



Competitive Carriers Association
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July 31, 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 30, 2015, Steven K. Berry, Rebecca Murphy Thompson and C. Sean Spivey of Competitive Carriers Association (CCA); Alison Minea of DISH Network, Inc.; Steve Sharkey and Chris Wieczorek of T-Mobile USA, Inc.; and Trey Hanbury and Cobun Keegan of Hogan Lovells US LLP, representing CCA, met with Jessica Almond of Chairman Wheeler's office to discuss issues relating to the 600 MHz incentive auction. CCA focused on four 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; (3) using the duplex gap for repacking broadcast television stations to enable high clearing targets; and (4) improving the assignment phase of the auction.

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, any of which would help mitigate the risk of anticompetitive foreclosure without significantly altering auction design.² 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.

Additionally, any suggestion that the Commission is procedurally unable to make the adjustments to the spectrum reserve sought by the competitive wireless industry is plainly wrong.³ In fact, the Commission acknowledged in its Auction Comments Public Notice that it stated in the *Mobile Spectrum Holdings* R&O that it “would seek comment in this Public Notice on any further implementation issues that may affect our market-based spectrum reserve, and whether and if so *how the policies and rules we adopted should apply or be adjusted based on any auction details that might be relevant to the process.*”⁴ Indeed, the *Mobile Spectrum Holdings* R&O states that “[a]mong other things, the *Comment PN* will seek comment on how to establish the details of a spectrum reserve trigger . . . [including] whether the trigger should be based solely on prices or revenues in the ‘major markets’ and, if so, how to identify such markets,”⁵ and the mechanics of the reserve trigger are not specifically laid out

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) (“Sprint May 20 Ex Parte”); 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 See Sprint May 20 Ex Parte; 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 (filed July 9, 2015); Letter of Trey Hanbury, Counsel to T-Mobile, USA, Inc. to Marlene H. Dortch, Secretary, FCC, AU Docket No. 14-252 (filed June 30, 2015).

³ See Letter of Joan Marsh, Vice President – Federal Regulatory, AT&T, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269 (filed July 30, 2015); Letter of John T. Scott III, VP & Deputy General Counsel, Verizon, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269 (filed July 30, 2015).

⁴ *Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*, Public Notice, 29 FCC Rcd 15750, 15799 ¶149 n.262 (2014) (emphasis added) (“*Comment PN*”).

⁵ *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133, 6211 ¶ 195 (2015) (“*Mobile Spectrum Holdings R&O*”).

in the final rules adopted in the *ReO*.⁶ Notably, the proposals to fix the trigger placed in the record do not suggest elimination of the FSR that was established in the *Incentive Auction ReO*,⁷ rather, those proposals address how, if at all, the reserve should be tied to the FSR (as the *Comment PN* proposed and sought comment on). Beyond the fact that the FCC has full authority to revise the currently-proposed reserve trigger, these revisions are necessary to promote competition in the auction and prevent anticompetitive foreclosure.

Further, two separate petitions for reconsideration – one from T-Mobile and another from CCA – addressed the risk of foreclosure posed by the proposed implementation of the spectrum reserve. These petitions prompted extensive industry-wide comment about the spectrum-reserve trigger, including comment from AT&T and Verizon. The wide-ranging discussion of the reserve trigger in the reconsideration proceedings and *Comment PN* docket makes AT&T and Verizon’s belated claims of unfair surprise wholly untenable.

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.⁸ 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 play by expressing excess demand in major markets and fulfill any remaining activity requirements by moving eligibility among secondary and tertiary markets.⁹ Likewise, the clock auction format is irrelevant to AT&T and Verizon’s ability to raise prices in some markets and not others: the

⁶ *Id.* at 6249.

⁷ See generally *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6578 ¶ 26 (2014) (“*Incentive Auction ReO*”).

⁸ The bid withdrawal and parallel rules on the size of the reserve actually *enhance* this foreclosure risk by denying reserve-eligible bidders flexibility to respond to foreclosure strategies. These bidders are forced to choose between two undesirable options: (i) remain active in all desired partial economic areas (PEAs), stretching their eligibility in ways that (absent demand by AT&T and Verizon in those markets) increase the likelihood that the clock prices in most PEAs remain stagnant while prices are driven up in the strategic bidders’ target markets; or (ii) respond by focusing their eligibility in the large markets not subject to concentrated bidding by AT&T and Verizon, spurring the more timely triggering of the Final Stage Rule – but at the cost of seeing the reserve shrink in a large number of mid- and small-sized PEAs because of insufficient reserve-eligible demand at the time the Final Stage Rule is triggered.

⁹ 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.

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. On the contrary, to the extent the auction procedures have any effect, they are more likely to heighten the risk of foreclosure strategies than prevent them. 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,¹⁰ the Commission could adopt one of the many alternative proposals that are already on the record to address the needs of unlicensed devices.¹¹

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.¹² 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.¹³ 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

¹⁰ *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").

¹¹ *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 (filed July 21, 2015) ("*T-Mobile Letter*"); *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); 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*").

¹² *See, e.g., Public Knowledge Proposal* at 3-4; *T-Mobile Letter* at 3; *CCA Letter* at 3.

¹³ *See* 47 C.F.R. §§ 15.707(b), 15.712(d).

vacant guard bands between broadcast television and public safety services.¹⁴ In these eleven markets, the Commission currently does not permit unlicensed operations in the UHF public safety or UHF guard band spectrum.¹⁵ 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.¹⁶

Improvements to the Assignment Phase of the Auction. Finally, CCA discussed the serious concerns it has with the Commission's proposals for conducting the assignment phase of the auction. The current assignment round proposal will likely take significant revenues out of the clock phase of the auction, which in turn could negatively impact broadcaster participation in the reverse auction. For example, even withholding between one and two percent of overall auction revenues could result in \$1 billion being withheld from the clock phase of the auction. Additionally, competitive carriers will likely be priced into the most impaired spectrum in the assignment round because these carriers are least likely to withhold additional funds from the clock phase for the assignment round, but also because many may only win a single block of spectrum in a given market.

There is wide record support for non-monetary-based bidding to assign specific spectrum blocks during the assignment phase of the incentive auction.¹⁷ Moreover, CCA discussed how the assignment round mechanism is ripe for decision. Regarding procedural objections, the Commission is not foreclosed from adopting revisions to the assignment phase in the Procedures PN. As U.S. Cellular stated, nothing in the *Incentive Auction ReO* bound the Commission to conduct a money-based assignment phase.¹⁸ There are a variety of options available to the Commission for changing or improving upon the current assignment phase proposal, each of which can include "bids" by which participants can express their particular preferences for specific frequencies.¹⁹

¹⁴ 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").

¹⁵ See 47 C.F.R. § 15.712(d).

¹⁶ 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).

¹⁷ See, e.g., Letter from United States Cellular Corp., *et al.* to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252 (filed July 30, 2015); Letter from Trey Hanbury, Counsel, T-Mobile USA, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252 (filed June 16, 2015).

¹⁸ See Letter from Leighton T. Brown, Counsel, United States Cellular Corp. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 12-269 (filed July 30, 2015).

¹⁹ See Comments of Competitive Carriers Association, AU Docket No. 1-252, GN Docket No. 12-268 at 35-37, 38-40 (filed Feb. 20, 2015).

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: Jessica Almond