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Anti-Collusion Provisions

On October 6, the Federal Communications Commission released a public notice providing guidance on the rules regarding communications during the upcoming spectrum incentive auction and establishing a “quiet period” during which certain communications would be prohibited between entities involved or potentially involved in the incentive auction of broadcast spectrum. Mayer Brown’s Angela E. Giancarlo explains why the decision to exempt certain communications from the “silence” was a sound one, yet one that affected parties might hesitate to take advantage of.

FCC Guidance on Avoiding Collusion During Upcoming Spectrum Incentive Auction Wisely Accounts for Broadcasting Business Realities

By ANGELA E. GIANCARLO

The staff of the Federal Communications Commission (“FCC” or “Commission”) has issued a Public Notice [DA 15-1129] providing guidance on the rules regarding communications during the upcoming spectrum incentive auction (“Guidance Notice”).

While the FCC has auctioned spectrum for more than 20 years, the incentive auction is the first “two-sided” spectrum auction. The auction begins with a “reverse” auction, intended to incentivize over-the-air broadcasters to relinquish their spectrum rights, and is followed by a “forward” auction of the spectrum returned by the reverse auction participants.

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The rules discussed in the Guidance Notice bar certain communications among covered parties (i.e., all eligible over-the-air television broadcasters and their interest holders), regardless of whether they participate in the reverse auction or not, and bars certain communications among those entities (including their interest holders) that apply to participate in the forward auction.

The bottom line: Addressing the types of discussions prohibited from the time of the deadline for submitting applications to participate in the reverse auction until the results of the incentive auction are announced by public notice, known as the “quiet period,” the Guidance Notice states that broadcasters, but not wireless entities, may undertake discussions related to both pending merger applications and routine business. This is a wise decision conceptually; it is, however, one whose practical effects might be minimal.

Given the critical need to attract broadcast participants in large numbers and from an array of markets, and in light of the fact that the rule covers all broadcasters regardless of auction participation, the Commission’s decision to relax aspects of the rule for broadcasters is not surprising. In practical terms, however, it is unlikely that either broadcasters or wireless entities will engage in any substantial merger or other transactional discussions during the quiet period, if for no

other reason than the general uncertainty inherent in this extremely complex spectrum auction.

Background Recognizing the skyrocketing consumer demand for faster and more powerful mobile broadband services, Congress in 2012 required the FCC to design and hold a first-in-the-world incentive spectrum auction. As a result, the Commission developed rules and policies aimed to incentivize a large number of over-the-air television broadcasters in an array of markets to relinquish their spectrum rights. In turn, the Commission will offer current and prospective wireless service providers an opportunity to license the returned spectrum at auction and thereafter construct new and upgrade existing mobile broadband networks.

As noted above, the incentive auction involves two parts, the first of which is scheduled to begin on March 29, 2016. The reverse auction will provide broadcasters an opportunity to consider a price for relinquishing rights and exiting the business, moving to a different channel, or for sharing a single channel with a neighboring broadcaster. Next, in the “forward auction,” wireless entities will have an opportunity to bid on spectrum returned by the broadcasters. Although some have advocated postponing the auction until at least late 2016, as of this writing delay does not seem likely.

Summary and Analysis While the dates of the quiet period will apply to, and run simultaneously for, broadcasters and those entities participating in the forward auction, the rules apply differently to each. The Guidance Notice addresses: (1) the reverse auction rule; (2) the forward auction rule; (3) the applicability of anti-trust laws; and (4) the duty to report rule violations.

The Reverse Auction Rule provides, subject to explicit exceptions, that during the quiet period, “all full power and Class A broadcast television licensees are prohibited from communicating directly or indirectly any incentive auction applicant’s bids or bidding strategies to any other full power or Class A broadcast television licensee or to any forward auction applicant.” 47 CFR § 1.2205(b).

Recognizing that broadcast licensees engage in “myriad” business arrangements with one another, or with affiliated entities, the Guidance Notice clarifies that, during the quiet period:

- Discussions relating to a proposed merger are permitted, provided that the merger application “(1) has been accepted for filing with the Commission as of” March 29, 2016, the deadline for participating in the auction; “and (2) includes the express representation that the party that will hold the license(s) upon consummation agrees to be bound by the original applicant’s actions in the auction with respect to the license(s).”

- Routine business communications do not violate the rule if they do not convey bids or bidding strategies. An applicant’s “statements or actions premised on continuing broadcast operations do not necessarily support an inference about the licensee’s bids or bidding strategies in the auction.” Conversely, a licensee might consider operational changes for any number of reasons, including plans to sell the station in the future or to change programming. *Id.* At bottom, “no one can know with certainty” the auction outcome; therefore, a covered broadcaster “that takes care not to communicate expressly about its bids or bidding strategies should be

able to communicate” with another covered party regarding routine matters without violating the rule.

These clarifications illustrate the extent of the Commission’s effort to entice broadcast participants. The Commission seeks to alleviate any lingering angst regarding the actual or perceived practical effects of auction participation. Relaxing the rule to accommodate discussions regarding pending transactions and routine matters theoretically makes the decision to participate easier. Given the critical need to attract broadcast participants in large numbers and from an array of markets, this guidance is not surprising.

Additional guidance:

- Communicating merely *whether* a licensee has or has not applied to participate does not violate the rule. Speaking to a broadcaster’s auction participation status does not constitute communication regarding bids or bidding strategies, and thus does not violate the rule.

- Communicating *how* a licensee will participate in the auction is prohibited by the rule. Communications regarding the “specific nature of a licensee’s participation, including without limitation to bid options or bidding actions” are prohibited.

- While the rule prohibits only communications among television broadcasters and forward auction participants, those covered by the rule have an obligation to take steps to guard against a third party becoming a conduit for prohibited communications to other covered parties. The Guidance Notice, as well as longstanding Commission precedent, suggests the types of actions attorneys, consultants and bankers, for example, must take to implement firewalls and other compliance measures to prevent becoming conduits for the communication of bids or bidding strategies to another covered party. Likewise, the Guidance Notice suggests that broadcasters limit access to information about bids and bidding strategies by news reporters by separating “management and editorial decision-making” functions.

- When communicating with channel-sharing partners, broadcasters must limit the scope as “solely between the specific licensees covered by a particular channel sharing agreement that is submitted with one of the licensee’s auction applications, and only with regard to the stations involved in the arrangement.”

The Forward Auction Rule provides, again subject to certain exceptions, that during the quiet period “all applicants are prohibited from cooperating or collaborating with respect to, communicating with or disclosing, to each other or any nationwide provider [of communications services] that is not an applicant, or, if the applicant is a nationwide provider, any non-nationwide provider that is not an applicant, in any manner the substance of their own, or each other’s, or any other applicants’ bids or bidding strategies (including post-auction market structure) or discussing or negotiating settlement agreements, until after the down payment deadline[.]” 47 CFR § 1.2105(c)(1).

In addition, beginning at the “application filing deadline for the forward auction and until the results of the incentive auction are announced by public notice, all forward auction applicants are prohibited from communication directly or indirectly any incentive auction applicant’s bids or bidding strategies to any . . . broadcast television licensee.” 47 CFR § 1.2105(c)(8)(ii).

In order to enable wireless service providers to comply with the rule and continue operations to the fullest extent possible, the Guidance Notice clarifies that:

■ Absent communications both relating to the licenses being auctioned and addressing bids, bidding strategies or post-auction market structure, certain types of arrangements and communications do not present concerns in spectrum auctions. These include: roaming; device acquisition; spectrum leasing; spectrum partitioning and disaggregation; and interconnection.

■ Likewise, broad industry discussions regarding technical standards for the spectrum band for which the licenses will be auctioned and discussions related to FirstNet and the construction of the Nationwide Public Safety Broadband Network are not prohibited.

■ Ongoing discussions between broadcast licensees and wireless service providers that become forward auction applicants with respect to voluntary relocation of the broadcasters out of channel 51 also may continue, so long as the discussions do not communicate bids or bidding strategies.

Finally, the Guidance Notice cautions that an applicant should avoid including in its short form applications anything that might convey information regarding its license selection, such as using applicant names that refer to licenses being offered, referring to certain licenses or markets in describing bidding agreements, or including any information in attachments that may otherwise disclose the applicants' license selections.

With respect to antitrust laws, the Guidance Notice expressly states, “the prohibited communications rule does not supplant the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace,” and further explains, “[w]here specific instances of collusion in the competitive bidding process are alleged, the Commission may conduct an investigation or refer such complaints to DOJ for investigation.”

Finally, *the rules require covered parties to report violations* to the Commission.

Conclusion In issuing its guidance on avoiding collusion during next spring's incentive auction, the FCC staff wisely accounts for broadcasting business realities. The guidance seeks to alleviate any lingering angst regarding the actual or perceived practical effects of auction participation. Relaxing the rule to accommodate discussions regarding pending transactions and routine matters theoretically makes the decision to participate easier while, at the same time, reflecting the importance of attracting broadcast participants in large numbers and from an array of markets, and the fact that the rule covers all broadcasters regardless of auction participation. In practical terms, however, it is unlikely that either broadcasters or wireless entities will engage in any substantial merger or other transactional discussions during the quiet period if for no other reason than the general uncertainty inherent in this extremely complex spectrum auction.