

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Applications of AT&T Inc. and East Kentucky) WT Docket No 15-79
Network, LLC for Consent to Assign Licenses)
)

OPPOSITION OF AT&T TO PETITION TO DENY

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I. INTRODUCTION AND SUMMARY

AT&T Inc., on behalf of its wholly-owned subsidiary AT&T Mobility Spectrum LLC (“Mobility Spectrum” and collectively with AT&T Inc., “AT&T”), demonstrated in the above-captioned proceeding that Mobility Spectrum’s proposed acquisition of Lower 700 MHz licenses in three Cellular Market Areas (“CMAs”) from East Kentucky Network, LLC (“EKN” and collectively with AT&T, the “Parties”) would benefit the public by enabling AT&T to provide improved and advanced wireless services to customers with threat of no competitive harm.

T-Mobile argues that the Commission should reject the application under its “enhanced review” applicable to certain transactions involving sub-1 GHz spectrum,¹ but AT&T’s application raises no substantial issues under that standard. This is a spectrum-only transaction. The transaction will not eliminate any competitors in these markets or diminish any other carrier’s ability to respond to AT&T. The spectrum is currently lying fallow, as EKN has not deployed this spectrum and has no plans to do so. AT&T will not only use that spectrum to deploy a cutting-edge LTE network, it can pair this spectrum with adjacent spectrum to increase its current 5 x 5 MHz deployments to a more spectrally efficient 10 x 10 MHz LTE deployment.

¹ Petition to Deny of T-Mobile USA, Inc., WT Docket No. 15-79 (June 22, 2015) (“T-Mobile Petition”).

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The Commission has repeatedly and consistently held that transactions with these characteristics strengthen competition and provide strong public interest benefits. Indeed, the Commission recently so held in its first application of the new “enhanced factor” review standard, in a case that T-Mobile never even cites.²

T-Mobile’s Petition does not seriously challenge any of AT&T’s showings, and indeed, T-Mobile has shown no interest in AT&T’s actual application: T-Mobile’s counsel has never even asked to see the confidential information supporting AT&T’s public interest showing. T-Mobile has also shown limited interest in the spectrum at issue: T-Mobile had the same opportunity to acquire the spectrum that AT&T did, but it was not willing to make a competitive offer and indeed did not submit a formal offer. In fact, T-Mobile has shown little interest in deploying networks in these smaller and more rural markets: it currently holds a substantial amount of spectrum in the markets at issue that it has never deployed, and indeed, it offers very little facilities-based service anywhere in the state of West Virginia. Most of T-Mobile’s claims are either based on a misunderstanding of the enhanced factor review standard or are otherwise legally irrelevant (*e.g.*, the spectrum would be better assigned to T-Mobile). Accordingly, the Commission should dismiss T-Mobile’s Petition and grant the Parties’ application expeditiously and without conditions.

² *Applications of AT&T Inc., E.N.M.R. Telephone Cooperative, Plateau Telecommunications, Inc., New Mexico RSA 4 East Limited Partnership, and Texas RSA 3 Limited Partnership For Consent to Assign Licenses and Authorizations*, Memorandum Opinion and Order, FCC 15-53, ¶ 29 (2015) (“*AT&T/Plateau Order*”)

II. THIS TRANSACTION PLAINLY SATISFIES THE COMMISSION’S STANDARD, INCLUDING THE “ENHANCED FACTOR” REVIEW AS APPLIED IN THE *AT&T/PLATEAU ORDER*.

AT&T amply demonstrated in its Application and its subsequent response to the General Information Request that the proposed transaction poses no significant threat of competitive harm and would provide substantial public interest benefits, and thus should be approved promptly.

T-Mobile’s Petition does not seriously contest any aspect of AT&T’s affirmative showing. Instead, most of T-Mobile’s case is based on a misstatement of the relevant standard. T-Mobile argues that the Commission should reject the Application under its “enhanced factor” review, which applies to transactions in which the licensee would, post-transaction, hold more than one-third of the available sub-1 GHz spectrum in a relevant market.³ Although T-Mobile seems to think that any acquisition of spectrum below 1 GHz triggering the “enhanced factor” test is *per se* anticompetitive,⁴ the Commission has made clear that enhanced factor review is merely a component of, and does not replace, the Commission’s case-by-case review. Indeed, T-Mobile does not even cite the one case in which the Commission has actually applied “enhanced factor” review to market-specific facts – the recent *AT&T/Plateau Order* – but that case confirms

³ *Policies Regarding Mobile Spectrum Holdings*, Report and Order, 29 FCC Rcd 6133, ¶ 280-286 (2014) (“*Mobile Spectrum Holdings Order*”). The Commission has long applied a case-by-case standard in reviewing spectrum transactions. Under that standard, the Commission considers a variety of factors to evaluate whether the benefits of a secondary market spectrum acquisition outweigh the potential for competitive harm. Contrary to T-Mobile’s suggestion, the Commission expressly reaffirmed this general framework in the *Mobile Spectrum Holdings Order*. *Id.* ¶ 286.

⁴ T-Mobile Petition at 15-16 (“At a minimum, AT&T has not established by a preponderance of the evidence that the demonstrable public interest harms are so outweighed by the ostensible benefits to AT&T that they overcome the presumption against excessive spectrum concentration the Commission adopted in the *Mobile Spectrum Holdings Order*.”).

that the overarching question always remains simply whether the potential for competitive harms outweighs the public interest benefits of the transaction.⁵ And as the Commission held, where the potential for competitive harm is low, “the acquisition of below-1-GHz spectrum resulting in holdings of approximately one-third or more would not preclude a conclusion that a proposed transaction, on balance, furthers the public interest.”⁶ Thus, under the correct “enhanced review” standard, as articulated and applied in the *AT&T/Plateau Order*, the proposed transactions raise no substantial issues and can be quickly approved.

First, this transaction does not pose any cognizable threat of competitive harm. This is a *spectrum-only* transaction. Despite T-Mobile’s assertions to the contrary, this transaction would not result in the exit of a competitor from the market, as EKN is not currently using the licenses at issue to provide service.⁷ Accordingly, most of the factors that the Commission would consider in assessing possible competitive harm are not even relevant. As the Commission noted in the *AT&T/Plateau Order*, such factors include: (1) the total number of rival service providers, (2) the number of rival firms that can offer competitive service plans, (3) the coverage by technology of the firms’ respective networks, (4) the rival firms’ market shares, (5) the combined

⁵ *Applications of AT&T Inc., E.N.M.R. Telephone Cooperative, Plateau Telecommunications, Inc., New Mexico RSA 4 East Limited Partnership, and Texas RSA 3 Limited Partnership For Consent to Assign Licenses and Authorizations*, Memorandum Opinion and Order, FCC 15-53, ¶ 29 (2015) (“*AT&T/Plateau Order*”) (“[i]n our market-by-market analysis, we evaluate the likely competitive effect of increased market and spectrum concentration, including increased below-1-GHz spectrum concentration, and assess whether, post-transaction, the combined entity would have the incentive and ability to harm competition in any local market”).

⁶ *Id.* at ¶ 15.

⁷ T-Mobile Petition at 13 (“The proposed transaction would actually eliminate one of AT&T’s competitors. East Kentucky Network, doing business as Appalachian Wireless, would cease to hold any spectrum in the Markets post-transaction.”).

entity's post-transaction market share and how that share changes as a result of the transaction, (6) the amount of spectrum suitable for the provision telephony/broadband services controlled by the combined entity, and (7) the spectrum holdings of each of the rival service providers.⁸

AT&T's mere acquisition of the spectrum at issue, however, will have no impact on the number of rival service providers, the number and nature of available service plans, the coverage of providers' networks, or market shares.

The evidence supplied by the Parties in this proceeding amply supports a finding, consistent with the *AT&T/Plateau Order*, that "the likelihood of competitive harm is low."⁹ Post-transaction, the four nationwide providers will all have substantial spectrum holdings in the three affected markets.¹⁰ Moreover, in the two markets subject to "enhanced factor" review, numerous entities will continue to hold spectrum below 1 GHz.¹¹ In all three markets, numerous parties either already have significant LTE/3G population and land area coverage, or possess the spectrum holdings necessary to constrain anticompetitive behavior.¹² In the *AT&T/Plateau Order*, the Commission relied on substantially similar facts in finding no significant threat to competition under its "enhanced factor" review, *even though* AT&T in that case was acquiring

⁸ *AT&T/Plateau Order* at ¶ 29.

⁹ *AT&T/Plateau Order* at ¶ 36.

¹⁰ *Id.* at ¶ 35 (favorably citing the fact that "the other nationwide service providers' spectrum holdings range from 25 to 193 megahertz of spectrum").

¹¹ Specifically, in both markets AT&T's post-transaction holdings below 1 GHz would be 55 MHz. Meanwhile, Verizon holds 47 MHz, Sprint holds 14 MHz, DISH holds 6 MHz, and other parties hold 12 MHz. *AT&T/Plateau Order* at ¶ 35. *See also* ULS File No. 0006672533, at Exhibit 4.

¹² *AT&T/Plateau Order* at ¶ 36 (favorably citing the fact that Verizon, T-Mobile, and Sprint all had either significant market share, significant coverage, or the ability to offer a competitive response in the affected market).

facilities and a number of customers.¹³ It should be even clearer that the spectrum-only acquisitions here are “unlikely to materially lessen the ability of rival service providers to respond to any anticompetitive behavior on the part of” AT&T in these markets.¹⁴

Second, and equally important, the transaction will provide substantial public interest benefits. As AT&T explained in the Public Interest Statement and its response to the General Information Request, the proposed transaction will enable AT&T to deploy a more robust and high-performing 4G LTE network in the affected markets. As AT&T has shown, this transaction will allow AT&T to expand its Lower 700 MHz LTE deployment in these markets from 5 x 5 MHz to 10 x 10 MHz.¹⁵ The East Kentucky Licenses are a logical complement to AT&T’s existing spectrum holdings, and acquisition of this spectrum will allow AT&T to deploy a LTE network that is more spectrally efficient and faster.¹⁶ The Commission has accorded significant weight, even under the “enhanced factor” test, to the fact that an acquisition of below-1-GHz spectrum “would enable AT&T to expand its LTE service offerings on contiguous spectrum, which has the potential to allow AT&T to achieve greater spectral efficiency and greater throughput and create some transaction-specific benefits.”¹⁷ Indeed, the Commission specifically noted in the *AT&T/Plateau Order* that “customers are likely to benefit in the immediate future from access to improved LTE performance and a more robust network as a

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Response of AT&T to General Information Request Dated May 21, 2015, WT Docket No. 15-79, at 10 (June 4, 2015) (“AT&T Response”).

¹⁶ *Id.* at 6-10.

¹⁷ *AT&T/Plateau Order* at ¶ 53.

result of the instant transaction.”¹⁸ These benefits are all the more salient because the East Kentucky spectrum is currently lying fallow. Here again, the Commission has repeatedly held, including in the *AT&T/Plateau Order*, that there are substantial public interest benefits to an acquisition that would allow the acquirer to expeditiously deploy unused 700 MHz spectrum in a manner that would “increase the potential for its more efficient use” to the benefit of consumers.¹⁹

T-Mobile does not dispute any of these benefits. Indeed, T-Mobile would hardly be in any position to comment on these benefits at all, given that it has not even asked to review the Highly Confidential filings by AT&T and EKN that form the factual basis for AT&T’s public interest showings. On June 4, 2015, AT&T submitted a detailed response to the Commission’s General Information Request in this proceeding, in which AT&T submitted substantial evidence of this transaction’s public interest benefits and its satisfaction of the “enhanced factor” standard of review.²⁰ While citing to AT&T’s heavily redacted response, and therefore acknowledging its existence, the Petition makes no mention of and contains no citation to the evidence submitted by AT&T in response to the General Information Request.²¹ Further, as of this date T-Mobile’s counsel has not submitted signed Acknowledgments of Confidentiality in this proceeding.²²

¹⁸ *AT&T/Plateau Order* at ¶ 53.

¹⁹ *Id.* (“In particular, given that Plateau Wireless’s Lower 700 MHz C Block spectrum is currently lying fallow, we find that its acquisition by AT&T would increase the potential for its more efficient use.”).

²⁰ *See* AT&T Response.

²¹ T-Mobile Petition at 10, n. 50.

²² *See* WT Docket No. 15-79. Because the same counsel did submit such acknowledgements in a separate docket relating to an acquisition of licenses from Club 42 by

Thus, the Highly Confidential information, documents, and other data submitted by AT&T and EKN in support of their application *have not been reviewed at all*. T-Mobile cannot credibly argue that AT&T has failed to meet its evidentiary burden when it is ignoring a substantial portion of the relevant record.²³

In short, the Parties have filed a wealth of facts confirming that the public interest benefits of this transaction greatly outweigh any negligible risks that this spectrum-only transaction might harm competition. The public interest benefits to be achieved through this transaction are the same as those on which the Commission relied in approving the transaction in the *AT&T/Plateau Order*, and thus AT&T has more than satisfied the “enhanced factor” standard. The evidence thus supports a prompt finding that the transaction at issue is in the public interest.

III. T-MOBILE’S PETITION IS WITHOUT MERIT AND SHOULD BE DISMISSED.

Most of T-Mobile’s Petition is devoted to issues and facts that are legally irrelevant. T-Mobile’s claims of harm are grounded almost entirely in its argument that grant of this transaction would preclude T-Mobile from acquiring these licenses, an argument that cannot be legally entertained in this proceeding. The Petition does not otherwise make a proper showing of

AT&T, they are aware of the procedures. *See* Letter from Trey Hanbury, Hogan Lovells US LLP, to Marlene H. Dortch, FCC, WT Docket No. 14-145 (June 5, 2015).

²³ Indeed, the Petition makes allegations refuted by the Highly Confidential submissions in this proceeding. For example, the Petition argues that AT&T already has “sufficient contiguous low-band spectrum in all three Markets to accommodate a 10 x 10 MHz deployment, making the proposed transaction superfluous.” T-Mobile Petition at 14. **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]**

[END AT&T HIGHLY

CONFIDENTIAL INFORMATION]

transaction-specific harm and instead relies primarily on generic arguments raised in the *Mobile Spectrum Holdings* proceeding.

The Communications Act and the Commission’s rules require that a petition to deny contain specific allegations of facts sufficient to demonstrate that grant of the subject application would cause it to suffer a direct injury.²⁴ T-Mobile simply asserts, with no supporting evidence, that grant of the proposed transaction will reduce T-Mobile’s ability to compete in the subject markets.²⁵ But rather than identifying any way in which *AT&T’s* acquisition of this spectrum would somehow harm T-Mobile’s ability to compete, the Petition focuses on the advantages that might accrue to T-Mobile if the licenses *were instead assigned to T-Mobile*.²⁶ Indeed, the Petition essentially asks the Commission to conclude that the public interest would be better served if T-Mobile were to acquire the East Kentucky licenses.²⁷

²⁴ See, e.g., *Applications of Cellco Partnership d/b/a Verizon Wireless, Coral Wireless, LLC and Coral Wireless Licenses, LLC for Consent to Assign Seven Personal Communications Service Licenses Covering Hawaii*, Order, 29 FCC Rcd 13397, ¶ 7 (2014) (“*Verizon Wireless/Coral Order*”). See also 47 C.F.R. § 1.939.

²⁵ *Id.*

²⁶ *Id.* at 3 (“T-Mobile needs access to low-band spectrum in order to better compete in that area against AT&T’s commanding market share.”); *id.* (“T-Mobile has no presence in the Charleston-Huntington area, and it needs low-band spectrum to begin providing competitive, affordable wireless services to consumers in CMA 110.”); *id.* at 8 (“In this case, CMAs 110, 116, and 448 are rural, hilly, and low-band spectrum is essential to provide widespread, cost-effective, high-quality service for consumers.”); *id.* at 14 (“This transaction appears to be no more than attempt by AT&T to . . . foreclose others from efficiently entering or improving their competitive positions. . .”).

²⁷ *Id.* at 13 (“T-Mobile does not hold any low-band spectrum in the Markets, and if given the opportunity to acquire some, T-Mobile would be able to create a bigger presence in the market it currently serves (CMA 116) and enter the market it currently does not (CMA 110). If T-Mobile rather than AT&T acquired the spectrum currently held by East Kentucky, the number of competitors using low-band spectrum in the markets would remain the same. T-Mobile has a proven track record of quickly deploying spectrum once acquired. . .”).

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The statute expressly prohibits the Commission from considering these arguments. Section 310(b) provides that “in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or a license to a person other than the proposed transferee or assignee.”²⁸ The only question in this proceeding is simply whether the proposed transaction, in which AT&T would acquire the licenses, is in the public interest. Whether any other possible transactions might also be in the public interest, or whether such hypothetical transactions might be “better” than the one before the Commission, is of no moment.

But even if the Commission could consider such arguments, T-Mobile’s claims are belied by the facts. T-Mobile had the same opportunity to acquire this spectrum that AT&T did. EKN contracted to sell these licenses through a broker, and EKN’s broker offered the licenses to numerous parties, including T-Mobile. However, T-Mobile declined to submit a written offer for the licenses and instead only made a verbal, informal, non-competitive bid. To the extent T-Mobile suggests it is unable to compete in these markets without this low-band spectrum, that consequence is one of its own making. Just as T-Mobile decided it would forego participation in the 700 MHz auction, it chose to squander its opportunity to acquire these licenses, or otherwise determined that the licenses in question were not of enough value to T-Mobile to justify a competitive bid. Significantly, the Commission noted in the *AT&T/Plateau Order* that “other rival service providers had the opportunity to acquire [the licenses at issue] on the secondary

²⁸ 47 U.S.C. § 310(d).

market if they had chosen to do so,” which the Commission viewed as a further reason for finding that the “enhanced factor” review was satisfied in that case.²⁹

Moreover, whether AT&T or EKN holds the spectrum at issue has no bearing on T-Mobile’s ability to compete in these markets. Rather, T-Mobile has done little to suggest that it places a high priority on these cities. As is the case in many smaller markets around the country, T-Mobile has long held substantial spectrum in the communities at issue that remains either undeployed or underdeployed. In West Virginia in particular, as shown in Figure 1 below, T-Mobile has declined to provide facilities-based service in almost the entire state despite having sufficient spectrum assets to do so.

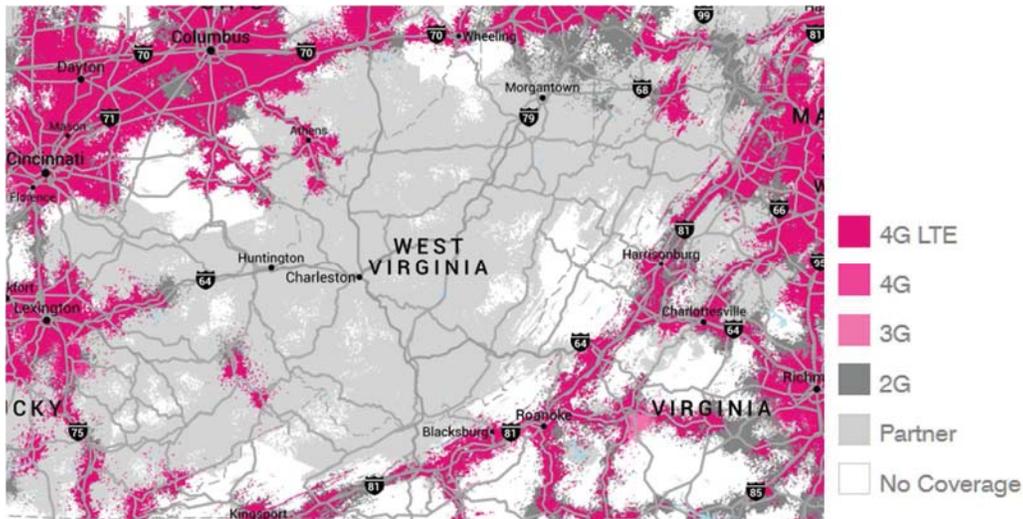


Figure 1: T-Mobile Coverage Around West Virginia

While T-Mobile may have made a strategic decision not to deploy a network in West Virginia using its above-1-GHz spectrum, it would not be uneconomical for it to do so – AT&T’s previously provided coverage maps illustrating that AT&T has successfully deployed high band

²⁹ *AT&T/Plateau Order* at ¶ 35. By the same token, the FCC should not permit its regulatory processes to be a lever for a disappointed bidder in an open auction to try and compel a seller to accept an otherwise unacceptably low bid.

coverage in large portions of CMA 110. As for Lexington, T-Mobile has access to 60 megahertz of spectrum in this market, which is certainly enough spectrum to compete; indeed, T-Mobile itself notes “TracFone has nearly 7% market share” (as compared to T-Mobile’s “roughly 4% market share”) even though Tracfone *has no spectrum at all*.³⁰ Thus, even if the Commission could lawfully consider alternative transactions, the fact that T-Mobile does not hold the 700 MHz C Block licenses at issue is not an economic bar to competing in this market.³¹

Most of the remainder of T-Mobile’s Petition simply recites generic arguments concerning the value of low-band spectrum that are not linked to any transaction-specific issue. These arguments, which include information about the propagation characteristics of low-band spectrum, low-band spectrum’s ability to penetrate buildings, and the “scarce” nature of spectrum below 1 GHz,³² simply regurgitate arguments made in the Commission’s broader, yet now concluded, *Mobile Spectrum Holdings* proceeding. Although T-Mobile alleges that concentration of low-band spectrum is generally problematic, the Commission’s “enhanced factor” review already accounts for any such concern and, as shown above, this transaction passes muster under that case-by-case standard. In all other respects, the Petition fails to demonstrate how AT&T’s acquisition of these licenses would harm T-Mobile specifically in the

³⁰ *Id.*

³¹ *Id.* (“T-Mobile has no presence in the Charleston-Huntington area, and it needs low-band spectrum to begin providing competitive, affordable wireless services to consumers in CMA 110.”).

³² T-Mobile Petition at 5-8.

relevant markets.³³ The Commission has consistently rejected petitions to deny that rely on generalized spectrum aggregation concerns, and it should do so again here.³⁴

³³ See, e.g., T-Mobile Petition at 7-8. The Petition asserts that consumers in the affected markets “will suffer from reduced competitive choice, less innovation, and higher quality-adjusted prices” if the Commission grants the Parties’ application, T-Mobile provides no evidence to support this claim. T-Mobile Petition at 4, 15.

³⁴ See, e.g., *Application of AT&T Mobility Spectrum LLC and Aloha Partners II, L.P. For Consent to Assign Advanced Wireless Services A, B, and C Block Licenses*, 29 FCC Rcd 8599, ¶ 6 (2014) (denying the Rural Wireless Association’s petition on the basis that it merely raised general spectrum aggregation arguments that echoed arguments made in other proceedings); *Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations*, Memorandum Opinion and Order, 29 FCC Rcd 02735, ¶ 73 (2014) (“All other general spectrum aggregation concerns are not specific to this transaction.”); see also *Verizon Wireless/Coral Order* at ¶ 7 (“In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action: it must demonstrate that the injury can be traced to the challenged action and that the injury would be prevented or redressed by the relief requested.”).

IV. CONCLUSION

AT&T has demonstrated how grant of its application will improve the quality of service offered to its customers in the Kentucky, Ohio, and West Virginia markets impacted by this transaction. Based on the framework established by the Commission in the *AT&T/Plateau Order*, AT&T and EKN have completely satisfied the Commission’s “enhanced factor” standard of review in this proceeding. Meanwhile, the Petition to Deny filed by T-Mobile fails to establish transaction-specific allegations of harm or a causal link between grant of the application and the injuries alleged. The Petition also fails to consider the *AT&T/Plateau Order* and ignores evidence in the record. Thus, the Commission should promptly grant the Parties’ application and dismiss T-Mobile’s Petition.

Respectfully Submitted,

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July 2, 2015

CERTIFICATE OF SERVICE

I, Patricia Destajo, hereby certify that on July 2, 2015, I caused true and correct copies of the redacted Opposition to Petition to Deny of AT&T Inc. to be served on the following via hand delivery or electronic mail, as indicated:

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