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Ex Parte

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

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

Dear Ms. Dortch:

The Commission has repeatedly found that consumers benefit from open auctions where spectrum licenses are assigned to the firms that value them most and that will put the spectrum to its highest and best use.[1] The Commission has rejected requests to deviate from that policy absent evidence that open eligibility would "pose a significant likelihood of substantial competitive harm."[2] Proponents of restricting Verizon and AT&T at the Incentive Auction continue to assert that competition might be harmed if their competitors were "foreclosed" from acquiring low-frequency spectrum, but the record evidence reveals that foreclosure theory to be meritless.

A. Neither Sprint, T-Mobile, Nor Any Other Firm Has Ever Been Foreclosed From Access to Low-Frequency Spectrum.

Proponents of restricting Verizon and AT&T emphasize that those two firms have the majority of the low-frequency (below 1 GHz) spectrum available to the wireless industry. But that is neither a historical accident nor the result of "foreclosure" by Verizon or AT&T. Instead, it is the result of conscious business choices on the part of other providers not to purchase low band spectrum when it was available to them. Imposing restrictions on Verizon and AT&T based on their larger low-frequency spectrum portfolios would simply penalize those two firms

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1 *See, e.g., Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order*, 22 FCC Rcd 15289 at 15385, ¶ 259 (2007) ("*700 MHz Service Rules Order*"); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2349-50, ¶¶ 3-7 (1994).

2 *700 MHz Service Rules Order*, 22 FCC Rcd 15289, ¶ 253.

for the fact that they were willing to invest when other national providers chose not to despite numerous opportunities to acquire such spectrum.

Verizon and AT&T participated in the 700 MHz auction in 2008. Sprint and T-Mobile chose not to. The result is that Verizon and AT&T increased their low-frequency spectrum holdings, and Sprint and T-Mobile did not. T-Mobile's and Sprint's decisions not to participate in the 700 MHz auction cannot be attributed to an inability to compete with Verizon or AT&T at the auction. Just two years before the 700 MHz auction, T-Mobile participated in an auction for AWS spectrum and it dominated the bidding – spending $4.2 billion and acquiring more spectrum than Verizon and AT&T *combined*.[3] And although Sprint chose to divest its low-frequency cellular spectrum, it has nearly twice as much spectrum as Verizon on an overall basis, including a nationwide block of 800 MHz spectrum, and its owners have the financial strength to purchase substantially more.

While T-Mobile and Sprint did not show up at the 700 MHz auction, many smaller firms did participate and – despite the presence of Verizon and AT&T – did acquire spectrum. There were a total of 214 qualified bidders, and 99 firms other than Verizon and AT&T won licenses.[4] These smaller bidders were particularly successful at acquiring 700 MHz licenses in rural markets. In fact, carriers other than Verizon and AT&T won a large majority of rural licenses – 72% of all licenses and 62% of all spectrum in terms of MHz*POPs.[5] That result confirms that although Verizon and AT&T competed vigorously against one another during the auction, they did not prevent competitors from acquiring spectrum.

Moreover, any firm interested in increasing its low-frequency spectrum holdings has had extensive opportunities to acquire such spectrum on the secondary market. Over 2,000 low-frequency spectrum licenses were traded on the secondary market between 2007 and May 2013, accounting for 13,466,000,000 MHz-POPs.[6] T-Mobile bought *one* of those licenses and Sprint bought none.[7] Similarly, far from being unable to acquire low-frequency spectrum on the secondary market, the regional rural carriers have been *net sellers* of such spectrum.[8] The disinterest of Sprint, T-Mobile, and the rural carriers in acquiring low-frequency spectrum (or in holding on to what they had) explains why Verizon and AT&T hold the majority of such spectrum – and that explanation has nothing to do with any foreclosure.

Earlier this year, T-Mobile finally availed itself of an opportunity to acquire low-frequency spectrum: it purchased from Verizon what it calls a "huge swath" of 700 MHz licenses allowing T-Mobile to deploy low-frequency spectrum across 70% of its customer base

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[3] *See* FCC Auction No. 66 Summary, *available at* http://wireless.fcc.gov/auctions/66/charts/66press_3.pdf.

[4] *See* FCC Auction No. 73 Fact Sheet, *available at* http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73.

[5] *See* Leslie M. Marx, *Economic Analysis of Proposals that Would Restrict Participation in the Incentive Auction*, ¶ 30 (Sept. 18, 2013) ("Marx Paper"), *attached to Ex Parte* letter of Tamara Preiss, Verizon, to Ruth Milkman et al., FCC, GN Docket No. 12-268 (filed Sept. 18, 2013).

[6] Marx Paper, ¶ 37.

[7] Marx Paper, ¶ 40.

[8] Marx Paper, ¶ 45.

and 9 of the 10 top markets.[9] It also has the ability to acquire more such licenses in the secondary market to further fill out its footprint. That purchase confirms both that Verizon has no interest in foreclosing T-Mobile's access to low-frequency spectrum and that T-Mobile does not need regulatory assistance to acquire such spectrum.

B. Speculation That Verizon and AT&T Might Attempt in the Future to Foreclose Rivals from Purchasing Low-Frequency Spectrum Is Misplaced.

No party seriously claims that Verizon or AT&T have engaged in a foreclosure strategy previously, nor could they. Verizon is the most efficient user of spectrum in the country, and AT&T is second. They both are far more efficient than either T-Mobile or Sprint, which holds by far the most spectrum and is by far the least efficient user of the national providers. Instead, some parties have speculated that Verizon and AT&T might have an incentive to attempt to foreclose rivals from purchasing low-frequency spectrum in the future. Their arguments are misplaced. There are numerous independent reasons why Verizon and AT&T have neither the incentive nor ability to foreclose any rival from access to low-frequency spectrum.

First, there is no such incentive because the absence of such spectrum does not reduce a wireless provider's ability to compete effectively. Sprint's and T-Mobile's historical lack of interest in acquiring (or holding onto) substantial low-frequency spectrum is inconsistent with their assertion that they are at risk of being "foreclosed" from access to an essential input.[10] Instead, their behavior confirms the extensive record evidence showing that low-frequency spectrum is not a competitive necessity. For example, the record shows that low- and high-frequency spectrum is substitutable, and that any differences in deployments costs are reflected in the prices paid for different types of spectrum.[11] International regulators have confirmed that the evidence does not show that holding low band spectrum is essential for a wireless provider to compete.[12] Indeed, various nationwide wireless operators in other countries have – just like T-Mobile and Sprint in the United States – made conscious rational decisions to compete with higher-frequency spectrum and to pass up opportunities to acquire low-frequency spectrum.[13]

This is particularly true here because T-Mobile and Sprint *already have* substantial low-frequency spectrum holdings. With its recent $3.3 billion acquisition of Verizon's 700 MHz licenses, T-Mobile now owns a 6x6 MHz block of low-frequency spectrum that provides a coverage layer for 70% of its customers and half the country's population. T-Mobile states that

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[9] Remarks of Neville Ray, T-Mobile CTO, T-Mobile US Inc. at Morgan Stanley Technology, Media & Telecom Conference (Mar. 5, 2014), at 3.

[10] Marx Paper, ¶ 27.

[11] *See, e.g.*, Jeffrey H. Reed & Nishith D. Tripathi, *The Value of Spectrum: A Response to Dr. Kostas Liopiros's Paper* (Mar. 13, 2014), *attached to Ex Parte* Letter of David Lawson, Counsel for AT&T, to Marlene Dortch, FCC, WT Docket No. 12-269 (Mar. 14, 2014).

[12] Mobile Future, *The Case For Inclusive Spectrum Auction Rules: How Failed International Experiments with Auction Bidding Restrictions Reveal the Strength of Inclusive Rules that Put Consumers and Innovation First* (Sept. 2013), at 15-16 (filed in Docket Nos. 12-268 & 269 on Sept. 19, 2013).

[13] *Id.* at 15.

its low-frequency spectrum "complements" its existing spectrum position,[14] and has stated that it may choose to purchase additional low-frequency on the secondary market.[15] T-Mobile's senior management said last year that a single 5x5 MHz block of low-frequency spectrum, in addition to its existing larger blocks of higher-frequency spectrum, would "dramatically" improve its coverage.[16] It now has the coverage layer of low-frequency spectrum that it says its needs. So does Sprint, which chose to divest its low-frequency cellular spectrum but still has a nationwide coverage layer of low-frequency 800 MHz spectrum and indeed is actively using that spectrum to provide LTE service.[17] And the rural carriers not only were able to acquire low-frequency spectrum in the 700 MHz auction, but have chosen to sell excess low-frequency spectrum on the secondary market.

Second, the competition Verizon and AT&T face renders a foreclosure strategy economically irrational. The stylized foreclosure example advanced by proponents of restrictions involves a hypothetical monopolist that might outbid a hypothetical potential entrant in an auction in order to preserve its monopoly profit.[18] But if there is no monopoly profit there is no incentive to preserve the monopoly, and any theoretical incentive to foreclose a rival diminishes precipitously when the unrealistic monopoly assumption is relaxed.[19] The U.S. wireless industry is far from a monopoly – in fact, it is among the least concentrated in the world,[20] and the vast majority of U.S. consumers can choose from multiple wireless providers.[21]

Third, the wireless industry's spectrum capacity patterns show that foreclosure is not rational. Verizon and AT&T serve many more customers for every megahertz than T-Mobile and Sprint.[22] Verizon and AT&T have every incentive to put spectrum they purchase to use promptly to meet their consumers' exploding demand for data – and they have no incentive to warehouse spectrum to keep it out of rivals' hands. And withholding spectrum from Sprint and T-Mobile would *not* damage those firms' ability to compete because those are the *least* capacity-

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[14] *See* Slide Presentation, "T-Mobile US Inc. – A Block Spectrum Transactions," Presented at T-Mobile US Inc. A-Block Transaction Conference Call, at 6 (Jan. 6, 2014), *available at* http://investor.t-mobile.com/Cache/1001182112.PDF?Y=&O=PDF&D=&fid=1001182112&T=&iid=4091145.

[15] *See* Remarks of Neville Ray, T-Mobile CTO, T-Mobile US Inc. at Deutsche Bank Media, Internet & Telecom Conference (Mar. 10, 2014), at 9.

[16] *See* Marx Paper, ¶ 57 (*citing* Aug. 28, 2013 Jefferies report, "T-Mobile USA").

[17] *See* Press Release, Sprint, Sprint Reports Second Quarter 2013 Results (July 30, 2013), *available at* http://newsroom.sprint.com/news-releases/sprint-reports-second-quarter-2013-results.htm.

[18] *See, e.g.*, Stanley M. Besen, Serge X. Moresi, Steven C. Salop, *Why Restricting Participation in Spectrum Auctions Can Increase Bidder Participation, Increase Auction Revenues, and Increase Competition in Wireless Markets*, at 4 (Mar. 12, 2013), *attached to* Reply Comments of Sprint Nextel Corporation, GN Docket No. 12-268 (Mar. 12, 2013).

[19] Marx Paper, ¶¶ 72-76.

[20] Comments of CTIA – The Wireless Association®, WT Docket No. 13-135, at 71-72 (filed June 17, 2013).

[21] *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, WT Docket No. 11-186, 28 FCC Rcd. 3700, 3705 (2013).

[22] *Ex Parte* Letter of Tamara Preiss, Verizon, to Marlene Dortch, FCC, Docket Nos. 12-268 & 12-269, Ex. A (Apr. 3, 2014).

constrained of the nationwide operators. That fact is confirmed by their pricing strategies, including their use of unlimited data usage plans, and by their marketing campaigns, which stress the uncongested nature of their networks.[23]

Fourth, foreclosure would be impossible in the context of anonymous bidding.[24] Verizon or AT&T cannot know when one of them (as opposed to one of the supposed targets of their foreclosure strategy) has won a license. The result is that there would be no way for Verizon and AT&T to avoid continuing to bid against one another long after the supposed foreclosure target has ceased bidding.

Fifth, by imposing build-out requirements (which Verizon supports) on licensees, the Commission would substantially increase the cost of warehousing spectrum, thereby making foreclosure even less viable.[25]

Sixth, incentives for Verizon and AT&T to free ride on one another's foreclosure efforts further reduce any risk of foreclosure.[26] Unlike the hypothetical monopolist discussed above, which would retain all of the profits associated with foreclosing the hypothetical new entrant, Verizon and AT&T would equally share the theoretical profits regardless of which firm incurs the costs of paying for and warehousing spectrum. Thus, each firm would prefer to free ride on the other's efforts to foreclose rivals.

Seventh, uncertainty about the supply of spectrum in the Incentive Auction makes a foreclosure strategy even more costly and difficult to implement.[27] In this two-sided auction, higher bids from the wireless providers would draw out additional supply from the broadcasters. Thus, a strategy of bidding high in order to keep licenses out of the hands of competitors would cause additional licenses to be made available – and those licenses would also need to be purchased, thereby drawing out even more supply, and so forth. That would increase the costs of implementing a foreclosure strategy and would further complicate the free rider problem discussed above.

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As summarized by Dr. Leslie Marx, auction expert and former FCC Chief Economist, proposals to restrict Verizon and AT&T "do not address any real world problem."[28] While Dr. Marx focuses on the empirical evidence showing that there is no risk of foreclosure, other prominent economists have demonstrated that the theoretical underpinnings of the foreclosure theory are flawed. For example, proponents of the foreclosure theory assert that regulators should distinguish between the "use value" (apparently the spectrum's "legitimate" value) and the "foreclosure value" that firms place on spectrum, but they do not even define those terms, let

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23 Marx Paper, ¶¶ 49-51.

24 Marx Paper, ¶¶ 67-68.

25 *Id.*, ¶¶ 59-64; *see also* United States Government Accountability Office, *Spectrum Management; FCC's Use and Enforcement of Buildout Requirements*, GAO-14-236, at 24-26 (Feb. 2014) (finding that build-out requirements are effective at preventing the warehousing of spectrum).

26 Marx Paper, ¶¶ 65-66.

27 *Id.*, ¶¶ 69-71.

28 *Id.*, ¶ 1.

alone present an economic framework with which to distinguish between those two concepts.[29] And Dr. Michael Katz, former Chief Economist of the FCC and the Department of Justice's Antitrust Division, submitted several declarations emphasizing that proponents of imposing auction restrictions fail to engage the extensive record evidence showing that such policies not only are unnecessary but harmful to consumers.[30]

This letter is being filed pursuant to Section 1.1206 of the Commission's Rules. Should you have any questions, please contact the undersigned.

Sincerely,

Christopher Oatway

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[29] *See* George S. Ford & Lawrence J. Spiwak, *Equalizing Competition Among Competitors: A Review of the DOJ's Spectrum Screen Ex Parte Filing*, Phoenix Center Policy Bulletin No. 33 (May 2013), *available at* http://www.phoenix-center.org/PolicyBulletin/PCPB33Final.pdf.

[30] *See, e.g.*, Michael L. Katz, et al., *Comment on the Submission of the U.S. Department of Justice Regarding Auction Participation Restrictions* (June 13, 2013), *attached to Ex Parte* Letter of David Lawson, Counsel for AT&T, to Marlene Dortch, FCC, WT Docket No. 12-269 (filed June 13, 2013); Michael Katz, et al., *Comments on Appropriate Spectrum Aggregation Policy with Application to the Upcoming 600 MHz Auction* (June 13, 2013), *attached to Ex Parte* letter of David Lawson, Counsel for AT&T, to Marlene Dortch, FCC, WT Docket No. 12-269 (filed June 13, 2013).