

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

In the Matter of)	
)	
Policies Regarding Mobile Spectrum)	WT Docket No. 12-269
Holdings)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	

REPLY OF SPRINT CORPORATION

Sprint Corporation (“Sprint”) hereby replies to the Oppositions filed in response to its Petition requesting that the Commission reconsider its decision not to incorporate spectrum weightings into the revised spectrum screen adopted in the *Report and Order* in this proceeding.¹

I. INTRODUCTION

The Commission should grant Sprint’s Petition and reverse its decision in the *Report and Order* because incorporating spectrum weights into the spectrum screen will provide a more accurate, transparent, and predictable tool for identifying transactions that raise potential competitive concerns. The Commission’s decision not to adopt spectrum weightings at this time cannot be squared with the findings in the *Order* that there are critical differences among the various spectrum bands, which are directly relevant to the competitive issues raised by proposed

¹ Opposition of AT&T to Sprint’s Petition for Reconsideration, WT Docket No. 12-269 (Sept. 24, 2014) (“AT&T Opposition”); Opposition of Mobile Future to Petitions for Reconsideration, WT Docket No. 12-269 (Sept. 24, 2014) (“Mobile Future Opposition”); Opposition of Verizon to Petitions for Reconsideration, WT Docket No. 12-269 (Sept. 24, 2014) (“Verizon Petition”). *See also* Petition for Reconsideration of Sprint Corporation, WT Docket No. 12-269 (Aug. 11, 2014) (“Sprint Petition” or “Petition”); *Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133, ¶ 274 (2014) (“*Report and Order*” or “*Order*”). Sprint is filing a separate reply regarding T-Mobile’s Petition for Reconsideration involving the spectrum reserve in the 600 MHz incentive auction and the Oppositions filed in response thereto.

spectrum transactions. The Commission's decision was also based on a flawed view of the record, which provides a sound basis for developing spectrum weightings that will greatly improve the accuracy and effectiveness of the spectrum screen.

The Oppositions raise misplaced procedural objections and rehash AT&T's and Verizon's prior efforts to treat all spectrum as equal under the Commission's spectrum policies – an approach that uniquely benefits AT&T and Verizon to the detriment of promoting sustainable, national wireless broadband competition for American consumers. The *Order* firmly rejected AT&T's and Verizon's efforts to convince the Commission to treat all spectrum bands equally for competitive analysis purposes. Accordingly, the Commission should, on reconsideration, adopt spectrum weightings to ensure that its spectrum screen promotes competition and the public interest.

II. SPRINT'S PETITION COMPLIES WITH THE COMMISSION'S PROCEDURAL RULES

The Oppositions claim that Sprint's Petition relies on arguments already fully considered and rejected by the FCC in the *Order*, and should therefore be dismissed as procedurally defective.² These claims have no merit. Sprint's Petition fully complies with the Commission's rules because it identifies fundamental flaws and inconsistencies in the *Order*, revealing important issues that the Commission has not fully considered. In particular, the Petition shows that the *Order* inadequately considered a number of critical facts in the record and reached conflicting conclusions regarding the important differences among spectrum bands in applying

² See AT&T Opposition at 2-5; Mobile Future Opposition at 2; Verizon Opposition at 3-4.

the Commission's spectrum screen. Sprint's Petition identifies and seeks reconsideration of this substantive error.³

Specifically, the *Order* contains a significant internal inconsistency. It finds that “not all spectrum is created equal,” that there are “more than mere” cost differences to deploy different bands, that “differences between spectrum bands can be relevant to a determination of the public interest in the context of reviewing transactions,” and that these differences will be a “key factor” in reviewing transactions.⁴ Yet it fails to adopt spectrum weightings to properly implement the Commission's conclusions about the substantial differences among spectrum bands, particularly in transaction reviews.

Sprint's Petition points out this inconsistency and also explains that the *Order*'s dismissal of spectrum weightings in favor of an ill-defined case-by-case approach is based on a flawed, superficial reading of the record. Spectrum weightings are the proper means of implementing the *Order*'s findings and ensuring that the spectrum screen reflects competitive realities. As Sprint noted in its Petition, moreover, the decision to count significant amounts of higher-frequency spectrum *exacerbated* the existing defects in the screen – the *raison d'être* for this proceeding – and amplified the importance of implementing a weighting mechanism that helps the Commission achieve its public policy objectives.⁵

These are precisely the sorts of issues – logical inconsistencies, misstatements regarding the record, and pragmatic issues of implementation overlooked in an initial agency decision – that the reconsideration process is designed to address. The Commission has, on prior occasions, reconsidered its decisions based on a showing that its original order was inconsistent with its

³ Accordingly, AT&T is incorrect in its argument, and Sprint's Petition does not qualify for dismissal under section 1.429(1)(3) of the Commission's rules.

⁴ See *Report and Order* ¶¶ 3, 65, 274, 289.

⁵ Sprint Petition at 4.

public interest objectives.⁶ As set forth in Sprint’s Petition, the Commission should similarly reconsider the flawed logic and assumptions in the *Order* and adopt spectrum weightings as part of its spectrum screen.

III. THE COMMISSION SHOULD ADOPT SPECTRUM WEIGHTINGS TO IMPLEMENT ITS FINDING THAT “NOT ALL SPECTRUM IS CREATED EQUAL”

A. The Commission Has Already Rejected the Arguments in the Oppositions that Seek to Treat All Spectrum As Fungible

It is actually AT&T, Verizon, and Mobile Future that seek to relitigate issues the Commission has already rejected. In their Oppositions, these parties rehash arguments claiming that low-band spectrum has no special advantages compared to higher bands.⁷ These parties essentially argue that trying to measure the differences between spectrum bands is too complex and that the Commission should simply throw up its hands and continue to apply the spectrum screen in a way that assumes all spectrum is equal.⁸ Under that methodology, one megahertz of 700 MHz spectrum would be counted the same as one megahertz of 2.5 GHz spectrum, making the raw total amount of an applicant’s spectrum holdings the only relevant factor in applying the screen.

These are the same arguments, however, that the Commission rejected in concluding in the *Order* that “not all spectrum is created equal” and that spectrum band differences will be a

⁶ See, e.g., *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 4654 (1995) (revising on reconsideration the cable-SMATV cross-ownership rule to more accurately reflect Congressional intent).

⁷ See AT&T Opposition at 7-8; Mobile Future Opposition at 3; Verizon Opposition at 6.

⁸ See, e.g., AT&T Opposition at 13 (assuming all spectrum is the same in asserting that “Sprint already holds more spectrum than AT&T and Verizon combined”); Verizon Opposition at 6 (asserting that 2.5 GHz spectrum “is not inherently different and less valuable than other spectrum”).

“key factor” in reviewing the competitive effects of proposed transactions.⁹ The *Order* finds that low-band spectrum has unique propagation characteristics and offers distinct cost and operational advantages relative to higher band spectrum.¹⁰ Relying on higher bands to deploy a network not only entails higher costs but also operational challenges, such as “increased obstacles ... to siting of new wireless facilities” due to the need to deploy a greater number of cell sites to make up for signal coverage disadvantages of higher band spectrum.¹¹ The Commission found that AT&T’s and Verizon’s efforts to dismiss or downplay the differences among bands were “not persuasive.”¹² The Commission has thus already rejected the underlying premise of the Oppositions’ arguments and there is no need to re-argue those points here.

The spectrum screen, as modified, is arbitrary, illogical, and at odds with the Commission’s factual findings. The purpose of the spectrum screen is to increase competition and enhance consumer welfare by combating excessive concentration of input resources critical to providing wireless broadband services. In the *Order*, the Commission found that, “in principle, spectrum weighting has the potential to enhance our competitive analysis of proposed spectrum acquisitions.”¹³ Yet the Commission declined to adopt specific spectrum weighting factors *at this time*, stating that it would instead consider spectrum band differences as part of its

⁹ *Report and Order* ¶¶ 3, 274.

¹⁰ *Id.* ¶¶ 3, 48-54, 274.

¹¹ *Id.* ¶ 65.

¹² *Id.* ¶ 51. The Commission comprehensively rejected the AT&T and Verizon arguments seeking to treat all spectrum bands the same. *See, e.g., id.* at ¶¶ 45, 48, 50-51, 53-54, 58, 60 (repeatedly recognizing the importance of low-band spectrum, which Sprint advocated for, despite AT&T’s and Verizon’s arguments to the contrary). In contrast, the Commission accepted Sprint’s arguments that the qualitative differences between spectrum bands are critically relevant to the Commission’s spectrum policies.

¹³ *Id.* ¶ 274.

case-by-case analysis of specific transactions.¹⁴ In making this decision, the Commission failed to provide a rational and non-arbitrary basis for the rules it chose to adopt.¹⁵

As modified, the spectrum screen applies unprecedented regulatory scrutiny to parties that hold spectrum less susceptible to the type of anti-competitive behavior the Commission claims to want to prevent. Indeed, far from finding facts sufficient to impose burdensome regulatory scrutiny on a company with substantial high-band spectrum holdings, the Commission found just the opposite: low-band spectrum is far more limited and far more susceptible to anti-competitive abuse than high-band spectrum.¹⁶ Incorporating high-band spectrum into an unweighted screen pushes Sprint closer to or past the trigger for additional regulatory scrutiny in most markets, even as it pushes the nationally dominant players below or further away from receiving the same type of regulatory scrutiny.

As explained in Sprint's Petition, moreover, the case-by-case approach the Commission adopted risks undermining the Commission's recognition that spectrum band differences are critical to its competitive analysis. At the very least, an ill-defined, *ad hoc* approach will create substantial uncertainty regarding how the spectrum screen will be applied and create delays in the Commission's transaction review. At worst, this approach risks the continued application of a spectrum screen that assumes, in direct contradiction to the findings in the *Order*, that all spectrum is equal.¹⁷ Adding substantial high-band spectrum (and in particular, higher-frequency

¹⁴ *Id.*

¹⁵ *See, e.g., Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 43 (1983) (explaining that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'").

¹⁶ For this very reason, the Commission declined to adopt any auction-specific limits on operators in the auction of higher-frequency AWS-3 spectrum. *Report and Order* at ¶¶ 222-24.

¹⁷ Indeed, the dominant carriers that have already successfully aggregated the vast majority of low-band spectrum have continued to seek *additional* low-band spectrum. In the process, they

spectrum with numerous unique encumbrances) exacerbates the screen’s central defect – treating all spectrum bands alike – and magnifies the importance of implementing some spectrum screen mechanism to reflect the key competitive differences among bands. As set forth below, a reasonable set of spectrum weightings can be developed to eliminate these risks and achieve the goals described in the *Order*.

B. The Record Provides a Sound Basis for Adopting Spectrum Weightings that Promote the Public Interest

Sprint and others have provided an extensive record from which the Commission can craft reasonable spectrum weightings that will streamline and greatly increase the accuracy of the Commission’s transaction review.¹⁸ The Oppositions fault Sprint for proposing different approaches and quibble with various aspects of its proposals, but these arguments miss the fundamental point.¹⁹ There is a range of spectrum weighting approaches that would greatly improve the accuracy of the spectrum screen and promote the FCC’s competition goals. Although there is no “perfect” spectrum weighting system, perfection is not the goal, and Sprint has never argued that it was. The goal of this proceeding is to repair the current spectrum screen that, notwithstanding the *Order*’s findings to the contrary, functionally assumes that all spectrum is equal and will return the many “false positives” and “false negatives” described in Sprint’s

have flaunted the Commission’s requirement for a more detailed public interest showing in their public interest statements, making the effective use of the Commission’s “enhanced factor” even more critical as a means of preventing further concentration of low-band spectrum. *See, e.g.*, Public Interest Statement, attached to Lead Application for Consent to Assign Licenses and Authorizations of AT&T Inc., Plateau Telecommunications, Inc, E.N.M.R. Telephone Cooperative, New Mexico RSA 4 East Limited Partnership, and Texas RSA 3 Limited Partnership, ULS File No. 0006366669 (received July 14, 2014) (seeking to assign between 32 and 57 megahertz of low-band spectrum in twenty-four counties to AT&T).

¹⁸ Sprint Petition at 14-21.

¹⁹ *See* AT&T Opposition at 11; Mobile Future Opposition at 2.

Petition.²⁰ The Commission should draw on the rich record that has already been developed to develop spectrum weights that improve the reliability of its transaction review and promote the public interest objectives set forth in the *Order*.

The Oppositions claim that the Commission should not adopt spectrum weightings because the weights would need to be updated frequently, given the dynamic wireless marketplace.²¹ Sprint's proposals acknowledged and compensated for the dynamic wireless marketplace by focusing on propagation characteristics and their corresponding deployment costs precisely *because* these factors tend to be more stable over time.²² Moreover, contrary to the Oppositions' implicit argument, Sprint believes that periodic updates to the Commission's spectrum policies, including its spectrum screen, serves the public interest by ensuring that such policies reflect new technologies and marketplace conditions. Spectrum weighting can be fine-tuned as necessary as part of the rulemaking process that the FCC has used for years in adopting and modifying its spectrum policies.²³

The Oppositions also mischaracterize Sprint's proposals, calling them "rigid" and "inflexible."²⁴ There is nothing "rigid" or "inflexible" about the spectrum weightings proposed in the record, especially compared to a spectrum screen that would treat all spectrum equally despite empirical evidence that individual bands are qualitatively unique. By definition, the spectrum screen – including a screen that incorporates spectrum weightings – simply flags transactions that require closer scrutiny. The Commission will retain the flexibility to examine

²⁰ Sprint Petition at 12-13.

²¹ See AT&T Opposition at n.39; Verizon Opposition at 4-5.

²² Sprint Petition at 17.

²³ For example, the Commission could seek comment on updating spectrum weights in the course of rulemakings that would impact spectrum availability, such as when it auctions spectrum or modifies rules that impact spectrum utility.

²⁴ AT&T Opposition at 9, 10.

the specific facts raised in markets that exceed the spectrum-weighted screen.²⁵ Given the Commission’s finding that “not all spectrum is created equal,” neither the *Order* nor the parties opposing Sprint’s Petition have adequately or reasonably explained why spectrum weighting should not be used.

Administrative agencies have the discretion to choose to regulate either on a case-by-case basis or by prophylactic rule.²⁶ But, as Sprint explained in its Petition, the far better policy is to develop spectrum weightings as upfront “rules of the road” to provide applicants and FCC staff guidance on how to implement the *Order*’s finding that “not all spectrum is created equal.”²⁷ Rules established through a rulemaking “provide reasonably clear and objective criteria for application to adjudicatory proceedings.”²⁸ Indeed, a leading treatise on administrative law has recognized the “near unanimity in extolling the virtues of the rulemaking process over the process of making ‘rules’ through case-by-case adjudication.”²⁹ Without upfront guidance concerning relative spectrum weights, the transaction review process will be beset by uncertainty about how spectrum band differences should be factored into the Commission’s review.³⁰

²⁵ *Report and Order* ¶ 277.

²⁶ See AT&T Opposition at 9-10; see also *Report and Order* ¶ 274.

²⁷ Sprint Petition at 13-14, 20-21.

²⁸ 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.8 369 (4th ed. 2002).

²⁹ *Id.* at 368 (citing Bernstein, *the NLRB’s Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 *Yale L.J.* 571 (1970); Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 *Harv. L. Rev.* 921 (1965)).

³⁰ In their Oppositions, AT&T and Verizon mischaracterize the *Order* as ratifying their assertion that all spectrum is created equal and will likely continue to make these arguments as they attempt to acquire additional low-band spectrum holdings. The screen needs further revision to avoid this anti-competitive result and to limit the potential for arbitrary and capricious transaction review decisions.

VI. CONCLUSION

For the foregoing reasons, Sprint requests that the Commission reject the Oppositions, reconsider the *Report and Order*, and incorporate frequency-specific spectrum weightings in its spectrum screen.

Respectfully submitted,

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October 6, 2014

Certificate of Service

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