Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

The State of Mobile Wireless Competition	)	WT Docket No. 11-186

SUPPLEMENTAL REPLY COMMENTS OF AT&T

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AT&T Services, Inc., on behalf of its subsidiaries and affiliates, submits the following supplemental reply comments in response to the Commission's Public Notice issued on March 14, 2012 ("*Public Notice*").

INTRODUCTION

The Commission's *Public Notice* made a single request: it asked for "updated, year-end 2011 data and information on wireless competition" so that the Commission could incorporate data from the full calendar year 2011 into its upcoming report on wireless competition.[1] Such data abundantly confirm AT&T's previous showing that the wireless marketplace is robustly competitive.[2] Indeed, CTIA's just-released year-end industry survey shows that the wireless industry is more competitive than ever.[3] The marketplace continues to grow rapidly: the total estimated number of wireless customer connections at the end of 2011 grew to 331.6 million, an

[1] Public Notice, *Wireless Telecommunications Bureau Seeks Updated, Year-End 2011 Data for Its Sixteenth Report on Mobile Wireless Competition*, WT Docket No. 11-186, DA 12-405 (rel. March 14, 2012).

[2] *See* Comments of AT&T Inc., *The State of Mobile Wireless Competition*, WT Docket No. 11-186, at 6-32 (Dec. 5, 2011); *see also* Reply Comments of AT&T Inc., *The State of Mobile Wireless Competition*, WT Docket No. 11-186, at 5-10 (Dec. 20, 2011).

[3] *See Annualized Wireless Industry Survey Results – December 1985 To December 2011*, CTIA-The Wireless Association, *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf ("*CTIA 2011 Report*").

increase of 20 million since the end of 2010.[4] Prices are declining: the average monthly bill decreased for the third year running, even as average usage measured in minutes, messages, and megabytes continued to grow.[5]

Wireless carriers again upped their investment in upgraded networks in 2011 to $25.3 billion, and many carriers of all sizes are investing billions more this year to expand or begin deploying the latest generation LTE networks.[6] The industry set a record for new cell sites in 2011, adding 30,299 – a 12 percent increase to a total of 283,385.[7] And customers are continuing to gain access to a broad variety of innovative new devices.[8] Google notes, for

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[4] *Id.*

[5] *Id.*

[6] *See, e.g.*, Sarah Reedy, Light Reading, *What I Learned At Sprint* (April 16, 2012), *available at* http://www.lightreading.com/blog.asp?blog_sectionid=958&doc_id=219824 ("Sprint is sticking to its plans to cover 123 million POPs covered with LTE by the end of the year and 250 million by the end of 2013"); Phil Goldstein, *MetroPCS Counts 500,000 LTE Customers*, Fierce Wireless (March 27, 2012), *available at* http://www.fiercewireless.com/story/metropcs-counts-500000-lte-customers-hunts-more-spectrum/2012-03-27 ("MetroPCS currently has around 500,000 total LTE subscribers out of a customer base of 9.34 million, a senior company executive said. That proportion of LTE customers – roughly 5 percent – is similar to figures that Verizon Wireless disclosed in February"); Leap Wireless, 4Q11 Earnings Call Presentation at 23 (Feb. 16, 2012), *available at* http://investor.leapwireless.com/phoenix.zhtml?c=95536&p=irol-irhome (Leap has already deployed LTE in some markets and "expect[s] additional market rollout across [about] two-thirds of network over next 2-3 years."); US Cellular News Release, U.S. Cellular Reports Fourth Quarter 2011 Results And 2012 Financial Guidance (Feb. 24, 2012), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=106793&p=irol-IRHome ("We're . . . rolling out 4G LTE service and devices to more than half of our subscribers by year end. And we'll introduce more devices throughout the year, to provide a wide range of options to meet all of our customers' needs"); Caroline Gabriel, *Clearwire Plays Capacity Card*, Rethink Wireless (March 25, 2012), *available at* http://www.rethink-wireless.com/2012/03/25/clearwire-plays-capacity-card.htm ("The company plans to build out TD-LTE over the coming year in the highest traffic areas of its WiMAX footprint, to serve its chief MVNO and investor Sprint and, it hopes, a wide range of other wholesale clients").

[7] *CTIA 2011 Report*, at 2.

[8] Kevin C. Tofel, *LTE Devices On The Rise, With Tablets Leading The Way*, GigaOM (April 25, 2012), *available at* http://gigaom.com/mobile/lte-devices-on-the-rise-with-tablets-leading-the-way ("The pace of LTE device availability is astonishing . . . [t]he number of new LTE

example, that 50 million Android-powered devices were activated worldwide in the last three months of 2011 alone, and that customers can now choose from more than 800 different Android devices, from more than 310 manufacturers, in 153 countries.[9]

However, the real story is again broadband wireless data services: total reported data traffic in just the *second half* of 2011 exploded to 525.7 billion MB – a 132 percent increase over the second half of 2010 and a substantial increase over the first half of 2011.[10] These rapid increases in data traffic again confirm the Commission's consistent warning that the industry is facing a spectrum crisis. These year-end data also demonstrate that the industry is doing its part to meet these challenges, by investing billions of dollars in upgraded networks and building a record number of new cell sites, all in an attempt to make the most out of the limited spectrum that the Commission has made available. But the Commission must do its part as well, and the record in this proceeding overwhelmingly confirms that the Commission's first priority should be to do everything it can as quickly as possible to make more spectrum available – which means *both* conducting auctions to make new spectrum available *and*, equally important, removing regulatory obstacles to the optimal use of spectrum that has already been allocated to mobile wireless services.

These goals should be non-controversial, but three commenters – T-Mobile, RCA, and NTCH – use this proceeding to repeat proposals they have elsewhere advanced that would have the opposite effect. For example, T-Mobile proposes a new value-weighted spectrum screen

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smartphones is up 33 percent since the beginning of this year, ...[t]here are currently 64 LTE smartphones available, ... [and t]he number of LTE capable tablets (31 in total) has increased by 72 percent since Jan. 20, 2012").

[9] *See* Comments of Google Inc., *The State of Mobile Wireless Competition*, WT Docket No. 11-186, at 1-2 (April 13, 2012).

[10] *CTIA 2011 Report*, at 7.

under which low band spectrum would count much more than high band spectrum in assessing spectrum concentration. But a core premise of that proposal – that low band spectrum is inherently more valuable than high band spectrum – cannot be reconciled with Verizon's recent announcements of its plans to acquire high-band spectrum and sell low-band spectrum and T-Mobile's publicly stated preference for the high-band AWS spectrum Verizon is acquiring versus the 700 MHz spectrum Verizon is selling.

These flawed proposals to game the spectrum screen would have pernicious effects. They would not only artificially depress future auction proceeds – thereby effecting a transfer of wealth from U.S. taxpayers to certain companies, but erect new obstacles to efficient spectrum use, thereby exacerbating the spectrum crisis, and harming competition and consumers. And to the extent they seek to limit participation of certain carriers in the upcoming auction of broadcast spectrum, these proposals would also violate the legislation authorizing the auctions.

T-Mobile and others also advocate an unprecedented intervention in the standards-setting process and departure from the Commission's longstanding policy of technological neutrality to mandate 700 MHz handset "interoperability," which would increase costs and spread harmful interference to a vastly greater array of LTE devices. And they ask for increased regulation of data roaming, which would further raise costs and thwart broadband providers' ability to manage their networks, while diminishing broadband investment. None of these contrived crises are properly raised here, and each should be considered – and swiftly rejected – in the appropriate proceedings on the basis of the records in those proceedings.

I. THE COMMISSION SHOULD REJECT T-MOBILE'S PROPOSAL FOR A "VALUE"-WEIGHTED SPECTRUM SCREEN.

T-Mobile and RCA both urge the Commission to scrap the current spectrum screen that it uses in license transfer proceedings, and T-Mobile asks the Commission to substitute a "value-

weighted" spectrum screen, in which "low-band" spectrum holdings (below 1 GHz) would weigh more heavily in the screen than "high-band" spectrum.[11] The premises of T-Mobile's argument – that low-band spectrum is always more desirable than high-band spectrum, and that any resulting differences in market value are relevant to the spectrum screen – are completely wrong.

The spectrum screen has always been properly focused on spectrum *capacity*, not nebulous notions of "value." The relevant question in any license transfer proceeding is whether the acquiring party would amass enough of the available, suitable spectrum capacity to threaten the robust facilities-based competition that currently exists.[12] Accordingly, the Commission has explained that the function of the screen is simply to assess how much "bandwidth" (*i.e.*, capacity) would remain available to competitors after any given proposed transaction.[13] The data-carrying capacity of all spectrum, however, is equal: 20 MHz of AWS spectrum can carry

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[11] *See* Comments of T-Mobile USA, Inc., *The State of Mobile Wireless Competition*, WT Docket No. 11-186, at 4-9 (April 13, 2012) ("T-Mobile Comments"); Comments of RCA – The Competitive Carriers Association, *The State of Mobile Wireless Competition*, WT Docket No. 11-186, at 4-9 (April 13, 2012), at 5 ("RCA Comments"). *See* T-Mobile USA, Inc. Petition to Deny, *Application of Cellco Partnership, d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses*, WT Docket No. 12-4, at 30-32 (Feb. 21, 2012) ("*T-Mobile SpectrumCo Petition*"); Reply of T-Mobile USA, Inc. to Opposition to Petition to Deny, *Application of Cellco Partnership, d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses*, WT Docket No. 12-4, at 24-26 (March 26, 2012) ("*T-Mobile SpectrumCo Reply*").

[12] *See* Memorandum Opinion and Order, *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, 19 FCC Rcd. 21552, ¶ 109 (2004) ("*AT&T-Cingular Merger Order*") (function of screen is to identify "any market in which one entity controls more than one-third of this critical input," *i.e.*, spectrum); *see also* Third Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 7988, ¶ 239 (1994) (original spectrum caps were designed to prevent any mobile service licensee from aggregating such large amounts of available spectrum capacity that it "might exert undue market power or inhibit market entry by other service providers"); *id*. ¶ 258 ("The purpose of the [spectrum] cap is to prevent licensees from artificially withholding *capacity* from the market.") (emphasis added).

[13] *AT&T-Cingular Merger Order*, ¶¶ 108-109.

as much wireless broadband data traffic as 20 MHz of 700 MHz spectrum. Accordingly, the spectrum screen must count all spectrum equally; weighting the spectrum on any other basis would produce a grossly distorted picture of the economic impact of a spectrum transaction.

T-Mobile's insistence (at 5) that the spectrum screen should account for differences in the "propagation" characteristics of different spectrum is mistaken, for two reasons. *First*, the screen already accounts for any such differences that are relevant. Propagation and other physical characteristics (such as interference) come into play in determining which spectrum is *suitable* for provision of mobile wireless services – *i.e.*, which spectrum is counted in applying the screen. If a band propagated so poorly, for example, that mobile wireless service using that band would not be economically (or technically) viable, then that spectrum is not suitable and would be excluded from the screen.[14] The bands at issue here, however – 700 MHz, cellular, PCS, AWS, and BRS/EBS – are unquestionably suitable for the provision of mobile wireless services; indeed, all of those bands are in widespread use *today* by successful providers of advanced mobile broadband wireless services. Thus, there is no conceivable propagation-related basis for treating any of those bands – all of which have equal data carrying capacity – differently from

[14] To determine "suitability" the Commission considers "the physical properties of the spectrum, the state of equipment technology, whether spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its use for mobile telephony." Memorandum Opinion and Order and Declaratory Ruling, *Applications of Cellco Partnership d/b/a Verizon Wireless And Atlantis Holdings LLC*, 23 FCC Rcd. 17444, ¶ 62 (2008) ("*Verizon-Alltel Merger Order*"); *see also, e.g., Cingular-AT&T Wireless Order*, ¶ 81; Memorandum Opinion and Order and Declaratory Ruling, *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp.*, 23 FCC Rcd. 12463, 12486 ¶ 43 (2008); Memorandum Opinion and Order, *Applications of AT&T Inc. and Dobson Communications Corp.*, 22 FCC Rcd. 20295, ¶ 26 (2007); Memorandum Opinion and Order, *Applications of Midwest Wireless Holdings, L.L.C. and Alltel Communications, Inc.*, 21 FCC Rcd. 11526, ¶ 31 (2006); Memorandum Opinion and Order, *Applications of Nextel Communications, Inc. and Sprint Corp.*, 20 FCC Rcd. 13967, ¶ 61 (2005).

the others for purposes of applying a spectrum screen designed to assess the accumulation of spectrum capacity.

T-Mobile recently touted a chart in an Ofcom report that it claims shows that, even with ten times as many cell sites, a carrier with 2.6 GHz spectrum could not match the *coverage* (in terms of percentage of population receiving 1.2 Mbps) of a carrier using 800 MHz spectrum.[15] But the bottom line conclusion of the very report T-Mobile cites was a change in Ofcom's position on the need for and relative value of spectrum below 1 GHz: "With regard to holdings of sub-1GHz spectrum, we now believe that the technical advantages of sub-1GHz spectrum are less clear."[16] As a result, Ofcom reversed its prior conclusion and found that Everything Everywhere could be a viable national wholesaler *without* sub-1GHz spectrum, because, for

[15] Letter from Jean L. Kiddoo (for T-Mobile) to Marlene H. Dortch, FCC, *Application of Cellco Partnership, d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses*, WT Docket No. 12-4 (April 18, 2012), at 1 & Attachment (chart from *Ofcom's Second Consultation on Assessment of Future Mobile Competition and Proposals for the Award of 800 MHz and 2.6 GHz Spectrum and Related Issues* (2012) ("*Ofcom Second Report*").

[16] *Ofcom Second Report* ¶ 1.24. Ofcom explained that its change in view reflected the fact that its "technical analysis now reflects more fully the range of service quality that consumers are likely to experience across a range of locations, rather than just focusing on service quality in something approaching the worst case." *Id.* In all events, T-Mobile reads too much into the one chart that it has pulled out of the report. As the technical appendices that support the Ofcom charts make clear, the Ofcom computer modeling did not even purport to account for the fact that a real-world carrier would plan and optimize its network to maximize its performance, and for this reason the sort of abstract comparison in this Ofcom chart would never be the basis for a real-world estimate of the absolute number of cell-sites required at a given frequency band. For example, the locations modeled by Ofcom were heavily weighted towards indoor locations where any propagation-related indoor coverage issues would be much more likely to be addressed on a more targeted basis with femtocells, wi-fi, or other solutions, rather than attempting the impossible task of building enough traditional cell sites to guarantee that *every* location achieves a particular throughput level. The lengthy Ofcom report and technical appendices are available at http://stakeholders.ofcom.org.uk/consultations/award-800mhz-2.6ghz/.

example, "the differences between an 800 MHz and an 1800 MHz network" are not "sufficiently important."[17]

Second, it would make no sense to adjust the screen to account for the fact that high band spectrum may have higher deployment costs than lower band spectrum.[18] As T-Mobile concedes – indeed, emphasizes – the marketplace *already* accounts for those cost differences, just as it accounts for the many other factors that may impact the value of any particular block of spectrum to potential purchasers. To the extent it costs more to deploy higher-band spectrum (and there are no offsetting advantages of that spectrum), the higher-band spectrum will fetch lower prices.[19] As T-Mobile's own expert puts it: "The substantial value difference among the

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[17] *Id*. In another context in the Verizon/SpectrumCo proceeding, a T-Mobile expert has suggested that relative propagation characteristics of high band and low band spectrum necessarily mean that a low band network will achieve higher throughput and spectral efficiency. *T-Mobile SpectrumCo Reply*, Exhibit A (Roberson Decl.) at ¶¶ 10-13 (claiming that low-band spectrum will provide a higher spectral efficiency over a given area than higher band spectrum, because better propagation will allow the network to deliver a higher received signal strength). Under basic engineering principles, however, data carrying capacity is determined by the signal-to-interference *ratio*, not signal strength standing alone. Although each base station in a lower band deployment may transmit a signal with better propagation, the surrounding base stations are *also* transmitting signals with better propagation, which creates more interference. Moreover, above some threshold "good" signal to interference level, improved signal to interference ratio will have no material impact on throughput. That is particularly important in modern cellular deployments in which cell size is frequently determined by capacity, not coverage, needs, in which case there may be no opportunity to take advantage of superior propagation characteristics of low band spectrum. Where even low band deployments are effectively on a high band grid to meet capacity needs and the vast majority of customer traffic is thus relatively close to a base station, there is unlikely to be any material difference in signal to interference ratio between high band and low band. The bottom line is that a properly engineered network optimized for the spectrum deployed will generally have roughly equal data carrying capacity/MHz of spectrum deployed in each cell regardless whether it is a high band or low band deployment.

[18] T-Mobile Comments, at 5; *see also T-Mobile SpectrumCo Petition* at 31.

[19] *See* Seth L. Cooper, *Stifling the Spectrum Market: The Negative Implications of the AT&T/Qualcomm Order,* Perspectives from FSF Scholars, The Free State Foundation, Vol. 7, No. 4, at 4 (Jan. 31, 2012) ("[A]ny cost savings to carriers arising from the unique characteristics of low-band spectrum would be factored in to the market price for the spectrum licenses. . . . The sorting out of near-term versus long-term deployment efficiencies should be left to the price

bands is well understood by all market participants and is reflected in market valuations and spectrum prices."[20] There is no economic or policy justification for treating a carrier that controls a small percentage of the available capacity as controlling a much larger percentage merely because it paid more for its spectrum. Indeed, T-Mobile's proposed screen would allow a single carrier to amass a large percentage of the available capacity in a market, as long as it focused on the high-band spectrum that would be under-weighted in T-Mobile's proposed screen. If a carrier acquired 20 MHz of AWS spectrum and sold 10 MHz of 700 MHz spectrum in a given city, T-Mobile's proposed screen would treat such a swap as having zero impact on spectrum concentration – even though the carrier would have doubled the amount of spectrum (and data-carrying capacity) it controlled.[21]

Moreover, any attempt to weight spectrum based on propagation-related "value" differences would be arbitrary in the extreme, because there are many other factors that determine the relative value of different spectrum bands.[22] To take an obvious example, any defensible measure of the value of spectrum would have to account for the fact that in most densely populated areas – the areas where spectrum needs are typically greatest and hence the

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system. For spectrum licenses exchanged through auctions this means winning bid amounts. And for secondary market transactions, this means bargained for sale amounts.").

[20] *T-Mobile SpectrumCo Petition*, Exhibit C (Cramton Decl.), ¶ 17; *id.* at 31 (contending that 700 MHz spectrum cost more than twice as much at auction than AWS spectrum).

[21] T-Mobile's proposed change would effectively double-count low-band spectrum: a carrier that holds 700 MHz spectrum, for example, that has *already* paid a marketplace premium for that spectrum (which reflects and offsets any coverage-related cost savings) would pay again in the Commission's screening process, because the premium it has already paid would effectively raise the cost (or eliminate the possibility) of future spectrum acquisitions as well.

[22] As Free Press explained in the Verizon/SpectrumCo proceeding, any attempt to construct a value-weighted screen would be extremely complex and require assessment of, among other things, "wavelength, contiguous block size, block pairing, market density and demographics, and interference issues." Free Press Petition to Deny, *Application of Cellco Partnership, d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses*, WT Docket No. 12-4, at 16 (Feb. 21, 2012).

areas in which a value-weighting approach would work the most mischief – providers are no longer focused on simply providing coverage but are instead seeking rapidly to expand *capacity* to meet the exploding demand for mobile data services. In these areas, all providers are using small cell sizes to increase capacity, which erases the propagation advantages of low-band spectrum; superior propagation does not matter if users in one square block use up all of its capacity.[23] As the Commission and others have recognized, higher band spectrum may actually be better suited for these urban deployments.[24]

T-Mobile's proposed schedule of relative spectrum weights is even more arbitrary.[25] T-Mobile offered an expert report in the Verizon/SpectrumCo proceeding (that it incorporates in this proceeding) to explain these weightings, but that report contains no independent analysis and relies entirely on snippets from equity research reports from J.P. Morgan and Deutsche Bank.[26]

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[23] Kevin Fitchard, *Verizon Trading Beachfront Spectrum for Penthouse Airwaves*, GigaOM (April 19, 2012), *available at* http://gigaom.com/broadband/verizon-trading-beachfront-spectrum-for-penthouse-airwaves/ ("The advantage of 700 MHz is its propagation . . . [but i]n urban areas that propagation advantage is nullified because high mobile-broadband demand requires operators to build very dense networks of closely packed cells. . . . To adequately cover a city like New York, Verizon needs to install thousands of LTE cell sites, and when you're talking that kind of density it doesn't matter how well your signal carries over distance. Lower frequencies do penetrate walls better, but again at urban cell densities, the differences between 700 MHz and AWS are negligible.").

[24] *See, e.g.*, Paul Kirby, *Sprint Nextel CTO Offers Vigorous Defense of WiMAX*, TR Daily, Apr. 22, 2008 (former Chief Technology Officer of Nextel and then Sprint Nextel explaining that "[t]he 2.5 gigahertz band spectrum Sprint Nextel's WiMAX network will use compares favorably to 700 megahertz band spectrum" and "[w]hile the lower band enables coverage to be deployed more cheaply initially, the upper band allows greater overall capacity to handle more subscribers."); Fourteenth Report, *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 25 FCC Rcd. 11407, ¶ 272 (2010) (noting that "higher-frequency spectrum may be particularly effective for providing significant capacity, or increasing capacity, within a smaller geographic area," and that "higher-frequency spectrum can be ideally suited for providing high capacity where it is needed, such as in high-traffic urban areas.").

[25] *See* T-Mobile Comments, at 7.

[26] *See T-Mobile SpectrumCo Petition*, Exhibit C (Cramton Decl.), ¶¶ 31-36; *see also* T-Mobile Comments, at 7-8 (incorporating those pleadings here).

The J.P. Morgan report appears to have plucked relative spectrum values from thin air. The only two data points it cites are the *average* prices paid in the 2006 AWS auction and the 2008 700 MHz auction. From those figures, J.P. Morgan concludes that 700 MHz spectrum is worth nearly twice as much as AWS spectrum. In fact, there were very large variations in the prices paid for particular blocks in each of those auctions, and in all events there were other reasons why AWS spectrum may have been valued lower in 2006 (including the fact that AWS spectrum required significant clearing and that the 2006 auction preceded the smartphone-driven wireless data explosion that greatly increased the demand for and value of wireless spectrum). The remaining J.P. Morgan valuations are simply assertions unsupported by analysis or explanation: a "30% premium" is added to top 100 markets, cellular is deemed 25% more valuable than 700 MHz, and MMDS and 2.5 GHz are discounted 67% and 75%, respectively, from the AWS value. The Deutsche Bank report never even purports to identify relative spectrum valuations. Rather, the portion of the report relied on by T-Mobile merely lists prices paid for spectrum at Commission auctions since 2005 and expressly warns that the average auction values it lists "can be misleading."[27] The Commission obviously could not lawfully rely on such insubstantial sources to justify the radical spectrum screen changes T-Mobile advocates.

Ironically, the very proceeding in which T-Mobile has been most aggressively pressing its weighted spectrum screen (the Verizon/SpectrumCo transaction) has provided clear market-based evidence as to just how wrong-headed that proposal is. In particular, while Verizon Wireless is currently spending billions of dollars to acquire more *high*-band (AWS) spectrum, it

[27] Brett Feldman, *Key Updates on Major Spectrum Deals*, Industry Update, Deutsche Bank Markets Research (Feb. 5, 2012).

has announced that it will sell substantial chunks of its *low*-band 700 MHz spectrum.[28] Moreover, in doing so, it explained that the high-band spectrum it hopes to acquire is better suited to its network deployment than the low band spectrum it hopes to sell.[29] Verizon's announcement belies self-serving claims by T-Mobile and others that low band spectrum is inherently more valuable than high band spectrum and, instead, underscores the reality that the "value" of different blocks of spectrum to any particular carrier depends on many different considerations, including their other spectrum holdings, their network architecture, coverage, congestion, and interference concerns. Indeed, contrary to its FCC advocacy, T-Mobile has effectively admitted as much by publicly disparaging the value of Verizon's low-band spectrum and urging the FCC to reject Verizon's AWS acquisition so that that high-band spectrum might be available to T-Mobile and others.[30]

It would thus be clear error for the Commission to revise its spectrum screen on the false premise that low band spectrum is inherently more valuable than high band spectrum, much less to attempt to quantify that purported difference. Rather, T-Mobile's value-weighting proposal should be seen for what it is: an attempt to use regulation to provide unlawful help to individual competitors by making it more difficult (or impossible) for others to participate in spectrum

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[28] *See, e.g.*, Phil Goldstein, *Verizon: We'll Sell 700 MHz Spectrum to Get Cable Companies' AWS Spectrum*, Fierce Wireless (April 18, 2012), *available at* http://www.fiercewireless.com/story/verizon-well-sell-700-mhz-spectrum-get-cable-companies-aws-spectrum/2012-04-18.

[29] Kevin Fitchard, "Verizon Trading Beachfront Spectrum for Penthouse Airwaves," gigaom.com (April 19, 2012) ("[a]t Verizon's earnings call Thursday, CFO Fran Shammo tried to explain the logic behind that move, claiming that the Advanced Wireless Services (AWS) airwaves it's buying from its cable partners is better suited to the kind of urban capacity infill Verizon will embark on in the next phase of its LTE rollout").

[30] *See* Letter from Jean L. Kiddoo to Marlene H. Dortch, WT Docket No. 12-4, at 2 (April 20, 2012) (arguing that Lower 700 MHz spectrum Verizon intends to sell has "problems" including "a lack of a national footprint," "interference from adjacent high-powered broadcasters, and lack of equipment and interoperability with the rest of the 700 MHz band").

auctions or secondary market transactions. A value-weighted screen would abandon the focus on capacity, which protects competition, in favor of a focus on "fairness" that is nakedly designed to help certain competitors (notably T-Mobile) against others. Any such change in the spectrum screen would be patently unlawful, because both the Commission and the courts have held repeatedly that the "Commission's statutory responsibility is to protect competition, not competitors."[31]

II. THE COMMISSION SHOULD ALSO REJECT THE COMMENTERS' OTHER PROPOSALS FOR UNNECESSARY REGULATORY INTERVENTION.

The commenters' remaining proposals for regulatory changes with respect to auction eligibility rules, 700 MHz interoperability, and data roaming are also meritless.

Limitations on Participation in Auctions. T-Mobile argues (at 9-10) that the Commission should consider adopting a rule governing the upcoming "forward auction" of broadcast spectrum that would limit the amount of spectrum that could be awarded to any single auction participant. Any such auction-specific limitation would violate the Tax Relief Act governing those auctions.[32] Section 6404 of that Act (titled "Certain Conditions On Auction Participation Prohibited") provides that,"[n]otwithstanding any other provision of law," the

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[31] Order and Authorization, *Application of Alascom, Inc. AT&T Corp. and Pacific Telecom, Inc. For Transfer of Control of ALASCOM, Inc. from Pacific Telecom, Inc. to AT&T Corp.*, 11 FCC Rcd. 732, ¶ 56 (1995); Report and Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶ 60 (1991) (large firms may have many advantages, including "perhaps, resource advantages, scale economies, established relationships with suppliers, ready access to capital, etc.," but the mere fact that a firm has these advantages does not mean that it is "appropriate for government regulators to deny the incumbent the efficiencies its size confers in order to make it easier for others to compete"); *United States* v. *W. Elec. Co.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (Commission has no public interest authority to "aid the minnows against the trout"). In addition, Section 310(d) flatly prohibits the Commission from considering whether the public interest would be "better" served if the spectrum were redirected to other providers because of the relative value of different carriers' holdings.

[32] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6404 (2012) ("Tax Relief Act").

Commission "may not prevent a person from participating" in an auction, as long as the potential bidder (i) "complies with all auction procedures and other requirements to protect the auction process" and (ii) meets the relevant "technical, financial, character, and citizenship" requirements. Thus, Congress has squarely prohibited the Commission from adopting any auction-specific rules that would limit any bidder's ability to participate beyond these basic requirements, and courts have made clear that when Congress prevents an agency from engaging in an activity "notwithstanding any other provision of law," that statutory phrase is absolute.[33]

As T-Mobile notes, Section 6404(B) preserves the Commission's authority to adopt rules of *general* applicability,[34] but Congress's use of the term "rules of general applicability" reflects the fact that, in the auction context, the Commission distinguishes general rules that apply across all services and auctions with "service-specific" rules that apply only to specific spectrum or to a particular auction.[35] In other words, subsection (B) preserves the Commission's power to adopt

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[33] *See, e.g., Multistate Commc'ns, Inc.* v. *FCC*, 728 F.2d 1519, 1525 (D.C. Cir. 1984) ("the phrase, 'notwithstanding any other provision of law' overrides any prior, inconsistent provision of the Communications Act"); *Cisneros* v. *Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) ("As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override the conflicting provisions of any other section."); *Liberty Maritime Corp.* v. *United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) ("a clearer statement is difficult to imagine") (alterations and internal quotation marks omitted).

[34] Subparagraph 309(j)(17)(B) provides that "[n]othing in subparagraph (A) affects any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition."

[35] *See, e.g.*, Second Order on Reconsideration, *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, 18 FCC Rcd. 10180, ¶ 18 (2003) ("[t]he rule revision adopted in this *Second Order on Reconsideration of the Part 1 Third Report and Order* rule is of general applicability to all services and does not apply on a service-specific basis"); Biennial Regulatory Review Report for the Year 2000, 2001 FCC LEXIS 378, ¶ 93 (2001); Memorandum Opinion and Order on Reconsideration, *Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, 13 FCC Rcd. 14569, ¶ 161 (1998); *see also* 1 C.F.R. § 1.1 (a document that has "general applicability" is one that is "applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations").

rules establishing overall spectrum caps limiting the total spectrum that carriers can accumulate.[36] But subsection (A) must also be given effect,[37] and an auction-specific rule that rendered a carrier ineligible to acquire some of the spectrum at auction independently of any rule of general applicability, would be precisely the type of restriction that subsection (A) flatly prohibits.

Such restrictions would also be contrary to the public interest. The thrust of both the Tax Relief Act and the Commission's long-established flexible use policies is to allow providers to pursue the spectrum that best fits their needs through participation in auctions and transactions on the secondary market. T-Mobile's proposed restrictions would thwart the most efficient use of the limited spectrum that is available, because it could prevent a provider from bidding on specific blocks of spectrum that could be most effectively combined with the spectrum it already holds. Even if the Commission were concerned about spectrum aggregation, it would be arbitrary to prevent providers from bidding on the spectrum that would lead to the most efficient use of scarce spectrum resources, as opposed to an overall cap, which would permit bidders to seek the spectrum that makes the most sense and sell other spectrum.

[36] But even in that context, the Tax Relief Act would prohibit the Commission from preventing licensees from fully participating in the auctions; rather, its authority would be limited to establishing the caps, under which a successful bidder would be responsible, at the conclusion of an auction where it acquired spectrum, for undertaking divestitures or otherwise bringing itself into compliance with the total spectrum aggregation limits.

[37] *See, e.g.*, *Milner* v. *Dep't of Navy*, 131 S. Ct. 1259, 1268 (2011) ("statutes should be read to avoid making any provision superfluous, void, or insignificant") (internal quotation marks omitted); *Whitman* v. *Am. Trucking Assn's*, 531 U.S. 457, 485 (2001) (an agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion").

700 MHz Interoperability. T-Mobile and RCA also urge the Commission to mandate handset interoperability in the 700 MHz band.[38] As these commenters acknowledge, the Commission is already considering these issues in a pending rulemaking proceeding, and therefore it would be inappropriate for the Commission to address such issues in this competition report.[39]

In all events, there is no basis for such a mandate. The current 700 MHz band classes were established in the international standards-setting body and, contrary to these commenters' assertions, are designed to maximize the value and usability of this spectrum in light of well-established interference concerns.[40] Although Lower A Block carriers have claimed that an interoperability mandate for the Lower 700 MHz bands is necessary to create the demand for devices that will work on their networks, that is obviously not the case, as Lower A Block carrier US Cellular is introducing multiple LTE devices this year.[41] Moreover, Lower A Block holders

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[38] T-Mobile Comments, at 18-19 ("While T-Mobile appreciates the Commission's efforts to promote interoperability in the 700 MHz spectrum, the Commission should broadly examine the requirement of interoperability throughout the 700 MHz band – and not just in the Lower 700 MHz band"); RCA Comments, at 6-8.

[39] Notice of Proposed Rulemaking, *Promoting Interoperability in the 700 MHz Commercial Spectrum; Interoperability of Mobile User Equipment Across Paired Commercial Spectrum Blocks in the 700 MHz Band*, WT Docket No. 12-69 (rel. March 21, 2012).

[40] *See, e.g.*, Comments of AT&T Inc., *Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, WT Docket No. 12-69; RM-11592, (filed March 31, 2010).

[41] Press Release, U.S. Cellular, *U.S. Cellular Launches First 4G LTE Smartphone: Samsung's Galaxy S Aviator; Aviator Available Online and in Stores Today* (April 5, 2012), *available at* http://www.uscellular.com/about/press-room/2012/USCELLULAR_LAUNCHES_FIRST_4G_SMARTPHONE_SAMSUNG_GALAXY_S_AVIATOR.html; Maisie Ramsey, *C Spire: We'll Launch LTE With a 'Full Suite' of Devices*, Wireless Week (March 30, 2012) ("'We plan to have a full suite of devices when we launch this fall,' C Spire President and CEO Hu Meena said Friday during a roundtable discussion at the Rural Cellular Association's (RCA) conference"). In fact, "Meena said C Spire – the only operator of its size to carry the iPhone – didn't run into significant problems securing devices for its network." *Id.*

refute their own claim that they are unable to take advantage of the economies of scale in LTE device development when they point out that manufacturers can make variants of existing LTE devices distributed by AT&T and Verizon that will operate in a different band class on the Lower A Block at a relatively small incremental cost.[42]

In reality, these parties' requests for a heavy-handed device interoperability mandate is a perfect example of a situation in which the Commission should be focused on removing regulatory obstacles to the use of spectrum rather than on adopting new regulations that will further restrict efficient spectrum use. Instead of pursuing an unprecedented intervention into the standards-setting process – which would only spread the interference to additional 700 MHz blocks, harm competition, and undermine the integrity and predictability of a standards-setting system on which the entire wireless ecosystem relies – the Commission should focus its energy on taking steps to eliminate the interference. More specifically, the Commission should be taking proactive steps both to address adjacent Channel 51 broadcasts and to prevent the development of harmful interference from the E Block. As T-Mobile recently acknowledged, "interference from adjacent high-powered broadcasters" is a real problem.[43] If the Commission solved the real problem – the interference – industry solutions could develop naturally.[44]

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[42] *See, e.g.*, Letter from Michele C. Farquhar (Vulcan Wireless LLC) to Marlene Dortch, FCC, *Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated for Consent to the Assignment of Licenses*, WT Docket No. 11-18, Attachment at 22 (Dec. 5, 2011) (a manufacturer can create a Band 12 variant of a Band 17 phone "simply [by] broaden[ing] the duplexer to Lower A, B and C Blocks," and even if a new filter and power amplifier modules are required, "similar [bill of materials] component prices are all <$1 and, in quantity, have no cost impact").

[43] *See* Letter from Jean L. Kiddoo (for T-Mobile) to Marlene H. Dortch, FCC, *Application of Cellco Partnership, d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses*, WT Docket No. 12-4, at 2 (April 20, 2012).

[44] *See, e.g.*, Letter from Joan Marsh (AT&T) to Marlene H. Dortch, FCC, *Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated for Consent to the Assignment of Licenses*, WT Docket No. 11-18, at 1-2 (Dec. 22, 2011); *see also* Letter from Joan Marsh (AT&T) to Marlene H. Dortch, FCC, *Applications of AT&T Mobility Spectrum LLC and Qualcomm*

Data Roaming. T-Mobile and RCA also call for "strict" but undefined conditions on data roaming, but any new restrictions would be inappropriate.[45] The Commission has already established a broad set of rules and complaint procedures that are unprecedented for services that are not common carrier services.[46] The Commission's rules require all wireless broadband providers to negotiate data roaming agreements in good faith and to offer terms that are "commercially reasonable."[47] If roaming disputes do arise, the Commission's rules provide a complaint procedure.[48] Although these parties express vague concerns about the ability to obtain roaming agreements,[49] any contention that the Commission's rule changes and complaint proceedings are inadequate is grossly premature.

Incorporated for Consent to the Assignment of Licenses, WT Docket No. 11-18, at 2-3 (Dec. 16, 2011) (if rule modifications were enacted "and the A Block were largely relieved of the interference concerns that prompted the creation of Band 17, we reiterated that AT&T would not rule out a migration to Band 12 in the future"). All providers should remain free, however, to implement any such migration in a way that minimizes harmful impacts on consumers and avoids unnecessary costs and delays.

[45] T-Mobile Comments, at 19-21; RCA Comments, at 8-9.

[46] *See* Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011) ("*Data Roaming Order*"), *appeal docketed sub nom. Cellco Partnership d/b/a Verizon Wireless* v. *FCC*, No. 11-1135 (D.C. Cir. May 13, 2011).

[47] *Data Roaming Order*, ¶ 23.

[48] *Id.* ¶¶ 85-86.

[49] *See, e.g.*, RCA Comments, at 9.

CONCLUSION

For the foregoing reasons, the Commission should find that the wireless marketplace is subject to effective competition.

Respectfully submitted,

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