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Spectrum Auctions

For months now, lobbyists, academics, and members of Congress have engaged in a slashing public debate about whether the Federal Communications Commission should set limits on how spectrum the largest two wireless carriers in the United States—Verizon Wireless and AT&T Inc.—should be allowed to buy in the agency's first-ever incentive auction of broadcast TV spectrum, which is now slated for 2015. Weighing in, antitrust attorney David A. Balto argues that any such restrictions placed on Verizon and AT&T would, in the end, "rig the game."

Like Referees, FCC Should Avoid Picking Sides in Spectrum Auctions

BY DAVID A. BALTO

In sports, everyone likes to root for an underdog. But what if the referees rigged the game in favor of the underdog team? A game like that would be a huge disappointment for fans, especially if the underdog team could have competed fairly without any help.

The Federal Communications Commission's upcoming incentive auction of spectrum could be compared to a game with established rules of play, where each side competes. And yet some of the players are now clamoring for the refs to change those rules and rig the game.

T-Mobile USA Inc., the fourth-largest wireless carrier in the United States, has proposed what it is calling a "Dynamic Market Rule," which would allow all carriers to bid on and buy at least 10 megahertz of spectrum in every market, but place restrictions on acquiring more than that amount in some circumstances.

Absent such favoritism, T-Mobile and other "underdogs"—namely Sprint Corp., the third–largest wireless carrier in the country—claim that their larger rivals—Verizon Wireless and AT&T Inc.—would scoop up every available bit of spectrum in the auction and snuff out competition in the process.

But recent experience, as well as the influx of substantial new capital to the two companies, belies the "too-weak-to-compete" imagery. And such accusations are deeply misleading and blatantly ignore the FCC's existing process in place for addressing competition and spectrum aggregation concerns. As I spelled out in a recent paper with economist Hal Singer, the FCC's so-called "impairment" standard addresses Sprint's and

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T-Mobile's concerns, consistent with FCC Chairman Tom Wheeler's pledge for ''fact-based'' rulemaking but without distorting the auction with complex and unproven bidding restrictions that ultimately harm the consumer.

Auction rules that presume to know exactly how much and what kind of spectrum individual carriers' require suggest uncanny foreknowledge of market and network trends and consumer needs—in an industry that has consistently astonished through innovation and unforeseen disruptions. The demise of Blackberry, Netscape Navigator, and AOL Inc., once deemed untouchable, exemplify the difficulty of knowing the telecom future. Auction rules based on similar wrong guesses could mean that wireless carriers freely chosen by consumers won't have enough spectrum to meet their needs.

Sprint, T-Mobile Not Exactly 'Underdogs.' Under the impairment approach, auction rules that favor any carrier require proof that the spectrum up for bid is a ''must-have'' input and the companies could not compete effectively without it. Apply that evidence burden to Sprint and T-Mobile and you find that, in fact, the two companies are aggressive competitors and do not need the government's help. T-Mobile, for example, has added about one million new subscribers in the past year and is testing new pricing models that its competitors are rushing to copy. For its part, Sprint recorded an 18 percent gain in contract customers in 2012, asserts it will achieve network superiority over all other carriers by 2015, and has frequently touted to Wall Street the competitive benefits of its vast inventory of higher-frequency spectrum, with which it is rolling out super-fast 4G LTE (fourth-generation long-term evolution) services. It's hard to square those facts with the notion that the low-frequency spectrum up for bid is a ''must-have'' and that either Sprint or T-Mobile would be lost without it.

Nor are these firms particularly disabled financially or in other respects. In July, Japan-based SoftBank's Corp. acquired a controlling stake in Sprint, giving Sprint a $5 billion cash infusion to help it expand its 4G LTE mobile broadband network and potentially cut more deals. With the promise of SoftBank's capital, Sprint also completed a buyout of wireless network operator Clearwire Corp., which holds more than 9,000 2.5 gigahertz spectrum licenses and leases covering 411 of the 493 basic trading areas, or BTAs, in the country, an average of 120 MHz to 150 MHz across its geographic footprint—by far the largest single spectrum holder among wireless carriers, even including Verizon and AT&T. As for T-Mobile, in May 2013, Deutsche Telekom AG, T-Mobile's parent company, acquired MetroPCS Communications Inc. and, a month later, T-Mobile entered into a $308 million deal to buy spectrum from U.S. Cellular Corp.

Thus, whatever struggles Sprint and T-Mobile may have had in the recent past, neither company can today be considered weak sisters. As Wheeler put it in a recent speech at The Ohio State University: ''. . .both T-Mobile and Sprint have been able to attract significant investment capital to build out their networks and increase competition in the mobile industry'' in the two years since the FCC blocked AT&T Inc.'s proposed $39 billion acquisition of T-Mobile.

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Perhaps that is the desired outcome from a policy perspective, but it doesn't look or feel very consumer friendly. Who wants to be told by the government what carriers or service plans they should pick? As further evidence of the challenge or rulemaking that aims to anticipate the marketplace, consider the reports that Sprint may seek to acquire T-Mobile and its spectrum, which would raise a whole new set of issues for the FCC to contemplate.

FCC Can Still Be Fair, Effective Referee. FCC Chairman Tom Wheeler is off to a quick start in his new job, mapping out a vision in which the agency will focus on competitive forces driving outcomes rather than on regulatory decree—and ''fact-based'' rulemaking when market failure requires intervention.

If some industry stakeholders fear ''too much'' spectrum in the hands of one company will drive prices up, quality down and investment out the door, the FCC has multiple tools at its disposal to address the problem, including remedial action on a case-by-case basis. For example, using authority in existing law, the commission could conduct a post-auction review of spectrum holdings in individual markets and require precisely calibrated divestiture in markets where it finds an indi-

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vidual carrier has accumulated too much low-frequency spectrum. As opposed to the blunt instrument of bidding restrictions, this more surgical approach would impose limits only where there is evidence of specific harm.

And not rig the game.

David A. Balto is an antitrust attorney who served as policy director of the Bureau of Competition of the Federal Trade Commission from 1998 to 2001 and attorney advisor to FTC Chairman Robert Pitofsky from 1995 to 1997.