FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

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MB 0511

May 16, 2013

The Honorable Julius Genachowski
Chairman
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:

On April 19, 2013, Energy and Commerce Committee Chairman Fred Upton, Subcommittee on Communications and Technology Chairman Greg Walden, and several other Republican members of the Committee filed a letter expressing their disagreement with comments filed by the Department of Justice in the above-referenced spectrum aggregation proceeding.[1] The Republican letter included a number of inaccuracies and omissions concerning the spectrum provisions in the Middle Class Tax Relief and Job Creation Act of 2012. As members directly involved in the passage of that legislation, we write to clarify details about the legislative history, especially with regard to Congressional intent.

We agree that Congress expects the incentive auctions to generate sufficient revenue to pay for several critical priorities, including up to $7 billion toward the construction of a nationwide public safety broadband network. But achieving those goals and protecting wireless competition are not mutually exclusive. The Republican letter ignores a key section of the Act that makes this point clear.

Section 6404 was a carefully negotiated provision designed to address the issue of auction participation while preserving the FCC's authority to protect against undue concentration of spectrum holdings. This provision added a new paragraph 17 to section 309(j) of the Communications Act. Subparagraph (17)(A) prohibits the FCC from preventing a person from participating in a "system of competitive bidding" as long as that person meets certain

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[1] Letter from Chairmen Fred Upton, Greg Walden, and Ed Whitfield, Vice Chairmen Marsha Blackburn, Robert Latta, and Rep. Long to Federal Communications Commission Chairman Julius Genachowski and Commissioners Robert McDowell, Mignon Clyburn, Jessica Rosenworcel, and Ajit Pai (Apr. 19, 2013).

enumerated requirements. Subparagraph (17)(A) does *not* require the FCC to allow every carrier to bid for every megahertz of a spectrum band that is made available for auction. A "system of competitive bidding" under the Communications Act could include multiple groups of licenses or blocks of licenses. It therefore would be permissible for the FCC to set aside blocks of licenses within an auction on which particular bidders may not bid as long as those bidders were eligible for other blocks or licenses being auctioned. For example, a system of competitive bidding in which the FCC established two blocks of licenses and allowed bidders to bid on either of the two blocks, but not both, would be consistent with new subparagraph 17(A).

Moreover, the Republican letter ignores subparagraph 17(B), which contains a savings clause clarifying that the new provision does not affect "any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition." This language explicitly preserves the FCC's pre-existing authority to issue rules limiting the amount of spectrum that companies can bid for or own, as long as the rules do not name specific entities or specific persons. In other words, if the Commission determines that a spectrum cap is warranted, subparagraph 17(B) clarifies that the FCC can adopt and enforce such limits. These limits can apply to all licenses or to spectrum offered in a particular auction. Alternatively, the FCC could implement spectrum aggregation rules by requiring the post-auction divestiture of specific spectrum, such as spectrum below 1GHz, in order to promote competition. These are both valid approaches to spectrum aggregation under subparagraph 17(B) as long as they are rules of general applicability.

Under subparagraph 17(B), the FCC is not required to impose such limits by either of these means. But what should be clear is that the new law confirms that the agency has the power to do so if it determines that these policies are important for competition.

Unfortunately, this is not the first time Republican members of the Committee have sought to advance a one-sided re-interpretation of the goals and meaning of the Middle Class Tax Relief and Job Creation Act.[2] We attach to this letter statements inserted in the Congressional Record by Ranking Member Waxman, Subcommittee Ranking Member Eshoo, and Representative Markey on February 28, 2012. These statements addressed one previous attempt to spin the legislative history in a way that inaccurately reflects the intent of Congress in adopting these provisions.

We believe the views of the Antitrust Division at the Department of Justice are entitled to serious consideration on such core antitrust principles as market foreclosure and the relative competitive value of various spectrum bands. The Antitrust Division, which submitted the filing, is responsible for enforcing antitrust laws that protect competition and consumers across various industry sectors. As detailed in its filing, the Department has been involved in the telecommunications industry for decades. During this time, "the preservation of competition in

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[2] *See, e.g.,* Statement of Chairman Fred Upton, Congressional Record, E237 (Feb. 24, 2012).

the telecommunications industry has been a key priority."[3] In fact, the Department's involvement in wireless mergers and its competitive concerns regarding the undue concentration of spectrum have been consistent across both Republican and Democratic administrations.[4]

The substantial expertise that the Department has gained in reviewing mergers involving the telecommunications industry and other transactions provides a solid factual and analytical basis for the views it has provided to the Commission in this proceeding. We believe the discussion is enhanced by the inclusion of the Department's comments.

We respectfully request that this letter be entered into all relevant dockets and expect that the Commission will take these views into account when evaluating how to balance the need for putting more spectrum in the hands of wireless providers with protecting and promoting wireless competition.

Sincerely,

Henry A. Waxman
Ranking Member
Committee on Energy and Commerce

Anna G. Eshoo
Ranking Member
Subcommittee on Communications and Technology

Edward J. Markey

Diana DeGette

Mike Doyle

Doris O. Matsui

cc: Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Chairman Fred Upton
Chairman Greg Walden

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[3] United States Department of Justice *ex parte*, WT Docket No. 12-269 (Apr. 11, 2013).

[4] *See, e.g.*, U.S. v. Cingular Wireless Corp., Civil No.1:04CV01850 (RBW), Competitive Impact Statement, 69 Fed. Reg. 65633, 65635-36 (Nov. 15, 2004).