

**Before the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
Washington, DC 20230**

In the Matter of)	
)	
Relocation of and Spectrum Sharing)	
by Federal Government Stations –)	Docket No. 110627357-2209-03
Technical Panel and Dispute Resolution)	
Board)	

COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”) submits these comments in response to the Notice of Proposed Rulemaking issued by the National Telecommunications and Information Administration (“NTIA”) in the above-referenced proceeding and published in the Federal Register on July 17, 2012.^{1/} T-Mobile applauds NTIA for taking steps necessary to implement important provisions of the Middle Class Tax Relief and Job Creation Act of 2012^{2/} governing the process for relocating Federal agencies from spectrum that will be made available for commercial use. The proposed rules will bring needed clarity to current Federal and future commercial spectrum users.

However, in order to ensure that Federal spectrum is made available for commercial operations in the manner contemplated by the Spectrum Act, T-Mobile suggests four changes to the proposed rules. *First*, the rules should better ensure that insufficient Federal agency spectrum Transition Plans do not delay Federal Communications Commission (“FCC” or “Commission”) spectrum auctions. *Second*, the rules should not restrict membership of the

^{1/} *Relocation of and Spectrum Sharing by Federal Government Stations – Technical Panel and Dispute Resolution Board*, Notice of Proposed Rulemaking, Docket No. 110627357-2209-03, 77 Fed. Reg. 41956-41966 (July 17, 2012) (“*NPRM*”).

^{2/} Middle Class Tax Relief and Job Creation Act of 2012, Pub L. No. 112-96, §§ 6701-6703, 126 Stat. 245 (Feb. 22, 2012) (“*Spectrum Act*”).

Technical Panel to Federal employees. *Third*, the rules should provide more guidance to the Technical Panel regarding the information that should be included in agency Transition Plans. *Finally*, the rules should recognize that the Dispute Resolution Board will issue binding decisions, not merely non-binding recommendations.

I. INTRODUCTION AND BACKGROUND

T-Mobile, a wholly-owned subsidiary of Deutsche Telekom AG, is headquartered in Bellevue, Washington, and offers nationwide wireless voice and data services to individual, business and government customers. It is the fourth largest wireless carrier in the United States and serves approximately 33 million subscribers. T-Mobile's spectrum holdings are in the Personal Communications Service ("PCS") and Advanced Wireless Service ("AWS") bands. Because of its use of AWS spectrum, much of which was previously employed by Federal agencies, T-Mobile has first-hand experience in the process by which Federal entities relocate from spectrum auctioned for commercial use.

The Spectrum Act specifies the process by which information about frequencies used by Federal government entities will be made available to potential commercial licensees of that spectrum. Briefly, no later than 240 days before a proposed spectrum auction, each affected Federal agency must prepare a Transition Plan regarding its current and future use of the frequencies that will be auctioned, which is presented to a Technical Panel, which, no later than 30 days after it receives the Transition Plan, must issue a report on the sufficiency of the Transition Plan.^{3/} If the Technical Panel finds a Transition Plan insufficient, the affected Federal entity is required to submit a revised Transition Plan in 90 days.^{4/} The Spectrum Act further provides that NTIA make Transition Plans publicly available on its web site no later than 120

^{3/} *Id.* § 6701(h)(1), (4).

^{4/} *Id.* § 6701(h)(4).

days before each auction.^{5/} If a dispute arises with respect to the implementation of the Transition Plan, the Spectrum Act provides for a Dispute Resolution Board to resolve the matter.^{6/} The *NPRM* proposes rules that would govern the operations of the Technical Panel and the Dispute Resolution Board.^{7/}

T-Mobile has encouraged the redeployment of Federal government spectrum for commercial purposes and is pleased NTIA is now implementing provisions of the Spectrum Act that will clarify parties' obligations and make critical information available during the transition process. As an AWS licensee, T-Mobile has significant experience with the relocation process previously used by Federal agencies. Accordingly, it is pleased to have the opportunity to submit these comments.

II. COMMENTS

A. The Rules Should Clarify That Maintaining Auction Timing Is a Priority.

As noted above, the Spectrum Act prescribes a limited time frame under which Federal agencies would make information available to the public regarding spectrum being transitioned from Federal to commercial use.^{8/} Agencies are required to submit their Transition Plans 240 days prior to an auction.^{9/} Under ideal circumstances, the Technical Panel would approve a Transition Plan during the initial 30-day review period, leaving 210 days for NTIA to post the Transition Plan on its website prior to an auction of the affected spectrum. This would allow NTIA to comfortably meet the Spectrum Act's 120-day pre-auction publication requirement.^{10/}

^{5/} *Id.* § 6701(h)(5).

^{6/} *Id.* § 6701(i).

^{7/} *NPRM* at 41958-61; *id.* at 41962-66 (proposed rules).

^{8/} Spectrum Act § 6701(h).

^{9/} *Id.* § 6701(h)(1).

^{10/} *Id.* § 6701(h)(5).

However, if the Technical Panel *rejects* the Transition Plan 30 days after it receives it and an agency then takes the 90 days permitted by the Spectrum Act to resubmit a Transition Plan, only 120 days of the original 240 days will remain – the precise period required under the Spectrum Act for pre-auction publication of Transition Plans.^{11/} Therefore, any additional review of the Transition Plan once it is resubmitted to the Technical Panel will necessarily impermissibly reduce the pre-auction Transition Plan publication period to less than 120 days.

The *NPRM* recognizes this tight schedule by proposing three alternatives if review of a Transition Plan will impermissibly abbreviate the 120-day pre-auction publication period. *First*, the *NPRM* suggests that NTIA could provide the FCC with the information it has, but note that information from insufficient Transition Plans is excluded.^{12/} *Second*, the *NPRM* proposes that NTIA make available the information it has from insufficient Transition Plans, if it finds that the information insufficiency would not substantially impact or impair the reliability or accuracy of agency costs or timelines.^{13/} *Finally*, NTIA suggests that it could recommend that the FCC delay the auction of the affected spectrum until such time as a sufficient Transition Plan could be timely published.^{14/}

The Spectrum Act attempts to achieve dual goals – it correctly seeks to make more Federal government spectrum available while ensuring that the information available to potential users of that spectrum is complete and accurate. Therefore, while the proposed rules should be designed to ensure that accurate information is available, they cannot interpose unnecessary delay in the auction process, particularly when the FCC is faced with a statutory deadline for

^{11/} *Id.*

^{12/} *NPRM* at 41959.

^{13/} *Id.*

^{14/} *Id.*

auctioning spectrum. Moreover, while T-Mobile assumes that all Federal entities will proceed in good faith, as has been T-Mobile's experience, rules that permit a continuous loop of back and forth between agencies and a Technical Panel may unintentionally allow Federal agencies to delay auction of the spectrum slated for transition.

Therefore, the rules should ensure, to the extent possible, that consideration of Transition Plans not delay auctions, particularly when a statutory deadline looms; delay of an auction should only occur as a last resort. In particular, the rules should require direct communication between the Technical Panel and an agency during the 90-day resubmission period for an insufficient Transition Plan, so that at the end of the additional 90-day period, any issues with the Transition Plan will be resolved. This would avoid situations in which an agency resubmits a modified Transition Plan to the Technical Panel for additional consideration, only to learn later that the modified Transition Plan is still insufficient. Instead, during the 90-day period, the agency should be required to work directly with the Technical Panel, so that at the end of the 90-day period, the Technical Panel can timely approve and publish the Transition Plan in advance of the auction.

If, during the course of the 90-day resubmission period, the Technical Panel determines that an acceptable Transition Plan cannot be available 120 days prior to a planned auction, the Technical Panel should be required to notify the FCC as soon as possible, documenting why no resolution is possible during the 90-day period. If there is no approaching statutorily imposed auction deadline governing the affected spectrum, the FCC can determine whether the public interest will be better served by delaying the auction or proceeding with whatever information may be available, under NTIA's first two alternatives noted above. As the agency with the

responsibility for managing spectrum used by non-Federal entities, the FCC will be in the best position to determine whether to proceed with, or delay, the auction.

Unfortunately, the FCC will not always be able to choose whether to postpone an auction, because, as NTIA recognizes, it must adhere to statutorily imposed deadlines for the auction of certain spectrum.^{15/} In those cases, it is even more critical that accurate and complete Transition Plans are timely available. Therefore, in the event of an initially rejected insufficient Transition Plan and an impending statutorily imposed auction deadline, NTIA's rules should direct the Technical Panel to immediately convene a meeting between it, the head of the agency that submitted the insufficient Transition Plan, and the FCC. In that way, NTIA can ensure that it fulfills its statutory obligation to make necessary spectrum information available, without impeding the FCC's statutory obligation to ensure that the auction of such spectrum occurs within congressionally imposed deadlines.

B. The Rules Should Not Limit the Technical Panel to Federal Employees.

In a departure from the Spectrum Act, the proposed rules would allow NTIA to require that members of the Technical Panel be Federal employees.^{16/} That departure is not justified and, to the contrary, the rules should specify that at least one member of each Technical Panel should be from a non-Federal entity. The data in Transition Plans evaluated by the Technical Panel will be used by non-Federal firms that will bid on Federal spectrum. Representatives from the private sector in general, and from potential bidders in particular, will be in the best position to determine if the information in the Transition Plans is sufficient for prospective spectrum

^{15/} *Id.* (recognizing that delaying an FCC spectrum auction “may not be feasible . . . in light of the statutory deadlines related to the auctions and licensing for particular spectrum bands . . .”).

^{16/} *Id.* at 41958-59 (“NTIA proposes that the initial members of the panel, as well as subsequent members, be Federal employees . . .”); *id.* at 41963 (Proposed Rule § 301.100(b)(2)(ii) (“The Assistant Secretary . . . may impose additional qualifications for one or more members of the Technical Panel . . . , including, but not limited to [requiring that the] member must be a Federal employee . . .”).

holders. This is especially true because private sector industry experts will likely have the most extensive experience with current and developing wireless technologies that will use the spectrum made available through this process.

T-Mobile is mindful that some of the data contained in Transition Plans will be sensitive, and the proposed rules appropriately allow NTIA to require members of the Technical Panel to have appropriate and current security clearances.^{17/} Members of the private sector regularly obtain security clearances to, for example, work as government contractors. Potential members of the Technical Panel can undergo the same process. In the event that a non-Federal Technical Panel member does not possess the appropriate security clearance to review particular data, that information can be excluded from the private sector member's review if necessary.

The Spectrum Act supports extending membership on the Technical Panel to non-Federal personnel. First, the Spectrum Act does not specify the qualifications of Technical Panel members, except to say that each member must be a "radio engineer or technical expert."^{18/} Second, members of the Technical Panel are merely "appointed" by the heads of the Office of Management and Budget ("OMB"), NTIA, and the FCC,^{19/} unlike members of the Dispute Resolution Board, which the Spectrum Act envisions will be "representatives" of OMB, NTIA, and the FCC – suggesting that the members of the Dispute Resolution Board (unlike Technical Panel members) must be Federal employees.^{20/} The Spectrum Act simply does not specify

^{17/} *NPRM* at 41958; *id.* at 41963 (Proposed Rule § 301.100(b)(2)(i) ("The Assistant Secretary . . . may impose additional qualifications for one or more members of the Technical Panel . . . , including, but not limited to [requiring that the] member must have appropriate and current security clearance to enable access to any classified or sensitive information that may be associated with or relevant to agency Transition Plans"))).

^{18/} Spectrum Act § 6701(h)(3)(B)(ii).

^{19/} *Id.* § 6701(h)(3)(B)(i).

^{20/} *Id.* § 6701(i)(2)(B).

additional qualifications for Technical Panel members (other than the requirement that they be technical experts) or require that they be representatives of particular Federal entities. Had Congress intended to impose additional qualifications on Technical Panel members, as it did on Dispute Resolution Board members, it could have. Because Congress did not impose those additional qualifications, the Technical Panel should include non-Federal experts.

C. The Rules Should Provide More Guidance to the Technical Panel and Agencies.

The proposed rules contain no guidance about the type of information that Federal agencies are required to provide to the Technical Panel. A clear understanding of the information required will allow agencies to supply better information to the Technical Panel, permitting more Transition Plans to be approved without resubmission. T-Mobile recognizes that, according to the *NPRM* and as required by the Spectrum Act, NTIA plans to seek public input on the “common format” that Federal agencies are required to use in submitting Transition Plans.^{21/} However, the rules should go beyond a common format and instead, should specify the information that the Technical Panel will require to conduct a timely and thorough analysis of Transition Plans. Moreover, the rules governing Transition Plans need not be limited to the matters covered by Section 6701(h)(2) of the Spectrum Act. To the contrary, the more relevant the information provided to the Technical Panel, the greater the likelihood that the Technical Panel will be able to approve submitted Transition Plans and that those Transition Plans will be useful to prospective auction participants.

^{21/} *NPRM* at 41959 (noting that “NTIA will be seeking public input on a ‘common format for all Federal entities to follow in preparing transition plans’ in accordance with the new law”); Spectrum Act § 6701(h)(1) (“The NTIA shall specify, after public input, a common format for all Federal entities to follow in preparing transition plans . . .”).

Accordingly, the rules should specify that agencies must include not only the information specified in Section 6701(h)(2),^{22/} but also other information that the Spectrum Act requires Federal agencies to consider. In particular, the rules should specify that Transition Plans include the realistic costs of achieving comparable capability. While Section 6701(h)(2)(G) states that Transition Plans should include the “plans and timelines” for various relocation activities, it does not specifically require the provision of information about the costs of achieving comparable capability of systems as outlined in Section 6701(a)(3) of the Spectrum Act.^{23/} Transition Plans should include those projected costs.

Similarly, the Spectrum Act notes that comparable capability may be achieved in several ways.^{24/} The Transition Plans should include an agency’s assessment of how it would achieve comparable capability. While the Spectrum Act specifically requires that Transition Plans include information about the “steps to be taken by the Federal entity to relocate . . . or share . . . ,”^{25/} that information is only a subset of what the Spectrum Act considers important regarding an agency’s evaluation of relocation costs. Accordingly, the rules should specify that agencies provide the information specified in Section 6701(h)(2) and (a)(3) of the Spectrum Act. By specifying in greater detail the information that agencies are required to submit, and that the Technical Panel will have available to consider, NTIA will ensure that Transition Plans are more complete and will make it less likely that the Technical Panel will find Transition Plans insufficient.

^{22/} Spectrum Act § 6701(h)(2).

^{23/} *Id.* § 6701(a)(3).

^{24/} *Id.*

^{25/} *Id.* § 6701(h)(2)(D).

D. Rules Stating That the Dispute Resolution Board’s Decisions Are Non-Binding Conflict With the Spectrum Act.

The *NPRM* states that “[b]ecause the new law does not confer independent authority on the [Dispute Resolution Board] to bind the parties,” the Dispute Resolution Board’s decisions should “take the form of specific written recommendations” that are non-binding on the parties.^{26/} However, limiting the Dispute Resolution Board’s authority to the issuance of non-binding recommendations is contrary to the statutory scheme.

As an initial matter, the *NPRM*’s assertion that Congress did not provide the Dispute Resolution Board with “independent authority . . . to bind the parties” to the dispute is incorrect. In fact, the Spectrum Act expressly conferred such authority, providing that the NTIA-established Dispute Resolution Board should “resolve” disputes relating to Transition Plans and should “rule” on any such dispute within 30 days.^{27/} Rather than establish a mechanism to provide parties with non-binding advice or guidance, the Spectrum Act specifically directs the Dispute Resolution Board to definitively resolve such disputes.

In addition, under the Administrative Procedure Act (“APA”), “an appeal to ‘superior agency authority’ is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review.”^{28/} Indeed, courts routinely review decisions from subordinate

^{26/} *NPRM* at 41961; *id.* at 41966 (Proposed Rule § 301.220(e)).

^{27/} Spectrum Act § 6701(i)(1) (“If a dispute arises between a Federal entity and a non-Federal user regarding the execution, timing, or cost of the transition plan submitted by the Federal entity . . . , the Federal entity or the non-Federal user may request that the NTIA establish a dispute resolution board to *resolve* the dispute.”) (emphasis added); *id.* § 6701(i)(4) (providing that “the dispute resolution board shall *rule* on the dispute” within 30 days) (emphasis added).

^{28/} *Darby v. Cisneros*, 509 U.S. 137, 154 (1993).

agency offices or decision-makers.^{29/} In this case, there is no statutory or regulatory requirement for agency review prior to judicial appeal. To the contrary, instead of requiring an appeal to a superior agency authority, Congress specifically provided that the Dispute Resolution Board would resolve particular disputes and that “a decision of the dispute resolution board may be appealed to the United States Court of Appeals for the District of Columbia Circuit.”^{30/} Because Congress expressly provided parties with the ability to appeal Dispute Resolution Board decisions directly to the D.C. Circuit, no further process at NTIA, OMB, or the FCC is required prior to a party’s exercise of that appeal right.

If the Dispute Resolution Board merely provides a recommendation, it will frustrate the statutory directive that its decisions may be appealed to the D.C. Circuit. Under the APA, the courts’ “authority to review the conduct of an administrative agency is limited to cases challenging ‘final agency action.’”^{31/} A decision from a Federal agency is “final for purposes of appellate review when it ‘imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.’”^{32/} As the Supreme Court has ruled, “[a]s a general matter, two conditions must be satisfied for an agency action to be ‘final’: (1) the action must mark the consummation of the agency’s decisionmaking process – it must not be of a

^{29/} See, e.g., *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 244-45 (D.C. Cir. 1980) (finding certain types of preliminary orders accepting or rejecting rate filings immediately reviewable given their finality, irremediable consequences, and relation to agency discretion); *Oregon Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977 (9th Cir. 2006) (finding annual operating instructions issued to holders of grazing permits reviewable as final agency action).

^{30/} Spectrum Act § 6701(i)(7).

^{31/} *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726, 731 (D.C. Cir. 2003); 5 U.S.C. § 704.

^{32/} *Papago*, 628 F.2d at 239 (quoting *Cities Servs. Gas Co. v. FPC*, 255 F.2d 860, 863 (10th Cir. 1958)); *Village of Bensenville v. FAA*, 457 F.3d 52, 69 (D.C. Cir. 2006) (finding that a letter of intent issued by a Federal agency “is non-final because it does not impose an obligation, deny a right, or otherwise fix some legal relationship”; it has no “direct and appreciable legal consequences” and therefore cannot be judicially reviewed).

merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.”^{33/} Non-binding recommendations from an agency – like those proposed by NTIA – do not constitute “final agency action” and are therefore non-reviewable.^{34/} Consequently, such recommendations issued by the Dispute Resolution Board would *not* be reviewable, in direct contravention of the Spectrum Act’s right of appeal of such decisions to the D.C. Circuit.

In addition to undermining the statutory directive that Dispute Resolution Board decisions be appealable to the D.C. Circuit, treating them as recommendations would render the dispute resolution process ineffective. It is unlikely that either Federal entities or non-Federal users will seek to initiate a likely time-consuming and resource-intensive process to obtain a non-

^{33/} *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Reliable*, 324 F.3d at 731 (stating that agency action is deemed final only if it is “definitive” and has a direct and immediate effect on the party challenging the agency action); *Genendo Pharm. N.V. v. Thompson*, 308 F. Supp. 2d 881, 884-85 (N.D. Ill. 2003) (finding that the positions of agency officials in carrying out their obligations do not amount to final agency action subject to review); *see also Sierra Club v. Dep’t of Energy*, 825 F. Supp. 2d 142, 156-57 (D.D.C. 2011) (finding that an agency decision was not final because it did not create legal consequences, “either technically or as a practical matter”).

^{34/} *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992) (finding an agency report non-final, and therefore non-reviewable, because the report carried “no direct consequences” and served “more like a tentative recommendation than a final and binding determination”); *Bennett*, 520 U.S. at 177-78 (discussing *Dalton v. Specter*, 511 U.S. 462, 478 (1994)) (finding that recommendations by the Secretary of Defense were not final agency actions appealable to the courts because the recommendations “were in no way binding” in that they were “purely advisory and in no way affected the legal rights of the relevant actors”); *Travelers Indem. Co. v. United States*, 593 F. Supp. 625, 627 (N.D. Ga. 1984) (finding that “even though formal procedures had been used, the . . . proceeding did not order anybody to do anything,” and therefore was not final agency action – “before agency action can be deemed to have occurred, the agency must do something that is binding on the parties”) (internal citations omitted); *Ctr. for Auto Safety & Public Citizen, Inc. v. Nat’l Hwy. Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006) (finding that policy guidelines “do not determine any rights or obligations, nor do they have any legal consequences,” and therefore “the guidelines cannot be taken as ‘final agency action,’ nor can they otherwise be seen to constitute a binding legal norm”); *Reliable*, 324 F.3d at 732 (finding that requesting voluntary corrective action is not agency action because “no legal consequences flow from the agency’s conduct to date, for there has been no order compelling [the party at issue] to do anything”); *id.* (finding that decisions should not be reviewable “when the agency’s position is tentative”); *Chicago Truck Drivers v. Nat’l Mediation Bd.*, 670 F.2d 665, 668 (7th Cir. 1981) (finding that any agency action must be definitive and have a direct and immediate effect to be deemed final for purposes of judicial review); *Int’l Tel. & Tel. Corp. v. Local 134*, 419 U.S. 428, 442-48 (1975) (finding that an agency process without binding effect, even if it leads to significant “practical consequences,” is not reviewable under the APA).

binding result. Removing the “teeth” from the dispute resolution mechanism by rendering its decisions non-binding makes it wholly ineffective at fulfilling its statutory obligation to resolve spectrum relocation disputes. Instead, such a non-binding mechanism creates more questions than it answers – it is not clear what would happen after a non-binding decision is rendered, except that the efficient transition of Federal spectrum to commercial entities would be impeded, contrary to the public interest.

III. CONCLUSION

While T-Mobile applauds NTIA for taking the steps necessary to expedite the transition of spectrum to commercial use, it requests that NTIA adopt the recommendations specified herein in order to ensure that its rules effectively achieve Spectrum Act goals.

Respectfully submitted,

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