

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

In the Matter of	)	
	)	
Policies Regarding Mobile Spectrum Holdings	)	WT Docket No. 12-269
	)	
	)	

**OPPOSITION OF AT&T TO T-MOBILE'S PETITION FOR RECONSIDERATION**

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**Table of Contents**

INTRODUCTION .....3

ARGUMENT .....7

I. T-MOBILE FAILS TO SATISFY THE BASIC REQUIREMENTS FOR RECONSIDERATION.....7

II. THE COMMISSION SHOULD NOT RECONSIDER THE MAXIMUM AMOUNT OF SPECTRUM “RESERVED” IN THE AUCTION. ....11

III. THE COMMISSION SHOULD NOT RECONSIDER THE PRICE TRIGGER IT ADOPTED FOR THE FINAL STAGE RULE. ....15

CONCLUSION.....22

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Pursuant to the Commission’s August 21, 2014 Public Notice, AT&T Inc., on behalf of itself and its affiliates (collectively “AT&T”), respectfully submits this opposition to the Petition for Reconsideration filed by T-Mobile USA, Inc. (“T-Mobile”)<sup>1</sup> of the Commission’s *Spectrum Order*.<sup>2</sup>

**INTRODUCTION**

In establishing “reserved” and “unreserved” classes of 600 MHz spectrum, the Commission sought to balance two concerns. Although the Commission wanted to structure the 600 MHz auction to maximize the chances that some of the spectrum would be assigned to reserved bidders, it properly recognized that too much of a “reserve” would be inequitable and unnecessary and might allow T-Mobile and other favored providers to obtain a large portion of the spectrum at below-market prices that fail to recover “a portion of the value of the public spectrum resource” as required by the Communications Act.<sup>3</sup> The Commission took two steps to

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<sup>1</sup> T-Mobile, Petition For Reconsideration, WT Docket No. 12-269 (filed Aug. 11, 2014) (“T-Mobile Pet.”). Notice of T-Mobile’s petition for reconsideration was published in the Federal Register on September 9, 2014. See 79 Fed. Reg. 53356.

<sup>2</sup> Report and Order, *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268 and WT Docket No. 12-269, FCC 14-63 (rel. June 2, 2014) (“*Spectrum Order*”).

<sup>3</sup> 47 U.S.C. § 309(j)(3)(C).

balance these concerns: it limited the amount of spectrum that would be available in the reserve auction in any given market to no more than 30 MHz, and in the *Incentive Auction Order*,<sup>4</sup> the Commission adopted a rule that the “reserve” auction would be triggered only if the bidding rose to price levels that exceeded a certain threshold measured by a price per MHz-POP. This threshold will be set at a level that will reflect “competitive market values for comparable spectrum licenses.”<sup>5</sup>

T-Mobile’s petition seeks to gut these protections, and turn the Commission’s scheme into a even more one-sided regulatory windfall for reserve-eligible bidders like T-Mobile. T-Mobile argues both that the Commission should have protected at least half of the spectrum in each market from a fully open auction and that it should not have set any price-related trigger reflecting competitive market values at all. T-Mobile’s request, if granted, would turn what is already a problematic reserve auction into a complete fire sale – opening the way for favored bidders like T-Mobile to acquire even larger amounts of 600 MHz spectrum, but all at prices well below market-based levels. Contrary to Congress and the Commission’s goals, T-Mobile’s revised scheme would give it an additional and unwarranted competitive advantage in the marketplace (by allowing it to acquire spectrum at below-market prices) while simultaneously depriving the public of a significant portion of the value of the spectrum.

T-Mobile’s petition should be rejected for several reasons. First and foremost, it is procedurally barred. The Communications Act and the Commission’s rules expressly prohibit reconsideration as a vehicle to reargue issues the Commission explicitly considered and

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<sup>4</sup> Report and Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, FCC 14-50 (rel. June 2, 2014) (“*Incentive Auction Order*”).

<sup>5</sup> *Id.* ¶ 343.

resolved.<sup>6</sup> The arguments raised in T-Mobile’s petition for reconsideration were expressly considered in detail by the Commission, and were rejected. T-Mobile offers no “new” evidence that calls the Commission’s considered determinations into question.

Even if the Commission considers T-Mobile’s arguments, it should reject them as meritless. T-Mobile’s argument that “reserving” 30 MHz of spectrum “is inadequate for more than one competitive provider to secure [a] twenty-megahertz block[]” of spectrum<sup>7</sup> is patently false. T-Mobile continues to mischaracterize the auction as limiting reserve-eligible bidders to the amount of “reserved” spectrum. Under the Commission’s rules, *all* auction participants may bid for the remaining “unreserved” spectrum.<sup>8</sup> The Commission’s rules limit only AT&T and Verizon, not T-Mobile or anyone else; reserve-eligible bidders are free to acquire as much of the available spectrum as they want, as long as they place the highest value on it. T-Mobile has offered no valid basis for the Commission to reconsider its judgment as to the size of the reserve. Moreover, the Commission’s determination that 30 MHz was an adequate “reserve” amount was based in part on *T-Mobile’s own evidence* – and T-Mobile does not even acknowledge its complete about-face.<sup>9</sup>

Nor does T-Mobile provide any basis for the Commission to reconsider its decision to set a minimum price per MHz-POP threshold before spectrum becomes reserved. As an initial matter, the trigger challenged by T-Mobile was adopted in the *Incentive Auction Order*, not the

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<sup>6</sup> 47 U.S.C. § 405; 47 C.F.R. § 1.429.

<sup>7</sup> T-Mobile Pet. at 8.

<sup>8</sup> *Spectrum Order* ¶ 190.

<sup>9</sup> *Id.* ¶¶ 190-91 & n.527 (citing Letter from Trey Hanbury (representing T-Mobile) to Marlene H. Dortch (FCC), GN Docket No. 12-268 & WT Docket No. 12-269 (May 5, 2014) (“T-Mobile May 5 Ex Parte”)).

*Spectrum Order*, and therefore the Commission could not consider T-Mobile's arguments in response to this petition, which deals only with the *Spectrum Order*.<sup>10</sup>

In all events, T-Mobile's arguments on the merits are foreclosed by the Communications Act and Commission precedent. The Communication Act requires that the Commission design the incentive auction to ensure "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource."<sup>11</sup> Thus, "[a]n objective common to *all* FCC auction of spectrum license is that auction prices generally reflect competitive market values for comparable spectrum licenses."<sup>12</sup> The Commission reasonably determined that the absence of AT&T and Verizon as bidders created a real risk that the prices for "reserved" spectrum would be far below "competitive market values for comparable spectrum licenses." In arguing that this minimum price requirement be eliminated, T-Mobile is improperly seeking to stockpile even greater amounts of spectrum at below-market prices (thus depriving taxpayers of a portion of the value of the spectrum). T-Mobile has not articulated any reasonable basis for the Commission to permit a *protected* "reserve" auction at *below*-market price levels.

In short, the Commission's rules already give T-Mobile substantial, asymmetrical – an entirely unwarranted – advantages in this auction, and the Commission need not and should not bend over any further backward to help T-Mobile. Indeed, T-Mobile does not need the Commission's help at all. T-Mobile has access to the capital necessary to purchase spectrum to the extent it can put the spectrum to its highest valued use. T-Mobile is not only a major wireless provider, but also the subsidiary of Deutsche Telekom, one of the world's largest



aspects of the *Spectrum Order* that were thoroughly and fully addressed by the Commission in its order. And T-Mobile’s claim that it now has “facts” that could not have been presented earlier is incorrect.

The first issue T-Mobile raises – whether the Commission should “reserve” spectrum and the amount of spectrum to be reserved – was hotly contested.<sup>16</sup> Indeed, T-Mobile and others specifically argued in favor of “allocating more reserved spectrum than unreserved spectrum.”<sup>17</sup> The Commission considered these arguments and properly rejected them. The Commission found that setting the maximum amount of reserves spectrum at 30 MHz will “facilitate the repurposing of more spectrum in the 600 MHz Band, because it provides the opportunity, and creates incentives, for all auction participants to bid aggressively to acquire more spectrum licenses as the total amount of available spectrum increases.”<sup>18</sup>

In contrast, the Commission specifically concluded that T-Mobile’s proposal would fail “to provide all bidders with an adequate opportunity to acquire licenses in the 600 MHz auction.”<sup>19</sup> Indeed, the Commission expressly recognized that AT&T and Verizon would be precluded altogether from bidding for “reserved” spectrum in many areas, and thus T-Mobile’s approach would preclude them from obtaining efficient levels of spectrum “notwithstanding their

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however, limits the evidence admissible upon reconsideration to newly discovered evidence, evidence which has become available only since the original taking of evidence.”).

<sup>16</sup> *Spectrum Order* ¶¶ 182-83.

<sup>17</sup> *Id.* ¶ 182 (citing *ex parte* filings); see also, e.g., T-Mobile May 5 Ex Parte at 4-6; Letter from Trey Hanbury (representing T-Mobile) to Marlene H. Dortch (FCC), GN Docket No. 12-268 & WT Docket No. 12-269 (April 28, 2014), at 2 (“T-Mobile April 28 Ex Parte”).

<sup>18</sup> *Spectrum Order* ¶ 190; see also *id.* ¶ 191 (“a maximum spectrum reserve of 30 megahertz for most levels of total available spectrum licenses, on balance, will make additional low-band spectrum available to multiple providers; ensure that all bidders have an opportunity to acquire a state in the 600 MHz ecosystem that will be critical in the future; and facilitate competitive bidding.”).

<sup>19</sup> *Id.* ¶ 191.

demonstrated demand.”<sup>20</sup> It also properly recognized that T-Mobile’s preferred allocation of reserved spectrum might improperly allow “T-Mobile and Sprint to acquire spectrum at a significant discount.”<sup>21</sup>

The Commission also expressly considered the other basis on which T-Mobile seeks reconsideration: whether the Commission should have adopted a reserve price for the final stage rule that includes a trigger based on the average price per MHz-POP of the spectrum. The Commission noted that the Communications Act directed “the Commission to establish methods for requiring a reserve price unless it determines that it is not in the public interest to do so.”<sup>22</sup> It further noted that “[a]n objective common to all FCC auctions of spectrum licenses is that auction prices generally reflect competitive market values for comparable spectrum licenses.”<sup>23</sup> While T-Mobile claims now that the Commission should not have adopted any such trigger, the Commission instead concluded that the market-price trigger was necessary to ensure both that goal and that “the forward auction recovers ‘a portion of the value of the public spectrum resource’ as required by the Communications Act.”<sup>24</sup>

T-Mobile claims that it is entitled to seek reconsideration because it is now in possession of “new facts” that “were not known or did not exist until after petitioner’s last opportunity to present analysis to the Commission.”<sup>25</sup> According to T-Mobile, it had no opportunity to adequately address these issues in light of the sudden, post-decision revelations that (1) the Commission is “apparent[ly] commit[ted]” to a marketplace with “no less than four nationwide

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<sup>20</sup> *Id.* ¶ 193.

<sup>21</sup> *Id.*

<sup>22</sup> *Incentive Auction Order* ¶ 343.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting 47 U.S.C. § 309(j)(3)(C)).

<sup>25</sup> T-Mobile Pet. at 7 & n.22 (citing 47 C.F.R. § 1.429).

competitors” and (2) the Commission was “circulat[ing]” a possible “notice of proposed rulemaking” that would prohibit “joint bidding” by T-Mobile and Sprint in the 600 MHz auction.<sup>26</sup>

These are not the sort of “new facts” that justify reconsideration. Indeed, they are not facts at all; they are, at most, assumptions about regulatory policies, and unwarranted ones at that. Certainly, T-Mobile could hardly have been surprised at either development, as both of them simply confirm widely held expectations about issues that were receiving significant attention during the comment stage. Indeed, both the debate in the comments and the Commission’s order plainly assume that T-Mobile and Sprint will remain independent companies that will compete against each other in the auction. Accordingly, Chairman Wheeler’s *after-the-fact* statement that Sprint’s abandonment of its proposed merger with T-Mobile was good for American consumers cannot be considered a sudden “change” in Commission policy that upends the basis for the auction rules. Similarly, barring joint bidding by nationwide providers like T-Mobile and Sprint that could negatively impact auction proceeds and that has no legitimate efficiency benefits cannot be considered a “change” in Commission’s assumptions regarding the auction.

Most tellingly, however, T-Mobile offers no valid theory as to how these “new facts” are relevant to any of the arguments it is advancing on reconsideration. At bottom, T-Mobile can only be contending that more spectrum must be “reserved” and the trigger price for closing the auction must be lowered because T-Mobile now faces potential competition from Sprint for that spectrum that it did not anticipate. But this only reinforces that T-Mobile is now improperly seeking reconsideration for the purpose of protecting it from unwanted bidding competition that

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<sup>26</sup> *Id.* at 7.

it hoped to avoid by merging with Sprint or by engaging in joint bidding with Sprint. The Commission, however, properly sought to adopt rules intended to ensure “aggressiv[e]” and “competitive bidding,”<sup>27</sup> that ensured “efficient use of spectrum,”<sup>28</sup> and that would generate revenues that “recover a portion of the value of the public spectrum resource as required by the Communications Act.”<sup>29</sup> With no valid basis for reconsideration, the Commission should simply dismiss the petition as procedurally improper.

## **II. THE COMMISSION SHOULD NOT RECONSIDER THE MAXIMUM AMOUNT OF SPECTRUM “RESERVED” IN THE AUCTION.**

Even if the Commission were to consider T-Mobile’s arguments, it should reject them on the merits. T-Mobile’s first argument – that the Commission should reconsider the amount of spectrum that it allocated to the “reserved” auction – is baseless.<sup>30</sup> Notwithstanding the fact that the Commission “reserved” 30 MHz of spectrum (thus generally walling such spectrum off from bidding by AT&T and Verizon) in most scenarios, T-Mobile complains that the Commission should have reserved half or more of the spectrum that would be available in any bidding scenario.<sup>31</sup> Although it is AT&T’s view that the Commission had no authority to “reserve” spectrum for favored bidders at all,<sup>32</sup> the Commission properly rejected T-Mobile’s argument that it should have sheltered *even more* spectrum from a fully open and competitive auction.

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<sup>27</sup> *Spectrum Order* ¶ 191.

<sup>28</sup> *Id.* ¶ 6.

<sup>29</sup> *Incentive Auction Order* ¶ 343.

<sup>30</sup> T-Mobile Pet. at 7-12.

<sup>31</sup> *Id.* at 11.

<sup>32</sup> *See, e.g.*, Letter from Peter D. Keisler (representing AT&T) to Marlene H. Dortch (FCC), GN Docket No. 12-268 & WT Docket No. 12-269 (May 7, 2014), at 2-12 (“AT&T-Keisler May 7 Ex Parte”).

T-Mobile begins with the contention that “economical low-band deployment” is feasible only if wireless providers are able to obtain a 20 MHz block of spectrum at auction.<sup>33</sup> Since the Commission has reserved only up to 30 MHz of spectrum, T-Mobile proceeds to the claim – on which its entire argument rests – that “only one reserve-eligible carrier can acquire twenty megahertz of spectrum” in the auction.<sup>34</sup> This, T-Mobile asserts, will be insufficient to ensure a competitive marketplace.<sup>35</sup>

But T-Mobile’s premise is incorrect. There is no limitation on how much spectrum the reserve-eligible providers can win. T-Mobile persists in mischaracterizing the auction as, in effect, containing two separate sub-auctions, one for AT&T and Verizon and one for everyone else.<sup>36</sup> That is not how the Commission structured the auction. *All* auction participants may bid for the “unreserved” spectrum, and thus T-Mobile is not “preclud[ed] from acquiring ... substantial amounts of spectrum.”<sup>37</sup> If T-Mobile places a higher value on unreserved spectrum than other bidders, it can win that spectrum. There is nothing in the rules that prevents two different reserve-eligible providers from each acquiring 20 MHz of spectrum if they place the highest value on it.<sup>38</sup> In contrast, if the Commission granted T-Mobile’s petition, then either AT&T or Verizon (or both) would be precluded from obtaining the minimum 20 MHz of spectrum that T-Mobile claims is needed for an economically feasible deployment.

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<sup>33</sup> T-Mobile Pet. at 8.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 8-9.

<sup>36</sup> *See, e.g., id.* at 8 (“the market-based spectrum reserve is inadequate for more than one competitive provider to secure [a] twenty-megahertz block[]” of spectrum).

<sup>37</sup> *Id.* at 10.

<sup>38</sup> *Spectrum Order* ¶ 190 (“[A] maximum of 30 megahertz for most levels of reserved spectrum will leave a significant amount of unreserved spectrum available, *which all bidders will have the opportunity to compete.*”) (emphasis added). As explained below, T-Mobile certainly has access to the capital necessary to acquire any 600 MHz spectrum it might need.

Moreover, the Commission’s selection of 30 MHz as the reserve amount was based in part on T-Mobile’s own advocacy. As recently as May of this year, T-Mobile was arguing in this very proceeding “twenty-megahertz blocks of 600 MHz spectrum are *not* required for effective mobile deployment.”<sup>39</sup> The Commission specifically cited and relied on T-Mobile’s claims in finding that an allocation of 30 MHz of spectrum would be sufficient to ensure that “multiple providers” will be able to provide service using that spectrum.<sup>40</sup> T-Mobile does not even acknowledge this remarkable about-face in its position, and it would be odd indeed for the Commission to grant reconsideration when the Commission’s actions were consistent with and relied on the position that T-Mobile itself had advocated.

T-Mobile’s vague suggestions that AT&T and Verizon can engage in “foreclosure” strategies are without foundation.<sup>41</sup> It is worth noting that T-Mobile is not (and could not be) talking about *market* foreclosure, which would be the only basis for special rules establishing reserved spectrum. The auction does not raise any legitimate foreclosure concerns in that regard.<sup>42</sup> Certainly, T-Mobile has been a highly effective competitor with a portfolio consisting primarily of high-frequency spectrum, as T-Mobile is not shy about pointing out.<sup>43</sup> Nor does T-

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<sup>39</sup> T-Mobile May 5 Ex Parte at 5 (emphasis added).

<sup>40</sup> *Spectrum Order* ¶¶ 190-91 & n.527 (citing T-Mobile May 5 Ex Parte).

<sup>41</sup> T-Mobile Pet. at 8, 10.

<sup>42</sup> *See, e.g.*, Comments of AT&T Inc., WT Docket No. 12-269 (Nov. 28, 2012), at 14-20 (“AT&T Nov. 28 12-269 Comments”); Reply Comments of AT&T Inc., WT Docket No. 12-269 (Jan. 7, 2013), at 8-12 (“AT&T Jan. 7 12-269 Reply Comments”); AT&T-Keisler May 7 Ex Parte at 6-7 & n.6 (citing evidence).

<sup>43</sup> *See, e.g.*, T-Mobile May 5 Ex Parte at 2 (“T-Mobile added more than 4.4 million new subscribers in 2013, and an additional 2.4 million subscribers in the first quarter of 2014. The recent quarter was T-Mobile’s fourth consecutive quarter with more than one million net customer additions . . . the largest subscriber additions of any carrier in the U.S. market.”).

Mobile lack for spectrum: in a recent press release, T-Mobile boasted that it has 70% more network capacity per customer than Verizon.<sup>44</sup>

Rather, T-Mobile is apparently making the much narrower claim that AT&T (or Verizon) would be able to “foreclose” other bidders from acquiring 600 MHz spectrum in this auction (in the sense that those providers may win the spectrum by bidding more for it). But any conceivable foreclosure concerns on those lines are put to rest by the Commission’s decision to reserve a substantial amount of 600 MHz spectrum that cannot be acquired by AT&T or Verizon. The mere existence of this reserve will preclude any attempt, however fanciful, to pursue an anti-competitive auction “foreclosure” strategy to exclude rivals from being able to offer viable wireless service. Under the Commission’s rules, even if AT&T wanted to try to obtain all of the 600 MHz spectrum merely to warehouse it, the Commission has reserved a substantial block of spectrum that AT&T *cannot* purchase at auction.<sup>45</sup>

In all events, any claim that the Commission’s auction rules would allow AT&T to foreclose T-Mobile in either sense would be absurd. Any attempt by AT&T to purchase 600 MHz spectrum to warehouse it in order to foreclose competition by T-Mobile would be doomed to failure. Under T-Mobile’s hypothesis, AT&T would incur billions of dollars to acquire spectrum it does not need even though T-Mobile could continue to expand its offerings with its existing excess capacity.<sup>46</sup> Moreover, the Commission’s rules already give T-Mobile a special opportunity to purchase substantial amounts of 600 MHz spectrum without facing any bidding competition from AT&T (or Verizon), as well as the opportunity to outbid AT&T for (and

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<sup>44</sup> See T-Mobile Data Press Release.

<sup>45</sup> *Spectrum Order* ¶¶ 175, 181, 184-88.

<sup>46</sup> *Accord*, T-Mobile Data Press Release (T-Mobile “is in a unique position to satisfy the growing demand for fast mobile data . . .”).

“foreclose” AT&T from acquiring) unreserved spectrum. No anti-competitive “foreclosure” of any type would be possible in such circumstances.<sup>47</sup>

For these same reasons, T-Mobile’s argument that the allocation adopted by the Commission will allow AT&T and Verizon to “divide the spectrum resources evenly without significant competition between them” is without merit.<sup>48</sup> All bidders are eligible to purchase unreserved spectrum.<sup>49</sup> AT&T thus faces the prospect of competition from not only Verizon, but from a host of other bidders, including T-Mobile. Again, the Commission’s rules hobble only AT&T and Verizon, not T-Mobile or anyone else. And to the extent that there is substantial demand for spectrum beyond what is “reserved” by the Commission, as T-Mobile posits, that will only serve to increase the competition that AT&T and Verizon face for the unreserved spectrum.

### **III. THE COMMISSION SHOULD NOT RECONSIDER THE PRICE TRIGGER IT ADOPTED FOR THE FINAL STAGE RULE.**

The Commission should also reject T-Mobile’s request for reconsideration of the determination to adopt a reserve trigger based on a price per MHz-POP threshold.<sup>50</sup> Under the Commission’s approach, spectrum will become “reserved” only when bidding prices reach a minimum price per MHz-POP for the spectrum.<sup>51</sup> T-Mobile’s request is both procedurally improper and substantively meritless.

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<sup>47</sup> See Mark A. Israel and Michael L. Katz, *Economic Analysis of Public Policy Regarding Mobile Spectrum Holdings*, at ¶¶ 26-32 (Nov. 28, 2012), attached to AT&T Nov. 28 12-269 Comments.

<sup>48</sup> T-Mobile Pet. at 9, 10.

<sup>49</sup> *Spectrum Order* ¶ 190.

<sup>50</sup> T-Mobile Pet. at 13.

<sup>51</sup> *Incentive Auction Order* ¶ 26.

First, in the instant petition T-Mobile is seeking reconsideration only of the *Spectrum Order*,<sup>52</sup> but the decision to adopt a price-per-MHz-POP trigger is in the *Incentive Auction Order*, not the *Spectrum Order*. T-Mobile cites only one paragraph of the *Spectrum Order* in support of its petition here, but that paragraph merely has a footnote in which the Commission takes note of the fact that it set the final stage rule in the *Incentive Auction Order*.<sup>53</sup> The *Spectrum Order* itself does not determine the specific final stage rule triggers. Indeed, the Commission in the *Spectrum Order* does not even discuss the specific price per MHz-POP trigger challenged by T-Mobile.<sup>54</sup> The Commission addressed and explained the basis for the final stage rule in its *Incentive Auction Order* and determined the specific components of the reserve price for the final stage rule there, including why it was necessary to set a reserve price by reference to a price per MHz-POP.<sup>55</sup> Accordingly, there is no basis for T-Mobile to seek reconsideration of that determination in this petition.<sup>56</sup>

In all events, the Commission’s decision to establish a price trigger for the reserve auction to ensure that bidders like T-Mobile do not win spectrum in the reserve auction at unduly low prices was reasonable and fully supported by the statute’s grant of authority to the Commission to “prescribe methods by which a reasonable reserve price will be required, or a

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<sup>52</sup> See T-Mobile Pet. at 1.

<sup>53</sup> *Id.* at 13 n.44 (citing *Spectrum Order* ¶ 187).

<sup>54</sup> *Accord*, *Spectrum Order* ¶ 195 (“In the coming months, the Commission will solicit public input in the *Incentive Auction Comment PN* on procedures for implementing certain auction-related decisions made in the *Incentive Auction Report and Order*. Among other things, the *Comment PN* will seek comment on how to establish the details of a spectrum reserve trigger . . .”).

<sup>55</sup> *Incentive Auction Order* ¶¶ 26, 338-46.

<sup>56</sup> T-Mobile has separately sought reconsideration of the *Incentive Auction Order* on similar grounds, and AT&T will address T-Mobile’s arguments there in an opposition in that proceeding.

minimum bid will be established, to obtain any license being assigned pursuant to the competitive bidding.”<sup>57</sup> The use of such a reserve was particularly warranted here, given Congress’ more specific intention that this incentive auction be designed to ensure “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource.”<sup>58</sup>

Those statutory provisions plainly foreclose T-Mobile’s argument that the Commission acted unreasonably and should have set no price reserve at all. While the Commission sought to ensure that T-Mobile had the *opportunity* to obtain some 600 MHz spectrum without competition from AT&T and Verizon, it properly recognized that it needed to take steps to ensure that the public interest was protected and that T-Mobile and others would not be able to purchase spectrum in a protected auction at prices well-below “competitive market values.”<sup>59</sup> The Commission thus adopted the reserve trigger to ensure spectrum is “reserved only where there is demand at *market-based prices*.”<sup>60</sup> In contrast, allowing T-Mobile to purchase spectrum at amounts well below competitive levels serves only to unjustly enrich T-Mobile – which would both undermine competition and potentially deprive the public of substantial auction revenues in a manner that furthers no legitimate statutory purpose.

T-Mobile’s arguments to the contrary are without merit. T-Mobile asserts that “efficiency” would be achieved by a reserve price based solely on the amounts necessary to clear

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<sup>57</sup> 47 U.S.C. § 309(j)(4)(F).

<sup>58</sup> *Id.* § 309(j)(3)(C).

<sup>59</sup> *Incentive Auction Order* ¶ 343.

<sup>60</sup> *Spectrum Order* ¶ 194 (emphasis added).

the spectrum and pay the statutorily-mandated expenses<sup>61</sup> that is incorrect. The “efficient” price would be the price that would result from a fully competitive bidding process in which spectrum would be transferred from the broadcasters to the provider that places the highest value on it. But by creating a “reserved” auction that calls off a substantial portion of the spectrum from a fully open auction, that will not occur. Thus, as the Commission recognized, in that circumstance, there is a substantial risk that the spectrum in the reserve auction may be purchased at a price well below competitive levels.<sup>62</sup> The price per MHz-POP threshold was thus required as an additional measure to counteract the price-depressing impact of reserving substantial spectrum for providers like T-Mobile. In seeking to eliminate the price per MHz-POP threshold, T-Mobile is not seeking to pay “efficient” prices for the spectrum, but instead is seeking to lock in a regulatory windfall.

T-Mobile says that the price per MHz-POP threshold will harm “competition” by potentially allowing “foreclosure” to occur.<sup>63</sup> Putting aside that the fact that this auction poses no legitimate foreclosure concern of any kind, T-Mobile’s argument makes no sense even on its own terms. Under the Commission’s rules, T-Mobile could be “foreclosed” from acquiring spectrum in this manner only in the situation in which T-Mobile is willing to pay only below-market prices for the spectrum. As long as T-Mobile is willing to pay market prices and bids accordingly, the price-per-MHz-POP trigger will kick in and T-Mobile can continue to bid in the reserve auction. T-Mobile has not articulated any basis for a rule that would guarantee providers like T-Mobile the opportunity to bid in protected auction for spectrum at below-market rates.

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<sup>61</sup> T-Mobile Pet. at 14; see also id at 12.

<sup>62</sup> Incentive Auction Order ¶ 343.

<sup>63</sup> T-Mobile Pet. at 14.

The price per MHz POP threshold merely requires that the providers purchasing the reserved spectrum pay a reasonable price for it.

The fact that T-Mobile would advocate such a rule underscores that T-Mobile is apparently claiming it can purchase spectrum only if can do so at a steep discount below market-value. This position is remarkable. T-Mobile's parent Deutsche Telekom is one of the largest telecommunications companies in the world and had an EBITDA of €15.8 billion with free cash of about €5 billion in 2013.<sup>64</sup> There can be no doubt that T-Mobile has access to the capital necessary to purchase 600 MHz spectrum at market-based prices. Indeed, when T-Mobile entered the 2006 AWS-1 auction, it was the highest bidder of all wireless providers, and acquired the most spectrum – even though that auction had no “reserved” spectrum at all.

T-Mobile contends that the Commission may get it wrong: spectrum is hard to value, T-Mobile says, and thus it will be difficult to determine a proper price per MHz-POP threshold.<sup>65</sup> T-Mobile overstates the difficulties in this specific context. The Commission would not be seeking to determine the precise value of the spectrum being auctioned, but only the minimum value necessary to trigger the reserve auction (where the precise values would be determined in the bidding). Notably, in stark contrast to T-Mobile's advocacy now, it previously endorsed the argument that spectrum valuation was sufficiently straightforward that it could be used to establish a market-weighted spectrum screen<sup>66</sup>—a far more complex and precise endeavor than what the Commission seeks to undertake now.

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<sup>64</sup> T-Mobile, Investor Relations, “2013: Key Financial Data,” <http://www.telekom.com/investor-relations/Company/financial-overview/92398>.

<sup>65</sup> T-Mobile Pet. at 15.

<sup>66</sup> Reply Comments of T-Mobile USA, Inc., WT Docket No. 12-269, at 7-8 (Jan. 7, 2013) (“T-Mobile Jan. 7 Reply Comments”).

Moreover, the fact that the Commission has not yet set the actual price threshold to be used in the reserve trigger is yet another reason why T-Mobile’s petition is procedurally flawed. Although the Commission has determined it will use a price per MHz-POP trigger, the Commission explained – again, in the *Incentive Auction Order* – that the Commission will set the actual price clearing benchmarks only after a further round of notice and comment.<sup>67</sup> At this point, it is completely speculative as to whether the specific price threshold set by the Commission would have any material impact on T-Mobile.<sup>68</sup> In the future rulemaking proceeding, T-Mobile will have an opportunity to press any arguments it has for why the Commission should set a low price per MHz-POP threshold. Until the Commission actually sets a price threshold, T-Mobile’s reconsideration request is not even ripe.<sup>69</sup>

T-Mobile’s request would rub against the grain of the statute in other ways as well. For example, without the Commission’s price trigger, it is far more likely that the auction will generate no extra revenues for the public. Under T-Mobile’s approach, “reserved” spectrum could be purchased for only those amounts sufficient to allow recovery costs and the other expenses identified in the Spectrum Act. With no additional price trigger, providers like T-Mobile may be able to purchase large portions of the available spectrum at below-market prices; walling off substantial demand from the auction can only serve to *lower* the prices that T-Mobile will need to pay for 600 MHz spectrum. Congress certainly did not want the Commission to

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<sup>67</sup> *Incentive Auction Order* ¶ 340.

<sup>68</sup> If the Commission were to set the price-per-MHz-POP trigger at a relatively “low” level, the reserve price may ultimately be set in many (or most) instances by the *other* component of the final stage rule—whether the auction proceeds are sufficient to meet all of the mandatory expenses that must be recovered under the Spectrum Act. *Id.* ¶ 341. T-Mobile concedes that this is a legitimate trigger. T-Mobile Pet. at 12-13.

<sup>69</sup> *Accord, Amerijet Intern., Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014) (case not ripe where “further factual development” necessary and before agency has not had a chance to “crystaliz[e] its policy”).



## CONCLUSION

For the foregoing reasons, the Commission should deny T-Mobile's Petition for Reconsideration.

Respectfully Submitted,

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*Systems, Inc.*, 16 FCC Rcd. 18357, ¶ 11 (2001) (“Section 309(j)(7)(A) prohibits the Commission from assigning a band of frequencies to a particular use . . . based on the expectation of auction revenue.”). Section 309(j)(7)(B) is even more inapposite. It provides that “[i]n prescribing regulations pursuant to *paragraph (4)(A)* [§ 309(j)(4)(A)] of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.” See 47 U.S.C. § 309(j)(7)(B) (emphasis added). Section 309(j)(4)(A) concerns the Commission’s authority to issue regulations that allow for alternative payment schedules, which is not at issue here.