

October 16, 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 15, 2015, Phillip Berenbroick and Harold Feld of Public Knowledge (“collectively, PK”) met with Chanelle Hardy, Chief of Staff to Commissioner Clyburn, with regard to the above-captioned proceedings.

PK 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 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, California² fails to satisfy the “enhanced factor” standard of review and should be denied.

The Commission Must Clearly Articulate How It Weighed The Relevant Factors And What Specific Information It Considered Essential To Its Decision To Grant Or Deny The Application.

PK made clear that the Commission’s decision and rationale in this transaction is critical to clarifying the contours of the enhanced factor review – whether or not the Commission grants or denies the Application. A mere statement that the factors enumerated in the *Mobile Spectrum Holdings Order* has been met will provide no guidance to stakeholders on what circumstances do or do not alleviate the concerns that justified the policy adopted in the *Mobile Spectrum Holdings Order*. While the repeated requests for information and range of matters the Commission has reviewed do credit to the thoroughness of the investigation, the broad scope also makes it impossible for concerned parties seeking guidance as to discern Commission policy without explanation as to how the Commission weighed the evidence and determined what would serve the public interest in accordance with Section 310(d).

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

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).

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. Even if it were possible for parties to know from this voluminous record what factors, specifically, weighed in favor of denial or grant of the application, the redaction of the record would make it impossible to establish clear precedent unless the Commission explicitly articulates *how* it evaluated the information.

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 *Spectrum Holdings Order*, these transactions trigger the greatest concern and require the most explicit showing that the transaction serves the public interest. 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.

Consideration of Whether Club 42 Received Other Offers Would Violate Previous Interpretations of Section 310(d), And Would Create Even Greater Confusion Going Forward.

PK 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.⁴ 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.”⁵ 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 on its own merits, and through the lens of the harms of low-band spectrum concentration the Commission identified and sought to remedy in the *Mobile Spectrum Holdings Order*, and determine whether the public interest benefits outweigh the harms. 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.”⁶

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

³ *Mobile Spectrum Holdings Order* at 6168 ¶ 68.

⁴ 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).

⁵ 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)).

⁶ *Mobile Spectrum Holdings Order* at 6240 ¶ 287.

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,⁷ and therefore raises the same foreclosure concerns raised by the Department of Justice and the Commission in the *Spectrum Holdings Order*. 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.

Additionally, if the Commission were to take this opportunity to revisit its previous determination that the availability of other buyers is prohibited by Section 310(d), it must provide an explanation for this change in policy.⁸ Nothing in the record justifies any change in policy. To the contrary, on the surface, it appears that Applicants argue that it would simply be more convenient to allow Club 42 to “flip” the license rather than meet its build out obligations. If the Commission intends to eliminate enforcement of its build out obligations, and reverse its long-standing policy of discouraging speculation in licenses, it is certainly obligated to acknowledge this explicitly!

Finally, consideration of whether Club 42 offered competitors an opportunity to buy the license is bad policy, and would create new burdens on future Applicants and deal opponents alike. What is the burden of proof that a licensee was public enough to meet its obligation to show there were no other buyers? Alternatively, is the burden of proof on those seeking to deny an application that they were unaware the licensee was “shopping” the license? Must competitors police the secondary market -- incurring significant new expenses that could be better expended on providing new services to consumers? Must a licensee seeking a transaction accept any alternative offer? Does the Commission propose to create a new “right” of licensees to “sell” their licenses even if the transfer would otherwise violate the public interest – a policy which would appear to directly violate Sections 301, 309(h) and 310(d)? If new buyers come forth as a consequence of the Application, are licensees required to consider these new offers?

These are only a few of the questions the Commission must address if it intends to consider whether or not Club 42 has alternative buyers as part of its public interest determination. Accordingly, the Commission should explicitly state that whether or not Club 42 sought other buyers for its license is irrelevant to its inquiry as to whether transfer of the license pursuant to the application before it does or does not serve the public interest.

To conclude, 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.⁹ 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.

⁷ 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.

⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). While the burden on the agency is no greater to reverse previous policy than it is to adopt the policy in the first place, the agency action must still provide a reasoned explanation for the policy adopted. See *Motor Vehicle Manufacturers Assoc. v. State Farm*, 469 U.S. 29 (1983).

⁹ *Mobile Spectrum Holdings Order* at 6239-40 ¶ 285-87.

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/ Harold Feld
Senior Vice President
Public Knowledge

CC: Chanelle Hardy