our last report:

**January 28, 2013 – 12:00 noon ET** – Short-Form Application (FCC Form 175) filing window opens.

**February 6, 2013 – prior to 6:00 p.m. ET** – Short-Form Application (FCC Form 175) filing window deadline. The deadline for applications marks the beginning of the FCC's very strict anti-collusion period. Bidders that intend to form consortia or otherwise partner with other bidders should have reached an agreement and disclosed it to the FCC by this deadline.

Auction communications between or among bidders after this date could expose bidders to disqualification and hefty fines.

**March 18, 2013 – 6:00 p.m. ET** – Upfront Payments (via wire transfer). Based upon the markets that a bidder has selected in its January Short-Form Application, funds must be wired to the FCC as an upfront deposit to prove that the bidder is genuinely interested in participating in the auction.

**April 23, 2013** – Auction Begins. ***This is a change from the initially-announced start date*** (i.e., March 26) that we reported in September. As we noted then – and as we advised the Commission in some formal comments – March 26 happens to fall in the middle of a number of religious holidays (first day of Passover, Tuesday of Holy Week), and also just before the start of the annual NAB convention. The postponement to April 23 is intended to avoid conflicts with these.

ment to April 23 is intended to avoid conflicts with these.

At least a week before the April 23 start date, the FCC will let bidders know how many rounds of bidding will take place during the first few days. Depending upon the level of participation, it may take as little as a few days or as many as several weeks for the auction to end. The FCC's anti-collusion rules

will remain in effect throughout the auction (and for some time beyond the close of the bidding – keep an eye out for an announcement of when the coast is clear). Those rules should be carefully followed.

Anyone who has any potential interest in participating in Auction 94 should review the notice in detail. While there's still more than five months to go before the bidding starts, prospective participants should take advantage of the time to perform due diligence about the channels they've got their eyes on. Remember what the Commission has said repeatedly in the past (and has said yet again in the Auction 94 Notice):

**The FCC makes no representations or warranties about the use of this spectrum for particular services. in a broadcast service, subject to certain cApplicants should be aware that an FCC auction represents an opportunity to become an FCC permittee onditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.**

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Inside the Incentive Auction NPRM (Part 2)



## Who's Eligible for the "Reverse" Broadcast Auction?

As required by Congress in the Middle Class Tax Relief and Job Creation Act of 2012 (which the FCC prefers to refer to as the "Spectrum Act"), in its Incentive Auction Notice of Proposed Rulemaking (NPRM) the Commission proposes significant eligibility limitations as far as the "reverse" auction goes.

First and probably most important, the only folks who could participate in the "reverse" auction would be licensees of full power and Class A television stations, both commercial and noncommercial. That automatically eliminates LPTV licensees and TV translator licensees.

But Class A licensees should not necessarily be breathing easily, particularly in light of the Commission's recent actions downgrading a number of Class A stations to LPTV status. The NPRM proposes that any station whose Class A status has been revoked by the Commission would *not* be eligible to participate in the auction, even if the order downgrading the station has not become final by the time of the auction. (Licensees who get downgraded can seek reconsideration or review of the decision to downgrade, thus avoiding finality and keeping alive – or so they hope – the possibility that the decision might be reversed during the appeals process. Under the FCC's proposed eligibility criteria for the reverse auction, however, any effort to reverse a downgrade might be pointless if the auction, and consequent repacking, occurs before the downgraded station could be restored to Class A status.)

There are some potential limiting considerations for full power licensees, too.

For instance, full power licensees' bids must be based on their stations' licensed facilities as of February 22, 2012. In other words, you can't apply to modify those facilities now in some way that might improve your posture in the auction.

Class A licensees, by contrast, would be treated slightly differently, based on the status of the Class A station's digital conversion. If the Class A station held a digital license on February 22, those facilities would determine the licensee's options as far as spectrum relinquishment go. But if the Class A station was licensed as analog on February 22 and thereafter obtains a digital license *prior to the beginning of the auction*, the station's licensed digital facilities as of the beginning of the auction would be considered. (However, if the digital license isn't in hand by the time the auction starts, the Class A's bidding options will be based on its licensed analog facilities as of February 22, 2012.)

The NPRM also proposes that any station whose license has

been revoked or cancelled or has expired would be ineligible. Also ineligible would be any station that failed to file its license renewal application by the expiration date of that license (although apparently eligibility could be maintained if a licensee filed its renewal application after the filing deadline, but prior to expiration).

The mere fact that a station has a license renewal application pending would *not* ordinarily prevent it from participating in the auction. But the Commission is proposing an important gotcha on this score. How, the Commission asks, should it deal with licensees whose renewals are being held up because of enforcement actions (or who are otherwise subject to such actions)?

In other words, imagine that a TV licensee's renewal has been held up because of indecency complaints or concerns about inadequate sponsorship IDs. (That shouldn't tax anybody's imagination too much – historically, hundreds of license renewals have been deferred for years because of such matters.) The FCC suggests in the NPRM that any licensee looking to turn in its license through the "reverse" auction process should have to pony up, in advance, an escrow payment to cover the fine that might result from any pending enforcement actions.

That proposed escrow scheme raises a number of questions, not the least of which involves the scheme's fundamental legality. The Communications Act (that would be Section 504(c), to be precise) flatly prohibits the Commission from using a pending notice of apparent liability (NAL) "to the prejudice" of the subject of the action unless and until the forfeiture has been paid or a court of competent jurisdiction has ordered it to be paid. Here the Commission appears to be proposing that, even in the absence of an NAL establishing (a) an apparent violation and (b) a proposed forfeiture amount, the Commission might bar otherwise eligible licensees from participating in the "reverse" auction unless they fork over a wad of cash to cover some indeterminate fine covering some violation that may or may not have occurred.

Such a proposal is plainly problematic. It is even more so in view of the Commission's well-established history of placing "enforcement holds" on a significant percentage of TV license renewal applications, often for unannounced reasons. (Side note: we have recently learned that the FCC has quietly lifted, without notice or explanation, some enforcement holds on some stations. This could be a harbinger of more sweeping efforts to clear away the holds that have stalled action on hundreds of TV renewal applications for years. But, since a new round of TV renewal applications is cur-

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*Inside the Incentive Auction NPRM (Part 3)*

## Doing More with Less: Repacking the TV Band



It's important to understand that the Incentive Auction program is merely a device designed to facilitate the "repacking" of the spectrum. That is, the FCC is dead-set on freeing up space for mobile broadband use in spectrum currently occupied by TV broadcast stations. As a result, many TV licensees can be expected to be moved off their current channels, whether voluntarily (through the "reverse" auction process) or by forced relocation. So while TV licensees not planning on participating in the "reverse" auction may not be terribly concerned with the mechanics of submitting bids, **all** TV broadcasters need to pay attention to the FCC's proposed approach to repacking the spectrum.

Under the Spectrum Act, when the Commission relocates TV stations in its repacking efforts, it must take "all reasonable efforts" to preserve the "coverage area" and "population served" of every surviving full power or Class A station. For these purposes, "coverage area" and "population served" are to be determined using the methods set out by the Office of Engineering and Technology's Bulletin No. 69 (OET-69). LPTV and translator stations will receive no protection during the repacking process and will be subject to displacement by any relocated full power or Class A station, although the *NPRM* does request comment on some measures designed to help LPTV and translator stations survive in a post-auction world.



As for full power and Class A stations, the Commission in the Incentive Auction Notice of Proposed Rulemaking (*NPRM*) is looking to determine just what "coverage area" and "population" must be protected. Under OET-69, the term "coverage area" is not defined, but it is used synonymously with "service area" as that latter term is defined in Section 73.622(e) of the rules. While "coverage area" (or "service area") does not account for interference from other stations, OET-69's measurement of "population served" does, counting only population that is both within the "coverage area" and where the signal is not masked by interference.

In the *NPRM*, the Commission proposes protecting full power stations' "service area" as currently defined in Section 622(e) of the Commission's rules. For Class A stations, the coverage area for purposes of repacking would be the station's "protected contour", *i.e.*, the area within which the station's signal is protected under the rules from interference. That "protected area" is frequently smaller than the area in which the station can actually deliver a signal.

Since propagation characteristics vary from channel-to-channel, changes in channels may necessitate modifications to a station's facilities in order to replicate that station's

original "service area". The FCC has software that should be able to calculate any necessary changes. Along those lines, the Commission suggests that it may not require construction of new antennas to precisely match the pattern that its software might specify; in those cases, the station would be permitted to continue to use its existing antenna pattern, with appropriate adjustment to its power level. Under the *NPRM*'s proposals, licensees would also be permitted to propose "alternate transmission facilities" to those specified by the FCC's software. But such alternate facilities would not be permitted to (a) extend the coverage area in any direction beyond those specified by the FCC's replication software or (b) cause new interference. And any reduction in coverage area and/or population served would have to be *de minimis*.

To protect a station's population served, the *NPRM* requests comment on three alternative proposals. First, the Commission could refuse to allow any new *overall* interference to any station's population served – although if interference were removed in one area, new interference could be created in another. As was the case in the DTV transition, the Commission proposes that interference up to 0.5% would **not** count as "new interference".

As a second, stricter, option, the *NPRM* suggests that no new interference could be created to **any** specific population. This would be more difficult to implement but, in the FCC's view, might be preferable because it would protect individual viewers from losing service.

The third option would allow creation of up to 2% new interference, but only if the new interference were created by another station that already caused interference to the subject station.

The *NPRM* requests comment on these three proposals, as well as various other considerations. Among those other considerations: whether greater interference should be allowed; whether new interference should be allowed only in areas with high MVPD penetration; and whether the Commission should amend its rules to allow stations to accept additional interference voluntarily.

As a final part of the repacking process, the *NPRM* also sets out the Commission's proposals regarding what facilities are to be protected. While the Spectrum Act requires the Commission to protect only facilities that were licensed (or for which a license application was pending) as of February 22, the Commission reads the Act to allow it to protect certain

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Inside the Incentive Auction NPRM (Part 4)

## TV Repacking: The Practical Side

Once the auctions have been completed, the Commission and the TV industry will have to grapple with the practical implementation of repacking: who gets what channels, how will stations moving from one channel to another effectuate that transition, what (if any) reimbursement of transition costs will be available, and to whom. This phase of the process will affect **all** TV broadcasters, whether or not they opted to participate in the “reverse” auction.

Initially, the post-transition channels to which full power and Class A station will be assigned will be determined by the FCC, **without** input from licensees. The Commission will use a software program to figure out the optimal way to squeeze the TV industry into the portion of the current TV band that will remain, post-auction, available for TV operations. Although stations are not to be involuntarily moved from UHF to VHF, almost any other move will be fair game as long as it’s consistent with the auction results. Licensees unhappy with whatever “new” channel they are assigned to will have very limited recourse: the Spectrum Act denies stations the right to protest modifications of their licenses (*i.e.* channel changes) imposed by the Commission to accomplish the repacking.

**Re-licensing Procedures.** Once the Commission announces its repacked TV band, a number of procedural steps will have to be taken: as we all learned from the transition to DTV several years ago, it’s one thing for the FCC to specify where stations are supposed to operate on the spectrum; it’s an entirely different thing to get those stations up and running on the appointed channels.

As envisioned in the Incentive Auction Notice of Proposed Rulemaking (*NPRM*), stations requiring modification of their existing authorizations in order to conform to their post-auction channel assignments would be required to file a Form 301 or 340 construction permit application. This would *not* apply to licensees who will simply be sharing a channel with a station that is not otherwise modified. The *NPRM* requests comment on how much time should be allowed for the filing of such applications. (Hint: the *NPRM* recognizes that more than 30 days would likely be appropriate, since any changes may not be ones the licensee has previously had any reason to anticipate, much less prepare for.) Whatever deadline is established, the *NPRM* requests comment on whether any extension procedures should be adopted and whether an early deadline should be established that would entitle applicants to expedited processing.

Stations that will be participating in a channel sharing arrangement without any technical changes would have to file a Form 302 license application; if the station whose facilities are to be shared is itself going to have those facilities modified

in the repacking, the *NPRM* proposes that both the sharer and sharee licensees would need to file license applications for the shared station’s original channel. That will cover their sharing arrangement until the new channel facility is constructed.

How long would licensees have to effectuate the changes in their facilities? The Commission is looking for input on the range of issues underlying that important question. Should there be a uniform, one-size-fits-all, nationwide deadline, or a series of deadlines determined geographically or based on the subsequent use (*i.e.* continued broadcast use or wireless) of the channel being vacated. The Commission indicates that it does not believe that a full three years should be required to implement changes, suggesting instead a possible 18-month timeframe. The *NPRM* asks whether any deadlines should be tied to its procedures for reimbursement of relocation expenses (discussed below), and whether advance payments from the Relocation Fund should be allowed.

With respect to stations that will be terminating operations entirely – as to whom the issue of additional construction is obviously irrelevant – the Commission asks whether earlier deadlines should be imposed. Finally, the *NPRM* requests comment on whether it would be appropriate to adopt tolling criteria, and/or allow flexibility for temporary operations, as was done during the DTV transition.

As noted above, licensees will not be able to protest channel modifications. But the *NPRM* does propose some limited relief for stations unhappy with their reassigned channels. The FCC suggests that such stations could request alternative channel assignments, but **only after** all initial construction permit applications implementing the repacking have been processed. Such alternative assignments would have to be technically feasible. Additionally, stations that successfully bid to relinquish a UHF channel in favor of a VHF would **not** be allowed to request a return to UHF.

**Reimbursement of Costs.** The Spectrum Act establishes a \$1.75 billion “TV Broadcaster Relocation Fund” from which the Commission must reimburse television stations’ “reasonable” relocation costs. Consistent with the chicken-and-egg complexity of the Incentive Auction process (including, particularly, implementation of the repacking process), cash for that fund is to come from the proceeds of the “forward” auction. The Act provides that such costs cannot be paid until after the end of the forward auction, and must be paid within three years. Since some reimbursements may need to be made before those proceeds roll in, the Act authorizes the FCC to borrow up to \$1 billion from

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*Inside the Incentive Auction NPRM (Part 5)*

## The “Forward” Auction



If the “reverse” auction designed to clear TV broadcasters out of large chunks of their current spectrum isn’t complicated enough, consider the “forward” auction. That’s the component of the Incentive Auctions in which hopeful wireless licensees will bid on the to-be-vacated spectrum sight unseen *at the same time* that the spectrum is being cleared. Because the availability of wireless licenses is dependent upon the results of the reverse auction in different geographic areas, wireless bidders won’t know exactly which spectrum band they’re bidding on or even whether any band will actually be available when the reverse auction is over.

This double helix of descending bids on spectrum simultaneously coupled in sequential stages with parallel ascending bids on that same spectrum is audacious. But it is theoretically an efficient and quick way of re-assigning a precious resource.

Complexity in the computer age is not necessarily a deal breaker, but human (and computer) fallibility gives us some pause about this plan. Through the Incentive Auction Notice of Proposed Rulemaking (*NPRM*), the Commission is still looking for input on its plan, so we can expect experts from the world of Academia to chime in knowledgeably on the concept.

In the meantime, we lay out here the Commission’s preliminary thoughts. The three basic auction design elements are: bid collection procedures, assignment procedures, and pricing.

***Bid Collection Procedures.*** The Commission proposes a “dynamic auction design format” with two alternative approaches: the typical “simultaneous multiple round ascending (SMR) auction” and, in this instance, the more favored “ascending clock auction.”

The SMR design may be the more traditional auction approach. It involves a sequential series of rounds in which bidders specify what they would be willing to pay for each license to be acquired; the last provisional winning bid for any license becomes final when the next round does not produce any additional bids for that license.

In the ascending clock format, by contrast, at the beginning of each round the Commission would announce prices for generic licenses in each category in each geographic area; bidders would then submit quantity bids for the number of licenses they would be willing to acquire at the FCC-established price for that round. Prices may dif-

fer depending on the category of license and the geographic areas to be served, but prices would remain the same within each category of a specific geographic area. Prices would be raised for each round until there is no longer demand. The hope is that bidding for generic blocks would speed up the process. (The *NPRM* includes a proposal for “intra-round bidding” in order to avoid a situation in which the FCC-set price for a given round does not attract enough bids.)

In addition to the above, the Commission seeks comment on the possibility of “package bidding”, which would afford bidders the opportunity to make an “all-or-nothing” bid for a group of licenses. The upside of “package bidding”: the bidder could avoid going home with a handful of licenses insufficient to meet its business needs, since its “package bid”, if successful, would give it the totality of necessary licenses. The downside, of course, is the same downside as any “all-or-nothing” proposition: the bidder could end up with nothing.

***Assignment Procedures.*** Details of exactly how successful bidders will be matched with particular licenses are a bit fuzzy. As discussed in the article in this series describing the reconfiguring of the UHF band for mobile operation, the Commission is tentatively figuring that it may sell spectrum in the “forward” auction in 5 MHz blocks, paired where possible. The Commission would assign contiguous blocks to bidders that bid for multiple blocks in the same geographic area; the assignment process could take into account the need to coordinate frequencies across adjacent areas.

Bidders would thus be bidding on spectrum blocks without knowing precisely what frequencies they might ultimately acquire – since the frequencies to be available won’t be known for sure until the “reverse” auction process and consequent TV repacking have been completed.

The *NPRM* contemplates that, at the conclusion of the initial “forward” auction, an additional “auction phase” might be used to assign specific frequencies. (Such an additional “phase” would likely involve additional bidding.) If “package bidding” is allowed, the Commission will need to take these bids into consideration in the final matching up of licenses to successful bidders. If the Commission goes forward with the generic blocks approach, “the assignment procedures would assign contiguous blocks to bidders that bid for multiple blocks in the same geographic area and could take into account the

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Inside the Incentive Auction NPRM (Part 6)

## The Final Step: Reconfiguration for Wireless

Once the “reverse” and “forward” auctions have been completed and the broadcast TV industry has been repacked, the FCC will finally be able to reconfigure the vacated UHF spectrum for mobile. But determining, now, precisely how that reconfiguration will ultimately look, then, poses a unique challenge in view of the number of unknowns currently in play.

Until the “reverse” auction is completed, questions will remain regarding the amount of spectrum that will be available for reconfiguration, the particular frequencies comprising that available spectrum, and the geographic locations covered by that spectrum. Therefore, the band plan described in the Incentive Auction Notice of Proposed Rulemaking (NPRM) is more of a “framework” based on the expectation of cleared frequencies. In admirable bureaucraticese, the NPRM describes its goal as “a band plan that balances flexibility with certainty.”

The certainty includes proposing a fixed amount of downlink spectrum nationwide with uplink spectrum possibly varying in different geographic areas. The idea is to best utilize what are expected to be varying amounts of cleared spectrum in different geographic areas. By providing uniform downlink spectrum throughout all geographical areas, the Commission hopes to assure a more interoperable universe at the device level, where each mobile device can use the same receive filters while the carriers’ base stations can be modified to allow for multiple uplink spectrum signals. A level of interoperability at the device level is expected to lead to lower device costs while allowing for greater economies of scale.

Consistent with the uncertainties surrounding the final reconfiguration process, the Commission advises that its general “focus” is on five “key policy goals”, to wit: utility, certainty, interchangeability, quantity, and interoperability.

**Utility:** The Commission is proposing to auction the newly-available mobile spectrum in 5 MHz “building blocks”, which can support a variety of wireless mobile technologies (including Wideband-Code Division Multiple Access (W-CDMA), High Speed Packet Access (HSPA) and Long Term Evolution (LTE)). To the extent possible, the Commission will seek to pair the blocks, consistent with the prevailing practice in many existing mobile networks.

**Certainty:** The Commission proposes methods to minimize interference between broadcasters and wireless, as well as harmonizing the band plan with international treaty obligations to Canada and Mexico. Notwithstanding the FCC’s best intentions on this front, though, border-related issues will complicate the reconfiguration

process, particularly in view of the disparate plans for DTV conversion in Mexico and Canada.

**Interchangeability:** The FCC intends to assure that the reconfigured band will permit “enhanced substitutability” of the spectrum blocks. The idea there is that, the more interchangeable the blocks are, the less important it will be to bidders that the particular frequencies up for auction can’t be known at the time of the auction – since whatever blocks they may buy will in any event be “interchangeable”. Technical solutions such as effective guard bands should assist in this regard.

**Quantity:** By providing varying amounts of uplink spectrum in different geographic regions, the Commission will ideally be able to take maximum advantage of whatever spectrum becomes available through the “reverse” auction. Different uplink amounts will permit the Commission to vary the total amount of spectrum per geographical area, which should provide greater efficiency than would a nationwide standard. Also, the Commission plans to maximize new unlicensed spectrum both by allowing such use in the guard bands between TV and wireless and by supplementing the guard bands with “remainder” spectrum from the conversion of 6 MHz blocks (*i.e.*, the standard for television stations) to 5 MHz.

**Interoperability:** The Commission’s “proposed band plan would allow for wide band radio operations using common radio components and improvements as technology evolves over time.”



With all the caveats about unknowns and the like, this is what the FCC has in mind for the reconfigured band.

**The Primary Proposal.** Under the Commission’s primary proposal (*see* Figure A), the uplink band would begin at channel 51 and extend downward toward channel 37. Exactly how far down the uplink band might extend will be determined by how much spectrum becomes available through the “reverse” auction and consequent repacking.

On the far side of channel 37, the downlink band would begin at channel 36 and, as with the uplink band, extend downward. How far down it goes would, again, depend on how much spectrum is freed up through the broadcast repacking.

The uplink and downlink bands would be placed with an eye towards limiting interference, thereby minimizing the need for guard bands. The new uplink band would be adjacent to the 700 MHz uplink band; these bands are harmonized so

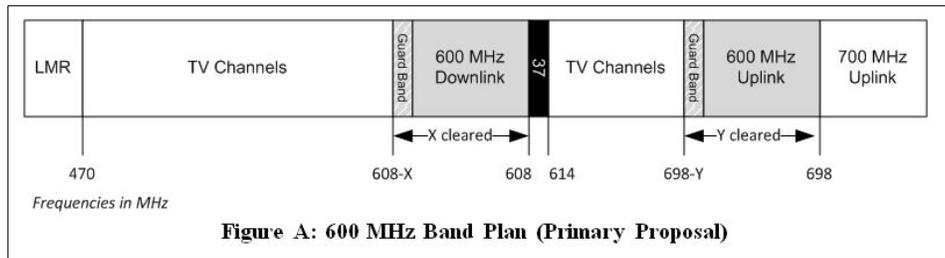
(Continued on page 9)



**(Wireless Reconfiguration—Continued from page 8)** there is no anticipated need for a guard band. The downlink band beginning at channel 36 would effectively utilize channel 37 as a guard band – the current services in channel 37 (radio astronomy and wireless medical telemetry) have been operating adjacent to broadcast television bands without interference. But note the Commission indicates a willingness to consider relocation of the current channel 37 services, of which the FCC has historically been highly protective.

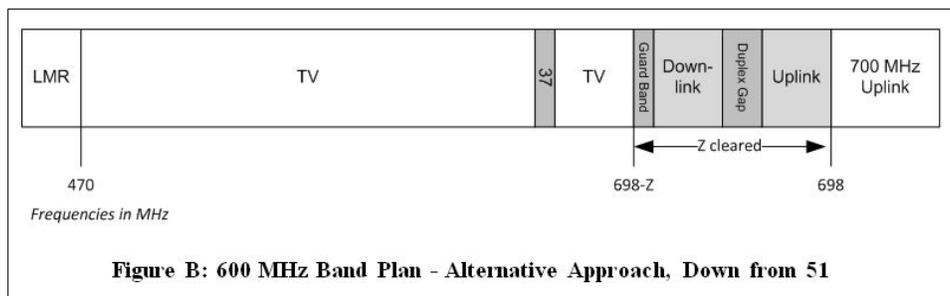
**Down from Channel 51(see Figure B):** The Commission could attempt to clear broadcast channels from channel 51 downward without regard to the natural separation of the channel 37 services. A downside would be the need to create a duplex gap between the uplink and downlink bands. The wider the duplex gap the better the mobile performance, but in a smaller licensed band.

One concern with this alternative is that if more than 84 MHz is cleared through the “reverse” auction/TV repacking process, channel 37 would be located in the downlink band –



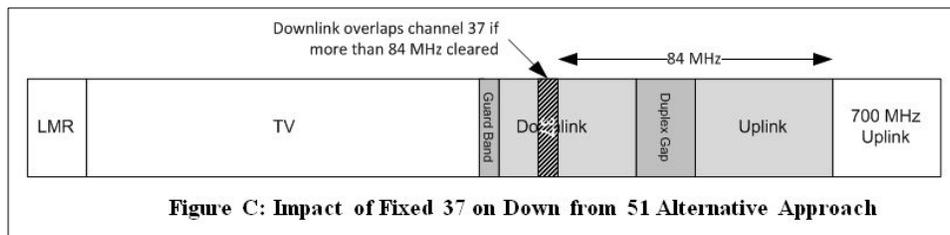
The Commission seeks comment on the proposed spectrum block size. The suggested size is 5 MHz, but the Commission would consider maintaining the 6 MHz block structure used for television operation; it might even look at larger units,

which would require the Commission to address, as part of the reconfiguration, what to do with the radio astronomy and medical telemetry services currently operating at channel 37. (See Figure C.) If radio astronomy and wireless



e.g., 10 MHz blocks. The Commission is interested in a structure that will allow the aggregation of 5 MHz blocks, both at the initial licensing stage and through the secondary

medical telemetry were moved from channel 37, the Commission might seek to place the downlink band at channel 32 rather than channel 36 thereby creating symmetry between



market and channel aggregation. The Commission proposes to auction and license paired blocks of spectrum. Where there is spectrum that cannot be paired, the Commission proposes to make such unpaired spectrum available for downlink purposes.

the total uplink and downlink spectrum.

**Alternative Band Plan Approaches.** While the proposal described above is the FCC’s “lead proposal”, the NPRM includes a few alternative visions for the band plan.

**In from Channels 51 and 21 (see Figure D, next page):** Another alternative would be to maintain the 51-down approach for the uplink band, but start the downlink band up from channel 21. That would avoid any need to move channel 37 services. There would be no need for a duplex gap, since TV broadcasters would operate between the uplink and downlink bands. However, guard bands would have to be

(Continued on page 10)



*(Wireless Reconfiguration—Continued from page 9)* created – one on each side of the downlink band and the lower edge of the uplink band (as in the lead proposal). There is also the question of

whether the pass band size would require multiple band plans.

**Prioritizing Paired Spectrum.** The Commission may consider a plan based around the pairing of spectrum nationwide instead of on a market-by-market basis. Rather than a series of asymmetrical markets where the uplink varies, the spectrum would be equally divided between

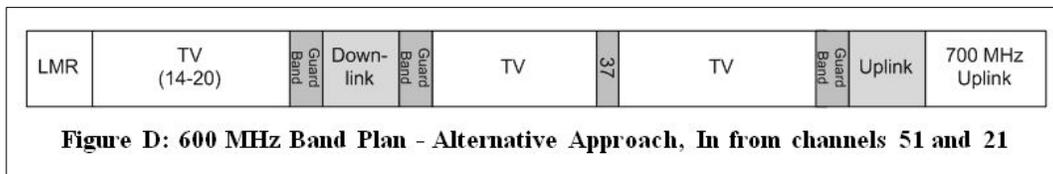


Figure D: 600 MHz Band Plan - Alternative Approach, In from channels 51 and 21

paired downlink and uplink spectrum. Where there is residual spectrum it would be used for one block of unpaired downlink spectrum. The obvious downside is that it would be limited to the “lowest common denominator” market availability of spectrum.

Another alternative would involve the creation of two families of paired spectrum, one nationwide and another in smaller markets. The goal here would be to try to balance the desire to offer as much paired spectrum as possible with the need to maximize the total amount of spec-

band plans. (See Figure E.) This way, mobile devices could be manufactured with common receive filter components to fit the common nationwide downlink spectrum, while the need for different receive filters could be addressed through operators’ base stations.

A further complicating factor: if broadcasters relinquish an unexpectedly large amount of spectrum, technical requirements might necessitate two downlink band plans as an initial matter. The Commission seeks comment on these issues, as well as interoperability concerns.

**Geographic Area Licensing.** The Commission intends to utilize an intermediate geographic area licensing approach, offering mobile spectrum to serve particular Economic Areas (EAs) rather than broader service areas. Auctioning the spectrum based on nationwide, or broad regional, service areas would be less than desirable because, depending on the results of the TV repacking, spectrum would likely not be available in uniform amounts in all markets. The amount of spectrum that could be available for a nationwide license, then, would be limited to the amount available in the market with the least spectrum

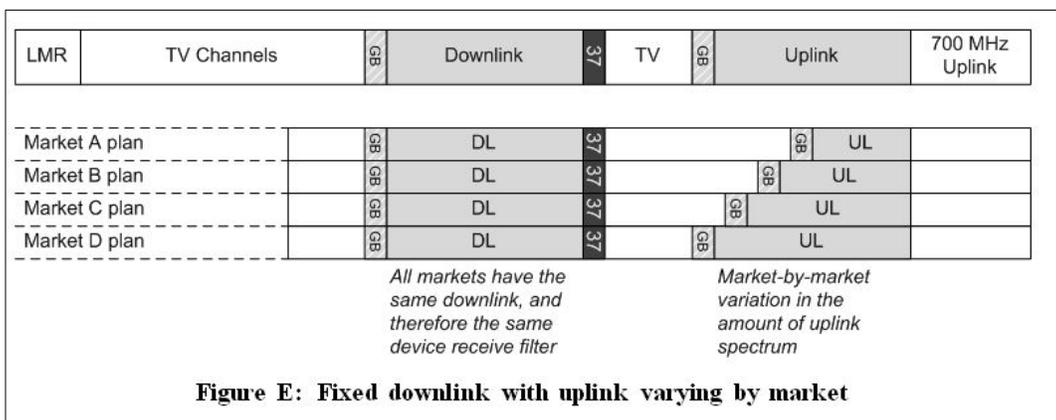


Figure E: Fixed downlink with uplink varying by market

trum reallocated.

**Different Amounts of Spectrum in Different Markets.** By allowing the conversion of different amounts of broadcast spectrum in different geographic areas, the Commission would hope to maximize the total amount of broadband spectrum available. However, the prospect of multiple band plans gives rise to technical complications, since such plans would create a need for different filters and/or duplexers in mobile devices. To address that problem, the Commission is considering a compromise solution involving “families” and “extended families” of related

relinquished. On the other extreme, a more granular licensing approach – based on, for example, Metropolitan Statistical Areas/Rural Statistical Areas (MSAs/RSAs) that are smaller than EAs – would risk complications in auction design and implementation, as well as in the service roll-out.

The Commission therefore is looking to the mid-sized, “Goldilocks zone” of licensing based on EAs. The Commission seeks comment on this approach, as well as what additional concerns to consider with respect to areas outside

*(Continued on page 11)*



(*Wireless Reconfiguration*—Continued from page 10) the lower 48 states (*i.e.*, Alaska, Hawaii, U.S. territories, Gulf of Mexico).

The Commission also seeks comment on possible early and voluntary resolution of issues related to broadcast protections affecting lower 700 MHz A Block licensees. The Commission would seek to facilitate channel reloca-

Commission seems to think there will be plenty of white space left after the repacking, but that's not intuitively obvious. After all, with TV broadcast channels being repacked even more tightly than has historically been the case (and with wireless service filling up most of the space freed up by the TV repacking), "white space" could ordinarily be expected to be in shortened, if not short, supply post-reconfiguration.

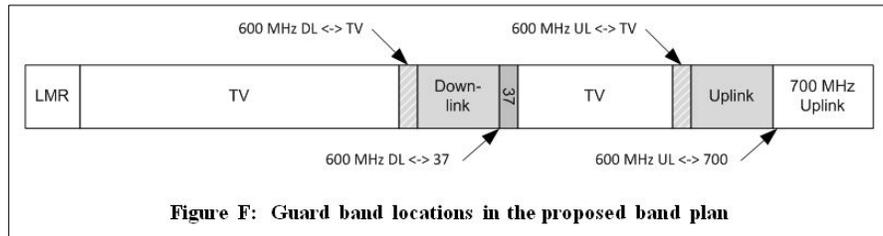


Figure F: Guard band locations in the proposed band plan

tion requests.

**Unlicensed use.** With all this band reconfiguration rearranging space for *licensed* operations, the Commission must still identify those areas of the spectrum which will be available for *unlicensed* use. The *NPRM* identifies three types of spectrum suitable for unlicensed use: guard bands, TV white spaces, and channel 37.

**Guard bands:** The Spectrum Act authorizes guard bands "no larger than [are] technically reasonable to prevent harmful interference between licensed services outside the guard bands." The Commission is proposing 6 MHz guard bands between mobile broadband use and broadcast use. (See Figure F.) Those would be supplemented with the leftover bits from the relinquished broadcast spectrum – 1 to 4 MHz segments which are too small to be licensed as 5 MHz blocks. These guard bands would be available for unlicensed use.

Of course, Congress's insistence that guard bands be "no larger than technically reasonable" frames an obvious question: what is "technically reasonable?" Is a 6 MHz guard band enough to provide the necessary interference protections? Also, could the "remainders" from converting 6MHz television channels into 5MHz broadband channels be properly added to this band?

**White Spaces:** In its repacking efforts, the Commission is also seeking to maintain a "substantial amount" of TV white space available for unlicensed operations. The

**Channel 37:** The Commission proposes unlicensed use in channel 37 "whether or not we relocate the WMTS and the Radio Astronomy Service." Every radio astronomy band is related to specific emissions from some cosmological event of interest to scientists. The channel 37 frequencies are particularly important in studies of the stuff between stars, distant pulsars, and our own Sun. The frequencies are protected by international treaty and used by radio-telescopes worldwide, so it will be interesting to see how commenters and the FCC address this issue.

If these services stay in channel 37, won't they suffer interference from the on-rush of unlicensed operations? The Commission hopes to avoid this problem by establishing protection areas around the limited number of medical telemetry and radio astronomy sites, thus opening up this slice of spectrum for unlicensed use outside those limited areas. The *NPRM* specifically solicits comment on the best protection criteria for medical telemetry and radio astronomy.

Finally, it's important to recognize that the voluminous *NPRM* poses many other questions addressing a wide range of critical issues, including pass band size, the possible authorization of TDD service in the band, and technical rules applicable to spectrum use. We strongly suggest that anyone with an interest in any of these areas review the full text of the *NPRM* carefully.



(*The "Forward" Auction*—Continued from page 7) need to coordinate frequencies across adjacent areas."

**Procedures to Determine License Prices.** Naturally enough, the final prices will be the highest amounts bid in the initial "phase" of the "forward" auction

(regardless of which particular format the FCC ultimately settles on). But as noted, those final prices may be increased through a second "auction phase" to assign specific frequencies to specific successful bidders. The structure of any such additional phase is at this point up in the air; the *NPRM* solicits comments on any additional procedures that might be necessary.



*(TV Repacking—Continued from page 6)*  
the Treasury to get things started.

As the Commission reads the Spectrum Act, reimbursement from the Relocation Fund would be available *only* to those stations that are *involuntarily* reassigned to a new channel. According to the FCC, that universe does *not* include licensees who opt to participate in the “reverse” auction. The FCC figures that successful “reverse” auction participants should pay for any relocation expenses out of the payout they get from the auction. With respect to “sharer” stations that participate in a channel sharing arrangement but do not submit winning bids in the reverse auction, the FCC would permit reimbursement of relocation costs in the event of a new channel assignment for the shared facility.

The *NPRM* proposes rules that would allow relocated broadcasters to elect reimbursement of their actual costs or estimated costs. Broadcasters electing estimated costs would be able to collect payment before implementing its channel change. The Commission requests comment on how to calculate estimated costs, and what station characteristics should be considered in any such determination. Stations electing to be paid their actual costs would, under the Commission’s proposal, be required to submit documentation showing the amounts claimed, and that such amounts were reasonable.

Since the Act limits reimbursement to “reasonable” costs only, the Commission must come up with some way to establish “reasonableness”. With that in mind, the *NPRM* requests comment on whether reimbursement should be provided for equipment that must be replaced, but where the newer equipment also represents an upgrade from the station’s existing equipment. In light of the Spectrum Act’s prohibition on reimbursing lost revenues, the Commission proposes no reimbursements for lost advertising while a station is off-air, but requests comment on whether reimbursements could be made for refunds to advertisers, the costs of make-goods, or other expenses.

Other reimbursement questions on the table: What happens if total requested reimbursements exceed the statutory \$1.75 billion cap? Is there anything the Commission can do to reduce the costs of relocation? As to that last question, could the FCC maybe obtain discounts by purchasing equipment in bulk, or somehow encourage stations to exchange and repurpose equipment, or possibly agree to waive certain rules in lieu of monetary reimbursement? If such waivers were offered, the *NPRM* asks what rules could be waived and what types of flexible use of spectrum could be allowed.

The Act also provides for reimbursement of costs in-

curred by multichannel video programming distributors (MVPDs) as a result of the repacking. While such costs are not likely to be terribly extensive, the *NPRM* requests comment on what types of costs may arise, whether reimbursements should be based on estimated or actual costs, and how to determine what costs are reasonable.

Finally, the Commission requests comment generally on how to prevent waste, fraud, and abuse in the reimbursement program.

**Consumer Education.** Harkening back to the DTV transition and concern that arose then about the need to increase public awareness of the changes involved there, the Commission asks whether a similar consumer education effort is warranted now. Since the repacking is, from a consumer standpoint, likely to be much less complicated than the DTV transition, the Commission asks whether less complicated consumer notification requirements might be appropriate. Also, because viewers will primarily need simply to rescan their receivers, the *NPRM* requests comment on whether it would really be necessary to establish viewer call center(s), require stations to broadcast on-air notifications, and require reporting to the FCC on any such efforts. The *NPRM* also requests comment on what type of notification stations should be required to provide to cable operators, and whether a simple letter notification of the station’s new channel and transition date would be sufficient.

**Post-Auction Licensing/Operating Rules.** The Commission recognizes that the repacking process will raise some ongoing post-auction regulatory issues. It’s looking for input on a number of specific issues along those lines, as well as on any issues that may not have been considered.

Recognizing that the removal of one or more stations from a market could affect remaining stations’ compliance with the multiple ownership rules, the *NPRM* proposes grandfathering any existing station combinations. (Other ownership issues are to be addressed separately in the Commission’s quadrennial review of its ownership rules.) The Commission also recognizes that removing some stations from operation, particularly where those stations are likely to be ones that served niche markets, will have a negative impact on diversity. The *NPRM* requests comment on how to address this loss of diversity, including possible ways to encourage multicasting or alternative delivery of niche programming that may disappear as a result of stations relinquishing their licenses.

The concept of channel-sharing arrangements (CSAs) raises another set of rule-compliance issues. While recognizing the Commission’s traditional reluctance to in-

*(Continued on page 13)*

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*The repacking process will raise some ongoing post-auction regulatory issues.*

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*(TV Repacking—Continued from page 12)*

involve itself in private contractual relationships, the *NPRM* requests comment on whether CSAs should be required to address certain matters, such as: access to station facilities; operation, maintenance, repair, and modification of those facilities; and transfer or assignment of either or both licensee's rights in the station. Comment is also requested on how to address future terminations of a shared license, particularly where one of the two sharing licensees were to have its license terminated, either voluntarily or involuntarily.

The Commission notes a number of particular difficulties that may arise with respect to CSAs involving a Class A station and a full power station. While such CSAs would be permitted, any such shared license would be subject to the technical rules applicable to the station that did not relinquish its channel. The Commission notes, however, that such a sharing would not grant the Class A station any enhanced MVPD carriage rights, nor would it diminish the full power station's carriage rights, except to the extent that the full power might no longer delivery a good quality signal to an MVPD headend.

For stations involved in channel sharing, the *NPRM* requests comment on how compliance with technical rules should be enforced. The Commission proposes generally to require each licensee individually to comply with all technical rules, but requests comment on whether certain responsibilities, such as preparation of station logs, compliance with the RF exposure rules, and EAS compliance, should be shared responsibilities.

Finally, the Commission proposes rules to address treatment of noncommercial educational licensees. While such licensees may, following repacking, end up on an "unreserved", or commercial, channel, the *NPRM* proposes that such licensees would still have to satisfy all of the existing noncommercial educational licensing requirements. Such licenses could be assigned only to another entity satisfying those requirements, and if terminated, such a license could be reassigned only to a noncommercial licensee. The *NPRM* also proposes allowing noncommercial and commercial licensees to enter into CSAs, although each licensee would remain subject to the applicable noncommercial or commercial licensing rules.



*(More With Less—Continued from page 5)*

facilities that were not licensed at that time. First, in a move of very limited application, the *NPRM* proposes protecting new full power stations whose original construction permits had been issued as of February 22, 2012. The Commission notes that there are only three such stations. Other unbuilt full power construction permits would generally be unprotected.

Unbuilt Class A digital permits, by contrast, could find themselves protected in some situations. The Commission proposes protecting only a single facility for each Class A station. However, to encourage the continued digital transition of Class A stations, it proposes allowing stations to notify the Commission in advance of the auction which facility (licensed analog or digital or a granted digital construction permit) they wish to protect. The *NPRM* also requests comment on whether the repacking should protect stations that hold construction permits to implement channel changes previously approved through a rulemaking proceeding. However, channel changes which have merely been proposed in, say, a petition for rulemaking would *not* receive protection if a notice of proposed rulemaking regarding the change has not yet been issued.

A second major post-auction regulatory issue is the treatment of LPTV and translator stations. As noted above, such stations are not eligible to participate in the auction, and their existing service will *not* be protected during the repacking process. As a result, many LPTV

stations may be forced to relocate to alternative channels – even though, with the smaller number of channels available, it is likely that at least some displaced LPTV and translator stations will not be able to find alternative over-the-air channels. The *NPRM* requests comment on potential approaches to minimize the impact on LPTV and translator stations. These include:

- authorizing voluntary channel sharing among LPTV and translator stations;
- taking steps to encourage the use by LPTV and translator stations of extra digital capacity on Class A and full-power stations; and
- taking steps to encourage distribution on MVPD providers or the internet.

The *NPRM* also requests comment on whether it should adopt any rule changes governing the displacement of LPTV and translator stations. For example, new rules might prioritize such applications over other LPTV and translator modifications. Alternatively, a "window" period might be established during which LPTV stations might be allowed to file displacement applications after the full-power and Class A repacking applications have been processed, but before any actual interference has occurred to the LPTV stations. Recognizing the likelihood of competing displacement applications from LPTV and translator stations, the *NPRM* also asks for comment on whether it should adopt any set of priorities to govern the processing of such applications. LPTV and translator licensees, particularly in congested areas, should consider these options.

**December 1, 2012**

**Radio Post-Filing Announcements** - Radio stations located in **Colorado, Minnesota, Montana, North Dakota, and South Dakota** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1, and February 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

**Television Post-Filing Announcements** - Television and Class A television stations located in **Alabama and Georgia** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1, and February 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

**Radio License Renewal Pre-Filing Announcements** - Radio stations located in **Kansas, Nebraska, and Oklahoma** must begin their pre-filing announcements with regard to their applications for renewal of licenses on December 1. These announcements then must be continued on December 16, January 1, and January 16.

**Television License Renewal Pre-filing Announcements** - Television and Class A television stations located in **Arkansas, Louisiana, and Mississippi** must begin their pre-filing announcements with regard to their applications for renewal of license on December 1. These announcements then must be continued on December 16, January 1, and January 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

**December 3, 2012**

**Digital Ancillary/Supplementary Services Report** - Each licensee of a (1) digital commercial or noncommercial educational full power television broadcast station; (2) digital low power television broadcast station; (3) digital translator television broadcast station; or (4) digital Class A television broadcast station must file a Digital Ancillary/Supplementary Services Report on FCC Form 317 by December 1 of each year to report whether it provided any such services during the past fiscal year, ending September 30, 2012. If so, the licensee must remit an appropriate fee, together with FCC Form 159.

**Radio License Renewal Applications** - Radio stations located in **Colorado, Minnesota, Montana, North Dakota, and South Dakota** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

**Television License Renewal Applications** - Television stations located in **Alabama and Georgia** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

**EEO Public File Reports** - All radio and television stations with five (5) or more full-time employees located in **Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

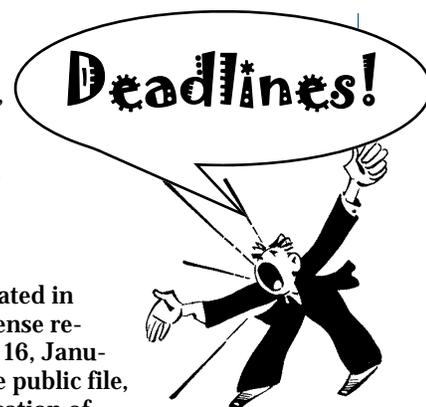
**Noncommercial Television Ownership Reports** - All noncommercial television stations located in **Alabama, Connecticut, Georgia, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

**Noncommercial Radio Ownership Reports** - All noncommercial radio stations located in **Colorado, Minnesota, Montana, North Dakota, and South Dakota** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

**January 10, 2013**

**Children's Television Programming Reports** - For all commercial television and Class A television stations, the

(Continued on page 15)





(Continued from page 14)

fourth quarter reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

**Commercial Compliance Certifications** - For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be uploaded to the public inspection file.

**Website Compliance Information** - *Television* and *Class A television* station licensees must upload and retain in their online public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

**Issues/Programs Lists** - For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

### January 25, 2013

**Television Spectrum Incentive Auction**- Comments are due in the proceeding seeking to re-allot certain spectrum now in the television band for broadband use and to develop rules and procedures for auctioning certain portions of this spectrum to new users. This date is subject to possible change as both the NAB and CTIA have requested an extension of the comment deadline.

### February 1, 2013

**Radio License Renewal Applications** - *Radio* stations located in **Kansas, Nebraska, and Oklahoma** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

**Television License Renewal Applications** - *Television* stations located in **Arkansas, Louisiana, and Mississippi** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

**Radio Post-Filing Announcements** - *Radio* stations located in **Kansas, Nebraska, and Oklahoma** must begin their post-filing announcements with regard to their license renewal applications on February 1. These announcements then must continue on February 16, March 1, March 16, April 1, and April 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

**Television Post-Filing Announcements** - *Television* and *Class A television* stations located in **Arkansas, Louisiana, and Mississippi** must begin their post-filing announcements with regard to their license renewal applications on February 1. These announcements then must continue on February 16, March 1, March 16, April 1, and April 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

**Radio License Renewal Pre-Filing Announcements** - *Radio* stations located in **Texas** must begin their pre-filing announcements with regard to their applications for renewal of licenses on February 1. These announcements then must be continued on February 16, March 1, and March 16.

**Television License Renewal Pre-filing Announcements** - *Television* and *Class A television* stations located in **Indiana, Kentucky, and Tennessee** must begin their pre-filing announcements with regard to their applications for renewal of license on February 1. These announcements then must be continued on February 16, March 1, and March 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

**EEO Public File Reports** - All *radio* and *television* stations with five (5) or more full-time employees located in **Arkan-**

(Continued on page 17)



*(Incentive Auction - Overall Design – Continued from page 1)*  
Sounds simple, but wait.

The precise spectrum to be bid on in the “forward” auction won’t be known until the “reverse” auction is completed. And Congress has mandated that the proceeds from the “forward” auction must cover all the payments to successful “reverse” auction bidders, plus a number of other administrative and reimbursement costs. So there’s a threshold interdependence between the two that poses conceptual problems (sort of a regulatory equivalent to M.C. Escher’s *Drawing Hands*).

But that chicken-and-egg problem is further complicated by the fact that the value of any particular broadcaster’s to-be-relinquished spectrum is likely to be different from any other broadcaster’s. The differences arise from a host of factors, some of them easily calculable (*e.g.*, population covered, perhaps whether any particular relinquishment would create “white” or “gray” areas), some not so much (*e.g.*, extent to which that particular spectrum will facilitate (a) repacking of the TV band and/or (b) repurposing of the spectrum). And, of course, the value of the spectrum available in the “forward” auction will depend on how much spectrum is available and where it can be used.

With respect to determining the value of to-be-relinquished TV spectrum, the FCC is considering a couple of computer programs that might serve to update the likely value of each participant’s to-be-relinquished TV spectrum constantly through the course of the “reverse” auction. Remember, while participating broadcasters will want to keep that value up, it’s in the Commission’s interest to keep it down, so as to minimize the overall pay-out (and, thus, maximize the government’s ultimate take from the “forward” auction).

One of the two computerized approaches under consideration (the “Integer Programming Algorithm Approach”) “would, for a specified amount of spectrum to be cleared, minimize the sum of the reverse auction bids accepted and the relocation costs of stations that are reassigned to new channels.” But that particular approach would not necessarily lead to “optimal” results – although the Commission advises that results would be “within a certain tolerance of optimality” that the Commission, at least, could find acceptable. Oh yeah, and those results might not be easily reproducible and, thus, “less than fully transparent”.

The second computerized approach – the “Sequential Algorithm Approach” – would, as best we can understand it, assess for each “reverse” auction participant prior to each auction round the feasibility of assigning that participant’s station to some channel in its pre-auction band. As long as the station can be assigned to its pre-auction band, the participant can opt to continue in the “reverse” auction. (Alternatively, of course, it could bail from the auction at any time as well – but heads up: a decision to exit the auction would be irreversible.) The program would determine for each participant the “least-cost” move (“least-cost”, that

is, to the Commission). If no re-assignment within the participant’s pre-auction band is possible, then that participant’s compensation would be set at the last price offer it accepted for its last preferred relinquishment option. This approach may be more easily replicated than the Integer Programming Algorithm, but it’s apparently more complicated and less efficient.

As far as operation of the “reverse” auction goes, the Commission is looking at two alternatives: either (a) a single round, one-and-done, put-your-final-bid-forward approach, or (b) a somewhat more conventional multiple round clock format. In the latter, in each round a progressively lower bid amount would be presented by the Commission and each bidder would indicate its willingness to accept that amount. It appears that each FCC-set bid would be unique to each auction participant (based on the particular attributes of that participant’s to-be-relinquished spectrum) and disclosed confidentially only to that participant. The idea is *not* to have broadcasters bidding against each other, but rather to enable the FCC and each broadcaster to

arrive at a mutually agreeable cash value for the relinquishment of that broadcaster’s spectrum.

*The “forward”  
auction would be  
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its quirks.*

Another interesting point: the Commission is considering establishing “reserve” prices, *i.e.*, a maximum that it would be willing to pay for the relinquishment of spectrum rights. The

maximum would likely vary from broadcaster to broadcaster, depending on the relevant characteristics (*e.g.*, audience served) of the broadcaster’s station.

The “forward” auction would be considerably simpler, but still not without its quirks. The Commission is tentatively planning on using a standard multiple round ascending auction typical of other spectrum auctions. Bidders would be bidding on “generic” categories of licenses (*e.g.*, paired or unpaired) in particular geographic areas, probably in 5 MHz blocks. Specific frequencies would *not* be involved; those would be assigned once the “forward” and “reverse” auctions have been completed and the repacking process has permitted the identification of specific frequencies available in specific areas.

For those readers who find the *NPRM*’s description of the auction process a bit too daunting, you may be better off by starting with the “Incentive Auction Rules Option and Discussion” included as Appendix C to the *NPRM*. (We’ve included a link to that document on our blog at [www.CommLawBlog.com](http://www.CommLawBlog.com).) Prepared at the FCC’s request by Auctionomics and Power Auctions, it provides a somewhat more accessible view of what the FCC has in mind. It’s still not quite “FCC Incentive Auctions for Dummies”, but we found it helpful.

Even those who are not interested in participating in the auction may want to take the opportunity to comment. Whether or not they choose to participate, all TV broadcasters will be affected by the Incentive Auc-

*(Continued on page 17)*



(Incentive Auction - Overall Design – Continued from page 16)

tion. That's because, in order to package more desirable spectrum blocks for the "forward" auction, the FCC will likely be forcing most, if not all, remaining full power broadcasters to change channels or implement other modifications. While the Commission is required to take "all reasonable efforts" to protect full-power stations' existing service areas, and to reimburse relocations costs (to be paid from the forward auction proceeds), the mechanics

and implementation of the repacking are, not surprisingly, rather complicated. For low power television licensees, the situation is much worse, as their services will not be entitled to any protection during the repacking process.

Obviously, there remain plenty of questions relative to all auction mechanics. Comments on any and all such questions are invited in the *NPRM*. Again, comments are currently due to be filed by **January 25, 2012** and reply comments by **March 12, 2013**.



(Incentive Auction - Overall Design – Continued from page 15)

**Deadlines!** **Arkansas, Kansas, Louisiana, Mississippi, Oklahoma, Nebraska, New Jersey, and New York** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

**Noncommercial Television Ownership Reports** - All *noncommercial television* stations located in **Arkansas, Louisiana, Mississippi, New Jersey, and New York** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

**Noncommercial Radio Ownership Reports** - All *noncommercial radio* stations located in **Kansas, Oklahoma, and Nebraska** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

### February 3, 2013

**Uploading of Public Files** – As previously reported, all *television* stations will have to have completed the uploading of their local public inspection file materials to the FCC-maintained online public inspection file system within six months of the effective date of the new system. That effective date was August 2. While the Commission has not yet formally announced a specific date by which the upload process must be completed, six months after August 2 will be February 2, so it would be prudent to assume that Sunday, February 2 (or the next business day, Monday, February 3) is the tentative target date.



(Continued from page 2)

And one last observation.

Warning: We have seen the Terry spots. Viewers who are easily offended would likely wish to turn to another channel – if they could find one where Terry doesn't also buy ads. Terry's ads in this election (and, we suspect, any he might opt to run in future elections) are focused on his pro-life philosophy and are intended to shock viewers with graphic images of aborted fetuses, as well as comparing the President of Planned Parenthood to a Nazi. As far as we can tell, most

stations that have been asked to air Terry's spots consider these spots highly offensive (they are intended to be at least shocking) and would prefer not to carry them. Tough. An earlier FCC decision, upheld by a court, prevents stations not only from refusing the ads but also from channeling them to late night hours when children are least likely to be in the audience. All time periods must be made available. Thanks to the WUSA decision, the politicians here in Washington who decry censorship had some tough stuff thrown in their faces on local TV. Whether that may have any effect going forward remains to be seen.



## FHH - On the Job, On the Go

On November 9, **Kathy Kleiman** presented two Lifetime Achievement Awards at the annual Heroines in Technology Awards Gala. **Kathy** is herself a Lifetime Achievement Award Winner (Class of 2009). The Heroines in Technology program is a joint project of the March of Dimes and Northern Virginia Chapter of the Armed Forces Communications and Electronics Association. It recognizes and honors women in the field of technology for their dedication to community service. Presumably emboldened by that front-of-the-room experience, on November 20 **Kathy** addressed the assembled multitude at the Falls Church (Virginia) Chamber of Commerce monthly lunch on the topic of "Free and Easy Ways to Protect Yourself and Your Business Online". Her message (in which she was joined by her fiancé, Mark Massey) was that there are free (well, at least affordable) and easy technical ways to protect against hackers and malware.

On November 14, **Kevin Goldberg** presented a webinar on "Social Media Facts, Flare Ups, and Fixes" to the Texas Association of Broadcasters.

And on November 15, **Frank Montero** served as the moderator for a briefing on the impact of spectrum auctions on minority audiences. The briefing was presented by the NAB and was held at the Rayburn House Office Building in Washington.



(Reverse Auction Eligibility—Continued from page 4)  
rently underway, it would not be surprising to see new enforcement holds cropping up, even if the old ones disappear.)

In any event, it seems to us that prospective “reverse” auction participants may want to oppose this element of the *NPRM* aggressively – unless they prefer to face the prospect of a potentially steep admission price for the privilege of participating in the auction.

One final eligibility note of truly limited impact: any newly licensed full power station will be eligible only if its initial construction permit had been granted by February 22, 2012 (the date on which the Spectrum Act was adopted) and the station has received a license by the time it submits its initial “short-form” auction application. Since there were a total of only three outstanding CP’s as of February 22, this particular condition is not likely to have far-reaching effect.

While the practical aspects of the “reverse” auction bidding process are addressed in greater detail in another article in this issue, we’ll shed some light on that here, too. The *NPRM* proposes three options regarding what rights a licensee may offer up in exchange for a possible pay-out. A licensee’s bid could vary based on what it’s willing to do. In particular, it could offer to:

cease broadcasting entirely (*i.e.*, the licensee would in effect be turning in its license and leaving the broadcasting business);  
operate on a VHF channel (assuming that the station is a UHF licensee). In this case, the licensee would be signaling that, for a price, it would be willing to have its operation re-

located to the VHF band; or  
share a 6 MHz channel with another station.

The *NPRM* also requests whether bidders agreeing to move from a UHF to a VHF channel should be allowed to limit that move to only a high-VHF channel, and whether licensees currently on high-VHF channels should be allowed to bid to move to low-VHF channels.

With respect to channel-sharing arrangements, the Commission proposes that stations entering into such deals would **not** be permitted to change their DMAs or communities of license. Although sharing a channel with a station in an adjacent DMA could be acceptable, neither station’s DMA assignment would be changed, and each would be required to continue to serve its respective existing community of license.

In addition to these broad-brush elements, the Commission solicits comments on a number of finer points. For example, should the FCC adopt a policy favoring waivers of existing power and height restrictions for stations agreeing to move to VHF channels? Should bidders be permitted, as part of their bids, to agree to accept additional interference, either from broadcast or wireless users, or to accept a reduced or modified service area?

To some degree, the auction eligibility requirements are set in stone, thanks to Congress – so LPTV and translator licenses need not apply, period. But the majority of auction niceties addressed in the *NPRM* are wide open for comment. Potential auction participants would do well to review the *NPRM* carefully and let the Commission know about points that are important to them.

*It’s another Memo to Clients sidebar!*

## Brrrrr - FM Minor Mod Freeze Announced

**W**ith the deadlines for FM Auction 94 now on the books, the Commission has also announced that it will not accept **ANY** commercial or noncommercial minor mod applications **between January 28 and February 6, 2013**. That’s the filing window for short form (Form 175) applications for Auction 94.

These freezes are standard operating procedure when it

comes to broadcast auctions. The goal is to avoid the creation of any conflicts (unforeseeable or otherwise) with auction proposals that could muck up the auction process. So if you have any intention of filing for a minor mod in the near term, you’d best be sure to get it filed before January 28 or be prepared to cool your heels for ten days until the freeze thaws on February 7.



(Continued from page 3)

(And yes, in keeping with tradition, the Commission itself made that ominous advisory even more ominous with the **boldface** emphasis.)

The Commission is also offering an online auction tutorial, which should be available as of January 28, 2013. (Look for an “Auction Tutorial” link on the FCC’s Auction 94 webpage.)

It’s for newbies or folks who want to re-gain their auction chops. (The online tutorial replaces the bidder seminars which the Commission offered in the run-up to previous auctions.)

Additionally, the Commission will conduct a “mock auction” on April 19, 2013, again to permit folks to dust off any cobwebs and be ready to jump right in when the bidding starts for real on April 23.

Stuff you may have read about before is back again . . .

## Updates On The News

**NCE fund-raising for Sandy victims** — Broadcasters have historically responded to catastrophes with incredible humanity, offering help wherever and whenever possible. And the devastation that Superstorm Sandy wreaked on the eastern seaboard — and particularly the Jersey Shore and NYC — has provided yet another unfortunate opportunity for that humanity to manifest itself again. As the horrific stories and images linger in the national consciousness, noncommercial educational (NCE) broadcast stations may want to undertake fund-raising efforts to support relief efforts. The FCC clearly does not want to do anything to discourage such laudable humanitarian impulses.

However, rules are rules — and the Commission's rules (Sections 73.503(d) for radio and 73.621(e) for TV) generally prohibit NCE broadcasters from engaging in on-air fund-raising activities on behalf of anybody but the station itself.

*Not to worry.* The Commission has historically waived that prohibition following “disasters of particular uniqueness or magnitude” — Hurricane Katrina, the 2004 Southeast Asia earthquake/tsunami, the 2010 Haiti earthquake and the 2011 Japanese earthquake/tsunami come to mind as ready examples. And just to be sure that we all know that the FCC views Sandy to be in the same league, the Commission has issued a public notice laying out the procedures by which NCE licensees may request waivers so that they can engage in fund-raising for relief efforts.

Stations seeking such waivers should prepare an informal request providing the following basic details of their fund-raising activity:

- ① the nature of the fundraising effort;
- ① the proposed duration of the fundraising effort;
- ① the organization(s) to which funds will be donated; and
- ① whether the fundraiser will be part of the licensee's regularly scheduled pledge drive or fundraising effort.

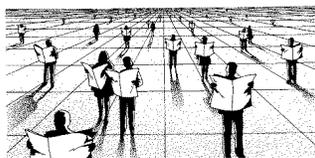
Of course, the public notice does not guarantee that such requests will automatically be granted, but it's a very good bet that the Media Bureau will be strongly inclined to

bless Sandy-related fund-raising efforts. These informal requests should be emailed to the FCC. NCE **television** licensees should address their requests to Barbara Kreisman ([barbara.kreisman@fcc.gov](mailto:barbara.kreisman@fcc.gov)). NCE **radio** licensees should address their requests to Peter Doyle ([peter.doyle@fcc.gov](mailto:peter.doyle@fcc.gov)) and Michael Wagner ([michael.wagner@fcc.gov](mailto:michael.wagner@fcc.gov)). Those points of contact are also available for any particular questions you might have about such things.

**Progress for proposed revision of contest rule?** — Last January, we wrote about a proposal by Entercom Communications Corp. to change the FCC's on-air contest rule. As we all know, that rule requires that, when a station promotes a station-conducted contest on the air, the station must disclose — **on the air** — all the material terms of the contest. Such disclosures can be a real drag programming-wise, even when they're jammed into the kind of compressed super-fast babble normally reserved for extended disclaimers about sketchy products.

Entercom has sensibly suggested that broadcasters be permitted to post contest rules on their stations' websites, rather than subject listeners to the fine-print recitations the Commission currently requires. (Note that the Enforcement Bureau has expressly held that, under the current on-air contest regulation, licensees may **not** rely exclusively on website posting of contest rules to satisfy Section 73.1216.)

Ten months after Entercom's petition rolled in the FCC's door, the FCC has finally gotten around to asking how anybody else feels about the proposal. If you would like to chip in your two cents' worth, you've got until **December 20, 2012** to let the Commission know. This invitation for comments does not mean that the Commission will for sure change the rule, or even issue a notice of proposed rulemaking (which would be a necessary step before the rule could in fact be changed). But the invitation does give interested parties the opportunity to let the Commission how they really feel about this issue. A solid show of support at this stage could improve the prospects for the eventual adoption of Entercom's proposal.



We wish you the happiest of holidays  
and peace in the new year.

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