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September 24, 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:

On September 22, 2015, C. Sean Spivey and I, together with Elizabeth Park from Latham & Watkins LLP, Kathleen Ham and Josh Roland of T-Mobile USA, Inc. (“T-Mobile”), Trey Hanbury of Hogan Lovells US LLP, and Phillip Berenbroick of Public Knowledge (collectively the “Parties”) met with Jessica Almond, Acting Legal Advisor for Engineering and Technology, Wireless and Incentive Auction to Chairman Tom Wheeler. During this meeting, the Parties discussed their recent *ex parte* submissions in the above-referenced dockets.¹ Specifically, the Parties urged the Commission to deny AT&T’s pending application to acquire Lower 700 MHz B Block licenses from Club 42 CM Limited Partnership² and give its “enhanced factor” standards of review strength and meaning to curb anticompetitive aggregation of low-band spectrum.

CCA began by noting that, in addition to previous buying sprees,³ AT&T has entered into a dozen transactions involving over 40 low-band spectrum licenses covering hundreds of megahertz

¹ See *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, CCA and Kathleen Ham, Senior Vice President, Government Affairs, T-Mobile US, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 14-145, 12-269 (filed Sept. 2, 2015) (“CCA/T-Mobile Ex Parte”); *Ex Parte* Letter from Phillip Berenbroick, Counsel, Government Affairs, Public Knowledge and Michael Calabrese, Director, Wireless Future Project, New America’s Open Technology Institute to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 14-145, 12-269 (filed Sept. 21, 2015).

² 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”).

³ See CCA/T-Mobile Ex Parte at 3, n.13.

of low-band spectrum since the Commission adopted its *Mobile Spectrum Holdings Report and Order*.⁴ Not surprisingly, because of AT&T's secondary market dominance, all of these transactions have triggered either or both of the enhanced factor standards of review in whole or in part.⁵ Stoking the Parties' fear that AT&T will continue to foreclose low-band spectrum opportunities, the Commission has recently granted, without conditions, several of these transactions which triggered the Commission's less stringent standard of review.

In each of these approved transactions AT&T did not hold more than one-third of the suitable and available spectrum in the relevant markets, but would upon consummation of the transaction.⁶ Pursuant to the lesser of the two enhanced factor standards, AT&T was required to make "a detailed demonstration regarding why the public interest benefits outweigh the harms."⁷ However, after evaluating the facts ordinarily considered, the Commission found a low likelihood of competitive harm in each transaction.⁸ The Commission did so in the AT&T/Kaplan transaction, for example, in spite of the fact that only three providers would have a significant market share in one of the impacted markets,⁹ in contradiction to Chairman Wheeler's longstanding insistence that "[f]our national wireless providers are good for American consumers."¹⁰

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.¹¹ The FCC previously has made clear, therefore, that AT&T and Club 42 bear the additional burden of demonstrating that this transaction should be approved in light of the enhanced factor standards of review. In addition, the present transaction triggers an even higher standard of review

⁴ See *id.* at 3, n.12.

⁵ *Id.*

⁶ *Applications of AT&T Inc., Plateau Telecommunications, Inc., et al.*, WT Docket No. 14-144, Memorandum Opinion and Order, 30 FCC Rcd 5107, 5123 ¶ 36 (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 at ¶ 21 (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 at ¶ 16 (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 at ¶ 16 (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 at ¶ 16 (rel. Sept. 2, 2015) ("AT&T/Consolidated Order").

⁷ *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 (2015) ("*Mobile Spectrum Holdings Report and Order*").

⁸ AT&T/Plateau Order at 5123 ¶ 36; AT&T/Kaplan Order ¶ 25; AT&T/KanOkla Order ¶ 23; AT&T/Worldcall Order ¶ 22; AT&T/Consolidated Order ¶ 18.

⁹ AT&T/Kaplan Order ¶ 25.

¹⁰ 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.

¹¹ *Mobile Spectrum Holdings Report and Order* at 6239 ¶ 285.

that AT&T and Club42 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.¹²

AT&T has identified only one claimed benefit resulting from the current transaction, and therefore has failed to meet its burdens of proof—particularly in light of the significant public interest harms identified by the Parties. The most significant harm would be to allow foreclosure-level pricing to be paid by a dominant provider to a spectrum speculator, thereby perpetuating the alarming trend of anticompetitive low-band spectrum aggregation. As the U.S. Department of Justice—the expert agency on antitrust issues—has previously explained to the Commission, the total value of this spectrum is the sum of its use value and its foreclosure value. Foreclosure value does not produce any consumer welfare but rather “represents the private value of foreclosing competition by, for instance, forestalling entry or expansion that threatens to inject additional competition into the market.”¹³ The Department went on to describe its process for evaluating spectrum transactions, and to identify the opportunity the Commission had before it in updating its mobile spectrum holdings policies:

In numerous wireless transactions . . . the Department carefully consider[s] assertions that the economies of scale arising from greater spectrum concentration will ultimately yield substantial benefits for consumers. As in any transaction, the key to this analysis is whether the efficiencies that could be realized as a result of the acquisition would reduce the marginal cost of service sufficiently to outweigh the often substantial benefits of additional competition [I]n the Department’s experience in this and other matters, it is important that the efficiencies described above are assessed accurately, including accounting for all alternative means for carriers to use their existing spectrum resources to expand capacity or launch new services [S]pectrum is a scarce resource and a key input for mobile wireless services. **The Commission has an opportunity through its policies on spectrum holdings to preserve and promote competition and to ensure that the largest firms do not foreclose other rivals from access to low-frequency spectrum that would allow them to improve their coverage and make them stronger, more aggressive competitors.**¹⁴

The Department more recently affirmed its “concern that acquisition of [low-frequency] spectrum, whether at auction or through other transactions, by carriers that already control large percentages of the available low-frequency spectrum, could be used to create or enhance market power.”¹⁵

The Department’s guidance touches upon two points previously raised by the Parties. First, in all transactions, but particularly those subject to enhanced factor review, the Commission should

¹² *Id.* at 6240, ¶ 287.

¹³ *See Ex Parte* Submission of the U.S. Dept. of Justice, WT Docket No. 12-269 at 11 (filed Apr. 11, 2013) (“2013 DOJ Ex Parte”). A copy of DOJ’s *ex parte* letter is attached hereto for ease of reference.

¹⁴ *Id.* at 16-18.

¹⁵ *Ex Parte* Letter from William J. Baer, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-269 at 2 (filed June 24, 2015).

not place reliance on claims that other service providers were given the “opportunity” to purchase the spectrum at issue.¹⁶ As the Department notes, the largest dominant providers have an incentive to pay a higher price for this scarce resource to keep other providers from effectively competing in the market. The Commission should ensure that the “offer” in question is not a target price that includes foreclosure values for the spectrum, which deters rivals’ interest in purchasing the spectrum. AT&T has posited in the past that the concept of foreclosure value is an impossibility in this transaction because the spectrum was offered through a broker.¹⁷ AT&T clearly misunderstands the concept of foreclosure value, and the Commission should not validate AT&T’s misunderstanding through approval of this transaction.

Second, to the extent the Commission heeds the Department’s guidance and considers the efficient use of AT&T’s current spectrum in the market as a factor in reviewing this transaction,¹⁸ a number of more preferable alternatives exist (such as deploying small cells, cell splitting, or carrier aggregation) to allowing AT&T to further aggregate critical low-band spectrum. In these rural markets, and considering how much low-band spectrum AT&T already holds in the market, it is hard to believe that AT&T is spectrum constrained and in need of even more low-band spectrum. In fact, AT&T has failed to demonstrate that it cannot use its existing spectrum and makes no mention of whether it has attempted to maximize efficiency of its low-band and other spectrum in the markets at issue.

T-Mobile noted additional public interest harms resulting from this transaction. In particular, while T-Mobile offers service in these markets and is working to deploy LTE service on its 700 MHz Lower A Block licenses, it would benefit from securing additional low-band spectrum as it continues to add subscribers and face increased capacity needs. T-Mobile’s low-band holdings, as well as the other service providers in the market, currently permit each of them to deploy at most a single 5x5 MHz LTE channel.¹⁹ Furthermore, 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.’”²⁰ 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 benefit” of deploying a 10x10 channel.²¹

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

¹⁶ See CCA/T-Mobile Ex Parte at 4.

¹⁷ See, e.g., Response of AT&T Mobility Spectrum LLC to Second Supplemental Information Request Dated May 20, 2015, WT Docket No. 14-145 at 11-13 (filed June 2, 2015).

¹⁸ See *Mobile Spectrum Holdings Report and Order* at 6240 ¶ 287; 2013 DOJ Ex Parte at 9-12.

¹⁹ See *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, CCA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-145 at 3 (filed Jan 15, 2015).

²⁰ *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*”).

²¹ See CCA/T-Mobile Ex Parte at 4-5; see also 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.

will have little meaning or impact. AT&T and Club 42 have presented no real evidence of increased public interest benefits resulting from the transaction, which they bear the burden of doing.²² The Commission should therefore set a strong precedent through its review of this transaction by rigorously applying the standards in a meaningful way, and either deny the transaction outright or designate the applications for an administrative hearing.²³

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

Rebecca Murphy Thompson
General Counsel
Competitive Carriers Association

cc: Jessica Almond
Jim Bird
Kate Matraves
Scott Patrick
Best Copy and Printing, Inc.

²² *Mobile Spectrum Holdings Report and Order* at 6239-40 ¶¶ 285-87.

²³ At the end of the meeting, Elizabeth Park and Trey Hanbury discussed confidential information in the record with Ms. Almond. The other parties, not having executed confidentiality acknowledgments pursuant to the applicable protective orders, stepped out of the meeting during this conversation.