

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Policies Regarding Mobile Spectrum Holdings

WT Docket No. 12-269

**REPLY OF  
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

The Computer & Communications Industry Association (“CCIA”)<sup>1</sup> files this Reply to Oppositions submitted in response to T-Mobile USA, Inc.’s (“T-Mobile”) Petition for Reconsideration of the Commission’s *Mobile Spectrum Holdings Order* in the above-captioned proceeding.<sup>2</sup> The Commission should reconsider both (1) its decision to only limit the ability of the two dominant providers to foreclose competitors’ access to spectrum resources in a maximum of three of the spectrum blocks available during the auction; and (2) its decision to tie the creation of the blocks of reserved spectrum to an arbitrary revenue target.

First, the Commission’s *Mobile Spectrum Holdings Order* does not explain how a spectrum reserve of thirty megahertz or less will adequately protect against the risk of anti-competitive foreclosure by the dominant providers, much less promote a market comprised of four or more nationwide competitors. Second, the Commission failed to explain whether or how

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<sup>1</sup> CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA’s members employ more than 600,000 people and generate annual revenues in excess of \$465 billion. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA’s members is available online at <http://www.cciagnet.org/members>.

<sup>2</sup> See T-Mobile, Petition for Reconsideration, WT Docket No. 12-269 (filed Aug. 11, 2014) (“T-Mobile Petition”); see also *Policies Regarding Mobile Spectrum Holdings: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133 (2014) (“*Mobile Spectrum Holdings Order*”).

it weighed its findings about the risks of anti-competitive foreclosure against the ostensible benefits of linking the release of reserved spectrum to aggregate bids meeting an arbitrary, government-established price. The Commission should reconsider its decision to cap the spectrum reserve at a maximum of thirty megahertz and its decision to link the spectrum reserve to an undefined – and unprecedented – revenue target in excess of statutorily mandated expenses.

**I. THE RECORD DEMONSTRATES THAT A SPECTRUM RESERVE OF 30 MHZ OR LESS WILL NOT BE ENOUGH TO GUARANTEE COMPETITION IN THE UPCOMING AUCTION.**

In its *Mobile Spectrum Holdings Order*, the Commission concluded that limited access to low-band spectrum would discourage investment, sap innovation, and harm consumers.<sup>3</sup> The Commission found that, absent regulatory intervention, AT&T and Verizon would likely limit their competitors' access to low-band 600 MHz spectrum, particularly in the roughly sixty percent of markets where both AT&T and Verizon already control more than one-third of low-frequency resources.<sup>4</sup> The Commission reasoned that the dominant carriers have a propensity to pay more than a typical "market" price in the reasonable expectation that a dearth of after-auction competition will allow the dominant carriers to recoup those costs at a later date. The Commission's findings were wholly consistent with those of the U.S. Department of Justice's as well as a wealth of record evidence presented by CCIA and other parties and, not surprisingly, directly contrary to AT&T and Verizon's current claim that no such foreclosure risk exists.<sup>5</sup>

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<sup>3</sup> See *Mobile Spectrum Holdings Order* ¶ 59 (finding that carriers without a mix of spectrum will be unable to compete as robustly or constrain price increases by providers that do have such access).

<sup>4</sup> See *id.* ¶ 62 ("We agree with the Antitrust Division of the DOJ, one of our nation's expert antitrust agencies: there is a risk of foreclosure in downstream wireless markets.").

<sup>5</sup> See AT&T Opposition to T-Mobile Petition for Reconsideration, WT Docket No. 12-269 at 13-15 (filed Sept. 24, 2014) ("AT&T Opposition"); Verizon Opposition to Petitions for Reconsideration, WT Docket No. 12-269 at 10 (filed Sept. 24, 2014) ("Verizon Opposition").

In light of its findings drawn from extensive record evidence, the Commission adopted a contingent spectrum reserve to provide regional carriers and all carriers that have less than one-third of the spectrum resources in a given market an opportunity to obtain low-band spectrum without the risk of foreclosure.<sup>6</sup> Under the Commission’s rules, either AT&T or Verizon, or both, are eligible to bid on the reserve spectrum blocks in roughly forty percent of the country. But in the approximately sixty percent of the country where both AT&T and Verizon each control more than one-third of the low-band resources – and thus could reasonably be anticipated to possess the power to charge supra-competitive prices in a less than fully competitive post-auction market – the reserve blocks provide a market access opportunity where non-dominant carriers can secure spectrum in a functionally competitive market, rather than one distorted by the prospect of limited competition in the future.<sup>7</sup>

CCIA and other parties welcomed the creation of the reserve blocks as a potent tool to prevent anti-competitive foreclosure and consumer harm. As T-Mobile explained, however, the Commission failed to establish why thirty megahertz sufficiently guards against anti-competitive foreclosure.<sup>8</sup> In response, none of the opposing parties disagree that carriers need twenty megahertz of spectrum to provide efficient LTE service. Indeed, the importance AT&T and Verizon continue to place on obtaining 10 x 10 megahertz of paired spectrum helps reveal the true value of twenty-megahertz blocks.<sup>9</sup> With only a maximum of thirty megahertz in the reserve, however, only one non-dominant carrier can acquire this level of resource without

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<sup>6</sup> *Mobile Spectrum Holdings Order* ¶ 153.

<sup>7</sup> *Id.* ¶¶ 146, 184.

<sup>8</sup> See T-Mobile Petition at 7-12.

<sup>9</sup> See AT&T Opposition at 8 (arguing that T-Mobile’s proposal to increase the spectrum reserve would “preclude [AT&T and Verizon] from obtaining efficient levels of spectrum”); Verizon Opposition at 10 (arguing that AT&T and Verizon prefer larger blocks of spectrum “given their capacity needs”).

facing foreclosure from AT&T and Verizon – one less than the four nationwide carriers the Commission has sought to encourage.<sup>10</sup>

The Commission has not explained how four nationwide carriers are expected to compete following the auction, when the reserve blocks only allow one non-dominant carrier to acquire sufficient spectrum without the risk of foreclosure from the dominant carriers. Similarly, the Commission has not explained whether and how the ability of AT&T and Verizon to acquire spectrum in the reserve blocks covering forty percent of the population influenced its decision to cap the reserve at only thirty megahertz and then sharply reduce the reserve at lower levels of clearing. Moreover, the Commission has not fully explained how the other countervailing considerations outweigh the need to redress the harm the spectrum reserve seeks to correct or precisely how these considerations led the Commission to conclude that: (1) a maximum of thirty megahertz was reasonably protective against foreclosure in a seventy megahertz auction; (2) a maximum of twenty megahertz was reasonably protective in a sixty megahertz auction; and (3) a maximum of ten megahertz was reasonably protective in an auction of fifty megahertz or less.<sup>11</sup>

The Commission's rules and precedent expressly provide for reconsideration when a petition demonstrates a material error or omission.<sup>12</sup> Reconsideration is also appropriate if additional facts or arguments were not known or did not exist until after the petitioner's last opportunity to present analysis to the Commission, or if the Commission otherwise determines that reconsideration is in the public interest.<sup>13</sup> In this case, the Commission erroneously adopted rules regarding the thirty megahertz spectrum reserve that contradict the Commission's statutory

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<sup>10</sup> See T-Mobile Petition at 9-10.

<sup>11</sup> See *Mobile Spectrum Holdings Order* ¶¶ 182-95.

<sup>12</sup> 47 C.F.R. § 1.429(b)(2); see, e.g., *Connect America Fund et al.*, Third Order on Reconsideration, 27 FCC Rcd 5622 ¶ 1 (2012).

<sup>13</sup> See 47 C.F.R. §§ 1.429(b)(2)-(3).

mandate to promote wireless competition.<sup>14</sup> The Communications Act requires the Commission to adopt auction rules that “avoid[] excessive concentration of licenses” and “disseminat[e] licenses among a wide variety of applicants.”<sup>15</sup> The reserve spectrum framework adopted by the Commission, however, will encourage licenses to be concentrated in the largest providers, and is likely to increase, rather than lessen, the danger of foreclosure that was raised by numerous commenters in this proceeding and recognized by the Commission itself.<sup>16</sup> While other statutory goals exist and the Commission is free to weigh them, it must provide a reasoned basis to elevate some considerations above others and make reasoned connections between the facts found and the conclusions made.

Additionally, new events related to “the desirability of no less than four nationwide competitors,” which alter the viability of the current reserve framework, became available after parties’ last opportunity to present analysis to the Commission.<sup>17</sup> Specifically, the Commission and the Chairman indicated an intention to, among other things, prohibit joint bidding among certain types of carriers only after parties had their final chances to comment.<sup>18</sup> As a result, T-Mobile and others had no opportunity to address the size of the reserve in light of this new guidance publicly disseminated from the Commission.<sup>19</sup>

The Oppositions of AT&T, Verizon, and Mobile Future each argue that T-Mobile has

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<sup>14</sup> See T-Mobile Petition at 7; see also 47 C.F.R. § 1.429(b).

<sup>15</sup> 47 U.S.C. § 309(j)(3).

<sup>16</sup> See *Mobile Spectrum Holdings Order* ¶ 62.

<sup>17</sup> See T-Mobile Petition at 7.

<sup>18</sup> See *id.*; see also Roger Sherman, Empowering Small Businesses, FCC Blog, Aug. 1, 2014, available at <http://fcc.us/UFHJt8>; Statement from FCC Chairman Tom Wheeler on Competition in the Mobile Marketplace, FCC News Release (Aug. 6, 2014), available at <http://fcc.us/1sk17dV>; *Mobile Spectrum Holdings Order* at ¶179.

<sup>19</sup> See T-Mobile Petition at 7.

failed to identify new facts that support reconsideration.<sup>20</sup> However, these arguments overlook key points and ultimately prove unpersuasive. For example, AT&T claims that these new facts are not relevant to any of the arguments T-Mobile is advancing on reconsideration.<sup>21</sup> Yet it is possible—if not likely—that the advocacy of T-Mobile, Sprint, and others in this proceeding was premised on the assumption that the number of nationwide carriers may be allowed by the Commission to fall to three in the coming years. Had these entities known of the Commission’s intention to prohibit joint bidding for example, they could have shaped their arguments and proposals to accommodate it. Because they were afforded no such opportunity before the final opportunity to comment, the Commission should account for this new information on reconsideration.

Increasing the spectrum reserve will also serve the public interest and benefit consumers by providing a greater number of carriers with the low-band spectrum resources necessary to compete effectively. The Commission has found that multiple competing service providers must have access to sufficient spectrum to support robust competition, which, in turn, will enable greater consumer choice among service providers and generate lower prices, improved quality, and increased innovation.<sup>22</sup> Thus, contrary to Mobile Future’s recycled and progressively more hyperbolic arguments,<sup>23</sup> increasing the spectrum reserve consistent with T-Mobile’s recommendation will “promot[e] consumer choice and competition” by “ensuring that sufficient spectrum is available for multiple existing mobile service providers.”<sup>24</sup>

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<sup>20</sup> See AT&T Opposition at 9-11; Verizon Opposition at 7-9; Mobile Future Opposition to T-Mobile Petition for Reconsideration, WT Docket No. 12-269 at 5-6 (filed Sept. 24, 2014) (“Mobile Future Opposition”).

<sup>21</sup> See AT&T Opposition at 10.

<sup>22</sup> *Mobile Spectrum Holdings Order* ¶ 17.

<sup>23</sup> See Mobile Future Opposition at 8.

<sup>24</sup> *Mobile Spectrum Holdings Order* ¶ 17.

## II. A RESERVE TRIGGER BASED ON A PRICE PER MHZ-POP THRESHOLD, INCORPORATED VIA THE FINAL STAGE RULE, THREATENS TO UNDERMINE THE SPECTRUM RESERVE.

In the *Mobile Spectrum Holdings Order*, the Commission adopted a spectrum reserve trigger that will determine when the reserved spectrum is made available and made this reserve trigger contingent on meeting the “final stage rule.”<sup>25</sup> Meanwhile, the final stage rule has two separate and independent components, each of which must be satisfied before the spectrum reserve exists and the auction can close. They are: (1) coverage of all mandatory expenses set forth in the Spectrum Act as well as any remaining funding requirements for the First Responder Network Authority (“FirstNet”); and (2) a per MHz-POP minimum closing price.<sup>26</sup> No parties take issue with making the spectrum reserve contingent on all mandatory Spectrum Act expenses. Rather, tying the reserve trigger to the second component of the final stage rule—the price per MHz-POP threshold—contradicts the Commission’s goal of promoting wireless broadband competition and undermines the entire reserve license framework.<sup>27</sup> Moreover, the Commission did not meet the requirements of the Administrative Procedures Act when it failed to provide a sufficient explanation for its decision to incorporate a price per MHz-POP threshold as part of the final stage rule.

The oppositions reveal a surprising amount of agreement regarding the Commission’s decision. No parties dispute that if the MHz-POP price is set too high, it will eviscerate the reserve spectrum the Commission worked so hard to create by allowing AT&T and Verizon to foreclose non-dominant carriers before the reserve is triggered.<sup>28</sup> No parties contend that the

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<sup>25</sup> *Id.* ¶ 187.

<sup>26</sup> *Id.*

<sup>27</sup> See T-Mobile Petition at 13.

<sup>28</sup> See Verizon Opposition at 16; AT&T Opposition at 18.

Commission linked the reserve trigger to MHz-POP threshold for any reason other than, as T-Mobile explains, to meet an arbitrarily determined revenue goal.<sup>29</sup> And no parties argue the Commission provides a sufficient explanation for its decision to reintroduce the risk of foreclosure that it had sought to mitigate.

The oppositions also do nothing to allay the concerns that the Commission originally expressed about the dominant two carriers seeking to foreclose non-dominant carriers from obtaining the low-band spectrum they need to compete. While AT&T, Mobile Future, and Verizon note that non-dominant carriers have every right to bid for unreserved spectrum, these parties neglect to mention that the Commission created the reserve precisely because it found other bidders will not be able to compete against the dominant carriers for the spectrum in light of the dominant players' incentive and ability to foreclose competitors from non-reserved blocks offered at auction.<sup>30</sup> Further, AT&T, Mobile Future, and Verizon neglect to mention that either AT&T or Verizon is eligible to bid freely in markets covering over forty percent of the population, meaning that the dominant carriers will compete for substantial amounts of reserved spectrum across more than one-third of the country's population and substantially more than one half of the nation's land area.

Because the Commission's decision expands the opportunity for AT&T and Verizon to foreclose competitive access to low-band spectrum by tying the reserve trigger to a MHz- POP threshold, the Administrative Procedure Act requires the Commission to provide a reasoned explanation for its decision. T-Mobile shows that (i) any MHz-POP threshold will be arbitrary and increase the chance of anticompetitive behavior by dominant bidders; (ii) the price per MHz-

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<sup>29</sup> T-Mobile Petition at 14.

<sup>30</sup> See *Mobile Spectrum Holdings Order* ¶¶ 62-69.



POP threshold is unrelated to the goal of ensuring that reserved spectrum bidders pay their “fair share” of spectrum clearing costs; and (iii) tying the reserve to both the statutory costs and MHz-POP price components of the final stage rule creates new risk to consumers and competition.<sup>31</sup> The Commission fails to discuss any of these shortcomings in adopting the MHz-POP price component for the reserve trigger. Taking these considerations into account – or explaining the reason to afford these concerns less weight than any counterarguments – will yield a better decision and a clearer record for appellate review.

Finally, AT&T and Verizon both argue that T-Mobile’s Petition should be in opposition to the *Incentive Auction Order*, not the *Mobile Spectrum Holdings Order*,<sup>32</sup> and that T-Mobile’s challenge is premature because the Commission has not yet set the price threshold to be used in the reserve trigger.<sup>33</sup> These arguments should be rejected. T-Mobile’s Petition is rightly filed in response to the *Mobile Spectrum Holdings Order*, which, as the Commission is aware, specifically establishes the MHz-POP threshold. Moreover, T-Mobile’s Petition is ripe because it challenges the existence of the threshold itself, which has already been established by the Commission, rather than any specific price for the threshold to be provided in a future notice. While the Commission will have an opportunity mitigate the damage of its decision to make the reserve trigger contingent on an arbitrary MHz-POP price,<sup>34</sup> a low MHz-POP reserve price would require the Commission to render superfluous one of its two minimum price requirements. The Commission presumably had a purpose in establishing two separate and independent

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<sup>31</sup> T-Mobile Petition at 15-16.

<sup>32</sup> *Id.* at 16; Verizon Opposition at 14; see also *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (“*Incentive Auction Order*”).

<sup>33</sup> AT&T Opposition at 20; Verizon Opposition at 14-15.

<sup>34</sup> See Competitive Carriers Association, *Pricing in the 600 MHz Incentive Auction* (Sept. 15, 2014), attached to Letter from Steven K. Berry to Marlene H. Dortch, Docket Nos. 12-268 and 12-269 (Sept. 15, 2014).

minimum sales prices, and it is unreasonable to contend that the Commission established these independent minimum prices only to have one of them rendered irrelevant through subsequent decision. The far more plausible – and more likely – outcome is that the high reserve price presupposed by the two separate and independent minimum payment requirements will allow the dominant carriers to effect the very type of foreclosure strategy the Commission has determined must be constrained.

### III. CONCLUSION

CCIA respectfully requests that the Commission reconsider its *Mobile Spectrum Holdings Order* as set forth in this Reply.

Respectfully submitted,

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