

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

In the Matter of	)	
	)	
Updating Part 1 Competitive Bidding Rules	)	WT Docket No. 14-170
	)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	)	GN Docket No. 12-268
	)	
Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver	)	RM-11395
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211
	)	

**COMMENTS OF SPRINT CORPORATION**

**SPRINT CORPORATION**

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## EXECUTIVE SUMMARY

Rather than bar all joint bidding arrangements between nationwide providers, the Commission should adopt policies that enable carriers to explore pro-competitive, marketplace solutions to the economic challenges of acquiring high-utility spectrum and building state-of-the-art wireless broadband networks. Sprint believes that a balanced, targeted regulatory approach will permit pro-consumer arrangements between competitive carriers that must pool their resources to gain access to a critical foundation of low-band spectrum.

In proposing to prohibit all joint bidding arrangements between nationwide providers, the Commission ignores the key structural reality in today's wireless marketplace. As the Commission has documented, the wireless industry is characterized by an enormous gap between the two most dominant providers, AT&T and Verizon, and all other wireless carriers in the United States. In addition to commanding shares of industry subscribers and revenue, their predominant share of low-band spectrum gives AT&T and Verizon significant cost and operational advantages relative to their competitors.

Certainly, the upcoming Incentive Auction represents a critical opportunity to promote competition, as it will be the last low-band auction for the foreseeable future and thus the last chance for competitive carriers to obtain the low-band spectrum they need to compete with the largest carriers on cost structure. Realistically, however, AT&T and Verizon stand directly in the way of such competitively beneficial spectrum acquisitions. With their vast financial resources and dominant position in the marketplace, AT&T and Verizon could likely outbid all other carriers for any available, "unreserved" 600 MHz spectrum, frequencies that are likely to be even more expensive in the wake of the AWS-3 auction. The Commission's joint bidding

proposal would only make the situation worse, helping the “Twin Bells” to corner the market on 600 MHz spectrum and exacerbating their entrenched, anti-competitive advantages.

To promote more robust competition against this duopoly, the Commission should modify its proposal and tie the Incentive Auction eligibility of any joint bidding arrangement between nationwide providers to the aggregate low-band spectrum holdings of those parties. Specifically, Sprint urges the Commission to allow joint bidding arrangements in Partial Economic Areas where the agreeing parties collectively hold less than 45 MHz of below-1-GHz spectrum on a population-weighted basis. This 45 MHz threshold is consistent with the Commission’s long-time approach to evaluating spectrum concentration in the wireless marketplace. The Commission last year established a new “enhanced review” of transactions in which a carrier would have more than 45 MHz of below-1-GHz spectrum in an affected market, and it also set a 45 MHz cut-off for applicant eligibility to bid on the 600 MHz “reserve spectrum” blocks in the Incentive Auction.

By entering into joint bidding arrangements and combining their capital resources, competitive nationwide carriers might realize the economies of scale necessary to outbid AT&T and Verizon in the Incentive Auction and obtain critical low-band spectrum. Competitive carriers’ success at auction would invigorate mobile broadband performance and competition, and this increased competition would likely lead to greater innovation and improved service quality as AT&T and Verizon are spurred to invest more in their respective networks. Thus, the benefits of this targeted approach – including the ability to enter into network and spectrum sharing agreements and facilitate faster deployment of next-generation networks – far outweigh the risk of any anti-competitive harm from joint arrangements between competitive nationwide carriers.

**TABLE OF CONTENTS**

I. THE COMMISSION’S PROPOSED PROHIBITION AGAINST JOINT BIDDING ARRANGEMENTS BETWEEN NATIONWIDE SERVICE PROVIDERS WOULD PREVENT ARRANGEMENTS THAT PROMOTE COMPETITION AND CONSUMER WELFARE ..... 2

    A. The Commission’s Proposal Ignores the Fundamental Differences Between the Two Largest Wireless Providers and All Other Carriers..... 3

    B. Other Harmful Effects of the Commission’s Proposal..... 9

    C. Sprint’s Alternative Proposal: The Commission Can Realize Its Pro-Competitive Goals Through More Tailored Means ..... 11

    D. The Commission Should Rely on Existing Rules and Antitrust Remedies in the Context of Joint Bidding Arrangements Between Competitive Carriers ..... 13

II. THE COMMISSION SHOULD ELIMINATE THE FORMER DEFAULTER RULE AND MAKE CERTAIN OTHER MODIFICATIONS TO ITS COMPETITIVE BIDDING RULES..... 15

III. CONCLUSION ..... 18

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**COMMENTS OF SPRINT CORPORATION**

Sprint Corporation (“Sprint”) hereby comments on the Commission’s Notice of Proposed Rulemaking proposing various changes to the Commission’s Part 1 competitive bidding rules.<sup>1</sup> Rather than bar all joint bidding arrangements between nationwide providers, the Commission should apply a balanced policy that permits pro-consumer arrangements between competitive carriers that must pool their resources to gain access to a critical foundation of low-band spectrum. This targeted regulatory approach will generate substantial public interest benefits by promoting more robust competition against the nation’s two dominant wireless providers.

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<sup>1</sup> *Updating Part 1 Competitive Bidding Rules; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission’s Rules and/or for Interim Conditional Waiver; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426, ¶ 107 (2014) (“NPRM”).

## I. THE COMMISSION’S PROPOSED PROHIBITION AGAINST JOINT BIDDING ARRANGEMENTS BETWEEN NATIONWIDE SERVICE PROVIDERS WOULD PREVENT ARRANGEMENTS THAT PROMOTE COMPETITION AND CONSUMER WELFARE

In reviewing its rules and policies governing joint bidding arrangements, the Commission’s goal in the *NPRM* is “to ensure that [these arrangements] preserve and promote competition in the mobile wireless marketplace and facilitate competition among bidders at auction, while providing potential bidders with greater clarity regarding the types of joint bidding arrangements that would be permissible.”<sup>2</sup> The Commission’s proposal does not further this goal. To the contrary, it would deter arrangements that promote competition and thus spur innovation and consumer welfare.<sup>3</sup>

When the Commission adopted its current rule and policies in 1994, it established an appropriate balance and provided carriers with the necessary flexibility to advance robust competition.<sup>4</sup> In that order, the Commission declined to categorically prohibit joint bidding

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<sup>2</sup> *Id.*

<sup>3</sup> Although the instant rulemaking is presented as proposing general rules for all future auctions, the 600 MHz Broadcast Television Spectrum Incentive Auction (“600 MHz Incentive Auction” or “Incentive Auction”) is the only auction of traditional wireless CMRS licenses on the horizon for the foreseeable future. *See, e.g., Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, ¶ 8 (2014). The Incentive Auction is indisputably important given that there is no other current resource available for bringing economically critical low-band spectrum to market. Thus, as a practical matter, the instant proceeding proposes rules for the 600 MHz Incentive Auction, and Sprint’s comments are primarily directed at the public interest implications of the Commission’s proposals for that auction. There will be future opportunities to comment on whether the Commission’s decisions in the instant proceeding advance the public interest if applied to a yet-to-be-identified future spectrum auction. For example, the public interest and competitive implications of joint bidding arrangements, designated entity opportunities, and bidding credits may be very different in a possible future auction at 3.5 GHz for one-year licenses on a census block basis with substantial federal spectrum exclusion zones along the heavily populated U.S. east and west coasts.

<sup>4</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348 (1994) (“1994 Auction Order”).

arrangements in Commission spectrum auctions, finding that “they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise and reduce entry barriers for small firms and other entities who might not otherwise be able to compete in the auction process.”<sup>5</sup> Given the entrenchment of two dominant operators within the wireless industry over the past decade, the public policy considerations underlying the Commission’s decisions in 1994 apply with even greater force today.

The Commission’s proposed restriction on joint bidding would constrain competitive carriers’ ability to participate in the 600 MHz Incentive Auction, thereby exacerbating the growing disparity between the two largest wireless carriers and the rest of the commercial wireless broadband industry. The Commission should instead adopt policies that enable carriers to explore pro-competitive, marketplace solutions to the economic challenges of acquiring high-utility spectrum and building state-of-the-art wireless broadband networks. To this end, Sprint respectfully proposes an alternative approach that would prohibit truly anti-competitive arrangements while enabling all prospective bidders, including nationwide carriers, to join in competition-enhancing joint bidding, spectrum sharing, and network sharing arrangements.

**A. The Commission’s Proposal Ignores the Fundamental Differences Between the Two Largest Wireless Providers and All Other Carriers**

In support of its proposed prohibition on joint bidding arrangements between nationwide carriers, the Commission provides only general statements and conclusory characterizations of the existing wireless marketplace. The Commission says that high market concentration and barriers to entry increase the potential for anti-competitive conduct in the mobile marketplace, and it points to the collective marketplace share of the top four facilities-based nationwide

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<sup>5</sup> *Id.* ¶ 221.

providers.<sup>6</sup> Based only on these generalizations and without any supporting data, the Commission makes the sweeping claim that “joint bidding arrangements among nationwide providers would reduce the [joint bidding] participants’ ability or incentive to compete independently, which would lessen competition in the downstream mobile wireless marketplace and could harm American consumers by increasing the price or reducing the quality of mobile wireless services.”<sup>7</sup>

The Commission’s common treatment of all “nationwide providers” ignores the key structural reality in today’s wireless marketplace and the true nature of the “high market concentration” and “barriers to entry” in this industry. As documented in the Commission’s mobile competition reports and in its *Mobile Spectrum Holdings* proceeding, the wireless industry is characterized by an enormous gap between the two most dominant providers, AT&T and Verizon, and all other wireless carriers in the United States.<sup>8</sup> If unable to form joint arrangements in the Incentive Auction and other auctions, even nationwide carriers like Sprint and T-Mobile will struggle to compete against these two enormous companies.

AT&T and Verizon currently dominate the wireless marketplace. AT&T currently enjoys a 32.7 percent share of all wireless industry connections in the United States,<sup>9</sup> and a

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<sup>6</sup> See NPRM ¶ 131; *Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133, ¶ 25 (2014) (“*Mobile Spectrum Holdings Order*”) (citing UBS Investment Research, *US Wireless 411: Version 51*, Mar. 18, 2014, at 14, 19).

<sup>7</sup> NPRM ¶ 132.

<sup>8</sup> See, e.g., *Mobile Spectrum Holdings Order* ¶¶ 25, 57-58, 68; *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Seventeenth Report, DA 14-1862, ¶ 22 (WTB rel. Dec. 18, 2014) (“*Seventeenth CMRS Competition Report*”).

<sup>9</sup> *Seventeenth CMRS Competition Report* at Table II.B.1 (estimating that AT&T has 116,542 facilities-based mobile wireless connections).

32.5 percent share of all wireless industry revenues in this country.<sup>10</sup> Verizon enjoys a 36.4 percent share of all domestic wireless connections,<sup>11</sup> and a 36.5 percent share of all domestic wireless industry revenues.<sup>12</sup> These figures far exceed the industry shares of Sprint and T-Mobile. Sprint has a 15.2 percent share of all domestic wireless connections,<sup>13</sup> and a 15.5 percent share of all U.S. wireless industry revenues.<sup>14</sup> T-Mobile has a 14.2 percent share of all wireless connections<sup>15</sup> and 10.9 percent share of all revenues.<sup>16</sup>

As the Commission has recognized, the dominance of AT&T and Verizon extends to their spectrum holdings. The two largest nationwide carriers hold the vast majority of the highly useful spectrum below 1 GHz. AT&T and Verizon hold approximately 73 percent of low-band spectrum on a population-weighted, nationwide basis, and more than 77 percent of such spectrum in the top 100 markets.<sup>17</sup> In contrast, Sprint and T-Mobile together hold only

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<sup>10</sup> *Id.* at Table II.C.2.

<sup>11</sup> *Id.* at Table II.B.1 (estimating that Verizon Wireless has 129,615 facilities-based mobile wireless connections).

<sup>12</sup> *Id.* at Table II.C.2.

<sup>13</sup> *Id.* at Table II.B.1 (estimating that Sprint has 54,080 facilities-based mobile wireless connections).

<sup>14</sup> *Id.* at Table II.C.2.

<sup>15</sup> *Id.* at Table II.B.1 (estimating that T-Mobile has 50,545 facilities-based mobile wireless connections).

<sup>16</sup> *Id.* at Table II.C.2.

<sup>17</sup> *Mobile Spectrum Holdings Order* ¶¶ 58, 68-69. As the Commission described in the *Seventeenth CMRS Competition Report*, “[b]elow-1-GHz spectrum includes Cellular (850 MHz), SMR (800/900 MHz), and the 700 MHz band. . . . Verizon Wireless and AT&T each hold a significant amount of the available Cellular and 700 MHz spectrum. In particular, when measured on a licensed MHz-POP basis, Verizon Wireless holds approximately 38 percent of the licensed MHz-POPs of the combined Cellular and 700 MHz band spectrum, while AT&T holds approximately 42 percent” of the licensed MHz-POPs of this spectrum. *Seventeenth CMRS Competition Report* ¶ 106.

approximately 15 percent of all low-band spectrum on an average nationwide basis.<sup>18</sup>

Given their predominant share of low-band spectrum, AT&T and Verizon enjoy significant cost and operational advantages relative to their competitors. In both the *Mobile Spectrum Holdings Order* and the *Seventeenth CMRS Competition Report*, the Commission recognized that the differences among frequency bands fundamentally influence deployment costs, operational flexibility, and, ultimately, downstream competition.<sup>19</sup> The Commission has found that while high-band spectrum can be useful in enhancing system capacity, “[s]pectrum below 1 GHz has . . . distinct propagation advantages for network deployment over long distances, while also reaching deep into buildings and urban canyons.”<sup>20</sup> Given the superior propagation of low-band frequencies, the Commission has found that it is much less costly and provides greater operational flexibility to deploy a wireless network using low-band spectrum.<sup>21</sup> According to the Commission, “the disadvantages of high band spectrum resulting from poor in-building coverage and increased obstacles today to siting of new wireless facilities are more than mere cost disadvantages.”<sup>22</sup> These factors substantially increase capital and operational costs and compromise service coverage, reliability, and customer satisfaction for carriers with large proportions of high-frequency spectrum. Overall, AT&T’s and Verizon’s long-standing dominance of available low-band spectrum – the essential, irreplaceable input for deploying

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<sup>18</sup> *Mobile Spectrum Holdings Order* ¶ 58.

<sup>19</sup> *See id.* ¶¶ 48-54; *Seventeenth CMRS Competition Report* ¶¶ 90-92.

<sup>20</sup> *Mobile Spectrum Holdings Order* ¶ 3; *see also id.* ¶¶ 48-54.

<sup>21</sup> *Id.* ¶¶ 60-61.

<sup>22</sup> *Id.* ¶ 65.

sustainable, competitive wireless broadband networks – is a major factor in the disturbing trend towards a “Twin Bell” duopoly.<sup>23</sup>

As the Commission has pointed out, low-band spectrum is also “relatively scarce as compared to higher band spectrum.”<sup>24</sup> As the Commission stated in the *NPRM*, the upcoming Incentive Auction at 600 MHz “holds historic potential for interested applicants to acquire licenses for below 1 GHz spectrum.”<sup>25</sup> This auction represents a critical opportunity to promote competition, as it will be the last low-band auction for the foreseeable future and thus the last chance for competitive carriers to obtain the low-band spectrum they need to compete with the largest carriers on cost structure.<sup>26</sup>

Realistically, however, AT&T and Verizon stand directly in the way of such competitively beneficial spectrum acquisitions. With their vast financial resources and dominant position in the marketplace, AT&T and Verizon could likely outbid all other carriers for any 600 MHz spectrum that is not reserved to promote competition.<sup>27</sup> As evidenced by the recent AWS-3

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<sup>23</sup> In the AWS-3 auction, AT&T and Verizon have obtained substantial new mid-band spectrum to further complement their robust spectrum inventories.

<sup>24</sup> *Mobile Spectrum Holdings Order* ¶ 14. In the *Seventeenth CMRS Competition Report*, the Commission stated that “[t]here is significantly less low-band spectrum than high-band spectrum that is suitable and available for the provision of mobile telephony/broadband services.” *Seventeenth CMRS Competition Report* ¶ 90.

<sup>25</sup> *NPRM* ¶ 1.

<sup>26</sup> The Commission has called the Incentive Auction “a once-in-a-generation opportunity to auction significant amounts of greenfield low-band spectrum.” *Id.* ¶ 2.

<sup>27</sup> In the Incentive Auction, the Commission has established reserve spectrum blocks to give competitive carriers the opportunity to bid on 600 MHz spectrum without having to compete against dominant providers AT&T and Verizon. *Mobile Spectrum Holdings Order* ¶¶ 146-217. The Commission’s reserve rules may not be sufficient to promote robust competition against AT&T and Verizon, however. As an initial matter, either AT&T or Verizon is likely to be reserve-eligible in a large percentage of markets nationwide. In addition, by reserving only 30 MHz of spectrum, at most, the Commission’s plan allows no more than one competitive carrier to obtain 20 MHz (10 x 10 MHz) of reserved spectrum in a geographic market (the amount necessary to deploy LTE services efficiently and economically). Moreover, the reserved

auction, acquiring mobile spectrum requires enormous upfront capital investment, and deployment of that spectrum also requires enormous capital commitments, especially for carriers expanding nationwide wireless broadband networks. Gross bids on the 1,614 mid-band AWS-3 licenses totaled approximately \$45 billion, the largest amount ever bid in a Commission auction.<sup>28</sup> Low-band 600 MHz spectrum, with superior propagation characteristics for covering large areas and in-building penetration, may attract even higher bid totals in the upcoming Incentive Auction. The Twin Bells' success in the AWS-3 auction foreshadows that they will find it in their corporate best interests to win substantial amounts if not the majority of available 600 MHz spectrum.

Given this likelihood, the Commission's prohibition on all joint arrangements between nationwide providers could actually *reduce* competition by helping AT&T and Verizon to corner the market on 600 MHz spectrum, thereby exacerbating the entrenched, anti-competitive advantages enjoyed by these dominant providers. This approach would allow the "rich to get richer," while leaving competitive carriers unable to make up much, if any, ground on the two largest wireless carriers. This outcome would be detrimental to wireless competition, harmful to consumers, and in conflict with the key objectives that Congress directed the Commission to fulfill in designing a competitive bidding system, including "promoting economic opportunity

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spectrum amount would be contingent upon the demand expressed in the forward auction by reserve-eligible bidders; if there is insufficient demand for reserved spectrum licenses in the round in which the Final Stage Rule is reached, the amount of reserved spectrum would be reduced. Finally, the Commission has also proposed to adopt a reserve "trigger" based on a MHz-POP threshold, and if that trigger is set too high it will harm competition by limiting bids from smaller and rural carriers. *See* Reply Comments of Sprint Corporation, WT Docket No. 12-269, at 5-8 (Oct. 6, 2014).

<sup>28</sup> *See Auction of Advanced Wireless Services (AWS-3) Licenses Closes; Winning Bidders Announced for Auction 97*, Public Notice, DA 15-131 (rel. Jan. 30 2015). The gross total for the AWS-3 auction does not take into account bidding credits for designated entities, which will result in a lower net total for this auction.

and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses[.]”<sup>29</sup>

Sprint strongly believes that an appropriate degree of joint bidding flexibility would generate benefits that outweigh any harm from such arrangements. By entering into joint bidding arrangements and pooling their capital resources, competitive nationwide carriers might realize the economies of scale necessary to outbid AT&T and Verizon and obtain critical low-band spectrum. With access to this spectrum, carriers such as Sprint and T-Mobile would be far better positioned to compete effectively against the two dominant providers. Competitive carriers’ success at auction would invigorate mobile broadband performance and competition, and this increased competition would likely lead to greater innovation and improved service quality as AT&T and Verizon are spurred to invest more in their respective networks.

#### **B. Other Harmful Effects of the Commission’s Proposal**

In addition to ignoring the Twin Bells’ dominance, the Commission’s joint bidding proposal can be interpreted as prohibiting numerous potentially pro-competitive arrangements that are not directly related to the competitive bidding process. In the *NPRM*, the Commission defines “joint bidding and other arrangements” to include “any bidding consortia, joint venture, partnership, or agreement, understanding, or other arrangement entered into relating to the competitive bidding process, including any agreement relating to post-auction market structure or operation.”<sup>30</sup> This broad category of prohibited arrangements extends well beyond the Commission’s expressed concern that the nationwide carriers bid individually, encompassing spectrum and network sharing agreements, roaming arrangements, and joint initiatives to serve unserved or underserved areas. Such arrangements can enhance the availability of broadband

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<sup>29</sup> See 47 U.S.C. § 309(j)(3)(B).

<sup>30</sup> *NPRM* ¶ 121.

service alternatives and thus *promote* competition and pro-consumer benefits. As Commissioner Clyburn observed in her separate statement to the *NPRM*, “[v]oice and data roaming and other network sharing agreements could stimulate the deployment of more networks to offer competitive alternatives.”<sup>31</sup>

Spectrum and network sharing arrangements between nationwide operators have become common in Europe and elsewhere internationally, with an International Telecommunication Union publication noting that “[s]haring mobile infrastructure . . . may also enhance competition between mobile operators and service providers, when safeguards are used to prevent anti-competitive behavior.”<sup>32</sup> For instance, Vodafone partnered with O2 in 2012 to share network infrastructure in the United Kingdom (“UK”), an arrangement designed to help the UK’s second and third largest mobile operators to compete against the 4G service offered by that nation’s largest provider.<sup>33</sup> In Sweden, Telenor Sweden and Tele2 Sweden in 2009 formed a joint venture to construct a nationwide mobile 4G network in order to “challenge TeliaSonera in the race to provide widespread LTE in Scandinavia.”<sup>34</sup> These kinds of pro-competitive, post-auction

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<sup>31</sup> See *NPRM* at Statement of Commissioner Mignon L. Clyburn.

<sup>32</sup> See *Sharing Infrastructure: Mobile Infrastructure Sharing*, International Telecommunication Union, <http://www.itu.int/itu-news/manager/display.asp?lang=en&year=2008&issue=02&ipage=sharingInfrastructure-mobile&ext=html> (last visited Feb. 19, 2015).

<sup>33</sup> See Gideon Spanier, *Vodafone and O2 to Save ‘Hundreds of Millions of Pounds’ by Sharing Networks*, *The Independent* (June 8, 2012), <http://www.independent.co.uk/news/business/news/vodafone-and-o2-to-save-hundreds-of-millions-of-pounds-by-sharing-networks-7827959.html>.

<sup>34</sup> See Paul Rasmussen, *Tele2 and Telenor Detail LTE Rollout*, *FierceWireless* (July 7, 2010), <http://www.fiercewireless.com/europe/story/tele2-and-telenor-detail-lte-rollout-plan-huge-2g-network-boost/2010-07-07>. In Switzerland, a “[p]otential network sharing deal between Orange [Switzerland] and Sunrise could create stronger competition to Swisscom’s dominant position by improving their cost profiles.” *Mobile SWOT – Q2 2015 Switzerland Telecommunications Report April 1, 2015 Wednesday*, Business Monitor International (posted Jan. 23, 2015) (summary analysis). See also *Infrastructure Sharing*, GSMA (Sept. 10, 2012), <http://www.gsma.com/publicpolicy/infrastructure-sharing> (stating that “[i]n some cases, site

agreements are not appropriately characterized as “joint bidding arrangements,” and the Commission should not treat such arrangements as potentially disqualifying factors for an auction applicant.

The *NPRM*'s proposed joint bidding restriction also ignores the actual circumstances of individual local geographic markets. The Commission would prohibit joint bidding arrangements in markets where the joint bidders each – or even collectively – have little or no low-band spectrum (or perhaps any spectrum) and where the market is dominated by other wireless providers. In such local markets, which tend to be less populated and largely rural, joint bidding arrangements and network sharing arrangements may be the only realistic and effective way to increase competition given low-population densities and higher deployment costs. At a minimum, the Commission should not prohibit joint bidding arrangements between nationwide carriers in such local markets.

**C. Sprint's Alternative Proposal: The Commission Can Realize Its Pro-Competitive Goals Through More Tailored Means**

Rather than adopt its proposed absolute prohibition against joint bidding arrangements between nationwide providers, the Commission should apply a balanced approach that permits pro-consumer arrangements between competitive carriers while preventing competitively harmful joint bidding agreements. The Commission should realize this goal by tying the Incentive Auction eligibility of any joint bidding arrangement between nationwide providers to the aggregate low-band spectrum holdings of those parties.

Specifically, Sprint urges the Commission to allow joint bidding arrangements in Partial Economic Areas (“PEAs”) where the agreeing parties collectively hold less than 45 MHz of

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sharing increases competition by giving operators access to key sites necessary to compete on quality of service and coverage”).

below-1-GHz spectrum on a population-weighted basis. This 45 MHz threshold, which represents one-third of available below-1-GHz spectrum, is consistent with the Commission's long-time approach to evaluating spectrum concentration in the wireless marketplace. The Commission applied a "one-third" spectrum threshold in the context of its pre-2004 spectrum cap,<sup>35</sup> and continues to use a one-third threshold in applying its spectrum screen to secondary market transactions.<sup>36</sup> Moreover, following a comprehensive review of its spectrum holdings rules and policies, the Commission last year established a new "enhanced review" of transactions in which a carrier would have more than 45 MHz of below-1-GHz spectrum in an affected market, given the greater competitive utility of low-band spectrum.<sup>37</sup> Finally, the Commission has also set a 45 MHz cut-off for applicant eligibility to bid on the 600 MHz "reserve spectrum" blocks in the Incentive Auction (*see, e.g.,* note 27 *supra*).<sup>38</sup>

Similar policy considerations warrant adopting a 45 MHz low-band spectrum threshold for joint bidding arrangements between nationwide carriers. Joint bidders that collectively hold less than 45 MHz of sub-1 GHz spectrum cannot foreclose access to critical low-band frequencies or otherwise dominate that key spectrum following an auction. Such carriers are the very wireless providers that lack this crucial spectrum resource. Accordingly, low-band-challenged carriers should have the flexibility to combine financial resources in the Incentive

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<sup>35</sup> See *Implementation Of Sections 3(N) and 332 of the Communications Act; Regulatory Treatment of Mobile Services Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, Third Report and Order, 9 FCC Rcd 7988, ¶¶ 258, 263 (1994).

<sup>36</sup> See, e.g., *Mobile Spectrum Holdings Order* ¶¶ 70, 246; *Applications of AT&T Wireless Inc. and Cingular Wireless Corporation For Consent To Transfer of Control of Licenses and Authorizations, et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶¶ 106-12 (2004).

<sup>37</sup> *Mobile Spectrum Holdings Order* ¶¶ 286-88.

<sup>38</sup> *Id.* ¶¶ 154, 174-78.

Auction and more effectively bid on 600 MHz spectrum, frequencies that are likely to be even more expensive following the AWS-3 auction. The benefits of this flexibility – including the ability to enter into network and spectrum sharing agreements and facilitate faster deployment of next-generation networks – far outweigh the risk of any anti-competitive harm from joint arrangements between competitive nationwide carriers.

**D. The Commission Should Rely on Existing Rules and Antitrust Remedies in the Context of Joint Bidding Arrangements Between Competitive Carriers**

Under Sprint’s proposed alternative approach, the Commission would generally permit joint bidding arrangements between nationwide carriers collectively holding less than 45 MHz of low-band (sub-1 GHz) spectrum. In that scenario, the Commission can rely on existing regulatory and antitrust mechanisms to prevent or penalize any specific arrangements in this category that might threaten to create anti-competitive effects.

The Commission has the authority and ability, on a case-by-case basis, to reject joint bidding arrangements between carriers on the basis of their anti-competitive consequences. The Commission’s review of joint bidding arrangements is an important part of the short-form and long-form auction application processes. Under the Commission’s existing anti-collusion rules, auction applicants must disclose any joint bidding arrangements in their short-form applications,<sup>39</sup> and the Commission has the discretion to investigate violations of its rules prior to the auction.<sup>40</sup> In addition, even if the Commission does not find any issue at the short-form stage, parties to a joint bidding arrangement that subsequently become the high bidder, will

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<sup>39</sup> 47 C.F.R. § 1.2105(c).

<sup>40</sup> *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014, Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97*, Public Notice, 29 FCC Rcd 8386, ¶¶ 11 n.21, 23 (2014) (“*AWS-3 Auction Public Notice*”) (citing 47 CFR sec. 1.2105(a)(2)(viii)). Potential bidders typically file such “short-form” applications one to two months before bidding commences in a spectrum auction.

obtain a license only if they demonstrate that the joint entity is qualified to hold the license and that such grant serves the public interest. In reviewing their auction filings, the Commission will consider any spectrum aggregation and competition issues raised by a joint bidding arrangement between competitive carriers.

In its application review process, the Commission whenever possible should provide guidance regarding joint bidding arrangements prior to the short-form application deadline, including those bidding arrangements between competitive nationwide carriers that would be generally permitted under Sprint's proposal. As applicants formulate bidding strategies and take other pre-auction actions, they will benefit greatly from prompt feedback regarding any applicable auction restrictions. Although the Commission has the ability to disqualify winning bidders upon long-form examination, the public interest is best served by the Commission providing certainty to prospective bidders that any disclosed joint bidding arrangements comply (or do not comply) with the Commission's requirements prior to auction. Ideally, this guidance would be sufficiently in advance of the short-form deadline to give prospective bidders a reasonable opportunity to come into compliance.

Of course, in addition to the Commission's regulatory and licensing processes, joint bidding arrangements are also subject to United States antitrust law.<sup>41</sup> As the Commission has repeatedly emphasized, if a joint bidding arrangement is anti-competitive and will reduce competition in the wireless marketplace, the antitrust authorities can invoke these laws and take action to negate that arrangement and prevent the anti-competitive conduct. The Commission

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<sup>41</sup> See, e.g., *AWS-3 Auction Public Notice* ¶¶ 35-36 (citations omitted). See also Press Release, Department of Justice, *Justice Department Sues Three Firms Over FCC Auction Practices* (Nov. 10, 1998), <http://www.justice.gov/opa/pr/1998/November/536at.htm> (announcing antitrust action filed against FCC auction applicants who allegedly agreed not to bid against each other).

has stated that “[r]egardless of compliance with [its] rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace. . . . The Commission has cited a number of examples of potentially anticompetitive actions that would be prohibited under antitrust laws: for example, actual or potential competitors may not agree to divide territories in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another market for the other.”<sup>42</sup>

If the Commission becomes aware of specific allegations indicating that parties may have violated federal antitrust laws, it has made clear that it may refer such allegations to the United States Department of Justice for investigation. According to the Commission, “[i]f an applicant is found to have violated the antitrust laws or the Commission’s rules in connection with its participation in the competitive bidding process, it may be subject to forfeiture of its upfront payment, down payment, or full bid amount and may be prohibited from participating in future auctions, among other sanctions.”<sup>43</sup>

## **II. THE COMMISSION SHOULD ELIMINATE THE FORMER DEFAULTER RULE AND MAKE CERTAIN OTHER MODIFICATIONS TO ITS COMPETITIVE BIDDING RULES**

Sprint agrees with the Commission that the existing former defaulter rule is “too far-reaching and impose[s] unnecessary costs and burdens on auction participants.”<sup>44</sup> Rather than narrow the rule, however, the Commission should eliminate this overbroad and unnecessary provision. There is no evidence in the record that requiring a larger upfront payment from a former defaulter provides any material benefits. For example, it is not clear that “former

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<sup>42</sup> *AWS-3 Auction Public Notice* ¶ 35.

<sup>43</sup> *Id.* ¶ 36; *1994 Auction Rules Order* ¶¶ 221-25.

<sup>44</sup> *NPRM* ¶ 86.

defaulters” are more likely to default on their auction payments than are any other auction participants.<sup>45</sup> Nor is there evidence that the Commission has had greater difficulty collecting default payments from winning bidders who are “former defaulters,” or that former defaulters’ default payments are more likely to exceed their already-collected upfront payments than the default payments of other parties. Absent persuasive evidence that the former defaulter rule provides substantive benefits, the Commission should delete this rule to avoid deterring bidding activity and suppressing competition.

At the very least, the Commission should adopt its proposal to “narrow the scope of the defaults and delinquencies that will be considered in determining whether or not an auction participant is a former defaulter.”<sup>46</sup> In August 2014, the Commission granted a waiver to narrow the circumstances under which an applicant in Auction No. 97 would be considered a former defaulter,<sup>47</sup> a step that Sprint supported.<sup>48</sup> By incorporating a similar change into its general competitive bidding rules, the Commission would strike a more appropriate balance and promote greater participation in future auctions.

Sprint supports eliminating all four types of cured defaults that the Commission proposes to exclude from the former defaulter rule,<sup>49</sup> including its proposal to “exclude a default or

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<sup>45</sup> See Comments of NTCH, Inc., WT Docket No. 14-170, at 7 (Feb. 6, 2015).

<sup>46</sup> NPRM ¶ 86.

<sup>47</sup> See *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.205(a)(2)(xi) and 1.2106(a) of the Commission’s Rules and/or for Interim Conditional Waiver; Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014 (Auction 97)*, Order, 29 FCC Rcd 10828 (2014).

<sup>48</sup> In Sprint’s comments on the Auction No. 97 waiver request, it expressed support for limiting the former defaulter rule “if the amount of the [auction participant’s] default was small or if the default had occurred and been resolved several years prior to the auction.” Letter from Richard B. Engelman, Sprint Corporation, to Marlene H. Dortch, FCC Secretary, GN Docket No. 13-185, at 2 (July 31, 2014).

<sup>49</sup> NPRM ¶ 86.

delinquency that was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding.”<sup>50</sup> Moreover, the Commission should not “expect financially reliable applicants to pay outstanding defaults on Commission licenses, or delinquencies on any non-tax debt owed to any Federal agency, while legal or arbitration proceedings are pending, even if the applicant’s liability for or the amount of the debt is in dispute[.]”<sup>51</sup> Requiring auction applicants to pay alleged debts that are subject to administrative or judicial review, when those applicants have not been found ultimately liable for those payments, would serve no useful purpose and would be patently unfair. Instead, an auction applicant involved in a delinquency or debt proceeding should be considered a former defaulter only to the extent that it fails to cure its default upon resolution of those proceedings.

Finally, Sprint urges the Commission to prohibit commonly controlled bidders from filing multiple auction applications for the same or overlapping geographic areas.<sup>52</sup> This change should enhance the transparency and efficiency of Commission auctions and help prevent anti-competitive bidding conduct. As the Commission notes, multiple commonly controlled parties might be able to submit identical bids on a license in ways intended to exploit auction bidding procedures.<sup>53</sup> In addition, commonly controlled entities bidding on the same licenses in an anonymous auction also could compromise the transparency of that auction by misleading other bidders about the true competitive interest in a license.<sup>54</sup> By requiring commonly controlled

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<sup>50</sup> *Id.* ¶ 93.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* ¶ 98.

<sup>53</sup> *Id.* ¶ 104.

<sup>54</sup> *Id.* ¶ 105.

applicants to participate in an auction as a *single* applicant, the Commission can prevent such harms.

### III. CONCLUSION

For the foregoing reasons, rather than barring all joint bidding arrangements between nationwide providers, the Commission should apply a balanced policy that helps competitive carriers access a critical foundation of low-band spectrum. This targeted approach will benefit the public interest by generating more robust competition against the nation's two dominant wireless providers.

Respectfully submitted,

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