

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION OR REQUEST  
FOR DECLARATORY RULING OF T-MOBILE USA, INC.**

T-Mobile USA, Inc. (“T-Mobile”),<sup>1/</sup> pursuant to Section 1.429(g)<sup>2/</sup> of the Commission’s rules, hereby files this reply to the Joint Opposition of DISH Network Corporation (“DISH”), Northstar Wireless, LLC, and SNR Wireless LicenseCo, LLC (the latter two together, the “DISH DEs”).<sup>3/</sup> Contrary to the arguments of DISH and the DISH DEs, the Commission has ample authority to issue a declaratory ruling to clarify how the former defaulter rule applies in the context of DISH’s and the DISH DEs’ selective default on their winning bids and other auction-distorting actions. The public interest requires the Commission to exercise its authority in this case to protect the integrity of the auction process by declaring that DISH and the DISH DEs are

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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> 47 C.F.R. § 1.429(g).

<sup>3/</sup> Joint Opposition to T-Mobile Petition for Reconsideration or Request for Declaratory Ruling of SNR Wireless LicenseCo, LLC, Northstar Wireless, LLC, and DISH Network Corporation, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269 (filed Dec. 28, 2015) (“DISH Joint Opposition”).

former defaulters and as such must provide a 50% higher upfront payment if they wish to participate in the upcoming Incentive Auction.<sup>4/</sup>

## **I. THE COMMISSION HAS AMPLE AUTHORITY TO ISSUE A DECLARATORY RULING THAT DISH AND THE DISH DES ARE FORMER DEFAULTERS**

As T-Mobile and AT&T have shown, issuing a declaratory ruling is appropriate in this case to “terminat[e] a controversy or remov[e] uncertainty.”<sup>5/</sup> Section 1.2 of the rules provides the Commission with broad discretion to remove uncertainty about how a rule applies in circumstances that the rule does not consider or clearly address.<sup>6/</sup> DISH and the DISH DEs created that uncertainty themselves by engaging in unprecedented and controversial behavior during and after the AWS-3 auction while at the same time claiming that their disruptive actions are beyond the reach of a Commission remedy. They cannot now object to the Commission considering whether the former defaulter rule – an appropriate response to their conduct – should apply in the context of their behavior.

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<sup>4/</sup> T-Mobile has separately requested that the Commission prohibit DISH and the DISH DEs from further gaming the auction process by barring them from bidding in the future on the AWS-3 licenses on which they selectively defaulted. *See* T-Mobile US *Ex Parte*, WT Dkt. Nos. 14-170 and 12-269, GN Dkt. Nos. 12-268 and 13-185, AU Dkt. Nos. 14-252 and 14-78, MB Dkt. No. 15-146 (filed Oct. 30, 2015) (“T-Mobile October 30<sup>th</sup> *Ex Parte*”); T-Mobile US *Ex Parte*, WT Dkt. Nos. 14-170 and 12-269, GN Dkt. Nos. 12-268 and 13-185, AU Dkt. Nos. 14-252 and 14-78, MB Dkt. No. 15-146, ULS File Nos. 0006670613 and 000667066 (filed Nov. 17, 2015) (“T-Mobile November 17<sup>th</sup> *Ex Parte*”). The Commission should promptly act on that request as well, either through the declaratory ruling requested here or in a separate proceeding.

<sup>5/</sup> 47 C.F.R. § 1.2.

<sup>6/</sup> *See* *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd. 13994, ¶ 32 (2009) (“*Section 332(c)(7)(B) Declaratory Ruling*”) (granting in part a petition for declaratory ruling “[t]o provide guidance” and “remove uncertainty”); *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended; A National Broadband Plan for Our Future; Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling, 26 FCC Rcd. 8259, ¶ 11 (2011) (“*Incumbent LEC Wireless Termination Tariffs Declaratory Ruling*”) (issuing a declaratory ruling to resolve uncertainty in the record about how statutory provisions apply in certain situations); *Id.* ¶ 18 (*citing* *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973)) (“The Commission has broad discretion whether to issue such a ruling[.]”).

The Commission has determined that DISH and the DISH DEs engaged in various auction-altering practices. Specifically, they (1) used the same list of target licenses; (2) placed identical bids for identical licenses in the same markets in the same rounds; (3) accepted the random computer assignments that are triggered when identical mutually exclusive bids are submitted for the same licenses in the same rounds; and (4) placed and withdrew bids that were contrary to their own independent economic interests but resulted in an economic “wash” to them overall as a syndicate.<sup>7/</sup>

This behavior falsely drove up prices, forcing other carriers to overpay for needed spectrum<sup>8/</sup> – costs that will ultimately be passed on to consumers – and likely hurt actual small businesses who wished to place bids.<sup>9/</sup> AT&T correctly characterized the DISH and DISH DE behavior as “gamesmanship that distorted the auction results.”<sup>10/</sup> In addition, by selectively defaulting on the licenses they won, DISH and the DISH DEs deprived other bidders of the ability to fairly win licenses that they intended to put to use promptly and forced the FCC to delay deployment of the licenses until a re-auction. AT&T observes that DISH’s behavior, together with its actions during the auction, “significantly and irreparably undermined the AWS-

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<sup>7/</sup> See *Northstar Wireless, LLC; SNR Wireless LicenseCo, LLC; Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 30 FCC Rcd. 8887, ¶¶ 109-112 (2015) (“*DISH DE Order*”).

<sup>8/</sup> See Phil Goldstein, *Analysts: Dish Could Strike a Spectrum Deal with Verizon or a Perpetual Leasing Agreement*, FIERCE WIRELESS (Oct. 9, 2015), <http://www.fiercewireless.com/story/analysts-dish-could-strike-spectrum-deal-verizon-or-perpetual-leasing-agree/2015-10-09>.

<sup>9/</sup> See Kyle Daly, *DISH Designated Entity Controversy Raises Questions About Incentive Auction*, SNL KAGAN (May 1, 2015).

<sup>10/</sup> AT&T Reply to Petition for Reconsideration, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269, 2-3 (filed Dec. 28, 2015) (“AT&T Reply”).

3 auction.”<sup>11/</sup> Moreover, as T-Mobile previously detailed, DISH has been able to reap substantial financial and economic benefits as a result of its selective default.<sup>12/</sup>

The former defaulter rule is designed to prevent precisely this behavior.<sup>13/</sup> However, despite the Commission’s clear intent that the rule prohibit the type of behavior in which DISH and the DISH DEs engaged, the rule does not address how it should apply in the context of selective default behavior coupled with a Commission finding of auction-altering practices. Because the Commission has not addressed the former defaulter rule under these circumstances, it is appropriate for it to issue a declaratory ruling to do so.<sup>14/</sup> Similarly, the Commission has not yet evaluated how ownership interests apply to the former defaulter rule in this unique context.

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<sup>11/</sup> AT&T Reply at 3.

<sup>12/</sup> See Petition for Reconsideration or Request for Declaratory Ruling of T-Mobile USA, Inc., GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269, 4 (filed Nov. 30, 2015) (“T-Mobile Petition”); *DISH Network (DISH) Charles William Ergen on Q3 2015 Results – Earnings Call Transcript*, SEEKING ALPHA (Nov. 9, 2015), <http://seekingalpha.com/article/3669026-dish-network-dish-charles-william-ergen-on-q3-2015-results-earnings-call-transcript?all=true&find=DISH%2Bnetwork>.

<sup>13/</sup> See AT&T Reply at 3 (“DISH’s actions produced the very result the Commission aimed to prevent in adopting its former defaulter rules: it bid irresponsibly and to the detriment of other participants and, when confronted with its financial obligations to the Commission, failed to pay the amount owed.”).

<sup>14/</sup> See *id.* at 3-4 (“AT&T supports T-Mobile’s alternative proposal that the Commission issue a declaratory ruling consistent with T-Mobile’s request. As T-Mobile notes, it ‘does not seek reconsideration of the former defaulter rules themselves.’ Rather, it seeks confirmation by the Commission that it will apply these policies to DISH. . . . [T]he relief sought by T-Mobile can accurately be described as a request to ‘terminat[e] a controversy or remov[e] uncertainty’ regarding DISH’s status.”); see also *Section 332(c)(7)(B) Declaratory Ruling*, ¶ 32; *Incumbent LEC Wireless Termination Tariffs Declaratory Ruling*, ¶ 11. On the other hand, none of the cases cited by DISH and the DISH DEs are applicable here. See *Petition for Declaratory Ruling that Any Interstate Non-Access Service Provided by Southern New England Telecommunications Corporation Be Subject to Non-Dominant Carrier Regulation*, Order, 11 FCC Rcd. 9051, ¶ 4 (1996) (denying a petition for declaratory ruling because the petition did *not* ask the Commission “to resolve a controversy or uncertainty with respect to the Commission’s existing rules” but instead essentially asked to revisit a rulemaking or grant an exception to a rule); see also *Improving Public Safety Communications in the 800 MHz Band*, Order, 26 FCC Rcd. 2035, ¶ 10 (explaining that *mere disagreement* with a decision does not constitute an “uncertainty”). Moreover, T-Mobile is not, as DISH argues, asking the Commission to ignore or overturn precedent without opportunity for comment. First, there has been opportunity for comment, as evidenced by DISH’s and the DISH DEs’ own filing. Second, as detailed above, the Commission may issue a declaratory ruling finding, under the circumstances presented, that the rules should be interpreted differently to uphold the integrity of the auction process without overturning or ignoring past precedent.

Accordingly, the Commission may and should also clarify through a declaratory ruling whether entities in which DISH has a disclosable ownership interest should also be considered former defaulters.<sup>15/</sup>

In an attempt to divert the Commission's attention away from its clear procedural path towards a declaratory ruling in this case, DISH and the DISH DEs argue that T-Mobile's request is procedurally impermissible by inaccurately characterizing T-Mobile's petition as requesting reconsideration of the *Competitive Bidding Order*,<sup>16/</sup> the *DISH DE Order*, the *SNR Interim Default Letter*,<sup>17/</sup> or the *Northstar Wireless Interim Default Letter*.<sup>18/</sup> In fact, T-Mobile has not sought reconsideration of any of those actions; instead its filing focuses on the Commission's implementation of the *Application Procedures Public Notice*.<sup>19/</sup> Moreover, while T-Mobile's petition was alternatively captioned to seek reconsideration of the *Application Procedures Public Notice*, the Commission need not reconsider that Public Notice to provide relief. Rather, as AT&T recognizes, the Commission can and should grant T-Mobile's request by clarifying how

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<sup>15/</sup> Further, the Commission may and should declare that any entity in which DISH has a disclosable interest is subject to the former defaulter rule to prevent DISH and the DISH DEs from evading the former defaulter rule and harming the public interest by investing in another applicant at a level above that which is disclosable but below that which is controlling.

<sup>16/</sup> *Updating Part 1 Competitive Bidding Rules*, Report and Order, FCC 15-80 (rel. Jul. 21, 2015) ("*Competitive Bidding Order*").

<sup>17/</sup> Letter from Roger C. Sherman, Chief, Wireless Telecommunications Bureau to Ari Q. Fitzgerald, Counsel for SNR Wireless LicenseCo, LLC, ULS File No. 0006670667 (Oct. 1, 2015) ("*SNR Interim Default Letter*").

<sup>18/</sup> Letter from Roger C. Sherman, Chief, Wireless Telecommunications Bureau to Mark F. Dever, Counsel for Northstar Wireless, LLC, ULS File No. 0006670613 (Oct. 1, 2015) ("*Northstar Wireless Interim Default Letter*").

<sup>19/</sup> *Application Procedures for Broadcast Incentive Auction Scheduled to Begin March 29, 2016; Technical Formulas for Competitive Bidding*, Public Notice, DA 15-1183 (rel. Oct. 15, 2015) ("*Application Procedures Public Notice*").

the former defaulter rule should apply in the upcoming Incentive Auction.<sup>20/</sup> Doing so need not disturb any previous Commission or Wireless Telecommunications Bureau (“WTB”) decision.

## **II. THIS IS AN APPROPRIATE INSTANCE FOR THE COMMISSION TO ISSUE A DECLARATORY RULING**

While issuing a declaratory ruling is discretionary, the Commission can and should exercise that discretion here. DISH and the DISH DEs assert that no further Commission action is necessary because they did not violate the auction rules in place at the time of the AWS-3 auction and have paid the interim default payments assessed by the Commission.<sup>21/</sup> Rather than allow DISH and the DISH DEs to continue to benefit from their inappropriate behavior, the Commission should use its discretion to demonstrate that there are consequences for violating the integrity of the auction rules.

As noted above, DISH’s and the DISH DEs’ actions have been widely recognized as unprecedented, undeniably skewed the results of the auction, and caused numerous negative outcomes that have been well documented by analysts.<sup>22/</sup> DISH’s and the DISH DEs’ gamesmanship “distorted auction results” and “significantly and irreparably undermined the AWS-3 auction[,] . . . produc[ing] the very result the Commission aimed to prevent in adopting its former defaulter rules” by “bid[ing] irresponsibly and to the detriment of other participants and, when confronted with its financial obligations to the Commission, fail[ing] to pay the amount owed.”<sup>23/</sup> Their actions have also been the subject of Congressional inquiry and comment. For instance, the U.S. Senate Committee on Commerce, Science, and Transportation

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<sup>20/</sup> See AT&T Reply at 2 (“AT&T agrees with T-Mobile that DISH and the DISH DEs should be considered former defaulters . . . and that an Order on Reconsideration of the *Application Procedures Public Notice* is not required for the relief sought.”).

<sup>21/</sup> DISH Joint Opposition at 6-8.

<sup>22/</sup> See *supra* notes 8-10.

<sup>23/</sup> AT&T Reply at 2-3.

launched a probe over DISH’s bidding strategies, and Committee Chairman Senator John Thune emphasized the need to prevent future bidders from “gaming the system to the disadvantage of authentic small and minority-owned businesses.”<sup>24/</sup> Senator Kelly Ayotte and Commissioner Pai agreed that DISH had “game[d] the system” by claiming “taxpayer-funded [bidding credits] for themselves and using them to outbid smaller, would-be competitors” and noted that “[p]lays like these shut out genuine small entrepreneurs.”<sup>25/</sup> Senator Claire McCaskill and Representative Frank Pallone, the Ranking Member on the House Energy and Commerce Committee, expressed similar sentiments.<sup>26/</sup>

Moreover, DISH and the DISH DEs have made absolutely no effort to assure the public and the FCC that they will not engage in such behavior in the future.<sup>27/</sup> Whether or not DISH’s and the DISH DEs’ actions resulted in any technical violations of the Commission’s prior auction rules has no bearing on the Commission’s ability to take steps to deter them from repeating that behavior in the Incentive Auction. As T-Mobile demonstrated,<sup>28/</sup> the Commission has ample authority to fashion protections for its auction procedures and processes as needed and to tailor remedies to best fit the circumstances before it. Contrary to DISH’s and the DISH DEs’

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<sup>24/</sup> Statement on FCC Decision to Strip DISH Network of Auction Discount, U.S. Senate Committee on Commerce, Science, and Transportation (Aug. 17, 2015), <http://www.commerce.senate.gov/public/index.cfm/2015/8/statement-on-fcc-decision-to-strip-dish-network-of-auction-discount>.

<sup>25/</sup> Kelly Ayotte and Ajit Pai, *Ending Welfare for Telecom Giants*, WALL STREET JOURNAL (Feb. 4, 2015), <http://www.wsj.com/articles/kelly-ayotte-and-ajit-pai-ending-welfare-for-telecom-giants-1423095287?cb=logged0.4209298825515541>.

<sup>26/</sup> See Letter from Senator Claire McCaskill to Tom Wheeler, Chairman, Federal Communications Commission, WT Docket No. 14-170 (filed Feb. 27, 2015); Letter from Representative Frank Pallone to Tom Wheeler, Chairman, Federal Communications Commission, GN Docket No. 12-268, WT Docket No. 14-170 (filed Feb. 20, 2015).

<sup>27/</sup> See DISH Joint Opposition at 3-4.

<sup>28/</sup> See T-Mobile Petition at 6-8.

contention, the decisions cited by T-Mobile<sup>29/</sup> affirming this authority do not limit this principle only to orders remedying “willful violations” or “flagrant disregard” of the Commission’s rules.<sup>30/</sup> In fact, Commission precedent makes clear this authority is not even limited to instances of rule violations.<sup>31/</sup> The actions that the Commission and the WTB have taken to date do not preclude the declaratory ruling that T-Mobile seeks here. The WTB was careful in its *SNR Interim Default Letter* and *Northstar Wireless Interim Default Letter* to say only that Northstar Wireless and SNR Wireless LicenseCo are not “current defaulters”; it did not address their status as former defaulters – clearly leaving that path open for action here. The Commission should take action now to safeguard the public interest in the integrity of its future auctions, including the upcoming Incentive Auction.

Last, DISH’s and the DISH DEs’ contentions that T-Mobile filed its petition to somehow gain an unfair advantage in the Incentive Auction is not true.<sup>32/</sup> First, T-Mobile has not asked that DISH and the DISH DEs be barred from participating in the upcoming Incentive Auction.

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<sup>29/</sup> See *id.* at 7 n.19.

<sup>30/</sup> DISH Joint Opposition at 8 n.34.

<sup>31/</sup> For instance, although the parties in *Ashtabula Cable TV, Inc.* were found to have violated the Commission’s rules, the Commission did not rest its authority to tailor appropriate remedies on that fact. Instead, the Commission modified the typical remedy applied to such violations in order to better promote the public interest, noting that under Sections 4(i) and (j) of the Communications Act, it is “within the authority of the Commission to take action which serves to meet the ends of justice.” *Ashtabula Cable TV, Inc., Complainant v. Ashtabula Telephone Co., Defendant*, 17 FCC 2d 113, ¶ 16 (1969). The Commission similarly stated that it could tailor remedies to best meet the circumstances and serve the ends of justice in *Warrensburg Cable, Inc.* See *Warrensburg Cable, Inc., Complainant v. United Telephone Co. of Missouri, United Utilities, and United Transmission, Inc., Defendants*, Memorandum Opinion and Order, 27 FCC 2d 727, ¶ 21 (1971) (“Other remedies tailored to best meet the particular factual situation in a given case are also available to the Commission to prevent unwarranted enrichment from the party’s own wrongdoing, to act as a deterrent to violation of the provisions of the Act, and to meet the ends of justice.”). Further, in *Time Warner Cable*, the Media Bureau exercised its authority under Section 4(i) to tailor remedies and “to issue such orders, not inconsistent with this (Act), as may be necessary in the execution of its functions[.]” *Time Warner Cable, A Division of Time Warner Entertainment Company L.P.*, Order on Reconsideration, 21 FCC Rcd. 9016, ¶¶ 34-35 (2006).

<sup>32/</sup> See DISH Joint Opposition at 1-2.

In fact, it appears that DISH and/or the DISH DEs plan to be active participants in the auction – making it all the more important for the Commission to protect itself and the public by taking the necessary steps to help ensure that DISH and the DISH DEs will be sincere in their bids.

Second, and more importantly, the declaratory ruling T-Mobile seeks is intended to protect the *public* interest concerns expressed by many others.<sup>33/</sup> The integrity of the auction process does not impact T-Mobile uniquely, but the American public as a whole.

### III. CONCLUSION

The Commission should (1) exercise its authority to issue a declaratory ruling addressing the former defaulter rule in the context of DISH's and the DISH DEs' selective default behavior coupled with its finding that DISH and the DISH DEs engaged in auction-altering practices, and (2) protect the auction process and the public interest by declaring that DISH and the DISH DEs are former defaulters and that they must provide a 50% higher upfront payment if they wish to participate in the Incentive Auction.<sup>34/</sup>

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<sup>33/</sup> *See supra* pages 6-7.

<sup>34/</sup> As noted above, the Commission should also bar DISH and the DISH DEs from participating in the re-auction of the AWS-3 licenses on which they selectively defaulted either through the declaratory ruling T-Mobile seeks here or separately. *See also* T-Mobile October 30<sup>th</sup> *Ex Parte*; T-Mobile November 17<sup>th</sup> *Ex Parte*.

Respectfully submitted,

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January 7, 2016

## CERTIFICATE OF SERVICE

I, Radhika Bhat, do hereby certify that on this 7th day of January, 2016, I caused a copy of the foregoing Reply to Opposition to Petition for Reconsideration or Request for Declaratory Ruling of T-Mobile USA, Inc. to be served via Federal Express on the following:

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