March 19, 2013

Via Electronic Delivery

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

Re: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268

Dear Ms. Dortch:

The Rural Telecommunications Group ("RTG") applauds the Federal Communications Commission ("FCC" or "Commission") on the work it has completed with regard to the first-ever broadcast spectrum incentive auction.[1] However, RTG respectfully disagrees with the positions Commissioners Robert McDowell and Ajit Pai took in their March 12, 2013 testimony before the Senate Committee on Commerce, Science, and Transportation indicating the FCC should not implement a spectrum cap in the forward auction. RTG also wishes to outline its support of those parties that have filed comments and replies in this proceeding pointing out that the FCC is required by Section 309(j) of the Communications Act of 1934, as amended, ("Communications Act" or "Act")[2] and the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act")[3] to adopt rules and procedures in the forward looking auction that support the participation of rural carriers and avoid the concentration of licenses by disseminating licenses across a variety of applicants.

Competition in the Wireless Broadband Marketplace Should Not Take a Back-Seat to Funding FirstNet

RTG respectfully disagrees with the positions taken by Commissioners McDowell and Pai in their testimony before the Senate Committee on Commerce, Science and Transportation

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[1] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, FCC 12-118 (rel. October 2, 2012) ("*Incentive Auction NPRM*"). *See also*, *Expanding the Economic Innovation Opportunities of Spectrum Through Incentive Auction*, GN Docket No. 12-268, Order, FCC 12-1916 (rel. November 29, 2012).
[2] 47 U.S.C. §309(j).
[3] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§6402, 6403, 125 Stat. 156 (2012) ("Spectrum Act").

on March 12, 2013 ("Senate Committee Hearing"). In his written testimony, Commissioner McDowell stated that the Commission should "avoid anything that functions as a spectrum cap."[4] Commissioner Pai also testified that "if the Commission starts picking and choosing who may participate in the forward auction – such as by setting a spectrum cap or narrowing the spectrum screen *despite the robust competition in the wireless market* – it will result in less participation, less revenue, less spectrum available for mobile broadband, and less funding for public safety."[5] However, as the Competitive Carriers Association ("CCA") points out in its comments, "the Commission has been unable for the past two years to conclude that the wireless marketplace is characterized by 'effective competition.'"[6] RTG respectfully submits that wireless markets do not have "robust competition" and a spectrum cap is absolutely necessary to ensure the future of wireless broadband competition.

RTG takes issue with certain statements made during the Senate Hearing regarding the purpose of the broadcast incentive auction. Senator Rockefeller stated "the auction must be driven by one simple principle – it must maximize the resources available for the construction of a nationwide, interoperable broadband network for first responders."[7] Commissioner Pai testified:

> I am concerned, for example, that the incentive auction may not provide sufficient funding for FirstNet to build a nationwide, interoperable public safety broadband network. Only one closing condition was set forth for the incentive auction in last fall's Notice of Proposed Rulemaking: that the revenues from the forward auction must cover the costs of the reverse auction. Such an outcome, in my view, would be entirely unacceptable. It would mean no money for FirstNet to build out a

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[4] Statement of Robert M. McDowell, Commissioner, Federal Communications Commission, Hearing Before the Committee on Commerce, Science and Transportation of the United States Senate, *Oversight of the Federal Communications Commission*, March 12, 2013 ("Commissioner McDowell Testimony").

[5] Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing Before the Committee on Commerce, Science, and Transportation of the United States Senate, *Oversight of the Federal Communications Commission*, March 12, 2013 (emphasis added) ("Commissioner Pai Testimony").

[6] Comments of the Competitive Carriers Association, GN Docket No. 12-268, at p. 6 ("CCA Comments") (*citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664 at ¶ 2 (2011) and *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, 25 FCC Rcd 11407 ¶3 (2010)).

[7] Statement of Senator John D. Rockefeller IV, Chairman, United States Senate Committee on Commerce, Science and Transportation of the United States Senate, *Oversight of the Federal Communications Commission*, March 12, 2013.

> nationwide, interoperable public safety broadband network; no money for state and local first responders; no money for public safety research; no money for deficit reduction; and no money for Next Generation 911 implementation. The statute mentions each of these items, which makes it difficult to square that legislation with an auction that would provide no funding for any of them. This is why I believe it is imperative for the incentive auction's rules to take into account the need to maximize net revenues.[8]

While the goal of funding FirstNet is certainly important, it is not the driving force behind the incentive auction. Nor does placing a spectrum cap on carrier holdings on a market by market basis necessarily mean the forward auction will fail to meet expectations.

Congress did not list funding FirstNet as a closing condition for issuing licenses upon completion of the forward auction. The Spectrum Act's only closing condition is that the proceeds from the forward auction cover the bids accepted by the FCC in the reverse auction, the costs of conducting the forward auction and the estimated costs to make reimbursements outlined in §6403(b)(4)(A) of the Spectrum Act.[9] If Congress had intended the revenue generated by the forward auction to also fully fund the Public Safety Trust Fund, Congress would have included that funding requirement as a closing condition.

Furthermore, Section 6403(d)(4) of the Spectrum Act sets out the manner in which the Commission is to deal with any unused incentive auction funds. The Spectrum Act specifically states: "*If any amounts remain* in the TV Broadcaster Relocation Fund after the date that is 3 years after the completion of the forward auction under subsection (c)(1), the Secretary of the Treasury shall (A) prior to the end of fiscal year 2022, transfer such amounts to the Public Safety Trust Fund…and (B) after the end of fiscal year 2022, transfer such amounts to the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction."[10] Clearly Congress contemplated there might not be money left at the end of the incentive auction to deposit in the Public Safety Trust Fund and the Treasury.[11]

Section 309(j) of the Communications Act directs the Commission to develop auction rules which "protect the public interest in the use of the spectrum" and to seek to promote certain objectives, including:

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[8] Commissioner Pai Testimony at pp. 1-2.

[9] *See* Spectrum Act at §6403(c)(2)(A).

[10] Spectrum Act at §6403(d)(4) (emphasis added).

[11] The Incentive Auction is not the only source of funding for the Public Safety Trust Fund. Funds are deposited into the Public Safety Trust Fund, which funds FirstNet's Network Construction Fund pursuant to Section 6413(b)(3) of the Spectrum Act, from both the incentive auction and the auction of reallocated federal spectrum authorized by Section 6103 of the Spectrum Act. *See* Spectrum Act §§ 6403(b)(3) and 6103. For ongoing support, FirstNet will also receive revenues from network user fees and lease fees resulting from secondary user sharing arrangements. *See* Spectrum Act at §6208.

> (A) development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas without administrative or judicial delays;
> (B) promote economic opportunity and *competition* by ensuring that new and innovative technologies are readily accessible to the American people by *avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women…*
> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use….and
> (D) *efficient and intensive use of the electromagnetic spectrum*.[12]

While RTG recognizes the importance of funding FirstNet and balancing the budget, the Commission's auction authority does not permit the FCC to sacrifice competition to provide funding for these initiatives. The FCC's authority to hold auctions requires the Commission to ensure competition in wireless markets and avoid the excess concentration of licenses. It would be extremely unfortunate if the forward auction was not sufficiently successful to provide funding for the Public Safety Fund. However, Congress did not amend the Communications Act nor draft the Spectrum Act in such a way as to authorize the Commission to ignore its obligations to ensure wireless competition, avoid the concentration of licenses and disseminate licenses among a wide variety of applicants. While testimony at the Senate Committee Hearing suggested that it would be acceptable for the Commission to overlook the concentration of wireless licenses in the hands of the two largest players as long as the forward looking auction raised sufficient money to fund FirstNet and to assist with deficit reduction, the Commission may not refuse to adopt a spectrum cap in this 600 MHz auction solely out of a desire to increase auction revenues.

The Commission Should Adopt a Spectrum Cap Prior to Auctioning the 600 MHz Spectrum

A spectrum cap is absolutely necessary in the forward auction to ensure that the two carriers with the largest wireless spectrum holdings do not acquire and warehouse this vital 600 MHz spectrum. As T-Mobile USA, Inc. ("T-Mobile") outlined in comments filed in the Commission's Spectrum Aggregation Proceeding, "AT&T and Verizon Wireless… together hold approximately 73 percent of the valuable spectrum below 1 GHz, measured on a MHz/POPs basis."[13] This aggregation of spectrum by two major carriers should not be perpetuated by this 600 MHz auction.

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[12] 47 U.S.C. §309(j)(3)(A)-(D) (emphasis supplied).

[13] *See* Comments of T-Mobile USA, Inc., WT Docket No. 12-269, at pp. 8-12 (filed Nov. 28, 2012) ("T-Mobile Spectrum Aggregation Comments"). *See also*, Comments of the Rural Telecommunications Group, Inc., WT Docket No. 12-269, at pp. 8-9 (filed Nov. 28, 2012) ("RTG Spectrum Aggregation Comments").

Many carriers support the adoption of a spectrum aggregation limit. T-Mobile finds that "most commenters...support imposing a cap on spectrum acquisitions…"[14] RTG agrees with T-Mobile that "[i]n a highly concentrated, capital intensive market such as mobile broadband, dominant firms have a strong economic interest in maintaining and increasing market power…. Absent some type of cap on acquiring critical spectrum resources, the two largest carriers will have an incentive to pay a premium during the competitive bidding process not because they can realize greater efficiencies using that spectrum, but rather because acquiring the spectrum will allow them to foreclose competitors from the market. A pro-competitive cap on spectrum below 1 GHz must apply during the 600 MHz auction."[15]

Congress clearly delegated to the Commission authority to "adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition."[16] The United States Cellular Corporation ("USCC") correctly notes that "the Commission's public interest objectives in any spectrum auction should include fostering a competitive wireless industry, which will serve the long-term economic interests of the United States. Such a policy would indeed be responsive to the mandate of Section 309(j)(3)(B) of the Communications Act to 'avoid excessive concentration of licenses' and to disseminate licenses among 'a wide variety of applicants.'"[17]

USCC strongly encourages the Commission to adopt "a limit on the percentage of 600 MHz spectrum any one applicant or affiliated applicants may acquire in a single market in the forward auction…"[18] USCC references the FCC's 1990s "strict 'per market' 45 MHz and 55 MHz spectrum 'caps' to limit spectrum concentration."[19] These rules were in effect at that time to ensure spectrum was diversified. As outlined by USCC, "the Commission has relaxed all of those limitations over time as more wireless spectrum became available."[20] However, spectrum scarcity is an issue once again, and it is time the Commission went back to tried and true policies to ensure this valuable 600 MHz spectrum is not concentrated in the hands of one or two carriers.

RTG shares the same concerns expressed by Sprint and other companies regarding the consequences for competition should this 600 MHz spectrum not be subject to acquisition

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[14] *See* Reply Comments of T-Mobile USA, Inc., GN Docket No. 12-268, at p. v ("T-Mobile Reply Comments") *citing* Comments of Cellular South, Inc. (d/b/a C Spire Wireless), GN Docket No. 12-268 at p. 3; Comments of Free Press, GN Docket No. 12-268, pp. 14-15; Comments of Public Interest Spectrum Coalition, GN Docket No. 12-268, p. 63 & 68; Sprint Comments at pp. 3-9; U.S. Cellular Comments at p. 32.

[15] T-Mobile Reply Comments at p. v.

[16] Spectrum Act at §6404.

[17] Comments of United States Cellular Corporation, GN Docket No. 12-268, at p. 32 ("USCC Comments") (*citing* 47 U.S.C. § 309(j)(3)(B)).

[18] USCC Comments at p. 30.

[19] USCC Comments at p. 33 citing former §§24.204, 20.6, and 22.942 of the Commission's Rules.

[20] *Id*.

limits.[21] Without spectrum aggregation limits, Verizon and AT&T will acquire the vast majority of mobile broadband spectrum. This concentration of spectrum stifles competition. CCA states the situation best when it says "[p]ut simply, the auction will be a failure, and the wireless industry will be substantially worse off, if the principal result of the auction is to further entrench the dominance of AT&T and Verizon at the expense of the rest of the industry."[22]

RTG supports the comments of USCC and T-Mobile to the extent they urge the FCC to adopt rules that prevent the further concentration of spectrum below 1 GHz.[23] To ensure robust competition, the Commission should adopt bright line rules in this proceeding that limit licensees to 25% of all available and usable mobile broadband spectrum in any given county, with no carrier permitted to hold more than 40% of all available and usable spectrum in any county below 1 GHz.[24] Such a spectrum aggregation limit is vital to ensuring the competitiveness of the broadband wireless industry. Licensees should be disqualified from bidding on spectrum in counties in which they exceed the spectrum aggregation limit.

Licensing the 600 MHz Band On the Basis of CMAs Complies with Section 309(j) of the Communications Act and the Spectrum Act

RTG supports the comments of the National Telecommunications Cooperative Association ("NTCA") and USCC urging the Commission to license spectrum made available through the incentive auction on a Cellular Market Area ("CMA") basis.[25] Licensing on a CMA basis will ensure rural and small business carriers have an opportunity to participate in the auction as required by the Communications and Spectrum Acts. Licensing on an Economic Area ("EA") or on a Major Economic Area ("MEA") basis will have the opposite effect.

Auctioning licenses exclusively on the basis of EAs, which cover service territories that are too large for rural carrier participation, is not consistent with the Communications Act or the

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[21] Sprint Comments at p. 8 ("a lack of eligibility limits will almost certainly result in Verizon and AT&T acquiring virtually all of the bi-directional spectrum – and potentially all supplemental downlink spectrum as a result of its depressed utility for other operators given the Twin Bells' aggregation of virtually all complementary spectrum for pairing in the 700 MHz Band"); CCA Comments at p. 7 (urging the Commission to "ensure that this auction does not reinforce the dominance of AT&T and Verizon"); T-Mobile Comments at p. 25 ("spectrum best suited for advanced mobile broadband applications – particularly below 1 GHz… has become increasingly concentrated in the hands of the largest U.S. wireless carriers.") *See also* RTG Spectrum Aggregation Comments.

[22] CCA Comments at p. 3.

[23] T-Mobile Comments at p. 27; USCC Comments at p. 32.

[24] *See* RTG Spectrum Aggregation Comments at p. 7.

[25] Comments of The National Telecommunications Cooperative Association, GN Docket No. 12-268, at p. 4 ("NTCA Comments") (proposing the FCC license spectrum blocks on the basis of MSAs and RSAs, which combined constitute CMAs); USCC Comments at p. 11 (CMAs must be designated…in order for small markets and rural areas to be adequately served).

Spectrum Act. The Spectrum Act "requires the Commission to 'consider assigning licenses that cover geographic areas of a variety of sizes.'"[26] The FCC is also statutorily required to adopt regulations that promote "economic opportunity for a wide variety of applicants, including small businesses [and] rural telephone companies…" and "ensure that small businesses [and] rural telephone companies… are given the opportunity to participate in the provision of spectrum-based services."[27] As stated by USCC, "auctioning small license areas benefits all carriers by allowing [large carriers] to take a building block approach and assemble as much coverage area as is needed."[28]

The fact that the use of small license areas may complicate auction strategy for large carriers does not justify licensing the 600 MHz band on an EA basis. First of all, contrary to the arguments made by T-Mobile, licensing on a MEA basis does not "meet the needs of most wireless carriers"[29] and most carriers are not "interested in creating a large regional or nationwide service footprint."[30] T-Mobile also argues that "licensing by MEA would also simplify the auction by reducing the need for package bidding…"[31] Verizon and Verizon Wireless argue the Commission should license this spectrum exclusively on an EA basis as it "will require fewer transactions"[32] for licensees attempting to build national or regional footprints and "will facilitate an efficient incentive auction…."[33] The Communications and Spectrum Acts make it clear that the Commission *must* (1) ensure that small and rural carriers are able to participate in the auction process and (2) make licenses available based on a variety of geographic areas.[34] There is no statutory caveat that allows the Commission to limit the ability of these small and rural carriers to participate in the auction in order to "simplify the auction." Congress did not task the Commission with adopting auction rules and procedures that make it easier for large companies to deploy nationwide networks. Congress tasked the Commission with ensuring that small businesses and rural telephone companies have the opportunity to participate in the auction. The Commission's desire to hold a less complicated auction, or ensure large carriers are able to aggregate licenses to provide nationwide services, cannot override these statutory mandates. As noted by NTCA, "[w]hile it may be 'easier' for carriers seeking a large geographic spectrum asset to obtain it if it is auctioned as a single area, that convenience should in no way influence the Commission's decision given the potential for harm to rural carriers and consumers and the Commission's legal mandates…"[35]

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[26] USCC Comments at p.17 (*citing*, Spectrum Act at §6403(c)(3).
[27] 47 U.S.C. §§309(j)(4)(C) &(D).
[28] USCC Comments at p. 14-15.
[29] Comments of T-Mobile USA, Inc., GN Docket No. 12-268 at p. 15 ("T-Mobile Comments").
[30] *Id*.
[31] *Id.*
[32] Comments of Verizon and Verizon Wireless, GN Docket No. 12-268 at p. 61 ("Verizon Comments").
[33] *Id*. at p. 62.
[34] Spectrum Act §§ 6402, 6403; 47 U.S.C. § 309(j)(3)(A) & (B).
[35] NTCA Comments at p.5.

The use of CMA geographic blocks will encourage auction participation by rural and regional carriers without precluding larger carriers from also participating in the auction. RTG believes the same cannot be said if the FCC licenses the 600 MHz band on the basis of EAs (or large), which will in fact preclude many small carriers from participating in the auction. USCC cites to several Commission orders that support the use of CMAs to encourage auction participation by rural carriers.[36] According to the Commission, CMAs "permit entities who are only interested in serving rural areas to acquire spectrum licenses for these areas alone and avoid acquiring spectrum licenses with high population densities that make purchase of license rights too expensive for these types of entities."[37] As outlined by USCC, the Commission has also found in the past that "CMAs also 'represent known area sizes to many business entities, especially small regional and rural providers,' and they 'correspond to the needs of many customers, including customers of small regional and rural providers.'"[38] RTG supports NTCA's contention that "EA geographic areas are too large for the prompt and efficient utilization of the spectrum resource in rural areas."[39] Licensing the 600 MHz spectrum on a CMA basis will allow the FCC to comply with its statutory directive to ensure the participation of small rural carriers.

RTG Opposes Licensing Spectrum Based on Designated Market Areas

RTG opposes the proposals made by Metro PCS Communications, Inc. ("MetroPCS") and the Competitive Carrier Association ("CCA") that the Commission consider the use of broadcast Designated Market Areas ("DMAs") for licensing the 600 MHz band.[40] However, should the Commission consider designing the licensing plan for this highly valuable spectrum on television broadcast viewership, RTG urges the Commission to also consider the fact that broadcast viewing areas have no relationship to existing wireless licensing plans. Specifically, a DMA is "a term used by Nielsen Media Research to identify an exclusive geographic area of counties in which the home market television stations hold a dominance of total [television] hours viewed."[41] Broadcast viewership is highly concentrated in urban geographic areas and less concentrated in rural areas, resulting in urban DMAs with high population densities that cover small geographic areas and low density rural DMAs that are too large to be served by rural

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[36] USCC Comments at p. 11 (*citing Service Rules for Advanced Wireless Service in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, 25177 (2003)); *See also Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022 at 1061 (2002) ("*Lower 700 MHz R&O*") ("[CMAs] can be the focus of smaller carriers that do not wish to bid on or provide service to larger regions").

[37] *Id*.

[38] *Id*.; NTCA Comments at p. 4 (*citing Lower 700 MHz R&O*, 17 FCC Rcd at 1061).

[39] NTCA Comments at p. 3.

[40] CCA Comments at p. 15; Comments of Metro PCS Communications, Inc., GN Docket No. 12-268, at p. 18 ("Metro PCS Comments").

[41] Nielsen Media Research, Glossary of Media Terms, available at: http://www.nielsenmedia.com/glossary/terms/D/index.htm. While there are 210 DMAs in the United States, there are 734 CMAs, 428 of which are RSAs, and 306 are MSAs. *See* 47 C.F.R. §22.909.

carriers.[42] Wireless licensing based on DMAs will have the unintended effect of allowing licensees to cherry-pick highly concentrated urban areas while leaving large rural areas unserved. Furthermore, auctioning large rural licenses will not ensure that small businesses and rural telephone companies are able to participate in the auction. Indeed, it would have the opposite effect. Offering DMA-based licenses will hinder the deployment of broadband services in rural areas and widen the broadband divide.

Section 309(j) of the Communications Act clearly requires the FCC to adopt rules and procedures that ensure licenses are disseminated to a variety of applicants and ensure that small businesses and rural telephone companies are given the opportunity to participate in the incentive auction. Auctioning licenses based on CMAs would provide small rural carriers with a meaningful opportunity to participate in the auction. It is equally important that the Commission adopt a spectrum cap to ensure this valuable spectrum does not fall into the hands of the two companies that already hold the majority of mobile broadband spectrum. The Commission should use this opportunity to allocate spectrum in a manner that ensures that those who live, work and travel in rural America gain much needed access to mobile broadband services.

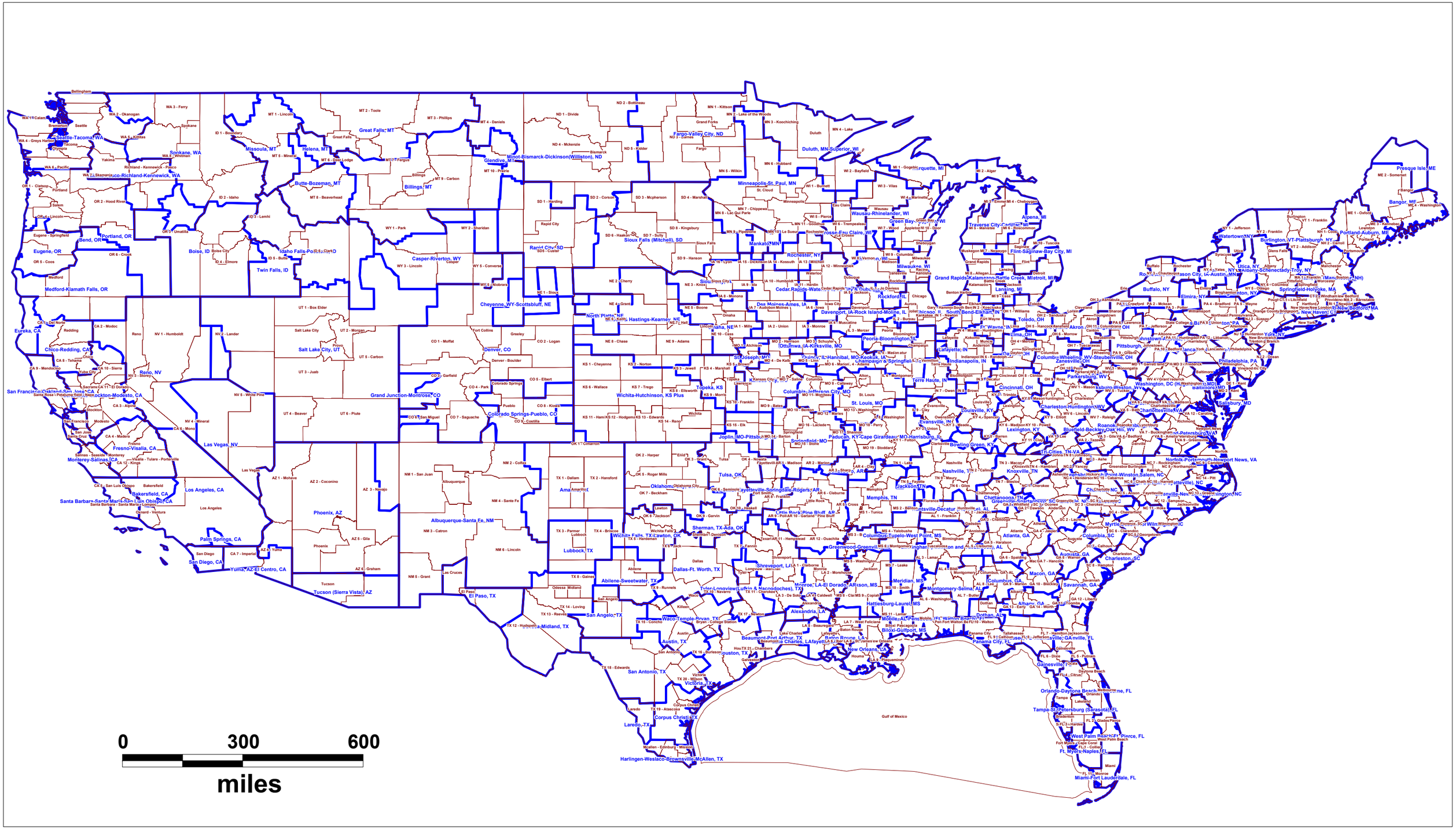
Respectfully submitted,

/s/ Caressa D. Bennet
Caressa D. Bennet
General Counsel

[42] *See* Exhibit A (map comparing DMAs and CMAs).

DMA vs CMA Market Boundary

Exhibit A



January 10, 2013

DMA Market Boundary

CMA Market Boundary

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