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July 2, 2015

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Submission – Response to AT&T Second Supplemental Information Response; AT&T Mobility Spectrum LLC and Club 42 CM Limited Partnership, Application for Consent to the Assignment of Two Lower 700 MHz B Block Licenses in California; WT Docket No. 14-145

REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Competitive Carriers Association ("CCA") hereby responds to the "Response of AT&T Mobility Spectrum to Second Supplemental Information Request Dated May 20, 2015," filed on June 2, 2015, in the above-referenced proceeding.[1]

The Commission's Second Supplemental Information Request sought additional information in connection with the proposed assignment of the Lower 700 MHz license for spectrum in San Luis Obispo County, California CMA340 ("CA-5") held by Club 42 CM Limited Partnership ("Club 42") to AT&T Mobility Spectrum LLC ("AT&T"). Specifically, the Commission requested that AT&T provide a detailed explanation "for why the proposed acquisition of this specific . . . spectrum would not raise rivals' costs or foreclose competition

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1 Response of AT&T Mobility Spectrum LLC to Second Supplemental Information Request Dated May 20, 2015, WT Docket No. 14-145 (filed June 2, 2015) ("AT&T June 2nd Response").

such that the ability of rival service providers to offer a competitive response to any potential anticompetitive behavior on the part of AT&T would be eliminated or significantly lessened."[2]

Preliminarily, as the Commission noted in the Second Supplemental Request, even before the proposed acquisition in the CA-5 market, AT&T already holds 49 MHz of below-1-GHz spectrum, which comprises more than one-third of currently suitable and available below-1 GHz spectrum. This level of low-band spectrum concentration triggers the "enhanced factor" review adopted in the *Mobile Spectrum Holdings Order*, which increases the burden of proof that the applicant must satisfy.[3] Under the applicable standard, the public interest benefits of the proposed transaction need to clearly outweigh the potential public interest harms, irrespective of other factors.

In the context of the 600 MHz Incentive Auction, the Antitrust Division of the Department of Justice ("Department"), the expert agency on marketplace competition, recently urged the Commission to protect and promote competition by establishing and implementing policies that help to prevent foreclosure from those with market power. The Department notes that wireless markets have undergone tremendous change in the past few years, including increased concentration of low-band spectrum by AT&T and Verizon. As a result, the Department is"concern[ed] that acquisition of [low-frequency] spectrum, whether at auction or through other transactions, by carriers that already control large percentages of the available low-frequency spectrum, could be used to create or enhance market power."[4] This latest submission marks the third time in the Incentive Auction proceeding that the Department has urged the Commission to promote competition, prevent spectrum aggregation, and guard against the real foreclosure threat from the largest two carriers.[5] All three of the Department's submissions underscore the importance of setting a strong precedent in this case of first impression.

Against this backdrop, AT&T continues to dodge the Commission's focus in the enhanced review on low-band spectrum and the significantly greater propagation advantages that such spectrum affords. AT&T instead argues that competitors have sufficient spectrum holdings

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2 Letter to Michael P. Goggin, AT&T Inc., from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, Application of AT&T Mobility Spectrum LLC and Club 42CM Limited Partnership for Consent to Assign Licenses (WT Docket No. 14-145), Second Supplemental Request for Information, Attachment (May 20, 2015) ("Second Supplemental Request").

3 *Policies Regarding Mobile Spectrum Holdings*, Report and Order, 29 FCC Rcd 6133 ¶ 287 (2014) ("*MSH Order*").

4 *Ex Parte* Letter from William J. Baer, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-269, at 2 (filed June 24, 2015).

5 *See Ex Parte* Submission of the U.S. Dept. of Justice, WT Docket No. 12-269 (filed Apr. 11, 2013); *Ex Parte* Letter from William J. Baer, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-269 (filed May 14, 2014).

to enable them to compete effectively by pointing to their licensed spectrum *above* 1 GHz,[6] and simply ignores the Commission's (and the Department's) conclusions regarding the distinct technological advantages (and attendant cost savings) of low-band spectrum.

The Commission's most recent request for supplemental information is prefaced with the Commission's acknowledgement of the circumstances that give rise to the heightened standard of review in the *Mobile Spectrum Holdings Order*: "the leading nationwide providers hold most of the low-band spectrum available today, and . . . if they were to acquire all, or substantially all, of the remaining low-band spectrum, they would benefit, *independently of any deployment*, to the extent that rival service providers are denied its use."[7] Specifically, the Commission was concerned about the vast disparity in low-band spectrum holdings of AT&T and Verizon, combined, as compared to all other competitive carriers. Allowing the proposed acquisition of Club 42's license in CA-5 would result in AT&T and Verizon's aggregated low-band holdings to approximately 80 percent of all such spectrum. In contrast, Sprint holds 14 MHz (representing approximately 10 percent) of low-band spectrum and T-Mobile holds 12 MHz (representing approximately 9 percent) of low-band spectrum, as AT&T acknowledges.[8] Therefore, the spectrum positions in CA-5 illustrate precisely the level of imbalance in low-band spectrum holdings that the Commission has determined results in a high likelihood of foreclosure of competition.

AT&T uses NRUF data **[BEGIN NRUF/LNP CONFIDENTIAL INFORMATION]**

[END NRUF/LNP CONFIDENTIAL INFORMATION].

Moreover, AT&T persists in declining to explain why it needs additional low-band spectrum and why it cannot simply use its already-significant spectrum position more efficiently. Given the very real foreclosure concern with AT&T's elimination of Club 42's spectrum position in CA-5, AT&T's reiteration that it can use the additional 700 MHz spectrum to deploy a 10 x 10 MHz configuration is insufficient to rationalize further concentration of scarce low-band spectrum in this market.

More broadly, AT&T has been on a buying spree of low-band spectrum. Since the Commission adopted its enhanced factor standard of review only a year ago, AT&T has entered into ten transactions, involving 98 licenses. The Commission has an opportunity in this transaction to implement and enforce the spectrum screen and administer its "enhanced factor"

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6 *See* AT&T June 2nd Response at 5.

7 Second Supplemental Request, Attachment (emphasis added); *see also MSH Order* ¶¶ 58, 63.

8 AT&T June 2nd Response at 5.

9 *Id.* at 7, 8.

reviews in a meaningful manner to address the foreclosure risk that the Commission and the Department have already determined exists.[10] Giving teeth to this new standard will help to stem the tide of anti-competitive aggregation of low-band spectrum and give all carriers greater certainty and transparency regarding their ability to acquire additional low-band spectrum on the secondary market.

Simply stated, AT&T still fails to demonstrate that it has met the heightened burden of proof applicable to its proposed acquisition of Club 42's spectrum in this transaction, even after being afforded multiple opportunities to do so. Therefore, CCA respectfully requests that the Commission deny AT&T and Club 42's application for consent to this transaction.

Respectfully submitted,

James H. Barker
Elizabeth R. Park

cc: Scott Patrick (scott.patrick@fcc.gov; hand delivery of Highly Confidential version)
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10 *See* Petition to Deny of Competitive Carriers Association, WT Docket No. 14-145 (filed Oct. 17, 2014); Reply to Joint Opposition, WT Docket No. 14-145 (filed Nov. 3, 2014); CCA Notice of *Ex Parte*, WT Docket No. 14-145 (filed Jan. 14, 2015); CCA *Ex Parte* Submission, WT Docket No. 14-145 (filed Feb. 18, 2015); CCA *Ex Parte* Submission – Response to AT&T Supplemental Information Response, WT Docket No. 14-145 (filed Mar. 20, 2015); CCA Notice of *Ex Parte* Presentation, WT Docket No. 14-145 (filed Mar. 25, 2015); CCA Notice of *Ex Parte* Presentation, WT Docket No. 14-145 (filed May 7, 2015).