

ALERT

# D.C. Circuit Upholds FCC Incentive Auction Order, Allowing Auction Process to Continue Forward

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June 15, 2015

Marking a win for the Federal Communications Commission (Commission or FCC) in the latest incentive auction battle, on June 12, 2015, the D.C. Circuit sustained the Commission's Incentive Auction Order and a related Declaratory Ruling. As we explained before, the Order, adopted on May 15, 2014, sets forth the rules of the upcoming reverse and forward auctions, and also lays out the FCC's repacking plan. The Declaratory Ruling, released September 30, 2014, clarifies the Commission's approach to repacking. Rejecting the arguments presented by Petitioners—the National Association of Broadcasters (NAB) and Sinclair Broadcast Group, Inc. (Sinclair)—a three-judge panel upheld the Commission's decisions, allowing the incentive auction process to continue forward.

Petitioners advanced both substantive and procedural objections to aspects of the FCC's incentive auction decisions. The majority of the challenges related to the Commission's attempt to carry out the Spectrum Act's mandate that it use "all reasonable efforts" to preserve "the coverage area and population served" by television broadcast stations during the repacking process. 47 U.S.C. § 1452(b) (2). Petitioners took issue with the FCC's decision to use new computer software (called "TVStudy")—along with population data that was not available when Congress adopted the Spectrum Act—to calculate coverage area and population served. These aspects of the repacking process will reduce the degree of protection afforded some stations, and the petitioners argued that the Spectrum Act prohibited the use of the new software and data. The Court reasoned, however, that the Commission could "fulfill th[e] forward-

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looking mandate” by using the newer software and data and upheld its decision to do so. The Court also sided with the Commission on the broadcasters’ procedural challenge to the use of TVStudy and updated population figures. The petitioners argued that because the Office of Engineering and Technology (OET), rather than the full Commission, issued notice of the proposed action, the notice was inadequate under the Administrative Procedure Act. The Court found, however, that any procedural error that may have resulted was harmless because the notice was published in the Federal Register and parties had an opportunity to comment.

Similarly, the D.C. Circuit held that the FCC’s approach to terrain loss—which is the coverage loss caused by a station’s new frequency interacting differently with the terrain of the coverage area—was reasonable, noting that “[t]he term ‘reasonable’... opens a rather large area for the free play of agency discretion.” Additionally, the Court agreed with the FCC that the Spectrum Act does not require protection of fill-in translators because such translators are not “full-power television stations[] and they do not qualify as Class A stations.” Thus, even though the “coverage area and population served” by a station today may include areas and persons served by fill-in translators, the Court agreed that the FCC does not need to protect those areas and persons in the repacking process.

Sinclair separately challenged two aspects of the Incentive Auction Order, but the Court rejected both of its arguments. First, Sinclair argued that the 39-month go-dark period—during which time a station must apply for a construction permit and fully transfer facilities to a new station—was unreasonably short, in part because of the limited number of tower crews available to construct modified facilities. The Court disagreed, however, and upheld the Commission’s “predictive judgment” that service providers would step up and respond to the surge in demand. Sinclair also argued that the Commission incorrectly interpreted the requirement that “at least two competing licensees participate in the reverse auction” to allow the auction to go forward as long as two licensees in any geographic area submit applications to take part in the auction. The Court disagreed with this argument too, finding the FCC’s “broad understanding of the two-participant requirement” consistent with the Spectrum Act.

In a statement released following the ruling, the NAB reiterated that it “remain[s] committed to working with policymakers to ensure a successful auction that protects the interests of broadcasters, whether they participate or not, and does not disenfranchise [its] tens of millions of viewers.” Chairman Wheeler also released a statement, indicating that Friday’s ruling will help the Commission stay on pace for a successful auction in the first quarter of 2016.