Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands	)	GN Docket No. 13-185

To: The Commission

REPLY COMMENTS OF
THE RURAL WIRELESS ASSOCIATION, INC.
f/k/a RURAL TELECOMMUNICATIONS GROUP, INC.

The Rural Wireless Association, Inc.

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SUMMARY

The Rural Wireless Association ("RWA") strongly opposes the Federal Communications Commission's ("FCC" or "Commission") proposal that it license the 1695-1710 MHz, 1755-1780 MHz, 2020-2025 MHz, and 2155-2180 MHz bands ("AWS-3") on the basis of Economic Areas ("EA") and adopt population-based construction requirements. Section 309(j) of the Communications Act, as amended, requires the Commission to promote competition and economic opportunities by ensuring licenses are disseminated to a wide range of licensees, including rural carriers, and ensure that new technologies and services are deployed to rural areas. The Commission's rules must provide real opportunities for rural carriers to obtain licenses through the competitive bidding process and compel the deployment of services to rural areas. Licensing the AWS-3 spectrum on the basis of EAs and adopting population-based construction requirements will not fulfill the statutory mandates of Section 309(j). As outlined by several commenters in this proceeding, the Commission must license the spectrum on the basis of Cellular Market Areas to ensure small rural carriers have the opportunity to effectively participate in the auction. In addition, the Commission must adopt geographic-based construction requirements to ensure service is deployed to rural areas and not just to high density urban areas. RWA also supports US Cellular's proposal that the Commission adopt mandatory interoperability requirements in the band.

RWA supports those commenters who urge the Commission to complete its review of spectrum holdings in WT Docket No. 12-269 and urges the FCC to adopt a bright-line spectrum aggregation limit that prohibits any entity from holding more than 25% of the "suitable and available" mobile telephony/broadband services spectrum at the county level. In addition, the Commission should prohibit any individual licensee from holding more than 40% of the suitable

and available “beachfront” spectrum (below 1 GHz) at the county level. RWA opposes Verizon’s recommendation that the Commission increase the “suitable and available” spectrum in the spectrum screen to include additional Broadband Radio Service spectrum as well as Educational Broadband Service spectrum, Mobile Satellite Service (Big LEO) spectrum, and AWS-4 spectrum as this spectrum is not suitable and available.

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The Rural Wireless Association, Inc. f/k/a Rural Telecommunications Group, Inc. ("RWA"), by its attorneys, hereby files these reply comments in response to the *Notice of Proposed Rulemaking and Order on Reconsideration* released by the Federal Communications Commission ("FCC" or "Commission") proposing rules for spectrum in the 1695-1710 MHz, 1755-1780 MHz, 2020-2025 MHz, and 2155-2180 MHz bands ("AWS-3").[1]

The Commission's AWS-3 rules must meet the statutory mandates of Section 309(j) of the Communications Act, as amended (the "Act").[2] Section 309(j) clearly requires the Commission to adopt rules that ensure new technologies and services are timely deployed to rural areas and promote competition and economic opportunities by ensuring licenses are disseminated to a wide range of carriers, including rural carriers. The language of the Act requires the Commission to adopt rules that meet these statutory requirements. The Commission

[1] *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185, Notice of Proposed Rulemaking and Order on Reconsideration, FCC 13-102 (rel. July 23, 2013) ("*AWS-3 NPRM*").
[2] 47 U.S.C. § 309(j).

must adopt rules that provide rural carriers with real opportunities to obtain licenses through the auction and adopt rules that compel the deployment of services in rural areas.

For these reasons, RWA supports those commenters that urge the Commission to (1) license the AWS-3 Band on a Cellular Market Area ("CMA") basis; and (2) adopt geographic-based construction requirements. RWA also supports United States Cellular Corporation's ("US Cellular") proposal that the Commission adopt rules mandating interoperability across the AWS-3 band.[3] While RWA agrees that the FCC must promptly act on the pending spectrum aggregation proceeding, RWA strongly opposes Verizon's recommendation that the Commission modify the spectrum screen to include an additional 192 MHz of spectrum.[4]

I. Section 309(j) of the Communications Act Requires the FCC to Ensure That Service is Deployed to Rural Areas and That Rural Carriers Have an Opportunity to Win Licenses at Auction.

In the *AWS-3 NPRM*, the Commission notes that it "seek[s] to adopt a service area for all bands that meets several statutory goals. These include facilitating access to spectrum by both small *and large providers*…"[5] However, "facilitating access to spectrum… by large providers" is not a statutory goal of Section 309(j). As outlined below, the goals of Section 309(j) include ensuring that rural areas are served by new technologies, and ensuring that rural carriers have access to spectrum licensed through the competitive bidding process. Neither the language of Section 309(j) nor its legislative history indicate that Congress was intending to ensure that the Commission made spectrum available to large carriers. The FCC's casual interpretation of Section 309(j) to include large carriers is characteristic of the Commission's larger problem of

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[3] Comments of United States Cellular Corporation, *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185 at p. 16 (filed Sept. 18, 2013) ("US Cellular Comments").

[4] Comments of Verizon Wireless, *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185 (filed Sept. 18, 2013) at p. 9 ("Verizon Comments").

[5] *AWS-3 NPRM* at ¶ 50 (emphasis added).

failing to analyze how its spectrum policies and competitive bidding rules follow the mandates of Section 309(j).

Section 309(j)(3) of the Act requires the Commission to adopt rules that safeguard the public interest in the use of the spectrum and seek to promote the purposes of the Act. These purposes include making radio communication service available "to *all* the people of the United States"[6] and meeting certain objectives, including:

> (A) the 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; and
>
> (B) promoting economic opportunity and competition and 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.[7]

Section 309(j)(4) of the Act further requires the Commission to:

> (B) include performance requirements, such as appropriate deadlines and penalties for performance failures, *to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees*, and to promote investment in and rapid deployment of new technologies and services; [and]
>
> (C) consistent with the public interest, convenience, and necessity, the purposes of this Act, and the characteristics of the proposed service, *prescribe area designations and bandwidth assignments that promote* (i) *an equitable distribution of licenses and services among geographic areas*, (ii) *economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies*, and businesses owned by members of minority groups and women, *and* (iii) *investment in and rapid deployment of new technologies and services*.[8]

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[6] 47 U.S.C. § 151 (emphasis added).

[7] 47 U.S.C. § 309(j)(3)(A)&(B) (emphasis added). The Supreme Court, in its *Adarand* and subsequent *VMI* decisions, struck down preferential treatment of minorities and women. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227-30 (1995) ("*Adarand*") and *United States v. Virginia*, 518 U.S. 515, 531-34 (1996) ("*VMI*").

[8] 47 U.S.C. § 309(j)(4)(B)&(C) (emphasis added).

Section 309(j) requires the Commission to take *proactive* steps to *promote* the purposes of the Act, which include ensuring that new technologies are rapidly deployed to rural areas, and ensuring that licenses are awarded to a variety of licensees, including rural carriers. The Commission is also required to adopt service rules that *ensure* economic opportunities for rural carriers. The Commission's *laissez faire* spectrum and competitive bidding policies with regard to rural carriers and service to rural areas are arbitrary and capricious in the light of the Act's requirement that the Commission take pro active steps to *ensure* that services are deployed to rural areas and *ensure* that rural carriers are able to obtain licenses through competitive bidding. RWA urges the Commission to include in its final report and order in this proceeding a detailed analysis showing how the rules it has adopted support the clear mandates of Section 309(j).

II. Licensing on a Cellular Market Area Basis Will Promote Rural Carrier Participation and Rural Service Deployments.

RWA supports the comments of US Cellular, Competitive Carrier Association ("CCA"),[9] Sandhill Communications, LLC ("Sandhill"),[10] Public Service Wireless Services, Inc. ("PSWS"),[11] Bluegrass Cellular, Inc. ("Bluegrass"),[12] and Atlantic Seawinds Communications, LLC ("Atlantic Seawinds")[13] who urge the Commission to auction the AWS-3 spectrum on a CMA basis to ensure that small rural carriers have an opportunity to acquire this valuable

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[9] Comments of Competitive Carrier Association, *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185 (filed Sept. 18, 2013) ("CCA Comments").

[10] Comments of Sandhill Communications, LLC, *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185 (filed Sept. 18, 2013) ("Sandhill Comments").

[11] Comments of Public Service Wireless Services, Inc., *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185 (filed Sept. 18, 2013) ("PSWS Comments").

[12] Comments of Bluegrass Cellular, Inc., *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185 (filed Sept. 18, 2013) ("Bluegrass Comments").

[13] Comments of Atlantic Seawinds Communications, LLC, *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185 (filed Sept. 18, 2013) ("Atlantic Comments").

spectrum and provide service to the rural areas they seek to serve. CMAs will also allow large carriers to aggregate licenses to cover the larger areas they seek to serve, thereby accommodating all sizes of carriers.[14] As outlined by US Cellular, CCA, and others, licensing this spectrum on an Economic Area ("EA") basis will make this spectrum unaffordable to many small and regional carriers, including RWA members.[15]

In addition, as outlined by US Cellular, although the FCC proposes to allow for partitioning, disaggregation and spectrum leases to small and rural carriers, "such divestitures have been, and likely will continue to be, the exception rather than the rule"[16], and are therefore far from certain. Section 309(j)(3) clearly requires the Commission to "*promot[e]* economic opportunity and competition and *ensur[e]* that new and innovative technologies are readily accessible to the American people by… *disseminating licenses*… to rural telephone companies."[17] Section 309(j)(4) requires the Commission to adopt rules that "*ensure* prompt delivery of services to rural areas…[and] *promote* economic opportunity for…rural telephone companies…"[18] As shown by US Cellular, CCA, Sandhill, PSWS, Bluegrass, and Atlantic Seawinds, licensing spectrum on an EA basis will *preclude* rural carriers from participating in the auction and will provide *uncertainty* as to whether services will be delivered to rural areas.

Licensing spectrum on a CMA basis will promote the deployment of new technologies to rural areas and promote economic opportunity and competition, by ensuring that licenses are

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[14] US Cellular Comments at p. 31.
[15] *Id*. at p. 30.
[16] *Id*. at p. 33 *citing Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, Notice of Proposed Rulemaking,22 FCC Rcd 17035, 17090, n. 260 (2007) ("*2155-2175 MHz Band NPRM*") ("[S]ome commenters in the rural proceeding … argued that existing secondary market mechanisms are insufficient to promote access to spectrum."); *Rural Broadband Report*, 24 FCC Rcd at 12860 (noting that some commenters stressed that the Commission's "secondary market rules do not always promote spectrum trading and re-use…").
[17] 47 U.S.C. § 309(j)(3) (emphasis added).
[18] 47 U.S.C. §§ 309(j)(4)(B) & (C).

available to small, local, and rural carriers. As outlined by US Cellular,[19] licensing this spectrum on the basis of CMAs best serves the public interest as CMAs

> allow for target spectrum acquisitions, and thus accommodate the business plans of both large and small carriers. In addition… CMA-based licenses can easily be aggregated by large carriers seeking expansive service territories, while small and regional carriers likely will never gain access to AWS-3 spectrum unless it is initially allocated and auctioned on the basis of CMAs.[20]

Auctioning licenses on a CMA basis will allow small, mid-sized and large carriers to all participate in the auction in accordance with Section 309(j) of the Act. However, licensing spectrum on an EA basis will only guarantee participation by large carriers, and is likely to prevent many small and regional carriers from participating in the auction, in contravention to the mandates of the Act.

A likely outcome of licensing spectrum on the basis of EAs will be that large carriers will win the licenses at auction, meet their interim and final build-out requirements by serving high density urban areas, and leave rural areas unserved. Assuming the Commission adopts a "keep what you use" penalty for failing to construct 100% of the service territory at the end of the ten year build-out deadline, licenses for the unserved rural areas will once again be auctioned by the Commission. Under this likely scenario, it will be years before rural areas are served by AWS-3 spectrum.

III. Population-Based Construction Requirements Fail to Promote Deployment of Services to Rural Areas.

RWA strongly opposes those commenters that support the Commission's proposal to adopt population-based construction requirements. Adopting this performance requirement would directly violate Section 309(j)(4)(B) which requires the Commission to "include

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[19] US Cellular Comments at p. 32.
[20] *Id*. at p. 31.

performance requirements … to ensure prompt delivery of service to rural areas…"[21] As outlined by US Cellular and the Commission itself, "licensees may meet an interim population coverage requirement by installing a small number of cell sites in an urban market, with few cell sites in rural markets."[22] Population-based performance requirements encourage carriers to deploy services to densely populated urban areas with no incentive to deploy services to rural areas. As outlined by CCA, geographic-based construction requirements meet the requirements of Section 309(j) as carriers are unlikely to meet their build-out requirements without constructing in harder to serve, less densely populated rural areas.

RWA also supports US Cellular's proposal that the Commission adopt a "keep-what-you-use" penalty for failure to meet the final build-out requirement. The alternative penalty -- automatic termination of a licensee's full license if it fails to meet the Commission's construction benchmark -- is draconian and would unjustly impact the carrier as well as existing customers operating on the licensed frequencies. A "keep-what-you-use" approach would allow a licensee to keep that portion of the license that has been constructed while requiring it to lose only that part of the license that is unconstructed, which would protect the licensee's existing customers.

IV. The FCC Must Adopt Rules That Promote Interoperability.

As outlined by US Cellular, it is imperative that the Commission adopt rules requiring interoperability in the AWS-3 band in order to increase deployment of wireless broadband services to rural America.[23] Mandating interoperability across the AWS-3 band will avoid a repeat of the problems small wireless carriers have experienced with obtaining devices that work in the Lower 700 MHz band, which has left them unable to effectively compete against large

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[21] 47 U.S.C. § 309(j)(4)(B).

[22] US Cellular Comments at p. 65 *citing Service Rules for Advanced Wireless Service in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, 25192 (2003) ("*AWS-1 R&O*").

[23] US Cellular Comments at p. 16.

carriers in their markets and has significantly delayed deployment of services. Not requiring a fully interoperable AWS-3 device ecosystem could result in a repeat of the delayed roll-out of the Lower 700 MHz band. Small rural carriers cannot compete with larger carriers if they do not have access to up to date handsets. Adopting interoperability requirements will also meet the statutory mandates of Section 309(j)(3)(A) by promoting rural customers' access to new technologies.

V. The FCC Must Complete Its Review of the Spectrum Aggregation Proceeding.

RWA agrees with commenters that it is imperative that the Commission complete its review of the spectrum aggregation rules. However, RWA strongly opposes Verizon's self-serving proposal that the Commission update the spectrum screen to include an additional 192 MHz of spectrum[24] because this spectrum is not "suitable and available" and does not meet the FCC's criteria for inclusion in its spectrum screen. The Commission determines the "suitability" of spectrum by "whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its use for the relevant mobile service."[25] The Commission will consider spectrum to be "available" "if it is fairly certain that it will meet the criteria for suitable spectrum in the near term."[26]

Verizon argues that the Commission should include the following spectrum in its screen: (1) 132.625 MHz of 2.5 GHz band spectrum designated for the Broadband Radio Service and the Educational Broadband Service ("BRS/EBS"); (2) 19.275 MHz of Mobile Satellite Service

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[24] Verizon Wireless Comments at p. 9.
[25] *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking, FCC 12-119 at ¶ 26 (rel. September 28, 2012).
[26] *Id*.

(MSS) spectrum; and (3) 40 MHz of 2 GHz spectrum designated as AWS-4. As discussed below, none of this spectrum should be considered suitable and available.

While Verizon argues that 111.625 MHz of EBS spectrum should be included in the Commission's spectrum screen, this spectrum is not suitable or available for commercial mobile wireless services because the licensing scheme for this spectrum, which focuses on educational licensees, is not conducive to commercial operations in the band. The Commission has found that "[w]hile [EBS] licensees are allowed to lease their excess capacity to commercial operators, leasing is subject to various special requirements designed to maintain the primary educational character of services provided using EBS."[27] The FCC has already declined to include EBS in the spectrum screen because the purpose of EBS is to further the educational missions of accredited schools, colleges and universities, not commercial operations. When it previously considered including EBS in the spectrum screen, the Commission found that the EBS licensing regime makes it difficult for the spectrum to be used for commercial purposes, and this is still the case. For these reasons, the Commission declined, and should continue to decline, to include spectrum acquired through EBS leases as part of the spectrum screen.[28] In addition, while some educational entities lease excess capacity to commercial entities, there are no assurances as to how long that spectrum will be available to those entities for the provision of mobile wireless services.

The 55.5 MHz of BRS spectrum that is currently viewed as suitable and available should not be changed. However, the additional 21 MHz of BRS spectrum Verizon seeks to add to the screen is not suitable or available for commercial mobile wireless services due to the spectrum's licensing and regulatory characteristics. As noted by Clearwire Corporation ("Clearwire") in its

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[27] *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522 at ¶ 71(2004) ("*Cingular-AT&T Wireless Order*") *citing* 47 C.F.R. § 27.1214.

[28] *Id*.

comments in the FCC's Mobile Spectrum Holdings proceeding, "the unique licensing and regulatory characteristics of the 2.5 GHz band that caused the Commission to exclude the Middle Band Spectrum (" MBS"), [BRS] Channel 1, the J and K guard bands, and EBS spectrum from the screen remain unchanged."[29] The EBS/BRS spectrum bands are not suitable or available for commercial wireless services, except for the 55.5 megahertz already recognized by the Commission.

The Big LEO mobile satellite service ("MSS" or "Big LEO") spectrum that Verizon seeks to add to the spectrum screen is not suitable and available for mobile wireless services. The FCC's rules include an ancillary terrestrial component ("ATC") provision which allows MSS licensees to operate terrestrial services that are ancillary to their satellite services, provided they meet certain gating requirements, which make this spectrum unsuitable and unavailable for wireless mobile services. Globalstar, Inc. ("Globalstar") "the only MSS operator to have had ATC deployments in the [MSS] spectrum… has found… that the ATC framework is not conducive to the robust terrestrial use of MSS spectrum."[30] While Globalstar filed a petition for rulemaking in November of 2012 asking the Commission to open a rulemaking on the terrestrial use of Big LEO spectrum, the Commission has not yet begun such a rulemaking. Since the Commission's current Big LEO licensing rules are not conducive to the provision of mobile wireless services, the spectrum should not be included in the spectrum screen.

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[29] *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Comments of Clearwire Corporation (filed Nov. 28, 2012) at p 2; *citing AT&T Inc. and Qualcomm Inc*., WT Docket No., 11-18, Order, FCC 11-188, ¶ 41 (rel. Dec. 22, 2011) ("AT&T/Qualcomm"); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC*, WT Docket No. 12-4, et. al., Memorandum Opinion and Order and Declaratory Rulemaking, FCC 12-95, ¶ 63 (rel. Aug. 23, 2012) ("Verizon/SpectrumCo") .

[30] *Globalstar, Inc. Petition for Rulemaking to Reform the commission's Regulatory Framework for Terrestrial Use of the Big LEO MSS Band*, Petition for Rulemaking of Globalstar, Inc. at p. 34 (filed November 13, 2012) ("*Globalstar Petition for Rulemaking*").

The FCC's rules covering the AWS-4 spectrum were recently modified to allow for flexible use of the spectrum.[31] However, DISH Network, the only licensee in the band, has not yet begun providing services over this spectrum. If upon review by the Commission as part of its annual report on mobile competition, the Commission finds this spectrum to be suitable and available for wireless mobile services, it may be included in the spectrum screen.

RWA continues to strongly encourage the Commission to adopt a bright line spectrum aggregation limit that prohibits any entity from holding more than 25% of "suitable and available" mobile telephony/broadband services spectrum at the county level.[32] RWA also urges the Commission to prohibit any individual licensee from holding more than 40% of the suitable and available "beachfront" spectrum (below 1 GHz) at the county level. RWA urges the Commission to complete its review of spectrum holdings in WT Docket No. 12-269, and adopt a bright-line spectrum aggregation limit (*i.e.*, spectrum cap) limiting each carrier to 25 percent of all suitable and available spectrum.

VI. Conclusion.

As outlined by a myriad of commenters in this proceeding, the Commission will be violating the statutory mandates of Section 309(j) of the Act if it licenses the AWS-3 spectrum on an EA basis and adopts population-based construction requirements, as these rules will preclude rural carriers from participating in the auction and will provide uncertainty as to

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[31] *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands*, WT Docket No. 12-70, ET Docket No. 10-142, WT Docket No. 04-356, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102 (rel. Dec. 17, 2012).

[32] Comments of the Rural Telecommunications Group, Inc., *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (filed November 28, 2012) ("RTG Spectrum Aggregation Comments").

whether services will be delivered to rural areas. In addition, interoperability in the band is essential to full competitive deployments in rural areas.

Respectfully submitted,

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