

October 5, 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 October 1, 2015, Phillip Berenbroick and Harold Feld of Public Knowledge (“collectively, Public Knowledge”) met with Roger Sherman, Jim Schlichting, Kathy Harris, Sean Conway, and Monica DeLong of the Wireless Telecommunications Bureau to discuss matters in the above-captioned proceedings.

Public Knowledge urged the Federal Communications Commission (“Commission”) to rigorously apply its “enhanced factor” standard of review, which it established in its 2014 *Mobile Spectrum Holdings Order*, in transactions 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, California² fails to satisfy the “enhanced factor” standard of review and should be denied.

Public Knowledge 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. 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.”³

This is particularly important where, as here, much of the basis of the Commission’s consideration will be redacted from the public record. The Commission has, appropriately, made several requests for data from the applicants to conduct its review. It has received additional “confidential” and “highly confidential” information from transaction opponents. It is impossible for parties to know from this voluminous record what factors, specifically, weighed in favor of denial or grant of the application.

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 6168 ¶ 68.

The spectrum screen, as the Commission has stressed, is a highly fact-specific analysis. It is neither a pure cap subject to waiver, or a safe-harbor for transactions below the screen. It is therefore imperative that the Commission illustrate through explicit case-by-case adjudication precisely what factors weigh in the public interest analysis, and the weight the Commission gives to each factor. That need is increased even further in this case of first impression, where a provider already over the screen seeks to acquire additional low-band spectrum. As the Commission noted in *Mobile Spectrum Holdings Order*, these transactions trigger the greatest concern and require the most explicit showing that the transaction serves the public interest.⁴ Because the reliance on so much confidential and highly confidential information of necessity obscures the analysis, it falls to the Commission to explain in the greatest detail possible the algorithm by which it evaluated the information. A mere restatement of the basic standard and a declaration that the standard has or has not been met will leave critical questions with regard to the nature of review in similar cases effectively unresolved.

Public Knowledge also explained that the Commission's consideration of the public interest harms and public interest benefits in a transaction review cannot take into account whether other parties had the opportunity to bid on a license. AT&T has claimed that Club 42 sold the licenses through a broker and that other parties had the opportunity to purchase the licenses.⁵ This fact is irrelevant. As AT&T has correctly stated, "legally the Commission may not consider whether the public interest would be better served if the Club 42 Licenses were assigned a party other than AT&T."⁶ Whether other parties may have been given an opportunity to bid on Club 42's licenses is utterly immaterial to the Commission's transaction review. The Commission must consider the transaction before it, and on its own merits. Further, the Commission must review transactions that trigger the enhanced factor review with a presumption that low-band spectrum concentration is problematic for competition and harmful to consumers as it determines whether the public interest benefits outweigh the harms.⁷ The Commission may not consider whether there were other bidders. And, in the case of the 700 MHz license AT&T seeks to acquire in San Luis Obispo, CA, AT&T must show that the public interest benefits "clearly outweigh" the public interest harms associated with additional aggregation of below-1-GHz spectrum, "irrespective of other factors."⁸

Additionally, even if the Commission were to consider whether Club 42 made the license available to other buyers, this factor fails to address the underlying concern of the spectrum screen – that the largest providers with significant advantage in low-band spectrum will seek to foreclose competitors from access. A secondary market auction conducted by a broker is not conceptually different from an initial auction conducted by the Commission,⁹ and therefore raises the same foreclosure concerns raised by the

⁴ *Mobile Spectrum Holdings Order* at 6240 ¶ 287

⁵ See, e.g., Response of AT&T Mobility Spectrum LLC to General Information Request, Dated September 22, 2014, WT Docket No. 14-145 at 12 (filed Oct. 6, 2014).

⁶ Response of AT&T Mobility Spectrum LLC to Second Supplemental Information Request Dated May 20, 2014, WT Docket No. 14-145 at 12 (filed June 2, 2015) (citing 47 U.S.C. § 310(d)).

⁷ See *Mobile Spectrum Holdings Order* at 6168 ¶ 68 (finding that below-1-GHz spectrum is "disproportionately concentrated" in the hands of the two largest wireless providers, and that excessive concentration of low-band spectrum is harmful to the public interest and to competition); see also *id.* at 6164 ¶ 60, 6168 ¶ 69.

⁸ *Id.* at 6240 ¶ 287.

⁹ Indeed, it is a central tenant of Coase's thesis on the value of market mechanisms and the justification of the superiority of auctions as a means of distribution of exclusive licenses that an auction is simply the initial market-based distribution, and that subsequent secondary market sales operate in the same fashion to improve efficiency, albeit sometimes at the expense of competition. See Harold Feld, *Spectrum Efficiency v. Competition Part II: Why Do Verizon and AT&T Keep Ending Up With All the Spectrum?*, *Tales of the Sausage Factory* (Mar. 15, 2012), <http://www.wetmachine.com/tales-of-the-sausage-factory/spectrum-efficiency-v-competition-part-ii-why-do-verizon-and-att-keep-ending-up-with-all-the-spectrum/> (last visited Oct. 2, 2015).

Department of Justice and the Commission in the *Mobile Spectrum Holdings Order*.¹⁰ Accordingly, even if AT&T were correct that the Commission could legally take cognizance of the possibility of another buyer, this would be, at best, a non-factor under the “enhanced” review of low-band spectrum. Indeed, if anything, the ability of AT&T to outbid others simply confirms the need to block the transaction as an exercise of foreclosure.

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 and Club 42 have presented no real evidence of increased public interest benefits resulting from the transaction, which they bear the burden of doing.¹¹ 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: Roger Sherman
Jim Schlichting
Kathy Harris
Sean Conway
Monica DeLong

¹⁰ *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269, at 10-14 (filed Apr. 11, 2013); *Mobile Spectrum Holdings Order* at 6165 ¶ 62.

¹¹ *Mobile Spectrum Holdings Order* at 6239-40 ¶ 285-87.