

June 3, 2013

VIA ELECTRONIC FILING

Acting Chairwoman Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ex Parte Presentation**WT Docket No. 12-269****Policies Regarding Mobile Spectrum Holdings**

Dear Acting Chairwoman Clyburn and Commissioners Rosenworcel and Pai:

On behalf of Sprint Nextel Corporation (“Sprint”), I hereby submit this letter in support of the recently filed *ex parte* submission of the United States Department of Justice (the “Department”) in the above-referenced proceeding.¹

I have had the privilege of serving in the Department under five presidents, including as U.S. Attorney General in the cabinets of Presidents Reagan and George H.W. Bush, as Assistant Attorney General in charge of the Criminal Division, and as U.S. Attorney for the Western District of Pennsylvania. After reviewing the Department’s *Ex Parte* in this proceeding, I believe it is fully consistent with its longstanding approach to competition policy under Republican and Democratic administrations alike. As a life-long Republican, I am proud that President Theodore Roosevelt was the first to promote and vigorously enforce our nation’s antitrust laws.² President Roosevelt recognized the pro-business importance of breaking the grip of monopolists that were stifling competition and innovation to the detriment of the U.S. economy and consumers. I am also proud both of the antitrust enforcement record of the administrations I served and of their having pursued their enforcement efforts with a focus on the twin goals of using sound economic theory to promote consumer welfare and increasing regulatory predictability.³

¹ See *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269 (filed April 11, 2013) (“Department’s *Ex Parte*”); see also Letter from Wayne Watts, Sr. Executive Vice President and General Counsel, AT&T Inc., to Chairman Genachowski, *et al.*, WT Docket No. 12-269 (filed April 24, 2013) (“AT&T Letter”); Letter from Fred Upton, Chairman, Committee on Energy & Commerce, U.S. House of Representatives, *et al.*, to Julius Genachowski, Chairman, FCC, WT Docket No. 12-269, at 3 (filed April 19, 2013).

² See, e.g., *Northern Securities Co. v. U.S.*, 193 U.S. 197 (1904).

³ See generally Broder, *U.S. Antitrust Law and Enforcement*, Ch. 1[D] (Oxford University Press, 2d ed. 2012). For example, in 1982 the Department issued the first substantial revision to its Merger Guidelines since the original Guidelines were released in 1968, providing companies planning major transactions with insight into the process used by the agencies to decide whether to challenge the proposed transaction as anticompetitive. See Eleanor M. Fox, *Introduction: The 1982 Merger Guidelines: When Economists Are Kings?*, 71 Cal. L. Rev. 281, 296 (1983) (describing the growing “consensus that antitrust should not be used in ways that interfere with efficiency” and that “economics should be used to inform antitrust”); Janusz A. Ordover & Robert D. Willig, *The*

The Department's *Ex Parte* recognizes the importance of these goals and properly draws upon decades of its antitrust policies and precedents in offering its comments.⁴ For the last 40 years, the Department has consistently supported public policies that promote competition and innovation in the telecommunications industry—from the breakup of the Bell System in 1984 during the Reagan administration, to the allocation of new broadband PCS spectrum as competition to the old analog cellular duopoly during the George H.W. Bush administration, to challenges to proposed telecommunications mergers under the George W. Bush administration, to the Department's exercise of its case-by-case merger review authority.⁵

In the wireless telecom context, the Department has necessarily worked closely with the Commission due to the spectrum management implications of such matters.⁶ In this proceeding, the Department simply continues this well-established practice by commenting on how prospective rules of general applicability for both spectrum auctions and secondary market transactions could protect and enhance the competitive dynamic of the wireless sector to the benefit of the American economy, consumers, and businesses.

Unfortunately, it appears that the Department's *Ex Parte* has been misconstrued by others as seeking to “rig” a specific auction (the upcoming 600 MHz Broadcast Incentive Auction) for the benefit of specific parties and to the detriment of other specific parties. I do not read the Department's *Ex Parte* to do any such thing. Rather, consistent with its longstanding approach, it encourages the Commission to adopt reasonable spectrum aggregation limits to protect competition and promote innovation in the wireless sector.

Moreover, as someone who has spent much of his career in law enforcement and as a two-term governor of Pennsylvania, I strongly support deployment of the FirstNet public safety broadband network that will be funded by spectrum auctions. I would not be speaking in favor of the Department's *Ex Parte* if I believed reasonable spectrum aggregation limits posed a substantial risk of depressing auction proceeds and thereby undermining FirstNet.⁷

1982 *Department of Justice Merger Guidelines: An Economic Assessment*, 71 Cal. L. Rev. 535, 535, 574 (1982) Merger Guidelines designed to “close the gap” between enforcement of the merger statutes and “the new learning in industrial economics” in a way that “protects competition and promotes social welfare”).

⁴ Department *Ex Parte* at 2.

⁵ Department *Ex Parte* at 2-3; see *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984) (noting that as conditions of GTE Corp.'s proposed acquisition of Southern Pacific Communications Company, the Department required GTE to (i) separate its local monopoly operations from its long distance and other competitive operations, (ii) provide equal access to all competitors on a phased-in basis, (iii) not provide interexchange services, (iv) phase out its existing interexchange services, and (v) agree to other competitive restrictions); *U.S. v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (describing Department challenges to two similar telecommunications mergers to prevent excess concentration of “last mile” connection holdings); *U.S. v. AT&T Inc. and Dobson Commc'ns Corp.*, 541 F. Supp. 2d 2 (D.D.C. 2008) (describing Department challenges to AT&T's acquisition of competitor to prevent AT&T from controlling all or most of the low frequency band cellular spectrum licenses in several rural local markets).

⁶ It should be noted that the notion of using competitive bidding as the preferred method of licensing spectrum was first published at the Commission during the Reagan Administration. See Evan Kwerel & Alex D. Felker, *Using Auctions to Select FCC Licensees*, Office of Plans and Policy, Working Paper Series 16, Federal Communications Commission (May 1985).

⁷ In addition to my past service in the Department, I am currently a member of the FBI Director's Advisory Board.

One frequent refrain I heard from the businesses community when I was governor of Pennsylvania was the need for regulatory predictability. The Antitrust Division's transaction-specific merger review does not always provide perfect guidance for every prospective transaction. With this in mind, I can understand why the Department would support the prospective certainty that reasonable FCC spectrum aggregation limits would provide. With such a rule, carriers would gain the benefit of knowing *in advance* how much spectrum they could obtain and how much their rivals could purchase in an auction or secondary market transactions. In particular, such certainty would help prospective auction participants prepare their business plans, models and strategies, and obtain necessary financing, leading to a more effective and efficient auction. Spectrum aggregation caps were in place before the Commission launched its Broadband PCS auctions in the 1990s. Those auctions were famously successful, raising billions in revenue and creating numerous new wireless competitors.

Lastly, some argue that the Department's *Ex Parte* conflicts with the spectrum-related provisions of the Middle Class Tax Relief and Job Creation Act of 2012 because, they assert, it would exclude qualified bidders and thereby put the Commission in the position of picking winners and losers.⁸ Here again, I do not read the Department's *Ex Parte* as supporting such an approach. As I understand the contemplated limits, it would not make a bidder ineligible to participate in an auction. Rather, it would provide prospective guidance on how much spectrum a bidder could acquire in an auction based either on its current spectrum holdings or an auction-specific cap. This approach is far more efficient than spectrum divestitures post-auction or as conditions to secondary market transactions. Indeed, Congress recognized the utility of spectrum aggregation limits when it preserved the Commission's jurisdiction to adopt them in the Spectrum Act.⁹ In this rulemaking proceeding, therefore, the Commission is doing exactly what the Spectrum Act reaffirmed—exercising its jurisdiction to consider the adoption of reasonable spectrum aggregation limits.

For the foregoing reasons, I support the Department's *Ex Parte* as consistent with longstanding Department policy and precedent and the Commission's efforts to adopt appropriate rules to promote competition and innovation in the wireless telecommunications sector.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Dick Thornburgh', with a large, sweeping flourish at the bottom.

Dick Thornburgh

⁸ Pub. L. No. 112-96, 126 Stat. 156 (2012) (the "Spectrum Act").

⁹ Reply Comments of Sprint Nextel Corporation at 2-3, WT Docket No. 12-269 (January 7, 2013).