

September 21, 2015

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: 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

Dear Ms. Dortch:

Recently, the Competitive Carriers Association (“CCA”) and T-Mobile pressed the Federal Communications Commission (“Commission”) to rigorously apply its “enhanced factor” standard of review in transitions involving sub-1-GHz spectrum to achieve the Commission’s goal of curbing further low-band spectrum aggregation. CCA and T-Mobile explained that the enhanced factor standard of review the Commission established in its *Mobile Spectrum Holdings Order* is a useful tool to help the Commission restore competition in the increasingly concentrated wireless market and protect consumers and the public interest from the harmful effects of further low-band spectrum aggregation by the nation’s two largest wireless carriers. CCA and T-Mobile also urged the Commission to deny AT&T’s application to acquire a Lower 700 MHz license from Club 42 CM Limited Partnership (“Club 42”) in San Luis Obispo County, California.¹

Public Knowledge and New America’s Open Technology Institute agree with CCA and T-Mobile that the Commission’s review of assignments or transfers of sub-1-GHz spectrum must be demonstrably different than its review of other transactions, particularly when the transaction would result in a carrier holding one-third or more of the sub-1-GHz spectrum in a given market. As the Public Interest Spectrum Coalition stated in comments and reply comments in the incentive auction and mobile spectrum holdings proceedings in support of cap on low-band spectrum holdings, “without a mechanism . . . to limit spectrum holdings below 1 GHz, the already-concentrated holdings of that beachfront spectrum would increase, and competition would be further hindered.”²

In the *Mobile Spectrum Holdings Order*, the Commission found that, “[a]s consumers increasingly demand mobile broadband service with greater coverage and signal quality, ensuring a robustly competitive mobile wireless marketplace in the future will likely depend upon more than two service providers in any area having access to both low- and high-band spectrum to

¹ See *Ex Parte* Letter from Competitive Carriers Association and T-Mobile US, Inc., WT Docket Nos. 14-145 and 12-

² Public Interest Spectrum Coalition, Reply Comments, WT Docket No. 12-269, GN Docket No. 12-268, at 37 (filed March. 13, 2013).

better achieve and optimize rapid network coverage and robust capacity.”³ The Commission also stated, “[t]oday, two nationwide providers control the vast majority of low-band spectrum If they were to acquire all of substantially all of the remaining low-band spectrum, they would benefit independently of any deployment to the extent that their rivals are denied its use.”⁴ Further, “[w]ithout access to this low-band spectrum, their rivals would be less able to provide a competitive alternative” because these spectrum constrained rivals “may lack the ability to quickly expand coverage or provide new or innovative services.”⁵

In response to harms to consumers and competition it attributed to the rapidly increasing consolidation in the marketplace and the concentration of low-band spectrum holdings, the Commission adopted its generally applicable enhanced factor review standards for secondary-market transactions involving aggregation of below-1-GHz spectrum.⁶ More specifically, the FCC established that, where an entity does not hold more than one-third of suitable and available low-band spectrum in a market before a transaction, but will afterward, the parties must make a “detailed demonstration regarding why the public interest benefits outweigh the harms.”⁷ In transactions where the acquiring party *already* holds more than one-third of suitable and available low-band spectrum in a market, and seeks to acquire even more, the Commission held that **the transaction would generally be precluded unless the acquiring party can show that “public interests benefits clearly outweigh the potential public interest harms** associated with additional concentration of below-1-GHz spectrum, irrespective of other factors.”⁸

The Commission established these standards of review based in part upon concerns voiced by the Department of Justice. In an April 2013 *ex parte*, the Department of Justice explained that “carriers may have incentives to acquire spectrum for purposes other than efficiently expanding their own capacity or services,” and that “absent compelling evidence that the largest incumbent carriers are already using their existing spectrum licenses efficiently and their networks are still capacity constrained, the Department would normally expect the highest value for new spectrum that is in the public interest to come from rivals to the leading firms that could effectively make use of additional spectrum to expand capacity, improve coverage, or introduce new services in an effort to challenge the dominant firms.”⁹ These concerns remain valid today, and are increasingly relevant given the shortage of low-band spectrum, and the ability of AT&T to use its existing spectrum more efficiently.¹⁰

³ 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, 6165 ¶ 61, 6205-06 ¶ 177, 6239 ¶ 283 (2014) (“*Mobile Spectrum Holdings Order*”).

⁴ *Id.* at 6161 ¶ 57, 6164 ¶ 60.

⁵ *Id.* at 6164-65 ¶¶ 60-61.

⁶ *Id.* at 6156 ¶ 44

⁷ *Id.* at 6240 ¶ 286.

⁸ *Id.* at 6240 ¶ 287 (emphasis added).

⁹ *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269, at 10, 12 (filed Apr. 11, 2013)

¹⁰ While AT&T has begun efforts to reform the spectrum used by its 2G network for more efficient purposes, the project will not be complete until year-end 2016. AT&T should not be permitted to increase its low-band spectrum holdings in already concentrated markets before it has finished efficiently using the substantial holdings it already has. Mike Dano, *Customer migration ‘going fine’ as AT&T prepares for 2G network shutdown by year-end 2016*, FierceWireless (Jul. 16, 2014), available at <http://www.fiercewireless.com/story/customer-migration-going-fine-att-prepares-2g-network-shutdown-year-end-201/2014-07-16>.

The Department of Justice’s concerns regarding spectrum concentration and competition in the wireless market was particularly prescient in light of the Commission’s findings in its December 2014 *Seventeenth Mobile Competition Report*. As the *Seventeenth Mobile Competition Report* noted, the Herfindahl-Hirschman Index, a metric used by the Commission and the Department of Justice to measure market concentration, crossed the 3,000 threshold by the end of 2013.¹¹ Antitrust authorities classify markets with a HHI greater than 2,500 as “highly concentrated.”¹² In 2013, the two largest carriers held a combined market share of 69%, based on service revenues.¹³ Critically, AT&T and Verizon hold a combined 73% of all low-band spectrum, and a combined 80% of the licensed MHz-POPs of the combined Cellular and 700 MHz bands.¹⁴

Unfortunately, the Commission’s recent string of approvals of secondary market spectrum acquisitions threatens to undermine the enhanced factor standard of review, weakening it to the point of irrelevance.¹⁵ As CCA and T-Mobile explained, AT&T has entered into approximately a dozen transactions involving more than forty low-band spectrum licenses, *subsequent to* the implementation of the rules amended in the *Mobile Spectrum Holdings Order*.¹⁶ These transactions trigger one or both of the enhanced factor standards, either in whole or in part. These deals are in addition to the buying spree AT&T engaged in prior to adoption of the updated *Mobile Spectrum Holdings Order*.¹⁷

It is clear, as AT&T conducts these transactions, that they view the enhanced factor standards as posing little to no barrier to continued spectrum concentration. In a recent blog post, AT&T went so far as to describe the standards as “business as usual,” while outright ignoring the even more rigorous Section 287 review standards.¹⁸ AT&T does not view these enhanced factor standards as any sort of deterrent to their quest to aggregate spectrum and foreclose competitors’ access to this critical input.

In the transaction at hand, AT&T has failed to meet the burdens of proof required by the enhanced factor standards and has failed to show that the transaction is in the public interest. The claims AT&T has made in the record are, at best, haphazard. AT&T claims as one benefit, for example, the increased spectral efficiency that comes from a 10x10 MHz LTE deployment. It has not, however, explained why it is unable to meet its capacity or coverage needs with its current,

¹¹ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Wireless, WT Docket No. 13-135, *Seventeenth Report*, 29 FCC Rcd 15311, 15327 ¶ 33 (2014) (“*Seventeenth Mobile Competition Report*”)

¹² *Id.* at 15327 n.46.

¹³ *Id.* at 15326 ¶¶ 30-31, Table II.C.2.

¹⁴ *Id.* at 15362, Table IV.A.2.

¹⁵ See Applications of AT&T Inc., Plateau Telecommunications, Inc., et al., WT Docket No. 14-144, *Memorandum Opinion and Order*, Statement of Commissioner Ajit Pai, 30 FCC Rcd 5107, 5133 (2015) (“The Commission’s enhanced review here considers the same factors, employs the same level of scrutiny, and achieves the same results as our traditional review.”)

¹⁶ *CCA/T-Mobile Ex Parte* at 2-3.

¹⁷ *Id.* at 3.

¹⁸ Joan Marsh, *The FCC’s Enhanced Transaction Review Standard*, AT&T Public Policy Blog (Sept. 15, 2015), available at <http://www.attpublicpolicy.com/fcc/the-fccs-enhancedtransaction-review-standard/>.

substantial, spectrum holdings. Additionally, AT&T has not explained why it would be unable to meet its needs through cell splitting, or through deployment of small cell or DAS infrastructure. Furthermore, the Commission stated, “10x10 megahertz blocks of [low-band spectrum are] ‘not required for effective mobile deployment’” in its denial of T-Mobile’s Petition for Reconsideration of the *Mobile Spectrum Holdings Order*.¹⁹ It would be unjust for the Commission to refuse to increase the size of the pro-competitive 600MHz spectrum reserve using this rationale, while at the same time approving acquisitions by AT&T, based solely on this claimed benefit. Additionally, the Commission denied Sprint’s Petition for Reconsideration of the *Mobile Spectrum Holdings Order*, based on its faith in these enhanced standards of review; in this case of first impression, it is now time for the FCC to put its weight behind its words.²⁰

The Commission’s decision and rationale in this transaction is critical to clarifying the enhanced factor review. A detailed explanation of the enhanced factor review is particularly warranted due to the first-impression nature of this case, and the Commission’s prior reliance on the enhanced factor review for its failure to adopt policies in other proceedings that would promote competition. The enhanced factor review must in fact be “enhanced” and effectuate the concerns the Commission raised in the *Mobile Spectrum Holdings Order*, namely that “excessive concentration in the allocation of relatively scarce below-1-GHz spectrum, given ever increasing consumer demand for more bandwidth-intensive services, would substantially harm the public interest and indeed, would create a significant risk in the future of an insufficient number of service providers with a network capable of satisfying consumer demand.”²¹

The Commission should be cognizant that its decision will determine how the enhanced factor review will be interpreted and applied in future transactions and will establish whether the Commission will use the review as a tool to address the harmful effects of low-band spectrum aggregation, or render the review meaningless. The Commission must not establish a precedent that ties its hands in promoting wireless competition and preventing the largest carriers from foreclosing access to low-band spectrum through secondary market acquisitions.

In conclusion, Public Knowledge and New America’s Open Technology Institute reiterate their agreement with the concerns voiced by CCA and T-Mobile, and urge the Commission to give meaning and weight to the enhanced factor standard of review it established to address spectrum aggregation concerns.

Sincerely,

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Public Knowledge

/s/ Michael Calabrese
Director, Wireless Future Project
New America’s Open Technology Institute

¹⁹ See 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 ¶ 10 (rel. Aug. 11, 2015) (“*Reconsideration Order*”).

²⁰ See *id.* at ¶¶ 21-22.

²¹ *Mobile Spectrum Holdings Order* at 6168 ¶ 68.

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