

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Expanding the Economic and Innovation) GN Docket No. 12-268
Opportunities of Spectrum Through)
Incentive Auctions)

**PETITION FOR RECONSIDERATION OF THE ASSOCIATION OF PUBLIC
TELEVISION STATIONS, CORPORATION FOR PUBLIC BROADCASTING,
AND PUBLIC BROADCASTING SERVICE**

The *Report and Order* adopting rules for the broadcast spectrum incentive auction overturns more than six decades of Commission precedent protecting reserved spectrum for noncommercial educational service, contrary to the statutory requirements of the Administrative Procedure Act and frustrating the congressional goals embodied in the Public Broadcasting Act of 1967.¹ For over 62 years, the Commission has reserved spectrum in the Table of Allotments for exclusive noncommercial educational use, but the *Report and Order* reverses this well-settled policy *sub silentio* by making the continued existence of noncommercial educational reserved spectrum subject entirely to market forces.² The Commission did not provide the required notice or reasoned analysis for this unprecedented reversal of longstanding policy.

The Association of Public Television Stations, Corporation for Public Broadcasting, and Public Broadcasting Service (collectively, the “PTV Petitioners”) file this Petition for Reconsideration pursuant to Section 1.429 of the Commission’s rules.³ The PTV

¹ Administrative Procedure Act of 1946, 5 U.S.C. § 553, 706(2)(A); Public Broadcasting Act of 1967, 47 U.S.C. § 396(a)(5), (7).

² *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, FCC 14-50, ¶¶ 367–68 (rel. June 2, 2014) (“*Report and Order*”). The *Report and Order* was published in the Federal Register on August 15, 2014. 79 Fed. Reg. 48442 (Aug. 15, 2014).

³ 47 C.F.R. § 1.429 (2013).

Petitioners urge the Commission to reconsider and revise its incentive auction rules so that a noncommercial educational station operating on a reserved channel may relinquish all of its spectrum usage rights only if at least one such station remains on-air in the community or at least one reserved channel is preserved during the repacking process to enable a new entrant to offer noncommercial educational television service in the community.⁴ This balanced approach would continue the Commission’s long-established reserved spectrum policy, while also enabling the success of the incentive auction.

I. WITHOUT THE REQUIRED NOTICE OR ANALYSIS, THE *REPORT AND ORDER* REVERSES LONGSTANDING COMMISSION POLICY BY MAKING THE CONTINUED EXISTENCE OF NONCOMMERCIAL EDUCATIONAL RESERVED SPECTRUM SUBJECT ENTIRELY TO MARKET FORCES.

For as long as there has been a television Table of Allotments, the Commission has reserved a significant portion of the television channels for noncommercial educational use. The Commission has recognized that if these channels were not reserved, market forces acting alone would result in a “sparse and haphazard” noncommercial educational television service, contrary to the public interest.⁵ Without the required notice or reasoned analysis, the rules adopted in the *Report and Order* effectively reverse more than six decades of Commission policy preserving these reserved channels, contrary to the requirements of the Administrative Procedure Act.⁶

A. For More Than Six Decades, the Commission’s Established Policy Has Been to Set Aside Reserved Channels for Noncommercial Educational Service, Rather Than Leave Such Service to Market Forces.

The Commission has long recognized the inherent value in reserving a significant portion of the television band for noncommercial educational service. As far back as 1952, the

⁴ Note that this would not preclude any stations from channel sharing or moving to the VHF band.

⁵ *Amendment of Section 3.606 of the Commission’s Rules and Regulations et al.*, Sixth Report & Order, 41 F.C.C. 148, ¶ 33, 41 (Apr. 11, 1952) (“*Sixth R&O*”).

⁶ 5 U.S.C. § 553, 706(2)(A).

Commission concluded that “as a matter of policy certain assignments in the VHF and UHF would be reserved for the exclusive use of non-commercial television stations” because the “public interest will clearly be served” if reserved channels are used to “contribute significantly to the educational process of the nation.”⁷ These findings have served as a foundation for Commission policy for more than 62 years.

Over the ensuing six decades, the Commission “sought to reserve approximately twenty-five percent of television channels for noncommercial use.”⁸ Throughout that time, the Commission acknowledges that it “has repeatedly denied requests to delete reserved channels, citing as a principal reason for doing so the need to preserve the future availability of the channels.”⁹

While the *Report & Order* states that the Commission’s “central objective in designing this incentive auction is to harness the economics of demand for spectrum in order to allow market forces to determine its highest and best use,” that has never been the case with the Commission’s creation and subsequent treatment of reserved spectrum.¹⁰ To the contrary, the Commission set aside reserved channels specifically to shield a portion of the public airwaves from market forces so that programming would have an opportunity to be created that fills the gaps left by market failures, such as curriculum-based educational children’s content. For instance, the Commission acknowledged in a 1981 review of policy concerning the noncommercial nature of educational broadcast stations that the “Commission’s interest in creating a ‘noncommercial’ service has been to remove the programming decisions of public

⁷ *Sixth R&O* at ¶ 33, 38.

⁸ *Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania*, Mem. Op. & Order, FCC 96-314, 11 FCC Rcd 11700, 11708 (1996) (“*First WQED Order*”).

⁹ *Id.* See also *Report & Order* at ¶ 704.

¹⁰ *Report & Order* at ¶ 2. See also *id.* at ¶ 367.

broadcasters from the normal kinds of commercial market pressures under which broadcasters in the unreserved spectrum usually operate.”¹¹ The Public Broadcasting Act and the Commission’s implementing regulations “were designed to further the important governmental interest in preserving the essentially noncommercial nature of public broadcasting within a minimal regulatory framework by insulating public broadcasters from commercial marketplace pressures.”¹² The unprecedented application of market forces to determine whether spectrum should continue to be reserved for noncommercial educational service would be a dramatic reversal from decades of past Commission practice.

As of 1996, when WQED Pittsburgh asked the Commission to dereserve the channel used by sister station WQEX, “the Commission [had] never dereserved a noncommercial channel without substituting another reserved channel.”¹³ Moreover, the Commission has denied dereservation requests for vacant channels and “even where dereservation was sought by an incumbent noncommercial licensee which represented that it would go dark absent grant of its dereservation request.”¹⁴ The Commission has also recognized “the long-term structural integrity of its noncommercial channel allotments scheme, including the maintenance of channel capacity as a means of facilitating future growth,” as a critical measure supporting the continued provision of noncommercial broadcast services.¹⁵

When the Commission ultimately did dereserve WQEX’s channel, it emphatically reaffirmed that its “policy disfavoring dereservation of noncommercial educational stations ...

¹¹ *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Second Report and Order, FCC 81-204, 86 F.C.C. 2d 141, 142 (1981).

¹² *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Memorandum Opinion and Order, FCC 82-327, 90 F.C.C. 2d 895, 896 (1982) (italics omitted).

¹³ *First WQED Order*, 11 FCC Rcd at 11708 (emphasis added).

¹⁴ *Id.*

¹⁵ *Id.* at 11709.

which is based on our continued recognition of the value of noncommercial educational television service, remains intact,” and that “only under compelling circumstances will we consider deviation from this policy.”¹⁶ The exceptional relief of dereservation was granted in 2002 because it would “not cause a reduction in public television’s coverage area” as “every viewer in WQEX(TV)’s coverage area will continue to receive educational service from WQED(TV).”¹⁷ Applying a similar metric in the context of the incentive auction to protect viewers of noncommercial educational service would be entirely appropriate.

In fact, the Commission’s longstanding policy to strongly disfavor the dereservation of noncommercial educational reserved channels has been reaffirmed in connection with recent band clearings. When the Commission established the new Table of Allotments as part of the digital television transition to facilitate clearing of the 740-806 MHz band, the Commission went to great lengths to provide as many new, vacant digital reserved channels as possible to replace any deleted vacant analog reserved channels.¹⁸ The Commission heavily disfavored early transition agreements “result[ing] in the loss of a community’s sole service on a reserved channel.”¹⁹ In order to “protect and preserve existing noncommercial educational service” while adopting band-clearing mechanisms to repurpose the 740-806 MHz band for new wireless services, the Commission reaffirmed its commitment to “carefully weigh[] the public interest effects of dereservation proposal[s] even in the context of band clearing.”²⁰

¹⁶ *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania*, Report and Order, FCC 02-209, 17 FCC Rcd 14038, 14048–49 (2002) (“*Second WQED Order*”).

¹⁷ *Id.* at 14053 (emphasis added).

¹⁸ *Id.* at 14048.

¹⁹ *Id.* at 14049.

²⁰ *Id.*

The incentive auction *Report and Order* itself acknowledges how critical the reservation of noncommercial educational channels is for “ensur[ing] a nationwide distribution of NCE stations” and reaffirms the fact that “historically, the Commission has denied requests to delete reserved channels, principally in order to preserve the future availability of such channels.”²¹ In the context of channel sharing arrangements, the Commission “seek[s] to ensure that we continue to reserve adequate NCE channel space” by providing that the portion of any channel shared with a noncommercial educational station licensed to a reserved channel will remain reserved and that “if a reserved-channel NCE sharing station’s license is relinquished or terminated, only another entity meeting the NCE eligibility criteria will be considered for reassignment of the license.”²² Yet, if a reserved-channel station seeks to relinquish its license at the outset rather than enter a channel sharing arrangement, the rules adopted in the *Report and Order* would allow the relinquishment without maintaining reserved spectrum for a new entrant. This would *de facto* delete the reserved channel without “carefully weighing the public interest effects of dereservation” as is the Commission’s well-established practice.²³

B. Without the Required Notice or Analysis, the *Report and Order* Reverses Longstanding Commission Policy By Allowing the Potential for Widespread Dereservation in the Incentive Auction and Repacking Process.

Despite the longstanding policy detailed above to maintain reserved spectrum for noncommercial educational service — including the recent reaffirmation of the importance of reserved spectrum in both the band-clearing and channel-sharing contexts — the *Report and Order* provides no safeguards to ensure that reserved spectrum will remain for noncommercial educational service following the incentive auction. The *Report and Order* states that the

²¹ *Report and Order* at ¶ 704.

²² *Id.* at ¶¶ 703–04.

²³ *Second WQED Order* at 14049.

Commission will not “restrict acceptance of [bids to relinquish spectrum] based on the potential loss of television service or specific programming.”²⁴ This suggests that if a station operating on a reserved channel volunteers to relinquish its license, the Commission will accept the bid (assuming all pricing and other conditions are satisfied)²⁵ and effectively dereserve the channel without any consideration for the impact that the loss of the channel will have on the community’s television service. Moreover, nothing in the *Report and Order*’s description of the repacking process suggests that the Commission intends to replace any dereserved channels with available channels reserved for a new noncommercial educational entrant following the repacking.²⁶ Consequently, if a reserved-channel noncommercial educational television station seeks to relinquish its spectrum without entering into a channel sharing arrangement or moving from the UHF band to the VHF band, the local community not only could lose existing noncommercial educational service but also would lose the ability for a potential new entrant to

²⁴ *Report and Order* at ¶¶ 367–68.

²⁵ Notably, the statutory requirement that the incentive auction remain “voluntary” is intended to protect stations against agency action that would place undue pressure on stations, either directly or indirectly, to relinquish their spectrum. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(a), 125 Stat. 156, codified at 47 U.S.C. § 1452 (2012) (“The Commission shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights”). Nothing in the statute guarantees that *every* station must be able to *successfully* relinquish its license. The Commission may decline a station’s offer to relinquish its spectrum for a wide variety of reasons (e.g., the dollar amount a station bids, the frequency on which a station operates, or the geographic location of a station). This does not mean the station was denied an opportunity to volunteer (or participate through channel sharing or moving to the VHF band). Consequently, the Commission’s conclusion that it cannot consider whether accepting a bid to relinquish a license would lead to a loss of particular television service because it would be “inconsistent with the statutory mandate to offer a license relinquishment bid option” is misguided. *See Report and Order* at ¶ 367. Regardless, the solution to this concern that is consistent with precedent is not to leave the outcome solely to market forces, but rather to set aside an available reserved channel for a new noncommercial educational entrant, if the Commission adheres to its finding that it is compelled to allow all existing stations to relinquish their spectrum entirely.

²⁶ *Report and Order* at ¶¶ 113–118; *see also id.* ¶ 269 (stating that “any other television channels unused by broadcast television stations after the incentive auction” will be made available for TV white space devices and wireless microphones).

resume noncommercial educational service in the market. Thus, the *Report and Order* subjects the continued existence of reserved spectrum entirely to market forces, which directly conflicts with the Commission’s established policy.

The Administrative Procedure Act requires the Commission to provide adequate notice of and a reasoned analysis for such a radical departure from longstanding Commission policy.²⁷ Neither of these requirements has been met here.

First, with respect to the notice requirement, nothing in the *Notice of Proposed Rulemaking* or the extensive record for this proceeding “fairly apprised the public of the Commission’s new approach” to reserved channels.²⁸ To the contrary, the *Notice* reaffirmed that the “Commission maintains a policy disfavoring dereservation of NCE channels.”²⁹ The *Notice*’s discussion of the impact of the incentive auction on noncommercial educational service was limited to channel sharing restrictions aimed at “preserv[ing] NCE stations and reserved channels.”³⁰ Because the *Report and Order* instead permits widespread dereservation through the unprecedented application of market forces, there was not adequate notice of “the terms or substance of the proposed rule or a description of the subjects and issues involved,” as required by the statute.³¹ Due to lack of required notice, interested parties did not have the statutorily mandated opportunity to comment on this sweeping change.

Second, the *Report and Order* provides no justification or acknowledgment whatsoever — much less a “reasoned analysis” — for reversing the well-settled policy detailed

²⁷ Administrative Procedure Act of 1946, 5 U.S.C. § 553, 706(2)(A). See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453–54 (3d Cir. 2011); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 57 (1983).

²⁸ *Prometheus Radio Project*, 652 F.3d at 453.

²⁹ *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118, 27 FCC Rcd 12357, 12479 n.557 (2012) (“*Notice*”).

³⁰ *Id.* at 12480.

³¹ 5 U.S.C. § 553(b)(3).

above that strongly disfavors dereservation and shields noncommercial educational service from market forces. An “agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”³² This requirement for a reasoned analysis to accompany agency policy reversals has been affirmed by the U.S. Supreme Court, but was disregarded in the *Report and Order*.³³ The Commission may not adopt rules *sub silentio* that reverse long-established policy by subjecting the continued existence of all reserved spectrum to market forces. As a result, the Commission’s reversal on the preservation of reserved spectrum is “arbitrary, capricious,” and “an abuse of discretion.”³⁴

II. THE COMMISSION CAN CONDUCT A SUCCESSFUL INCENTIVE AUCTION WHILE MAINTAINING RESERVED CHANNELS FOR NONCOMMERCIAL EDUCATIONAL TELEVISION SERVICE.

The PTV Petitioners urge the Commission to reconsider and revise its incentive auction rules to allow a noncommercial educational station to relinquish its spectrum so long as at least one such station remains on-air in the community or at least one reserved channel is preserved in the repacking to enable a new entrant to offer noncommercial educational television service in the community.

This balanced approach allows any station to voluntarily participate in the incentive auction by permitting even the last licensee on a reserved channel in the community to voluntarily enter into a channel sharing arrangement, move from the UHF band to the VHF band, or relinquish its license as long as the reserved channel is preserved in the repacking process and

³² *Greater Boston Television Corp. v. Fed. Commc’ns Comm’n*, 444 F.2d 841, 852 (D.C. Cir. 1970).

³³ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 57.

³⁴ 5 U.S.C. § 706(2)(A).

made available to a new entrant. In this manner, the Commission can avoid taking the drastic step of reversing 62 years of sound agency policy, while also facilitating a successful incentive auction.

CONCLUSION

For the reasons described above, the PTV Petitioners urge the Commission to reconsider and revise its incentive auction rules to only allow a noncommercial educational station operating on a reserved channel to relinquish all of its spectrum usage rights provided that at least one such station remains on-air in the community or at least one reserved channel is preserved during the repacking process to enable a new entrant to offer noncommercial educational television service in the community.

Respectfully submitted,

/s/

Lonna Thompson
Executive Vice President, Chief
Operating Officer, and General Counsel
ASSOCIATION OF PUBLIC TELEVISION
STATIONS
2100 Crystal Drive, Suite 700
Arlington, VA 22202

/s/

Katherine Lauderdale
Senior Vice President, General Counsel,
and Corporate Secretary
Thomas Rosen
Senior Counsel
PUBLIC BROADCASTING SERVICE
2100 Crystal Drive
Arlington, VA 22202

/s/

J. Westwood Smithers, Jr.
Senior Vice President and General
Counsel
CORPORATION FOR PUBLIC BROADCASTING
401 Ninth Street, NW
Washington, DC 20004

/s/

Mace Rosenstein
Lindsey Tonsager
Michael Beder
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Counsel for Public Broadcasting Service

September 15, 2014