



March 18, 2014

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th St SW
Washington, DC 20554

Re: Revision of Part 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band, ET 13-49; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN 12-268; Policies Regarding Mobile Spectrum Holdings, WT 12-269; 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 13-185

Dear Ms. Dortch:

Today, John Bergmayer and Harold Feld of Public Knowledge (PK) met with Louis Peraertz to discuss the wireless topics detailed below.

On the AT&T/Leap transaction, PK reiterated its primary concerns; namely, those relating to spectrum consolidation, and to Leap's unique contribution to the marketplace in terms of its price plans and the markets it serves. On balance, PK continues to believe that the transaction should be blocked for the reasons laid out in PK's initial filings, and that it would be better for the Commission to finalize its work on spectrum aggregation before processing new transactions. But because it appears that the Commission is moving forward on this transaction,¹ PK explained that because AT&T is already a dominant holder of spectrum, it should not be permitted to exceed the spectrum screen in any market, and that if the Commission elects to allow the transaction to go through that any divestitures it orders should enhance competitiveness -- in other words, spectrum divestitures should not merely be a means for AT&T and Verizon to rationalize their holdings.

Additionally, if the Commission allows this transaction to go forward, it should adopt conditions designed to ensure that AT&T does not eliminate consumer choice and limit the services available through Leap. As PK argued in its petition to deny, this means that at a minimum the FCC should require AT&T to (1) Continue offering the same prepaid service as Leap, with the same rates, terms and conditions, for a minimum of four years for existing Leap customers and two years for new prepaid customers; (2) allow existing Leap customers, for a minimum of four years, to upgrade their plans or devices without losing the terms and conditions currently available to them; (3) not throttle its prepaid customers when they using their guaranteed "Full-Speed Data"; and (4) make the same handsets available to its prepaid customers that it does to its postpaid customers.

In the 5 GHz proceeding, PK is encouraged that the Commission appears headed to a good policy outcome. It cautioned, however, that the Commission should be skeptical of filings

¹ The order was issued between the time of these meetings and the filing of this ex parte notice.

by Globalstar that clearly exaggerate potential interference issues in ways that seem calculated to gain leverage in other, unrelated proceedings.²

As to the incentive auction, PK shares the joint position of many companies and public interest groups that the Commission should put a cap on the total amount of sub-1 GHz spectrum any one carrier can control, and structure the auction in a way that promotes competition rather than allows dominant carriers to further cement their control of the market. PK continues to believe that, in an ideal world, the Commission would adopt a system for weighting spectrum based on different frequencies' propagation characteristics in different geographic settings, and apply additional weights to encourage certain policy goals (e.g., spectrum that has not been built out should be weighted more heavily). Then, in auctions such as the incentive auction, it would simply be a matter of applying the existing screen to prevent additional anticompetitive spectrum concentration. However, the Commission has not yet done this, and the existing spectrum screen is not up to the task of promoting competition. Therefore, auction-specific eligibility and spectrum cap rules are necessary.

PK discussed why, because of the “incumbent discount” which enables larger carriers to deploy new spectrum more cheaply and thus bid up licenses,³ and because of “foreclosure value” effects,⁴ without Commission intervention designed to promote competition it is likely that dominant carriers would prevail in most auctions, to the detriment of wireless consumers. PK further observed that foreclosure effects do not necessarily involve warehousing: A dominant carrier might value spectrum more than its competitors because of its foreclosure value and thus bid it up, but this does not mean it won't actually deploy the spectrum. Indeed, because of the incumbent discount it might even be cheaper for the dominant carrier to deploy the spectrum. This vicious cycle where spectrum tends to end up controlled by dominant carriers does not need to involve any bad intent. Dominant carriers' rational economic choices can result in their squeezing out competition. The FCC's job is to counter the economic forces that lead to monopoly, and to protect consumers by promoting competition, not to punish the guilty and reward the just.

On that point, it is important to note that eligibility restrictions are not about “rewarding” companies for their past “bad business decisions.” The Commission's spectrum policies are about protecting consumers by promoting competition—period. The Commission and Congress have consistently stressed that competition in the wireless sector is the preferred method of fulfilling the FCC's obligation to prevent unjust and unreasonable prices or practices, rather than rate regulation or other traditional intrusive mechanisms employed in uncompetitive markets.

² See Harold Feld, *Globalstar's Stellar Chutzpah: Trying To Hold Up New Free WiFi To Leverage 'Licensed WiFi'*, Dec. 30, <http://www.wetmachine.com/tales-of-the-sausage-factory/globalstars-stellar-chutzpah-trying-to-hold-up-new-free-wifi-to-leverage-licensed-wifi>.

³ See Harold Feld, *Spectrum Auction Theory v. Competition Theory*, February 15, 2012, <http://www.wetmachine.com/tales-of-the-sausage-factory/spectrum-auction-theory-v-competition-theory/>

⁴ See Harold Feld, “Is Fear of Wireless Foreclosure Speculative?” April 22, 2013 <http://www.wetmachine.com/tales-of-the-sausage-factory/is-fear-of-wireless-foreclosure-speculative-depends-is-this-about-intent-or-effect/>

If competitive carriers lack sufficient spectrum, they do not pose a competitive threat. Regardless of whether Sprint or T-Mobile made “bad business decisions,” if they remain effectively uncompetitive from a lack of low-band spectrum, or a lack of spectrum generally, then they cannot provide even the threat of meaningful competition to discipline AT&T and Verizon. Further, AT&T and Verizon know that a lack of spectrum imposes a hard limit on the number of customers a provider can serve before its service is overloaded. They can therefore safely ignore short-term price reductions and other efforts by spectrum-constrained rivals.

Spectrum policy is not a game of “capture the flag,” with the right to charge monopoly rents to consumers as the prize for winning the most licenses. If the Commission wishes to encourage lower prices and improved service, it must take steps to ensure that the incentive auction benefits competition rather than providing a means for the already-dominant carriers to lower their costs and solidify their lead in the marketplace.

In addition, there are several other reasons why attempting to cast spectrum eligibility as rewarding bad decisions. First, many of those advocating for spectrum eligibility restrictions, caps, and related policies are companies (e.g., DISH Network, C. Spire) it is impossible to characterize as somehow having willfully sat out auctions with the hope of being “rewarded” with discounted spectrum in the future. Second, whether a company chooses to participate in an auction is due to many factors, e.g., the ability to obtain financing for a bid in a regulatory environment where the scales are tipped in favor of incumbents. Third, due to the incumbent discount and foreclosure effects discussed above, as well as other factors in an auction, participation in a particular auction by a particular firm may be futile.

In any case the circumstances surrounding each auction are so variant that it is difficult to extrapolate from participation in one auction to potential participation in another without taking into account numerous factors that may affect participation—simplistic arguments about “moral hazard” are misleading and the Commission should reject them. Finally, the outcomes of past auctions are only a part of the reason why current spectrum holdings are so lopsided. AT&T and Verizon or their corporate predecessors were given massive amounts of free spectrum to “reward” them for being incumbents.

PK also noted that in this auction, smaller geographic license sizes likely better serve the public interest. In addition to promoting rural build-out, smaller licenses will provide licensees greater flexibility in secondary markets and could assist spectrum rationalizations and sales that may be necessary in light of any revised spectrum screen policies the Commission may adopt. Also, while PK remains convinced that revenue maximization is not a proper goal for a spectrum auction (indeed, taken too far, revenue maximization can be counter-productive to the extent it diverts funds that would otherwise be used for build-out or constrains a provider from lowering prices), it is worth observing that smaller license sizes more properly allow companies to value licenses, resulting in lower prices for rural licenses and higher prices for urban ones. On the aggregate, this increases revenue without pricing smaller competitors out of the auction.

With regard to the upcoming auction of 1755 MHz and AWS-3, PK likewise urged smaller license sizes for the above stated reason. A mix of licenses should favor CMAs over EAs, rather than the reverse. In determining the revenue split between the 1755 MHz band and

the AWS-3 band, the Commission should give prominence to the goals of the Spectrum Act of 2012 – in particular the need to fund FirstNet. Accordingly, all revenue not obligated to migrate federal users out of the 1755 MHz band under the Commercial Spectrum Enhancement Act (CSEA) should be allocated to the AWS-3 band and distributed in accordance with the Spectrum Act of 2012.

PK noted DISH’s recent AWS proposal and agrees that interoperability generally promotes competition and consumer welfare. Should the Commission decide it does not have sufficient time to fully consider the proposal before issuing its AWS-3 Report and Order it should at least (1) ensure that it does not take any actions inconsistent with later adopting such a requirement and (2) request comment on DISH’s proposal.

Finally, PK underscored the importance of protecting white spaces in the incentive auction process. If the Commission wishes to promote unlicensed high-speed broadband, it should secure at least 24 MHz of white space, which does not need to be contiguous.⁵ PK further pointed out that the Commission has several ways to accomplish this goal, for example, through channel-sharing and by leveraging guard bands.

Respectfully submitted,

/s John Bergmayer
Senior Staff Attorney
Public Knowledge

⁵ Due to an editing error an earlier ex parte from PK in these proceedings was changed from “needs to be contiguous” from “needs not be contiguous.” For clarity, it is PK’s position that the 24 MHz of white spaces do **not** need to be contiguous.