

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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April 19, 2013

Chairman Julius Genachowski
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Genachowski and Commissioners McDowell, Clyburn, Rosenworcel, and Pai:

We write to express our disagreement with the April 11, 2013, U.S. Department of Justice (DOJ) submission in the spectrum aggregation proceeding.¹ We do not believe the comments in that submission are consistent with the multiple goals articulated by Congress in the Middle Class Tax Relief and Job Creation Act of 2012 (the "Spectrum Act"). And we are concerned that, if the DOJ's suggestions are adopted, the Federal Communications Commission (FCC or Commission) will reduce the potential revenues from the auction and possibly cause the auction to fail.

When Congress authorized the Commission in the Spectrum Act to conduct an incentive auction of broadcast spectrum, we had several goals in mind. We certainly wanted the Commission to design an auction that would make more spectrum available to wireless carriers to meet soaring demand for mobile broadband use. But, as is clear from the statutory language, we also expected the incentive auction to generate sufficient revenues to compensate television broadcasters that wish to voluntarily relinquish spectrum, to pay for the possible relocation of television stations that remain on air, to cover the cost of the auction, to contribute up to \$7 billion toward the construction of a nationwide public safety broadband network, and to reduce this nation's unacceptable budget deficit. The DOJ submission appears oblivious to these multiple goals.

¹ United States Department of Justice, "*Ex Parte* Submission of the United States Department of Justice," Docket No. 12-269 (filed April 11, 2013) ("DOJ Submission").

In authorizing the Commission to design and conduct an incentive auction, we recognized that we were asking the Commission to do something unprecedented and extremely complex. But the DOJ submission fails to acknowledge or appreciate this complexity. Instead, the submission demonstrates the DOJ's lack of understanding of the dynamic U.S. wireless marketplace.

For instance, the DOJ submission suggests that “different rules, weights, or caps ... apply [to spectrum auctions] based on the kinds of spectrum frequency put up for auction,” and that such rules “could ensure that the two smaller nationwide carriers are not foreclosed from access to more ... low frequency spectrum.”² This is an ironic argument given that the two carriers to which the DOJ refers chose not to participate in the Commission's auction of “low frequency” spectrum in the 700 MHz band. To “ensure that [such] carriers are not foreclosed from access to more [such] spectrum,” the Commission should simply design an auction that allows the willing participation of these carriers *without* foreclosing the participation of others. We also note that one of those two carriers previously held low-frequency spectrum but was forced to spin it off to comply with FCC restrictions on participation in the 1996 Personal Communications Service auction. This is yet another example of how auction restrictions ultimately hurt, rather than help, spectrum policy and should caution against micromanaging this or other auctions. Regardless, if the FCC wishes to maximize the potential for multiple parties to win spectrum, it should endeavor to auction for licensed use as close to the 120 MHz of spectrum many believe this auction could produce. The less spectrum the FCC auctions, the less is available for all licensed providers. Conversely, maximizing the amount of licensed spectrum auctioned would advance both any interest in making spectrum available to multiple carriers and the statute's revenue objectives. With the maximum amount of spectrum cleared for auction, the FCC shall then be in a position to consider offering spectrum blocks of varied geographic sizes. That is something the Spectrum Act suggested the FCC should consider.

Next, citing the possibility of “foreclosure value,” the DOJ asserts that: “[a]bsent compelling evidence that the largest incumbent carriers are already using their existing spectrum licenses efficiently and their networks are still capacity-constrained, the Department would normally expect the highest use value for new spectrum that is in the public interest to come from rivals to the leading firms”³ This assertion borders on the absurd. The Commission itself has repeatedly identified the spectrum crunch faced by *all* wireless carriers. In particular, Chairman Genachowski expressed the view that “[t]he looming spectrum shortage is real—and it is the alleged hoarding that is illusory.”⁴ In light of this and multiple confirming industry reports, ample evidence exists that all carriers are facing, or will shortly face, capacity constraints. The broadcast incentive auction presents the only auction in the foreseeable future

² *Id.* at 23.

³ *Id.* at 12.

⁴ FCC Chairman Julius Genachowski, “The Clock is Ticking,” Remarks on Broadband at Mobile Future Forum 8 (Mar. 16, 2011) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305225A1.pdf).

to assist carriers in addressing such constraints. Moreover, if, as the DOJ asserts, the highest use value of the spectrum would come from rivals to the leading firms, those rivals should be able to raise the capital needed to win the licenses at auction. That would also further advance the revenue raising objectives of the legislation. Significantly, at least one of the smaller nationwide carriers is likely to have more resources at its disposal in light of a pending proposal to be acquired.

Finally, while the DOJ acknowledges that “competition typically is best served by a thorough case-by-case analysis of the competitive effects of each transaction,”⁵ it nevertheless recommends auction rules to “ensure [that] the smaller nationwide networks ... would have an opportunity to acquire [low-frequency spectrum].”⁶ However, given the incentive auction’s complex challenges, the Commission must design a straightforward and intuitive process that will maximize the number of participants. Ideally, a large number of broadcasters will participate in the reverse auction, and an array of current and prospective wireless providers will participate in the forward auction. Artificially limiting either the wireless carriers that may participate or the compensation to broadcasters will surely undermine success. Creating unbridled competition in an open and fair auction is the only way to maximize auction revenues and ensure that the spectrum is put to its highest and best use. Limiting or preventing the participation of potential bidders will certainly reduce the size of bids and the amount of revenue generated, and could lead to a complete failure of the auction and the Spectrum Act’s other priorities, such as the construction of an interoperable public safety broadband network. The FCC has ample authority under the Communications Act to address post-auction any undue spectrum concentration that might result.

We appreciate the efforts you, your colleagues, and the Commission staff have undertaken to tackle the complex issues presented by the auction. The recent DOJ submission, however, does not appear to contemplate the multiple goals of the Spectrum Act, nor does it appear to appreciate the complexity of the task the Commission faces. The Commission should focus on the capacity constraints faced by all wireless carriers, rather than upon the DOJ’s unsubstantiated speculation about the theoretical incentives that carriers may or may not have. The reality is that the U.S. market is characterized by competition for bandwidth-hungry consumers and the exponential growth in the demand for spectrum caused by smartphones and tablets.

We hope and expect that the Commission will implement the Spectrum Act as Congress intended. The spectrum vacated by broadcasters participating in the incentive auction should be available to any qualified bidder; the Commission should not pick winners and losers before the

⁵ *DOJ Submission* at 18.

⁶ *Id.* at 23.

auction even commences. Please put a copy of this letter in the spectrum aggregation, incentive auction, and any other relevant dockets.

Sincerely,



Fred Upton
Chairman



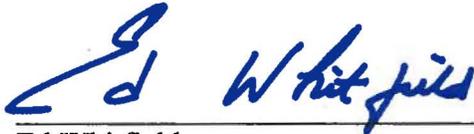
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Billy Long
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cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Anna G. Eshoo, Ranking Member
Subcommittee on Communications and Technology