



NEW AMERICA
FOUNDATION

November 9, 2012

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

Re: Notice of Oral *Ex Parte* Presentation
WT Docket No. 12-70 (Service Rules for AWS-4 in 2000-2020 and 2180-2200)
WT Docket No. 12-69 (Promoting Interoperability in 700 MHz Spectrum)

Dear Ms. Dortch:

On November 7, 2012, the undersigned spoke by phone with Louis Peraertz, Legal Advisor to Commissioner Mignon Clyburn, on behalf of the New America Foundation's Open Technology Institute and other nonprofit groups affiliated with the Public Interest Spectrum Coalition (PISC) that filed jointly in the proceedings referenced above.

With respect to the Lower 700 MHz interoperability proceeding, I urged a rapid completion of the proceeding, reiterating the arguments PISC groups made in Comments and Reply Comments concerning the importance of interoperability for promoting competition and consumer choice in mobile broadband markets.¹ The Public Interest Organizations have emphasized that any failure to ensure interoperability and roaming across the 700 MHz band would be a radical departure from longstanding FCC competition policy, dating back to the original PCS auctions, that ensures interoperability as new bands are auctioned. Without interoperability, competitive carriers that are A Block licensees would face enormous additional obstacles to deploying LTE and acquiring popular devices in an economic fashion. I asserted that although we support interoperability across the entire 700 MHz band – which would also promote the quality and affordability of an interoperable public safety network – that the Commission should complete an order as rapidly as possible to require lower 700 MHz band interoperability, since that record is complete.

¹ See Comments of New America Foundation, Consumers Union, Public Knowledge, WT Docket No. 12-70, ET Docket No. 10-142, WT Docket No. 04-356 (filed May 17, 2012) (“Public Interest Organizations’ Comments”).

Concerning the Commission’s proposed assignment of new AWS-4 terrestrial mobile service licenses to the incumbent 2 GHz MSS licensee, which incorporates a permanent waiver of the ATC “integrated services” rule that has restricted flexible use of MSS spectrum (both the S band and the L band) for terrestrial-only deployments, I reiterated arguments in the Comments and Reply Comments of the Public Interest Organizations in support of four public interest obligations that should be imposed in exchange for the multi-billion dollar value of this flexible, terrestrial spectrum grant. The Commission should follow the precedent it set in granting substantively similar MSS license transfers and limited waivers of the integrated service rules granted to LightSquared Subsidiary LLC (“LightSquared”) in 2009 and 2010, respectively. LightSquared compensated the public for the grant of valuable spectrum rights by agreeing to a series of compelling public interest obligations that included deployment of a wholesale-only LTE network, rapid buildout requirements, and a requirement to seek Commission approval for any sale or leasing of more than 25 percent of the network’s capacity in an economic market area to one of the two largest terrestrial carriers by market share.

In contrast, without obligations that deter or at least condition the sale and transfer of AWS-4 licenses, the Commission may end up conferring a \$4 to \$6 billion subsidy while actually making the market less competitive if one of the two dominant carriers ends up with the AWS-4 spectrum unconditioned by wholesale access or other pro-competitive conditions. As our comments in the proceeding describe in more detail, we continue to urge that the assignment of these valuable AWS-4 licenses without an auction should be subject to four specific public interest conditions that could recoup value for the public, while also promoting wireless industry competition, innovation and spectrum efficiency, particularly in rural areas.

First, for the duration of the initial license period, the AWS-4 licensee should make up to 50 percent of its capacity available in each Economic Area for open wholesale leasing, or for roaming by other carriers, on a non-discriminatory basis at fair and reasonable rates.

Second, whether or not the AWS-4 licensee is required to make substantial capacity available for wholesale leasing and roaming, the Commission should require that the licensee seek Commission approval before making more than 25 percent of the licensee’s data traffic capacity within any Economic Area available to any single carrier, or to any other entity, regardless of whether that capacity is accessed on a wholesale basis, roaming basis, under a spectrum manager lease arrangement, or as part of a network sharing agreement. There is no need to limit the trigger on this approval to the two largest terrestrial carriers, as the Commission did in the context of the *SkyTerra* license transfer noted above.

Third, any buildout requirements should be augmented by a “use it or share it” license condition that would permit other parties to make use of unused AWS-4 spectrum on a localized basis until such time as the licensee actually deploys and commences service to consumers.

There appears to be no reason to limit use of the TV Bands Databases to the TV band alone, as such databases likewise could be used to regulate contingent access to fallow portions of other bands, including the S Band.² The Commission's ongoing certification of geolocation databases to govern opportunistic and conditional access by frequency-hopping radios to vacant TV channels makes this entirely feasible. At a minimum, the 20 MHz being acquired from DBSD is fallow spectrum and is likely to remain so for many years under the modest, population-based buildout requirements proposed in the Commission's NPRM.

Fourth, the Commission should impose unjust enrichment penalties on sale of the AWS-4 licenses to either of the two largest mobile carriers. This penalty could be modeled on the rules governing the clawback of benefits reserved for designated entity licensees (DEs).

Finally, with respect to proposals that would impose stringent out-of-band emission requirements on the lower boundary of the AWS-4 band at 2000-2020 MHz, I reiterated the previously expressed view of the Public Interest Organizations that hobbling the AWS-4 licensee as a potential new market competitor seems far more likely to harm than to serve the public interest. The benefits of enhancing the value of the adjoining 5 MHz of H Band spectrum at 1995-2000 MHz, for the purpose of a future auction, appear remote and hypothetical in comparison to the immediate delay and possible loss of a market entrant. The PISC representatives maintain that the public interest is best served by *both expediting and conditioning the buildout of the entire 40 MHz* that is the subject of this proceeding in a manner that will promote more wireless competition with minimal delay. Extensive delay in the buildout and market entry of a new competitive wireless service provider would undermine the Commission's justification for awarding terrestrial broadband rights without an auction just as surely as would the Commission's failure to impose public interest conditions that at least increase the likelihood that the AWS-4 grantee will become a competitive market entrant – and not a vendor of spectrum to one of the dominant wireless carriers.

Respectfully submitted,

/s/

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² See Comments of the Public Interest Spectrum Coalition, In the Matter of Promoting More Efficient Use of Spectrum Through Dynamic Spectrum Use Technologies, ET Docket No. 10-237 (Feb. 28, 2011). See also Michael Calabrese, "Use it or Share it: Unlocking the Vast Wasteland of Fallow Spectrum," Working Paper, presented at 39th Research Conference on Communication, Information and Internet Policy (TPRC), September 25, 2011.