

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
AT&T Inc. (“AT&T”) and)	WT Docket No. 07-153
)	(DA 07-3404)
DOBSON COMMUNICATIONS)	
CORPORATION (“Dobson”))	
)	
For consent to transfer of control of licenses,)	
authorizations and <i>de facto</i> transfer spectrum leases)	
held by Dobson and its subsidiaries from Dobson CC)	
Limited Partnership to AT&T, including the application)	File No. 0003092370
for transfer of control of Station KNKA455, <i>et al.</i> ,)	
licensed to American Cellular Corporation)	

PETITION TO CONDITION APPROVAL OR TO DENY

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SUMMARY

East Kentucky Network, LLC (“EKN”) which operates a CDMA wireless system in rural east Kentucky requests the Commission to condition its approval of the captioned applications, or to deny the application that proposes a transfer of control of Dobson’s American Cellular Corporation. The merger as proposed would result in AT&T subsidiaries holding both the Block A and Block B cellular licenses in CMA450, for a total of 90 MHz of spectrum in seven of the ten counties in CMA450, including PCS licenses held by AT&T and Dobson subsidiaries.

Although AT&T claims that its acquisition of Dobson will have no adverse effect on competition, it fails to consider a significant competitive circumstance – that its proposed accumulation of 90 MHz of spectrum in a market with such low population density will result in underutilization of spectrum by AT&T and foreclose access to efficient 800 MHz cellular spectrum by competing wireless providers. Allowing AT&T to hold both cellular licenses will indisputably harm the ability of EKN to compete with AT&T in CMA451 and CMA452 because customers in those two markets need to make use of their phones in CMA450 where there is inadequate CDMA service, as confirmed by drive test results that accompany this petition.

Applicants state that at least four competitors will remain in the vast majority of CMAs affected by their merger plan. However, the inferior propagation characteristics of 1900 MHz PCS, and correspondingly more costly build-out of CDMA systems using PCS spectrum, curtails a cost-effective build-out in CMA450 by CDMA carriers. Absent a cellular license divestiture, the prospects for build-out of competitive services using CDMA technology in CMA450 would be greatly diminished and AT&T would have a dominant competitive position in CMA450 as well as in nearby rural markets CMA451 and CMA452 where EKN operates, to the detriment of CMRS subscribers and roamers, and of EKN.

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To: Secretary, Federal Communications Commission

Attn: Chief, Wireless Telecommunications Bureau

PETITION TO CONDITION APPROVAL OR TO DENY

East Kentucky Network, LLC (“EKN”), by its attorney, respectfully petitions the Federal Communications Commission (“Commission”) pursuant to Section 1.939 of its rules¹ and Section 309(d) of the Communications Act of 1934, as amended,² to condition its approval of the captioned applications, or to deny the application that proposes a transfer of control of American Cellular Corporation (“ACC”).³

Contrary to the assertions of applicants, the proposed acquisition of Dobson by AT&T would be harmful to the public and diminish prospects for competition among Commercial Mobile Radio Service (“CMRS”) providers in the Kentucky 8 – Mason Rural Service Area

1 47 C.F.R. § 1.939.

2 47 U.S.C. § 309(d).

3 See File No. 0003092370. Notice of the filing of this application and the accompanying applications was given in a Public Notice, “AT&T Inc. and Dobson Communications Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations,” WT Docket No. 07-153 (DA 07-3404), released July 26, 2007. This petition is timely filed. EKN’s attorney acknowledges the assistance of Adam Thomas, law student at the University of Pittsburgh, in the preparation of this petition.

(“CMA450”) and in nearby markets. The merger as proposed would result in AT&T subsidiaries holding both the Block A and Block B cellular licenses in CMA450, for a total of 90 MHz of spectrum in seven of the ten counties in CMA450, including Personal Communications Services (“PCS”) licenses held by AT&T and Dobson subsidiaries.⁴ Absent a cellular license divestiture condition the prospects for a build-out of competitive services using CDMA technology in CMA450 would be greatly diminished and AT&T would have a dominant competitive position in CMA450 as well as in nearby rural markets where EKN operates, to the detriment of CMRS subscribers and roamers, and of EKN.

I. Introduction and Statement of Facts

The Commission has demonstrated a keen interest in avoiding competitive harm by preventing unfair advantage through excessive concentration of CMRS spectrum. In a recent transaction between Midwest Wireless Holdings, L.L.C. and ALLTEL (“Midwest-ALLTEL”) the Commission conditioned the applications’ grant on a divestiture of licenses and business units in four markets.⁵ The Commission should examine the AT&T-Dobson applications just as carefully and if the merger is allowed to proceed, AT&T should not be permitted to hold both of the two cellular licenses for CMA450.

The public interest analysis that follows will show that the number of remaining competitors in CMA450 is not nearly as important a factor as it might be in other circumstances when evaluating whether or not there will be sufficient competition in this rural and mountainous eastern Kentucky area if the merger is completed. In EKN’s experience, the absence of a reliable wireless network that uses CDMA technology in CMA450 weighs heavily on the competitive

⁴ See “*Description of Transaction, Public Interest Showing and Related Demonstrations*” (“AT&T Demonstrations”) filed by the applicants, at Appendix A, page 3.

⁵ Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., *Memorandum Opinion and Order*, paras. 14-15 (Oct. 2, 2006) (*Midwest-ALLTEL Order*).

climate in CMA450 and in nearby markets. And the competitive climate will worsen if AT&T, as the leading GSM network operator, is permitted to hold both of the cellular licenses for CMA450.

CMA450 is not an island, rather it is one of several adjoining east Kentucky markets where the Appalachian Mountains dominate the physical landscape and provide a cultural bond among area residents. Interstate Highway 64 and numerous two-lane highways wind through mountain passes to connect villages, towns and small cities in the region. One of the most frequented destinations in the region is Morehead State University (“MSU”) which is in Rowan County in CMA450. MSU is both an important educational resource and a major employment center in the region that attracts thousands of commuters from areas not just within CMA450 but also from the neighboring markets.

EKN is a CDMA network operator but it does not have a license to serve any part of CMA450. When EKN’s customers roam into CMA450 they report an inability to place and receive calls during much of their travel time on roads leading to MSU and elsewhere in CMA450. This is a safety concern for parents of students who travel daily to and from MSU and, in more general terms, a problem for all CDMA subscribers who travel within CMA450 regardless of which CMRS licensee is their home carrier. EKN’s engineering staff confirmed the CDMA service availability problem in a drive test survey conducted earlier this month.⁶ EKN has reported this problem to CDMA operators that hold PCS licenses for portions of CMA450, but the problem has not improved after years of discussion. Meanwhile EKN has not been able to

⁶ See the attached Declaration of Paul DeLong (“DeLong Declaration”), EKN Paging technician, who found that only about 50 of the 830 road miles surveyed via drive test in CMA450 provided reliable CDMA service. (para.6) This drive test showed that there was an adequate CDMA signal from Verizon Wireless or Sprint at approximately 6% of the points during the road test where signal level was checked. EKN is a CDMA network operator but it does not presently hold any license for spectrum in CMA450.

secure licenses for CMA450 counties to address the problem by its own CDMA build-out. It is apparent that the situation will not improve if AT&T is permitted to acquire the second cellular license for CMA450.

II. Standing

Under Section 309(d)(1) of the Communications Act of 1934, as amended (“Act”), a party must have standing to file a petition to deny challenging an application.⁷ The Commission’s most consistently applied test for standing is that of direct injury,⁸ although indirect injury has been found to be sufficient.⁹ To demonstrate direct injury, causation between the purported injury and the proposed Commission action must show (a) the injury will likely arise from the challenged action; and (b) the injury could be prevented or redressed by the relief requested.¹⁰ EKN can demonstrate that an injury will occur and proposes two possible preemptive solutions: denial of the application or divestiture of cellular spectrum in the relevant market to a CDMA network operator.

Headquartered in Prestonsburg, Kentucky, EKN provides wireless services on a commercial basis in the Kentucky 9 - Elliot Rural Service Area (“CMA451”) and the Kentucky 10 - Powell Rural Service Area (“CMA452”).¹¹ AT&T, through its affiliate New Cingular

⁷ 47 U.S.C. § 309(d)(1) (2000). See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-477 (1940).

⁸ *Friends of the Earth, Inc. and Forest Conservation Council*, 17 FCC Rcd. 201, para. 6 (CWD 2002); *AmericaTel Corp.*, 9 FCC Rcd. 3993, paras. 8-10 (1994).

⁹ A less burdensome test that the Commission has effectively employed holds that standing is derived from status as a competitor in the market; thus a petitioner “does not need to demonstrate that it will suffer a direct injury from grant” of an application. Nor, as a competitor, “must it demonstrate, or even allege . . . that it will be subjected to increased or materially different competition as a result of the proposed assignment.” *American Mobilphone, Inc. and Ram Technologies, Inc.*, Order, 10 FCC Rcd 12297, 12298 (WTB 1995) (“American Mobilphone”).

¹⁰ *Los Angeles Cellular Tel. Co.*, 13 FCC Rcd. 4601, 4604 (CWD 1998).

¹¹ In addition to cellular spectrum held by EKN, EKN has acquired PCS licenses for the Middlesboro-Harlan, KY Basic Trading Area (BTA), the Corbin, KY BTA and for Leslie County, KY as partitioned from the Lexington, KY BTA.. EKN is also the proposed assignee of a PCS license for the Williamson, WV-Pikeville, KY BTA, but a petition has delayed Commission action on that application (File No. 0003023125) The petition concerns a contractual dispute among the owners of the assignor, ComScape Communications, Inc., and does not question EKN’s qualifications to hold the license in question. A Spectrum Manager Lease permits EKN to operate in the

Wireless PCS, LLC, provides wireless services in direct competition with EKN by means of 800 MHz cellular licenses it holds for CMA451 and CMA452.¹² Accordingly, as a competitor to AT&T, EKN has standing to file this petition.¹³

EKN's potential injury is the prospect that AT&T will acquire control of a second 800 MHz cellular license in CMA450 through the proposed Dobson merger and thereby improve its competitive position in the region. The 800 MHz cellular spectrum has superior propagation characteristics when compared to 1900 MHz PCS spectrum and, for that reason, it is economically more efficient to use cellular spectrum to serve rural and mountainous area such as CMA450.¹⁴ If AT&T controls both 800 MHz cellular licenses in CMA450 the prospects for effective competition by a CDMA competitor in the market will be reduced because CDMA network operators will be relegated to use of 1900 MHz PCS spectrum which has inferior propagation characteristics and would require a more costly build-out to achieve the same geographic coverage in CMA450. As a rural mountainous market with a population density of only about 50 persons per square mile, CMA450 presents economic challenges for any wireless operator.¹⁵

Accordingly, AT&T's proposed acquisition of a second 800 MHz cellular license in CMA450 would lessen the prospects for effective wireless competition in CMA450 and throughout the region and, as a result, categorically and indisputably harm both EKN and the public.

assignor's area.

12 This fact can be confirmed by reference to the Commission's Universal Licensing System.

13 See American Mobilphone at 12298.

14 Declaration of Gerald Robinette ("Robinette Declaration"), attached hereto, at paragraph 9.

15 Robinette Declaration at 9. See also the Delong Declaration which confirms that the competitors of AT&T in CMA450 that use CDMA technology have not constructed networks in that market that provide reliable service along many of the area's highways.

III. Discussion

Although AT&T claims that its acquisition of Dobson will have no adverse effect on competition,¹⁶ it fails to consider a significant competitive circumstance – that its proposed accumulation of 90 MHz of CMRS spectrum in a market with such low population density will result in underutilization of spectrum by AT&T and foreclose access to efficient 800 MHz cellular spectrum by competing wireless providers. Allowing AT&T to hold both cellular licenses will indisputably harm the ability of EKN to compete with AT&T in CMA451 and CMA452 because customers in those two markets need to make use of their phones in CMA450 where there is inadequate CDMA service.

1. FCC Merger Review Standards

In order to equitably review mergers and other transactions with the potential for anticompetitive effects in wireless markets, the Commission applies a standardized public interest test. The Commission evaluates potential anticompetitive effects, lending equity and uniformity to its approval process.

In order to properly decide whether to grant the applications of AT&T and Dobson (“Applicants”) under Sections 214(a) and 310(d) of the Act,¹⁷ the Commission must determine whether doing so will serve the public interest. The Commission’s first step is to assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission’s rules. If the proposed transaction complies, the Commission considers whether this could result in public interest harms. At that point a balancing test is employed, weighing potential harms to public interest against potential benefits to public

¹⁶ See *AT&T Demonstrations*, at Appendix A, page iii.

¹⁷ 47 U.S.C. §§ 214(a), 310(d).

interest.¹⁸ In this weighing process, Applicants bear the burden of proving the transaction serves the public interest by a preponderance of the evidence.¹⁹

In the instant proposal, Applicants do not meet their burden. The potential benefits do not outweigh the anti-competitive effects of the proposed transfer. AT&T cited myriad potential benefits but failed to acknowledge or examine the genuine anti-competitive harm: (1) the effective lock-out of CDMA service in CMA450 and (2) the effect that AT&T's accumulation of cellular licenses and spectrum would have on competition not only in CMA450 but also in CMA451 and CMA452.

This harm is real and will have a *bona fide* anti-competitive impact on EKN. The Commission's evaluation of the public interest includes "a deeply rooted preference for preserving and enhancing competition in relevant markets."²⁰ While the instant proposal may offer some potential benefits it also harms competition to an unacceptable degree.

At a time when EKN is concerned with the build-out of a CDMA network in CMA450 AT&T plans to "decommission redundant towers."²¹ Such plans add to concern that AT&T's control of all 800 MHz cellular spectrum in CMA450 will impede CDMA competitors in their efforts to construct facilities to serve more of the market.

18 See, e.g., SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, *Memorandum Opinion and Order*, 20 FCC Rcd 18290, para. 16 (2005) ("*SBC-AT&T Order*"); Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, WC Docket No. 05-75, *Memorandum Opinion and Order*, 20 FCC Rcd 18433, para. 16 (2005) ("*Verizon-MCI Order*"); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, para. 20 (2005) ("*Sprint-Nextel Order*"); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, para.40 (2004) ("*Cingular-AT&T Wireless Order*")

19 See, e.g., *SBC-AT&T Order*, 20 FCC Rcd at 18300, para. 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, para. 16; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40.

20 See *In the matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, 19 FCC Rcd 21522, para. 41. (2004).

21 *Id.* at 14.

In evaluating the competitive effects of this merger, the following will be discussed: the product market, geographic markets, market participants and their ability to expand or reposition, and barriers for new entrants (taking into account the time market entry requires).

2. Precedent Cautions Against Grant of the Current Application

Applying these principles, the Commission has twice recently opted for divestiture conditions when proposed transactions substantially increased market concentration. This analysis focuses on the first of the two cases, although the second, the Midwest-ALLTEL Order, is also instructive. In an earlier application in which ALLTEL proposed to acquire control of Western Wireless licenses, ALLTEL argued adverse unilateral effects were unlikely because (1) substitute services were available; (2) competitors could quickly expand their networks or reposition in response to price increases; (3) there were an array of market participants; and (4) entry had low barriers.²² However, the Commission and Department of Justice were not persuaded, finding, on balance, the anti-competitive elements of the transaction outweighed the potential benefits. Specifically, the Commission found (1) in the markets where the applicants' operations overlapped, "other providers generally are unable to match the price or service options offered by the applicants"; (2) "other licensees in these markets have limited ability to reposition in response to any attempted exercise of market power by the merged firm"; and (3) "entry by firms not currently in the market cannot be counted on to prevent possible exercise of market power."²³ The Commission also rejected the argument that resellers, satellite providers,

22 Application of ALLTEL Corp. and Western Wireless Corp., *Memorandum Opinion and Order*, 20 FCC Rcd. 13053, paras. 37, 55-56, 67-71, 80 (2005) ("*ALLTEL-Western Wireless Order*").

23 *Id.* at para. 84.

mobile virtual network operators (“MVNO”s) and wireless VoIP providers would necessarily guarantee competitive markets.²⁴

The Complaint filed by the Department of Justice to challenge the ALLTEL-Western Wireless merger explicitly rejected the theory that PCS services were a potential substitute for cellular services, such that PCS licensees could ramp-up network capacity to prevent extraction of monopoly profits by a licensee with excessive market power. Differences between the propagation characteristics of cellular’s robust 800 MHz spectrum and the less forceful PCS signals were recognized as build-out efficiency factors.²⁵ Analogously, the instant situation is equally dangerous where AT&T can leverage GSM service superiority over an insufficiently built-out CDMA competitor. East Kentucky’s mountainous terrain exacerbates the differences in propagation between the 800 MHz and 1900 MHz services.²⁶ Because AT&T and EKN compete in CMAs adjacent to CMA450, and because reliable service in CMA450 is so vital to competitive interests in the adjoining markets, their services are substitutes. As such, allowing AT&T to acquire Dobson’s CMA450 license, giving the merged entity the market’s entire available 800 MHz cellular spectrum, would not be consistent with the DOJ’s call for divestment in the ALLTEL-Western Wireless merger.²⁷ In yet another similarity, both cases involve rural areas with low population densities that are expensive to build out. As such, the timeline necessary to combat monopolistic pricing is insufficiently short to adequately protect consumers.²⁸

24 *Id.* at para. 72.

25 *US v. ALLTEL, Complaint*, 11, Case No. 1:05CV01345 (DDC 2005) (“*DOJ Complaint*”).

26 As EKN’s CEO described, “800 MHz cellular spectrum has superior propagation characteristics when compared to 1900 MHz PCS spectrum and, for that reason, it is economically more efficient to use cellular spectrum to serve rural and mountainous areas such as CMA450.” Robinette Declaration at para. 9.

27 *DOJ Complaint* at 9-11.

28 *Id.* at 11; Robinette Declaration at para. 9 (“Census Bureau data shows that CMA450 has approximately 50 persons per square mile.”).

3. AT&T's Purported Justifications for Acquisition of Dobson

Analysis of the AT&T – Dobson application which purports to justify retention by AT&T of all of the Dobson spectrum,²⁹ yields the conclusion that Applicants have failed to meet the required burden. The potential harm to competition from a single, dominant GSM provider is not adequately compensated for by theoretical benefits.

a. Product Market

Relevant product markets are defined by the services that are reasonable substitutes for one another in the eyes of the consumer.³⁰ Both prior Commission analysis and the AT&T Demonstrations are consistent on this point: the Commission should define the relevant product market as the combined market for mobile telephony devices.³¹ This market includes mobile voice and data services for residential and enterprise users.³²

b. Geographic Markets

It is appropriate to define the relevant market at the CMA level. The Commission has so stated in previous mergers.³³ Applicants suggest otherwise, claiming that an examination of the market structure in areas as small as CMAs or Component Economic Areas “does not accurately account for the competitive forces that will constrain the behavior of the merged firm and assure continued intense competition in all the local areas affected by the merger.”³⁴ EKN agrees to an

²⁹ *AT&T Demonstrations* at 28-30.

³⁰ *ALLTEL-Western Wireless Order* at para.25.

³¹ *Id.* at para. 28; *AT&T Demonstrations* at 16.

³² *Id.*

³³ *ALLTEL-Western Wireless Order*, paras. 44-51; In re Midwest Wireless Holdings, L.L.C. and ALLTEL Comm'ns, Inc. for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 21 FCC Rcd 11526 paras. 35-43 (2006) (“*Midwest Wireless Order*”); In re Applications of Nextel Comm'ns, Inc. and Sprint Corp. for Consent to Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 20 FCC Rcd 13967 paras. 57, 63-67 (2005) (“*Sprint-Nextel Order*”).

³⁴ *AT&T Demonstrations* at 18.

extent and submits that an examination of the state of potential competition in each CMA and also across the East Kentucky region that includes CMA450, CMA451 and CMA452 exposes the overall harm that can be expected if AT&T is permitted to hold both 800 MHz cellular licenses in CMA450.

c. Market Participants and Competitor Expansion Capacity

Looking only at the number of market participants and their market share is insufficient in the instant case. More information is required to properly determine an entity's ability to compete. The ability of other market participants to provide reliable service in a given market is a more reliable predictor of competitive ability. As such, their ability to compete is more relevant to the core question of how quickly and how adequately anticompetitive conduct can be placed in check by market forces than simply looking at the sheer number of participants.

Applicants state that at least four competitors will remain in the vast majority of AT&T acquired CMAs.³⁵ However, the inferior propagation characteristics and correspondingly more costly build-out of CDMA systems using the 1900 MHz spectrum licensed to Verizon Wireless and Sprint in the counties that comprise CMA450 inherently and significantly curtail a cost-effective build-out in the market by CDMA carriers so as to compete efficiently in the market. This reality belies AT&T's assertion that "existing rivals have access to enough spectrum to compete effectively and to expand their service in the event of a unilateral price increase."³⁶ A failure to consider differential standards when examining the overall supply of spectrum leaves an incomplete analysis. Applicants' avowal that "there are no practical constraints to expansion into affected CMAs by established carriers who do not operate there today," is overreaching.

³⁵ *AT&T Demonstrations*, at 26.

³⁶ *Id.* at 28.

Lack of reliable CDMA access in CMA450 is just such a constraint. Constraints hurt consumer choice, and this constraint will lead to a real harm.

d. Timely Market Entry

The Commission has noted its interest in “whether the entry of potential competitors is likely in a timely and sufficient manner.”³⁷ The instant case should thus raise concern. The potential for substitution in the near term by new market entrants is overstated by AT&T. It is suggested that cable-based mobile telephony be included in the analysis for competition in the market of mobile telephony devices.³⁸ This proposition does not consider the fact that these services are not yet widely available and will likely remain unavailable for a long time – especially in rural markets such as East Kentucky.³⁹ The Commission is also told that it “must take account of a new generation of MVNOs.”⁴⁰ If so, it must be considered that only MVNOs that can negotiate business relationships with AT&T will be successful because relationships with CDMA-based wireless carriers will suffer the same effects that a lack of reliable CDMA service in CMA450 has upon EKN. There is no reason to predict that MVNOs that lack a business relationship with AT&T will be successful in CMA450 or other markets in Eastern Kentucky.

Applicants acknowledge a conclusion in the Commission’s Eleventh CMRS Competition Report that competition in rural areas is “no less vigorous than in more populous areas.”⁴¹ The

37 *ALLTEL-Western Wireless Order* at para. 72.

38 *AT&T Demonstrations* at 21-22.

39 The article AT&T cites notes that several thousand handsets are being test-marketed in major metropolitan areas, but there is no indication of when this new competitor would enter the East Kentucky market. Todd Spangler, *Operators Going Slow on Pivot Wireless*, MULTICHANNEL NEWS, June 20, 2007, <http://multichannel.com/article/CA6453879.html> (last visited Aug. 9, 2007).

40 *AT&T Demonstrations* at 20.

41 *Id.* at 24 citing *In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Mkt. Conditions with Respect to Commercial Mobile Svcs.*, Eleventh Report, 21 FCC Rcd. 10947, para.2 (“*Eleventh CMRS Competition Report*”).

text of the report states that rural carriers are rolling out competitive national pricing plans with “surprisingly low per-minute pricing.”⁴² EKN is one such rural carrier and offers a nationwide plan,⁴³ but a prospective customer might well choose another carrier if he or she cannot reliably place or receive a call while on a commute to work or school in a neighboring rural market. In sum, the proposed merger would have anti-competitive consequences in regard to the number of potential entrants to CMA450.

Any statement to the effect that competition and consumer choice will in no way be inhibited should this application be approved is mistaken. Henry Ford notably remarked of the Model-T, “Any customer can have a car painted any color that he wants so long as it is black.”⁴⁴ AT&T proposes that competition take any form, so long as a customer understands that his or her call in CMA450 had better use the AT&T GSM network. Both propositions limit consumer choice, but Ford was not given exclusive access of our best highways through license. By analogy, the Commission should not limit competition by allowing only AT&T to acquire and hold the spectrum best suited for Eastern Kentucky’s mountainous terrain and dispersed population.

4. Divestiture of a Cellular License in CMA450 to a CDMA Operator Would Promote Competition

There are two possible pro-competitive solutions aside from denial of the merger application. First, EKN is willing to purchase one of the 800 MHz cellular licenses for CMA450, if it is made available at a price EKN can afford. In the alternative, sale of the license to another

42 *Id.*

43 EKN d/b/a Appalachian Wireless, *Our Calling Plans*, <http://www.appwireless.com/?page=plans> (last visited Aug. 9, 2007).

44 Henry Ford, *My Life and Work*, Ch.4 (1922).

CDMA operator that commits to a comprehensive build-out plan in CMA450 would also be satisfactory.

The Commission's authority to order relief that furthers public interest goals is broad and enables the imposition of narrowly tailored transaction-specific conditions. Specifically, Section 303(r) authorizes restrictions or conditions not inconsistent with law that may be necessary to carry out provisions of the Act.⁴⁵ Thus the Commission is vested with all necessary authority to order divestiture of a cellular license in CMA450 as a condition of the acquisition. There is more than ample precedent for such a condition and in this instance, it would preclude an unjust outcome.⁴⁶ The Commission should not allow the surviving company in a merger to gain so significant an advantage over all other competitors in a market area or a region. Accordingly, a required sale of one cellular license in one CMA in order to promote adequate competition at the local and regional level is a just and reasonable mode of relief.

IV. Conclusion

For the foregoing reasons, the above-captioned application should be denied unless divestiture of a cellular license for CMA450 is required as a condition of approval.

Respectfully submitted,

EAST KENTUCKY NETWORK, LLC

/s/ David L. Nace [Filed electronically]

David L. Nace
Its Attorney

⁴⁵ 47 U.S.C. § 303(r); *See also Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc.*, Memorandum Opinion and Order, para. 20 (Oct. 2, 2006) (*Midwest-ALLTEL Order*). The Commission also has authority under Section 214(c) to attach to a certificate of public convenience and necessity "such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c); *See also Midwest-ALLTEL Order* at para. 20.

⁴⁶ In the *Midwest-ALLTEL Order*, ALLTEL was ordered to divest business units in four markets as a condition of the approval. *Id* at paras. 14-15.

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