

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

December 11, 2012

To: Subcommittee on Communications and Technology Democratic Members and Staff
Fr: Committee on Energy and Commerce Democratic Staff
Re: Subcommittee Hearing on “Keeping the New Broadband Spectrum Law on Track”

On Wednesday, December 12, 2012, at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing titled “Keeping the New Broadband Spectrum Law on Track.” The hearing will examine spectrum provisions contained in Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, commonly known as the Public Safety and Spectrum Act (the Act).

In two areas in particular, unlicensed spectrum and bidder eligibility, the majority memorandum seeks to reopen issues that were resolved in the legislation. This memorandum provides additional background on these key issues.

I. KEY PROVISIONS OF THE PUBLIC SAFETY AND SPECTRUM ACT

A. Overview

The Act creates a nationwide, interoperable public safety broadband network called “FirstNet” and provides the Federal Communications Commission with incentive auction authority to efficiently and responsibly repurpose broadcast spectrum for commercial broadband services.¹ In order to make more spectrum available to handle increased demand for wireless broadband, the new law directs the FCC to auction up to 185 MHz of spectrum for commercial mobile broadband. Notably, the FCC for the first time is granted authority to conduct “incentive auctions,” a new kind of auction that compensates licensees who voluntarily relinquish their

¹ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 §§ 6001-6703 (hereinafter “Public Safety and Spectrum Act”).

spectrum usage rights.² In addition to provisions specifically designed for the repurposing of broadcast television spectrum for mobile broadband services through an incentive auction, the new law also contains critical provisions expanding unlicensed broadband operations and updating the FCC’s auction rules.

B. Broadcast Television Incentive Auction

Section 6403 of the Act requires the FCC to conduct an incentive auction of the broadcast television spectrum and includes provisions outlining specific auction procedures and safeguards for broadcast television licensees. First, the new law describes the “reverse auction” in which a broadcast television licensee may participate and accept compensation in exchange for voluntarily relinquishing some or all of its broadcast television spectrum usage rights.³ Second, the Act provides for reorganization, or “repacking,” of the broadcast television spectrum, allowing the Commission to “make such reassignments of television channels as the Commission considers appropriate” and to “reallocate such portions of such spectrum” the Commission deems available for reallocation, subject to international coordination with Mexico and Canada.⁴ Finally, the new law directs the FCC to conduct a “forward auction” in which it assigns licenses for the flexible use of the reallocated broadcast television spectrum, taking into consideration license areas covering a variety of sizes.⁵

In conducting the reorganization and reallocation of the broadcast television spectrum, the Act directs the FCC to make “all reasonable efforts to preserve ... the coverage area and population served of each broadcast television licensee” based on a specific methodology.⁶ The Commission may not involuntarily reassign a broadcast television licensee from a UHF to a VHF channel or from a high VHF (174 to 216 MHz) to a low VHF (54 to 88 MHz) channel.⁷ Furthermore, the Commission is directed to reimburse broadcast television licensees that are reassigned as well as multichannel video programming distributors (MVPDs) for costs

² Public Safety and Spectrum Act § 6402.

³ *Id.* at § 6403(a). Specifically, a broadcast television licensee may be compensated for giving up rights that include the following: “all usage rights with respect to a particular television channel without receiving in return any usage rights with respect to another television channel,” “all usage rights with respect to [a UHF] television channel in return for receiving usage rights with respect to a [VHF] television channel” or “usage rights in order to share a television channel with another licensee.”

⁴ *Id.* at § 6403(b)(1).

⁵ *Id.* at § 6403(c).

⁶ *Id.* at § 6403(b)(1).

⁷ *Id.* at § 6403(b)(3).

reasonably incurred as a result of relocation.⁸ Total reimbursement available for all licensees is capped at \$1.75 billion and must be made within three years of completion of the forward auction.⁹

The Act permits the FCC to conduct the reverse auction, the reassignment or reallocation, and the forward auction at the same time.¹⁰ The Commission may only complete one reverse auction and one reorganization of the broadcast television spectrum under the bill.¹¹ Net proceeds from the incentive auction must be deposited in the Public Safety Trust Fund established by the Act.¹² The reverse auction and the forward auction provisions for the broadcast television spectrum expire after the end of fiscal year 2022.¹³

C. Unlicensed Spectrum

Unlicensed spectrum is available for use by the public and is utilized for everyday communications services such as home Wi-Fi, public Wi-Fi hot spots, and Bluetooth connections. Recognizing the role unlicensed spectrum plays in driving innovation and economic growth, the Act paves the way for the creation of a nationwide band of spectrum for unlicensed operations within the broadcast television frequencies to be repurposed for wireless broadband services.¹⁴ It accomplishes this goal in three ways. First, for those television bands that are not repurposed for other uses, it preserves the FCC’s authority to allow unlicensed operations in the unused spectrum between television channels, otherwise known as “white spaces.”¹⁵ Second, it gives the FCC the authority to optimize existing TV white spaces for unlicensed use by consolidating the existing white spaces into more optimal configurations through band plans.¹⁶ Finally, it preserves the FCC’s authority to use “relinquished or other spectrum” to implement nationwide band plans with “guard bands.”¹⁷ Such guard bands may not be larger than is “technically reasonable to prevent harmful interference between licensed

⁸ *Id.* at § 6403(b)(4). Lost revenues are not reimbursable.

⁹ *Id.* at § 6403(b)(4)(D).

¹⁰ *Id.* at § 6403(f)(1).

¹¹ *Id.* at § 6403(e).

¹² *Id.* at §§ 6401(c)(4), 6402, 6413.

¹³ *Id.* at § 6403(f)(3)-(4).

¹⁴ *Id.* at § 6407.

¹⁵ *Id.* at § 6403(i)(2).

¹⁶ *Id.* at § 6403(b)(1)(B)(i)

¹⁷ *Id.* at § 6407(a).

services outside the guard band” and may be used by unlicensed services.¹⁸ Such unlicensed services must rely on a database or subsequent methodology as determined by the FCC and may not cause harmful interference to licensed services.¹⁹

The majority memorandum incorrectly asserts that “construing section 6403 as mandating that the FCC auction all the spectrum it clears, *as a plain reading of the language requires*, is perfectly consistent with section 6407.”²⁰ In other words, the majority states that the FCC is required to auction even the guard bands that protect licensed bands against harmful interference, which the law says may be made available for non-interfering unlicensed uses. Contrary to this assertion, there is no requirement in the Act that the FCC auction guard bands. Section 6407(a) expressly provides that “relinquished ... spectrum” can be used for guard bands and that these guard bands can be used for “unlicensed use.”²¹

The legislative history also conflicts with the interpretation in the majority memorandum. During Committee consideration of the legislation, the majority circulated a discussion draft that would have required the FCC to auction any spectrum intended for unlicensed use.²² Despite Democratic objections, a version of that proposal was included in H.R. 3630, which was not considered by the full Energy and Commerce Committee but passed the House on December 13, 2011.²³ During the bipartisan, bicameral negotiations that produced the final legislative language, those provisions were modified by the compromise language regarding guard bands described above.²⁴ In short, Congress specifically rejected the very approach the majority memorandum now suggests was written into the law.

D. FCC Auction Rules

Under current law, the FCC has broad authority to craft auction rules consistent with the public interest. The agency has used this authority to ensure that communications markets remain competitive and spectrum is not concentrated in the hands of a monopoly or duopoly of providers. The Act restricts the FCC’s ability to single out specific providers for exclusion from a system of competitive bidding, but explicitly preserves the ability of the FCC to: (1) ensure

¹⁸ *Id.* at § 6407(b)-(c).

¹⁹ *Id.* at § 6407(d)-(e).

²⁰ House Committee on Energy and Commerce, Majority Staff, *Hearing on “Keeping the New Broadband Spectrum Law on Track* at 4 (Dec. 10, 2012) (emphasis added).

²¹ Public Safety and Spectrum Act §§ 6407(a), (c).

²² *See* Discussion Draft of the “Spectrum Innovation Act of 2011” § 104 (July 26, 2011).

²³ H.R. 3630.

²⁴ *See* Extension of Remarks of Rep. Henry A. Waxman, Congressional Record, 112 Cong. Rec. E266 (Feb. 28, 2012).

bidder compliance with FCC auction procedures and other requirements to protect the auction process; (2) impose certain technical, financial, character, and citizenship qualifications as may be required by the Commission to hold a license; and (3) adopt and enforce “rules of general applicability,” including rules concerning “spectrum aggregation that promote competition.”²⁵

As amended, section 309(j)(17) of the Communications Act ensures every carrier is eligible to participate in a system of competitive bidding. The Act preserves the FCC’s ability to require those carriers to come into compliance with applicable spectrum holding limitations and all other license qualifications of any type prior to granting a particular license. It also preserves the FCC’s authority to restrict who may bid on portions of the spectrum to be auctioned so long as no carrier is prohibited from the “system of competitive bidding.” For example, if the FCC divided the spectrum to be auctioned into two blocks and allowed carriers to bid for only one block, this would be consistent with the statutory language because no carrier would be prohibited from participating in the “system of competitive bidding.”

Subparagraph 17(B) regarding the agency’s authority to adopt and enforce “rules of general applicability” clarifies that Congress intends for the FCC to continue to promote competition through its spectrum policies. Under the terms of this provision, the FCC can adopt and enforce, for example, a spectrum cap through a rule that applies either to all licenses or to spectrum offered in a particular auction as long as such rules are not party-specific. This provision thus preserves the FCC’s ability to require, among other things, the divestiture of specific spectrum in specific markets, such as spectrum below 1 GHz, in order to promote competition.

II. FCC IMPLEMENTATION

The FCC has taken several steps to begin implementation of the spectrum provisions of the new law. On March 27, 2012, the FCC announced a group of leading experts in auction theory and implementation that will help the agency carry out its new incentive auction authority.²⁶ On April 27, the FCC adopted an order establishing a framework for broadcasters to participate in channel sharing agreements with other stations.²⁷ On June 25, the Commission held a workshop on the design of the FCC’s program to reimburse broadcasters for costs associated with channel reassignments in connection with the repacking authorized by the new

²⁵ Public Safety and Spectrum Act § 6404.

²⁶ Federal Communications Commission, *FCC Announces Paul Milgrom and Other Leading Auction Experts to Advise Commission on Incentive Auction Design and Implementation* (Mar. 27, 2012).

²⁷ Federal Communications Commission, *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements* (ET Docket No. 10-235), Report and Order (Apr. 27, 2012).

law.²⁸ The Commission subsequently launched an educational program for broadcasters, the Learn Everything About Reverse Auctions Now (LEARN) Program, and held a workshop to provide an overview of the incentive auction process on October 26, 2012.²⁹

On September 28, 2012, the FCC adopted a Notice of Proposed Rulemaking on the implementation of the Act.³⁰ The FCC is seeking comment on the auction design, including how bidding will work in both the reverse and forward auctions and how to implement broadcaster repacking in a manner that clears spectrum as quickly as possible while minimizing disruption to broadcasters and their viewers.³¹ In addition, the FCC proposes a band plan for the reclaimed broadcast spectrum that would establish 6 MHz-wide guard bands between wireless and broadcast use which would be available for unlicensed services.³² The FCC also asks whether and how the Commission should address spectrum aggregation issues in the auction.³³ On November 29, 2012, the FCC granted a request by the National Association of Broadcasters and CTIA –The Wireless Association to extend the initial comment deadline from December 21, 2012 to January 25, 2013, with reply comments due on March 12, 2013.³⁴

²⁸ Federal Communications Commission, *FCC Announces Details for June 25, 2012 TV Broadcaster Relocation Fund Workshop* (June 1, 2012).

²⁹ Federal Communications Commission, *FCC Launches Broadcaster L-E-A-R-N Program to Offer In-Depth Resources & Services to Broadcaster Community About the Unique Financial Opportunities of Incentive Auctions* (Sept. 28, 2012).

³⁰ Federal Communications Commission, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions* Notice of Proposed Rulemaking (Oct. 2, 2012).

³¹ *Id.*

³² *Id.*

³³ *Id.* The FCC also adopted a separate NPRM to examine mobile spectrum holdings policies that apply to both transactions and auctions. See Federal Communications Commission, *In the Matter of Policies Regarding Mobile Spectrum Holdings* Notice of Proposed Rulemaking (Sept. 28, 2012).

³⁴ Federal Communications Commission, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions* Order (Nov. 29, 2012).

III. WITNESSES

Julius Genachowski

Chairman

Federal Communications Commission

Robert M. McDowell

Commissioner

Federal Communications Commission

Mignon Clyburn

Commissioner

Federal Communications Commission

Jessica Rosenworcel

Commissioner

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Ajit Pai

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