

The National Broadband Plan's TV spectrum reallocation and repacking objectives present significant, long-term challenges to NRB's members. The Plan's sudden identification of anticipated wireless broadband capacity gaps is curious, since that need, much less its urgency and scope, was never mentioned during the digital television transition. Regrettably, the "sudden need" appears to be driven by a token spectrum inventory and a one-way auction approach that has the central purpose of raising capital for government coffers largely at the expense of TV broadcasters, whose spectrum is desirable. Spectrum auctions, whether voluntary or not, present substantial risks to NRB TV members, including the potential loss of spectrum, loss of coverage area, channel changes, and infrastructure costs. Spectrum reallocation creates a cloud of uncertainty that hangs over NRB TV members' ability to plan or finance operations long term, or fulfill their important role of serving the public interest with critical, needed programming.

I. The *NPRM* prematurely proposes repurposing and repacking TV spectrum before auction authority even exists, or the mechanics of an auction are clear.

The *NPRM* seeks comment on what appears to be a predetermined decision to allow broadband users to hold licenses in the TV band, allow TV stations to channel share, and increase TV stations use of VHF channels 2-13 – all in the name of repurposing at least twenty TV channels to broadband use. Commenters are only asked about ways to smartly implement such changes, not whether such changes are appropriate or in the public interest in the first place, or whether alternative approaches exist. The ultimatum is clear – whether you like it or not, TV channels will be repurposed to broadband users, and this is TV broadcasters' token opportunity to figure out their future on less spectrum. Frankly, that is a recipe for opposition, not collaboration.

Without clear legislative authority, or knowledge of the mechanics of an auction conducted pursuant to that authority, it is virtually impossible to provide informed comments on the wisdom or implementation of the proposed rules. For example, if Congress were to grant but

restrict the FCC's authority to auction spectrum by limiting how much TV spectrum can be auctioned, or completely foreclose auctions, a rule on channel sharing might be completely unnecessary. Even if auction authority is granted, the mechanics of participation may raise other concerns or dictate different solutions.

Currently, a number of proposed bills are pending in Congress on spectrum auctions. Some give lip service to preserving a TV broadcaster's voluntary right to participate or not;² others make clear that involuntary participation, even by indirect means, is prohibited.³ Some bills wisely propose an inventory of spectrum before auctions can be conducted; others simply authorize an auction regardless of the need.⁴ Most of the bills leave the FCC unfettered discretion in implementing an auction, raising concerns that auction structures may yield an eventual scenario that forces even non-participants to relocate facilities. None of the pending bills make clear what percentage of auction proceeds a TV broadcaster will enjoy. And the FCC's "Allotment Optimization Model", disclosed in the *NPRM* as the tool used to estimate how much spectrum should be left to TV broadcasters,⁵ remains a mystery and is not accessible to those most impacted by spectrum repacking.

Thus, the wisdom or need for a rule change allowing channel sharing, VHF power increases, or co-equal broadband rights to TV spectrum, remain largely unknown. NRB submits that a rule change permitting broadband use of TV spectrum or channel sharing should only be adopted after the FCC receives auction authority and conducts a thorough rulemaking to allow comment on auction mechanics and eligibility. If those proceedings make clear that auction participation is truly necessary and voluntary, informed rules on channel-sharing or broadband use of TV spectrum can then be legitimately considered and adopted. The current approach –

² See, e.g., Senate bills S.415 and S.455.

³ See, e.g., House bill H.R.911.

⁴ H.R.911 requires an inventory before auctions can proceed; S.455 requires an inventory, but not as a precondition to auctions; S.415 does not address a spectrum inventory at all.

⁵ *NPRM*, ¶10.

adopting and implementing rule changes in a vacuum – will only produce inadequate rules on an incomplete record, and generate more uncertainty.

II. The FCC’s approach completely ignores alternative solutions, in a mad dash to an auction-only solution.

The FCC’s National Broadband Plan focused solely on an auction scenario as the method of repurposing TV and other spectrum for broadband use.⁶ The *NPRM* follows suit, contemplating rule changes that are predicated only on incentive auctions.⁷ And in a recently released FCC Webinar being presented by the staff to state broadcaster associations, a decision to channel share or move to VHF is a pre-condition for auction participation, unless a station simply elects to contribute its entire channel and get out of the television business altogether.⁸

No FCC proceeding has invited comment on solutions other than auctions. FCC Commissioner Robert McDowell has twice proposed consideration of such alternatives, first in his comments to the National Broadband Plan, and again in his comments to the *NPRM*. On March 16, 2010, when the FCC released its 375+ page National Broadband Plan, McDowell wrote:

“... we should explore our authority under Section 336 to provide television broadcasters an incentive to lease their spectrum. Focusing on this statutorily permissible and voluntary mechanism for leasing parts of the airwaves may be an easier path to accelerating deployment of advanced wireless services than more coercive means.”⁹

Again on November 30, 2010, in conjunction with the release of the *NPRM*, McDowell emphasized the need for comments “about the feasibility of alternatives that may be used in lieu

⁶ See generally, National Broadband Plan, Chapter 5, Spectrum (hereinafter “NBP”)

⁷ See, e.g., *NPRM* at ¶ 8.

⁸ *Incentive Auctions: New Options for Broadcasters*, FCC State Broadcasters Association Webinar Series, March 2011, p. 6. (hereinafter “FCC SBA Webinar”)

⁹ Statement of Commissioner Robert M. McDowell, March 2010 Open Agenda Meeting, p. 3 (March 16, 2010).

of, or in conjunction with, channel sharing”, and cited again to Section 336 of the Communications Act as a mechanism for leasing spectrum for wireless broadband purposes.¹⁰

Yet the FCC’s Webinar flatly cuts off any debate on that issue, claiming that a leasing mechanism would detrimentally affect the value of the spectrum to the government, and naming a host of reasons why, in the FCC’s view, leasing is inefficient. To get there, the FCC counts a TV station’s continuing obligation to provide an over the air video signal to the public as a negative, and posits the potential inability of broadcasters to retain their FCC licenses as a risk that wireless companies cannot tolerate.¹¹

Had the FCC offered an opportunity for public comment on such matters, it might have learned about alternatives to its soda-straw, auction-only approach to spectrum repurposing. The FCC’s position has recently been completely rebutted by Capitol Broadcasting’s proposal for an alternative broadband plan, where broadcasters provide an ancillary service to handle distribution of video when wireless broadband providers cannot handle traffic volumes.¹² The “broadcast overlay” plan would use broadcast chips in mobile devices to “hand-off” large video requests to broadcasters, and the government would forever enjoy 5% of the revenue under current ancillary rules.¹³ This is precisely what Commissioner McDowell has called for, but nothing in this *NPRM* or other proceedings has solicited, much less vetted, such options.

Clearly, such alternative approaches would potentially negate the need for channel sharing altogether, or adding broadband providers as “co-equal” license holders in the TV bands, rendering this *NPRM* moot. NRB submits that the FCC should fully consider all such options, as part of a comprehensive proceeding, before rushing to adopt mechanisms to clear the TV band for auctions, and crowd TV broadcasters into a smaller and less desirable slice of the band.

¹⁰ Broadband NPRM, Statement of Commissioner Robert M. McDowell, p. 1, ¶ 3.

¹¹ FCC SBA Webinar, p. 11.

¹² *DTV Pioneer Pitches FCC On Alternative Broadband Plan*, John Eggerton, Broadcasting & Cable, March 14, 2011.

¹³ *Id.*

III. The FCC's lack of clarity on how spectrum reallocation affects low power television stations threatens the continued viability of these valuable public interest servants.

NRB's low power television ("LPTV") member stations¹⁴ are in a particularly precarious situation when it comes to the FCC's plans to repurpose spectrum. As secondary services that must cede to primary users of the TV spectrum, LPTV business models are particularly vulnerable in a spectrum reallocation/repacking scenario. Despite having set a course for LPTV digital transition through either flash cut applications or companion channel windows,¹⁵ the FCC has not provided certainty on a myriad of issues affecting LPTV or Class A stations. Included among those issues is a build-or-lose policy that permits extensions of digital permits in only narrow circumstances,¹⁶ an unknown deadline for completing transition to digital nationwide,¹⁷ a contraction/freeze of new authorizations,¹⁸ and the recent rejection of an experimental application to allow data transmissions on TV digital capacity using a non-ATSC standard.¹⁹

In the auction context, it is not clear whether Class A or LPTV stations will be eligible to participate in incentive auctions. Although the NBP openly contemplated such an option,²⁰ and this *NPRM* posits the idea of including LPTV stations in channel-sharing,²¹ the FCC has not affirmatively stated that auction participation is guaranteed for Class A and LPTV stations. And pending auction legislation speaks only generally of TV broadcasters, without specifying the

¹⁴ The *NPRM* considers Class A, LPTV stations and TV translators collectively as "LPTV" stations, though Class A stations are not secondary services, and enjoy much broader interference protections.

¹⁵ See Report and Order, *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, 19 FCC Rcd 19331 (2004) ("*Digital LPTV Order*").

¹⁶ *Digital LPTV Order* at ¶172.

¹⁷ Further Notice of Proposed Rulemaking, *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, DA 10-172, ¶¶ 8-19, rel. Sept 17, 2010 ("*Digital LPTV FNRPM*").

¹⁸ *Digital LPTV FNRPM*, ¶¶ 26-28.

¹⁹ See *In re Request for Modification of Experimental License File No. BPEX-20100406ADD*, Letter to WATCTV, Inc., February 10, 2011 Inc., DA 11-260 (dismissing application of LPTV station for experimental license to provide broadband service).

²⁰ NBP, Chapter 5, p. 92.

²¹ *NPRM*, ¶ 40.

inclusion of either Class A or LPTV stations.²² These licensees therefore face a conundrum about whether to build out digital at extraordinary expense, or if already built out, whether and how to continue operations depending on auction participation rights or other outcomes.

On the one hand, an existing station might hold out for auction participation on the hopes of recouping the value of its investment, but if the station is in a rural area, there may be no interest by wireless broadband providers in bidding on the station's spectrum at auction.²³ And if an LPTV station participates and receives nothing because of lack of interest, or if it elects not to participate and continues broadcast operations, the post-auction landscape is highly uncertain, since only primary services in the TV bands will receive interference protection during re-licensing and repacking of the TV bands.²⁴ The potential for being displaced in a post-auction world is high, and there is nothing at this time to assure LPTV stations that the cost of displacement to other channels will be paid for by the government or winning auction bidders.

Further, if LPTV stations can participate in spectrum auctions, and if, as the FCC's Webinar sets forth, auction participation is predicated on relinquishing a channel, channel sharing, or moving to VHF, special protections will be necessary. For LPTV stations, severe digital power limitations in the current FCC rules would make a move to VHF the equivalent of a death sentence, as interference would severely hinder continued broadcast options. The *NPRM* does not even raise power increase issues for LPTV stations.²⁵

Participation by committing to channel share presents equally difficult choices. Because Class A and LPTV station mandatory carriage rights are so restrictive, channel sharing presents a substantial risk that carriage rights will be jeopardized. For example, channel sharing may

²² See Spectrum Optimization Act (S. 415); Spectrum Inventory and Auction Act of 2011 (H.R. 911); Reforming Airwaves by Developing Incentives and Opportunistic Sharing Act ("RADIOS Act") (S. 455)

²³ FCC SBA Webinar at p. 13.

²⁴ *NPRM*, ¶ 14.

²⁵ Elsewhere, in the 2010 *Digital LPTV FNPRM*, ¶17, VHF power issues are considered but that proceeding is surprisingly not even referenced in the *NPRM*.

displace the station from being within 35 miles of a cable system principal headend, or relocate the station to a county that already has a licensed full-power television station. Both situations would end mandatory carriage rights under the current rules.²⁶

The FCC has already recognized that LPTV stations provide valuable, often exclusive coverage of local issues, as well as different and often unique programming, and therefore serve a critical public interest. And yet the regulatory landscape for these most critical providers leaves them most vulnerable. NRB submits that certainty is paramount for Class A and LPTV licensees. At a minimum, these licensees must have unequivocal assurances that:

- any post-auction displacement – regardless of auction participation – will be paid for by the government or winning bidders
- post-auction displacement will not eliminate current mandatory carriage rights
- Class A and LPTV licensees are eligible for auction participation
- auction participation based on a voluntary VHF move must be predicated on granting the Class A or LPTV station increased power to overcome interference
- auction participation based on voluntary channel sharing would not create a loss of mandatory carriage rights

The FCC should adopt such protections, or urge legislative action to empower the Commission to do so.

IV. Channel sharing mechanics raise mandatory carriage concerns for full power stations as well.

NRB TV members heavily rely upon statutory mandatory carriage rights for distribution of TV station signals. Any threat to those rights is material, as a loss of carriage rights would adversely affect the financial and public interest value of a station. While the *NPRM* seeks comment on channel sharing from a regulatory, rule-definition perspective,²⁷ the practical implications of channel sharing pose greater threats, and will drive any decision to participate in an incentive auction.

²⁶ 47 C.F.R. § 76.55(d)(4) and (d)(6). Relocation to a station transmission facility located within the top 160 Metropolitan Statistical Areas as of 1990 would also end carriage rights.

²⁷ With respect to the FCC's carriage regulations, clarification that the current rules extend to stations electing to channel share is paramount. That clarification must be unequivocal.

First, stations opting to channel share will not know which station they will join with, or whether another station will join with them. Sharing partners are chosen “after the auction in coordination with the FCC.”²⁸ That uncertainty alone may be enough to dissuade a TV broadcaster from participating in the auction under a channel share arrangement because coverage changes or losses will be unknown, as will the possibility of lost coverage over cable principal headends or satellite receive facilities.²⁹

Second, deciding a station’s “channel share” partner after the auction does not permit a pre-auction agreement/understanding between channel share parties so that liabilities and responsibilities can be fairly allocated, commercial risks assessed or a share of auction proceeds potentially negotiated. These issues are central to any channel share decision, and yet by the time such issues would be decided, the broadcaster whose spectrum has been sold at auction cannot back out if, for example, its “chosen” channel share partner takes commercially unreasonable positions in connection with facility collocation or other matters.

TV broadcasters will require certainty – before they agree to auction any spectrum – as to their channel share partner and the details of a specific channel sharing arrangement. The FCC should make those matters clear before adopting any rules that permit or incentivize channel sharing.

²⁸ FCC SBA Webinar at p. 7.

²⁹ The FCC should make clear that if a channel share arrangement improves the coverage area of a TV station’s signal, the station will be entitled to carriage in new coverage areas if it provides a sufficient signal.

Conclusion

For the above reasons, NRB respectfully submits that the *NPRM* is premature. The FCC must first publicly consider alternatives to an auction-only scenario, and provide far better certainty for television broadcasters on channel sharing and cable carriage before making the *NPRM's* proposed rule changes.

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