

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	WT Docket No. 07-153
Applications of AT&T Inc. and	)	
Dobson Communications	)	File Nos. 0003092370
Corporation Seeking FCC Consent to)	)	0003092375
Transfer Control of Licenses and	)	
Authorizations	)	

**PETITION TO DENY**

**MID-TEX CELLULAR LTD.**

Michael R. Bennet  
Bennet & Bennet, PLLC  
4350 East West Highway  
Suite 201  
Bethesda, MD 20814  
202/371-1500

*Its Attorneys*

Dated: August 27, 2007

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## SUMMARY

Based on the substantial and excessive spectrum holdings of a merged AT&T in the Texas 9B2 RSA, and its dominant market share in that market, the FCC should deny its consent to the proposed transfer of control of Dobson wireless telecommunications licenses in the Texas 9B2 market to AT&T, or impose conditions on any grant, such that the merged AT&T is required to divest spectrum held by the combined entity in excess of 70 MHz in any county in that market in which it has interests in more than 70 MHz in any county in that market in which it has interests in more than 70 MHz of commercial mobile radio service spectrum. Any grant should also include a condition preventing the merged AT&T from bidding in Auction No. 73 for any licenses in any license area in which the merged entity controls, or has a 10 percent or greater interest in, 70 MHz or more of CMRS spectrum.

AT&T's additional market power resulting from a merger with Dobson, added to its demonstrated ability to enter into roaming agreements that discriminate against small carriers, threatens to cause further competitive harm to the Texas 9B2 market. While the FCC's recent *Roaming Order* bars discriminatory rate pricing, it does not prevent AT&T from continuing to price roaming based on volume discounts, to the competitive detriment of small carriers such as Mid-Tex. The FCC should require AT&T to enter into a roaming agreement that does not discriminate based on volume discounts or geographic location.

The FCC should not allow AT&T to acquire Dobson's Eligible Telecommunications Carrier (ETC) status in Texas 9B2. Rather, the FCC should require AT&T as the acquiring entity to obtain its own ETC status before it is entitled to universal service support.

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To: Wireless Telecommunications Bureau

**PETITION TO DENY**

Mid-Tex Cellular Ltd. (“Mid-Tex”), by its attorneys and pursuant to Section 1.939 of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby petitions the FCC to deny the grant of the above-referenced applications with respect to the Texas 9B2 Rural Service Area (“RSA”) (Cellular Market Area (“CMA”) 660)<sup>1</sup>, or impose conditions on the grant of such applications requiring that certain spectrum in that market be divested.

**I. Statement of Interest**

Mid-Tex is the cellular licensee for CMA 660 B2 (“Texas 9B2”). In the applications, AT&T Inc. (“AT&T”) and Dobson Communications Corporation

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<sup>1</sup> Texas 9B2 is a part of CMA 660. In 1989, as part of the cellular full market settlement to resolve licensing issues among the wireline common carriers eligible to hold the B band cellular licenses, the FCC approved the partitioning of the Texas 9 – Runnels RSA. At that time, Mid-Tex, a limited partnership, consisted of several wireline common carriers, including AT&T’s predecessor in interest, Southwestern Bell Mobile Systems, Inc. Currently AT&T through its various subsidiaries holds a limited partnership interest in Mid-Tex.

(“Dobson”) seek Commission consent for Dobson to transfer control of various wireless radio service licenses to AT&T. The subject licenses include licenses to provide various forms of commercial mobile radio service (“CMRS”) in Texas 9B2. As discussed below, grant of the above-referenced applications will result in competitive harm to Mid-Tex. Accordingly, Mid-Tex is a party in interest with standing to file the instant petition.

**II. The Excessive Spectrum Holdings and Market Share of the Merged Entity Require Careful Commission Analysis**

The merged AT&T entity will hold a substantial and excessive spectrum interest in Texas 9B2. Specifically, the merged entity will hold a combined interest of up to 100 megahertz of spectrum in portions of Texas RSA 9B2. The combined spectrum holdings of the merged entity would be as follows:

<u>County</u> <sup>2</sup>	<u>Total CMRS Spectrum</u> <sup>3</sup>
Erath	100 MHz
Runnels	80 MHz
Coleman	60 MHz
Brown	55 MHz
Comanche	55 MHz
Mills	55 MHz

The Commission has established as a fundamental tenet of its public interest review that a transaction that creates or enhances significant market power is unlikely to serve the public interest.<sup>4</sup> In considering whether there is a likelihood that a proposed

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<sup>2</sup> Texas 9B2 is comprised of the following six counties: Erath, Runnels, Coleman, Brown, Comanche, and Mills.

<sup>3</sup> Total CMRS spectrum includes Cellular, PCS, and AWS spectrum held by AT&T or Dobson.

<sup>4</sup> See *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, File Nos. 0001656065, et al.*, WT Docket No. 04-70; and *Applications of Subsidiaries of T-Mobile USA, Inc. and*

merger will result in anticompetitive effects, the FCC has established a threshold test for conducting an in depth competitive analysis in a particular market. Under this test, applied by the Commission in its order addressing the prior merger of AT&T and Cingular, the FCC gives particular scrutiny to markets in which, post-transaction, the applicants would have 70 MHz or more in at least part of the market.<sup>5</sup> Because the merged AT&T would hold 100 MHz of spectrum in Erath County and 80 MHz of spectrum in the Runnels County, the proposed transaction clearly requires the Commission's heightened scrutiny.

Dobson currently has a dominant share of the Texas 9B2 market. By Mid-Tex's estimation, Dobson holds 60% of the market share throughout the market. In Brown and Erath Counties, Sprint and Mid-Tex each hold an 18% share of the market, while T-Mobile and Verizon hold a combined 4% share of the market.<sup>6</sup> In the remaining counties, Mid-Tex holds a 31% market share, Sprint holds a 5% market share, and T-Mobile holds a 4% share of the market. Post-merger, the Texas 9B2 market will have four carriers in five of the six counties, and five carriers in Erath County. Of these carriers, Mid-Tex is a small local carrier without the resources, spectrum or market share

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*Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses, File Nos. 0001771442, 0001757186, and 0001757204, WT Docket No. 04-254; and Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses, File Nos. 0001808915, 0001810164, 0001810683, and 50013CWAA04, WT Docket No. 04-323, Memorandum Opinion and Order, FCC 04-255 at par. 68 (rel. October 26, 2004) ("AT&T/Cingular Merger Order").*

<sup>5</sup> *Id.* at par. 109.

<sup>6</sup> The level of buildout by Sprint, T-Mobile and Verizon is concentrated along the highways connecting Dallas and San Angelo. The focus for Sprint, T-Mobile and Verizon is on serving their urban customers that roam through the Texas 9B2 market.

to compete with the merged AT&T behemoth. Only one of the remaining carriers in the market (the merged AT&T) will have more than an 18% market share in any county, while no national competitor will have more than a 4% market share in four of the six counties. At 18%, even Sprint's market share in Brown and Erath Counties pales in comparison with the merged AT&T's 60% share.

The Commission has recognized that a merger which results in an imbalance in the availability of spectrum would cause other carriers to be more spectrum-constrained than the merged entity at a later point in the deployment of next-generation services, and thereby cause harm to the public.<sup>7</sup> Accordingly, it considers spectrum holdings as part of its market-by-market analysis of local areas identified by its initial screen.<sup>8</sup> With the advent of 4G services approaching, such an analysis assumes particular importance. Indeed, the Commission has stated that “the presence and capacity of other firms matter more for future competitive conditions than do current subscriber-based market shares.”<sup>9</sup> The excessive spectrum holdings that a merged AT&T will hold post-transaction in portions of the Texas 9B2 market clearly raise cause for concern. Such spectrum holdings are particularly worrisome given the relatively small spectrum holdings of AT&T's competitors. The merged AT&T would have roughly two to three times the amount of CMRS spectrum as any of its Texas 9B2 competitors,<sup>10</sup> and, based on the small number of competitors in Texas 9B2 and their limited spectrum holdings, neither

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<sup>7</sup> *Id.* at par. 140.

<sup>8</sup> *Id.* at par. 141.

<sup>9</sup> *Id.* at par. 148.

<sup>10</sup> Verizon, Sprint and T-Mobile (with one exception) each hold 30 MHz of spectrum in Texas RSA 9B2. T-Mobile holds 20 MHz of spectrum in Erath County. Mid-Tex holds 25 MHz of spectrum in each county.

Sprint nor any other Texas 9B2 competitor would have the ability to absorb all customers of the merged AT&T in a 3G or 4G environment should the merged AT&T attempt to raise prices or engage in another exercise of its market power.<sup>11</sup> In its *AT&T/Cingular Merger Order*, the FCC indicated that it is only able to clearly find that harm to competition resulting from a merger is not likely in “those markets in which there will be five or more genuine competitors in the market, post-transaction, each with a sufficiently built out network and sufficient bandwidth to discipline Cingular post-merger through the ability to attract customers away from Cingular should it attempt to increase price or reduce service.”<sup>12</sup> Accordingly, in a market such as Texas RSA 9B2, where there are two to three nationwide competitors, only one of which is arguably “genuine”, and none of which have a sufficiently built out network in the Texas 9B2 market *and* sufficient bandwidth to discipline AT&T post-merger through the ability to attract customers away from AT&T should it attempt to increase price or reduce service, the Commission clearly must subject the proposed merger to the utmost degree of scrutiny.

By acquiring control of Dobson, AT&T will bring not only its additional spectrum holdings to the combined entity – which will give the merged entity over one third of the licensed CMRS spectrum in the Erath County portion of the market (and over half of all licensed Cellular and PCS spectrum in that county) – but the competitive assets of its name recognition and marketing strength. As AT&T and Dobson have noted,

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<sup>11</sup> See *AT&T/Cingular Merger Order* at par. 186 (“If rival carriers face binding capacity constraints, such as limited access to spectrum that cannot be overcome economically in a reasonably short period of time, then they likely will not be able to respond to the combined carrier’s price increase or other harmful conduct in a manner sufficient in the aggregate to make the action of the combined carrier unprofitable.”)

<sup>12</sup> *AT&T/Cingular Merger Order* at par. 191.

nationwide carriers generally conduct nationwide advertising that results in dissemination of their brand and rate plan information in areas where they do not currently provide service.<sup>13</sup> The merged entity, therefore will not only hold almost two thirds of the market share for the entire market,<sup>14</sup> it will also have AT&T's storied marketing clout. To allow such an entity to also have two to three times the amount of spectrum of the next largest spectrum holder in the market gives the merged entity more than enough ability to engage in competitive harm.

The Commission has found “especially worrisome” markets in which the total number of providers – or the total numbers of providers of nationwide service – is low, and markets in which providers are present but are constrained from repositioning and expanding output for some reason such as incomplete footprint or inadequate spectrum bandwidth.”<sup>15</sup> Texas 9B2, with five providers in Erath County and four providers in the rest of the market, is a prime example of a market with a small number of providers, each constrained by inadequate bandwidth. “[A]lso worrisome are markets in which the combined market share of the merged entity is very high.”<sup>16</sup> Again, the Texas 9B2 market meets this description. For the reasons discussed above, the proposed acquisition poses a significant threat to competition in Texas 9B2, and allowing the merged AT&T

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<sup>13</sup> See Declaration of Robert D. Willig and Jonathan M. Orszag, attached to the above-captioned applications, at p. 21.

<sup>14</sup> In the Texas 9B2 market, Sprint, the next largest national competitor, holds no more than an 18% market share in one of the six counties comprising the market and just a 5% share in the remaining five counties.

<sup>15</sup> *AT&T/Cingular Merger Order* at par. 149.

<sup>16</sup> *Id.*

entity the ability to exert its new market power will not serve the public interest. At a minimum, therefore, the Commission should designate the applications for hearing.<sup>17</sup>

### **III. AT&T/Dobson Should Be Required to Divest Spectrum Holdings in Texas RSA 9B2 in Excess of 70 MHz and Comply With Additional Conditions Related to Spectrum Acquisition**

The FCC's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.<sup>18</sup> To safeguard the public interest, the Commission should require that the merged AT&T divest spectrum held by the combined entity in excess of 70 MHz in any county in which it has interests in more than 70 MHz of CMRS spectrum, and any grant of the subject applications should be conditioned on the completion of such divestitures. The Commission has recognized that such divestitures "will serve the public interest by making spectrum available to strengthen an incumbent competitor or to allow new entry in these markets."<sup>19</sup>

For the same reasons, Mid-Tex requests that the Commission impose a condition restricting the merged AT&T from bidding on certain licenses in the upcoming 700 MHz auction. Specifically, AT&T should not be permitted to bid in Auction No. 73 for any licenses in any license area in which the merged AT&T controls, or has a 10 percent or greater interest in, 70 MHz or more of CMRS spectrum. Such a condition is consistent with a condition imposed on AT&T and Cingular in the *AT&T/Cingular Merger Order*.<sup>20</sup>

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<sup>17</sup> See 47 U.S.C. § 309(e); *AT&T/Cingular Merger Order* at par. 40.

<sup>18</sup> *AT&T/Cingular Merger Order* at par. 43.

<sup>19</sup> *Id.* at par. 141; *Id.* at par. 283.

<sup>20</sup> *Id.* at par. 284.

#### **IV. The FCC Should Require AT&T to Enter into a Fair Roaming Agreement With Mid-Tex**

Recent mergers and consolidation in the wireless market have created an anti-competitive atmosphere. The FCC recognized the possibility that mobile service licensees might exert undue market power over or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum. Mid-Tex has already seen this happen with AT&T and Dobson before their proposed merger when they entered into preferential roaming agreements with one another. By gobbling up regional and small license holders and further consolidating its market power, AT&T is driving the small, rural carriers that it doesn't acquire out of business. Mid-Tex estimates that it has lost 7,500 customers to Dobson (or 8% of the market share) since the time AT&T and Dobson began giving each other preferential roaming treatment.

Eliminating competitors, such as Mid-Tex, in small and rural markets will reduce pricing pressures to the detriment of consumers. Mid-Tex's customers are dependent on Mid-Tex to secure competitive roaming agreements in areas outside of its licensed area. Since coverage area is a priority for consumers when selecting a wireless provider, wireless carriers with small license areas are at a competitive disadvantage and could eventually face elimination altogether if they cannot enter into roaming agreements to provide expanded cellular service to their customer base. Mid-Tex is concerned that even though the Commission's recent

*Roaming Order*<sup>21</sup> forbids discriminatory rate pricing, a huge loophole exists for AT&T to price roaming based on volume discounts. Such volume discounts will allow AT&T to charge Mid-Tex more to utilize AT&T's network to provide service to Mid-Tex's customers. In addition to forcing AT&T to divest itself of CMRS spectrum above 70 MHz, the Commission should require AT&T to offer Mid-Tex its lowest roaming rate regardless of the volume of minutes Mid-Tex roams on AT&T. By forcing AT&T to enter into a truly fair roaming agreement with Mid-Tex, the Commission will ensure that local consumers served by Mid-Tex will be able to obtain roaming service at fair and reasonable rates. AT&T must not be allowed to engage in discriminatory acts such as charging Mid-Tex roaming premiums, leveraging increased subscriber share to exact discriminatory roaming rates, or favoring larger carriers in "sweetheart" roaming agreements. Such actions have already caused a substantial loss of revenue to Mid-Tex who in some portions of the Texas 9B2 market is the only source for wireless service to any consumer. To eliminate these anti-competitive practices, Mid-Tex requests the FCC to limit the amount of spectrum that AT&T holds in the Texas 9B2 market and to require AT&T to enter into a roaming agreement that does not discriminate based on volume discounts or geographic location. Such actions will aid in eliminating anti-competitive pricing and roaming practices and allow rural consumers served by Mid-Tex to obtain fair and equitable treatment.

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<sup>21</sup> *In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143 (August 16, 2007) ("*Roaming Order*").

## V. Dobson's ETC Status Does Not Entitle AT&T to Universal Service Support

The FCC should not allow AT&T to acquire Dobson's Eligible Telecommunications Carrier ("ETC") status in Texas 9B2. Dobson, as a rural carrier serving high-cost areas, was designated as an ETC in the State of Texas. Based on Commission precedent, once merged, AT&T as the acquiring entity will be eligible to receive universal service support merely based on Dobson's ETC status. AT&T should not be entitled to universal service support in Texas 9B2 merely based on Dobson's ETC status. Rather the FCC should require AT&T as the acquiring entity to obtain its own ETC status before it is entitled to universal service support.

The FCC should apply the same analysis to wireless carriers that acquire wireless companies that it applies to wireline companies that acquire wireline exchanges. The FCC's universal service rules and policies are designed to discourage carriers from purchasing wireline exchanges solely to garner more high cost support.<sup>22</sup> In such situations, the FCC is reluctant to grant the purchaser higher levels of high-cost support than it deserves.<sup>23</sup> To enable AT&T to obtain Dobson's ETC status as a result of AT&T's purchase of the Dobson high cost areas where it has been designated an ETC would violate this principal of discouraging carriers from acquiring territory in order to receive additional high-cost support. If AT&T desires to receive the same support received by Dobson, it should be required, as discussed *supra*, to make its case for such support in an ETC proceeding. In essence, AT&T's purchase of Dobson will allow it to

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<sup>22</sup> 47 C.F.R. § 54.305.

<sup>23</sup> See *Federal-State Joint Board on Universal Service, Valor Telecommunications of Texas, L.P. Request for Waiver of Section 54.305 of the Commission's Rules*, 20 FCC Rcd 782 (2005) (denying Valor's request for a waiver of Section 54.305).

receive support intended for a smaller carrier. Therefore, it is appropriate to apply the FCC's wireline exchange precedent to the instant wireless case.

Recent growth of the Universal Service Fund ("USF") has been a major concern to the Commission and has raised questions about the sustainability of the FCC's USF program. Ironically, prior to the Telecommunications Act of 1996 ("1996 Act"), the FCC established the USF program to promote the availability of reasonably comparable service at reasonably comparable rates in rural areas because AT&T would not serve high-cost, low-density areas. In the 1996 Act, Congress affirmed the FCC's historical universal service structure and codified the FCC's universal service principles to ensure that rural consumers had access to the same telecommunications services as were available in urban areas. Dobson was designated as an ETC based on its extensive showing and sincere intent to provide and expand its service in high-cost, rural areas of Texas. AT&T's track record proves it has no intent to build out high-cost, rural areas, like those currently served by Dobson. However, if AT&T has a sincere intent to provide service and expand coverage in high-cost, rural areas in Texas, it should be required to obtain ETC status based on its own commitments.

Further, AT&T, a company with millions in annual profits, does not need USF support to build out its network. According to the Universal Service Administrative Company's disbursement data, Dobson received approximately \$1.8 million in USF support for Texas in 2006. In 2007, Dobson has already received almost \$1.3 million for Texas in USF support. If AT&T automatically begins receiving this same level of

support as the acquiring company, the high-cost support that flows to AT&T may only be padding AT&T's bottom line, profiting shareholders rather than providing service to rural customers. Universal service support should be targeted to those carriers that have demonstrated their commitment to improving service in rural areas. Accordingly, AT&T should make the same demonstrations as other ETCs before it is entitled to this significant amount of USF support.

## V. Conclusion

Based on the foregoing, Mid-Tex respectfully requests that the Commission deny the above-referenced applications to the extent they seek consent to transfer control of Dobson licenses in the Texas 9B2 market to AT&T, or impose conditions on the grant of such applications requiring that the merged AT&T divest spectrum held by the combined entity in excess of 70 MHz in any county in that market in which it has interests in more than 70 MHz of CMRS spectrum, and condition any grant of the subject applications on the completion of such divestitures. In addition, Mid-Tex requests that the Commission impose a condition such that AT&T will not be permitted to bid in Auction No. 73 for any licenses in any license area in which AT&T/Dobson controls, or has a 10 percent or greater interest in, 70 MHz or more of CMRS spectrum. The Commission should also require AT&T to enter into a fair and nondiscriminatory roaming agreement with Mid-Tex, and require AT&T to obtain ETC status before it may be entitled to USF support.

Respectfully Submitted,

**MID-TEX CELLULAR LTD.**

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/s/

Michael R. Bennet  
Bennet & Bennet, PLLC  
4350 East West Highway  
Suite 201  
Bethesda, MD 20814  
202/371-1500

*Its Attorneys*

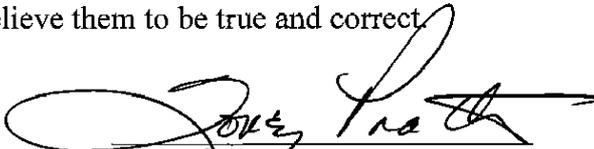
August 27, 2007

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**DECLARATION OF TONEY PRATHER**

I, Toney Prather, do hereby declare under penalty of perjury the following:

1. I am the Manager of, and President of the sole member of the managing general partner of, Mid-Tex Cellular, Ltd.
2. I have read the foregoing "Petition to Deny." I have personal knowledge of the facts set forth therein, and believe them to be true and correct.

  
Toney Prather

8/27/07  
Date

Certificate of Service

I, Linda L. Braboy, with the firm of Bennet & Bennet, PLLC, hereby certify that I have on this 27<sup>th</sup> day of August 2007 caused a copy of the foregoing Petition to Deny to be delivered by first-class mail to the following:

Ronald L. Ripley  
American Cellular Corporation  
Dobson Cellular Systems, Inc.  
Dobson CC Limited Partnership  
14201 Wireless Way  
Oklahoma City, OK 73134

Lawrence J. Movshin  
Wilkinson Barker Knauer, LLP  
2300 N Street, N.W., Suite 700  
Washington, DC 20037

William R. Drexel  
AT&T Inc.  
175 East Houston, Room 242  
San Antonio, TX 78205

In addition, courtesy copies of the foregoing Petition to Deny were delivered via e-mail upon the following:

Erin McGrath  
Mobility Division  
Wireless Telecommunications Bureau  
Federal Communications Commission

Susan Singer  
Spectrum and Competition Policy Division  
Wireless Telecommunications Bureau  
Federal Communications Commission

Linda Ray  
Broadband Division  
Wireless Telecommunications Bureau  
Federal Communications Commission

David Krech  
Policy Division  
International Bureau  
Federal Communications Commission

Neil Dellar  
Office of General Counsel  
Federal Communications Commission

Best Copy and Printing, Inc.  
Portals II  
445 12th Street, S.W.  
Room CY-B402  
Washington DC 20554

/s/

\_\_\_\_\_  
Linda L. Braboy