



September 2, 2015

**Via ECFS**

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

**RE: EX PARTE NOTICE**

**WT Docket No. 14-145:** *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. 12-269:** *Policies Regarding Mobile Spectrum Holdings*

Ms. Dortch:

Competitive Carriers Association (“CCA”) and T-Mobile US, Inc. (“T-Mobile”) urge the Federal Communications Commission (“FCC” or “Commission”) to rigorously apply its “enhanced factor” standard of review for transactions involving below-1-GHz spectrum in a manner that effectively achieves its intended purpose of curbing further low-band spectrum aggregation. CCA represents the interests of more than 100 competitive wireless carriers, including T-Mobile, and has steadily sounded the alarm in recent years concerning increased consolidation in the wireless industry. In a recent decision to deny a Petition for Reconsideration by Sprint of the *Mobile Spectrum Holdings Report and Order*,<sup>1</sup> the Commission cited the adoption of its enhanced factor standard of review as a basis for denying the Petition. CCA and T-Mobile agree that the new standard of review is an important tool for restoring competition to the wireless market, but the Commission must ensure that this tool in actuality protects consumers from the harmful effects of further low-band spectrum aggregation by the two dominant nationwide providers. As a case of first impression and based on the record evidence, the Commission should deny AT&T’s application to acquire a Lower 700 MHz B Block license from Club 42 CM Limited Partnership in San Luis Obispo County, California.<sup>2</sup>

On August 5, the Commission adopted the *Reconsideration Order*, which in addition to denying a petition to increase the size of the spectrum reserve to create a more competitive 600 MHz

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<sup>1</sup> *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, WT Docket No. 12-269, GN Docket No. 12-268, Order on Reconsideration, FCC 15-79 (rel. Aug. 11, 2015) (“*Reconsideration Order*”); Petition for Reconsideration, Sprint Corp., WT Docket No. 12-269, GN Docket No. 12-268 (filed Aug. 11, 2014) (the “*Sprint Petition*”).

<sup>2</sup> AT&T Mobility Spectrum LLC and Club 42CM Limited Partnership, WT Docket No. 14-145, *Public Notice*, DA 14-1288 (rel. Sept. 8, 2014) (“*AT&T/Club 42 Public Notice*”).

auction,<sup>3</sup> denied the Sprint Petition.<sup>4</sup> Specifically, this petition asked the Commission to revise the spectrum screen it uses in reviewing secondary market transactions to include a specific set of weighting factors for each band of suitable and available spectrum, most notably to reflect the disproportionate competitive impact of low-band aggregation.<sup>5</sup> In denying the Petition, the Commission found that the *Mobile Spectrum Holdings Report and Order* “concluded that treating below 1-GHz spectrum concentration as an enhanced factor in its case-by-case review was a more appropriate approach than spectrum weighting . . . .”<sup>6</sup>

The *Mobile Spectrum Holdings Report and Order* adopted the enhanced factor standards of review for secondary market transactions involving concentration of below-1-GHz spectrum, to “help ensure that further concentration of such spectrum will not have adverse competitive effects either in particular local markets or on a broader regional or national level.”<sup>7</sup> The Commission did so based on its finding that “spectrum holdings by service provider in the limited low . . . bands have become particularly concentrated,” as well as its “concerns about the potential effects of further concentration of below-1-GHz spectrum on competition and innovation in the mobile wireless services marketplace.”<sup>8</sup> According to the Commission, “[e]nsuring that sufficient spectrum is available for multiple existing mobile service providers as well as potential new entrants is crucial to promoting consumer choice and competition throughout the country, including in rural areas, and is similarly crucial to fostering innovation in the marketplace.”<sup>9</sup>

In establishing its new enhanced factor review, the FCC created two different standards, one more stringent than the other. In transactions where an entity will acquire more than one-third of below-1-GHz spectrum as a result of the transaction, the assignee must provide “a detailed demonstration regarding why the public interest benefits outweigh the harms.”<sup>10</sup> In transactions where an entity already holds more than one-third of the below-1-GHz spectrum in the market, and seeks to acquire additional low-band spectrum, “the demonstration of the public interest benefits of the proposed transaction would need to clearly outweigh the potential public interest harms associated with such additional concentration of below-1-GHz spectrum, *irrespective of other factors*.”<sup>11</sup>

Yet this new standard of review has done little in practical application to curtail increased low-band spectrum aggregation following its adoption. In particular, AT&T has entered into at least ten transactions involving over 40 low-band spectrum licenses covering 328 MHz of low-band spectrum *subsequent to the Mobile Spectrum Holdings Report and Order*, which trigger either or both of the

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<sup>3</sup> *Reconsideration Order* ¶¶ 4-14.

<sup>4</sup> *Id.* ¶¶ 15-24.

<sup>5</sup> *See generally* Sprint Petition.

<sup>6</sup> *Reconsideration Order* ¶ 21.

<sup>7</sup> *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, WT Docket No. 12-269, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6133, 6240 ¶ 288 (2015) (“*Mobile Spectrum Holdings Report and Order*”).

<sup>8</sup> *Id.* at 6239 ¶ 283.

<sup>9</sup> *Id.* at 6143 ¶ 17.

<sup>10</sup> *Id.* at 6240 ¶ 286.

<sup>11</sup> *Id.* at 6240 ¶ 287 (emphasis added).

enhanced factor standards in whole or in part.<sup>12</sup> This is in addition to the buying spree AT&T embarked upon before the Commission created the enhanced factor standards of review.<sup>13</sup>

Most recently, the Commission granted, without conditions, several transactions filed after adoption of the *Mobile Spectrum Holdings Report and Order* that triggered enhanced factor review.<sup>14</sup> These transactions triggered the enhanced factor standard applicable when an assignee holds more than one-third of the suitable and available spectrum in the relevant markets following consummation of the transaction.<sup>15</sup> After considering “the particular facts ordinarily considered,”<sup>16</sup>

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<sup>12</sup> See, e.g., AT&T/Club 42 Public Notice; *Applications of AT&T Inc., Plateau Telecommunications, Inc., et al.*, WT Docket No. 14-144, Memorandum Opinion and Order, 30 FCC Rcd 5107 (2015) (“AT&T/Plateau Order”); *Applications of AT&T Mobility Spectrum LLC and Kaplan Telephone Co., Inc. for Consent to Assign Licenses*, WT Docket No. 14-167, Memorandum Opinion and Order, DA 15-958 (rel. Aug. 26, 2015) (“AT&T/Kaplan Order”); *Applications of AT&T Mobility Spectrum LLC and KanOkla Telephone Assoc. for Consent to Assign Licenses*, WT Docket No. 14-199, Memorandum Opinion and Order, DA 15-963 (rel. Aug. 27, 2015) (“AT&T/KanOkla Order”); *Applications of AT&T Mobility Puerto Rico Inc. and Worldcall Inc. for Consent to Assign Licenses*, WT Docket No. 14-206, Memorandum Opinion and Order, DA 15-971 (rel. Aug. 31, 2015) (“AT&T/Worldcall Order”); *Application of AT&T Mobility Spectrum LLC and Consolidated Telephone Co. for Consent to Assign Licenses*, WT Docket No. 14-254, Memorandum Opinion and Order, DA 15-985 (rel. Sept. 2, 2015) (“AT&T/Consolidated Order”); *Applications of AT&T Inc. and Pine Cellular Phones, Inc.*, WT Docket No. 15-13, CC Docket No. 99-200, *Public Notice*, DA 15-418 (rel. Apr. 2, 2015); *AT&T Inc. and Cellular Properties, Inc.*, WT Docket No. 15-78, *Public Notice*, DA 15-608 (rel. May 20, 2015); *AT&T Mobility Spectrum LLC and East Kentucky Network, LLC*, WT Docket No. 15-79, *Public Notice*, DA 15-617 (rel. May 21, 2015); *AT&T Mobility Spectrum LLC and Agri-Valley Communications, Inc.*, WT Docket No. 15-181, *Public Notice*, DA 15-911 (rel. Aug. 12, 2015); FCC, ULS Application No. 0006842123, FCC Form 603 at Ex. 1, *Description of Transaction and Public Interest Statement* (application of New Cingular Wireless PCS, LLC (an indirect wholly-owned subsidiary of AT&T Inc.) and Bluegrass Cellular Inc. and Bluegrass Wireless LLC for consent to assignment of four Lower 700 MHz B Block licenses and seven Lower 700 MHz C Block licenses); FCC, ULS Application No. 0006811616, FCC Form 603 at Ex. 1, *Description of Transaction and Public Interest Statement* (application of New Cingular Wireless PCS, LLC (an indirect wholly-owned subsidiary of AT&T Inc.) and NEP Cellcorp., Inc. for consent to assignment of one Lower 700 MHz B Block license and one PCS A Block license).

<sup>13</sup> See *Applications of AT&T Mobility Spectrum LLC, Triad 700, LLC CenturyTel Broadband Wireless, LLC Cavalier Wireless, LLC, Ponderosa Telephone Co., David L. Miller, ComSouth Cellular, Inc., Farmers Telephone Co., Inc., and McBride Spectrum Partners, LLC for Consent to Assign Licenses*, ULS File Nos. 0005286787, 0005337520, 0005262760, 0005295740, 0005295055, 0005296026, 0005304258, 0005293645, and 0005323094, Memorandum Opinion and Order, 27 FCC Rcd 15831 (WTB 2012) (processing applications by AT&T to acquire 112 Lower 700 MHz licenses); *Applications of AT&T Inc. and Atlantic Tele-Network, Inc. for Consent to Transfer Control of and Assign Licenses and Authorizations*, WT Docket No. 13-54, Memorandum Opinion and Order, 28 FCC Rcd 13670 (WTB, IB 2013); *Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations*, WT Docket No. 11-18, Order, 26 FCC Rcd 17589 (2011).

<sup>14</sup> See AT&T/Plateau Order; AT&T/Kaplan Order; AT&T/KanOkla Order; AT&T/Worldcall Order; AT&T/Consolidated Order.

<sup>15</sup> AT&T/Plateau Order at 5123 ¶ 36; AT&T/Kaplan Order ¶ 21; AT&T/KanOkla Order ¶ 16; AT&T/Worldcall Order ¶ 16; AT&T/Consolidated Order ¶ 16.

the Commission found a low likelihood of competitive harm in the transactions.<sup>17</sup> In the AT&T/Plateau Order, its first decision applying the enhanced factor standard, the Commission considered “the rural nature of the market, the number of service providers with a significant market share [four], the number of service providers with substantial mobile broadband coverage and capacity [including Verizon and its 47 MHz of low-band spectrum, as well as Sprint’s 14 MHz and DISH Network’s 6 MHz of low-band spectrum], and the ability of other rival service providers to offer competitive service, *notwithstanding the fact that AT&T would hold 55 megahertz of below-1-GHz spectrum post-transaction.*”<sup>18</sup> Even more troubling, the Wireless Bureau adopted the AT&T/Kaplan Order despite finding that only three providers would have a significant market share in one of the impacted markets.<sup>19</sup> This is in direct opposition to Chairman Wheeler’s longstanding insistence that “[f]our national wireless providers are good for American consumers.”<sup>20</sup> Unfortunately, Commissioner Pai may have *best described* the Commission’s application of its “new” standard of review as one that “considers the same factors, employs the same level of scrutiny, and achieves the same results as our traditional review.”<sup>21</sup> This cannot be the spirit or the intent of the enhanced factor standards crafted in the *Mobile Spectrum Holdings Report and Order*. And the Commission has a chance in the AT&T/Club 42 transaction to correct this perception.

If the Commission has decided that enhanced factor review is the mechanism it will use to implement its statutory directives to “promot[e] the ‘efficient and intensive use of the electromagnetic spectrum’ and avoid[ ] an ‘excessive concentration of licenses’ in the design of systems for competitive bidding, as well as in [its] secondary market transaction reviews,”<sup>22</sup> and it says it has, then it must take steps to ensure that this tool actually works. The only way to do so is to apply the enhanced factor standards in a way that meaningfully differentiates transactions involving critical below-1-GHz spectrum.

In applying the new standards, the Commission should be mindful of at least two points. The first is that the Commission should not place undue weight on other service providers being given the “opportunity” to purchase spectrum subject to enhanced factor review.<sup>23</sup> Unless the Commission can be certain that communications between and among the relevant parties did not result in a target price that includes foreclosure values for the spectrum, these “opportunities” may be illusory, and citing to them would only undermine the Commission’s screen process. Second, in the *Reconsideration Order*, the Commission denied T-Mobile’s request to increase the size of the spectrum reserve for the 600 MHz auction in part because of its prior determination that “10x10 megahertz blocks of [low-band spectrum] were ‘not required for effective mobile deployment.’”<sup>24</sup>

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<sup>16</sup> AT&T/Plateau Order at 5123 ¶ 36; AT&T/Kaplan Order ¶ 25.

<sup>17</sup> *Id.*; AT&T/KanOkla Order ¶ 23; AT&T/Worldcall Order ¶ 22; AT&T/Consolidated Order ¶ 18.

<sup>18</sup> AT&T/Plateau Order at 5123 ¶ 36 (emphasis added).

<sup>19</sup> AT&T/Kaplan Order ¶ 25.

<sup>20</sup> Statement from FCC Chairman Tom Wheeler on Competition in the Mobile Marketplace, Aug. 6, 2014, [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-328687A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-328687A1.pdf).

<sup>21</sup> AT&T/Plateau Order at 5133, Statement of Commissioner Ajit Pai.

<sup>22</sup> *Mobile Spectrum Holdings Report and Order* at 6147 ¶ 27 (quoting 47 U.S.C. §§ 309(j)(3)(D); 309(j)(3)(B)).

<sup>23</sup> See AT&T/Plateau Order at 5123, ¶ 35 n.113; AT&T/Kaplan Order ¶ 25, n.89; AT&T/KanOkla Order ¶ 19, n.63.

<sup>24</sup> *Reconsideration Order* ¶ 10.

Irrespective of whether or not this is true today as a practical matter, it would be inconsistent for the Commission to deny T-Mobile's Petition for Reconsideration, on the one hand, on this basis, but to approve pending low-band spectrum transactions, on the other hand, based in large part on AT&T's claimed "public interest benefits" of deploying a 10x10 channel.<sup>25</sup>

Whatever impact the Commission's resolution of the AT&T/Plateau transaction may have on its review of future transactions, it has yet to issue a decision in a contested case,<sup>26</sup> nor one involving the more stringent standard applicable to entities who hold more than one-third of all suitable and available low-band spectrum before consummation of the transaction—such as the case of AT&T's current request to acquire from Club 42 a Lower 700 MHz B Block license in San Luis Obispo County, California.<sup>27</sup> It is imperative that the Commission's review of this transaction be demonstrably different than its pre-*Mobile Spectrum Holdings Report and Order* process, or else the enhanced factor standards will have little meaning or impact. AT&T has presented no real evidence of increased public interest benefits resulting from the transaction to "clearly outweigh the potential public interest harms associated with such additional concentration of below-1-GHz spectrum, *irrespective of other factors.*"<sup>28</sup> The Commission should therefore set a strong precedent through its review of the AT&T/Club 42 transaction by applying the standards in a meaningful way, and either deny the transaction outright or designate the applications for an administrative hearing.

This *ex parte* notification is being filed electronically with your office pursuant to Section 1.1206 of the Commission's Rules.

Regards,

/s/ Rebecca Murphy Thompson

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<sup>25</sup> See AT&T/Plateau Order at 5129, ¶ 53; AT&T/Kaplan Order ¶¶ 29, 31; AT&T/KanOkla Order ¶¶ 21-22; AT&T/Worldcall Order ¶¶ 20-21; AT&T/Consolidated Order ¶¶ 20-21.

<sup>26</sup> AT&T/Kaplan Order ¶¶ 5, 19; AT&T/KanOkla Order ¶¶ 5, 14; AT&T/Worldcall Order ¶¶ 5, 14; AT&T/Consolidated Order ¶¶ 5, 14.

<sup>27</sup> See AT&T/Club 42 Public Notice.

<sup>28</sup> *Mobile Spectrum Holdings Report and Order* at 6240 ¶ 287 (emphasis added).