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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

RE: Policies Regarding Mobile Spectrum Holdings; WT Docket No. 12-269

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

On April 11, 2013, the United States Department of Justice (the "Department") filed a submission in this docket that features the extraordinary suggestion that the Commission should tailor its spectrum aggregation rules to help two specific providers, Sprint and T-Mobile.[1] I write to express AT&T's strong disagreement with the Department's views.

The Department suggests that the Commission should consider rules that would rig the upcoming 600 MHz incentive auction to "ensure" that the "two smaller nationwide networks" – *i.e.*, Sprint and T-Mobile – can win much of the spectrum.[2] Speculating that low-frequency spectrum may be unusually important to Sprint and T-Mobile and that AT&T and Verizon may bid for 600 MHz spectrum merely to "foreclose" access to it, the Department urges the Commission to intervene to make sure Sprint and T-Mobile end up with that spectrum so that they can "mount stronger challenges" to AT&T and Verizon.[3]

It is surprising that the Antitrust Division of the Department of Justice would even propose measures that are so nakedly designed to help specific companies. The Commission's mandate under the Communications Act is to promote the competitive process, not to pick winners and losers in that process.[4] The Spectrum Act reinforces that mandate by requiring that 600 MHz spectrum be allocated pursuant to an auction from which no qualified carrier may be

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

[2] *Id.* at 1, 11.

[3] *Id.* at 10-11.

[4] *See, e.g.*, *SBC Commc'ns, Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995).

excluded.[5] An auction that is deliberately designed to steer spectrum to two particular carriers is not consistent with those mandates.

The Department's recommendation is not only at odds with the competitive bidding process required by the Spectrum Act, but, as the Chairman and several members of the House Committee put it, "oblivious" to the critical public policy objectives of that Act. As Chairman Genachowski has noted, "spectrum is the oxygen that ultimately sustains the mobile revolution,"[6] and freeing up more of it is essential to U.S. economic growth and technological leadership. But the Department's proposal would jeopardize the auction, because "[l]imiting 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."[7]

These are reasons enough for the Commission to reject the Department's recommendation; indeed, it has no choice under the law but to do so. Nonetheless, it bears noting that the Department bases its recommendation on nothing more than musings about theoretical possibilities that are neither substantiated nor remotely realistic. Indeed, Chairman Genachowski has emphatically debunked the notion that spectrum hoarding is taking place, noting that the "looming spectrum shortage is real – and it is the alleged hoarding that is illusory."[8] The Chairman's observation, which has been confirmed by industry experts of every stripe, underscores that the Department's speculation about the threat of warehousing spectrum is completely divorced from reality, all the more so given that the Commission will certainly establish stringent build-out requirements for the 600 MHz spectrum. Indeed, the Department's spectrum hoarding theory is so far afield from the real world that it is hard to see the Department's filing as anything but a naked plea for regulatory favoritism.

It is especially puzzling that the Department feels the need to help Sprint and T-Mobile in particular. Sprint already has *by far* the largest nationwide portfolio of spectrum, and holds vastly more spectrum than either AT&T or Verizon. It will also have ample financial resources at its disposal, as the Department has already approved Sprint's purchase by Softbank, a financially strong Japanese company, and Dish Network has now made a competing offer for Sprint, citing the financial and strategic advantages of its own proposed combination. Regardless of how this bidding war turns out, Sprint will receive a sizeable infusion of cash,

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[5] *Ex Parte* Letter from Fred Upton, Chairman, Committee on Energy and Commerce, United States House of Representatives, *et. al.* to Chairman Julius Genachowski and Commissioners McDowell, Clyburn, Rosenworcel and Pai, FCC, WT Docket No. 12-269 (Apr. 19, 2013) ("*Energy and Commerce Committee Letter*").

[6] Prepared Remarks of Chairman Julius Genachowski, FCC, Telecommunications Industry Association 2011 Summit, at 2 (May 19, 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-3067681.pdf

[7] *Energy and Commerce Committee Letter* at 3.

[8] FCC Chairman Julius Genachowski, *The Clock Is Ticking*, Remarks on Broadband, at 7-8 (Mar. 16, 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305225A1.pdf ("Genachowski March 16 Remarks").

spectrum or both. T-Mobile, which is owned by Deutsche Telekom, one of the largest telecommunications companies in the world, just recently acquired substantial amounts of spectrum from both AT&T and Verizon, and is on the verge of completing a merger with MetroPCS that will add another trove of spectrum. So it is surely not for a lack of spectrum resources or financial backing that the Department needs to propose a financial giveaway to these companies.

Moreover, neither company even chose to bid at the Commission's last auction of low-frequency spectrum, nor have they availed themselves of opportunities to acquire such spectrum in secondary markets. If low-frequency spectrum was critical to their business plans, as the Department simply assumes, someone should have informed their management, which has, instead chosen to acquire deep holdings in PCS, AWS, and BRS/EBS spectrum.

For all of these reasons, to the extent Sprint and T-Mobile now conclude that they desire or need spectrum in the upcoming auction, they are perfectly capable of bidding for it and paying the market price like every other auction participant. Certainly it would be news to the American taxpayers that they are expected to subsidize spectrum purchases by two large companies, which have the backing of equally large or larger owners such as Deutsche Telekom and Softbank, and that are perfectly capable of funding their own businesses.

Instead of following the Department's recommendation, the Commission should adhere to its statutory mandate and conduct an open and competitive auction that awards spectrum to the highest bidder. That approach offers the best prospect for a successful auction that meets all of Congress' stated goals, including freeing up the maximum amount of spectrum for mobile broadband use, reducing the deficit, and funding a nationwide public safety network. It also would ensure the consumer benefits that would flow from putting this scarce resource is put to its best and highest use.

Rigging Spectrum Auctions to Favor Sprint and T-Mobile Would Be Unlawful. The central thrust of the Department's submission is that the Commission should establish rules to rig the upcoming 600 MHz auctions for the benefit of two specific competitors, Sprint and T-Mobile. In place of a fair and open auction in which licenses are assigned to those that express the highest use value of the spectrum through their bids, the Department urges the Commission to design an auction that "ensure[s]" that spectrum is allocated to these "two smaller nationwide networks."[9] The Department is quite candid about its motive for this blatant favoritism: it hopes that reducing competition for the spectrum may enable Sprint and T-Mobile "to mount stronger challenges" to AT&T and Verizon.[10] Picking winners and losers in this fashion would be patently unlawful.

First, as noted, the Commission's "statutory responsibility" under the Communications Act "is to protect competition, not competitors,"[11] and courts have consistently held that the

[9] *DOJ Submission* at 1, 14.

[10] *Id.* at 11-12.

[11] *Order and Authorization, Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control of ALASCOM, Inc., et al.*, 11 FCC Rcd. 732, ¶ 56 (rel. Aug. 2, 1995).

Commission may not "subordinate the public interest to the interest of equalizing competition among competitors."[12] The Commission thus may not, as the Department suggests, tilt its policies to make two specific wireless companies "stronger" competitors while simultaneously making it more difficult for two other rival companies to expand capacity to meet the needs of their customers. The Commission has no such authority.[13]

Second, rules designed to guarantee a 600 MHz spectrum allocation to T-Mobile and Sprint would violate the Spectrum Act. That legislation directed the Commission to conduct an *auction* to allocate 600 MHz spectrum obtained from broadcasters. The Department makes no bones about its antipathy to that process, which it claims "may not lead to market outcomes that would ordinarily maximize consumer welfare due to the presence of strong wireline or wireless incumbents."[14] So in lieu of relying on a real auction, the results of which the Department does not trust, the Department urges the FCC to conduct a rigged auction – one that steers spectrum to two providers the Department has decided need low-frequency spectrum and away from two providers the Department inexplicably presumes are hoarding spectrum and are somehow immune from the spectrum crunch. That suggestion not only flies in the face of the auction mandate itself, but of Section 309(j)(17)(A), which Congress wrote into the law specifically to prevent this kind of bias in the design of the auction. Section 309(j)(17)(A) provides that, "[n]otwithstanding any other provision of law," the 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.[15] When Congress prevents an agency from engaging in an activity "notwithstanding any other provision of law," that statutory phrase is absolute,[16] and this provision clearly forecloses rules that would "prevent" AT&T and Verizon from fully participating in the incentive auctions for the sole purpose of giving Sprint and T-Mobile a leg up.[17]

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[12] *SBC Commc'ns*, 56 F.3d at 1491; *see also W. Union Tel. Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981) ("equalization of competition is not itself a sufficient basis for Commission action"). The Department's charge, and, indeed, the underlying premise of antitrust law in general, is likewise to protect competition, not competitors.

[13] *See United States v. W. Elec. Co.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (Commission has no authority to "aid the minnows against the trout"); *see also* Report and Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶ 60 (rel. Sep. 16, 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").

[14] *DOJ Submission* at 10.

[15] *See* 47 U.S.C. § 309(j)(17)(A).

[16] *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"); *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (a "clearer statement is difficult to imagine") (internal quotation marks omitted).

[17] To be sure, Section 309(j)(17)(B) preserves the Commission's authority "to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition," but the

The Department's suggested approach would not only be unlawful, but also, as Chairman Upton and members of the House Committee on Energy and Commerce recently confirmed, remarkably short-sighted and "oblivious" to Congress' Spectrum Act goals: "as is clear from the statutory language," Congress "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."[18] The Department's proposal, by effectively reserving much of the 600 MHz spectrum for T-Mobile and Sprint, threatens every one of these goals. As auction experts, including the Department's former chief economist, have shown, with less competition for the spectrum, Sprint, T-Mobile and other auction winners would pay less than they would have without the special rules favoring them.[19] The reduced auction revenues would mean less (and potentially no) broadcast spectrum cleared for mobile wireless use and less (or no) surplus available to fund the Spectrum Act's other goals.

The Commission cannot turn a tin ear to that concern. Artificially limiting auction participation would jeopardize the entire auction, denying wireless consumers the benefits of additional spectrum capacity and a state-of-the-art public safety network, and wasting years of legislative and administrative effort.

The Department's "Foreclosure Value" Rationale Is Unfounded and Unsupported. The Department recognizes that "[t]he goal in assigning licenses to spectrum reallocated for commercial services should be to ensure that it generates the greatest ultimate benefit to the consumers of those services," and "the best way to pursue this goal in allocating new resources is typically to auction them off, on the theory that the highest bidder, *i.e.*, the one with the highest private value, will also generate the greatest benefits to consumers."[20] But the Department urges the Commission to jettison those foundational principles out of fear that AT&T and Verizon might bid up the price of spectrum simply to "hoard" it and on the assumption that Sprint and T-Mobile have the greatest need for the new spectrum and will make the best use of it. In the words of Chairman Upton and other members of the Committee on Energy and Commerce, the Department's "foreclosure value" concern "borders on the absurd."[21]

Department urges exactly what subsection (A) forbids: rules that would apply specifically and uniquely to the 600 MHz auctions and are specifically designed to limit the ability of two specific wireless providers to participate fully. The authority preserved by subsection (B) cannot be used as a backdoor mechanism for circumventing the restrictions on the Commission's authority in subsection (A).

[18] *Energy and Commerce Committee Letter* at 1.

[19] *See* Michael L. Katz, *et. al.*, *Spectrum Aggregation Policy, Spectrum- Holdings-Based Bidding Credits, and Unlicensed Spectrum* (Reply Declaration, attached to Reply Comments of AT&T, GN Docket No. 12-268 (Mar. 12, 2013)), at ¶¶ 3, 31-42.

[20] *DOJ Submission* at 9-10.

[21] *Energy and Commerce Committee Letter* at 2.

As Chairman Genachowski has recognized, it is "just not true" that "wireless companies[] are just sitting on top of, or 'hoarding,' unused spectrum . . . . The looming spectrum shortage is real—and it is the alleged hoarding that is illusory."[22] Indeed, the idea that AT&T or Verizon could use spectrum hoarding as an effective weapon against Sprint and T-Mobile is nonsensical. Sprint has the largest spectrum portfolio in the industry (with an average of almost 200 MHz in the top 100 markets), nearly twice as much as either AT&T or Verizon, despite its significantly smaller customer base.[23] T-Mobile also has significant spectrum resources, having substantially bulked up its holdings with transfers from AT&T and Verizon and a pending merger with MetroPCS. But, importantly, if, as the Department apparently believes, Sprint and T-Mobile, despite their robust existing spectrum holdings and smaller customer bases, do have the highest use value for the 600 MHz spectrum, an open auction will provide them with full and fair opportunities to express that value through their bids.

The Department offers no coherent explanation of why this is not the case and why, more specifically, U.S. taxpayers should effectively subsidize these two large companies' spectrum purchases through one-sided auction rules. Instead, it offers little more than qualified musings as to what might be theoretically possible.[24] It does not even acknowledge, much less engage with, the overwhelming factual record in this proceeding showing that foreclosure is no longer a realistic concern; nor does it explain why existing regulatory mechanisms, which include a spectrum screen and strict build-out requirements for low-frequency spectrum, more than address any concern about foreclosure strategies.[25]

The Department's "low-frequency" spectrum musings are particularly misguided. Indeed, the Department paper-thin analysis rests entirely on a single proposition: that "the two smaller nationwide carriers have a somewhat diminished ability to compete, particularly in rural areas where the cost to build out coverage is higher with high-frequency spectrum"[26] unless they obtain low-frequency spectrum at the 600 MHz auction. Based on that proposition, the

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[22] Genachowski March 16 Remarks at 7-8

[23] *See, e.g.,* Comments of AT&T, WT Docket No. 12-269, at 3 (Nov. 28, 2012).

[24] *See, e.g., DOJ Submission* at 10-11 ("a carrier *may even have* incentives to acquire spectrum and not use it at all"; "the value of keeping spectrum out of competitors' hands *could be* very high") (emphasis added).

[25] *See* Genachowski March 16 Remarks at 8 ("It is not hoarding if a company paid millions or billions of dollars for spectrum at auction and is complying with the FCC's build-out rules. There is *no evidence* of non-compliance.") (emphasis added). Hoarding is even less likely to occur in low band spectrum, where the build-out requirements are generally the most stringent—70 percent of the geographic license area for lower 700 A and B Blocks, for example, as compared to either 25 or 66 percent of the population (pops) in the license area for PCS licenses. *Compare* 47 C.F.R. § 27.14(g) *with* 47 C.F.R § 24.203. Moreover, the trend has been toward stricter build out requirements even in higher bands. *See,* Order on Reconsideration, *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Services in the Wireless Communications Services in the 2.3 GHz Band,* 27 FCC Rcd. 13651, ¶¶ 111-135 (rel. Oct. 17, 2012) (75 percent of pops for WCS subject to automatic license termination penalty for non-compliance).

[26] *Id.* at 14.

Department urges the FCC to "prevent[] the leading carriers from foreclosing their rivals from access to low-frequency spectrum,"[27] and that this alone may justify auction rules for 600 MHz spectrum that restrict participation to "ensure that the smaller nationwide networks . . . acquire it."[28] But this "low-frequency foreclosure" theory is unsupported, economically unsound, and reflects a fundamental misunderstanding of network engineering and competitive rivalry in the wireless marketplace.

At the outset, the Department's view that T-Mobile and Sprint must have low-frequency spectrum to "compete in offering coverage across a broad service area"[29] ignores the real world facts. Sprint and T-Mobile have *already* built out networks nationwide that rely almost entirely on high-frequency spectrum, and they have been using those networks to compete with AT&T and Verizon for years. In the Department's words, the four largest wireless carriers "compete across many dimensions" today, and T-Mobile, for its part, continues to exert "competitive pressure" despite owning virtually *no* low frequency spectrum.[30] The Department does not explain how the ostensibly higher costs of building out networks that are already nationwide in scope and are being used today to compete could be a linchpin of a foreclosure strategy.

Notably, Sprint and T-Mobile have repeatedly shown through words and deeds that they do not share the Department's view that low-frequency spectrum is essential. If they did, they surely would have leapt at opportunities to acquire such spectrum. Yet neither company bothered to participate in the last major auction of low band spectrum (700 MHz), and neither has taken advantage of the many subsequent opportunities to acquire such spectrum in the secondary market. Indeed, T-Mobile has publicly expressed its view that higher-frequency spectrum is "as effective, or preferred to, lower band spectrum in providing competitive services,"[31] and, when recently given a choice between high-frequency AWS spectrum and low-frequency 700 MHz spectrum, T-Mobile unambiguously chose the former over the latter. T-Mobile and Sprint would undoubtedly jump at the chance to pick up 600 MHz (or any other) spectrum on the cheap, but there is absolutely no evidentiary basis for the Department's apparent belief that those two carriers have such an extraordinary need for low-frequency spectrum that the 600 MHz auction should be rigged to "ensure" that they get it.

As the Department's former chief economist has explained, the Department's low-frequency foreclosure theory also makes no economic sense.[32] The Department focuses on the

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[27] *Id.*

[28] *Id.* at 23.

[29] *Id.* at 14.

[30] *Id.* at 6, 7.

[31] Letter from Russell H. Fox, T-Mobile USA to Marlene H. Dortch, FCC, WT Docket 10-133, at 2 (Dec. 2, 2010).

[32] Mark A. Israel and Michael L. Katz, *Economic Analysis of Public Policy Regarding Mobile Spectrum Holdings* (Declaration, attached to Comments of AT&T, WT Docket 12-269 (Nov. 28, 2012)), at ¶¶ 91-92 ("Katz-Israel Decl."); Mark A. Israel and Michael L. Katz, *Economic Analysis of Public Policy Regarding Mobile Spectrum Holdings* (Reply Declaration, attached to Reply Comments of AT&T, WT Docket 12-269 (Jan. 7, 2013)), at ¶ 22 ("Katz-Israel Reply Decl.").

superior propagation characteristics of low-frequency spectrum that have the potential to reduce network build-out costs in some areas (because fewer cell towers may be needed to provide basic coverage). But, apart from the fact that both Sprint and T-Mobile already have built out their networks – which is itself a fatal flaw in the Department's analysis – a second flaw is that it is the full cost of entry and expansion – *i.e.*, the *combined* cost of spectrum and the infrastructure on which it is deployed – that is relevant for foreclosure analysis. And in areas where the propagation qualities of a given spectrum band do materially decrease deployment costs, that spectrum commands a correspondingly higher price in the marketplace. Because the propagation qualities of low-frequency spectrum do not in and of themselves provide any systematic marketplace advantage – all else being equal, lower cost spectrum (that costs more to deploy) and higher cost spectrum (that costs less to deploy) are economically equivalent to a carrier seeking to expand – "there is no meaningful distinction between high- and low-frequency spectrum from the perspective of a foreclosure analysis."[33]

Moreover, as the Department recognizes, even the technical premise of its faulty economic theory – *i.e.*, that superior propagation yields build-out cost reductions – is false outside of rural areas.[34] In urban and other high demand areas, network design is driven not by propagation qualities or coverage considerations, but by ever-increasing capacity needs, and cell towers must be closely spaced regardless of the spectrum frequencies used.[35] Indeed, in these areas, the "superior" propagation qualities of low-frequency spectrum can actually be a *disadvantage*, because closely-spaced low-frequency cells are more likely to interfere with each other.[36] Thus, even under the Department's own flawed theory, there is no basis for restricting participation by AT&T and Verizon in the competitive bidding for 600 MHz spectrum licenses in major markets where capacity needs are greatest.[37]

And in the rural areas where superior propagation can make a difference in build-out costs, there can be no serious foreclosure concern at all even apart from the fact that those build-

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[33] *See* Katz-Israel Reply Decl. ¶ 9.

[34] *DOJ Submission* at 12-13 ("when a carrier is attempting to augment the capacity of its network in dense urban areas, for example, higher-frequency spectrum may be just as effective as low-frequency spectrum.")

[35] Jeffrey H. Reed and Nishith D. Tripathi, *The Value of Spectrum* (attached to Reply Comments of AT&T, WT Docket No. 12-269 (Jan. 7, 2013)), at 9-11.

[36] *Id*.

[37] The Department notes that low-frequency spectrum may provide better coverage inside buildings but never suggests how (if at all) that should factor into the foreclosure analysis. The truth is that neither low- or high-frequency spectrum is fully effective at penetrating exterior and interior building walls, particularly in the concrete and steel buildings that are prevalent in urban areas. And the engineering solutions that have been developed, from cell site placement and optimization to distributed antenna systems (DAS), small cells and in-building femtocells, are equally available to all providers, regardless of the spectrum frequencies they use. Most importantly, all providers today distribute devices with Wi-Fi capabilities that can take advantage of the in-building Wi-Fi networks that are increasingly common in commercial and residential buildings. And with the transition to voice over LTE that will occur well before 600 MHz spectrum is widely deployed, all providers should be able to rely upon Wi-Fi to address in-building coverage issues for both voice and data.

out cost advantages are offset by the higher prices for low-frequency spectrum. Any theory of foreclosure via spectrum aggregation depends on the underlying assumption that spectrum is a *scarce* input that can effectively be denied to rivals. But the Department does not claim that spectrum scarcity exists in rural areas (where demand density, growth, and spectrum prices are all comparatively low) or that Sprint or T-Mobile have any significant unaddressed demands for spectrum in those areas. To the contrary, although both carriers are now (belatedly) focused on deploying new technologies within their *existing* footprints, neither has expressed any desire to expand its rural presence. Thus, the higher rural area build-out costs that are the foundation of the Department's foreclosure theory are entirely irrelevant.

In short, there is simply no foreclosure risk to be addressed by restrictions on auction participation or other regulations designed to limit any provider's share of low frequency spectrum. At the same time, as Professor Katz and others have demonstrated, any such restrictions would bring very real consumer harms. By arbitrarily restricting the ability of successful firms to obtain the additional spectrum needed to support expansion and driving up their costs, such limits would inevitably stifle both innovation and competition.[38]

The Department recognizes some, although not all, of the trade-offs associated with the auction bias it advocates. And it concedes that the Commission must "balance[]" these concerns against any risk of foreclosure. But its discussion of these trade-offs reflects an unfortunate double standard. It notes, for example, that "there may be substantial efficiencies associated with ownership of relatively large blocks of spectrum,"[39] but suggests that it is fine to deny AT&T and Verizon those efficiencies because new technologies may allow them to cobble together "small, non-contiguous blocks of spectrum in different bands"[40] without ever acknowledging that Sprint and T-Mobile would have access to those same new technologies. Similarly, the Department recognizes that "supporting each additional spectrum band class adds weight and cost to consumer devices" and thus "carriers usually seek to meet their capacity needs using as few different types of spectrum as possible."[41] But its double standard in invoking this consideration has matters exactly backwards: Sprint and T-Mobile generally have *less* fragmented spectrum holdings in *fewer* bands than AT&T and Verizon and thus are less impacted by the form factor, cost and performance trade-offs of adding band classes to consumer devices.

Even worse, the Department postulates without any factual support that the Commission should disbelieve any suggestion that AT&T and Verizon need additional spectrum to meet the growing demands of their customers absent "compelling evidence that the[y] are already using their existing spectrum licenses efficiently and their networks are still capacity constrained."[42] Yet, it would have the Commission simply *assume* the urgent spectrum needs of T-Mobile and

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[38] Katz-Israel Decl. at ¶¶ 41-43.

[39] *DOJ Submission* at 15 ("due to the nature of wireless technology, for example, twice the spectrum may under certain conditions provide over twice the amount of capacity").

[40] *Id.* at 16.

[41] *Id.* at 13.

[42] *Id.* at 12.

Sprint – indeed, their urgent needs for spectrum *in particular bands*. As with its other theories, the Department offers no factual support for this double standard, nor is it even entirely clear what the Department is proposing the Commission do with these assumptions, since the Commission has never purported to second guess a carrier's assessment of its own business requirements in establishing auction eligibility. But the bias of the sentiment is both startling and revealing. And certainly, in light of that proposed double standard, the Department's admonition that the FCC "should not needlessly prevent carriers from assembling spectrum portfolios that can take advantage of these efficiencies,"[43] rings hollow.

In short, the record overwhelmingly supports spectrum aggregation policies that apply equally to all providers by employing a safe harbor spectrum screen that includes, and treats equally, all suitable available spectrum. A spectrum screen that acts as a true safe harbor, coupled with case-by-case review for transactions that exceed the screen, strikes the appropriate regulatory balance by providing marketplace certainty for transactions that leave a provider's holdings below the screen, but permitting careful review of the competitive effects of a transaction that exceeds the screen. The Department's contrary view of an auction that is designed to favor particular competitors would be unlawful and completely unwarranted as a matter of public policy and should be rejected.

Sincerely,

Wayne Watts
Sr. Executive Vice President and
General Counsel
AT&T Inc.

[43] *Id.* at 15.