



April 27, 2016

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **Ex Parte Presentation**, *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, WT Docket No. 12-354

On April 26, 2016, pursuant to Section 1.1204(a)(10) of the Commission's rules, I responded to an inquiry from Erin McGrath, Legal Advisor to Commissioner Michael O'Rielly, regarding CTIA's petition for reconsideration of the 3.5 GHz Order.¹ We discussed CTIA's continued concern with the 3.5 GHz Order's "N-1" auction policy for Priority Access Licenses (PALs) and the decision to eliminate PALs in a census tract in favor of GAA-only spectrum if the Commission finds the interest in PALs to be insufficient. This approach risks the FCC's entire three-tier framework and the effective elimination of a PAL option in some markets. If there remain concerns regarding the number of parties seeking PAL licenses, the most prudent course would be to adopt the common sense changes CTIA has proposed to facilitate greater investment in the 3.5 GHz band.

The 3.5 GHz Order adopted a new auction policy that, where there are two or more applicants in a census tract, the FCC will make available one less PAL than the total number of PALs that all applicants applied for, up to a maximum of seven.² Where there is only a single applicant in a census tract, the FCC will not license any PALs and will make the spectrum available via GAA.³ As the Petition for Reconsideration points out, this approach is unprecedented and unwise. If each PAL holder in an area applies for the same number of PALs as it currently holds, the N-1 policy will dictate that the number of PALs available will decline by one at each new license term.⁴ Under this "musical chairs" scenario, the supply of PALs will decline, term after term.⁵

¹ *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959 (2015) ("*3.5 GHz Order*").

² *Id.* ¶ 133.

³ *Id.* ¶ 136.

⁴ See Petition for Reconsideration of CTIA – The Wireless Association®, GN Docket No. 12-354 (filed July 23, 2015).

⁵ Response of T-Mobile USA, Inc., GN Docket No. 12-354, at 4 (filed Oct. 19, 2015).



That means there will be fewer PALs than could be awarded where there is sufficient spectrum to accommodate multiple applicants, and no PALs where there is a single applicant.

Since first adopting auction rules, the Commission's general auction practice has been, if an application is filed in an auction filing window and is not mutually exclusive, "the Commission will issue a Public Notice cancelling the auction for this license" and will move to license using the long-form application process instead.⁶ The 3.5 GHz Order recognized "we could issue PALs for these areas on a non-auctioned basis,"⁷ but it chose instead to do away with PALs in the census tract and convert all the spectrum to GAA. That is, instead of following its traditional practice of awarding a license to the applicant, the FCC's approach would spurn genuine interest in PALs and put at risk the three-tier framework that the FCC seeks to achieve.

This new approach to auction policy fails to account for the competing interests that the Commission established in the innovative new Citizens Broadband Radio Service—namely, that the novel 3.5 GHz regime "provid[es] users with the simultaneous option of bidding at auction for priority PAL use in areas where they need and are willing to pay for it, while obtaining shared use on a GAA basis in all other scenarios."⁸ And some will choose to pursue PALs in a census tract while others rely on GAA in the same tract. But under the Commission's policy, applicants eager to pay at auction for PAL rights will be sent home without any interference protection rights if others in that census tract are willing to operate on a GAA basis. In such a case, applicants that sought Priority Access rights and are now relegated to GAA use may be forced to contend with multiple GAA user operations, creating a form of mutual exclusivity that would not exist with Priority Access licenses.

If the FCC is not to follow its traditional practice, the Commission should recognize that GAA user interest in the same frequencies available for PAL use is mutually exclusive and should revise its PAL auction policy accordingly. The advent of GAA in this three-tier framework amounts to a new form of mutual exclusivity, creating an escape valve for demand and alternative use in the very spectrum at auction. Interest in GAA use of the band may work to the detriment of those

⁶ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2376 (1994). *E.g.*, *Closed Auction of Broadcast Construction Permits*, Public Notice, 25 FCC Rcd 7139 (WTB/MB 2010); *Closed Auction of Broadcast Construction Permits*, Public Notice, 25 FCC Rcd 2942 (WTB/MB 2010); *Removal of MX Group for Closed Auction of Licenses for Cellular Unserved Service Areas Scheduled for June 17, 2008*, Public Notice, 23 FCC Rcd 7933 (WTB 2008).

⁷ *3.5 GHz Order* ¶ 137.

⁸ *Id.* ¶ 57. Indeed, the "same technical rules will apply to devices operated in both the Priority Access and GAA tiers." *Id.* ¶ 155.



that seek Priority Access license rights.⁹ The Commission thus should proceed with PAL licensing where there is interest, whether a single applicant seeks one PAL or two applicants together seek the total number of PALs available in a census tract. Among options potentially available to the Commission would be making such licenses available pursuant to Section 309(j) subject to a minimum opening bid or reserve payment condition.

The Commission took a similar approach in the Incentive Auction proceeding. In the Incentive Auction Order, the Commission noted “the mutually exclusive uses of the spectrum” presented by existing licensees and forward auction winners, as well as the “interdependencies” between the reverse and forward auctions. The Commission then “reject[ed] the suggestion that more than one forward auction bidder must make a bid on specific available reallocated spectrum to satisfy section 309(j)(1).”¹⁰ The competing interests between GAA and PALs dictate that the Commission should take similar action here and enable PAL licensing even when there is a single PAL applicant or when there are applications for fewer PALs than are available in a census tract.

Sincerely,

/s/ Scott K. Bergmann

Vice President, Regulatory Affairs
CTIA®

⁹ See Petition for Reconsideration of Jon M. Peha, GN Docket No. 12-354, at 2-3 (filed July 22, 2015).

¹⁰ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6760-6761 (2014).