

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

In the Matter of)	
)	
Application of AT&T Mobility Spectrum LLC)	WT Docket No. 15-79
and East Kentucky Network, LLC for Consent to)	File No. 0006672533
Assign Licenses)	

REPLY OF PUBLIC KNOWLEDGE

Public Knowledge urges the Federal Communications Commission (“Commission”) to conduct an extensive review of AT&T Mobile Spectrum LLC’s (“AT&T”) application (“Application”) for assignment of three Lower 700 MHz C Block licenses from East Kentucky Network, LLC (“EKN” and collectively with AT&T, the “Applicants”). The Commission’s review should effectuate the Commission’s concerns with the concentration of low-band spectrum assets, as articulated in the *Mobile Spectrum Holdings Report and Order* (“*MSH R&O*” or “*Order*”), and deny the Application.

I. INTRODUCTION AND SUMMARY

The Commission should extensively examine and reject AT&T’s proposed acquisition of 700 MHz spectrum licenses from EKN.¹

As the Commission’s Public Notice indicates, the proposed transaction would result in AT&T holding approximately one-third or more of sub-1 GHz spectrum in two CMAs, triggering consideration of low-band spectrum concentration as an “enhanced factor” in the

¹ *AT&T Mobility Spectrum LLC and East Kentucky Network, LLC Seek FCC Consent to the Assignment of Three Lower 700 MHz C Block Licenses in Kentucky, Ohio, and West Virginia*, WT Docket No. 15-79, Public Notice, 30 FCC Rcd 4924 (2015).

Commission's transaction review.² Approving the transaction would gut hard-won safeguards to competition and consumer welfare adopted by the Commission in the *MSH R&O*.³ Moreover, the Commission should deny the Application because the Applicants have failed to meet their burden to show that the public interest benefits of the transaction outweigh the harms.⁴

Finally, the Commission's transaction review must thoroughly consider, consistent with the *MSH R&O*, that acquisitions of critical low-band spectrum by dominant firms have the potential to foreclose future competition. The consequences of this foreclosure must be considered as the Commission weighs the potential public interest benefits and harms. Failure to do so would render the pro-competitive core of *MSH R&O* functionally inoperative.

II. ENFORCEMENT OF THE SPECTRUM SCREEN IS VITAL TO COMPETITION IN THE WIRELESS BROADBAND MARKET

The Commission's *MSH R&O* recognized the need for effective limits on spectrum aggregation to promote a vibrant and competitive wireless market. Public Knowledge participated in the *Mobile Spectrum Holdings* proceeding,⁵ and it continues to advocate for such limits because a competitive market in the mobile industry is vital to consumer welfare, while a lack of competition drives prices up for consumers and discourages carriers from investing in their existing networks.⁶

² *Id.* at 4924-25 (citing *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd 6133, 6240 ¶¶ 286-88 (2014) ("*MSH R&O*").

³ *MSH R&O*. See Petition to Deny of T-Mobile USA, Inc., WT Docket No. 15-79 (filed Jun. 22, 2015) ("Petition to Deny").

⁴ *MSH R&O*, 29 FCC Rcd at 6240 ¶ 286 (requiring the assignees that would exceed one-third of the sub-1 GHz spectrum in a given market to provide a "detailed demonstration regarding why the public interest benefits outweigh the harms.>").

⁵ See generally Comments of Public Knowledge, WT Docket No. 12-269, WT Docket No. 11-286 (Nov. 28, 2012) ("Public Knowledge Comments"); Reply Comments of Public Knowledge, WT Docket No. 12-269, WT Docket No. 11-186 (Jan. 7, 2013).

⁶ See Press Release, *Public Knowledge Joins Save Wireless Choice to Promote Wireless Competition* (Apr. 27, 2015), <https://www.publicknowledge.org/press-release/public-knowledge-joins-save-wireless-choice-to-promote-wireless-competition>.

Secondary market transactions for valuable and limited low-band spectrum licenses have particularly important implications for mobile broadband competition. Different propagation and in-building penetration characteristics mean that one band of spectrum does not have the same value for a particular application as another, even if they have the same bandwidth.⁷ For mobile telephony and broadband, low-band spectrum (including the 700 MHz band) is more valuable than high-band spectrum (such as the AWS band) because the propagation characteristics at these frequencies make such spectrum less expensive to deploy.⁸

The Commission recognized the critical importance of low-band spectrum to competition in the mobile broadband marketplace when it revised the spectrum screen.⁹ As the Commission has acknowledged, the unique technical attributes of low-band spectrum are “important for other competitors to meaningfully expand their provision of mobile broadband services or for new entrants to have a potentially significant impact on competition.”¹⁰ The revised spectrum screen rules established by the Commission in the *MSH R&O* were meant to promote variety in licenses and encourage rural deployment; give rise to consumer benefits arising from heightened competition; and prevent firms from engaging in anti-competitive behavior.¹¹

The *MSH R&O* amended the Commission’s existing case-by-case spectrum screen to add a consideration of low-band frequency holdings as an “enhanced factor” when a carrier’s post-transaction holdings would include approximately or more than one-third of the market’s low-band spectrum.¹² Specifically, the *Order* outlined a two-step review process for the Commission to employ when weighing the competitive effect of a secondary market transaction that would

⁷ *Public Knowledge Comments* at 4.

⁸ *Id.*

⁹ *See, e.g., MSH R&O*, 29 FCC Rcd at 6165-58 ¶¶ 44-48.

¹⁰ *MSH R&O*, 29 FCC Rcd at 6142 ¶ 14 (*quoting Application of AT&T Inc. and Qualcomm Inc.*, Order, 26 FCC Rcd 17589, 17611 ¶ 51 (2011)).

¹¹ *Id.* at 6156 ¶ 45.

¹² *Id.* at 6239 ¶ 283-88.

result in an applicant holding more than one-third of suitable and available low-band spectrum in a market. First, the Commission determines, “based on the totality of the circumstances, whether there is an increased ability or incentive for the acquiring firm to successfully raise prices or otherwise engage in anti-competitive behavior.”¹³ Then, the Commission weighs any potential public interest harms against any potential public interest benefits. The applicants bear the burden of proving “by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest *with a detailed demonstration regarding why the public interest benefits outweigh harms.*”¹⁴

The Commission’s spectrum screen rules place the burden on applicants seeking to acquire a dominant position of at least one-third of all low-band spectrum holdings in a market. If the Commission’s review finds that a proposed transaction presents a high potential for competitive or public interest harm, and the applicant fails to provide evidence that this harm would be outweighed by some tangible public benefit, the Commission will find that the acquisition will “more likely be found to cause competitive harm” and be rejected.¹⁵ The acquisition of one-third or more low-band spectrum licenses in a market is a distinct and more rigorous standard than the test the Commission applies for secondary market transactions involving high-band spectrum, or fewer than one-third of of sub-1 GHz spectrum licenses in a market.

¹³ *Id.* at 6239 ¶ 285. Factors considered at this step include “the total number of rival service providers; the number of rival firms that can offer competitive service plans; the coverage by technology of the firms’ respective networks; the rival firms’ market shares; the amount of spectrum suitable for the provision of mobile telephony/broadband services controlled by the combined entity; the spectrum holdings of each of the rival service providers; the acquisition of below-1-GHz spectrum nationwide; and concentration in a particular band with an important ecosystem.” *Id.* at 6239 ¶ 284.

¹⁴ *Id.* at 6239 ¶ 285-86 (emphasis added).

¹⁵ *Id.* at 6240 ¶ 286.

III. GRANTING AT&T'S APPLICATION WOULD GUT THE SPECTRUM SCREEN

Approving AT&T's proposed acquisition of East Kentucky's 700 MHz licenses would show that the Commission's "enhanced factor" analysis is enhanced in name only. The Commission must deny the Application Because AT&T has failed to meet the high standard of proving that public interest benefits arising from the proposed acquisition outweigh the competitive harm caused by the transaction.

A. AT&T Has Failed to Show the Transaction's Potential Public Interest Benefits Outweigh the Potential Public Interest Harms

As T-Mobile explains, AT&T's Public Interest Statement ("Public Interest Statement")¹⁶ does not meet the Commission's requirement to provide a detailed accounting of why the transaction's public interest benefits outweigh the harms.¹⁷ The Public Interest Statement fails to advance any tangible public interest benefits of the transaction. Instead, AT&T relies on nebulous claims of operational efficiencies that are far more likely to benefit AT&T than the public. AT&T's failure to present even scant public interest benefits led to a request for information from the Commission's Wireless Telecommunications Bureau ("WTB").¹⁸ AT&T's response ("Response") to the WTB provides little additional detail regarding the capacity and efficiency gains the transaction will produce, but again, only demonstrates that the transaction is beneficial to AT&T.¹⁹

¹⁶ ULS File No. 0006672533 Ex. 1, *Description of Transaction and Public Interest Statement* ("Public Interest Statement").

¹⁷ *See* Petition to Deny at 10-12.

¹⁸ Wireless Telecommunications Bureau Letter for Information Request, WT Docket No. 15-79 (May 21, 2015).

¹⁹ Response of AT&T to General Information Request Dated May 21, 2015, WT Docket No. 15-79 (filed June 4, 2015) ("AT&T Response").

AT&T suggests that, because the spectrum they would acquire is “lying fallow,” its acquisition and deployment of this spectrum will result in net benefits to consumers.²⁰ AT&T may intend to build out the spectrum EKN currently holds, but such a benefit is irrelevant to the policy concern that sparked the “enhanced factor” analysis in the first place—ensuring a healthy competitive market for low-band spectrum. The transaction would impair a competitor’s ability—EKN’s—to deploy a next-generation network on low-band spectrum, augment its capacity, and deliver new services to consumers, and thus reduces both consumer choice as well as the incentive for competitors to drive down prices and increase innovation. If EKN deployed its network using this spectrum, it would create competitive and public interest benefits far outweighing those AT&T claims.

AT&T also argues that its competitors were free themselves to apply to acquire EKN’s licenses.²¹ This is not a relevant factor in the Commission’s test. The lack of spectrum acquisition offers from smaller firms cannot, and should not, be taken as evidence that they are not interested in this valuable spectrum. The United States Department of Justice recently noted, “those [entities] with market power may be willing to pay the most to reinforce a leading position.”²² AT&T’s deeper pockets and ability to offer top dollar for low-band licenses is unrelated to the public interest. Because AT&T has failed to provide a more than cursory demonstration of public interest benefits, the Commission should find that any potential public interest harms outweigh potential benefits and are likely to cause competitive harm, particularly when applying the “enhanced factor” of significant low-band spectrum concentration.

²⁰ Opposition of AT&T to Petition to Deny, WT Docket No. 15-79 at 7 (July 2, 2015).

²¹ *Id.* at 10.

²² Letter of William J. Baer, Assistant Attorney General, U.S. Department of Justice, Antitrust Division to Tom Wheeler, Chairman, FCC, WT Docket No. 12-269 (June 24, 2015).

In the context of the Commission’s conclusions in the *MSH R&O*, it is clear that the proposed transaction poses an anticompetitive risk. The *MSH R&O* held that increasing the number of providers that have access to low-band spectrum could increase mobile wireless competition in rural America – like the affected areas in this transaction.²³ This transaction moves the affected markets in the opposite direction – further consolidating low-band spectrum holdings to the degree that it prompts the use of the Commission’s “enhanced factor” analysis. The Commission has found that the availability of low-band spectrum is already quite limited and concentrated in the hands of the nation’s two largest carriers, and that permitting those carriers to hold an even greater concentration of low-band spectrum would allow them to starve their rivals of a critical input. As result, the dominant carriers can benefit without actually improving services to consumers or deploying the spectrum.²⁴ Speaking to the core of the issue in this transaction, the Commission concluded that without access to low-band spectrum, smaller firms are less able to provide a competitive alternative because they may lack the ability to expand coverage or offer new or innovative services.²⁵ Permitting AT&T to acquire more than one-third of the low-band spectrum in these markets will deny competitors the opportunity to obtain low-band spectrum to expand coverage to consumers and offer new services in areas where, as T-Mobile shows, AT&T already controls 50% or more of the mobile market.²⁶ AT&T’s acquisition of these licenses would foreclose the introduction more robust competition in an already concentrated market, creating significant public interest harms.

AT&T’s Public Interest Statement and Response fail to address the harms to competition and the public interest that will likely arise from this transaction. The Public Interest Statement

²³ *MSH R&O* 29 FCC Rcd at 6161 ¶ 57.

²⁴ *Id.* at 6157 ¶ 46, 6161 ¶ 57, 6164 ¶ 60.

²⁵ *Id.* at 6164-65 ¶¶ 60-61.

²⁶ Petition to Deny at 3 (citing KPMG StreamShare – April 2015 Report.).

erroneously claims that the transaction “will not cause an aggregation of anticompetitive risk post-closing.”²⁷ Amazingly, AT&T’s review of the anticompetitive effect of the transaction in its Response is even more concise than the negligible analysis in the Public Interest Statement. Its Response merely claims that competitors in the applicable markets will provide a competitive restraint to AT&T post-transaction and that the transaction will make AT&T itself a more effective competitor.²⁸ Acquiring more low-band spectrum will undoubtedly benefit AT&T. What is less clear is how AT&T’s competitors will realistically discipline an already dominant firm when AT&T is willing to pay foreclosure prices for the very spectrum resources its competitors are starved for. Merely stating that competitors exist and will discipline AT&T’s behavior does not make it so. Hence, AT&T has not adequately demonstrated that potential public interest benefits outweigh potential public interest harms. As a result, AT&T has failed to satisfy its burden and the Commission should deny the Application.

B. The Commission Should Thoroughly Review All Transactions that Result in a Carrier Holding Approximately or More than One-Third of a Market’s Low-Band Spectrum

As the Commission is aware, the Application is only the latest of nearly a dozen low-band transactions AT&T has initiated across the country over the past year.²⁹ In many of these transactions, AT&T seeks to acquire more than one-third of the below-1-GHz spectrum in the relevant market. While AT&T is entitled to submit applications to acquire as many megahertz of low-band spectrum as it would like, the spectrum screen exists to check the ability of dominant providers to irrevocably impede future competition in the mobile broadband marketplace. Low-band spectrum is an essential input for all mobile broadband providers. Spectrum below 1 GHz is

²⁷ Public Interest Statement, at 4-5.

²⁸ AT&T Response at 14-15.

²⁹ See Appendix for a list of all pending AT&T applications for low-band spectrum that would exceed the spectrum screen.

especially crucial for competitive carriers that lack the low-band spectrum holdings that would allow them to compete with AT&T's lower deployment costs and ability to provide superior coverage and in-building penetration.

The Commission revised its spectrum screen because it understood that the continued dominance of AT&T and Verizon in low-band spectrum holdings poses a serious threat to competition that directly impacts consumers. The burden lies with AT&T to establish that the Commission should grant this transaction. The test is not, as AT&T appears to believe, whether AT&T would benefit from this transaction: it undoubtedly would. The test is whether the proposed acquisition of EKN's licenses would provide benefits to the *public* and those benefits outweigh harms. Because AT&T has failed to provide persuasive evidence to satisfy this test, the Commission must deny the application.

Further, to establish a consistent, pro-competitive wireless policy, the Commission should ensure that its transaction review process gives full effect to its conclusions in the *MSH R&O*.³⁰ Without a thorough secondary transaction review process, the wireless industry is doomed to further consolidate market-by-market, license-by-license until nearly all low-band spectrum is held by AT&T and Verizon. As a result, competitors will be starved of spectrum and unable to provide any semblance of market discipline on the dominant firms, leading to reductions in deployment, slower network upgrades, and less innovation because consumers have nowhere else to turn. The Commission must do more than just publicly articulate pro-

³⁰ To truly enforce its findings, the Commission's review of the proposed public interest benefits and potential public interest harms in this and future transactions must be substantially more rigorous than in its recent *AT&T/Plateau Order*. *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*, WT Docket No. 14-144, Memorandum Opinion and Order, 30 FCC Rcd 5107 (2015). The Commission's analysis in the *AT&T/Plateau Order* is particularly egregious in light of the fact that it was the first transaction that triggered the *MSH R&O*'s "enhanced factor" analysis. The record was bereft of public interest benefits, other than those benefitting AT&T itself. Particularly troubling is the fact that these "benefits" were given more weight than the very public interest harms caused by excessive spectrum concentration that the Commission identified in the *MSG R&O*.

competitive policies and principles, only to abandon them when they require enforcement. To realize a more competitive wireless market that better serves the public interest, the Commission must consider its policy goals in the context of secondary market transactions and apply the tools it has at its disposal to reach those goals.

IV. CONCLUSION

The Commission should deny AT&T's proposed acquisition of 700 MHz licenses from EKN. AT&T has failed to establish under the Commission's enhanced factor spectrum screen test that the transaction would more likely than not provide public benefits that would outweigh the obvious harms arising from allowing a dominant provider to acquire more than one-third of the low-band spectrum in a market. Granting AT&T's application on the basis of the record in this proceeding would gut the test adopted in the *Mobile Spectrum Holdings Order* and establish a dangerous precedent for pending and future applications for low-band spectrum licenses by dominant providers across the country. To avoid the type of anti-competitive effects that the enhanced factor rules from *MSH Order* were meant to prevent, the Commission should deny this transaction.

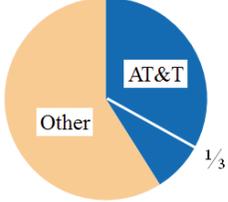
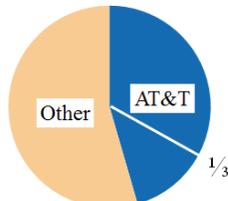
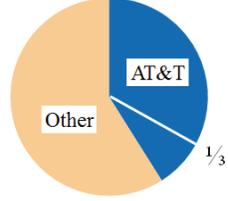
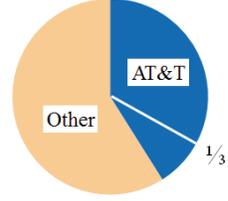
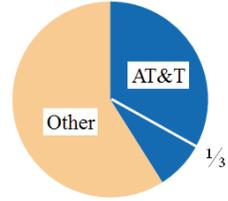
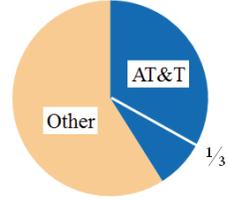
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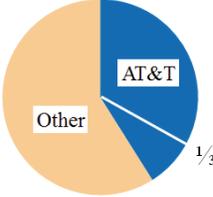
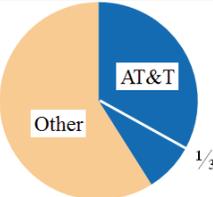
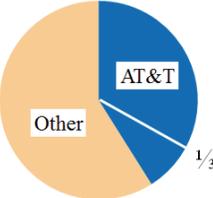
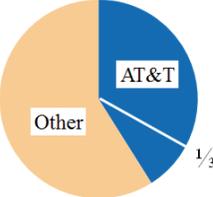
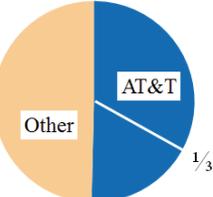
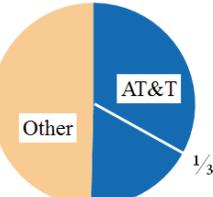
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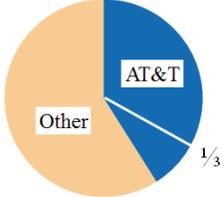
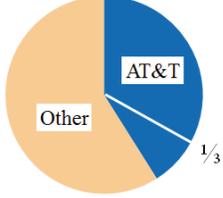
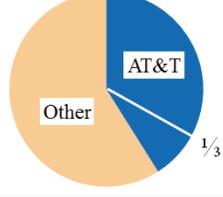
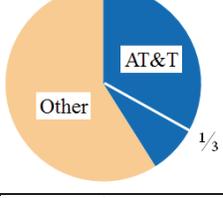
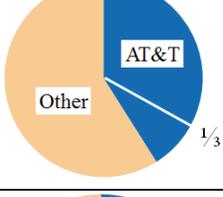
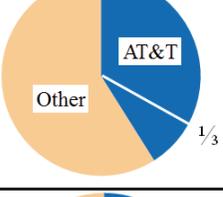
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APPENDIX

Pending AT&T Applications for Low-Band Spectrum that Would Exceed the Spectrum Screen:

Assignor/Transferor	Markets Triggering Enhanced Factor Review	Amount of Low-Band Spectrum AT&T Would Hold Post-Transaction
Club 42CM Limited Partnership	San Luis Obispo, CA (CMA340)	55 MHz (acquiring B Block) 
	Kings, CA (CMA347)	61 MHz (acquiring B Block) 
East Kentucky Network, LLC	Huntington-Ashland, WV/KY/OH (CMA 110)	55 MHz (acquiring C Block) 
	Lexington-Fayette, KY (CMA 116)	55 MHz (acquiring C Block) 
Kaplan Telephone Co., Inc.	Lafayette, LA (CMA 174)	55 MHz (acquiring C Block) 
	Beauregard, LA (CMA 458)	55 MHz (acquiring B & C Blocks) 

Pine Cellular Phones, Inc.	Polk, AR (CMA 332)	55 MHz (acquiring B Block)	
KanOkla Telephone Ass'n	Grant, OK (CMA 598)	55 MHz (acquiring C Block)	
Worldcall, Inc.	Aibonito, PR (CMA 726)	55 MHz (acquiring B Block)	
	Ceiba, PR (CMA 727)	55 MHz (acquiring B Block)	
Cellular Properties, Inc.	Clay, IL (CMA 402)	68 MHz (acquiring 25 MHz of cellular)	
Consolidated Telephone Co.	Hubbard, MN (CMA 487)	55-67 MHz (acquiring C Block)	

Bluegrass Cellular, Inc.	Evansville, IN (CMA 119)	55 MHz (acquiring C Block)	
	Clarksville, TN (CMA 209)	55 MHz (acquiring B Block)	
	Owensboro, KY (CMA 293)	55 MHz (acquiring B Block)	
	Brown, IN (CMA 410)	55 MHz (acquiring C Block)	
	Union, KY (CMA 444)	55 MHz (acquiring B Block)	
	Madison, KY (CMA 448)	55 MHz (acquiring B Block)	
	Trimble, KY (CMA 449)	55 MHz (acquiring C Block)	