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FCC Must Maintain Open Eligibility for Incentive Spectrum Auction

by

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When a government agency is assigned a difficult task with multiple complex parts, it's critical that the agency get the simple parts right. The FCC is now designing the upcoming two-sided spectrum incentive auction, an extraordinarily complicated endeavor. But if the FCC makes the simple mistake of barring highly capitalized wireless carriers from participating in the auction it would risk scuttling the entire undertaking.

Amidst the myriad engineering and economic complexities confronting the FCC, here is one simple thing it must get right: The FCC should keep the upcoming incentive auction, in which it hopes that TV broadcasters will voluntarily offer up spectrum for sale, open to all wireless providers.

Congress required that auction proceeds meet minimal thresholds or the auction fails. Open eligibility is critical to ensuring the auction produces enough bid revenue to succeed. An open approach is also essential to ensuring the most efficient approach whereby those carriers that will pay the most for spectrum licenses can put those resources to their highest use. Any concerns about spectrum concentration resulting from the auction, if proven according to proper evidentiary requirements conforming to due process, can be remedied through a divestiture and resale process once the auction is successfully completed.

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The right regulatory approach to spectrum auctions was the topic for examination by an expert panel at FSF's Fifth Annual Conference. The video for the spectrum panel is [here](#). Explained panelist Jeffrey Campbell, Vice President for The Americas, Government Affairs for Cisco Systems, "we are in a moment where the use of mobile devices for IP-related technologies is exploding like nothing we've ever seen before." [Cisco's Virtual Networking Index](#), for instance, projects that "[b]y 2017, wired devices will account for 45 percent of IP traffic, while Wi-Fi and mobile devices will account for 55 percent of IP traffic." And over the next five years, "TVs, tablets, mobile phones, and machine-to-machine (M2M) modules will have traffic growth rates of 24 percent, 104 percent, 79 percent, and 82 percent, respectively."

Mr. Campbell concluded:

[W]e need a significant amount of additional spectrum for licensed usages because of the huge demand that's going on. That calls for things like incentive auctions, and we need an incentive auction process where we maximize the availability of spectrum for licensed uses to give it the most intense use possible.

To its credit, Congress authorized the FCC to conduct a reverse auction incentivizing TV broadcasters to relinquish their spectrum licenses in the 600 MHz band in exchange for a portion of forward auction proceeds, including relocation cost recovery. The voluntarily relinquished licenses are to be repackaged and repurposed by the FCC, presumably to be purchased primarily by wireless carriers. Since the 600 MHz band is well-suited for wireless broadband, wireless carriers have expressed strong interest in bidding on licenses in that band for commercial use.

But following Congress's authorization of the TV broadcaster incentive auction, some have continued to urge the FCC to exclude certain highly capitalized wireless carriers from participating. Such an exclusionary approach would be a serious mistake.

To be sure, nothing in the legislation authorizing incentive auctions requires the FCC to impose *ex ante* rules that exclude wireless providers from participating in the bidding, either categorically or on a market-by-market basis.

Equally important, restricting auction participation could cause the auction to fail entirely. Congress requires that auction proceeds be plentiful enough to cover a variety of expenses. As CTIA's VP of Regulatory Affairs Christopher Guttman-McCabe explained in his panel remarks at FSF's Annual Conference:

[W]e need a financially successful auction for there to be any ability to have licensed or unlicensed spectrum. We need enough money to clear the broadcasters. I'm of the view that we should do whatever we need to do to get those broadcasters that want to participate and give them a desire to participate. Financially, let's not constrain what they might take away. Let's let the market determine that. We also need sufficient money to repack the remaining broadcasters, so that is another financially significant constraints. There's also a desire, as the Senator said, to reduce our deficit, pay down our debt, and to fund a

public safety network... [A]nd the reality is if we don't have a financially successful auction, nobody gets any spectrum.

Nonetheless, some have urged the FCC to exclude certain highly capitalized carriers, perhaps by twisting its existing spectrum screen into an outright bar on auction participation for those carriers.

Properly understood, the FCC's spectrum screen is an analytical tool to help focus and expedite the Commission's review of spectrum license transfers. A far more sensible approach to any TV broadcaster auction-related concerns about spectrum concentration – and one that is in keeping with the screen's true purpose – was offered by Verizon Executive Vice President Tom Tauke:

We have no difficulty with the FCC having a spectrum screen with roughly 30%, a third of the available spectrum, being if you exceed that, then the FCC takes a close look. We understand that policy. We understand that it is an adjunct, if you will, of a good antitrust policy... We also think the screen should be adjusted to reflect all the spectrum that is in the marketplace, which it does not now reflect... [W]hen they have the auction, the auction should permit all players to come and participate. First of all, a player should be given an option to buy spectrum and trade other spectrum or sell other spectrum if they want to. But all players should be able to participate, because that's how you get the best read of what's going on in the marketplace. That's how you get the most efficient allocation.

In other words, should market power concerns about spectrum concentration arise, those are best addressed in a proper evidentiary proceeding after the auction is completed. Rather than exclude wireless carriers with *ex ante* rules, the FCC can address potential competitive problems in an *ex post* case-by-case process. If there is evidence of likely market failure – that is, downstream market foreclosure – related to spectrum aggregation, the FCC can use targeted remedies. The winning bidder of spectrum from the incentive auction could be given opportunity to divest spectrum licenses of its choosing from its inventory to alleviate concentration concerns. The selected spectrum licenses would then be put up for sale in the secondary market.

This targeted approach offers certainty to wireless providers participating in the bidding. Giving wireless carriers the ability to divest the spectrum licenses of their choice will likewise better ensure that all such spectrum goes to its highest purpose. In addition, this remedial approach is less open to manipulation than having a government agency decide in advance of bidding where or how particular spectrum licenses should be reallocated.

Misgivings about possible restrictions on spectrum auction eligibility were also expressed by Professor Michelle Connolly, a member of the FSF Board of Academic Advisers and former Chief Economist of the FCC:

Two things in particular concern me in proposals in the incentive auction NPRM put out by the FCC. One is related to the spectrum screen and the uncertainty that that's bringing forward, not only for this auction but for future events. Another is the suggestion that we might want to have specific credits for certain groups of

people to have privileged status in the auctions. That has been shown to be a very bad thing.

For an example of an FCC privileging approach gone awry, look no further than the saga surrounding mid-1990s botched auction winner NextWave. The FCC took a restrictive, protectionist approach to spectrum auctions, rather than an open and market-oriented approach. This enabled the financially challenged NextWave to tie up valuable spectrum licenses and leave them unused. It took a decade-long legal drama to sort matters out so that spectrum lying fallow could begin to be put to use.

A successful incentive auction is essential for ensuring more spectrum is available to meet present and future demands for growing mobile data traffic. This means embracing an open eligibility and market-based approach to the auction. Open eligibility for highly capitalized wireless carriers is a simple imperative for a complex task.

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Further Readings

Randolph J. May, "[The FCC's Incentive Auction: Kiss It](#)," *FSF Blog* (June 17, 2013).

Seth L. Cooper, "[Spectrum Rules for Reducing Uncertainty Must Reject Unduly Regulatory FCC Precedents](#)," *Perspectives from FSF Scholars*," Vol. 7, No. 29 (September 24, 2012).

Seth L. Cooper, "[Pro-Investment Spectrum Policy Requires Open Eligibility and Flexibility](#)," *FSF Blog* (September 19, 2012).

Randolph J. May, "[Repurposing the FCC](#)," *Perspectives from FSF Scholars*," Vol. 7, No. 8 (April 2, 2012).

Randolph J. May, "[Spectrum Auctions and Communications Policy Reform](#)," *Perspectives from FSF Scholars*," Vol. 7, No. 5 (February 15, 2012).

Randolph J. May, "[Spectrum Policy – Who's Micro-Managing Who?](#)" *FSF Blog* (February 8, 2012).

Randolph J. May, "[Implementing Spectrum Incentive Auctions](#)" *FSF Blog* (January 16, 2012).

Michelle Connolly, "[Proposed FCC Incentive Spectrum Auctions: The Importance of Re-Optimizing Spectrum Use](#)," *Perspectives from FSF Scholars*," Vol. 6, No. 28 (November 8, 2011).