

**Before the
Federal Communications Commission
Washington, DC 20554**

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| In re Applications of |) | |
| |) | |
| T-Mobile US, Inc. and |) | WT Docket No. 18-197 |
| Sprint Corporation |) | DA 18-740 |
| |) | |
| For Consent to Transfer Control of |) | |
| Licenses and Authorizations |) | |

PETITION TO DENY OF BROADCAST DATA CORP.

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PETITION TO DENY OF BROADCAST DATA CORP.

Broadcast Data Corp. (“Petitioner”), by its counsel and in response to the Public Notice, DA 18-740 (July 18, 2018), hereby petitions the Commission to deny the above-captioned applications (“Applications”) of T-Mobile US, Inc. (“T-Mobile”) and Sprint Corporation (“Sprint”) (collectively, “Applicants”) for the Commission's consent to the transfer of control of the various radio station authorizations and licenses held by Sprint (“Merger Transaction”).¹ In support thereof, the following is respectfully submitted.

I. BACKGROUND

A. Petitioner is a Party in Interest

Petitioner owns 33.3% of Lakeland BDC-MMDS Company (“Lakeland BDC”), which holds Broadcast Radio Service (“BRS”) geographic service area (“GSA”) licenses for Channels E1, E2, E3 and E4 in the Lakeland – Winter Haven, Florida market (“Lakeland Market”). These four channels add up to 22.5 MHz of spectrum. Sprint holds BRS licenses and leases Educational Broadband Service (“EBS”) channels in the Lakeland – Winter Haven, Florida market. In the six largest counties covered by Lakeland BDC’s GSA, Sprint’s combined

¹ For ease of reference, a post-merger T-Mobile/Sprint entity is referred to as “New T-Mobile.”

BRS/EBS holdings range from 135 – 186 MHz.² Nationwide, Sprint holds an average of 160 MHz of BRS/EBS spectrum in its top 100 markets,³ and an average of 120 MHz of BRS/EBS spectrum in 90 of the top 100 U.S. markets.⁴ In the Lakeland Market, and many markets nationwide, Sprint has monopolized the 194 MHz of spectrum available in the BRS/EBS band.

Petitioner is a party in interest because it is a potential competitor to Sprint and T-Mobile in using or leasing BRS/EBS spectrum to provide broadband wireless service in the Lakeland Market.

B. The Merger Transaction is Inconsistent with the Public Interest

Under the Communications Act, the Commission must review transactions involving authorizations to determine whether the proposed transaction would serve "the public interest, convenience, and necessity."⁵ Inherent in its analysis is an examination of the proposed transaction's effects on competition, on consumers, and on competitors.⁶ For example, no person may acquire an FCC authorization if "the purpose is and/or the effect thereof may be to substantially lessen competition."⁷

² Source: Allnet Insights and Analysis. See Table 1 below. Sprint holds the BRS BTA overlay license for each of the four channels in the E group for which Lakeland BDC holds the BRS GSA license.

³ Comments of Sprint CTO John Saw at Mobile World Congress 2018, cited in <https://www.zdnet.com/article/sprint-cto-at-mwc-we-have-the-best-5g-spectrum/>, published Feb. 28, 2018 ("In 2.5, we have an average of 160MHz of spectrum in our top 100 markets, which is a lot of spectrum.")

⁴ See, *Policies Regarding Mobile Spectrum Holdings*, Report and Order, 29 FCC Rcd. 6133 (2014) at ¶ 119. ("Spectrum Screen Order").

⁵ See, 47 U.S.C. §§ 214(a) and 310(d).

⁶ See, *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd. 17444, 17461-62 (2008) ("Verizon-Alltel Merger Order").

⁷ See, 47 U.S.C. § 314.

If, after reviewing the record, the Commission determines that there is a substantial and material question of fact, or that it cannot determine that the proposed transaction would serve the public interest, it must designate the Applications for an administrative hearing.⁸ Applicants bear the burden of proof by a preponderance of the evidence, to demonstrate that the Applications will serve the public interest, convenience, and necessity and otherwise be consistent with the Communications Act.⁹ For the reasons set forth below, Applicants have not met that burden of proof.

The Merger Transaction would enhance Sprint's monopolization of BRS/EBS spectrum in the Lakeland Market and in many markets nationwide, and thereby substantially lessen competition in these markets. As the Commission has recognized, "[c]ompetition ... depends critically upon the availability of suitable spectrum as a necessary input in the provision of mobile wireless services."¹⁰ For the reasons explained in further detail below, there is inadequate BRS/EBS spectrum in the Lakeland Market and many other market nationwide -- after removing from the equation the extensive BRS/EBS spectrum held by Sprint -- for Petitioner or another potential competitor to launch a viable wireless broadband service in the BRS/EBS band. Accordingly, the Commission should deny the Applications, or grant the Applications subject to appropriate conditions requiring the divestiture of suitable amounts of BRS/EBS spectrum to ensure that potential competitors have access to enough spectrum to provide a viable and competitive broadband wireless service.

⁸ See, 47 U.S.C. § 309(e).

⁹ *Verizon-Alltel Merger Order*, 23 *FCC Rcd.* at 17460-61.

¹⁰ *Spectrum Screen Order* at ¶ 1.

II. ARGUMENT

A. The Merger Transaction Would Substantially Reduce Competition in the Provision of Broadband Wireless Service

The Merger Transaction would substantially reduce competition, or potential competition, in the Lakeland Market and many markets nationwide, by exacerbating Sprint's dominance of the BRS/EBS spectrum band. Petitioner submits that 45 MHz or more (ideally, 60 MHz) of BRS/EBS spectrum is necessary to operate a viable broadband wireless service.¹¹ Further, this threshold level of BRS/EBS spectrum must be available in a critical mass of markets nationwide in order for a competitor to achieve the economies of scale necessary to compete successfully with incumbent wireless broadband providers. Petitioner holds 22.5 MHz of spectrum. At present, Petitioner is unable to purchase additional spectrum in the BRS/EBS band, because Sprint has locked up the vast majority of that spectrum. At the same time, Petitioner is unable to sell or lease its spectrum in the BRS band, because no new entrant can purchase enough spectrum to operate a viable wireless broadband service. Nationwide, other holders of BRS/EBS spectrum, or potential entrants into the wireless broadband service market, face the same constraints.

The Merger Transaction would exacerbate the harm to Petitioner. At present, T-Mobile is a potential purchaser of BRS/EBS spectrum. T-Mobile has demonstrated strong interest in mid-band spectrum for 5G (capacity) deployments, as evidenced by its very active participation in Commission proceedings regarding the 3.55 – 3.7 GHz CBRS band and the 3.7 – 4.2 GHz C-band.¹²

¹¹ See, Comments of the Wireless Internet Service Providers Association, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, filed Aug. 8, 2018 at 21.

¹² See, *In the Matter of Promoting Investment in the 3550 – 3700 MHz Band*, GN Docket No. 17-258, Notice of Proposed Rulemaking, where ECFS shows 13 filings by T-Mobile; *Amendment of the Commission's Rules with*

The Merger Transaction would eliminate a critical “competing buyer” from the market.

The FTC/DOJ Merger Guidelines state that “[m]ergers of competing buyers can enhance market power on the buying side of the market”¹³

Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods and services. However, when that is not the case, the Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.¹⁴

The Merger Guidelines continue:

Reduction in prices paid by the merging firms not arising from the enhancement of market power can be significant in the evaluation of efficiencies from a merger¹⁵

Finally, Example 24 is relevant.

Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buying power and depress the price paid to farmers for this product.¹⁶

Conversely, if Petitioner or another entity could purchase or lease enough BRS/EBS spectrum, entry of a new competitor providing wireless broadband service in the Lakeland Market, and markets nationwide, would be viable. As noted above, this is not possible because Sprint has monopolized the BRS/EBS spectrum.

Regard to Commercial Operations in the 3550 – 3650 MHz Band, WT Docket No. 12-354, Notice of Proposed Rulemaking (22 filings); *Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz*, GN Docket No. 17-183, Notice of Inquiry (12 filings); and *Expanding Flexible Use of the 3.7 – 4.2 GHz Band*, GN Docket No. 18-122, Notice of Proposed Rulemaking (6 filings). In each of these four proceedings, T-Mobile filed Comments and Reply Comments, as well as numerous *ex parte* filings. The number of filings is as of August 27, 2018. Petitioner recognizes that there is some double counting because of the overlap of Dockets 17-183 and 18-122, and because certain *ex parte* filings covered multiple dockets. Sprint, which has monopolized the BRS/EBS band, filed a grand total of two documents in the four proceedings listed above, the last of which was filed in October 2014.

¹³ *U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines* (Aug. 19, 2010) at 32.

¹⁴ *Id.* at 33.

¹⁵ *Id.*

¹⁶ *Id.*

B. If the Merger Transaction is Approved, New T-Mobile Must be Required to Divest Spectrum Holdings above the 238.5 MHz Spectrum Threshold

The FCC employs an initial spectrum screen to determine whether a proposed transaction will result in the acquiring entity holding more than one-third of the spectrum available for mobile broadband service.¹⁷ When an acquiring party proposes to hold more than one-third of low- and mid-band spectrum, the FCC will undertake an analysis to determine potential anti-competitive effects.¹⁸

Currently, the initial spectrum screen is 715 MHz, and accordingly, one-third of the spectrum screen for any single CMA is 238.5 MHz.¹⁹ Absent a divestiture requirement, New T-Mobile would hold well in excess of 238.5 MHz in each of the six largest counties within the GSA of Lakeland BDC, and over 300 MHz in four of those counties, as set forth in Table 1 below.²⁰

Table 1:

| County | Total Sprint EBS | Attributable Sprint EBS | Total Sprint BRS | Attributable Sprint BRS | Attributable Sprint (all bands) | Attributable T-Mobile (all bands) | Total Attributable New T-Mobile |
|--------------|------------------|-------------------------|------------------|-------------------------|---------------------------------|-----------------------------------|---------------------------------|
| Hillsborough | 112.5 | 89 | 73.5 | 68 | 206 | 117 | 323 |
| Pasco | 112.5 | 89 | 73.5 | 68 | 206 | 117 | 323 |
| Osceola | 106.5 | 84 | 73.5 | 68 | 206 | 122 | 328 |
| Polk | 106.5 | 84 | 28.5 | 23 | 151 | 122 | 273 |
| Hardee | 106.5 | 84 | 28.5 | 23 | 156 | 97 | 253 |
| Lake | 106.5 | 84 | 73.5 | 68 | 206 | 102 | 308 |

¹⁷ See, *Spectrum Screen Order* at ¶ 246.

¹⁸ See, generally, *Spectrum Screen Order*.

¹⁹ *Id.*, at ¶¶ 76 – 134.

²⁰ Source: Allnet Insights and Analysis

Sprint holds similar levels of BRS/EBS spectrum in many markets across the U.S. As noted above, Sprint's CTO has confirmed Sprint's dominance of the BRS/EBS spectrum, stating that nationwide, Sprint holds an average of 160 MHz of BRS/EBS spectrum in its top 100 markets.²¹ On average then, only 34 MHz of BRS/EBS spectrum is available in these markets to potential competitors.

The Assistant Attorney General for the Antitrust Division recently remarked that if there is evidence that a particular aspect of a merger would harm competition, "businesses should be prepared to divest those aspects that harm competition."²² "Antitrust enforcement should ensure that the markets allow for new, more efficient, more innovative competitors to enter."²³

The amount of spectrum that would be held by New T-Mobile is so far above the 238.5 MHz initial spectrum screen as to harm competition. New T-Mobile makes the unsupported assertion that, "post-transaction, competitors to New T-Mobile will continue to have access to sufficient spectrum to compete."²⁴ Petitioner submits that this is just plain incorrect; with only 22.5 MHz of BRS spectrum, and little if any access to additional BRS/EBS spectrum in the Lakeland Market, there is insufficient spectrum for Petitioner or another entity to provide a competitive mobile broadband service.

²¹ Comments of Sprint CTO John Saw at Mobile World Congress 2018, cited in <https://www.zdnet.com/article/sprint-cto-at-mwc-we-have-the-best-5g-spectrum/>, published Feb. 28, 2018 ("In 2.5, we have an average of 160MHz of spectrum in our top 100 markets, which is a lot of spectrum.').

²² See, remarks of Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, "*The Street Speaks With Makan Delrahim Ahead of the AT&T-Time Warner Decision*," <https://www.thestreet.com/video/thestreet-speaks-with-makan-delrahim-ahead-of-the-att-time-warner-decision-14616199> (June 9, 2018).

²³ See, Makan Delrahim, "*Don't Stop Believin': Antitrust Enforcement in the Digital Era*," University of Chicago's Antitrust and Competition Conference, (April 19, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos>.

²⁴ See, *Application Public Interest Statement*, at p. 135.

There is no public interest reason to allow New T-Mobile to hold more than 238.5 MHz of spectrum in any market. Pending a full examination at a hearing, Petitioner asserts that the merged entity should not be permitted to hold more than 238.5 MHz of spectrum. A divestiture requirement that ensures that competitors nationwide have access to at least 45 MHz of BRS/EBS spectrum will enable facilities-based competition for mobile broadband services. Petitioner submits that the most appropriate spectrum to divest is the BRS/EBS spectrum because Sprint currently monopolizes this spectrum, making it difficult, if not impossible, for competitors to access enough BRS/EBS spectrum to provide a viable wireless broadband service.

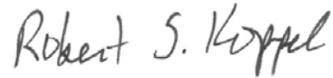
Divestiture will permit a public sale of BRS/EBS spectrum allowing potential competitors the opportunity to acquire sufficient spectrum to offer high-speed wireless broadband service.

III. CONCLUSION

The Merger Transaction would enhance Sprint's monopolization of BRS/EBS spectrum in the Lakeland Market and in many markets nationwide, and thereby substantially lessen competition in these markets. Accordingly, the Commission should deny the Applications, or grant the Applications subject to appropriate conditions requiring the divestiture of suitable amounts of BRS/EBS spectrum to ensure that potential competitors have access to enough spectrum to provide a viable and competitive broadband wireless service.

Respectfully submitted,

BROADCAST DATA CORP.



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August 27, 2018

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AFFIDAVIT

I, James Lindstrom, am the sole shareholder of Broadcast Data Corp. (“BDC”). BDC owns 33.3% of Lakeland BDC-MMDS Company (“Lakeland BDC”).

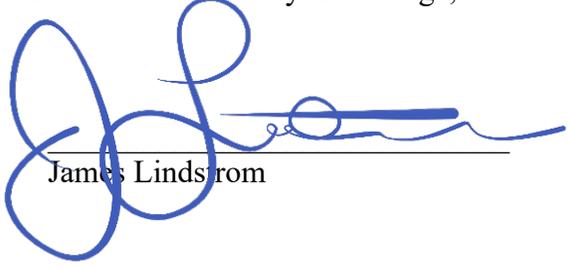
This statement is provided in connection with BDC’s Petition to Deny (“Petition”) T-Mobile’s proposed acquisition of Sprint Corporation’s mobile voice and broadband business.

Lakeland BDC holds Broadcast Radio Service (“BRS”) geographic service area (“GSA”) licenses for Channels E1, E2, E3 and E4 in the Lakeland – Winter Haven, Florida market (“Lakeland Market”).

A potential competitor to Sprint would need a minimum of 45 MHz or more (ideally, 60 MHz) of BRS and Educational Broadband Service (“EBS”) spectrum to provide a viable, competitive wireless broadband service in the Lakeland Market. Further, this threshold level of BRS/EBS spectrum must be available in a critical mass of markets nationwide in order for a competitor to achieve the economies of scale necessary to compete successfully with incumbent wireless broadband providers. The Merger Transaction would substantially reduce competition, or potential competition, in the Lakeland Market and many markets nationwide by exacerbating Sprint’s dominance of the BRS/EBS spectrum band.

If Sprint’s proposed acquisition of T-Mobile is approved without a divestiture requirement, the merged entity would further exacerbate Sprint’s current monopolization of BRS/EBS spectrum. The most appropriate spectrum to divest is the BRS/EBS spectrum because Sprint currently monopolizes this spectrum, making it difficult, if not impossible, for competitors nationwide to access enough BRS/EBS spectrum to provide a viable wireless broadband service.

I declare under penalty of perjury that the statements set forth above and in the petition to which this affidavit is made part of are true and correct to the best of my knowledge, information and belief.



James Lindstrom

Certificate of Service

I, Robert S. Koppel, certify that on August 27, 2018 a copy of the Petition to Deny attached hereto was sent via US Postal Service mail to the following:

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