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**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

Re: ***Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268 Incentive Auction Task Force and Media Bureau Adopt Post-Incentive Auction Transition Scheduling Plan, MB Docket No. 16-306***

Dear Ms. Dortch:

On behalf of Wiley Rein LLP, I am writing to encourage the FCC to expeditiously clarify that its Incentive Auction prohibited communications rules no longer apply to information concerning the actions of any broadcast television station in the reverse auction, Auction 1001.

In the Transition Scheduling Adoption Public Notice, the Media Bureau acknowledged that, with the reverse auction now over, “some relief from the prohibition for communications among broadcasters may be appropriate.” The Public Notice indicated that the Media Bureau will address such relief “at the time post-auction channel assignment information is provided to broadcasters.”<sup>1</sup> While any relief will be welcome to an industry that has been constrained by the quiet period rules since January 12, 2016, the Bureau need not and should not wait any longer.

The Commission can provide much-needed relief to broadcasters simply by clarifying that nothing a broadcaster says about the reverse auction at this point would violate the prohibition on certain auction-related communications. The agency previously explained that “the rules prohibiting certain communications are limited in scope and only prohibit disclosure of information that affects, or has the

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<sup>1</sup> See *Incentive Auction Task Force and Media Bureau Adopt a Post-Incentive Auction Transition Scheduling Plan*, Public Notice, DA 170197, MB Docket No. 16-306, GN Docket No. 12-268 ¶ 68 (rel. Jan. 27, 2017) (“Transition Scheduling Adoption Public Notice”).

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potential to affect, bids and bidding strategies.”<sup>2</sup> Now that the final stage rule has been satisfied, the Incentive Auction will end once the forward auction is over, and there is no further opportunity for broadcasters to engage in “bids and bidding strategies.” Moreover, given that the FCC has publicly released the reverse auction clearing target and all of the licenses in the forward auction are unimpaired, there is no risk of “dangerous and anti-competitive information asymmetries” among forward auction bidders.<sup>3</sup> In short, there is absolutely nothing a broadcaster could say about the reverse auction at this point that would “affect[, or ha[ve] the potential to affect, bids and bidding strategies.”

Absent further clarification, the ongoing uncertainty regarding the prohibited communications rules threatens to undermine the Commission’s repacking efforts. As the Media Bureau recognized in the Transition Scheduling Adoption Public Notice, “certain broadcasters cannot communicate with other broadcasters regarding post-auction channel assignments without disclosing bids and bidding strategies.”<sup>4</sup> Moreover, the Transition Scheduling Adoption Public Notice continued to send mixed signals about the ability of broadcasters to communicate with third parties, stating on one hand that such communications are permitted, while on the other hand warning that “precautions taken will not protect a party against liability in the event a prohibited communication nevertheless takes place.”<sup>5</sup> As a result, broadcasters, engineers, equipment vendors, and attorneys continue to be very reluctant to engage in any communications that could result in liability because of information pertaining to the auction that may be inadvertently disclosed.

Finally, the Commission should be mindful of the detrimental effect its unnecessarily stringent interpretation of its rules is having on the broadcast industry. When adopting the prohibited communications rules, the FCC emphasized that “[t]he prohibition applies during a limited period of time, which we expect will be only a matter of months.”<sup>6</sup> Broadcasters, however, have been hamstrung in their ability to discuss transactions and other business requiring disclosure of auction

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<sup>2</sup> See, e.g., *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 ¶ 492 (2014) (“Report and Order”); *Guidelines Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd. 10794 ¶ 3 (2015).

<sup>3</sup> See Report and Order ¶ 401.

<sup>4</sup> Transition Scheduling Adoption Public Notice ¶ 67.

<sup>5</sup> *Id.* ¶ 66 & n.207.

<sup>6</sup> Report and Order ¶ 399.

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results for more than a year, and it may yet be a “matter of months” before the Incentive Auction officially comes to an end.<sup>7</sup> We respectfully submit that there is simply no justification to handcuff the broadcast industry any longer.

The Commission should promptly clarify that broadcasters may freely communicate about their participation in the reverse auction without violating the prohibition on certain auction-related communications.

Sincerely,

*/s/ Kathleen A. Kirby /s/*

Kathleen A. Kirby  
Co-Chair  
Telecommunications, Media & Technology Practice Group

cc: Chairman Ajit Pai  
Commissioner Mignon Clyburn  
Commissioner Michael O’Rielly  
Rachael Bender  
Matthew Berry  
Michelle Carey  
Robin Colwell  
Gary Epstein  
David Grossman  
Nese Guendelsberger  
Jean Kiddoo  
Alison Nemeth  
Erik Salovaara  
Margaret Wiener

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<sup>7</sup> According to the FCC’s Public Reporting System, once the forward auction clock phase is complete, the Commission will conduct weeks of bidder education for the assignment phase, followed by actual bidding in the assignment phase that “will take several weeks given the number of PEAs that must be assigned.”