

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

In the Matter of)	
)	
AT&T Mobility Spectrum LLC and)	WT Docket No. 11-18
Qualcomm Incorporated Seek FCC)	DA 11-252
Consent to the Assignment of)	ULS No. 0004566825 (lead)
Lower 700 MHz Band Licenses)	

PETITION TO DENY OF RURAL CELLULAR ASSOCIATION

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Rural Cellular Association (“RCA”)¹ hereby petitions to deny the above-captioned Applications. The proposed transaction would diminish competition in the already overly concentrated wireless marketplace, and would harm consumers as a result. The public interest therefore requires rejection of the Applications in the entirety, or, at a minimum, the imposition of conditions to ameliorate the threatened harms.

INTRODUCTION AND SUMMARY

In recent years, the wireless industry in the United States has experienced an unprecedented wave of consolidation and spectrum aggregation. Two large “supercarriers,” AT&T and Verizon, now dominate the industry in terms of subscribership and spectrum holdings that can be used for wireless voice and broadband services. AT&T, presently the second largest wireless provider, has accumulated enormous swaths of AWS-1 and 700 MHz spectrum in recent auctions, and has in parallel engaged in a series of aftermarket spectrum acquisitions that have further increased its already-dominant position. Put simply, the wireless industry is marching

¹ RCA is an association representing the interests of nearly 100 small, mid-sized and rural wireless licensees that provide commercial services to subscribers throughout the United States. Most of RCA’s carrier members serve fewer than 500,000 customers.

towards duopoly. Thus, it is hardly a surprise that the most recent Wireless Competition Report *for the first time* was unable to certify that the wireless industry is characterized by effective competition, due in part to “continued industry concentration.”²

AT&T’s pattern of spectrum acquisition to date already has created or imminently threatens significant harm to competition industry-wide, including foreclosing actual and potential competitors from acquiring needed spectrum; impairing device interoperability; and limiting the ability of consumers to enjoy the seamless voice and data roaming that they demand. The result has been less competition and less consumer choice. Now, in the face of such evident consumer harms, AT&T proposes a massive new acquisition of Qualcomm’s 700 MHz licenses, “including six D block licenses, which together provide a nationwide footprint, and five E block licenses in the Boston, Los Angeles, New York, Philadelphia, and San Francisco Economic Areas.”³ Enough is enough.

AT&T has the affirmative burden of demonstrating that the proposed transaction, “on balance, serves the public interest.”⁴ That burden has not been satisfied here. AT&T’s spree of acquiring vast amounts of a critical input can no longer be justified by conclusory assertions that the warehousing of yet more scarce, nationwide spectral capacity will be in the public interest and will have no adverse competitive effects. Congress has sought expressly to “avoid[] excessive concentration of [spectrum] licenses” and has charged the Commission to

² See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407, 11411-12, ¶¶ 3-4 (May 20, 2010) (“*14th Wireless Competition Report*”).

³ AT&T and Qualcomm Public Interest Statement at 2.

⁴ E.g., *Applications of AT&T Inc. & Cellco P’ship d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses & Authorizations & Modify a Spectrum Leasing Arrangement*, Memorandum Opinion and Order, 25 FCC Rcd. 8704, ¶ 22 (2010) (“*AT&T/Verizon Order*”).

“disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”⁵ The instant transaction plainly frustrates and impairs those goals.⁶

DISCUSSION

I. ALLOWING AT&T TO FORTIFY ITS ALREADY-DOMINANT SPECTRUM POSITION CANNOT BE SQUARED WITH THE PUBLIC INTEREST

The Commission should deny the Applications because entrusting additional beachfront spectrum to AT&T would cause irreparable harm to competition and consumers. In a market that is teetering dangerously on the brink of true duopoly, the Commission should not tip the balance further.

A. AT&T’s Recent Spectrum Aggregation Already Has Placed it in a Dominant Position

In the last decade, AT&T has acquired large portions of commercial mobile radio service (“CMRS”) spectrum through its acquisitions of Telecorp (2002), Highland Cellular and BellSouth (2006), Dobson Communications (2007), Edge Wireless and McBride Spectrum Partners I (2008), Centennial Communications (2009), and former Alltel spectrum (from Verizon) (2010).⁷ AT&T purchased 48 AWS-1 licenses at auction in 2006 (Auction No. 66) for approximately \$1.3 billion that cover nearly 200 million POPs. AT&T subsequently purchased

⁵ 47 U.S.C. § 309(j)(3).

⁶ See, e.g., *AT&T/Verizon Order* at ¶ 22 (Commission’s public interest analysis includes whether transaction “could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes”).

⁷ See Government Accountability Office, *Telecommunications: Enhanced Data Collection Could Help FCC Better Competition in the Wireless Industry*, Report to Congress, GAO-10-779 at 12, Figure 2 (July 2010) (“GAO 2010 Wireless Report”); *Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses*, WT Docket No. 09-104 (June 22, 2010).

700 MHz spectrum from Aloha, covering 72 of the 100 largest markets in the U.S. In 2008, AT&T bid \$6.6 billion to acquire an additional 227 B Block licenses during the Commission’s 700 MHz auction (Auction No. 73).⁸ In that auction, AT&T and Verizon collectively acquired 70% of the available 700 MHz spectrum.⁹

As a result of these and other transactions, AT&T already enjoys a dominant industry position that threatens competition. A recent study demonstrated that AT&T and Verizon have rapidly increased market share at the expense of competitors, enjoy a staggering 90% of industry EBITDA, and have created a wireless market characterized by markedly increasing concentration.¹⁰ In addition, the GAO has recognized that the “primary change in the wireless industry” over the last decade is “industry consolidation [that] has created some challenges for small and regional carriers to remain competitive.”¹¹ The GAO noted that from 2006 to 2009, AT&T and Verizon increased their subscriber market share by nearly 20 percent.¹² Overall, the Commission has found that industry concentration “has increased 32 percent since 2003 and 6.5 percent in the most recent year for which data is available.”¹³ The instant transaction thus must be understood in the context of the last decade in which AT&T has attained—and now maintains—a commanding market position, in large part by acquiring large amounts of spectrum that is ideal for mobile voice and data services.

⁸ See Stifel Nicolaus, *Special Focus: The Wireless World After 700 MHz* (March 28, 2008).

⁹ *Id.* at 2-3.

¹⁰ See Peter Cramton, *700 MHz Device Flexibility Promotes Competition*, (Aug. 9, 2010) (“Cramton Report”), attached to *Ex Parte Letter from Rebecca Murphy Thompson, General Counsel for Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC*, filed in RM-11592 (Aug. 10, 2010).

¹¹ *GAO 2010 Wireless Report* at 10.

¹² *Id.* at 13.

¹³ *14th Wireless Competition Report*, ¶ 4.

B. The Commission Should Not Approve a Spectrum Transaction That Would Facilitate AT&T's Foreclosure of Wireless Competition and Cause Attendant Consumer Harms

RCA's concerns stem not only from AT&T's alarming aggregation of spectrum, but from related conduct and consequences that cause significant harms to competition and consumers. AT&T's spectrum acquisitions to date have foreclosed competitors from acquiring a needed input to compete, have sharply limited the potential for industry-wide device interoperability, and have impaired consumers' ability to enjoy voice and data roaming. This transaction would further exacerbate those harms.

1. AT&T's Hoarding of Spectrum Promotes Neither Competition Nor the Public Interest

As the Commission has recognized, spectrum is "an increasingly pivotal input. In particular, lower-frequency spectrum possesses superior propagation characteristics that create certain advantages in the provision of mobile wireless broadband service, especially in rural areas."¹⁴ The Commission explicitly observed that "sufficient access to spectrum ... may be a contributing factor in the ability of a wireless service provider to compete effectively," and moreover that "access to lower-frequency spectrum may account for some of the disparities in operating economics among providers."¹⁵

An effort by a dominant carrier to hoard large swaths of an essential input plainly has detrimental effects on competition.¹⁶ Spectrum that AT&T amasses for itself is spectrum that smaller rivals cannot use to compete. The impact on consumers is particularly acute in rural areas, where lower-frequency spectrum is more effective and could enable multiple smaller

¹⁴ *14th Wireless Competition Report* ¶ 4.

¹⁵ *Id.*

¹⁶ *See Cramton Report* at 3-6.

competitors to compete with AT&T. As low-frequency spectrum remains scarce, this “pivotal input” creates a significant barrier to entry that solidifies AT&T’s market position.

Indeed, there is little doubt that AT&T’s incentive as a dominant incumbent is to acquire spectrum at least in part as a means of foreclosing access by competitors, even if it means paying a higher price at auction or in private transactions. In advance of the 700 MHz auction several years ago, several economists expressed the grave concern that AT&T and Verizon would have skewed incentives to acquire 700 MHz spectrum in Auction No. 73 in order to foreclose competitive usage of that spectrum:

Auctions are often assumed to be the most efficient way of distributing scarce inputs. Where market power is present, however, an open auction that treats incumbents and potential new entrants symmetrically, will often produce outcomes that are inefficient and have anticompetitive consequences for post-auction markets. Suppose that an incumbent monopolist already has one license, and now a second license is to be sold in an auction. Assume that a new entrant has greater economic value for the second license than the incumbent does. This is often the case, since an operator’s value for additional spectrum typically falls with each additional increment. However, the incumbent enjoys monopoly rents that it wants to retain. Under nearly any economic model, entry would reduce monopoly rents and hence the monopolist’s profit. The incumbent’s license valuation is its economic value *plus* the foreclosure value (which is the loss of incumbent’s monopoly rents were an entrant to win that license)—that is, the incumbent’s valuation includes the value of deterring entry.

Under these assumptions, the incumbent monopolist will win the license (thereby blocking entry), even though the new entrant is more efficient, whenever the entrant’s efficiency advantage is less than the incumbent’s loss of monopoly rents were it to fail to deter entry. The greater are the monopoly rents, and hence the worse the monopoly problem is, the more likely it is that the incumbent wins.¹⁷

¹⁷ Peter Cramton, Andrzej Skrzypacz, and Robert Wilson, *The 700 MHz Spectrum Auction: An Opportunity to Protect Competition In a Consolidating Industry*, at 3 (November 13, 2007).

These economists noted that the same incentives and conduct were present with respect to AT&T's transactional activity in the aftermarket, for example when it acquired a huge 700 MHz footprint from Aloha: "A more recent example is AT&T's recent agreement to purchase 700 MHz spectrum from Aloha. This spectrum would have been valuable to new entrants, but AT&T was willing to pay more, possibly in an effort to frustrate the acquisition of such valuable spectrum by a new competitive force."¹⁸

The instant transaction poses precisely the same problem. Qualcomm holds nationwide spectrum assets that could be particularly valuable for other carriers to employ in competition with AT&T. AT&T's argument that it will repurpose Qualcomm's underutilized spectrum entirely avoids the question of how the public interest is advanced by permitting AT&T, as a dominant carrier, to utilize that spectrum, as opposed to other competitors. Furthermore, AT&T's buildout track record highlights the foreclosure concern. In spite of its acquisition of approximately \$1.3 billion of AWS spectrum in 2006, AT&T has yet to deploy commercial operations in this band, in spite of the fact that many of its competitors are doing so.¹⁹ In view of AT&T's economic incentives and track record, the Commission should not accept at face value that the spectrum to be acquired from Qualcomm actually would be deployed to "help AT&T address the exploding demand for wireless broadband services."²⁰ To the contrary, the experience to date suggests that it would be shelved.

¹⁸ *Id.* at 4.

¹⁹ *See e.g.*, <http://www.dailywireless.org/2010/06/18/phoney-spectrum-scarcity> (noting that "T-Mobile, Cricket and MetroPCS are using their expensive AWS spectrum. Verizon and AT&T are not.").

²⁰ AT&T and Qualcomm Public Interest Statement at 8.

2. The Transaction Would Foster Foreclosure Via Equipment Interoperability Restrictions

A specific example of how AT&T's dominant spectrum position already harms consumers relates to the use of devices within the 700 MHz band. The Commission has found that "handsets and devices are becoming increasingly central to the dynamics of the overall wireless market," and that "handsets play[] an increasingly important role for consumers as a basis for choosing providers."²¹ Device interoperability throughout the 700 MHz band enables smaller competitors to increase economies of scale and provide stronger competition to AT&T and Verizon.

By dominating the use of the spectrum and by dictating operational characteristics of devices that render them incompatible with those employed by smaller carriers, AT&T and Verizon have frozen out Lower A and B Block licensees—most of whom serve rural communities—from the development of the most attractive equipment that consumers demand.²² In doing so, they impose significant costs on smaller and regional carriers, and ultimately on consumers. In addition, lack of interoperability creates uncertainty for current and future rival 700 MHz spectrum holders that can chill them from investing in network and device deployment. These are significant collateral harms to competition and to the public interest that arise from AT&T's unchecked accumulation of scarce 700 MHz spectrum.

²¹ *14th Wireless Competition Report* ¶ 299.

²² *See, e.g., Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Between Commercial Wireless Carriers and Handset Manufacturers*, ET Docket RM-11497; *Petition for Rulemaking Regarding the Need for 700 MHz Mobile Equipment to be Capable of Operating on All Paired Commercial 700 MHz Frequency Blocks*, Petition for Rulemaking, ET Docket RM-11592.

3. The Transaction Also Would Foster Foreclosure Due to Data Roaming Restrictions

The Commission has recognized that “data roaming is important to entry and competition for mobile broadband services.”²³ In addition, “most wireless customers expect to roam automatically on other carriers’ networks when they are out of their home service area.”²⁴

The record in the Commission’s voice and data roaming docket (and in other AT&T merger and assignment transactions) reveals widespread industry complaints of impediments to securing roaming arrangements with AT&T.²⁵ The Commission expressly found that “consolidation in the wireless industry may have reduced the number of available roaming partners” and that “this trend ... may have contributed to reductions in the availability of voluntary and reasonable roaming arrangements.”²⁶ With regard to data roaming, the entire wireless industry—aside from AT&T and Verizon—is united in its call for an automatic data roaming obligation precisely because AT&T’s and Verizon’s dominant positions give them incentives to exclude others, subtly or openly, from accessing their networks, despite the economic reality that other carriers must do so to compete.

²³ *National Broadband Plan* at 49.

²⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 05-265, ¶ 27 (Aug. 16, 2007).

²⁵ *See, e.g., Ex Parte Letter from Thomas J. Sugrue, T-Mobile to Marlene H. Dortch, Secretary, FCC*, WT Docket No. 05-265 (Mar. 10, 2011); *Ex Parte Letter from Mosaic Telecom to Marlene H. Dortch, Secretary, FCC*, WT Docket No. 05-265 (Jan. 14, 2011); *Ex Parte Letter from Rebecca Murphy Thompson, RCA General Counsel, and Caressa D. Bennet, RTG General Counsel, to Marlene H. Dortch, Secretary, FCC*, WT Docket No. 05-265 (Nov. 12, 2010).

²⁶ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, WT Docket No. 05-265, ¶ 29 (April 21, 2010).

The Commission's findings confirm that consolidation is harmful to smaller carriers' ability to obtain roaming agreements and thus harmful to their ability to compete. Again, these harms to competition are a direct product of spectrum accumulation by AT&T. This transaction would exacerbate that problem by granting AT&T yet another nationwide spectrum footprint, all to the detriment of competition and consumers.

C. The Commission Must Searchingly Evaluate the Harms to Competition That Would Flow from the Transaction

In light of the significant harms to competition that have resulted from AT&T's spectrum accumulation, the Commission must engage in a careful analysis of the proposed transaction that accounts for the actual and potential competitive harms to competitive carriers and consumers. AT&T relies principally on the Commission's current spectrum screens to argue that this transaction will not harm competition, but its analysis is both incomplete and ultimately irrelevant.

As a threshold matter, any consideration of AT&T's spectrum aggregation now should include AT&T's WCS spectrum holdings. The Commission has developed a three-part test for determining the "suitability" of spectrum for mobile telephony/broadband services. First, the Commission assesses whether "the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology." Second, the Commission asks whether the spectrum is actually "licensed with a mobile allocation and corresponding service rules." And third, the Commission considers whether the spectrum is "committed to another use that effectively precludes its uses for mobile telephony/broadband service."²⁷ Although the Commission has not yet expressly incorporated WCS spectrum into its screen, it recognized in

²⁷ *AT&T/Verizon Wireless Order* ¶ 39; *see also AT&T-Centennial Order* ¶ 43 (same); *Verizon Wireless-ALLTEL Order* ¶ 53 (same).

the National Broadband Plan that WCS spectrum is suitable for broadband services,²⁸ and recently adopted rules that specifically are designed to enhance WCS spectrum's suitability for mobile services, to the point of mandating that WCS licensees actually begin providing competitive mobile services in local markets.²⁹ In light of such developments confirming WCS suitability for wireless broadband services, there no longer is any valid basis to exclude AT&T's WCS spectrum holdings from the Commission's spectrum aggregation analysis.³⁰

More fundamentally, however, the Commission should reject AT&T's efforts to dismiss competitive and public interest harms based merely on the fact that current spectrum screens in many markets may not be triggered. The Commission has never suggested that its spectrum screen analysis provides a basis to ignore actual harms to competition or the public interest. Further, as more mobile broadband spectrum comes to market via new allocations or repurposing for mobile broadband use, the FCC's current spectrum screen obviously becomes less effective. In the current wireless environment, the FCC's spectrum screen does not provide a sufficient review of spectrum consolidation and harms to competitors, and the FCC should consider revising its overall spectrum screen approach.

Indeed, on the merits of this particular transaction—in which the Commission confronts unprecedented and increasing concentration in the industry, in which there is no serious question

²⁸ *National Broadband Plan* at 85-86.

²⁹ *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, WT Docket No. 07-293, Report and Order and Second Report and Order, FCC 10-82, ¶ 1 (May 20, 2010).

³⁰ AT&T broadly attempts to factor MSS and BRS/EBS spectrum *en masse* into the Commission's spectrum screen analysis in particular markets. *See AT&T/Qualcomm Public Interest Statement* at 22-28. RCA believes that the degree to which the underlying spectrum allocated to these services would indeed satisfy the Commission's suitability inquiry for spectrum screen purposes warrants further exploration, perhaps in the Competition Report docket or in a separate proceeding. It is premature here.

that the industry is threatened by two dominant carriers, and in which numerous competitors have established the actual harms to competition that they face—the Commission must move beyond screening tools and evaluate the actual competitive harms implicated by this transaction. Spectrum screens are mechanisms for predicting foreclosure effects, not for shielding actual foreclosure from evaluation. AT&T therefore cannot hide behind spectrum screens to avoid grappling with the serious competitive harms caused by its acquisition.

II. AT A MINIMUM, THE COMMISSION SHOULD IMPLEMENT CONDITIONS TO AMELIORATE COMPETITIVE HARMS

At a minimum, the Commission must take steps to alleviate the serious competitive harms identified above. If the Commission grants the Applications, it should impose at least three conditions on their approval. First, the Commission should require AT&T to ensure interoperability within the same air interface of devices across *all* 700 MHz band licenses. Second, the Commission should impose on AT&T an obligation to provide commercially reasonable data roaming agreements to any requesting carrier. Third, the Commission should harmonize the technical specifications and operating parameters of the assigned spectrum to be consistent with those in the Lower A and B blocks.³¹ These conditions would not fully resolve the competitive harms arising from AT&T's acquisition of this spectrum, but they would provide at least some protections for competitors and consumers.

CONCLUSION

For the foregoing reasons, the Commission should deny the Applications. In the alternative, the Commission should impose the conditions proposed above to ensure that the transaction does not harm the public interest.

³¹ For example, Qualcomm presently is permitted to broadcast at 50 Kw on its 700 MHz spectrum. This power limit must be revised and harmonized in order to avoid causing harmful interference with adjacent licensees.

Respectfully submitted,

- /s/ -

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March 11, 2011

CERTIFICATE OF SERVICE

I, James H. Barker, certify that on this 11th day of March , 2011, I caused the foregoing

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