

**Before the
U.S. DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
Washington, DC 20230**

In the Matter of)	
)	
Relocation of and Spectrum Sharing by)	Docket No. 110627357-2209-03
Federal Government Stations – Technical Panel)	RIN 0660-AA26
And Dispute Resolution Board)	

COMMENTS

Ericsson hereby submits its comments in response to the Notice of Proposed Rulemaking (“NPRM”) concerning regulations governing the Technical Panel and Dispute Resolution Boards that are to facilitate the relocation of, and spectrum sharing with, federal government stations in spectrum bands to be opened to non-government use.¹ The National Telecommunications & Information Administration (“NTIA”) is conducting this proceeding as directed by Section 6701 of the Middle Class Tax Relief and Job Creation Act of 2012,² which amends Section 113 of the National Telecommunications and Information Administration Organization Act.³

Ericsson is concerned that the proposed rules appear to deviate from the intention of Congress to establish a neutral dispute resolution process that will facilitate the relocation of, or spectrum sharing with, federal government spectrum users. Specifically, the issues Ericsson believes need to be addressed pertain to (1) the effect of a ruling by a Dispute Resolution Board; (2) the membership of the Technical Panel; (3) the need to consider a delay of a spectrum auction only as a last resort; and (4) the scope of the Technical Panel’s reports.

¹ 77 Fed. Reg. 41956 (July 17, 2012).

² Pub. L. 112-96, 126 Stat. 245-252 (2012).

³ 47 U.S.C. § 923 (referred to herein, as amended, as “Section 113”).

1. Effect of Dispute Resolution Board Rulings. The NPRM proposes that rulings by a Dispute Resolution Board take the form of “recommendations to NTIA, OMB, the Commission, or the parties, as applicable,” to take remedial steps, and states that the law “does not confer independent authority on the board to bind the parties.”⁴ Ericsson submits that this is inconsistent with the plain language of the statute. The statute states that the dispute resolution board’s duty is to “resolve the dispute,” or “rule on the dispute,”⁵ not to recommend how others might resolve it.

If there were any doubt that the dispute resolution board is authorized to issue a binding ruling, that doubt is dispelled by Congress when it wrote: “a *decision* of the dispute resolution board may be appealed to the United States Court of Appeals for the District of Columbia Circuit.”⁶ That court, as an Article III court, only has jurisdiction to hear concrete disputes. Non-final recommendations that may be changed or countermanded by another agency are not ripe for judicial review. In *CTIA—The Wireless Ass’n v. FCC*, 530 F.3d 984 (D.C. Cir. 2008), the D.C. Circuit held that a Federal Communications Commission (“Commission”) rule was not ripe for review because it remained subject to review by the Office of Management and Budget (which subsequently disapproved the rule).

Because the statute does not suggest that Congress intended dispute resolution boards to issue only recommendations, and authorizes judicial review of the boards’ “decision[s],” NTIA should confirm that dispute resolution board rulings will be binding on the parties.

2. Membership of the Technical Panel. In Section 113(h)(3)(B) Congress set forth the clear and unambiguous criteria for membership of the Technical Panel: there are to be three members, one appointed by the Director of the Office of Management and Budget (“OMB”), one

⁴ 77 Fed.Reg. at 41961.

⁵ Section 113(i), (i)(4).

⁶ Section 113(i)(7) (emphasis added).

appointed by the Assistant Secretary of Commerce who heads NTIA, and one appointed by the Chairman of the Federal Communications Commission (“FCC”); each member must be a radio engineer or a technical expert.

The NPRM proposes to impose an additional requirement. Specifically, it proposes that each member be a federal employee.⁷ The statute, however, does not empower NTIA to add new qualification requirements to those established in the statute. The statute does allow each of the appointing officials to determine whether to appoint a federal employee, a state employee, or an expert from the private sector. A prior draft of the bill, by contrast, would have required that the appointee *not* be “employed by, or a paid consultant to, any Federal or State governmental agency.”⁸ By omitting that limitation in the final version that became law, Congress removed a strict limitation on eligibility and instead gave the appointing officials the flexibility to appoint the most qualified persons, regardless of their employers.

The NPRM proposes to strip that flexibility away and tilt the balance of the panel toward a government-centric point of view. Not only will this significantly restrict the pool of candidates for membership on the Technical Panel, but it may disqualify one or more of the most qualified candidates – a private sector candidate. It will also tend to ensure that all of the members come from agencies employing radio engineers—*i.e.*, agencies that use federal spectrum—which may result in a loss of balance on the Technical Panel. Ensuring a diversity of membership on the Technical Panel will help avoid a bias in favor of maintaining or sharing government spectrum with private users rather than reallocating government-used spectrum for commercial use. Accordingly, Ericsson urges NTIA not to adopt federal employment as a qualification requirement.

⁷ Proposed 47 C.F.R. § 301.100(b)(ii).

⁸ H.R. 3019, 111th Cong., 1st Sess., § 2(b) (as introduced June 24, 2009, by Rep. Inslee).

3. Delay of Spectrum Auctions. The delay of a spectrum auction should be avoided if at all possible, and not considered to be just another “option” in the event the Technical Panel determines a transition plan is “insufficient.”⁹ The NPRM correctly observes that one of the key themes of the President’s Spectrum Initiative is the need to develop new tools to free up spectrum from federal government users in order to attract public and private sector investment in wireless broadband service.¹⁰ Given the recognized need for wireless broadband service, spectrum auctions should be delayed only when absolutely necessary.

Ericsson understands that circumstances may arise where a transition plan requires additional review by the Technical Panel or revision by the submitting agency. NTIA should require the agency that submitted the insufficient plan to re-file a plan with an urgency, so as not to delay the auction. Delay of an auction should only be considered in cases where moving forward would imperil a successful spectrum auction.

4. Scope and Content of the Technical Panel’s Report(s). The NPRM seeks comment on whether the Technical Panel’s report(s) should be limited to “those assessments and findings most relevant to NTIA’s ability to compile estimated relocation costs and timelines for purposes of the notifications required under the [Commercial Spectrum Enhancement Act].”¹¹ The statute itself specifies the Technical Panel’s reporting responsibility, however. It specifies that

the Technical Panel shall submit to the NTIA and to the Federal entity a report on the sufficiency of the plan, including whether the plan includes the information required by paragraph (2) and an assessment of the reasonableness of the proposed timelines and estimated relocation or sharing costs, including the costs of any proposed expansion of the capabilities of a Federal system in connection with relocation or sharing.¹²

⁹ 77 Fed.Reg. at 41959.

¹⁰ 77 Fed.Reg. at 41956.

¹¹ 77 Fed.Reg. at 41959.

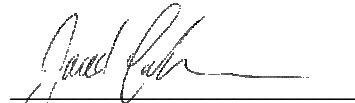
¹² Section 113(h)(4).

As this makes clear, the statute is not limited to assessments and findings most relevant to NTIA; it includes assessments and findings relevant to the federal spectrum-using agency's transition plan. Accordingly, Ericsson urges NTIA not to limit unduly the scope and content of the Technical Panel's report(s).

Ericsson appreciates this opportunity to address some of the issues raised by the NPRM on the operations of the Technical Panel and dispute resolution boards and urges NTIA to modify its proposed rules as set forth above.

Respectfully submitted,

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