

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
Expanding the Economic and Innovation)	Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	
)	

COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

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I. Introduction

Writers Guild of America, West, Inc. (WGAW) is pleased to submit the following comments in response to the Federal Communication Commission's (FCC) Notice of Proposed Rulemaking (NPRM), "Expanding the Economic and Innovation Opportunities Through Incentive Auctions," released on September 28, 2012, Docket No. 12-268.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media, including news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, "WGA"). Increasingly, video programming produced for initial distribution over the Internet is also written by WGA members.

From the first television broadcasts in the late 1920's to the transition to digital television, radio spectrum used to deliver broadcast television to American homes has facilitated innovation in news and entertainment programming. In recent years, wireless technology has evolved to expand distribution opportunities for video content. We support the Commission's efforts to reallocate broadcast spectrum for wireless phone and broadband Internet services, allowing content creators and consumers to take full advantage of wireless video platforms. However, just as the Commission instituted rules to promote competition in the broadcast market and prevent the control of this important public resource by a few powerful entities, the WGAW believes the Commission has a similar responsibility in the wireless market. To serve the public interest, promoting competition and innovation should guide the Commission in its design of the auction process. Such action will ensure that spectrum is used to deliver the next generation of innovative communication services. As the WGAW has highlighted in numerous filings with this

Commission, competition is lacking in media and action is needed to remedy the harmful effects of consolidation.¹ While the television industry is characterized by oligopoly control of production, exhibition and distribution, the wireless industry is even more concentrated, with Verizon and AT&T controlling 64% of the market.² The lack of competition in this market promises to slow the development and adoption of new products and services, harming both content creators and consumers.

With the proliferation of Internet-enabled devices, wireless broadband is becoming increasingly important. Significant competition exists in the device market, fueling the adoption of smartphones and tablet computers. However, the data plans offered by most wireless carriers limit the ways in which consumers and content creators can take full advantage of these new products. In addition, the policies of many wired broadband providers threaten to limit the growth of Internet-delivered video. The four largest high-speed Internet providers account for 67% of the wired broadband market.³ The lack of competition in wired broadband has allowed many providers to institute data caps that limit consumer adoption of online video viewing.⁴ The high entry barriers for wired broadband limit the potential for new entrants, making wireless services such as fixed or mobile broadband the best hope for increased competition. Therefore,

¹ See Comments of the Writers Guild of America, West, Inc., *In the Matter of Annual Assessment of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, September 10, 2012 and Comments of the Writers Guild of America, West, Inc., *In the Matter of 2010 Quadrennial Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 2020 of the Telecommunications Act of 1996*, MB Docket No. 09-182 and *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, March 5, 2012, and Comments of the Writers Guild of America, West, Inc., *In the Matter of Annual Assessment of Competition in the Market for Delivery of Video Programming*, MB Docket No. 07-269, June 8, 2011, and Comments of the Writers Guild of America, West, *In the Matter of Applications of Comcast Corporation, General Electric and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56, June 21, 2010, and Reply Comments of the Writers Guild of America, West, *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, April 26, 2010.

² SNL Kagan, “Wireless Industry Benchmarks – Wireless Subscribers 2012 Q3,” <http://www.snl.com>.

³ SNL Kagan, “2012 Q2 High Speed Data Subscribers,” <http://www.snl.com>.

⁴ Stacey Higginbotham, “Which ISPs are capping your broadband, and why?” *GigaOm*, October 1, 2012, <http://gigaom.com/2012/10/01/data-caps-chart/>.

as additional spectrum is made available through the auction process we urge the Commission to take appropriate action to ensure that this results in more competition, not less. Specifically, we ask the Commission to address the issue of spectrum aggregation, currently being considered in the proceeding, “Policies Regarding Mobile Spectrum Holdings,” WT Docket No. 12-269. As the WGAW noted in its filing, the Commission must develop a weighting mechanism that recognizes the qualitative differences in spectrum and limits the aggregation of higher value spectrum by the companies that control the wireless market.⁵ In addition, we ask the Commission to increase the amount of unlicensed spectrum available because this vital alternative promotes competition, allowing anyone to develop innovative products and services that utilize spectrum without the requirement of a spectrum license. Finally, we urge the Commission to institute stringent performance requirements on spectrum licensees to ensure timely development of spectrum, preventing potentially anticompetitive actions such as spectrum warehousing. Commission action in these key areas will enhance competition among wireless and wired providers of broadband Internet access.

II. FCC Must Address Spectrum Aggregation Before Auctioning More Spectrum

With the Commission poised to make prime, lower-band spectrum available to wireless providers through the auction process it is imperative to address the growing problem of spectrum aggregation. The Commission’s decision to remove a cap on spectrum holdings in 2001 has had a detrimental impact on competition. Between 2001 and 2011, a number of mergers increased consolidation in the marketplace. Significantly, Nextel and Sprint merged, AT&T and BellSouth merged, and Cingular and AT&T merged. By 2011, four nationwide providers—AT&T, Verizon, T-Mobile and Sprint—accounted for 90% of the nation’s mobile

⁵ See Comments of the Writers Guild of America, West, Inc., *In the Matter of Policies Regarding Mobile Spectrum Holdings*, WT Docket No 12-269, November 28, 2012.

subscribers, down from six national providers in 2000.⁶ Removing the spectrum cap also allowed the large carriers to use their size and incumbency advantage to win spectrum at auction, with the effect, if not the intent, of foreclosing competition. In the 2008 spectrum auctions Verizon and AT&T were able to win approximately 60% of MHz-POPs, to the detriment of new competition.⁷

This consolidation is impairing the development of a wireless video market. Currently 64 million consumers own some form of tablet device, and smartphone penetration has reached 47% of US mobile device owners, or 110 million people.⁸ Widespread adoption of these devices can increase video consumption, which benefits content creators seeking an audience and consumers, who now have increased flexibility to choose when and where they watch videos. Unfortunately the data plans currently offered, particularly by market leaders AT&T and Verizon, discourage video viewing through low data caps, expensive plans and hefty overage fees. As wireless providers have acquired spectrum and invested in network upgrades, data has become more expensive to the consumer, not less. This fact suggests that there is not enough competition to incentivize wireless providers to offer affordable data plans.

The lack of competition in wireless and the harm it is causing the mobile video market makes it critical that the Commission address spectrum aggregation before making more spectrum available to wireless providers. The Commission must act now because the spectrum

⁶ FCC, *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 Services*, 15th Report, WT Docket 10-133, 2011, Table 4.

⁷ Bryan Gardiner, “In Spectrum Auction, Winners Are AT&T, Verizon and Openess,” *Wired*, March 20, 2008, <http://www.wired.com/business/2008/03/fcc-releases-70/>, and *Rural Telecommunications Group, Inc. Petition for Rulemaking to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, RM-11498 (filed July 16, 2008).

⁸ SNL Kagan, “U.S. Tablet Projections,” July 5, 2012, <http://www.snl.com> and Ingrid Lunden, “ComScore: US Smartphone Penetration 47% In Q2; Android Remains Most Popular, But Apple’s Growing Faster,” *Tech Crunch*, August 1, 2012, <http://techcrunch.com/2012/08/01/comscore-us-smartphone-penetration-47-in-q2-android-remains-most-popular-but-apples-growing-faster/>.

that will be made available in the upcoming auction is prime lower band spectrum, widely considered to be more valuable because it requires less investment to develop and use. For example, a cell tower in the lower 700 MHz range will cover 100 meters whereas four towers are required to cover 100 meters in the higher 1.9 GHz range. Because the current spectrum screen process does not recognize such qualitative differences, AT&T and Verizon have been able to acquire the majority of lower frequency spectrum best suited for mobile broadband. As such, the development of a weighting mechanism would represent a significant improvement to the FCC's current screen of 1/3 of available spectrum because it would limit further aggregation of such valuable spectrum, making room for more competition. In addition, while the Spectrum Act does not allow the FCC to bar any specific participants from the spectrum auction, it does allow the Commission to implement policies to promote competition including rules that concern aggregation.⁹ A spectrum screen that recognizes the differences in the value of spectrum is therefore necessary to ensure that the upcoming spectrum auction enhances competition.

III. Unlicensed Spectrum Promotes Competition and Innovation

The continued availability of unlicensed spectrum is critical to promoting competition and innovation in the wireless market. While a licensed spectrum approach cedes innovation to the few companies that are able to invest in spectrum and develop wireless networks, an approach that includes unlicensed spectrum allows anyone to innovate and offer wireless products and services without the permission of gatekeeping license holders. Approximately 80% of the healthcare wireless market is served by open wireless technologies and companies across diverse industries use supply chain management, inventory tracking and mobile payment

⁹ 47 USC § 309(j)17.

technologies that utilize unlicensed spectrum.¹⁰ These developments are a direct result of the availability of unlicensed spectrum.

Unlicensed spectrum also serves the public interest by enhancing competition. The availability of Wi-Fi networks has made it possible for consumers to watch videos on wireless devices because the data plans offered by wireless carriers are often cost prohibitive. Content providers have developed mobile applications to meet the growing demand for mobile video. The broadcast networks have developed mobile applications that allow consumers to stream content. In addition, Netflix and Hulu have also developed apps that are available for smartphones, most MVPDs now offer TV Everywhere applications for mobile devices and YouTube is a standard feature on most mobile devices. Consumer demand for mobile video is evident but data plans offered by market leaders AT&T and Verizon make mobile video consumption cost prohibitive. For example, AT&T charges \$50 a month for 5GB of data but consumers would need almost 10GB to watch just an hour of video a day.¹¹ An AT&T customer would be charged \$100 a month for this small amount of video viewing. Verizon's data calculator estimates that an hour of streaming HD video uses 1 GB of data, which would limit consumers to only 10 hours of video for \$100.¹² Increasing the amount of unlicensed spectrum available would help the development of the wireless video market and could incentivize wireless carriers to offer more affordable data plans in competition with Wi-Fi. Unlicensed spectrum has also provided significant cost savings for wireless carriers. It is estimated that 40-

¹⁰ Yochai Benkler, "Open Wireless vs. Licensed Spectrum: Evidence from Market Adoption," Berkman Center for Internet & Society at Harvard University, November 7, 2011, http://www.benkler.org/Open_Wireless_V_Licensed_Spectrum_Market_Adoption_current.pdf.

¹¹ AT&T, "Individual Data Device Plans," AT&T Website, <http://www.att.com/shop/wireless/plans/dataplans.html>, accessed November 26, 2012 and AT&T, "Data Calculator," AT&T website, <http://www.att.com/att/datacalculator/#fbid=gjw3Et1PPgg>, accessed November 16, 2012.

¹² Verizon Wireless, "Data Calculator," Verizon Wireless Website, <http://www.verizonwireless.com/b2c/splash/dataShareCalculator.jsp?popup=true?popup=true>, accessed November 16, 2012.

90% of mobile broadband data to smartphones and tablets use open wireless systems.¹³ Mobile carriers using unlicensed spectrum for data offloading have saved an estimated \$25 billion in cell tower construction.¹⁴

The WGAW supports the Commission's plan to allow the use of unlicensed spectrum in the guard bands following the 2014 auction as well as the recently announced plan to free an additional 195 MHz in the 5 GHz band for unlicensed use.¹⁵ Maximizing the amount of unlicensed spectrum available would provide much needed market competition. We encourage the Commission to establish a minimum amount of unlicensed spectrum by geographic area to prevent reductions in the availability of this vitally competitive resource. Such action is necessary because, as the Commission notes in the *NPRM*, the upcoming auction may reduce the amount of unused spectrum currently available in the broadcast white spaces.¹⁶ In addition, future technological improvements may address the existing interference issues that make the size of the guard bands necessary and cause the Commission to reduce the size of the guard bands, which also serve as unlicensed spectrum. It is important that the Commission dedicate a set amount of unlicensed spectrum to ensure continued innovation and development of offerings that utilize unlicensed spectrum. This will also provide important competition to the offerings of licensed spectrum holders.

¹³ Yochai Benkler, "Open Wireless vs. Licensed Spectrum: Evidence from Market Adoption," Berkman Center for Internet & Society at Harvard University, November 7, 2011, http://www.benkler.org/Open_Wireless_V_Licensed_Spectrum_Market_Adoption_current.pdf, p 1.

¹⁴ Consumer Federation of America, "The Consumer Benefits of Expanding Shared Use of Public Airwaves," November 29, 2011, <http://www.consumerfed.org/pdfs/Consumer-Benefits-of-Shared-Use-Spectrum.pdf>. p 1 and Exhibit 4.

¹⁵ FCC, "Chairman Announces Effort to Increase Wi-Fi Speeds," January 1, 2012, <http://www.fcc.gov/document/chairman-announces-effort-increase-wi-fi-speeds>.

¹⁶ FCC, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Docket No. 12-268, October 2, 2012, ¶233.

IV. Strong Performance Requirements for Spectrum Licensees Serve the Public Interest

Companies that seek to license spectrum must adhere to performance requirements that ensure their use of this public resource serves the public interest. The WGAW supports the Commission's plan to institute performance requirements on companies that seek to acquire spectrum in the upcoming auctions and encourages the Commission to consider ways to improve transparency of licensing conditions and licensee compliance. Such conditions are necessary to ensure that spectrum is put to use in a timely fashion and is not acquired to restrict competition. Transparency ensures that licensees are accountable to the Commission and the public at large.

The WGAW supports the proposal that licensees are required to meet multiple, quantifiable service development benchmarks throughout the license term. This proposal is the most effective way to ensure continuous progress in implementing wireless services in a geographic area. This is preferred to an interim or end of license benchmark because these practices may allow a license holder to delay investment. An end of license benchmark could potentially allow a license holder to control spectrum without developing it for the entire license period. Ongoing, transparent benchmarks help prevent spectrum warehousing.

While we support the Commission's proposal to use population within a geographic area as the build-out progress benchmark, we also caution that this may adversely impact rural consumers. As such, the Commission should consider how to make sure that license holders develop services in rural parts of geographic license areas. License holders are incentivized to develop services that reach the most consumers at the lowest cost. This can result in services covering most consumers in a geographic area without fully developing the geographic area.

Penalties for failure to meet performance benchmarks must be sufficiently strong to incentive license holders to develop the spectrum they control. As such, the WGAW supports the

strongest measure contemplated by the FCC, that license holders use the spectrum or lose it. As suggested in the *NPRM*, if a licensee fails to meet an interim benchmark the license term should be reduced. The failure to meet an end of term benchmark should result in the cancellation of a license, making the spectrum available to an entity that will develop it. This is preferred to alternatives like losing the unserved portion of the license because the undeveloped portion of such license may be in a sparsely populated area that a carrier is not incentivized to develop absent spectrum that covers the rest of the market. Performance requirements that institute multiple benchmarks and result in the shortening or loss of a license for failure to meet such requirements are the most effective ways the Commission can ensure license holders develop spectrum in a timely fashion.

V. Conclusion

The growth of wireless devices and services promises to increase opportunities for content creators, providing new ways for independent and diverse content to reach an audience. This is especially important at a time when independently produced content has all but disappeared from broadcast television. The 2012 Fall primetime broadcast lineup included only 7 independently produced television series, or 8% of primetime network programming.¹⁷ However, the development of wireless video distribution is currently constrained by the cost of watching video on a wireless carrier's network. The Commission must take proactive steps to ensure additional spectrum made available for wireless services is used to enhance competition and further the development of online video and other innovative wireless services.

To serve the public interest, the Commission must adopt spectrum aggregation limits that account for the qualitative differences in spectrum prior to the 2014 auction. In addition to

¹⁷ See Comments of the Writers Guild of America, West, Inc., *In the Matter of Annual Assessment of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, September 10, 2012, p 3.

allowing unlicensed use of spectrum in the repackaged guard bands, we urge the Commission establish a minimum amount of unlicensed spectrum in each market. Finally, we believe that spectrum acquired at auction should be subject to strong performance conditions. Spectrum license holders should regularly report on the status and use of spectrum holdings in formats that are accessible and transparent. License holders that do not meet performance requirements must face reduced license terms or license cancellation. These actions will promote competition in the wireless industry among service providers, lower costs for consumers, support innovation in the wireless device industry and facilitate the growth of an online video market.