

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**

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November 24, 2014

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Pursuant to Section 1.429 of the Federal Communications Commission’s (“Commission’s” or “FCC’s”) Rules, T-Mobile USA, Inc. (“T-Mobile”),<sup>1</sup> respectfully submits this consolidated reply to the oppositions submitted by AT&T and Mobile Future to T-Mobile’s Petition for Reconsideration<sup>2</sup> of the *Incentive Auction Report and Order* (the “Order”).<sup>3</sup>

**I. INTRODUCTION AND SUMMARY.**

As T-Mobile explained in its Petition for Reconsideration, adopting two minimum sales prices is unnecessary and contrary to the Commission’s goal of encouraging competition, maximizing the efficient use of the spectrum resource, and recovering a portion of license value for taxpayers.<sup>4</sup> The Commission, largely without explanation, adopted a second average MHz-POP reserve price in addition to a reserve price designed to recover costs incurred under the Spectrum Act.<sup>5</sup> In so doing, the Commission failed to consider or explain its decision or address

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<sup>1</sup> T-Mobile USA, Inc. is a wholly owned subsidiary of T-Mobile US, Inc., a publicly traded company.  
<sup>2</sup> T-Mobile Petition for Reconsideration, GN Docket No. 12-268 (Sept. 15, 2014) (“T-Mobile Petition”).  
<sup>3</sup> See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (“*Incentive Auction Report & Order*”); see also Opposition of AT&T to T-Mobile’s Petition for Reconsideration, Docket No. 12-268 (Nov. 24, 2014) (“AT&T Opposition”); Opposition of Mobile Future to Petitions for Reconsideration, Docket No. 12-268 (Nov. 24, 2014) (“Mobile Future Opposition”).  
<sup>4</sup> See *Incentive Auction Report & Order* ¶ 343.  
<sup>5</sup> See *id.* ¶¶ 338-46.

the increased risk of foreclosure, the heightened the risk of auction failure, and the introduction of additional complexity in an already complex auction process.

The oppositions reveal some key areas of agreement. No party suggests that the Commission explains the rationale behind adopting a second MHz-POP reserve price in the context of the incentive auction. And even AT&T effectively recognizes that the Commission's decision to adopt a MHz-POP reserve price risks reducing the amount of spectrum cleared in the incentive auction and, correspondingly, reduces the protections of the Commission's reserve license framework.<sup>6</sup> In particular, because of the substantial uncertainty in predicting spectrum values, the decision to implement a second MHz-POP reserve price introduces the risk that the Commission will adopt a minimum price that is too high, thereby delaying the introduction of the spectrum reserve beyond the price where it would be a meaningful competitive protection, especially for smaller carriers. Indeed, for these reasons, T-Mobile has separately petitioned for reconsideration of the Commission's decision to link the reserve license framework to an artificial MHz-POP price.<sup>7</sup>

The key disagreement is therefore whether the Commission's plan to issue the *Procedures Public Notice* ("*Procedures PN*") reduces the Commission's obligation to explain its decision to adopt a MHz-POP reserve price. It does not. Adding a price per MHz-POP reserve component to the reserve price introduces substantial complexity to what is already a very complex undertaking, jeopardizes the Commission's efforts to promote competition, and

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<sup>6</sup> Although Mobile Future did file an opposition to T-Mobile's Petition, it only did so insofar as T-Mobile's challenge to the MHz-POP reserve price would remove a MHz-POP price trigger for the spectrum reserve that the Commission implemented to promote competition. *See* Mobile Future Petition at 6-7 ("The Commission should reject requests to reconsider the price per MHz-POP portion of the *spectrum reserve trigger*." (emphasis added)).

<sup>7</sup> *See* T-Mobile Petition for Reconsideration, WT Docket No. 12-269 at 12-17 (Aug. 11, 2014) ("T-Mobile MSH Petition for Reconsideration").

substantially increases the risk of securing less broadband spectrum for use by the public. The Commission should reconsider its decision to adopt the price per MHz-POP component of its proposed reserve price.

## **II. NEITHER AT&T NOR MOBILE FUTURE OFFERS A “SATISFACTORY EXPLANATION” FOR THE COMMISSION’S DECISION TO IMPOSE A SECOND MHZ-POP RESERVE PRICE.**

As T-Mobile explained in its Petition for Reconsideration, the Commission must reconsider its decision to adopt a second MHz-POP reserve price because it failed to “articulate a satisfactory explanation” for its decision, including “a rational connection between the facts found and the choice made.”<sup>8</sup> In particular, T-Mobile noted that, in adopting a second MHz-POP reserve price, the Commission has not adequately explained: (1) why a MHz-POP reserve price is necessary when it introduces opportunities for AT&T and Verizon to foreclose competitors; (2) why this second reserve price is justified when it risks reducing the amount of spectrum cleared; or (3) how the Commission will determine the average MHz-POP reserve price and whether the average price is predictable enough for bidders to rely upon.<sup>9</sup>

AT&T and Mobile Future effectively concede that the Commission does not adequately address these problems in the *Order*.<sup>10</sup> Instead of discussing whether the Commission’s rationale for its decision is adequate – the basis of T-Mobile’s Petition – AT&T and Mobile Future suggest that the problems that T-Mobile raises could disappear when the Commission issues its *Procedure PN*.<sup>11</sup> According to AT&T, all of T-Mobile’s arguments regarding the risks

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<sup>8</sup> T-Mobile Petition at 2 (citing *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 43 (1983)).

<sup>9</sup> See *id.* at 2-7. Far from seeking regulatory advantages, T-Mobile is concerned about introducing additional complication into what the Commission has already recognized is one of the most complicated endeavors it has ever undertaken. See, e.g., AT&T Opposition at 7. The FCC did not adequately explain the MHz-POP reserve price, which introduces substantial complications and uncertainty into the auction.

<sup>10</sup> See generally AT&T Opposition; Mobile Future Opposition.

<sup>11</sup> See AT&T Opposition at 4-16; Mobile Future Opposition at 6-7.

introduced by the second MHz-POP reserve price would largely go away if the MHz-POP reserve price is set at a low level.<sup>12</sup>

Whether or not the problems in the *Order* could be erased, as AT&T suggests, by a subsequent Commission decision is irrelevant.<sup>13</sup> No party disputes that the Commission has adopted a MHz-POP reserve price.<sup>14</sup> The question is whether the Commission “articulate[s] a satisfactory explanation” for introducing substantial complexity and substantial risks with its decision to adopt a second MHz-POP reserve price.<sup>15</sup> All parties, including AT&T and Mobile Future, agree that the Commission does not discuss these potential problems, and instead relies on the same justification it has used in other, far simpler auctions. There are several reasons AT&T and Mobile Future’s arguments fail.<sup>16</sup>

*First*, AT&T effectively recognizes that by adopting an average MHz-POP reserve price, the Commission has introduced a mechanism that could reduce the amount of spectrum clearing by causing an individual round’s spectrum clearing target to go unmet and, in the worst case, the overall auction to fail.<sup>17</sup> AT&T, however, contends that this risk is minimal because the MHz-

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<sup>12</sup> See, e.g., AT&T Opposition at 2.

<sup>13</sup> See *infra* Section III (discussing that the fact that the Commission can reverse an earlier decision is not sufficient to insulate it from challenge).

<sup>14</sup> Specifically, the Commission requires that “the average price per MHz-pop for licenses in the forward auction meets a price benchmark.” *Incentive Auction Report & Order* ¶ 340.

<sup>15</sup> *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 43 (1983).

<sup>16</sup> See, e.g., CCA Petition for Reconsideration, GN Docket No. 12-268 at 5 (Sept. 15, 2014) (“Rather than address the particular facts of why it is appropriate to add an additional reserve price factor to this already complex equation, the Commission relies instead on the same rote explanation that it has used for standard spectrum auctions with standard reserve prices.”). As the Commission explains, “[a]n objective common to all FCC auctions of spectrum licenses is that auction prices generally reflect competitive market values for comparable spectrum licenses.” *Incentive Auction Report & Order* ¶ 343.

<sup>17</sup> See AT&T Opposition at 5.

POP reserve price will remain low compared to overall expected auction revenues.<sup>18</sup> While T-Mobile agrees that a reserve price, if any, should be set at low levels, the MHz-POP reserve price is entirely redundant if it is set at a level near or below the statutory reserve price. The Commission must have intended that its second MHz-POP reserve price was higher than its baseline statutory expenses, or it would be wholly superfluous. In any case, the Commission neither considers, nor discusses the risk that a MHz-POP reserve price could reduce broadcaster clearing in the one-shot incentive auction.<sup>19</sup>

*Second*, AT&T also effectively recognizes that the average MHz-POP reserve price reintroduces the opportunity for foreclosure by dominant bidders. The Commission has acknowledged that AT&T and Verizon have the incentive and ability to foreclose competitors.<sup>20</sup> While the MHz-POP reserve price may be set at a level causing an individual round to fail, as AT&T recognizes, there is likely a range of prices just below that at which the auction would fail that may nonetheless allow AT&T and Verizon to foreclose other carriers. In other words, as the Commission has found, there is a MHz-POP price where AT&T and Verizon would pay supra-competitive prices to acquire the spectrum and keep other carriers from accessing it, and the MHz-POP reserve price reintroduces that possibility.

This foreclosure potential is substantial, particularly given the difficulty to predict spectrum prices prior to any auction, as illustrated most recently by the AWS-3 auction, whether

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<sup>18</sup> See *e.g.*, *id.* at 15 (explaining that the Commission, in setting a MHz-POP price, “would not be seeking to determine the precise value of the spectrum being auctioned, but only the minimum value necessary to trigger the final stage”).

<sup>19</sup> AT&T suggests that the T-Mobile will have a full opportunity to challenge the *level* of the MHz-POP reserve price after the *Procedures PN*, but it does not and cannot suggest that T-Mobile can challenge the existence of the MHz-POP reserve price.

<sup>20</sup> See *Policies Regarding Mobile Spectrum Holdings: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133 ¶ 62 (2014) (“We agree with the Antitrust Division of the DOJ, one of our nation’s expert antitrust agencies: there is a risk of foreclosure in downstream wireless markets.”) (“*MSH Report and Order*”).

those prices are substantially higher or substantially below what analysts predict.<sup>21</sup> Based on this uncertainty, the Commission risks adopting a MHz-POP reserve price that is too high, thus preventing the reserve spectrum framework from coming into existence in time to be a meaningful protection against foreclosure, especially for smaller carriers. Because of these concerns, T-Mobile has relatedly challenged the Commission’s decision to link its spectrum reserve framework to this artificial MHz-POP price.<sup>22</sup> Neither the Commission, nor AT&T or Mobile Future, provides any explanation for why the *Order* adopted a mechanism that could allow the foreclosure the Commission has sought to prevent.

*Third*, AT&T agrees that the Commission does not discuss the complex details regarding calculating an *average* MHz-POP reserve price, but suggests that those details will appear in the *Procedures PN*.<sup>23</sup> However, the plain text of the *Order* indicates that the *Order* announces nearly all the details that the Commission plans to provide regarding averaging: according to the *Order*, the MHz-POP reserve price will be satisfied when it “meets a price benchmark that will be set by the Commission in the [*Procedures PN*].”<sup>24</sup> The Commission’s discussion of the issue suggests that, as with the alternative reserve price for higher clearing scenarios,<sup>25</sup> all that remains to be done regarding the calculation of the price per MHz-POP reserve is for the Commission to announce a price figure – “[t]he price and spectrum clearing benchmarks” for both the average

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<sup>21</sup> See FCC, *Integrated Spectrum Auction System* (last accessed Nov. 24, 2014) (reporting provisionally winning bids well in excess of \$35 billion dollars); see, e.g., John Eggerton, *AWS-3: Bids Up, Total Up, Auction Rolls*, *Broadcasting & Cable* (Nov. 21, 2014) (“The auction began on Nov. 13, with some predicting it to generate \$15 billion or so.”), available at <http://bit.ly/11raL2Z>.

<sup>22</sup> T-Mobile MSH Petition for Reconsideration at 12-17.

<sup>23</sup> See AT&T Opposition at 14-16.

<sup>24</sup> See *Incentive Auction Report & Order* ¶ 340.

<sup>25</sup> *Id.*

<sup>25</sup> The Commission adopts an alternative price per MHz-POP-based reserve price for higher clearing scenarios based on a spectrum clearing benchmark set prior to the auction (i.e., the total price must exceed the product of (x) a price benchmark times (y) a spectrum clearing benchmark times (z) the total U.S. pops). See *id.* ¶ 340.

MHz-POP reserve price and the alternative price for higher clearing scenarios “will be established by the Commission in the *Procedures PN*, after an opportunity for additional comment.”<sup>26</sup>

Nowhere does the Commission suggest that it will address the mechanism for averaging in the *Procedures PN*, and AT&T cannot cite to a passage where the Commission makes such a commitment. To the contrary, while the Commission indicates, for example, that in the future it will examine whether the final stage rule will apply solely to “major markets” to speed up the auction process, it does not indicate that it plans to address the averaging methodology.<sup>27</sup> For other, similarly complex auction mechanisms, the Commission explicitly explains when it will provide further elaboration – for example, the Commission explicitly explains that it will defer to the *Procedures PN* details regarding the dynamic reserve price for the reverse auction<sup>28</sup> and factors in setting prices for broadcast stations.<sup>29</sup> Even if the Commission intended to provide further detail in the *Procedures PN*, its complete failure to so provide in the *Order* is precisely the problem.<sup>30</sup> The *Order* fails to offer answers to a number of important questions, including: (1) Will the averaging be based on the number of licenses, on the geographic area of the license, or on a population-weighted basis? (2) How will the averaging account for the existence of licenses that are impaired to different degrees? (3) How can impairment be calculated into the average per unit pricing until after the auction is nearly complete? and (4) What consequences

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

<sup>27</sup> *Id.* ¶ 338.

<sup>28</sup> *Id.* ¶ 335 (“Details of the operation of the dynamic reserve price will be established in the [*Procedures PN*].”).

<sup>29</sup> *Id.* ¶ 451.

<sup>30</sup> AT&T’s confusion regarding the averaging mechanism further illustrates the Commission’s lack of adequate explanation. AT&T criticizes T-Mobile’s plain reading of the *Incentive Auction Report & Order*, suggesting that it is strange that “no auction would clear if the overall average was below the price per MHz-POP trigger because of low prices in a few geographic markets.” See AT&T Opposition at 14. But that supposedly strange interpretation is precisely how a reserve price expressed in the aggregate would operate.

arise from broad-based averaging across all spectrum blocks and all geographic licenses?<sup>31</sup> In sum, the *Order* fails to provide a “satisfactory explanation” for its decision to adopt an average MHz-POP reserve price.<sup>32</sup>

**III. ALL PARTIES AGREE THE COMMISSION ADOPTED A SECOND MHZ-POP RESERVE PRICE – A DECISION THAT THE COMMISSION SHOULD RECONSIDER.**

AT&T and Mobile Future suggest that T-Mobile’s Petition for Reconsideration is “premature” because the Commission can decide to change course regarding the second MHz-POP reserve price at a later date.<sup>33</sup> Tellingly, however, neither AT&T nor Mobile Future denies that the Commission adopted the second MHz-POP reserve price in the *Order*.<sup>34</sup> Moreover, neither party actually cites any judicial or Commission precedent regarding whether the Commission’s decision is appropriate for reconsideration.

Whether a Petition for Reconsideration is suitable for Commission review does not depend on whether the Commission can subsequently change its decision. With sufficient explanation, an agency can almost always make a decision and reverse course at a later date.<sup>35</sup> But, both at the time of the initial decision and when the agency reverses course, an agency must provide a reasoned analysis for its decision,<sup>36</sup> which is precisely the problem here.

Further, while AT&T and Mobile Future argue that T-Mobile can challenge the ultimate price benchmark the Commission adopts, they do not suggest that T-Mobile can actually petition

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<sup>31</sup> See T-Mobile Petition at 6-7.

<sup>32</sup> See *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 43 (1983).

<sup>33</sup> See Mobile Future Opposition at 6; AT&T Opposition at 4-7.

<sup>34</sup> See *Incentive Auction Report & Order* ¶ 340 (requiring forward auction bids to meet an average price per MHz-POP).

<sup>35</sup> 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 may later reverse course).

<sup>36</sup> See *id.* at 42-43.

the Commission for reconsideration regarding the adoption of the MHz-POP reserve price at a later date. If, after the time the Commission issues the *Procedures PN*, T-Mobile then challenged the adoption of the MHz-POP reserve price or the lack of explanation related to averaging the MHz-POP reserve price, the Commission may find it untimely.<sup>37</sup> Moreover, if T-Mobile were to challenge the adoption of the MHz-POP reserve price following adoption of the *Procedures PN*, AT&T would likely argue that T-Mobile has missed its opportunity to object. Administrative review should not be a guessing game. Reconsideration affords the Commission the opportunity to provide an explanation for its decision or, alternatively, to reconsider the price per MHz-POP component of its minimum price requirement in light of the weight of the record evidence.

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<sup>37</sup> See 47 C.F.R. § 1.429(d) (requiring petitions for reconsideration to be filed within thirty days).

#### IV. CONCLUSION

The Commission has not adequately explained its decision to adopt a complex new price per MHz-POP reserve benchmark for the incentive auction, and neither AT&T nor Mobile Future actually suggests that the Commission offers a sufficient rationale. The second MHz-POP reserve jeopardizes mobile competition, adds complexity to an already complex undertaking, and threatens to reduce the amount of spectrum converted to mobile broadband use. Failing to address these issues raised by the second MHz-POP reserve price calls into question the otherwise well-reasoned conclusions of the *Incentive Auction Report & Order*. Therefore, the Commission should reconsider its *Order* and eliminate the unnecessary second MHz-POP reserve price.

Respectfully submitted,

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