



601 Pennsylvania Ave., NW
Suite 800, North Building
Washington, DC 20004
202-654-5900

July 31, 2015

EX PARTE VIA ECFS

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

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268; Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269; Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002, AU Docket No. 14-252*

Dear Ms. Dortch:

In a last-ditch effort to foreclose competition in the incentive auction, AT&T and Verizon filed substantively identical letters on July 30, 2015 claiming that the Commission is procedurally barred from accepting T-Mobile USA, Inc.'s ("T-Mobile's")¹ proposal to amend the spectrum reserve trigger.² There is no such procedural barrier. T-Mobile, along with other petitioners, raised broad objections to the spectrum reserve trigger mechanism. The Commission properly circulated these proposals for reform of the proposed spectrum reserve trigger rules for public comment, and a large number of parties—including AT&T and Verizon—have addressed T-Mobile's recommendations. Because the scope of T-Mobile's proposal falls squarely within the ongoing reconsideration proceeding and the subsequent *Auction Procedures Public Notice*, the Commission must reject the dominant carriers' unfounded claims.

There is no question that all parties had notice that the Commission would consider a wide range of options for triggering the spectrum reserve. Under the Administrative Procedure Act ("APA"), the Commission "need not specify 'every precise proposal which [the Commission] may ultimately adopt

¹ T-Mobile USA, Inc. is a wholly owned subsidiary of T-Mobile US, Inc., a publicly traded company.

² Letter from Joan Marsh, Vice President—Federal Regulatory, AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269 (July 30, 2015); Letter from John T. Scott, III, VP and Deputy General Counsel, Verizon to Marlene Dortch, Secretary, Federal Communications Commission, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269 (July 30, 2015).

as a rule.”³ As long as the public notice was “sufficiently specific” to “fairly apprise interested parties of the issues involved,” it provides a perfectly sufficient platform for reforming the spectrum reserve trigger.⁴ The *Auction Procedures Public Notice* easily clears that bar.⁵ The Commission sought comment on implementing the market-based spectrum reserve at the time the final stage rule is satisfied, specifically soliciting public input on “any further implementation issues that may affect our market-based spectrum reserve” and on whether and how the rules adopted in the *Mobile Spectrum Holdings* proceeding “should apply or be adjusted based on any auction details that might be relevant to the process.”⁶ Those categories clearly encompass changes to both the revenue and cost prongs of the spectrum reserve trigger.

Notably, the Commission explained months ago that it did not plan to finalize the spectrum reserve trigger until it released the *Auction Procedures Public Notice*. In the *Mobile Spectrum Holdings Order*, the Commission observed that “the *Auction Procedures [Public Notice]* will seek comment on how to establish the details of a spectrum reserve trigger based on the final stage rule.”⁷ The Commission added that the *Auction Procedures Public Notice* “will adopt the details of our spectrum reserve trigger at the same time that we establish final auction procedures and resolve crucial auction design issues, including the benchmarks required to implement the final stage rule.”⁸ All parties were thus on notice that the Commission continued to consider trigger proposals.

The Commission gave Verizon and AT&T additional notice and opportunities to be heard regarding the spectrum trigger mechanism when it put T-Mobile’s petition for reconsideration out for public comment.⁹ There, the Commission expressly sought input on T-Mobile’s argument that the proposed spectrum reserve trigger could give rise to the risk of foreclosure by the dominant providers.¹⁰ T-Mobile is also not the only petitioner to raise these issues. Another petitioner—Competitive Carriers Association (“CCA”)—also asked the Commission to revise the spectrum

³ *Action For Children’s Television v. F.C.C.*, 564 F.2d 458, 470 (D.C. Cir. 1977) (quoting *California Citizens Band Ass’n v. United States*, 375 F.2d 43, 48 (9th Cir. 1967)); see also *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (finding that to satisfy the APA’s notice requirement, the notice of proposed rulemaking and the final rule need not be identical: “An agency’s final rule need only be a ‘logical outgrowth’ of its notice. A final rule qualifies as a logical outgrowth interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”) (internal citations omitted).

⁴ *Action for Children’s Television v. F.C.C.*, 564 F.2d at 470. (citation omitted).

⁵ *Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*, 29 FCC Rcd 15750 (2014) (“*Auction Procedures PN*”).

⁶ *Id.* at 15799 ¶ 149.

⁷ *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6133, 6211 ¶ 195 (2014).

⁸ *Id.* at 6211-12. The *Incentive Auction Order* only created the “basic framework” for the spectrum reserve trigger—the Commission very explicitly intended to set forth the actual rules in the *Auction Procedures PN* proceeding. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6574 ¶¶ 14-15 (2014).

⁹ See *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 79 Fed. Reg. 53356 (Sept. 9, 2014) (setting deadlines for opposition and replies to the petition).

¹⁰ *Id.*; see also T-Mobile USA, Inc., Petition for Reconsideration, WT Docket No. 12-269 at 14-16 (Aug. 11, 2014).



reserve trigger.¹¹ In its petition for reconsideration of the spectrum reserve trigger, CCA argued that the proposed trigger mechanism would be arbitrary and increase the risk of auction failure.¹² AT&T and Verizon conveniently ignore the CCA petition for reconsideration. In any case, the large volume of discussion on this issue prompted by two separate petitions for reconsideration belies AT&T and Verizon's contention that proposals regarding implementation of the spectrum reserve trigger represent an unfair surprise. Because T-Mobile and CCA have both asked the Commission in broad terms to reconsider how it triggers the spectrum reserve, AT&T and Verizon cannot claim surprise when the Commission does just that.¹³

Even if AT&T and Verizon had, on the last day prior to the quiet period preceding the open-agenda meeting, identified a procedural defect in this months-long proceeding, the error would be harmless.¹⁴ AT&T and Verizon's vigorous opposition to T-Mobile's proposal demonstrates that they have no "colorable claim that [they] would have more thoroughly presented [their] arguments" had the Commission put out the more precise notice they seem to think the APA requires.¹⁵ For example, AT&T¹⁶ and Verizon¹⁷ have both repeatedly addressed T-Mobile's proposed reforms to the cost trigger, rightly acknowledging that the proposal was squarely before commenters based on the *Auction Procedures Public Notice* and issues raised by T-Mobile and CCA's petitions.¹⁸ In fact, in its initial opposition to T-Mobile's petition for reconsideration, Verizon noted that under the proposed auction design, the forward auction could close without the spectrum reserve ever being triggered—exactly the issue that T-Mobile is seeking to address in its reserve trigger proposal.¹⁹

¹¹ Competitive Carriers Association, Petition for Reconsideration, GN Docket No. 12-268 (Sept. 15, 2014).

¹² *Id.* at 8.

¹³ See *Globalstar, Inc. v. FCC*, 564 F.3d 476, 486 (D.C. Cir. 2009) (because petition for reconsideration sought broad relief, the Commission was "free to modify its decision based on the evidence amassed throughout the entire proceeding").

¹⁴ See 5 U.S.C. § 706 (courts must take "due account" of "the rule of prejudicial error" in reviewing agency action).

¹⁵ *Nat'l Ass'n of Broadcasters v. F.C.C.*, 789 F.3d 165, 177 (D.C. Cir. 2015) (citation omitted); see also *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (observing that agency notice is required so that "interested parties will...know what to comment on").

¹⁶ Letter from Joan Marsh, Vice President—Regulatory, AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252 (July 29, 2015); Letter from Joan Marsh, Vice President—Regulatory, AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252 (July 27, 2015).

¹⁷ Letter from John T. Scott, III, VP and Deputy General Counsel, Verizon to Marlene Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269, WT Docket No. 14-170 (July 9, 2015); Letter from John T. Scott, III, VP and Deputy General Counsel, Verizon to Marlene Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269 (July 8, 2015).

¹⁸ AT&T has even addressed the issue of reforming the spectrum reserve trigger on its public policy blog. See Joan Marsh, Stop the Magenta Madness: A Word on the Spectrum Reserve, AT&T Public Policy Blog (July 2, 2015), <http://www.attpublicpolicy.com/fcc/stop-the-magenta-madness-a-word-on-the-spectrum-reserve/>.

¹⁹ Opposition of Verizon to Petitions for Reconsideration, WT Docket No. 12-269 at 17 (Sept. 24, 2014).



Moreover, other parties clearly understood that changes to the cost trigger were under consideration.²⁰ In response to the *Auction Procedures Public Notice*, for example, Sprint submitted a proposal to begin the auction with the reserve in place and offered a method to reclassify reserved blocks as un-reserved relative to meeting the final stage rule.²¹ Sprint's reply comments also called on the Commission to revise the mechanism for implementing the reserve.²² More recently, Sprint has filed a detailed proposal for amending the spectrum reserve implementation mechanism.²³ Neither AT&T nor Verizon has claimed that Sprint's proposal was foreclosed from consideration by the newly discovered procedural flaw raised in their July 30, 2015 letters.

Contrary to AT&T and Verizon's protestations, T-Mobile has *not* proposed a wholesale elimination of the cost trigger. T-Mobile's proposal actually preserves the cost component of the spectrum reserve trigger and modifies the application of the trigger depending on the amount of bidding in the forward auction. Consistent with exactly the type of comment called for under the *Auction Procedures Public Notice* and in keeping with the foreclosure concerns advanced in its petition for reconsideration, T-Mobile's proposal preserves the cost trigger and acknowledges the Commission's statutory requirement not to close the auction before meeting all auction costs, including the cost of reimbursing all participating broadcasters and paying all repacking expenses. Under T-Mobile's proposal, the Commission would retain the cost trigger but create the reserve before all costs are met if forward auction prices reach an average of \$2.00 per MHz-POP in the top 40 PEAs.²⁴ T-

²⁰ Letter from Rebecca Murphy Thompson, General Counsel, Competitive Carriers Association to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 14-252, GN Docket No. 12-268 (July 17, 2015); Letter from Angie Kronenberg, Chief Advocate and General Counsel, COMPTTEL to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 14-252, GN Docket No. 12-268 (July 16, 2015); Letter from Harold Feld, Senior Vice President, Public Knowledge to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252 (July 15, 2015); Letter from Harold Feld, Senior Vice President, Public Knowledge to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252 (July 9, 2015); Letter from Henry A. Waxman, Chairman, Waxman Strategies to Tom Wheeler, Chairman, Federal Communications Commission, GN Docket No. 12-268, WT Docket No. 12-269, AU Docket No. 14-252 (July 9, 2015); Letter from Michael Calabrese, Director, Wireless Future Project, Open Technology Institute at New America to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252 (July 9, 2015); Letter from Rafi Martina, Counsel, Legal and Government Affairs, Sprint Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 14-252, GN Docket No. 12-268 (July 30, 2015); Letter from SaveWirelessChoice Coalition (Cellular South Inc. d/b/a C Spire, Competitive Carriers Association, COMPTTEL, Computer & Communications Industry Association, the Consumer Federation of America, DISH Network Corporation, Engine Advocacy, NTCA—The Rural Broadband Association, Public Knowledge, Rural Wireless Association (RWA), Sprint Corporation, T-Mobile USA, Inc. and the Writers Guild of America, West) to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, WT Docket No. 12-269, AU Docket No. 14-252 (June 4, 2015).

²¹ Comments of Sprint Corporation, AU Docket No. 14-252, GN Docket No. 12-268, 43-48 (Feb. 20, 2015).

²² Reply Comments of Sprint Corporation, AU Docket No. 14-252, GN Docket No. 12-268, 27-29 (Mar. 13, 2015).

²³ Letter from Lawrence R. Krevor, Vice President, Legal and Governmental Affairs—Spectrum, Sprint Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, AU Docket No. 14-252 (May 20, 2015).

²⁴ See, e.g., Letter from Trey Hanbury, Counsel, T-Mobile USA, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 14-252 (June 30, 2015).



Mobile's proposed adjustment to the cost trigger of the earlier of either \$2.00 per MHz-POP or closing costs thus preserves the cost component but modifies its application.

Even if the Commission found that T-Mobile's specific proposed adjustment to the cost trigger were somehow procedurally barred, the Commission can still modify the spectrum reserve trigger pursuant to Sprint's alternate proposal. Sprint has proposed that the Commission revise the options available to forward auction participants to enter bids before the final stage rule is satisfied.²⁵ Specifically, Sprint recommends that the auction system not process any bid demanding more than three blocks (or more than 40% in clearing targets above 84 megahertz) of Category 1 spectrum in any partial economic area in a bidding round before the final stage rule is satisfied.²⁶

The last minute, half-hearted procedural attack by the two dominant carriers comes as no surprise. The dominant providers have every incentive to encourage the Commission to retain proposed rules that could inadvertently allow the dominant providers to game the system and foreclose competitors from accessing the spectrum reserve. No procedural barrier prevents the Commission from revising the spectrum reserve trigger to avoid anticompetitive foreclosure by the dominant providers. To ensure the success of the auction and the future of competition in the mobile broadband market, the Commission should do so.

Please contact the undersigned if you have any questions.

Respectfully submitted,

/s/ Kathleen O'Brien Ham

Kathleen O'Brien Ham
Vice President, Federal Regulatory Affairs
T-Mobile USA, Inc.

²⁵ Letter from Lawrence R. Krevor, Vice President, Legal and Government Affairs—Spectrum, Sprint Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 14-252, GN Docket No. 12-268 (July 9, 2015).

²⁶ *Id.*