

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

Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	
)	
Incentive Auction Task Force and Media Bureau)	MB Docket No. 16-306
Seek Comment on Post-Incentive Auction)	
Transition Scheduling Plan)	
)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

November 15, 2016

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SUMMARY

Initial comments in this proceeding support the Commission's efforts to begin planning now for the post-auction transition of repacked television stations. This transition will involve unprecedented logistical challenges, and all stakeholders will be best-served by an advanced understanding of how the Commission will manage the most complex transition it has ever overseen. Many of the Commission's proposals are reasonable steps towards planning for an efficient transition.

The Commission understandably seeks to develop a repacking schedule ahead of time based on a systematic, software-driven approach that can rapidly categorize and assign stations to different phases. However, the record of this proceeding suggests this is unlikely to produce a workable and efficient plan in practice. Instead, commenters urge the Commission to adopt a flexible, dynamic plan for the transition that can be readily amended based on particular circumstances of individual stations as the transition unfolds. In particular, the Commission will need to retain flexibility to adjust phase assignments and deadlines as broadcasters and the Commission itself learn more about the work required and available resources. We urge the Commission to incorporate changes to its proposal that promote agility and flexibility in response to challenges both predictable and unforeseen.

The Commission should also revisit its 39-month deadline for the completion of the transition. Numerous commenters have expressed concern that the Commission's repacking plan makes overly optimistic assumptions concerning the availability of resources and potential sources of delay. Viewers of repacked television stations should not lose service in the event the Commission's optimism proves unfounded, or if unanticipated developments make it impossible for some stations to complete their moves on schedule.

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Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions)	GN Docket No. 12-268
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**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ hereby replies to comments filed in response to the Commission’s Public Notice seeking comment on a proposal for developing a schedule to transition repacked television stations to new channels following the close of the broadcast spectrum incentive auction.²

I. THE RECORD REFLECTS BROAD SUPPORT FOR RELAXING THE PROHIBITED COMMUNICATIONS RULE ONCE THE FINAL STAGE RULE IS SATISFIED

In an effort to allow repacked television stations to get a head start on completing their construction permit applications and cost estimates, the Commission proposed notifying repacked stations of their new channel assignments once the final stage rule is satisfied, but before the incentive auction is complete. NAB strongly supports this constructive proposal.

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Incentive Auction Task Force and Media Bureau Seek Comment on Post-Incentive Auction Transition Scheduling Plan*, Public Notice, MB Docket No. 16-306, GN Docket No. 12-268, DA 16-1095 (Sept. 30, 2016) (Public Notice).

Numerous commenters agree with NAB that the Commission can improve this proposal by waiving the prohibited communications rules for reverse auction participants once the final stage rule is satisfied.³ Providing a blanket waiver for of the prohibited communications rule that would allow any broadcaster to communicate with any other station or any vendor or service provider would better serve the Commission’s goals by allowing stations to communicate freely regarding their repacking plans. As American Tower correctly observes, “Adoption of a blanket waiver to allow communication of post-auction channel assignments and other information would expedite the post-auction planning process for all parties involved, which is critical to maximizing the efficiency of the repacking coordination process.”⁴ Similarly, broadcasters emphasize the need for stations to communicate with other stations due to, for example, shared transmission facilities and equipment and shared tower infrastructure,⁵ as well the need to coordinate among stations in the same market for testing.⁶

Commenters also agree with NAB that, once the final stage rule is satisfied, there is no public policy goal advanced by leaving the prohibited communications rules in place for broadcasters.⁷ Satisfaction of the final stage rule necessarily means that there will be no further bidding by reverse auction participants. There is thus no potential for harm to the integrity of the auction from allowing stations to communicate regarding any aspect of their

³ See, e.g., Joint Comments of California Oregon Broadcasting, Inc; CNZ Communications, LLC; Gray Television, Inc.; Local Media Holdings, LLC; Media General, Inc.; Nexstar Broadcasting Group, Inc.; and Venture Technologies Group, LLC at 4-8, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (COBI Comments); ATC Comments at 3; Comments of FDH Velocitel at 1, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (FDH Comments)

⁴ ATC Comments at 3.

⁵ COBI Comments at 5.

⁶ Joint Comments of Cordillera Communications, Cox Media Group and Meredith Corporation at 17, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (Cordillera Comments).

⁷ *Id.* at 17; ATC Comments at 3; COBI Comments at 7; T-Mobile Comments at 20.

auction participation, let alone their post-auction channel assignments. Accordingly, we urge the Commission to promptly waive its prohibited communications rules once the final stage rule of the auction is satisfied in order to allow repacked television stations to share information regarding repacking as soon as they receive their confidential letters.

II. THE RECORD CONFIRMS THE NEED FOR FLEXIBILITY IN THE COMMISSION'S REPACKING PLAN

Multiple stakeholders across industries have urged the Commission to adopt a flexible, dynamic approach to repacking television stations.⁸ While the Commission's general approach of dividing stations into up to ten preliminary repacking phases may be a reasonable first step, any repacking plan based on a rigid, pre-determined schedule is unlikely to result in the most efficient transition possible. The Commission should heed these warnings and build into its plan the ability to adjust its schedule based on progress during the transition.

A. The Repacking Plan Should Incorporate Flexibility to Adjust Phase Assignments and Phase Deadlines

The Commission's plan to assign broadcasters to phases with fixed transition deadlines before the Commission, or repacked broadcasters themselves, know the scope of work involved with a particular transition is unlikely to be successful in practice. For example, Block Communications notes that at least two of its stations are located at sites that may require significant tower improvements – including potentially the need to replace the towers

⁸ See, e.g., Comments of T-Mobile USA, Inc. at 4-11, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (T-Mobile Comments); Comments of America Tower Corporation at 7-10, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (ATC Comments); Comments of Block Communications, Inc., Lima Communications Corporation, Independence Television Company, WAND(TVO Partnership, Idaho Independent Television, Inc., and West Central Ohio Broadcasting, Inc. at 3-7, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (Block Comments).

entirely or find new tower sites.⁹ More generally, Block also emphasizes the importance of getting additional information from broadcasters regarding their construction projects, some of which cannot possibly be known until after broadcasters receive their final channel assignments.¹⁰ For example, if a station is assigned a lower channel, it may require a larger and heavier antenna that could exceed the load limitation on the station's existing tower. Significant tower construction work itself could easily require the full 39-month transition period to accomplish. In the event that the Commission assigns a station that requires such work to an early repacking phase, the station will have been put in a no-win situation where, through no fault of its own, the station cannot possibly meet its repacking deadline. Assigning deadlines that are unachievable at the outset is not a reasonable approach to a complex project.

Other commenters urge the Commission to allow broadcasters and other knowledgeable stakeholders to provide input with respect to specific sites the FCC should identify as "complicated" sites that will not be assigned to early phases of the transition. NAB agrees with American Tower that the FCC "should afford parties a process by which to confirm that structures they consider to be complicated will, indeed, be treated by the Transition Plan as complicated."¹¹ Similarly, broadcasters recommend that the Commission "seek from broadcasters information regarding these types of complex build-outs *prior to* assigning stations to a transition phase and building that information into the model."¹² NAB supports these recommendations. The Commission should seek input regarding complicated projects,

⁹ Block Comments at 4-5.

¹⁰ *Id.* at 4, n. 5.

¹¹ ATC Comments at 5.

¹² Cordillera Comments at 11.

and should retain the flexibility to adjust phase assignments and deadlines based on additional information as it becomes available.

B. The Commission Should Accommodate Creative Repacking Solutions By Promptly Resolving Lingering Uncertainty Regarding Carriage Rights

In its original comments, NAB urged the Commission to allow broadcasters to develop creative solutions for overcoming repacking challenges while preserving service to viewers.¹³ In particular, NAB recommended allowing temporary channel sharing arrangements, on a wholly voluntary basis, as one potential tool for assisting in the transition.¹⁴ Other commenters also recommended adopting a flexible approach to temporary channel sharing on a wholly voluntary basis.¹⁵ NAB and other commenters also recommended that the Commission allow, again on a wholly voluntary basis, the use of temporary channels during the transition in some cases.¹⁶

Unfortunately, NCTA has previously opposed channel sharing arrangements other than those resulting from bids in the incentive auction and contended that stations engaged in such sharing would lose their must carry and retransmission consent rights.¹⁷ In this proceeding, NCTA similarly takes the position that any broadcasters seeking to use temporary channels during the transition would lose these rights.¹⁸

¹³ Comments of NAB at 10-12, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 28, 2016) (NAB Comments).

¹⁴ *Id.* at 11-12.

¹⁵ T-Mobile Comments at 9; Comments of OTA Broadcasting, LLC at 1-5, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 26, 2016).

¹⁶ NAB Comments at 15; T-Mobile Comments at 8.

¹⁷ Comments of the National Cable & Telecommunications Association at 4, GN Docket No. 12-268, MB Docket No. 15-137 (August 13, 2015); Letter from Diane B. Burstein to Marlene H. Dortch, GN Docket No. 12-268, MB Docket No. 15-137, MB Docket No. 03-185 (June 15, 2016).

¹⁸ Comments of NCTA – The Internet & Television Association at 3-5, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016).

NAB urges the Commission to expeditiously reject NCTA's parochial and cramped reading of the must carry provisions of the Cable Act. As NAB has previously explained, the Commission is well within its rights to extend must carry rights to stations engaged in voluntary channel sharing arrangements outside the auction, and such rights visit no harm whatsoever on MVPDs. If two stations have carriage rights before they enter into a channel sharing agreement, and they preserve carriage rights after entering the agreement, there is no increased burden for the MVPD.¹⁹ Similarly, if a station has carriage rights before the transition begins, and maintains these rights while operating on a temporary channel during the transition, the MVPD suffers no harm.²⁰

To prevent uncertainty leading into the transition, the Commission should expressly determine that stations operating on temporary channels or pursuant to temporary channel sharing will maintain their must carry and retransmission consent rights without alteration. We urge the Commission to act immediately in this regard, to provide clarity well in advance of the close of the auction and the commencement of the transition.

C. The Commission Should Provide Transparency Into the Progress of the Transition Without Placing Undue Burdens on Broadcasters

NAB has previously urged the Commission to provide transparency with respect to repacking progress. As NAB has noted, winning forward auction bidders should be kept apprised of the status of the transition so they can plan for testing and deployment, and broadcasters will similarly need to know the status of progress in their markets to ensure that

¹⁹ Reply Comments of NAB at 3-5, MB Docket No. 15-137, GN Docket No. 12-268 (Aug. 28, 2015).

²⁰ Both broadcaster and MVPD expenses associated with voluntary channel sharing or the voluntary use of temporary channels during the transition should be eligible for reimbursement from the broadcaster relocation fund.

channel cutovers can be as smooth as possible for viewers.²¹ Most critically, the Commission itself will not be able to adapt its repacking plan in real-time without an understanding of the progress of the transition.²²

Accordingly, NAB supports AT&T's proposal that the Commission establish a web portal to disseminate transition information to all affected parties.²³ To that end, broadcasters should be required to provide the Commission with an estimate as to when they will be able to complete their transition, and update those estimates periodically, based on major project milestones or when problems arise.

III. THE COMMISSION SHOULD PROTECT VIEWERS BY ADJUSTING ITS DEADLINE

The Commission's paramount concern in finalizing a plan for repacking over a thousand television stations to new channels should be preserving service for viewers wherever possible. This means that no station should be forced off the air, or forced to operate on reduced facilities, if it is unable to meet the Commission's arbitrary repacking deadline due to circumstance outside the station's control. Such an outcome unfairly penalizes repacked television stations and their viewers for a failure that is wholly of the Commission's making.

A. The Commission Should Reject False Urgency

CTIA's comments would have the Commission step into a time machine and revert back to a time when claims of a "spectrum crunch" or "spectrum crisis" appeared to have more credibility. CTIA begins by recycling its well-worn threats concerning the "staggering

²¹ Letter from Rick Kaplan to Marlene H. Dortch at 3, GN Docket No. 12-268 (March 21, 2016).

²² *Id.*

²³ Comments of AT&T at 3, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (AT&T Comments).

growth” in data usage by wireless customers and the projection that this growth will only continue to accelerate.²⁴ According to CTIA, this staggering growth “requires expeditious access to a variety of spectrum,” with the 600 MHz band representing “a crucial low-band component to unleashing [] innovation.”²⁵

This is a remarkable claim given the state of the incentive auction to date. The failure of CTIA’s members to engage in more robust bidding for spectrum has fatally undercut CTIA’s position in at least two ways. First, CTIA’s members have left spectrum on the table through their unwillingness to bid. The Commission began the incentive auction with a clearing target of 126 MHz – the highest eligible target – which would have made 100 MHz of spectrum available in the forward auction. After two unsuccessful stages, however, the Commission is now able to offer only 80 MHz of spectrum in the forward auction, and there is no guarantee the auction will close at that level. The wireless industry has clearly indicated that there is no requisite demand for these amounts of low-band spectrum.

Second, the unwillingness of CTIA’s members to bid at a sufficiently high level to allow a successful conclusion to the auction at an earlier stage has already delayed the transition. Bidding in the reverse auction began on May 31, 2016. The incentive auction is thus already the longest spectrum auction the FCC has ever conducted, and it is likely to continue for additional weeks, if not months, while the Commission waits for wireless carriers to step up their bidding to match their rhetoric regarding “the urgency for post-auction access to the 600 MHz spectrum.”²⁶

²⁴ Comments of CTIA at 1-2, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (CTIA Comments).

²⁵ *Id.* at 2.

²⁶ *Id.* at 6.

Similarly, CCA claims that the Commission should not adjust its arbitrary 39-month deadline because, by the end of that time, “broadcasters and suppliers of critical inputs will have had more than seven years to prepare for the introduction of new wireless broadband services contemplated by Congress’s adoption of the landmark Spectrum Act of 2012.”²⁷ Of course, CCA’s members have now had four years to prepare for bidding in the incentive auction, but that has not resulted in robust bidding that would have already closed the auction and started the process of clearing the spectrum CCA claims its members so desperately need.

Further, although the broadcast industry has been aware for years that the incentive auction would occur, it remains to this day uncertain whether any individual broadcaster will be repacked, let alone to what channel that broadcaster may be repacked, which can have enormous impact on the scope and type of planning necessary. It is wholly unreasonable to assert that broadcasters should have spent the past four years preparing for a repack about which they knew so little.

NAB agrees that the Commission should seek to clear the 600 MHz band as expeditiously as possible as long as viewers are protected in that process. But, in light of bidding in the forward auction to date, the Commission should not allow the wireless industry’s well-worn tropes regarding a spectrum shortage to overwhelm protecting viewers of existing television services, for whom the benefits of additional wireless spectrum are speculative at best.

²⁷ Comments of Competitive Carriers Association at 4, MB Docket No. 16-306; GN Docket No. 12-268 (Oct. 31, 2016) (CCA Comments).

B. The Commission's Deadline Is Likely Unachievable

Tellingly, the consensus among broadcasters who submitted comments in this proceeding is that the FCC's 39-month schedule for the transition reflects unduly optimistic assumptions, oversimplifies challenges, may compromise safety and is unlikely to be achievable in practice. If the Commission elects not to heed the input of commenters with substantial broadcasting experience, neither the Commission nor other stakeholders should be surprised if the repacking plan proves unsuccessful.

The record suggests that the proposed transition plan relies on assumptions that may not be validated in practice. While the proposed plan assumes that broadcasters and vendors will neatly queue resource demands and availability to coincide with the transition schedule, NAB agrees that, "supply and demand are unlikely to fit the neat linear models the Commission envisions."²⁸ The Commission's deadline for the submission of construction permit applications and cost estimates within three months, combined with the threat that stations will be forced off the air if they are unable to meet their transition deadline, is likely to result in stations racing to obtain access to vendors and services they will need for the transition. Rather than creating incentives for broadcasters to work cooperatively during the transition, "the Commission's repacking plan creates a paramount, 'every man for himself' incentive" that will inevitably lead to inefficiencies that will slow the progress of the transition.²⁹

The proposed repacking plan also makes assumptions regarding resource availability that may not prove accurate. American Tower states that, while the Commission assumes

²⁸ Cordillera Comments at 4.

²⁹ Comments of Sinclair Broadcast Group at 3, MB Docket No. 16-306, GN Docket No. 12-268 (Oct. 31, 2016).

there are 25 U.S. tower crews eligible to work on difficult sites, “American Tower has only approved 14 tower crews to work on its complicated sites, and it understands that other tower owners may similarly limit the number of crews they believe are qualified to work on complicated sites.”³⁰ Similarly, broadcasters warn the Commission that unreasonable deadlines and resource constraints may compromise safety.³¹ *The Commission must not substitute its judgment for that of broadcasters and tower owners with respect to which vendors are or are not qualified to perform repacking work safely and responsibly.*

The Commission’s repacking plan does not take into account likely delays due to weather and seasonal site access limitations. NAB agrees with commenters that, “weather is a far greater obstacle than the Commission staff seems to appreciate.”³² Some stations operate at sites that are inaccessible for month at a time due to heavy snow pack.³³ Cold weather and ice will affect the ability of tower crews to perform complex work safely and, at a minimum, will slow the pace of work.³⁴ Beyond cold weather, hurricane season can easily cause substantial delays for stations located in the southeast.³⁵ The proposed repacking plan does not reflect this fact, and there is currently no mechanism in place to address wholly predictable seasonal delays by adjusting phase assignments or deadlines.

The proposed repacking schedule also fails to consider regulatory hurdles outside the Commission’s control. While we take the Commission at its word that it will promptly process construction permit applications and cost estimates, to ensure that the FCC itself does not

³⁰ ATC Comments at 9.

³¹ Cordillera Comments at 14-16.

³² *Id.* at 5.

³³ *Id.*

³⁴ ATC Comments at 7.

³⁵ Cordillera Comments at 6.

become a source of delay in the transition, the Commission is not the sole government agency that may limit the pace of the transition. NAB supports the recommendation that the transition schedule should take into account the resource constraints of local zoning authorities and state and tribal historic preservation offices that will limit the ability of repacked broadcasters to expeditiously secure all needed approvals.³⁶ In particular, NAB supports the recommendation that the transition plan should afford more time for stations on towers in states and jurisdictions that have a history of delaying tower permits and zoning variations.³⁷ NAB also supports the recommendation that the transition plan account for potential FAA application processing delays associated with tower modifications, and that the Commission work with the FAA ahead of time to ensure that the FAA will process applications on an expedited basis.³⁸

Finally, the Commission should consider the potential impact on its repacking schedule of projects other than repacking broadcast television stations that will be ongoing during the transition. American Tower rightly notes that some tower crews “that would otherwise be eligible to work on non-difficult sites will be occupied with wireless sites” during the transition.³⁹ Additionally, however, the inputs to the Phase Assignment tool do not take account other licensees that may be collocated on towers used by broadcast television stations (such as radio and wireless facilities) and how those operations may affect the pace of the transition. In short, based on the comments of broadcasters and tower owners, it is

³⁶ ATC Comments at 8-9.

³⁷ Cordillera Comments at 13.

³⁸ *Id.*

³⁹ ATC Comments at 9.

clear that there are significant questions as to whether or not the Commission's 39-month deadline is achievable.

C. The Commission Should Protect Viewers By Adjusting the Deadline or Incorporating a Waiver Process

Given the serious concerns as to whether or not 1,100 television stations can successfully shift to new channels in just 39 months, the Commission's repacking plan should incorporate a safety valve that protects viewers and does not jeopardize continued service. Threatening broadcasters and their viewers with service losses solely due to the Commission's miscalculation is an irresponsible and unfair approach to the repacking challenge.

NAB has repeatedly urged the Commission to establish ambitious yet achievable deadlines for repacked television stations once the scope of the repack is clear.⁴⁰ NAB respectfully submits that this remains the best approach, and one that will be most conducive to an efficient repack. Accordingly, the Commission should reject AT&T's request to establish "consequences for failure" to meet deadlines regardless of whether or not those deadlines are achievable.⁴¹ The Commission should not punish stations for the FCC's decision to adopt an unrealistic and unachievable deadline.

While NAB does not object to sanctions for repacked broadcasters that fail to work diligently to complete their moves, no station should be subject to sanction for delays that are outside its control. Threatening broadcasters for missing an arbitrary deadline is fundamentally unreasonable. It is also foolhardy – as it removes any incentives for an orderly

⁴⁰ See Letter from Rick Kaplan to Marlene H. Dortch, Attachment at 15, GN Docket No. 12-268 (March 9, 2016); Letter from Patrick McFadden to Marlene H. Dortch at 2, GN Docket No. 12-268 (Jan. 29, 2016); Letter from Rick Kaplan to Marlene H. Dortch, Attachment at 15, GN Docket No. 12-268 (Nov. 9, 2015).

⁴¹ AT&T Comments at 4.

repack. Were the wireless industry subject to a similarly ambitious project with an arbitrary deadline, we seriously doubt that AT&T would volunteer to complete its work only after Verizon, Sprint and T-Mobile – even if this would result in the most efficient process – if the consequence for failure was the shutdown of AT&T’s network.

In the event, however, that the Commission elects to keep its 39-month deadline in place for purposes of establishing a repacking plan, it should, at a minimum, establish a predictable waiver process based on a clearly-defined standard. Waivers should not be subject to a “heavy burden of proof” as AT&T suggests, for the same reasons provided above. The Commission has selected an unrealistic deadline with no empirical basis. Should stations prove unable to comply with that deadline due to circumstances beyond their control, they should be able to remain on the air and continue to serve all of their viewers until they are able to complete their moves. NAB agrees with Scripps that repacking “is a first-of-its-kind project and the end result, if it doesn’t go perfectly, should not be a loss of service for viewers and a loss of stations for broadcasters.”⁴²

IV. CONCLUSION

When the incentive auction comes to a successful close, the Commission will be faced with a daunting task: the relocation of well over a thousand broadcast television stations to new channels. Even assuming best case scenarios unfold across the country, this will pose unprecedented logistical challenges for broadcasters and their vendors. The Commission’s own experience with previous large-scale transitions, such as the DTV transition and the reconfiguration of the 800 MHz band, should give the Commission and all affected stakeholders pause in assuming that best case scenarios will actually unfold. When

⁴² Comments of the E.W. Scripps Company at 2, MB Docket No. 16-306, GN Docket No. 12-268 (Oct. 31, 2016).

complications inevitably arise, under the Commission's current rules, viewers who depend on their current television service will bear the burden.

The Commission still has time to develop a plan for a successful transition, and the record of this proceeding lays out a roadmap for how the constructive proposals the Commission has set forth can be amended. The Commission must incorporate flexibility into its plan by retaining the flexibility to adjust phase assignments as stations provide more information concerning their individual projects. The Commission should also retain the flexibility to adjust phase deadlines to account for predictable and unpredictable delays. Most critically, the Commission should commit to the principle that it will not deprive viewers of service solely to comply with an artificial and counterproductive deadline.

Respectfully submitted,

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