Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

The Computer & Communications Industry Association ("CCIA")[1] files this Reply to Oppositions filed in response to T-Mobile USA, Inc. ("T-Mobile") and Competitive Carriers Association's ("CCA") Petitions for Reconsideration of the Commission's *Incentive Auction Order* in the above-captioned proceeding.[2] The Commission should reconsider its decision to adopt a second, MHz-pop reserve price for the forward auction that must be met in addition to an aggregate reserve price.

First, the record in this proceeding demonstrates that adopting a second, MHz-pop reserve price will increase the risks of auction failure and foreclosure. Second, T-Mobile and CCA's Petitions for Reconsideration are not premature because the Commission's decision to adopt a second, MHz-pop reserve price was a final action in a rulemaking proceeding.

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[1] CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA's members employ more than 600,000 people and generate annual revenues in excess of $465 billion. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A complete list of CCIA's members is available online at http://www.ccianet.org/members.

[2] *See* T-Mobile, Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 15, 2014) ("T-Mobile Petition"); Competitive Carriers Association, Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 15, 2014) ("CCA Petition"); *see also Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) ("*Incentive Auction Order*").

Accordingly, the Commission should reconsider its decision to adopt a superfluous and arbitrary second reserve price that will both increase the likelihood that spectrum will go unsold at the incentive auction and erode the protections the Commission found necessary to prevent foreclosure.

I. A SECOND, MHZ-POP RESERVE PRICE INCREASES THE RISKS OF AUCTION FAILURE AND FORECLOSURE

In the *Incentive Auction Order*, the Commission adopted a final stage rule that will determine when – and whether – spectrum is made available for assignment to wireless providers.[3] That final stage rule has two components, which effectively creates two reserve prices.[4] First, the proceeds from the forward auction must be sufficient to cover any amounts still required by the First Responder Network Authority ("FirstNet") and the mandatory expenses set forth in the Spectrum Act, such as compensation for broadcasters, relocation costs, and certain administrative costs of the auction.[5] Second, the proceeds from the forward auction must meet a minimum MHz-pop reserve price.[6]

CCIA welcomes the creation of a reserve price for the forward auction, especially one based on the aggregate amount necessary to satisfy the Spectrum Act's requirements for

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[3] *Id.* ¶ 338.

[4] *Id.* ¶ 26.

[5] *Id*. *See also* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(c)(2), 126 Stat. 156 (2012) ("Spectrum Act").

[6] *See Incentive Auction Order* at ¶ 340 ("Specifically, the . . . reserve price will be satisfied if, for a given stage of the auction: the average price per MHz-pop for licenses in the forward auction meets a price benchmark that will be set by the Commission in the pre-auction process, or the total proceeds associated with licenses in the forward auction exceed the product of the price benchmark, the spectrum clearing benchmark, and the total number of pops for those licenses").

covering mandatory auction expenses.[7] However, as T-Mobile and CCA have warned, adopting two reserve prices and basing one of them on a price per MHz-pop benchmark increases the risk of auction failure, increases the risk of foreclosure, and introduces unneeded complexity into an already complex auction.[8] For instance, there is significant risk that the price per MHz-pop reserve the Commission may establish will be higher than the value the market places on the spectrum and, as a result, spectrum will remain unsold at the close of the auction, which will require a reduction in the overall clearing target.[9] A second, per MHz-pop reserve price may also erode the protections the Commission found necessary to establish to prevent AT&T and Verizon from foreclosing their competitors from obtaining low-frequency spectrum.

Of the sixteen parties who responded to the Petitions for Reconsideration in this proceeding, only AT&T Services, Inc. ("AT&T") disputes that a second, per-MHz pop reserve price would increase the risks of auction failure and foreclosure.[10] Its arguments, however, are unpersuasive.

AT&T dismisses T-Mobile and CCA's auction failure arguments as "at best, theoretical conjecture."[11] AT&T also claims that these arguments "fail[] to account for the fact that the Commission adopted an alternative trigger" (i.e., a trigger for higher clearing scenarios that

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[7] Indeed, the Spectrum Act expressly directs the Commission to create a reserve price or a minimum bid unless it finds that it is not in the public interest to do so. *See* 47 U.S.C. § 309(j)(4)(F).

[8] *See, e.g.*, T-Mobile Petition at 2; CCA Petition at 5.

[9] *See* CCA Petition at 7-8.

[10] Mobile Future also filed an opposition to the Petitions for Reconsideration of T-Mobile and CCA, but its arguments rest on other grounds. *See* AT&T, Opposition to Petitions for Reconsideration of T-Mobile and CCA, GN Docket No. 12-268 (filed Nov. 12, 2014) ("AT&T Opposition"); Mobile Future, Opposition to Petitions for Reconsideration, GN Docket No. 12-268 (filed Nov. 12, 2014) ("Mobile Future Opposition").

[11] AT&T Opposition at 5.

incorporates a clearing benchmark in addition to a price benchmark).[12] However, T-Mobile and CCA have provided ample evidence that attempting to predict spectrum's market value is "challenging in the best of circumstances" and that any price per MHz-pop threshold the Commission creates will necessarily be arbitrary.[13] In fact, the Commission's own experiences with spectrum auctions bear out this point,[14] and have led analysts at J.P. Morgan to conclude that "spectrum valuation is more art than science" and that valuations can "swing[] widely" due to a number of factors.[15] Moreover, the "alternative trigger" for higher-clearing scenarios does not necessarily reduce the risk of auction failure.[16] Although this alternative formulation provides another way to meet the second, per MHz-pop reserve price, it too will lead to auction failure if the Commission sets the clearing and price benchmarks too high. In other words, if the Commission overestimates the value of spectrum and how much will clear, then neither iteration of the per MHz-pop reserve price will permit a successful auction.

Meanwhile, the risks associated with setting a reserve price too high are more consequential in the 600 MHz incentive auction than in standard auctions. Typically, the Commission is able to re-run an auction if it overestimates the market price of spectrum.[17] With

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[12] *Id*. at 13 (quotation omitted).

[13] *See, e.g.*, T-Mobile Petition at 4; CCA Petition at 7-8.

[14] In the 700 MHz Auction, for instance, many lower C and D Block licenses did not sell in an auction that featured a "high reserve price." *See* Marguerite Reardon, *Assessing Success in the FCC's 700 MHz Auction*, CNET (Mar. 18, 2008, 8:52 p.m.), http://www.cnet.com/news/assessing-success-in-the-fccs-700mhz-auction/; *see also Lower 700 MHz Band Auction Closes; Winning Bidders Announced*, Public Notice, 17 FCC Rcd 17272, Attachs. A, C (2002); *Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002*, Public Notice, 17 FCC Rcd 4935 (2002).

[15] *See* Philip Cusick et al., *Telecom Services & Towers*, J.P. Morgan 1 (2002); CCA Petition at 8.

[16] AT&T Opposition at 13.

[17] *See, e.g.*, T-Mobile Petition at 5; *Lower 700 MHz Band Auction Closes; Winning Bidders Announced*, Public Notice, 17 FCC Rcd 17272 (WTB, 2002); *Auction of Lower 700 MHz Band Licenses Scheduled for April 16, 2013*; Public Notice, 17 FCC Rcd 24353 (WTB, 2002).

the incentive auction, however, the Commission gets only one bite at the apple.[18] Congress has given it permission to offer the broadcasters' spectrum for sale only once.[19] Thus, if the Commission inadvertently sets a reserve price that is too high, then it will miss this "once-in-a-lifetime opportunity" to repurpose particularly desirable spectrum for mobile broadband use.[20] Notably, neither AT&T nor Mobile Future addresses the heightened stakes associated with setting the reserve prices for the incentive auction.[21]

A per MHz-pop reserve price would also increase the risk of foreclosure. AT&T rejects this possibility out of hand and does not even try to engage with T-Mobile and CCA's arguments.[22] AT&T merely states that "[s]uch a requirement does not 'foreclose' participation in the auction in any relevant sense, but . . . promotes recovery for the public of the value of the spectrum," and then attempts to cast doubt on T-Mobile's motives for raising the argument in the first place.[23] AT&T both misunderstands the concept of foreclosure and affirmatively ignores the Department of Justice and FCC's prior findings regarding foreclosure. Together with the Antitrust Division of the Department of Justice, the Commission has expressly found that a dominant carrier has incentives to outbid competitors in the incentive auction "not because it will put the spectrum to its highest use, but because it is motivated to engage in a foreclosure strategy."[24] Indeed, the Commission's concerns about foreclosure establish the basis for

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[18] *See* 47 U.S.C. § 1452(e).

[19] *Id*.

[20] *Incentive Auction Order* at ¶ 3.

[21] *See* AT&T Opposition; Mobile Future Opposition.

[22] *See* AT&T Opposition at 7-8.

[23] *Id*. at 8 (quotation omitted).

[24] *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133, ¶¶ 29, 62 (2014) ("*Mobile Spectrum*

adopting a spectrum reserve in the first place.[25] AT&T conveniently forgets to mention these findings, and at times expressly contradicts them by arguing that foreclosure is not even a potential problem.

Contrary to AT&T's flawed analysis, the *Incentive Auction Order* undoes the Commission's efforts to prevent foreclosure "by adding a premium payment requirement on top of the requirement to cover all congressionally-mandated expenses."[26] With such a requirement, the dominant carriers may not need to outbid other carriers to prevent them from obtaining low-frequency spectrum; instead, they can rely on the second reserve price – a "premium payment requirement" – to foreclose competitors from this critical resource.[27] In other words, if the Commission keeps the second, per MHz-pop reserve price, the artificial MHz-POP reserve price would do the work of foreclosure for Verizon and AT&T – either by increasing the price beyond what competitive carriers can afford, or diminishing the total amount of broadband spectrum cleared in the auction, or both.

II. T-MOBILE AND CCA'S PETITIONS FOR RECONSIDERATION ARE NOT PREMATURE

The petitions for reconsideration of T-Mobile and CCA are entitled to Commission review. In their Oppositions, AT&T and Mobile Future both contend that T-Mobile and CCA's Petitions for Reconsideration are procedurally defective because they challenge a reserve price

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Holdings Order"); Department of Justice, *Ex Parte* Submission, WT Docket No. 12-269, at 10-11 (filed Apr. 11, 2013).

[25] *See, e.g.*, *Mobile Spectrum Holdings Order* ¶ 146 (explaining that the spectrum reserve is designed to "ensure against excessive concentration in holdings of low-band spectrum").

[26] T-Mobile Petition at 3.

[27] *Id*.

that has not been set yet.[28] Specifically, AT&T claims that "the petitions are improper because they are . . . focused on issues the Commission has not yet decided."[29] Mobile Future adds that "any concerns about how the spectrum reserve trigger is determined should be addressed in [the ongoing] proceeding."[30] However, these arguments misinterpret the standard for petitions for reconsideration. The Commission's rules plainly permit parties to petition for reconsideration of a "final action[s]" in rulemaking proceedings,[31] and the Commission's adoption of a second, per MHz-pop reserve price in the *Incentive Auction Order* was a final action in a rulemaking proceeding.[32]

No one disputes that the *Incentive Auction Order* was released as part of a rulemaking proceeding. Thus, the question becomes whether the Commission's decision to adopt a second, per MHz-pop reserve price in the *Incentive Auction Order* was a final action. The Supreme Court has clarified that two conditions must generally be satisfied for agency action to be "final."[33] First, the action must mark the "consummation of the agency's decisionmaking process."[34] Second, the action must be one "by which rights or obligations have been determined, or from which legal consequences will flow."[35]

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[28] *See* AT&T Petition at 2, 4-5; Mobile Future Petition at 6-7.

[29] AT&T Opposition at 2.

[30] Mobile Future Opposition at 6.

[31] *See* 47 C.F.R. § 1.425.

[32] *See Incentive Auction Order* at ¶ 26.

[33] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also National Min. Ass'n v. McCarthy*, 758 F.3d 243, 250-51 (D.C. Cir. 2014).

[34] *Bennett*, 520 U.S. at 177-78 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp*., 333 U.S. 103, 113 (1948)).

[35] *Id*. (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Here, both conditions of finality are satisfied. The Commission's adoption of a second, per MHz-pop reserve price was a consummation of its decisionmaking process. Absent reconsideration or other intervention, that decision will apply at the upcoming incentive auction and is not "merely tentative or interlocutory" in nature.[36] In addition, legal consequences will flow from the Commission's adoption of a second, per MHz-pop reserve price. In particular, participants in the forward auction will be unable to purchase spectrum from broadcasters unless their bids exceed this additional threshold. In other words, the second, per MHz-pop reserve price is binding on these participants and, in some cases, may cause them to pay more for spectrum than they would otherwise (or fail to obtain spectrum that they would have obtained otherwise).

In other words, the Commission has unambiguously decided to impose a minimum payment requirement based on a price per MHz-pop to be determined. The Commission's decision to delay a decision on setting the precise price per MHz-pop value that bidders must satisfy does not render the decision to impose a minimum price per MHz-pop requirement any less final. As the D.C. Circuit has explained, "[a] final order need not necessarily be the very last order in an agency proceeding."[37] Instead, what matters is whether the agency action in question meets the two conditions of finality articulated above.[38] Moreover, courts often review as final agency actions "orders issued pending further proceedings," especially when the orders could not

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[36] *Id.*; *see also Incentive Auction Order* at ¶¶ 25-26 (explaining that the incentive auction will close only if both reserve prices are met).

[37] *NetCoalition v. SEC*, 715 F.3d 342, 351 (D.C. Cir. 2013) (quotation omitted); *see also*, *e.g.*, *Obale v. Attorney General of the U.S.*, 453 F.3d 151, 157-58 (3rd Cir. 2006) (agreeing that a "final" agency action need not be the very last order in a proceeding).

[38] *Obale*, 453 F.3d at 151.

be challenged in any subsequent proceedings.[39] Such is the case here, where the Commission will decide at a later point not *whether* to apply a second, per MHz-pop reserve price, but *what* that price should be. When the Commission makes that decision, its "final" action will be setting a particular price. But the *Incentive Auction Order* contains a different "final" action—to require the second, per MHz-pop reserve price in the first place—and it is that decision that is appropriately targeted in T-Mobile and CCA's Petitions for Review.

III. CONCLUSION

CCIA respectfully requests that the Commission dismiss the Oppositions discussed herein, and reconsider its *Incentive Auction Order* as set forth in this Reply and in the Petitions for Reconsideration of T-Mobile and CCA.

Respectfully submitted,

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[39] *NetCoalition*, 715 F.3d at 351.