



Competitive Carriers Association
Rural • Regional • Nationwide®

Competitive Carriers Association
805 15th Street NW, Suite 401
Washington, DC 20005
Office: (202) 449 -9866 • Fax: (866) 436 -1080

July 30, 2015

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: EX PARTE NOTIFICATION

GN Docket No. 12-268: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions;*

AU Docket No. 14-252: *Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*

Dear Ms. Dortch:

On July 28, 2015, Rebecca Murphy Thompson and C. Sean Spivey of Competitive Carriers Association (CCA); Larry Krevor and Richard Engelman of Sprint Corporation; Hadass Kogan of DISH Network, Inc.; Steve Sharkey and Chris Wiczorek of T-Mobile USA, Inc.; and Trey Hanbury of Hogan Lovells US LLP, representing CCA, met with David Strickland of Commissioner Mignon Clyburn's office to discuss issues relating to the 600 MHz incentive auction. CCA focused on three areas: (1) fixing the spectrum reserve trigger to prevent the dominant carriers from driving up prices to force competitive carriers out of the auction before the reserve is created; (2) addressing the likelihood that the dominant carriers will delay the spectrum-reserve trigger to foreclose competition; and (3) using the duplex gap for repacking broadcast television stations to enable high clearing targets. Because the gaming opportunities are greatest at high clearing targets, these issues are interrelated and should be considered together.

Fixing the Spectrum-Reserve Trigger. CCA and its members explained that the proposed spectrum-reserve trigger presents an unacceptable risk to the success of the auction and the future of wireless competition. The Commission's proposal to tie the reserve trigger to the Final Stage Rule (FSR) will allow the nation's dominant carriers to game the Commission's bidding system, effectively negating the competitive benefits of the reserve. CCA said that the proposed 30 megahertz (or smaller) reserve does not go far enough to promote competition, but the competitive benefits of a 30 megahertz reserve would be completely undone if the reserve only comes into existence after the bidding on spectrum by the dominant carriers has reached foreclosure levels or is not triggered until the auction is close to closing.

The risk of the dominant carriers implementing a gaming strategy to undercut the effectiveness of the spectrum reserve by exploiting a flaw in the trigger is highly likely. The problem is well documented in the record and numerous economists with extensive spectrum auction experience have independently identified it.¹ These experts advise that the dominant carriers will act in their own self-interest by bidding strategically to foreclose competition, if the opportunity to do so is not eliminated. Simply put, the Commission cannot ignore the extensive record evidence of an auction design flaw that empowers certain bidders to compromise the reserve's effectiveness and undermine the Commission's goal of promoting competition.

CCA noted that its members have offered several different proposals to address this foreclosure risk prior to the auction. Sprint has proposed limiting auction participants' bidding to a certain number of blocks in each geographic area to reduce the risk of competitive carriers being priced out of bidding on all the spectrum blocks in any given market.² For example, limiting forward auction participants to bidding on up to 40 percent of the available channel blocks in a Partial Economic Area (PEA) per round would prevent bidders from artificially raising demand in a PEA to reach foreclosure pricing; it would also have the salutary effect of forcing bidders to spread out their bids among PEAs, thereby facilitating meeting the FSR and triggering reserve bidding sooner. Alternatively, T-Mobile has proposed a "safety-valve" trigger where the Commission would implement the reserve when bids exceed an average of \$2.00 per MHz-POP in the Top 40 markets or when revenues cover broadcast clearing and relocation costs, whichever occurs first.³

Either of these proposals would help mitigate the risk of anticompetitive foreclosure. Neither of the proposals would significantly alter the auction design and should be readily implementable. Regardless of the specific mechanism it selects, the Commission should take steps to limit the avoidable risk of the flawed reserve trigger and constrain the ability of the dominant carriers to circumvent the pro-competitive rules the Commission has adopted.

Thwarting Competition with the Spectrum-Reserve Trigger. In addition, discrete auction-design features do not make the dominant carriers' likely strategy of delaying the spectrum-reserve trigger any less implausible. For example, while the "no excess supply" rule and associated restrictions on bid withdrawals may result in AT&T and Verizon holding more spectrum than they strictly need to serve consumers, this also will forestall market entry or expansion that might otherwise have increased competition for the benefit of consumers—precisely the anti-competitive behavior the spectrum reserve is intended to combat. Nor will high activity rules limit AT&T and Verizon's ability to delay the spectrum reserve, because they can put vast amounts of eligibility into

¹ See, e.g., Letter of Dr. David J. Salant & Dr. Gregory Attiyeh, *et al.*, on behalf of Sprint Corp., GN Docket No. 12-268, AU Docket No. 14-252 (filed May 20, 2015); Joint Declaration of Dr. Gregory Rosston & Dr. Andrzej Skrzypacz, attached to Letter of Trey Hanbury, counsel to T-Mobile USA, Inc., AU Docket No. 14-252, GN Docket No. 12-268 (filed July 10, 2015).

² Letter from Lawrence R. Krevor, Vice President, Legal and Government Affairs – Spectrum, Sprint Corp. to Marlene H. Dortch, Secretary, FCC, AU Docket No. 14-252, GN Docket No. 12-268 at 3, n.6 (filed July 9, 2015).

³ Letter of Trey Hanbury, Counsel to T-Mobile, USA, Inc. to Marlene H. Dortch, Secretary, FCC, AU Docket No. 14-252 at 3 (filed June 30, 2015).

play by expressing excess demand in major markets and fulfill any remaining activity requirements by moving eligibility among secondary and tertiary markets.⁴ Likewise, the clock auction format is irrelevant to AT&T and Verizon's ability to raise prices in some markets and not others: the dominant carriers can affect relative prices among markets in a clock-auction format simply by expressing excess demand in key markets and limiting demand in the rest.

In sum, none of the auction's current mechanisms prevent AT&T or Verizon from pursuing the foreclosure strategy previously identified by CCA and others in the record. Moreover, AT&T and Verizon can pursue this strategy using relatively small amounts of capital. T-Mobile and Sprint have shown that AT&T and Verizon could spend substantially *less than* AT&T alone spent in the AWS-3 auction and still drive prices well above foreclosure levels in key markets.

Securing Access to the Duplex Gap Where Necessary for Repacking. CCA next explained that its members strongly support minimally-impaired high clearing targets in the incentive auction. The low-band spectrum reclaimed in this auction will be essential to mobile broadband deployment and competition in the wireless industry. CCA and its members, therefore, urged the Commission to reject proposals prohibiting the placement of relocated broadcasters in the 600 MHz duplex gap. Rather than limiting its own ability to reach higher clearing targets,⁵ the Commission could adopt one of the many alternative proposals that are already on the record to address the needs of unlicensed devices.⁶

Prioritizing those solutions, CCA said it supported reserving a second vacant channel for unlicensed operations in those markets where the duplex gap is needed for broadcaster relocation.⁷

⁴ Because the reserve is available only to the extent reserve-eligible bidders demand licenses during the round in which the reserve is triggered, the no-excess-supply rule would put important constraints on smaller bidders moving eligibility/demand across areas. These practical constraints mean smaller bidders will have to behave more straightforwardly than the dominant carriers or risk losing access to the spectrum reserve by failing to remain active in the markets where the reserve will be most important to them.

⁵ *Incentive Auction Task Force Releases Initial Clearing Target Optimization Simulations*, Public Notice, 30 FCC Rcd 4854, 4856 n.16 (WTB 2015) (explaining that "simulation results reflect that protecting the duplex gap at lower participation scenarios would result in the selection of lower clearing targets").

⁶ See, e.g. Letter from Rebecca Murphy Thompson, General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, AU Docket No. 14-252, GN Docket No. 12-268 at 3 (filed July 14, 2015) ("*CCA Letter*"); Letter from Kathleen O'Brien Ham, Vice President, Federal Regulatory Affairs, T-Mobile USA, Inc. to Marlene H. Dortch, Secretary, FCC, AU Docket No. 14-252, GN Docket No. 12-268 at 2-3 ("*T-Mobile Letter*") (filed July 21, 2015); *Ex Parte* Letter from Henry A. Waxman, Chairman, Waxman Strategies, to Hon. Tom Wheeler, Chairman, FCC, GN Docket No. 12-268, WT Docket No. 12-269, AU Docket No. 14-252 at 2 (filed July 9, 2015) ("*Waxman Proposal*"); Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252 at 1 (filed July 9, 2015) ("*Public Knowledge Proposal*").

⁷ See, e.g., *Public Knowledge Proposal* at 3-4; *T-Mobile Letter* at 3; *CCA Letter* at 3.

CCA also said it supported more intensive use of UHF Channels 14 to 20 by unlicensed devices. The Commission's current rules generally permit the operation of fixed unlicensed services in Channels 14 to 20 when those channels are vacant, but prohibit mobile and portable services from operating in those channels.⁸ In eleven markets, however, the Commission has allocated some of the available UHF Channels in the 14 to 20 range to support public safety operations and for use as vacant guard bands between broadcast television and public safety services.⁹ In these eleven markets, the Commission currently does not permit unlicensed operations in the UHF public safety or UHF guard band spectrum.¹⁰ CCA and its members noted the successful coexistence of low-power unlicensed operations with services operating in adjacent channels and observed that several of the markets where unlicensed devices could use this guard band spectrum are the same markets where repacking a broadcast television station in the duplex gap may be necessary to achieve a competitively-significant band plan.¹¹

This *ex parte* notification is being filed electronically with your office under section 1.1206 of the Commission's rules.

Regards,

/s/ Rebecca Murphy Thompson

Rebecca Murphy Thompson
General Counsel, CCA

cc: David Strickland

⁸ See 47 C.F.R. § 15.707(b), 15.712(d).

⁹ See 47 C.F.R. §§ 15.712(d), 90.303 (listing thirteen markets where public safety can operate within Channels 14 to 20, but noting that channels in Cleveland and Detroit will not be available "until further order from the Commission").

¹⁰ See 47 C.F.R. § 15.712(d).

¹¹ See 47 C.F.R. § 90.303(b) (listing the markets where certain channels between 14 and 20 are reserved for public safety, including Los Angeles, New York, Chicago, Boston, and San Francisco, where spectrum could be particularly constrained after the incentive auction repacking process).