



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

pkeisler@sidley.com
(202) 736 8027

BEIJING	HONG KONG	SHANGHAI
BOSTON	HOUSTON	SINGAPORE
BRUSSELS	LONDON	SYDNEY
CHICAGO	LOS ANGELES	TOKYO
DALLAS	NEW YORK	WASHINGTON, D.C.
FRANKFURT	PALO ALTO	
GENEVA	SAN FRANCISCO	

FOUNDED 1866

May 7, 2014

By Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

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:

Over the last few weeks, the Commission Staff has been briefing the parties to this proceeding about its recent proposal for rules to govern the upcoming 600 MHz incentive auction, and the Commission is scheduled to consider this proposal at its next meeting. The Staff's new proposal, which would shield almost half of the available 600 MHz spectrum in each market from an open auction and prevent AT&T from bidding for that spectrum, would violate the Spectrum Act, the Communications Act, and the Administrative Procedure Act ("APA").

As AT&T understands the Staff's proposal, the auction would be divided into two stages. In the first stage, the Commission would conduct an open auction among all bidders, until the auction reaches a certain, but yet to be defined, "threshold of success." Once the auction reaches this threshold, however, the open phase of the auction would terminate, and the auction would move into a "final stage" in which the available spectrum blocks will be split into "reserved" and "unreserved" blocks. If a bidder holds more than one-third of the available low-frequency spectrum in an area (low-frequency being defined as below 1 GHz), then that bidder would be permitted to bid only on the unreserved blocks.

As a practical matter, this system, once it reaches the final stage, will essentially create two auctions. For licenses in the areas that cover the vast majority of the U.S. population, AT&T and Verizon would be walled off into a separate auction for the unreserved pool spectrum, in circumstances in which only one of the two companies could win a 10 x 10 MHz block of

Ms. Marlene H. Dortch
May 7, 2014
Page 2

spectrum; the other company could at best win only a 5 x 5 MHz block. This represents a very serious limitation on auction participation, because there is a broad consensus that a 10 x 10 MHz block of spectrum is the minimum amount necessary to take full advantage of the performance characteristics of modern LTE wireless technology.¹ Thus, in essence, AT&T and Verizon would be forced to compete for a single 10 x 10 MHz block, with the virtual certainty that both companies would end up with fragmented and inefficient 600 MHz footprints. In addition, the Staff's auction plan would further enforce the bidding exclusions with a purported "no speculator" rule, which would bar anyone that acquires spectrum from the reserved pool from reselling that spectrum to an excluded bidder within six years after the auction. Under this rule, AT&T and Verizon would be prohibited from filling in gaps in their 600 MHz holdings or building up to an efficient 10 x 10 MHz deployment through secondary market purchases from willing sellers.

As explained below, the Spectrum Act prohibits the Commission from adopting such limitations on the ability of generally qualified carriers like AT&T to participate in the auction. Congress sought to ensure that the auction would generate the maximum amount of revenues for broadcasters and to meet other goals while efficiently allocating new spectrum to the wireless providers that place the highest value on the spectrum. The Staff's proposed plan, in contrast, attempts to reserve spectrum for a preferred segment of the industry at below-market prices, in ways that will reduce auction revenues, harm consumers, and threaten Congress' goals in the Spectrum Act. In addition, the record demonstrates that there is no economic or wireless engineering basis for the proposed exclusions, and any Commission order adopting them would constitute arbitrary agency action in violation of the Administrative Procedure Act. Indeed, the clear purpose of the bidding exclusions is to tilt the playing field to favor certain wireless providers over their competitors in direct violation of the Communications Act.

I. The Commission Lacks Statutory Authority To Adopt The Proposed Exclusions.

As "a creature of statute" the Commission has "only those authorities conferred upon it by Congress." *North Carolina v. EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008). In the Spectrum Act, Congress added a new section 309(j)(17) to the Communications Act, which specifically prohibits the Commission from adopting auction-specific rules that would prevent otherwise

¹ See, e.g., AT&T Slide Presentation, *The 600 MHz Forward Incentive Auction, Principles for Maximizing Success*, at 10 (Oct. 25, 2013), attached to Letter from Brian Benison, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268 (Oct. 29, 2013); Testimony of Kathleen O'Brien Ham (T-Mobile) on Oversight of Incentive Auction Implementation before the Subcomm. on Communications and Technology, H. Comm. on Energy and Commerce, at 7 (July 23, 2013).

Ms. Marlene H. Dortch
May 7, 2014
Page 3

qualified carriers like AT&T from participating in the auctions of the broadcast spectrum that is the subject of the legislation. This section is titled “Certain Conditions On Auction Participation Prohibited,” and it contains two subparagraphs. Subparagraph (A) provides that, “[n]otwithstanding any other provision of law,” the Commission “may not prevent a person from participating in a system of competitive bidding under this subsection,” so long as the potential bidder (i) “complies with all auction procedures and other requirements to protect the auction process” and (ii) meets the relevant “technical, financial, character, and citizenship” requirements. 47 U.S.C. § 309(j)(17)(A). Subparagraph (B) provides that “[n]othing in subparagraph (A) affects any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition.” *Id.* § 309(j)(17)(B).

Subparagraph (A) squarely prohibits the proposed auction plan. The Commission is specifically prohibited from “prevent[ing] a person from participating” in an auction so long as the person complies with the auction procedures and meets certain technical and financial requirements, “[n]otwithstanding any other provision of law.” The Staff’s proposal violates subparagraph (A), because it prevents AT&T from participating in the auction on the basis of conditions or criteria other than those specified in that subsection. *See* Notice of Proposed Rulemaking, *Policies Regarding Mobile Spectrum Holdings*, 27 FCC Rcd. 11710, 11711 ¶ 3 (2012) (“Spectrum Aggregation NPRM”) (section 309(j)(17) “prohibit[s] the Commission from preventing an otherwise qualified entity from participating in an auction”).

The fact that AT&T might be able to bid for *some* of the available spectrum does not save the proposed plan. Subparagraph (A) provides that the Commission may not “prevent” a carrier from participating in “a system of competitive bidding under this subsection,” *i.e.*, subsection 309(j). The Commission, in effect, is creating two auctions: the Staff’s plan “carves out” almost half of the available spectrum in each market for a separate auction that excludes AT&T. That separate auction, however, would still be “a system of competitive bidding” under subsection 309(j), and subparagraph (A) prohibits the Commission from excluding carriers from that separate auction based on conditions other than the technical and financial qualifications specified in the subparagraph.

Subparagraph (B) provides no support for the proposed exclusions. Congress’ purpose in adding subparagraph (B) was not to limit the plain terms of subparagraph (A), but instead to ensure that the prohibition in subparagraph (A) was not over-read to extend beyond simply prohibiting auction-participation conditions. By its clear terms, subparagraph (B) was adopted to ensure that no one could argue that a generally applicable limitation on the amount of spectrum a single carrier can acquire was in effect a prohibition on auction participation on the ground that such a generally applicable limitation could affect the amount of spectrum a winning bidder could retain. Subparagraph (B), captioned “Clarification of authority,” precludes such an

Ms. Marlene H. Dortch
May 7, 2014
Page 4

argument by “clarifying” that the Commission’s other “authority”—derived from *other* provisions of the Act—still exists. But it does absolutely nothing to diminish Congress’s express prohibition on the adoption of auction-specific exclusions on participation other than those specifically listed in subparagraph (A). Relatedly, reading subparagraph (B) as authority to restrict AT&T’s participation in this manner would undermine the express prohibitions on the Commission’s authority in subparagraph (A).

In any event, the exclusions that Staff has proposed cannot reasonably be construed as “rules of general applicability.” They are manifestly targeted at AT&T and Verizon and have no life outside this auction. They are not expressed in any other Commission rule or policy of general applicability, but are intended solely to identify and reserve *specific blocks* of 600 MHz spectrum that AT&T and Verizon cannot bid for (or even purchase in secondary markets for six years).²

Finally, even to the extent that section 309(j)(17) is deemed ambiguous, the proposed exclusions would still not be consistent with any “reasonable” construction of the statute. *See, e.g., Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1261 (D.C. Cir. 1990) (reversing agency interpretation of ambiguous statute as unreasonable and inconsistent with the statutory purpose). Restricting participation in the 600 MHz auction based on an arbitrary level of low-frequency spectrum ownership not forbidden by any general rule of applicability is contrary to Congress’ fundamental purpose of ensuring full auction participation and the efficient allocation of spectrum. This is particularly so given the overwhelming evidence from this proceeding and the spectrum aggregation proceeding that there is no economic or engineering justification for treating low-frequency spectrum as fundamentally different from any other spectrum for purposes of the market foreclosure rationale of the Commission’s spectrum aggregation policies.

² The Commission cannot avoid section 309(j)(17)’s prohibitions by at the 11th hour deciding to adopt the bidding exclusions in the spectrum aggregation proceeding instead of the incentive auction proceeding that was initiated to establish the framework that would govern the upcoming 600 MHz auction. *See* Notice of Proposed Rulemaking, *Expanding the Economic and Innovation Opportunities of Spectrum*, 27 FCC Rcd. 12357 ¶ 9 (2012) (“Incentive Auction NPRM”) (establishing a proceeding to determine the “auction design” of the 600 MHz auction). To the contrary, that would only serve to confirm that the Commission was impermissibly attempting to circumvent the limits on its authority imposed by Congress. In all events, the exclusions are not generally applicable spectrum aggregation limits and have no life outside the auction. The exclusions would prevent AT&T from bidding on a substantial amount of the spectrum being auctioned while allowing other bidders to obtain spectrum without limit at below-market rates, even to the extent that their post-auction low-frequency spectrum holdings in a license area would exceed AT&T’s low-frequency spectrum holdings in that area.

Ms. Marlene H. Dortch
May 7, 2014
Page 5

II. Adopting The Staff’s Proposed Auction Exclusions Would Be Arbitrary And Capricious.

The bidding exclusions proposed by Staff are not only foreclosed by section 309(j)(17), but find no support in the record. Adopting Staff’s proposed approach would—for multiple, independent reasons—be arbitrary and capricious in violation of the Administrative Procedure Act.

The lack of connection between the bidding exclusions and post-auction spectrum ownership. The proposed bidding exclusions are based on the amount of low-frequency spectrum that carriers hold today, and because AT&T and Verizon are the only carriers that currently have more than one-third of low-frequency spectrum in most areas, this restriction applies almost exclusively to AT&T and Verizon. A bidding exclusion based on a carrier’s pre-auction spectrum holdings, however, is clearly not directed at addressing any legitimate harm related to excessive spectrum aggregation. For example, the Commission’s rule would permit a provider that does not *currently* have more than one-third of the low-frequency spectrum to purchase as much low-frequency spectrum as it would like in the 600 MHz auction, even if those purchases would result in that carrier having well over one-third of all low-frequency spectrum. (Indeed, there would be no limitation on a provider that today holds 32.99 percent of the low-frequency spectrum in a license area acquiring all of the spectrum auctioned in that license area and ending up with two-thirds or more of the available low-frequency spectrum post-auction.) The bidding exclusions simply have no connection to any legitimate spectrum aggregation policies.

Tilting the playing field to preferred wireless providers. The clear purpose of the bidding exclusions is to allow “favored” competitors to buy more low-frequency spectrum, and to buy it more cheaply, than AT&T and Verizon. But the courts have emphasized that the Commission’s “statutory responsibility is to protect competition, not competitors,”³ and the Commission may not use its authority to “subordinate the public interest to the interest of ‘equalizing competition among competitors.’”⁴ Such industrial policy is particularly inappropriate when the favored

³ Order and Authorization, *Application of ALASCOM, Inc. AT&T Corp. & Pac. Telecom, Inc. For Transfer of Control of ALASCOM, Inc. from Pac. Telecom, Inc. to AT&T Corp.; & Application of ALASCOM, Inc. For Review of Authorization to Acquire & Operate a Fiber Optic Cable Sys. between Alaska & Or. for the Provision of Interstate Switched & Private Line Services*, 11 FCC Rcd. 732, 758 ¶ 56 (1995) (citing *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974)).

⁴ *SBC Commc’ns, Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (internal quotations omitted).

Ms. Marlene H. Dortch
May 7, 2014
Page 6

companies—T-Mobile and Sprint—are owned by large global corporations with enormous market capitalizations and full access to capital markets. To the extent these providers are in a position to put the auctioned spectrum to the highest valued use, they have the financial means to acquire it over rival bidders without manipulation of the auction. Indeed, these providers have recently purchased substantial blocks of low-frequency spectrum without special Commission assistance.

The arbitrary post-auction exclusions. Further compounding the failures of this proposed auction structure, AT&T understands that Staff is proposing to prevent unrestricted auction participants from selling any spectrum they acquire in the 600 MHz auction to restricted auction participants for a period of six years, ostensibly to prevent “speculators” from purchasing spectrum in the auction for the purpose of later reselling it to AT&T and Verizon. This is arbitrary. First, this restriction is clearly not tied to any legitimate spectrum aggregation concerns, because it applies regardless of the amount of low-frequency spectrum AT&T or Verizon might hold in future years. For example, if AT&T were to reduce its holdings of low-frequency spectrum in a particular area to well below the one-third threshold, AT&T would still be precluded from purchasing 600 MHz spectrum. On the other hand, unrestricted wireless providers like T-Mobile could purchase more low-frequency spectrum than AT&T currently owns. Second, this restriction is not tied to ensuring the success of the auction. To the contrary, this restriction could only reduce auction participation and revenue, thus undermining the success of the auction. Third, the “no-resale” rule apparently does not bar unrestricted bidders from obtaining spectrum through post-auction transactions but only bars sales to excluded restricted bidders, confirming that the purpose of the rule is to prevent not “speculation” but sales to AT&T and Verizon.

The arbitrary one-third threshold. The specific numerical threshold selected by Staff for disfavored status—ownership of one-third or more of low-frequency spectrum in a market—is unsupported and arbitrary. Even accepting the premise that some level of low-frequency spectrum provides a competitive advantage, there is nothing in the record that would justify the proposed one-third threshold. Certainly, there is nothing to suggest why a provider that owns a substantial amount of low-frequency spectrum, but less than one-third, should be able to participate in the auction without restriction, but a provider that is right at the threshold may not.⁵ To the contrary, the record is replete with evidence that wireless providers that own more than one-third of low-frequency spectrum have no ability to engage in anticompetitive foreclosure, and that wireless providers compete successfully in the marketplace without substantial low-

⁵ Compounding the arbitrariness of the one-third threshold is that it is based on *pre*-auction spectrum holdings that exclude the 600 MHz spectrum being auctioned. If ownership of less than one-third of “suitable and available” spectrum raises no concerns, as the Staff is necessarily assuming, then the one-third threshold should include the spectrum being auctioned.

Ms. Marlene H. Dortch
May 7, 2014
Page 7

frequency spectrum holdings.⁶ The courts have consistently struck down these types of arbitrary numerical thresholds when the agency has failed to justify adequately the specific threshold it has selected. *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001) (striking down 30 percent cable ownership limit as not sufficiently justified); *USTA v. FCC*, 188 F.3d 521, 525-26 (D.C. Cir. 1999) (striking down 6 percent X-Factor as not sufficiently justified).

Failure to account for the price of spectrum. The record does not support bidding exclusions based solely on the amount of low-frequency spectrum held by a carrier. The logic behind this limitation—at least as articulated by its supporters in the Commission proceeding—is that low-frequency spectrum has special competitive advantages because it has lower deployment costs. According to this argument, low-frequency spectrum propagates further, and penetrates buildings better, than high-frequency spectrum, which means that low-frequency spectrum can cover an area using fewer cell sites, and hence at lower cost. Supporters of auction exclusions thus argue that AT&T and Verizon should not be permitted to “foreclose” other providers’ access to this uniquely valuable low-frequency spectrum and thereby gain an overwhelming cost advantage. This argument, however, is fundamentally flawed as a matter of basic economics, because it ignores half the equation: the cost of the underlying spectrum licenses. To the extent low-frequency spectrum permits carriers to deploy a network at lower cost using fewer cell sites, the price of low-frequency spectrum licenses will be bid up to offset those deployment cost advantages, such that the *overall* cost of high- and low-frequency networks will remain roughly equivalent. Any decision based only on the deployment cost

⁶ Comments of AT&T at 64-65, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (Nov. 28, 2012) (“AT&T 11/28/2012 Comments”); Mark A. Israel & Michael L. Katz, *Economic Analysis of Public Policy Regarding Mobile Spectrum Holdings* ¶¶ 26-32 (Nov. 28, 2012), attached to AT&T 11/28/2012 Comments; Reply Comments of AT&T at 11, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (Jan. 7, 2013) (“AT&T 1/7/2013 Reply Comments”); Mark A. Israel & Michael L. Katz, Reply Declaration, *Economic Analysis of Public Policy Regarding Mobile Spectrum Holdings: Reply Declaration*, ¶¶ 8-11 (Jan. 7, 2013) (“Israel/Katz 1/7/2013 Reply Decl.”), attached to AT&T 1/7/2013 Reply Comments; Letter from Wayne Watts, Counsel, AT&T, to Chairman Julius Genachowski, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn, Commissioner Jessica Rosenworcel, Commissioner Ajit Pai, Federal Communications Commission, at 7-8, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, at 7-8 (Apr. 24, 2013) (“Watts 4/24/2013 Letter”); Letter from Alex Starr, AT&T, to Marlene H. Dortch, Secretary, FCC, at 1-2, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, GN Docket No. 12-268 (Apr. 2, 2014) (“Starr 4/2/2014 Letter”).

Ms. Marlene H. Dortch
May 7, 2014
Page 8

savings of low-frequency spectrum, while ignoring the cost of the underlying spectrum licenses (and the many countervailing advantages of high- over low-frequency spectrum) would be arbitrary.⁷

Lack of engineering support for key justifications underlying the bidding exclusions. The putative deployment cost justifications that have been advanced for restricting “aggregation” of low-frequency spectrum by a wireless provider—e.g., that it takes many more cell sites to cover a given area with high-frequency spectrum—are contrary to the record evidence. For example, there is considerable evidence that real-world spectrum deployments are driven by the need for greater network capacity and not network coverage.⁸ For such capacity-driven deployments, high-frequency spectrum is often superior to low-frequency spectrum.⁹ There is also considerable evidence that the wireless providers with the most low-frequency spectrum have *more*, not less, cell sites than those that use high-frequency spectrum—thus contradicting the premise that real-world low-frequency deployments are much less costly.¹⁰ The engineering evidence further shows that “high-frequency spectrum has significant advantages over low-

⁷ See, e.g., AT&T 11/28/2012 Comments at 66-67; AT&T 1/7/2013 Reply Comments at 25; Israel/Katz 1/7/2013 Reply Decl. at ¶¶ 9, 22-25; Watts 4/24/2013 Letter at 7-8; AT&T Slide Presentation, *A Rational and Lawful Spectrum Screen*, at 6, 14 (Mar. 26, 2014) (“*Rational and Lawful Spectrum Screen*”), attached to Letter from Stacey G. Black, AT&T, to Marlene H. Dortch, Secretary, FCC, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (Mar. 28, 2014) (“Black 3/28/2014 Letter”); Letter from David L. Lawson, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, at 1-2, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, (Mar. 14, 2014) (“Lawson 3/14/2014 Letter”); Michael L. Katz, Philip A. Haile, Mark A. Israel, and Andres V. Lerner, *Sprint’s Proposed Weighted Spectrum Screen Defies Economic Logic And Is Inconsistent With Established Facts*, ¶¶ 3, 7, 11, 13 (Mar. 13, 2014), attached to Lawson 3/14/2014 Letter.

⁸ AT&T 11/28/2012 Comments at 23, 29-31, 67-68; Jeffrey H. Reed & Nishith D. Tripathi, *The Value of Spectrum, A Response To Professor Jon M. Peha’s Paper*, at 9-11 (Jan. 7, 2013) (“Reed-Tripathi 1/7/2013 Peha Response”), attached to AT&T 1/7/2013 Reply Comments; Watts 4/24/2013 Letter at 8; *Rational and Lawful Spectrum Screen* at 8; Lawson 3/14/2014 Letter at 2-3; Jeffrey H. Reed & Nishith D. Tripathi, *The Value of Spectrum, A Response To Dr. Kostas Liopiros’ Paper*, at 3, 11 (Mar. 14, 2014) (“Reed/Tripathi Liopiros Response”), attached to Lawson 3/14/2014 Letter.

⁹ AT&T 11/28/2012 Comments at 23, 27, 68-69; Reed-Tripathi 1/7/2013 Peha Response at 8-11; Watts 4/24/2013 Letter at 8; *Rational and Lawful Spectrum Screen* at 9; Reed/Tripathi Liopiros Response at 6-16.

¹⁰ See, e.g., Lawson 3/14/2014 Letter at 5; Reed/Tripathi Liopiros Response at 22-24.

Ms. Marlene H. Dortch
May 7, 2014
Page 9

frequency spectrum in terms of the ability to implement and achieve the maximum benefits from advanced LTE technologies that significantly increase throughput and reliability.”¹¹ For these reasons, carriers that use predominantly high-frequency spectrum can compete successfully—T-Mobile until recently has only offered services using high-frequency spectrum.¹²

The arbitrary rural deployment justification. AT&T understands that another justification for the proposed bidding exclusions is that they are intended to boost deployment of wireless broadband networks in rural areas by the two providers that have largely not deployed in rural America—T-Mobile and Sprint. It is entirely speculative that bidding exclusions designed to lower the prices that those preferred providers pay for spectrum will result in those providers purchasing the spectrum in rural areas and building rural networks, but even putting that aside, the proposed exclusions are arbitrary. First, the bidding exclusions are not well-designed to promote access to rural spectrum and thus rural deployment by the two preferred carriers. There are vast swaths of rural America in which AT&T does *not* currently hold one-third of the outstanding low-frequency spectrum. Specifically, AT&T would not be excluded in the vast majority of Rural Service Areas from 300 to 731. Of the nearly 1,900 counties (of slightly more than 3,000 total counties) in which AT&T holds licenses for less than one-third of sub-1 GHz spectrum, more than 80 percent have population densities of less than 100 persons per square mile and more than 90 percent have population densities of less than 200 persons per square mile. AT&T would therefore not be a restricted bidder in those markets. Verizon, too, would not be a restricted bidder in many rural areas. Thus, the bidding exclusions typically will not even limit bidding competition for the rural licenses at which they are ostensibly aimed. Second, because of lower demand for wireless broadband services, spectrum is much more available today in rural areas, including low-frequency spectrum, even without special auction rules designed to favor particular carriers. Wireless providers like Sprint and T-Mobile have ignored rural markets mostly for business reasons and the economic challenges of deploying in rural markets—not because they are unable to obtain low-frequency spectrum.¹³ Finally, the supposed need to prohibit AT&T and Verizon from bidding for rural spectrum provides no justification for prohibiting them from bidding to purchase spectrum in urban and suburban areas—particularly when it is undisputed that low-frequency spectrum provides no compelling advantages in these capacity-driven areas and may even be inferior to high-frequency spectrum.¹⁴ Indeed, although many are defending the proposed auction plan as a way of promoting rural deployment, its principal effect will be to limit auction bidding in *urban*

¹¹ Reed/Tripathi Liopiros Response at 8.

¹² *See, e.g.*, AT&T 11/28/2012 Comments at 65-66.

¹³ Watts 4/24/2013 Letter at 8-9.

¹⁴ *See, e.g.*, Reed/Tripathi Liopiros Response at 6-16.

Ms. Marlene H. Dortch
May 7, 2014
Page 10

markets—significantly reducing auction revenues and denying AT&T a fair opportunity to obtain the additional spectrum capacity it needs to serve the exploding demand from its existing customers.

The arbitrary “running the table” justification. The proposed exclusions are also apparently being justified on the ground that they are necessary to prevent a single wireless provider from running the table and purchasing all of the spectrum available at the auction. As an initial matter, as explained above, any auction-specific limits on purchases in an individual auction are contrary to the Communications Act. All that are permissible under the Communications Act are general rules of applicability that limit total spectrum holdings necessary to address foreclosure concerns. But even assuming the Commission had authority to adopt auction specific limits, the proposed exclusions are arbitrary for multiple reasons. First, the proposed exclusions are aimed at only two providers—AT&T and Verizon. Major providers, such as T-Mobile and Sprint, are not restricted in any way and can potentially purchase all of the spectrum at this auction. In all events, as explained above, there is no engineering or economic basis for any notion that acquisition of 600 MHz spectrum consistent with generally applicable spectrum aggregation rules raises any legitimate competitive issues. Nor does the purported need to stop a provider from “running the table” provide a justification for restricting post-auction sales by bidders that successfully purchased the spectrum at auction.

Risk of auction failure. The principal purpose of the proposed bidding rules is to steer spectrum to favored bidders at below-market prices. The predictable result will be reduced auction revenues and an increased likelihood that less spectrum will clear than would otherwise have been the case. Moreover, the proposed bidding rules, by creating two auctions and allowing the favored bidders to shift demand to the unreserved blocks without affecting their bids for the reserved blocks, introduce further incentives for strategic bidding that will likely reduce revenues and result in suboptimal allocations of spectrum. In short, the bidding rules will arbitrarily warp the bidding process in ways that will undermine the stated goals of the auction, and the likelihood of these types of harmful effects is precisely why Congress mandated an open auction and prohibited such restrictions.

The arbitrary counting of 700 MHz D & E blocks toward the bidding exclusion threshold. Including AT&T’s Lower 700 MHz D and E blocks when determining whether AT&T meets the one-third threshold for low-frequency spectrum would also be arbitrary. Unlike other low-frequency spectrum, the D and E blocks (“D/E blocks”) are unpaired and will be used for supplemental downlink only (they can only transmit signals to devices). To work in a two-way mobile broadband network, therefore, the D/E blocks must be “bonded” to other spectrum with uplink capabilities. Due to certain technical limitations, the D/E blocks must be bonded to mid- or high-frequency (*e.g.*, AWS) spectrum. As a result, from the standpoint of deployment costs, the D/E blocks are for all intents and purposes equivalent to mid- or high-frequency spectrum,

Ms. Marlene H. Dortch
May 7, 2014
Page 11

and do not provide the licensee with the same deployment cost benefits as traditional two-way low-frequency spectrum.¹⁵

Lack of notice. The Commission has not satisfied the APA’s notice requirements.¹⁶ The notice of proposed rulemaking in the incentive auction proceeding addresses these issues in a single paragraph. The Commission “note[d] that under current spectrum aggregation policies, the Commission would apply its spectrum screen and undertake its competitive analysis only after the auction,” but then mused (without proposing any contrary rule) that “[a]s discussed above, however, it is of particular importance to have certainty for bidders in this auction.”¹⁷ The Commission also suggested that the statutory “direction to avoid excessive concentration of licenses might militate in favor of a rule that permits *any* single participant in the auction to acquire no more than one-third of all 600 MHz spectrum being auctioned in a given licensed area” and sought comment on this proposal and certain “variations.”¹⁸ The Commission has

¹⁵ See, e.g., Starr 4/2/2014 Letter at 2; *Rational and Lawful Spectrum Screen* at 14; Lawson 3/14/2014 Letter at 7 n.22; Reed/Tripathi Liopiros Response at 28.

¹⁶ Adopting the auction bidding exclusions in the spectrum aggregation proceeding would only heighten the notice problems. Nowhere in the notice of proposed rulemaking for that proceeding did the Commission indicate that it would be adopting any auction design rules, much less auction-specific exclusions of the sort now being proposed. Cf. Spectrum Aggregation NPRM ¶ 1 (“[W]e adopt today, in a separate proceeding, a Notice of Proposed Rulemaking soliciting comment on the framework for an incentive auction of the broadcast television spectrum.”). While the Commission indicated in the Spectrum Aggregation NPRM that it might adopt generally applicable spectrum aggregation limits, including limits on low-frequency spectrum, the proposed exclusions are not spectrum aggregation limits but restrictions in the incentive auction designed to steer spectrum to favored providers at lower prices. No generally applicable spectrum ownership level is set—indeed, providers like T-Mobile would be permitted to acquire low-frequency spectrum in amounts greater than the one-third level that triggers the exclusions that would restrict AT&T. Nor did the Commission indicate that it would adopt rules prohibiting successful bidders from selling spectrum to AT&T post-auction (even if AT&T was willing to divest equal amounts of other low-frequency spectrum).

¹⁷ Incentive Auction NPRM ¶ 384 (footnote omitted).

¹⁸ *Id.* (emphasis added); see also *id.* (“Commenters may also discuss variations of that approach, including whether we should adopt thresholds that differ in urban and rural areas, whether we should adopt a threshold that recognizes the different characteristics of different spectrum bands, and/or whether we should adopt a threshold that would allow a licensee to acquire additional 600 MHz spectrum above that threshold so long as the licensee agrees to comply with certain conditions such as spectrum sharing through roaming and/or resale obligations, infrastructure sharing, or accelerated buildout requirements.”) (footnotes omitted).

Ms. Marlene H. Dortch
May 7, 2014
Page 12

never formally put the public on notice that it was considering a quite different rule that would target AT&T and Verizon specifically and that would prevent those providers (and only those providers) from bidding for 600 MHz spectrum in the separate “reserved” auction while imposing no limitations or exclusions at all on other bidders. The proposed auction-participation rules could not have been anticipated based on the Commission’s notice in this proceeding, and therefore such rules, if now adopted, would violate the APA’s notice requirement.¹⁹

The arbitrary failure to consider less restrictive alternatives. Even assuming *arguendo* the policy goals underlying Staff’s proposal were legitimate and not barred by the Communications Act, there are other, less-restrictive means for achieving them. For example, the Commission could permit an unrestricted auction and require any entity that, post-auction, was determined to hold “excess” low-band spectrum (pursuant to some legitimate, non-arbitrary application of the spectrum foreclosure rationale for the Commission’s spectrum aggregation policies) to divest the excess spectrum. Also, to the extent that the exclusions are designed to allow wireless providers to acquire low-frequency spectrum to serve rural areas, there is no basis for restricting bidding for spectrum in urban areas.

* * *

For the foregoing reasons, as amplified in the evidence that AT&T has submitted in this proceeding, the proposed exclusions on participation in this auction would be unlawful.

Sincerely,

/s/ Peter D. Keisler

Peter D. Keisler
Counsel for AT&T

¹⁹ See, e.g., *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (a notice that contains no rule proposal still must “describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making” (quoting *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994)) (internal quotation marks omitted).