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April 23, 2014

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 - 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Ex Parte

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268; *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269.

Dear Ms. Dortch:

The Utilities Telecom Council and its Rural Broadband Council<sup>1</sup> hereby formally support the adoption of reasonable spectrum aggregation limits in the above-referenced proceedings. The public interest would be served by spectrum aggregation limits in order to ensure that smaller wireless service providers will have a meaningful opportunity to access spectrum below 1 GHz in the upcoming broadcast incentive auctions. Spectrum aggregation limits will prevent major wireless service providers from dominating the upcoming incentive auction to the exclusion of smaller wireless service providers. These smaller wireless service providers have tended to serve rural America, and it is likely that they would use the spectrum from the incentive auctions to improve service to rural America. As more fully described below, this spectrum would provide smaller wireless service providers with favorable propagation characteristics that they need to provide affordable, robust and scalable wireless services to rural America. In turn, this will promote economic, social and educational growth in rural America. In addition, this will promote reliable, robust and resilient communications – including in remote areas – that utilities need to support the safe, effective and secure delivery of essential electric, gas and water services to the public at large. Therefore, UTC and the RBC support the adoption of reasonable spectrum aggregation limits in the above-referenced proceedings.

The record in these proceedings supports the adoption of spectrum aggregation limits. As the Commission observed in the *NPRM*, there has been significant market concentration and spectrum aggregation since the FCC eliminated spectrum caps and adopted a more flexible case-by-case approach for review of spectrum transactions. Specifically, the market has shrunk from six nationwide wireless carriers in 2003 with a 78% market share to four wireless carriers with a 88% market share today. In

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<sup>1</sup> Founded in 1948 and based in Washington, DC, the Utilities Telecom Council (UTC) is an international association for the telecom and information technology interests of all types of electric, gas, and water utilities, pipeline companies, and other critical infrastructure industries. UTC advocates for public policies that promote the development of reliable, robust and resilient communications networks that support the safe, secure and efficient delivery of essential energy and water services to the public at large. UTC created its Rural Broadband Council (RBC) to support utilities that are currently offering or interested in offering broadband services to their customers, many of whom are currently unserved by broadband and are unable to obtain robust, affordable and scalable services in the foreseeable future from commercial communications service providers. UTC and the RBC have been active participants in many Commission proceedings, including those involving wireless communications and rural broadband. More information about UTC and the RBC is available at [www.utc.org](http://www.utc.org) and [www.ruralbroadbandcouncil.org](http://www.ruralbroadbandcouncil.org).

addition during that time, a number of regional and rural facilities-based providers have exited the marketplace through mergers and acquisitions, including Dobson Communications, SunCom Wireless, Rural Cellular Corporation, ALLTEL, and Centennial Communications.<sup>2</sup> Consolidation in the wireless industry, as measured by the Herfindahl-Hirschman Index (“HHI”) increased from 2,151 in 2003 to an alarming 2,848 in 2010 (where an HHI of greater than 2,500 indicates a “highly concentrated” market). As a result, the Commission has been unable to conclude that the wireless marketplace is characterized by “effective competition” in its last three mobile wireless competition reports.<sup>3</sup>

Market concentration has also led to consolidation of low band spectrum. AT&T and Verizon control no less than 78% of the suitable and available spectrum below 1 GHz in the United States.<sup>4</sup> This gives them considerable advantages over their competitors in terms of the cost of deployment and quality of service, which in turn makes it easier for them to acquire and retain customers.<sup>5</sup> As a result, together they control more than 70% of the wireless market nationwide. This confirms the concerns of the United States Department of Justice, which stated that “it is important that the Commission devise policies that address the allocation of low-frequency spectrum” and that these new policies, particularly when applied to the “auction of new low-frequency spectrum, can potentially improve the competitive landscape by preventing the leading carriers from foreclosing their rivals from access to low-frequency spectrum.”<sup>6</sup>

UTC agrees that this market concentration and the resulting consolidation of low band spectrum have been harmful to rural providers and the consumers they serve.<sup>7</sup> While large carriers typically concentrate on serving densely populated areas, smaller carriers tend to focus on rural areas and thus

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<sup>2</sup> Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269, *Notice of Proposed Rulemaking*, FCC 12-119 (rel. Sep. 28, 2012) (“*NPRM*”).

<sup>3</sup> See Comments of the Competitive Carriers Association in WT Docket No. 12-269 at 4 (filed Nov. 28, 2012), *citing*, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fourteenth Report*, 25 FCC Rcd 11407 ¶ 3 (2010) (“*14<sup>th</sup> Mobile Wireless Competition Report*”) and Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services, *Fifteenth Report*, 26 FCC Rcd 9664 ¶ 2 (2011) (“*15<sup>th</sup> Mobile Wireless Competition Report*”). *And see*, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, *Sixteenth Report*, 28 FCC Rcd 3700, ¶¶ 14-15 (2013) (“*16<sup>th</sup> Mobile Wireless Competition Report*”) (also refraining from any conclusions about whether there is effective competition in the mobile wireless market.)

<sup>4</sup> *In the Matter of Policies Regarding Mobile Spectrum Holdings*, Ex Parte Submission of the United States Department of Justice, WT Docket No. 12-269 (filed April 11, 2013) (“*DOJ Ex Parte*”) at p. 14.

<sup>5</sup> See Declaration of Mark McDiarmid at 2-3, *attached to*, Letter from Trey Hanbury, Hogan Lovells US LLP, Counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 and WT Docket No. 12-269 (filed April 1, 2014) (observing that “some of the characteristics of low-band spectrum. . . make this scarce resource uniquely valuable to mobile broadband network operators” and that “the predicted and observed differences between and low- and high-band signal propagation simply mean that a dearth of low-band spectrum imposes constraints on the ability of a wireless carrier to cost effectively serve customers across multiple operating environments).

<sup>6</sup> *DOJ Ex Parte*.

<sup>7</sup> Letter from Jill Canfield Director of Legal and Industry, Assistant General Counsel, NTCA—The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 and WT Docket No. 12-269 at 1 (filed April 10, 2014).

invest in their rural communities.<sup>8</sup> That puts customers in the position of being forced to choose between receiving service from either a small carrier with quality local service or a large carrier with more device choices and a nationwide calling and data plan, but spotty service.<sup>9</sup> Moreover, as Commission Clyburn observed, there are still 400,000 Americans that lack access to any mobile service option, and there are 7.7 million people living in rural census blocks with two or fewer mobile voice providers. UTC agrees with Commissioner Clyburn that the Commission needs to continue its focus on policies that can promote more competitive options for mobile voice service.<sup>10</sup>

The broadcast incentive auctions offer the best chance for smaller wireless service providers to obtain access to low band spectrum that would promote competition and access in rural America for broadband wireless services, as well as cellular 2G and 3G services. As noted above, low band spectrum provides better propagation characteristics, which is critical to serving rural areas where population density is low and terrain becomes an issue for signal quality. In addition, low band spectrum helps to reduce the cost of tower construction, which can be particularly difficult for smaller carriers that serve rural areas. Lower infrastructure costs mean lower prices for consumers, which is particularly important for rural America, where 571 out of the 704 counties with high poverty levels (i.e. more than 20% of the population is below the poverty line) are located in rural areas and where one in four children live below the poverty line.<sup>11</sup> As Commissioner Clyburn observed, 52 percent of American adults whose incomes are below the poverty line rely solely on mobile for voice service. In addition, a 2011 study by Dr. Raul Katz of Columbia University concluded that making competitive wireless broadband available to rural America would create nearly 117,000 jobs over four years and increase the median annual income in rural areas by an average of \$1,200.<sup>12</sup>

Spectrum aggregation limits would help to improve the chances for smaller carriers to compete in the broadcast incentive auction, consistent with the public interest and the Commission's statutory authority. As the Department of Justice explained, "spectrum policies that promote competition and enhance the potential for entry and expansion in the wireless market play a vital role in protecting, and indeed enhancing, the competitive dynamic to the benefit of American consumers."<sup>13</sup> Larger carriers can leverage their market dominance in major markets to preclude access to spectrum by smaller carriers that tend to serve rural areas.<sup>14</sup> Therefore, the public interest in promoting mobile wireless access and competition would be served by spectrum aggregation limits, especially for spectrum below 1 GHz that is particularly suitable for serving rural areas.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Sixteenth Report*, Statement of Commissioner Mignon L. Clyburn at 1.

<sup>11</sup> Remarks of John Padalino, Administrator, Rural Utilities Service, U.S. Department of Agriculture at the FCC's Rural Broadband Workshop (Mar. 19, 2014) at <http://www.fcc.gov/events/rural-broadband-workshop>.

<sup>12</sup> Dr. Raul L. Katz, et al., "Economic Impact of Wireless Broadband in Rural America," at 8-9 (2011), available at [http://www.teleadvs.com/wp-content/uploads/RCA\\_FINAL.pdf](http://www.teleadvs.com/wp-content/uploads/RCA_FINAL.pdf).

<sup>13</sup> *DOJ Ex Parte* at 8.

<sup>14</sup> *See e.g.* Letter from Jill Canfield, Director of Legal and Industry, Assistant General Counsel, NTCA—The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 and WT Docket No. 12-269 at 1 (filed April 10, 2014)(stating "[l]arger carriers with more resources can often edge out much smaller competitors in a quest for additional spectrum, reasonably priced equipment and favorable roaming agreements.

Spectrum aggregation limits are also consistent with Section 309(j) of the Communications Act. Congress was particularly concerned that spectrum auctions could distort spectrum policy and it directed the Commission to ensure:

(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.*<sup>15</sup>

In addition, Congress further directed 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.*<sup>16</sup>

Therefore, UTC respectfully submits that the Commission should adopt spectrum aggregation limits, particularly for low band spectrum, in order to promote opportunities for smaller carriers to compete in the upcoming broadcast incentive auction.

If there are any questions concerning this matter, please let me know.

Respectfully,



Brett Kilbourne

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<sup>15</sup> 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*”).

<sup>16</sup> *Id.* at Section 309(j)(4).