Public Knowledge

September 24, 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:

On September 22, 2015, Phillip Berenbroick and John Gasparini of Public Knowledge, Michael Calabrese of New America's Open Technology Institute, and Trey Hanbury of Hogan Lovells US LLP, representing T-Mobile USA, Inc. (collectively, the "Parties") met with Johanna Thomas, Legal Advisor to Commissioner Rosenworcel, to discuss matters in the above-captioned proceedings.

The Parties urged 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.[1] Further, the Parties explained AT&T's pending application to acquire a Lower 700 MHz license from Club 42 CM Limited Partnership ("Club 42") in San Luis Obispo County, California[2] fails to satisfy the "enhanced factor" standard of review the Commission established in its *Mobile Spectrum Holdings Order* and should be denied.

The Parties explained that the *Mobile Spectrum Holdings Order* was the Commission's 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. To address these harms, protect consumers and promote competition and innovation, the Commission adopted its generally applicable enhanced factor review standards for secondary-market transactions involving aggregation of below-1-GHz spectrum.[3] 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."[4] 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."[5]

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[1] *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, *Report and Order*, 29 FCC Rcd 6133, 6240 ¶¶ 286-87 (2014) ("*Mobile Spectrum Holdings Order*").
[2] *See* Application of AT&T Mobility Spectrum LLC and Club42 CM Limited Partnership for Consent to Assign Licenses, ULS File No. 0006344543, Ex. 1 (filed July 15, 2014, amended July 16 and Aug. 1, 2014).
[3] *Mobile Spectrum Holdings Order* at 6156 ¶ 44, 6240 ¶¶ 286-87.
[4] *Id*. at 6240 ¶ 286.
[5] *Id*. at 6240 ¶ 287 (emphasis added).

The Parties noted that even under the traditional case-by-case review process, applicants bear the burden of proving that their proposed transaction will serve the public interest.[6] The FCC previously has made clear therefore that, in cases of low-band spectrum aggregation beyond one-third of the total available resources, applicants bear the additional burden of demonstrating that that these transactions should be approved in light of the enhanced factor standards of review. In addition, the present transaction triggers an even higher standard of review that AT&T and Club 42 bear the burden of proving. That is, the public interest benefits must "clearly outweigh" the public interest harms associated with additional aggregation of below-1-GHz spectrum, "irrespective of other factors."[7]

The Parties made clear that the Commission's decision and rationale in this transaction is critical to clarifying the contours of the enhanced factor review. A detailed explanation of the enhanced factor review and how it is applied in transactions 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.[8] The enhanced factor review must in fact be "enhanced" and effectuate the concerns the Commission raised in the *Mobile Spectrum Holdings Order*. In that decision, the Commission found 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."[9]

In this case, AT&T and Club 42 have presented no meaningful evidence of increased public interest benefits resulting from the transaction, which they bear the burden of doing.[10] Moreover, the harm to consumer choice, investment and innovation will be pronounced and, given the concentration of critical input resources, very challenging to reverse if approved. The Commission should therefore set a strong precedent through its review of the AT&T/Club 42 transaction by rigorously applying the standards in a meaningful way, and either deny the transaction outright or designate the applications for an administrative hearing.

In accordance with Section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please contact me with any questions regarding this filing.

Sincerely,

/s/ Phillip Berenbroick
Counsel, Government Affairs
Public Knowledge

CC: Johanna Thomas, Legal Advisor to Commissioner Rosenworcel

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[6] *Id*. at 6239 ¶ 285.
[7] *Id*. at 6240, ¶ 287.
[8] *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, 21-22 (rel. Aug. 11, 2015) (denying separate Petitions for Reconsideration filed by Sprint and T-Mobile).
[9] *Mobile Spectrum Holdings Order* at 6168 ¶ 68.
[10] *Id*. at 6239-40 ¶ 285-87.