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Press Release

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PHOENIX CENTER FINDS SEVERE LEGAL AND ECONOMIC DEFECTS IN DOJ'S ATTEMPT TO DESIGN STRUCTURE OF THE U.S. MOBILE WIRELESS MARKET

Department of Justice Provides No Legitimate Analysis to Support Position that FCC Should Rig Upcoming Voluntary Incentive Auction for Broadcast Spectrum

WASHINGTON, D.C. — Last year, Congress passed the Middle Class Tax Relief and Job Creation Act of 2012 which directed the Federal Communications Commission to design and hold a voluntary incentive auction to transfer the “beachfront” spectrum held by television broadcasters to the mobile wireless broadband sector. This auction will likely prove the most complicated ever implemented, since the auction design will determine not only which firms receive spectrum but which broadcasters make their spectrum available. One important concern for the upcoming and highly-complex auction is the degree to which the largest mobile wireless providers will be allowed to participate. Recently, the U.S. Department of Justice encouraged the FCC to engineer the auction to favor specific providers in an attempt to equalize competition among mobile wireless competitors. In a new study released today entitled *Equalizing Competition Among Competitors: A Review of the DOJ's Spectrum Screen Ex Parte Filing*, the Phoenix Center reviews the Department of Justice's arguments and finds significant legal and economic defects.

First, the Phoenix Center's analysis demonstrates that the DOJ's notion of “foreclosure value” is not a sufficient justification for designing the auction to favor Sprint and T-Mobile. Instead, the Center's paper demonstrates that the efficiency of an auction's outcome should be based on relative “use value” —i.e., the present value of the future profits attributable to the use of new spectrum—and there are good reasons to suspect the use value of larger carriers exceeds that of smaller carriers. Accordingly, contrary to the DOJ's unsupported assertions, economic theory suggests that consumers are better off when the larger carriers are able to obtain spectrum in open auctions. As such, the DOJ is wrong to conclude that “absent compelling evidence” the auction should be manipulated to pick winners; rather, in the absence of compelling evidence, the auction should be open to all bidders.

Second, the Center demonstrates that the DOJ's proposal is inconsistent with its own depiction of how competition functions in the wireless market. While the DOJ continues to cling to a textbook theory that more firms automatically equal lower prices, the DOJ simultaneously concedes that U.S. mobile wireless firms are currently facing spectrum exhaust. Published

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research shows that when wireless firms face spectrum exhaust, an increase in the number of firms may lead to higher prices and lower quality.

Third, the Center shows that it is well-established legal doctrine that government intervention, whether by the FCC or the DOJ, may not be directed at equalizing competition among competitors. Yet, the DOJ's recommendation is plainly aimed at doing so. Moreover, the DOJ's attempt to put the broadcast spectrum into the hands of particular firms effectively returns spectrum allocation to the comparative hearing process, where government—not markets—selects deserving entities for spectrum licenses in a process disguised as an “auction” among pre-selected winners.

“While the DOJ's ex parte is long on self-promotion about its purported expertise regarding the economics of mobile wireless markets, the DOJ's pleading is remarkably short on substance,” said study co-author and Phoenix Center President Lawrence J. Spiwak. “As such, the FCC should accord the DOJ's pleading little probative weight.”

“The purpose of a spectrum auction is to take the spectrum allocation decision out of the hands of politicians and put it into the hands of a market process,” said study co-author and Phoenix Center Chief Economist Dr. George S. Ford. “If the FCC adopts the DOJ's recommendation to design the mobile wireless market to ‘equalize’ competition among four national carriers, then there is really no point to holding an auction—the winners are already selected.”

The complete copy of the study, PHOENIX CENTER POLICY BULLETIN NO. 33: *Equalizing Competition Among Competitors: A Review of the DOJ's Spectrum Screen Ex Parte Filing*, may be downloaded free from the Phoenix Center's web page at: <http://www.phoenix-center.org/PolicyBulletin/PCPB33Final.pdf>.

The Phoenix Center is a non-profit 501(c)(3) organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of telecommunications and high-tech industries.