

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

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

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)<sup>1</sup> hereby replies to oppositions<sup>2</sup> filed in response to NAB’s petition for reconsideration of a Public Notice adopting a plan to develop a schedule to transition repacked television stations to new channels following the close of the broadcast spectrum incentive auction.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> Opposition of T-Mobile USA, Inc. to the Petition for Reconsideration Filed by the National Association of Broadcasters, GN Docket No. 12-268, MB Docket No. 16-306 (April 26, 2016) (T-Mobile Opposition); Opposition of Competitive Carriers Association to the Petition for Reconsideration Filed by the National Association of Broadcasters, GN Docket No. 12-268, MB Docket No. 16-306 (April 26, 2016) (CCA Opposition); CTIA Opposition to the Petition for Reconsideration Filed by the National Association of Broadcasters, GN Docket No. 12-268, MB Docket No. 16-306 (April 26, 2016) (CTIA Opposition).

<sup>3</sup> *Incentive Auction Task Force and Media Bureau Adopt a Post-Incentive Auction Transition Scheduling Plan*, Public Notice, MB Docket No. 16-306, GN Docket No. 12-268, DA 17-107 (Jan. 27, 2017) (Public Notice).

NAB asked the Commission to reconsider aspects of the scheduling plan for the transition of repacked television stations.<sup>4</sup> While certain decisions made by a previous Commission exacerbated the repacking challenge,<sup>5</sup> the current Commission can mitigate the harm to viewers and broadcasters by adopting a more flexible, fact-based approach to the repack. The parties opposing NAB's petition for reconsideration ask the current Commission to ignore information that is or will soon be available to it. The result of this approach will be to deprive viewers and listeners of broadcast television and radio service for the benefit of a single nationwide wireless carrier that already has substantial spectrum holdings in other bands. We urge the Commission to grant NAB's petition.

#### **I. NAB'S PETITION IS PROCEDURALLY PROPER**

The oppositions to NAB's petition for reconsideration all largely consist of the accusation that NAB's petition constitutes an untimely petition for reconsideration of the 39-month deadline for repacking the Commission adopted in its 2014 Report and Order.<sup>6</sup> This is a specious argument, for at least two reasons.

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<sup>4</sup> Petition for Reconsideration of the National Association of Broadcasters at 5-16, GN Docket No. 12-268, MB Docket No. 16-306 (March 17, 2017) (NAB Petition).

<sup>5</sup> In particular, the Commission's refusal to treat the \$1.75 billion TV Broadcaster Relocation Fund as a budget for repacking unnecessarily and irrevocably complicated the transition. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6831-6832 ¶¶ 646-648 (2014); see also *id.* at 7041-7042 (Commissioner Pai, dissenting, stating "the Commission should have adopted a \$1.75 billion budget for any repack.") A more responsible decision could have limited the number of stations that would need to move and ensured that stations would not need to go out of pocket to fund their relocation – which itself would have helped speed the repacking process for those stations with limited financial resources. Instead, in a plain case of picking winners and losers by regulatory action, the Commission took an unconstrained approach to repacking.

<sup>6</sup> T-Mobile Opposition at 3-9; CCA Opposition at 1-2, 9-13; CTIA Opposition at 4-7.

First, this claim is patently false. In its petition, NAB sought specific reforms of the transition plan set forth in the Public Notice. In particular, NAB asked the Commission to:

- Grant the Media Bureau authority to approve reasonable requests for extensions of time;
- Direct the Media Bureau to adjust phase assignments to reflect to scope of work repacking will require (which will not be known until stations have completed engineering analyses);
- Take additional steps to mitigate disruption to FM stations and other broadcasters during repacking;
- Take a more proactive role in managing the repack; and
- Clarify international coordination requirements for repacked stations.<sup>7</sup>

These specific requests for reconsideration, which are largely unaddressed by the oppositions, are discussed in greater detail below.

Second, the 39-month deadline remains subject to a pending petition for reconsideration. NAB, or any stakeholder for that matter, remains free to comment on that pending petition and advocate for or against its grant. T-Mobile,<sup>8</sup> CCA and CTIA know this, because they have each continued to argue that the Commission should not adjust the 39-month deadline.<sup>9</sup>

Obviously, reconsideration of the transition scheduling plan set forth in the Public Notice is informed by, and inextricably linked to, the Commission's 39-month deadline, which

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<sup>7</sup> NAB Petition at 5-16.

<sup>8</sup> T-Mobile's procedural objections are ironic given that T-Mobile failed to serve NAB with a copy of its opposition, in violation of the Commission's rules. 47 C.F.R. § 1.429(f).

<sup>9</sup> See, e.g., Letter from Davina S. Sashkin to Marlene H. Dortch, GN Docket No. 12-268, MB Docket No. 16-306 (March 22, 2017); Letter from Rebecca Murphy Thompson to Marlene H. Dortch, MB Docket No. 16-306 (Dec. 8, 2016); Comments of CTIA at 7, 15, GN Docket No. 12-268, MB Docket No. 16-306 (Oct. 31, 2016).

drives many of the elements of the plan. There is nothing remotely improper about linking reconsideration of the scheduling plan to the pending petition for reconsideration of the 39-month deadline.

CTIA also argues that NAB's petition is procedurally improper under Section 1.429 of the Commission's rules because that section "pertains only to petitions for reconsideration of final actions in *rulemaking* proceedings."<sup>10</sup> CTIA argues that the FCC has previously held that public notices establishing pre-auction procedures pursuant to the Commission's Part 1 competitive bidding rules are not final actions in rulemaking proceedings.<sup>11</sup> While CTIA is correct as a general matter, its claim does not apply to this Public Notice. Unlike the cases CTIA cites, the Public Notice in this case does not deal with pre-auction procedures or the day-to-day conduct of the auction. Further, in seeking comment on its transition plan, the Media Bureau and Incentive Auction Task Force expressly sought comment pursuant to the Commission's rules regarding rulemaking proceedings.<sup>12</sup> If CTIA believes the Public Notice not to be a final action in a rulemaking proceeding, its quarrel is with the Bureau and the Task Force, not with NAB.

In short, the opposing parties largely rely on misplaced procedural arguments that reflect a refusal to engage with the substance of NAB's petition. The Commission should disregard these arguments, and grant NAB's requests for reconsideration.

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<sup>10</sup> CTIA Opposition at 5-6 (emphasis in original).

<sup>11</sup> *Id.*

<sup>12</sup> *Incentive Auction Task Force and Media Bureau Seek Comment on Post-Incentive Auction Transition Scheduling Plan*, Public Notice, 31 FCC Rcd 10802, ¶ 32 (2016) (Comment Notice).

## II. THE COMMISSION SHOULD RECONSIDER THE PUBLIC NOTICE

As an initial matter, in its petition, NAB asked the Commission to direct the Media Bureau to take a more proactive role in managing the transition, by appointing regional coordinators to serve as primary points of contact for repacked stations. NAB believes this request has been mooted by the subsequent release of a public notice announcing regional coordinators to facilitate repacking.<sup>13</sup> NAB commends the Media Bureau and the Task Force for this action, which will benefit all stakeholders.

In its petition, NAB sought reconsideration of four additional aspects of the Public Notice. None of the opposing parties raise arguments that should prevent the Commission from granting NAB's requests.

First, NAB asked the Commission to allow the Bureau to grant reasonable requests for waivers allowing stations to remain on their pre-auction channels beyond the deadlines established by the transition scheduling plan.<sup>14</sup> In response CTIA asserts that the Commission's rules already permit the grant of extensions of time to construct facilities.<sup>15</sup> While true, this response is irrelevant. Grant of an extension of time to construct does not, in and of itself, allow a repacked station to continue operation on its pre-auction channel until construction is complete, which is the only way to preserve service to all of that station's viewers.

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<sup>13</sup> *Incentive Auction Task Force and Media Bureau Announce Regional Coordinators to Facilitate Post-Auction Transition for Broadcast Stations*, Public Notice, GN Docket No. 12-268, MB Docket No. 16-306, DA 17-376 (April 20, 2017).

<sup>14</sup> NAB Petition at 5-8.

<sup>15</sup> CTIA Opposition at 9.

CCA, meanwhile, asserts that the Public Notice provides for waivers of construction permit deadlines that “specifically demonstrate that implementation would not interfere with other stations’ transition efforts.”<sup>16</sup> This point, however, does not address the problem. Of course the Commission should grant waivers where there would be no impact on the transition schedule. The relevant question before the Commission, however, is whether it is willing to deprive viewers of service for extended periods of time to maintain the existing repacking schedule that will primarily benefit T-Mobile. If it is not, the Commission must build into its repacking plan additional flexibility to allow stations to continue to operate on their pre-auction channels if those stations, despite diligent efforts, are unable to complete their transition by their assigned deadline.

NAB greatly appreciates the creativity and flexibility shown by the Media Bureau in its willingness to consider options for stations to remain on the air if they are unable to complete their transition, including the use of auxiliary facilities or temporary channels. The reality, however, is that these options – likely the best available in many cases – will involve loss of service to viewers. Temporary or auxiliary facilities will simply not allow stations to continue to serve those who currently rely on their signals. NAB does not doubt the Media Bureau’s commitment to maintaining service to viewers. However, the Commission must provide the Bureau the flexibility to do so, or viewers will lose signals.

Second, NAB asked the Commission to direct the Bureau to adjust phase assignments for particular stations to reflect the scope of work involved in those stations’ relocation to new channels.<sup>17</sup> In response, CTIA asserts that the Public Notice takes into consideration the

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<sup>16</sup> CCA Opposition at 8.

<sup>17</sup> NAB Petition at 8-10.

scope of work required for repacking as a whole.<sup>18</sup> Even if one were to accept that contention, it does not address NAB's point; namely that the Commission has assigned individual stations to phases with specific deadlines months before the stations themselves, let alone the Commission, understand the scope of work those individual stations will require to effectuate their channel changes.

CTIA also asserts that NAB is raising only "hypothetical concerns" rather relying on actual facts, and suggests that NAB should have relied on the data NAB collected and made publicly available in a clearinghouse of repacking information to document specific repacking issues.<sup>19</sup> This claim demonstrates the dangers of relying on the wireless industry for reliable information concerning the repacking of broadcasters. As NAB explained in its petition, broadcasters cannot know exactly what work will need to be done prior to completing engineering analyses, including, for example, structural analyses of towers.<sup>20</sup> That is not possible based on the information collected in the NAB clearinghouse or publicly released by the Commission.

There should be no disagreement that assigning stations specific deadlines to complete construction before knowing the scope of work will not always produce accurate outcomes. NAB has asked that the Commission allow the Media Bureau to adjust phase assignments as necessary based on the facts, not proxies and assumptions built into a computer model. This is a logical approach. The only reason to oppose it is concern that it could conceivably threaten the transition schedule if the scheduling plan's assumptions prove incorrect. If the Commission adopts the oppositions' views, it will be agreeing that it is more

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<sup>18</sup> CTIA at 9.

<sup>19</sup> *Id.* at 9, n. 37.

<sup>20</sup> NAB Petition at 6, 9.

important to clear spectrum for T-Mobile than to maintain service to viewers and listeners of stations across the country.

Third, NAB asked the Commission to direct the Media Bureau and Task Force to revise the scheduling plan to minimize disruption to FM stations and other non-repacked broadcasters. In response, CCA and CTIA state that the Media Bureau and Task Force had already revised the plan to accommodate concerns regarding broadcasters that share facilities with repacked television stations.<sup>21</sup> In particular, the Public Notice announced that the Media Bureau and Task Force had reduced the “same tower discount” applicable in developing the transition schedule.

While we appreciate this effort by the Media Bureau and Task Force, CCA and CTIA miss the point. The “same tower discount” reduces the amount of time the scheduling plan estimates to complete work on a tower if more than one television station on the tower is transitioning in the same phase.<sup>22</sup> The discount thus does not take into account the presence of non-repacked broadcasters on a tower. As NAB noted in its petition, it is customary to try to schedule tower work at off-peak hours to avoid disruption to other broadcasters on a tower.<sup>23</sup> To accommodate this industry standard approach, the Commission would need to allow *more* time for repacked broadcasters on towers with other broadcast stations, regardless of whether there are other repacked television stations on those towers. Reducing the same tower discount does not address this problem.

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<sup>21</sup> CCA Opposition at 7-8; CTIA Opposition at 11-12.

<sup>22</sup> Comment Notice at ¶ 50.

<sup>23</sup> NAB Petition at 12.



Finally, NAB asked the Commission to direct the Media Bureau and the Task Force to clarify international coordination requirements.<sup>24</sup> The Public Notice is ambiguous regarding the need for stations in border regions to coordinate their channel assignments with Canada or Mexico. No opposing party addressed this request. As it currently stands, stations along the borders that have been repacked do not know whether their new channel assignments, determined exclusively by the Commission, will require coordination. Additionally, foreign station channel allotment parameters have not yet been released. This injects a level of uncertainty into the repack that benefits no one.

Additionally, NAB noted that Canadian stations still lack a funding mechanism for transitioning to new channels, and it is not clear that they will be able to accomplish their transition in a synchronized fashion with U.S. stations. NAB asked the Commission to clarify how it will address the transition of U.S. stations where that transition would impact Canadian stations that have not yet changed channels. Similarly NAB noted that a number of Mexican DTV stations above TV Channel 37 are broadcasting in the border area. As with Canada, there is no funding mechanism in place to move Mexican stations to new channels, and NAB sought clarification as to how the Bureau will address issues resulting from the delayed transition of Mexican TV stations. Again, no party opposed this request, and the Commission should direct the Bureau to provide this clarification.

### **III. CONCLUSION**

Setting aside the misguided procedural arguments raised in opposition to NAB's petition for reconsideration, the opposing parties essentially insist that the current Commission should continue the previous Commission's practice of favoring the wireless

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<sup>24</sup> *Id.* at 15-16.

industry over broadcast viewers and listeners. We urge the Commission to reverse this course, and at least provide the Media Bureau with the flexibility to adjust its schedule to reflect the facts as they unfold.

Respectfully submitted,

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

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Rick Kaplan  
Patrick McFadden

Bruce Franca  
Alison Neplokh  
Robert Weller

May 8, 2017

**CERTIFICATE OF SERVICE**

I, Susan Baurenfeind, certify that on this 8<sup>th</sup> day of May, 2017, I have caused a true and correct copy of the foregoing Reply to Opposition to Petitions for Reconsideration to be served via first class mail, postage paid, upon:

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