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

In re Application of	)	
	)	
QUALCOMM INCORPORATED, Transferor,	)	
	)	
and	)	WT Docket No. 11-18
	)	
AT&T MOBILITY SPECTRUM, LLC,	)	File No. 0004566825
Transferee	)	
	)	
for Consent to the Assignment of Lower 700 MHz	)	
Band Licenses	)	

PETITION TO DENY

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SUMMARY

The Rural Telecommunications Group, Inc. ("RTG") petitions the Federal Communications Commission ("FCC" or "Commission") to deny the proposed assignment of Qualcomm Incorporated's ("Qualcomm") lower 700 MHz band licenses to AT&T Mobility Spectrum, LLC ("AT&T") or in the alternative to condition any such grant in a manner that will protect rural consumers and ensure that the availability, price and quality of service provided by rural wireless carriers to rural consumers is not threatened or harmed.

Approval of the proposed transaction would pose a serious threat to meaningful competition in the mobile wireless marketplace and would be contrary to the public interest. Such approval would frustrate the purpose of the National Broadband Plan and would have a harmful effect on the domestic roaming market and place too much concentration of market power in the hands of AT&T, to the particular detriment of rural wireless consumers.

If the transaction is approved, AT&T and Verizon will control all of the cellular and 700 MHz band licenses (a.k.a. "beachfront spectrum") in most of the largest markets in the country as well as many rural markets. Such duopolization to date has resulted in anticompetitive harm to wireless carriers and their customers, and has had the effect of driving some smaller carriers out of business. The resulting inability of small rural carriers to get data roaming agreements on a nationwide level, at the most advanced data speeds available, and at fair and reasonable rates has prevented them from competing effectively against AT&T and Verizon, to the ultimate harm of customers residing in or travelling through rural areas.

Any approval of the proposed transaction should be subject to several conditions. Specifically, AT&T should be required to offer data roaming on reasonable terms and conditions (including rates) and on any compatible air interface technology of the requesting carrier. In addition, the Commission should prohibit handset exclusivity agreements and impose a mandatory

requirement that all mobile wireless devices be interoperable across the entire 700 MHz band. Public Safety should also be given priority access and the ability to roam on AT&T's commercial network.

Finally, to ensure that the proposed transaction advances the Commission's and the Administration's broadband deployment goals (especially in rural areas), and to ensure that AT&T does not warehouse additional spectrum, the Commission should condition any approval of the proposed transaction on AT&T's compliance with uniform, accelerated performance requirements for all of its 700 MHz licenses (including licenses acquired as part of this transaction).

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PETITION TO DENY

The Rural Telecommunications Group, Inc. ("RTG"), by its attorneys and pursuant to 47 C.F.R. § 1.939 and the *Public Notice* of the Federal Communications Commission ("FCC" or "Commission") released February 9, 2011,[1] hereby petitions the FCC to deny the above-captioned application or in the alternative to place significant conditions upon the grant in order to protect rural consumers by ensuring that the availability, price and quality of service provided by rural wireless carriers to rural consumers is not threatened or harmed.[2]

[1] FCC Public Notice, DA 11-252, *AT&T Mobility Spectrum, LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, WT Docket No. 11-18, *Pleading Cycle Established* (released February 9, 2011) ("*Public Notice*").

[2] RTG is a 501(c)(6) trade association whose members consist of rural and small wireless carriers and licensees that depend upon the availability of spectrum, voice and data roaming services, and competitive mobile handsets and devices to attract and serve rural consumers. The proposed transaction will harm RTG's members and the rural consumers living and working in their coverage areas. Accordingly, RTG, through its members, is a real party in interest in the above-captioned proceeding and has standing to file the instant petition.

I. APPROVAL OF THE PROPOSED TRANSACTION IS CONTRARY TO THE PUBLIC INTEREST.

For years, small and rural wireless carriers have been requesting fair and reasonable roaming conditions,[3] warning of the harms of hyper-consolidation in the mobile wireless marketplace,[4] and seeking the right to purchase competitive devices and handsets that function across the entirety of the spectrum bands utilized by commercial carriers.[5] RTG warned the Commission of the multiple competitive harms that would befall the industry three years ago when Verizon Wireless purchased ALLTEL Communications.[6] RTG submits that the proposed

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[3] *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Comments of the Rural Telecommunications Group, Inc., WT Docket No. 05-265 (filed June 14, 2010); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Reply Comments of the Rural Telecommunications Group, Inc. and the Organization for the Promotion and Advancement of Small Telecommunications Companies (dated November 6, 2007); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Comments of the Rural Telecommunications Group, Inc. and the Organization for the Promotion and Advancement of Small Telecommunications Companies (dated October 29, 2007); *Ex Parte* Notification Letter from Caressa D. Bennet, Counsel for Rural Telecommunications Group, Inc., FCC, WT Docket No. 00-193 (dated February 9, 2005); *Ex Parte* Notification Letter from Caressa D. Bennet, Counsel for Rural Telecommunications Group, Inc., FCC, WT Docket No. 00-193 (dated January 31, 2005); *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, Petition for Commission Action (dated November 1, 2004).

[4] *In the Matter of Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing* Arrangement, Petition to Deny of the Rural Telecommunications Group, Inc., WT Docket No. 09-104 (filed July 20, 2009); *In the Matter of Fifteenth Annual Report on the State of Competition in Mobile Wireless*, Comments of the Rural Telecommunications Group, Inc., WT Docket No. 10-133 (filed July 30, 2010); *In the Matter of Fourteenth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Service*, Comments of the Rural Telecommunications Group, Inc., WT Docket No. 09-66 (filed June 15, 2009); *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorization, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Petition to Deny of the Rural Telecommunications Group, Inc., WT Docket No. 08-95 (filed August 11, 2008) ("*RTG Petition to Deny*"); *In the Matter of Rural Telecommunications Group, Inc. Petition for Rulemaking to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, Petition for Rulemaking, RM No. 11498 (filed July 16, 2008) ("*Spectrum Cap Petition*").

[5] *In the Matter of 700 MHz Block A Good Faith Purchasers Alliance Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, Comments of the Rural Telecommunications Group, Inc., RM No. 11592 (filed March 31, 2010); *In the Matter of Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, Comments of RTG, OPASTCO and NTCA, RM No. 11497 (filed February 2, 2009) ("*RTG Comments on Handset Exclusivity Agreements*").

[6] *See generally RTG Petition to Deny*.

transaction is more of the same. Commission approval of the sale of spectrum from Qualcomm Incorporated ("Qualcomm") to AT&T Mobility Spectrum, LLC ("AT&T") will pose a serious threat to meaningful competition and consumer choice in the mobile wireless marketplace.

The Commission is barred from granting any transfer or assignment of a license unless and until the Commission finds that "the public interest, convenience and necessity will be served."[7] As part of their mandatory FCC filings, AT&T and Qualcomm have included a *Public Interest Showing*[8] which purports to justify the public interest benefits of this massive transaction. In the eyes of AT&T and Qualcomm, there are two types of public interest arguments: (1) the transaction furthers the goals of the *National Broadband Plan*[9]; and (2) AT&T and its existing and future customers will all benefit from having more spectrum at their disposal. As discussed below, FCC approval of this transaction will in fact *frustrate* the goals of the *National Broadband Plan.* Moreover, operational efficiency benefits to AT&T and monetary benefits to Qualcomm do not in any way confer a generalized benefit to the American public. Rather, this transaction only accentuates the divide between the haves and the have-nots in the mobile industry and expedites the decade-long slide of the industry towards a harmful *de facto* duopoly. Additionally, despite hollow arguments by AT&T and Qualcomm to the contrary, putting even more beachfront 700 MHz spectrum into the hands of AT&T will *erode* competition, not enhance it. The only way to prevent this elimination of competition is to deny the application, or at the very least, impose a modicum of fair and reasonable conditions that

[7] 47 U.S.C. §310(d).

[8] *In re Application of AT&T Mobility Spectrum, LLC and Qualcomm Incorporated for Consent to the Assignment of Lower 700 MHz Band Licenses*, WT Docket No. 11-18, Description of Transaction, Public Interest Showing and Related Demonstrations (filed January 13, 2011) ("*Public Interest Showing*").

[9] *In the Matter of Joint Statement on Broadband*, GN Docket No. 10-66, Connecting America: The National Broadband Plan (released March 16, 2010) ("*National Broadband Plan*").

would allow rural consumers to enjoy advanced mobile communications services in their rural areas as well as access to large carriers' networks when they travel to urban areas.

A. The Proposed Transaction Is Contrary to the Public Interest.

The proposed transaction is by no means a run-of-the-mill license sale from one operator to another. In some respects, it rivals the mergers and acquisitions that have removed former wireless carriers ALLTEL, AT&T Wireless, Nextel, SunCom, Rural Cellular, Dobson, Centennial and dozens of other well-known mobile operators over the last decade. To understand the magnitude of this transaction, the Commission needs only to look at the depth, breadth and frequencies of the specific licenses involved. AT&T proposes to buy from Qualcomm six D Block licenses in the Lower 700 MHz Band, which together provide a national footprint, and five E Block licenses in the metropolitan markets of New York, Los Angeles, San Francisco, Boston and Philadelphia.[10] Each of these licenses is 6 megahertz. In those markets where AT&T will purchase both the D Block and E Block license, it will have 12 megahertz of contiguous spectrum, not including its other 700 MHz holdings in the Lower 700 MHz B Block and C Blocks, plus its vast Cellular license holdings. In Auction 73, the FCC was fully prepared to auction off the Upper 700 MHz D Block, consisting of only 10 megahertz, across the entire country and for use by a *single* operator in order to support a national mobile broadband network. Here, AT&T will have 12 megahertz of similarly situated spectrum. Clearly the licenses in question could support a potential stand-alone mobile operator or at the very least a regional operator that could compete with AT&T.

[10] *Public Interest Showing* at 2.

AT&T states that "repurposing underutilized spectrum…will further an important public interest."[11] However, the "public interest" that AT&T wishes to improve is primarily its own interest. RTG and its members concede that any increase in a particular company's spectrum portfolio will improve its operational efficiencies, which in turn benefits a company's current customer base and allows it to further increase that customer base.[12] If the Commission goes down this path and approves this transaction, AT&T will attract new customers away from competitors who are unable to gain access to the spectrum at issue, either because they were unable to purchase it from the onset or because they are denied reasonable inter-operator data roaming agreements.

AT&T contends that by purchasing Qualcomm's D and E Block licenses in the Lower 700 MHz Band, it will "further the goals of the National Broadband Plan"[13] and "unlock the full potential of 4G."[14] However, as discussed below, the goals of the *National Broadband Plan* are subverted by the proposed AT&T-Qualcomm transaction.

An examination of the *National Broadband Plan* reveals that the proposed transaction is inconsistent with the true intent of the Commission. In the introduction to the section dedicated exclusively to the matter of spectrum, the Commission states explicitly that "[u]nlocking the full

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[11] *Public Interest Showing* at 8.

[12] By the year 2014, AT&T and Verizon Wireless are expected to have a combined 70% of the domestic mobile market share, with AT&T's market share increasing from the current 29.5% to 33.0% and Verizon Wireless' market share surging from 31.9% to 36.5%. IE Market Research Corporation (released January 2010) (http://www.dailywireless.org/2010/02/11/sprint-7-4-market-share-in-5-years/).

[13] *Public Interest Showing* at 4.

[14] *Id.* at 5.

potential of 4G will require more than a 're-farming' of existing mobile spectrum and deployment using recently released spectrum in the 700 MHz."[15] It goes on to add that:

> "*Additional spectrum is also required to accommodate multiple providers in a competitive marketplace, including new entrants and small businesses*, as well as to enable wireless services to compete with wireline services. The U.S. Department of Justice (DOJ) aptly summarized: 'Given the potential of wireless services to reach underserved areas and to provide an alternative to wireline broadband providers in other areas, *the Commission's primary tool for promoting broadband competition should be freeing up spectrum*."[16] (emphasis added)

What AT&T and Qualcomm propose is nothing more than "re-farming" spectrum. The spectrum pie is not getting bigger; AT&T is merely grabbing yet another large slice and preventing smaller competitors or new entrants from accessing it.

According to the DOJ, true competition will only occur if *additional* spectrum is freed up for new or existing operators. Unfortunately, since the release of the *National Broadband Plan* (one goal of which was repurposing at least 500 megahertz of airwaves) not a single megahertz anywhere in the country has been repurposed and auctioned off to the public to address the "looming spectrum crunch" that the nation currently faces.[17] Spectrum is a scarce resource, without doubt, and to allow such large segments of it already in the public domain to be further consolidated before the release of any new spectrum for use by additional market players, or small and rural competitors, is completely contrary to the spirit of the *National Broadband Plan*. Consumers pay the ultimate price in the end, as the Commission has already noted, because "the cost of not securing enough spectrum may be higher prices, poorer service, lost productivity, loss

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[15] *National Broadband Plan* at 78.

[16] *Id*.

[17] *See* Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, at the Minority Media & Telecom Council Broadband and Social Justice Summit, Washington, DC, at 3 (January 20, 2011).

of competitive advantage and untapped innovation."[18] If the Commission wants to truly adhere to its "longstanding goals of competition, diversity, and localism" it must deny the application, or alternatively, apply conditions that truly reflect *the public interest*.

B. The Proposed Transaction Will Erode Competition and Frustrate the Public Interest By Concentrating Too Much Spectrum In the Hands of AT&T.

Any transaction that creates or enhances significant market power is unlikely to serve the public interest.[19] A post-transaction AT&T will hold a substantial spectrum interest in markets throughout the United States. In applying its public interest test under section 310(d) of the Communications Act of 1934, as amended ("the Act"), the FCC employs a balancing test weighing any potential public interest harms of a proposed transaction against any potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest.[20] Under this test, AT&T bears the burden of proving that the proposed transaction, on

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[18] *Id.* at 85.

[19] *See Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement,* Memorandum Opinion and Order, WT Docket No 09-104, FCC 10-116 at par. 22 (rel. June 22, 2010) ("*AT&T/Verizon Order*"); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements, File Nos. 0003463892, et al.*, Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 08-95, FCC 08-258 at par. 26 (rel. November 10, 2008) (*Verizon/ALLTEL Order*"); *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases, File Nos. 0003155487, et al.*, WT Docket No. 07-208, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-181 at par. 43 (rel. August 1, 2008) ("*Verizon/RCC Merger Order*"); *Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations, File Nos. 0003092368 et al.*, WT Docket No. 07-153, Memorandum Opinion and Order, FCC 07-196 at par. 15 (rel. November 19, 2007) ("*AT&T/Dobson Merger Order*"); *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 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*").

[20] *AT&T/Verizon Order* at par. 22.

balance, serves the public interest.[21] If it is unable to so demonstrate, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that the FCC designate the application for hearing.[22]

AT&T and Qualcomm insist that the supposed public interest benefits will not come at the expense of competition.[23] Furthermore, they argue that because AT&T is acquiring only spectrum and not an active business or subscriber base, there will be no increase in market concentration.[24] Finally, AT&T contends that the spectrum screen utilized by the Commission to identify potential competitive harms is not triggered, so therefore, industry competition is in no way reduced.[25] Unfortunately, the putative "spectrum screen" is broken beyond repair.

At the outset, the spectrum screen is simply a "processing tool," not an end unto itself.[26] The screen was designed as a means of identifying *competitive harm*, not as a method of clearing transactions that would otherwise harm the public interest. In this case, the limited pool of available 700 MHz spectrum that is licensed to commercial operators – spectrum that AT&T, the Commission, industry leaders and analysts have long touted as the nation's "beachfront spectrum" – is qualitatively different than the spectrum in other bands that is subject to the FCC's "spectrum screen."[27] In past transactions, the FCC has applied a market-by-market

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[21] *Id.*

[22] 47 U.S.C. §309(e).

[23] *Public Interest Showing* at i.

[24] *Public Interest Showing* at ii.

[25] *Id*. at ii.

[26] *See, e.g., Applications of AT&T Inc. and Centennial Communications Corp.*, WT Docket No. 08-246, Memorandum Opinion and Order, 24 FCC Rcd 13915 ¶ 46 (2009).

[27] *See, e.g.*, Ars Technica, *AT&T surprises with Beachfront 700 MHz Spectrum Purchase*, (Oct. 9, 2007), *available at* http://arstechnica.com/old/content/2007/10/att-surprises-with-beachfront-700mhz-spectrum-purchase.ars. Even

spectrum screen that can include spectrum in the AWS-1 and BRS bands in addition to all of the spectrum in those bands designated for cellular, PCS, SMR, and 700 MHz services.[28] The FCC has never conducted any evidentiary or market-based analysis of the material differences among the bands included in the screen. On the contrary, the FCC has adjusted the spectrum screen at seemingly random intervals depending on the bands at issue in a particular case. As a result, the current spectrum screen ignores all differences among the included bands in terms of propagation characteristics, infrastructure expenses, technical and service rules, international harmonization, and licensing arrangements.

Rather than assessing the *relative* competitive effects of desirable "beachfront" spectrum acquisitions against less desirable "backwater" spectrum purchases, the FCC's screen treats every band as entirely fungible. With a jumble of spectrum of wildly different values tossed in to the screen, it has little significance that AT&T's purchase of up to twelve megahertz of beachfront 700 MHz spectrum does not trigger the *ad hoc* screen.

Determining the impact of a transaction on competition is not as simple as the use of a formulaic computation. A better gauge of marketplace competition is found in the following remarks by the DOJ:

> "We do not find it especially helpful to define some abstract notion of whether or not broadband markets are 'competitive.' Such a dichotomy makes little sense in the

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the Commission's own annual competition report has recognized that "[t]wo licensees may hold equal quantities of bandwidth but nevertheless hold very different spectrum assets…The different propagation characteristics of these bands impact how they can be used to deliver mobile services to consumers. Bidders in recent auctions in the United States also appear to have recognized these differences, which helps explain the significantly different prices per MHz-POP in the AWS-1 and 700 MHz auctions." *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, WT Docket No. 09-66 (released may 20, 2010) at par. 268 ("*Fourteenth Annual Competition Report*").

[28] *See e.g.*, Sprint Nextel Corporation and Clearwire Corporation, Memorandum Opinion and Order, 23 FCC Rcd 17570 ¶ 29 (2008) ("we determine in this proceeding to revise the Commission's initial spectrum aggregation screen to include the BRS and AWS-1 bands in those markets where spectrum in those bands is available for use…").

> presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures. The operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition. In highly concentrated markets, the policy levers often include: (a) merger control policies; (b) limits on business practices that thwart innovation (e.g. by blocking interconnection); and (c) public policies that affirmatively lower entry barriers facing new entrants and new technologies."[29]

Despite endorsing these DOJ recommendations in its *National Broadband Plan,*[30] in the last decade the Commission has eschewed these recommended policy levers when faced with a consolidating mobile broadband marketplace. First, the Commission has not prevented any acquisitions or mergers, even among the largest of operators. Second, the Commission has failed to recognize the need for automatic roaming obligations to be extended to data services in an industry that will eventually replace traditional voice traffic with data-only traffic. Finally, the Commission has refused to take proactive measures to increase small and rural carriers' access to scarce spectrum before the release of any new, repurposed spectrum can become available. Instead, the Commission has continued to rely on a dated model of what constitutes effective competition while the warning signs of a *de facto* duopoly flash brighter than ever.

As noted above, not all spectrum is of equal value. The economic and technical benefits of operating within the lower frequency bands are common knowledge in the industry, particularly the cost benefits resulting from the extended propagation (and fewer cell sites required) to operate in spectrum below 1 Gigahertz (GHz). This truism is further supported by the current and historic price-per-pop valuations of various spectrum bands via FCC auction or in

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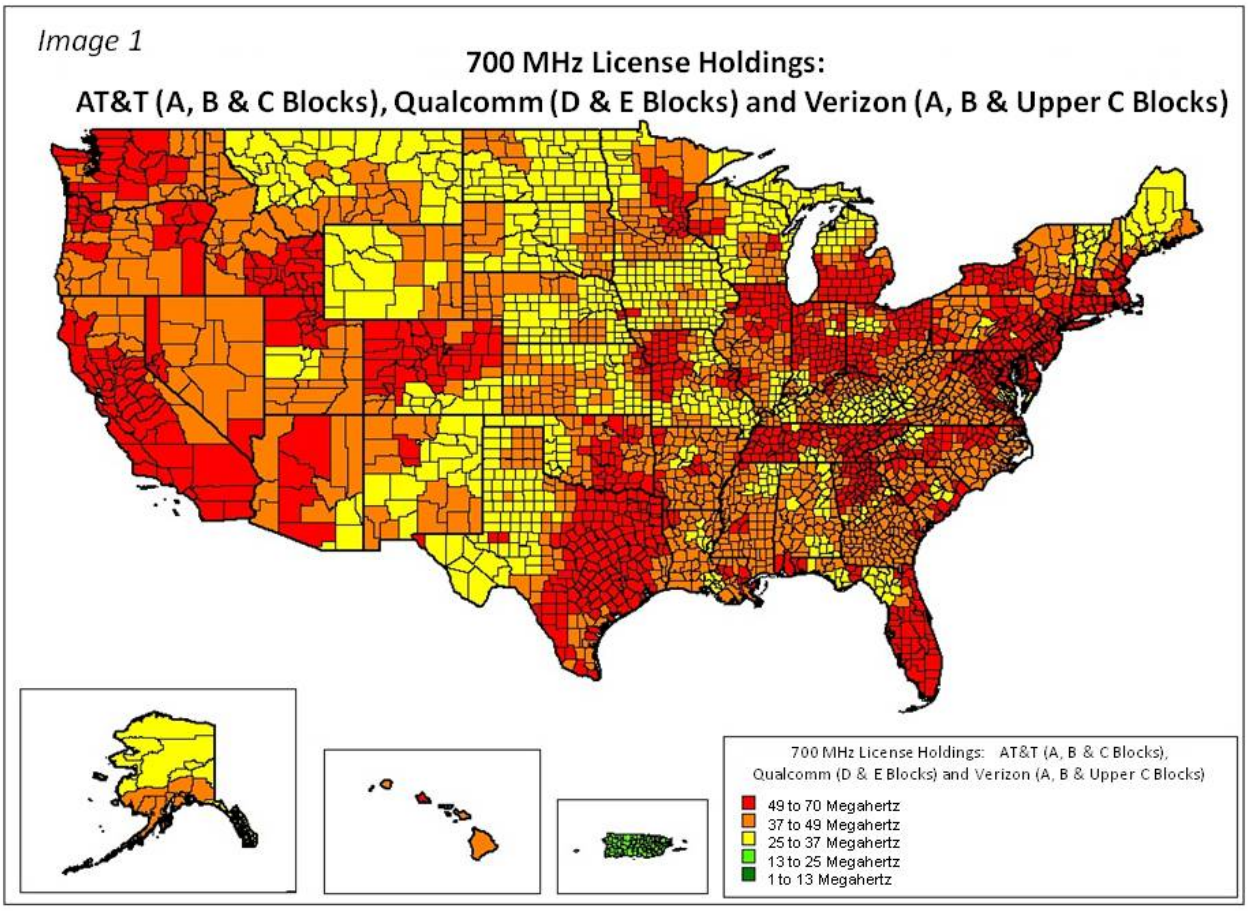
[29] *In the Matter of Economic Issues in Broadband Competition, A National Broadband Plan*, Ex Parte Submission of the United States Department of Justice, GN Docket No. 09-51 (filed January 4, 2010) at 11.

[30] *National Broadband Plan* at 62, End Note 4.

the secondary marketplace. Quite simply, the Cellular and 700 MHz Bands are more valuable than those bands above 1 GHz such as PCS and AWS. Should this transaction be approved, not only will AT&T and Verizon have a stranglehold on the 700 MHz Band (see *Image 1*) but AT&T and Verizon will also own all of the Cellular and 700 MHz licenses in the country's two largest markets: New York and Los Angeles.



Furthermore, with the exception of a few markets where Dish Network (not an active mobile broadband operator) holds a single 6 megahertz E Block license and the Boston market where MetroPCS will hold the licenses for the Lower 700 MHz A Block, AT&T and Verizon will control all of the Cellular and 700 MHz bands in the rest of the Top 10 largest markets in the

United States. This trend towards duopolization of the beachfront Cellular and 700 MHz bands is not new and is not restricted to urban markets, as evidenced by AT&T's earlier (and still pending) acquisition of Windstream Corporation licenses in rural northeastern Pennsylvania.[31]

Any public interest benefits that may result from the proposed transaction are more than outweighed by the likely harm to the public interest that would result from approval of such a mammoth deal. The wireless industry has experienced unprecedented consolidation over the last decade.[32] This consolidation has had an anticompetitive effect on the wireless market. As noted by RTG in its 2008 petition seeking re-imposition of a spectrum cap, as a result of this consolidation, larger carriers have even greater market power and they have been exerting this power to the detriment of small, rural carriers and their consumers.[33] In its *Spectrum Cap Petition*, RTG illustrated the inability of small carriers to compete resulting from this consolidation and demonstrated how this consolidation is driving some smaller carriers out of business.[34]

Also in its *Spectrum Cap Petition*, RTG cited to several examples of small, rural wireless carriers selling their assets and transferring their license to large nationwide carriers, reducing

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[31] *In the Matter of New Cingular Wireless PCS, LLC and D&E Investments, Inc. Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, Comments of the Rural Telecommunications Group, Inc., ULS File No. 0004448347 (filed January 19, 2011).

[32] More than a dozen mergers, acquisitions and large-scale spectrum purchases have occurred since 2001. Some of the major transactions have included Verizon Wireless' divestiture to AT&T, ALLTEL Corp with Verizon Wireless, AT&T with Centennial Communications, NextWave Personal Communications, Inc. with Cingular Wireless LLC, Cingular Wireless Corp. with AT&T Wireless Services, Inc., ALLTEL Corp. with Western Wireless Corp., Nextel Communications with Sprint Corp., AT&T Inc. with BellSouth Corporation, AT&T Inc. with Dobson Communications Corporation, T-Mobile with SunCom Wireless, and AT&T and Aloha Partners. Further, AT&T has acquired numerous Tier III wireless carriers since 2001. *See Spectrum Cap Petition* at pp. 8-9.

[33] *Spectrum Cap Petition* at pp. 10-11.

[34] *Id*.

consumer choice and diversity.[35] Herfindahl-Hirschman Indice ("HHI") data confirms that the mobile wireless market is becoming substantially less competitive.[36] Recent spectrum auction results[37] as well as the most recent annual industry competition report[38] confirm that this trend is continuing. As a result of this spectrum concentration, the fewer (and larger) carriers in each market have the ability and incentive to use their market power to the detriment of small carriers and their rural customers. As discussed in more detail below, rural consumers will end up paying more for roaming services or in the case of 3G and 4G data roaming, they will be denied the ability to offer existing and prospective customers nationwide data services. To date, the FCC has refused to regulate roaming rates[39] or extend automatic roaming obligations to data services. As will be discussed further below, large-scale spectrum aggregation by AT&T and Verizon does more than reduce retail competition; it also has trickle-down repercussions, namely, preventing small and rural operators from competing on price, services, device availability, and most importantly, the opportunity to offer rural consumers a truly nationwide footprint. These repercussions are definitely not in the public interest.

AT&T and Qualcomm have failed to demonstrate that the proposed transaction, on balance, serves the public interest. Accordingly, the Commission should deny the application. At a minimum, the record presents a substantial and material question of fact as to whether the

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[35] *Id.*

[36] *Id.* at pp. 12-13.

[37] *Id.* at pp. 13-14.

[38] *Fourteenth Annual Competition Report* at p. 15. ("The weighted average of the HHIs (weighted by EA population) was 2,848 in 2008, an increase from 2,674 in 2007. The weighted average HHI has increased by nearly 700 since we first calculated this metric in 2003.").

[39] See *Roaming Order* at par. 18.

proposed transaction serves the public interest, and pursuant to Section 309(e) of the Act, the FCC should designate the application for hearing.

C. The Proposed Merger Will Allow AT&T To Continue Engaging In Anticompetitive Roaming Behavior.

With the infusion of Lower 700 MHz spectrum, AT&T (together with Verizon) will control the bulk, if not the entirety, of the precious "beachfront" spectrum below 1 GHz in both urban and rural markets throughout the country to the detriment of competition. In addition to the inability to compete against large carriers with huge swaths of prime spectrum, small carriers and their customers would be harmed by the inability to roam on such networks. AT&T and Verizon have fought vociferously to prevent mobile users who are not their customers from engaging in 3G data roaming, and every indication is that both of these operators will continue to do the same when it comes to 4G and future IP-based mobile wireless technologies.

The ability of mobile wireless consumers throughout the United States to access data roaming is more important now than ever before. Roaming has been defined by the Commission as the ability of a customer of one mobile wireless operator to use the facilities of another mobile wireless operator when they are outside of their home service area.[40] The Commission has already recognized that mobile wireless consumers are reliant on having access to mobile voice services when outside their home service area.[41] The *National Broadband Plan* stated that "[m]obile broadband is growing at unprecedented rates" in this country and that services delivered over this technology "play an increasingly important role in our lives and our

[40] *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 05-265 (rel. August 16, 2007) ("*Roaming Order*") at par. 5.

[41] *Id.* at par. 3.

economy."[42] Additionally, Chairman Julius Genachowski has echoed the widely accepted belief that while "broadband is the future of mobile" it is also true that "mobile is essential to the future of broadband."[43] As the most recent mobile wireless competition report makes abundantly clear, our society is morphing from a voice-centric service model to one that is data-centric at its core.[44] But the simple truth is that American consumers do not distinguish between "voice" and "data" services, whether they are at home or roaming; they just view their mobile wireless device as their primary, and sometimes *only*, connection to the outside world.

What American consumers do distinguish when choosing between mobile wireless operators are those major factors that influence point-of-purchase decisions: quality of service, price, the size of the carrier's coverage footprint, whether cutting edge services (i.e., data) are offered throughout that coverage footprint, and finally the variety, freshness and sophistication of the carrier's catalog of mobile devices and handsets. RTG members and other small, rural and regional mobile operators can build mobile wireless data networks, even at the objectively less desirable bands higher than 1 GHz. These same operators can also tightly control the quality of their network's service, despite the lack of economies of scale enjoyed by AT&T and Verizon Wireless. And thanks solely to the Commission's recognition of automatic roaming in 2007 as a common carrier service, they are now able to, at the very least, offer nationwide voice roaming to rural consumers. Unfortunately, this is not enough for rural consumers, nor should it be.

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[42] *National Broadband Plan* at 49.

[43] *Genachowski Speech to International CTIA Wireless IT and Entertainment, San Diego, October 7, 2009.*

[44] *Fourteenth Annual Competition Report* at par. 8 ("For the Fourteenth Report, our analysis of the mobile wireless services industry includes voice, messaging, and broadband services because they are often jointly use the same spectrum, network facilities, and customer equipment; and many mobile providers have integrated the marketing of these services, often offering them in bundles. Also, consumers are increasingly substituting among voice, messaging, and data services, and in particular, are willing to substitute from voice to messaging or data services for an increasing portion of their communications needs.")

Rural consumers should be able to access mobile data networks of other carriers when they travel from rural areas to urban areas without being required to purchase two handsets -- one from the rural carrier for local use and one from the nationwide carrier. RTG submits that this occurs because large, nationwide carriers purposefully choose not to serve rural areas that fall outside of Interstate highways. Rural consumers either have to do without service at home or without service when they travel unless they purchase two devices and two service plans. Most rural consumers cannot bear this expense, nor should they have to do so.

Due to exclusivity agreements between mobile device manufacturers and the largest mobile wireless operators, consumers are denied the ability to purchase the device of their choice to use on the network of their choice. This one factor alone is enough to drive prospective "iPhone-chasers" from small and rural mobile wireless operators to AT&T and Verizon. The device exclusivity problem is compounded by the pending possibility, discussed in more detail below, that some devices in the 700 MHz band might not be able to function on neighboring "blocks," a scenario unimaginable in the Cellular, PCS and even AWS bands. However, the highest barrier preventing small and rural operators from competing effectively against AT&T and Verizon, by far, is the inability of those mobile wireless operators to get data roaming agreements on a nationwide level and at the most advanced data-speeds available, at fair and reasonable rates. This problem is so pervasive and so intense, and so demonstrative of the plight of the "haves" (AT&T and Verizon Wireless) and the "have-nots" (consisting of almost the entirety of the remaining U.S. mobile wireless operators) that it has been raging for over four years - - as evidenced by the plethora of information submitted in the data roaming docket.[45]

[45] *See generally In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265.

In sum, approval of the AT&T-Qualcomm transaction will have a detrimental effect on the domestic roaming market and place too much concentration of market power in the hands of AT&T. Rural consumers will be particularly harmed. Those with mobile wireless service provisioned by small and rural operators will be unable to get data roaming agreements at competitive rates or at comparable generational speeds. Additionally, small and rural operators will be unable to expand into many markets (both urban and rural) to provide their own service because AT&T and Verizon will control the bulk or entirety of the prime 700 MHz and Cellular licenses. The combination of excessive spectrum holdings with the resulting market power in the domestic roaming arena highlight that AT&T has failed to demonstrate that the proposed transaction, on balance, serves the public interest and therefore must be denied.

II. ANY APPROVAL OF THE PROPOSED TRANSACTION SHOULD BE CONDITIONED ON AT&T OFFERING DATA ROAMING, THE PROHIBITION OF ALL HANDSET EXCLUSIVITY AGREEMENTS, A REQUIREMENT THAT ALL MOBILE WIRELESS DEVICES BE INTEROPERABLE ACROSS THE ENTIRE LOWER 700 MHZ BAND, A REQUIREMENT THAT PUBLIC SAFETY BE GIVEN PRIORITY ACCESS AND THE ABILITY TO ROAM, AND PLACING ERFORMANCE REQUIREMENTS ON ALL AT&T 700 MHz SPECTRUM.

The sheer market dominance that AT&T will hold if this transaction is allowed to proceed is self-evident. The FCC should not allow the transfer of licenses to proceed because of the resulting market power of AT&T both in the wholesale roaming marketplace and in its vice-grip control of prime spectrum bands. However, if AT&T is allowed to go forward with the acquisition of Qualcomm's D and E Block licenses, the Commission should impose specific conditions to ensure that AT&T does not stifle competition or use its market power to harm consumers, especially those consumers living and traveling in rural America. In addition to the sheer volume of prime spectrum below 1 GHz that AT&T will hold throughout the country, combined with its unbridled control over nationwide data roaming, the Commission must look at

the market power that AT&T will hold in the mobile device marketplace and should place strict conditions and regulatory oversight over each of these aspects of the merged entity. To forego conditions in any one of these areas will prove irreparably detrimental to mobile wireless competition and will cause severe harm to consumers in the mobile wireless marketplace.

A. AT&T Should Be Required to Support All Data Roaming Requests on Reasonable Terms and Conditions, Including Reasonable Rates, and on Any Compatible Air-Interface Technology of the Requesting Carrier.

A post-transaction AT&T would hold an excessive concentration of 700 MHz and Cellular spectrum in every market throughout the nation. In most of the country's largest markets, AT&T and Verizon will completely shut-out all of their competitors from these prime bands. Even if 500 megahertz of new spectrum is repurposed by the Commission and auctioned off for commercial use, as called for in the *National Broadband Plan*, there will be no additional 700 MHz spectrum made available. Therefore, it is imperative that competitors without a nationwide footprint and/or access to these lower 700 MHz band frequencies held overwhelmingly by incumbents like AT&T and Verizon be granted access to data roaming services on fair and reasonable terms which include fair and reasonable rates. Furthermore, this wholesale access to data roaming should be granted at the same compatible air-interface technology "level" used by the requesting carrier. In other words, if the requesting carrier is deploying 4G LTE, AT&T should not limit the requesting carrier to 3G HSPA+ data roaming if AT&T has a compatible 4G LTE data network. A small, rural or regional mobile operator, even one which has deployed the most technologically-advanced network available (*i.e.*, HSPA+ or LTE), will be unable to compete for customers in its home market if those prospective customers are unable to roam nationwide at those throughput speeds or if they are forced to pay astronomically high roaming rates. Rational, price-sensitive shoppers will opt in ever-increasing

numbers, to purchase the mobile wireless services of the "nationwide" operator, all other things being equal. Those few customers remaining with smaller operators lacking a nationwide licensed footprint, predominantly rural Americans, will be forced to purchase a second device and accompanying service with a larger operator, or alternatively, they will be forced to endure service in an "island" cut-off from the rest of the country.

RTG strongly opposes the proposed transaction between AT&T and Qualcomm because it will be difficult, if not impossible, for the FCC to protect consumers from abuses of power in the domestic roaming market if the transaction occurs. If the Commission does approve the proposed transaction, the approval should be conditioned upon the extension of automatic roaming obligations for data services on fair and reasonable terms (including rates) and at the same technology level of the requesting mobile wireless operator.

B. The Commission Should Prohibit Handset Exclusivity Agreements and Impose a Mandatory Requirement that All Mobile Wireless Devices Be Interoperable Within the Entire 700 MHz Band and Allow Priority Access for Public Safety

Should the proposed transaction proceed, even with conditions mandating fair and reasonable data roaming between mobile wireless carriers, such conditions will have only theoretical effect and no practical teeth unless and until the Commission: (1) prohibits exclusivity agreements between mobile wireless operators and device manufacturers; and (2) mandates that all mobile devices operating within the 700 MHz Band be able to function properly on all license "blocks" within that band. The need for a prohibition of handset exclusivity agreements is well documented in the public record.[46] RTG will not re-hash the anticompetitive repercussions and public interest harms resulting from the Commission's

[46] *See generally RTG Comments on Handset Exclusivity Agreements*.

continued protection of these agreements. Suffice it to say that as commercial mobile wireless services move to 3G and 4G - and broadband mobility becomes the norm - the FCC is essentially reinforcing the "digital divide" between urban and rural consumers by continuing to allow these exclusive arrangements. Prohibiting handset exclusivity agreements will help diminish the current rural/urban dichotomy.

Perhaps the biggest threat to competition in the mobile wireless industry as a result of this transaction is the ability of AT&T to prevent roaming partners, especially licensees of the Lower 700 MHz A Block, from physically accessing AT&T roaming networks due to a deliberate and long-standing attempt to scuttle the potential for interoperability. AT&T argues that it intends to use the Qualcomm Lower 700 MHz D and E Blocks for "supplemental downlink technology (also referred to as carrier aggregation technology)" so that it may "couple this spectrum with paired spectrum AT&T already holds."[47] The paired spectrum AT&T intends to "couple" with the D and E Blocks is apparently its vast Cellular, PCS and AWS spectrum in higher bands and *not* its vast holdings of Lower 700 MHz Band B and C Block licenses.[48] In order to create devices that can take advantage of any newly acquired D and E Block licenses, one of two things must happen. Either AT&T must push the Third Generation Partnership Project ("3GPP") to create some new type of Band Class separate from Band Classes 12, 13, 14 and 17, that can include the D and E Blocks, or, AT&T must undertake the development of two separate "types" of 700 MHz devices; one type with functionality on the Lower 700 MHz B and C blocks and another type with functionality in those markets where it will acquire Lower 700 MHz D and E blocks for paired use with higher frequency bands.

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[47] *Public Interest Showing* at 1.

[48] *Id.*at 15-16.

The most likely scenario is that AT&T will push equipment vendors to create a single, brand new Band Class that includes only the Lower 700 MHz B, C, D and E license blocks, all of which are adjacent to each other, but not the A license block, which is also adjacent but predominantly owned by small, rural and regional licensees. RTG believes AT&T will, or is already in the process of developing plans to, utilize devices and handsets that work only on the Lower 700 MHz B, C, D and E blocks and consciously exclude A block interoperability so that any data roaming mandate will be "theoretically" but not practically possible. Considering in addition the looming need for national interoperability among public safety entities in the Upper 700 MHz Band (and eventually interoperability among both the Lower and Upper 700 MHz Bands), the time is now for the Commission to mandate that all devices intended for use on the 700 MHz Band be able to function on all license blocks, paired or unpaired. Requiring AT&T to provide public safety with priority access and roaming on its networks would enhance public safety interoperability with the 700 MHz Band and promote the Commission's public safety broadband goals (including the deployment of a nationwide, interoperable wireless broadband network). Moreover, such conditions would be consistent with the National Broadband Plan, which recommended that "authorized public safety users should get priority access on commercial networks, including all networks using the 700 MHz band and potentially other networks as well."[49] It also recommended that the FCC consider requiring CMRS providers to "give public safety users the ability to roam on commercial networks in 700 MHz and potentially other bands."[50] Thus, imposing priority access and roaming conditions would ensure that no matter how much the transaction increases AT&T's dominance, public safety will still have the

[49] *See National Broadband Plan* at 315-16.

[50] *Id.*

"necessary resiliency, capacity and redundancy" needed for its life-saving, mission-critical activities.[51]

Universal interoperability within a frequency band has been the norm with Cellular, PCS and even AWS for the life of the mobile wireless industry. To allow AT&T to deftly and quietly eliminate the possibility of data roaming through a little-known, standard-development process within 3GPP would be anticompetitive and harmful to consumers. RTG believes the true motivation of AT&T to encourage the development of mobile devices that work on the vast majority of a licensed band plan with the notable exception of a single license block is to prevent the small, rural and regional licensees of that license block (the Lower 700 MHz A block) from ever being able to data roam onto the B, C, D and E blocks.

The less likely alternative that AT&T could pursue post-transaction is the development of two separate "types" of devices, some with Band Class 17 (Lower B and C blocks) and some with a new band class configured only for Lower D and E blocks and other higher-frequency paired spectrum. However, this second option is commercially impractical because AT&T has no way of knowing the travel patterns of its various customers (*i.e.*, customers might travel to markets where their devices will not work on the licensed spectrum, rendering them useless) and simply producing two lines of devices is a costly endeavor and logistical nightmare. If AT&T is unwilling to publicly state its intentions for how its devices will operate within the 700 MHz Band, then the Commission must intervene and require universal interoperability within the entire 700 MHz band in a manner that will not frustrate its rulemaking efforts with respect to data roaming. To avoid further fracturing the 700 MHz band in a manner that allows AT&T to

[51] *Id.* at 315.

enhance its already considerable market power, the Commission should require universal interoperability.

The Commission should also mandate public safety priority access and roaming at the lowest unit charge, given the increased scope of AT&T's spectrum holdings in the 700 MHz band. Requiring AT&T to provide public safety with priority access and roaming on its network would enhance public safety interoperability within the 700 MHz band and promote the Commission's public safety broadband goals (including the deployment of a nationwide, interoperable wireless broadband network). Moreover, such conditions would be consistent with the National Broadband Plan, which recommended that "authorized public safety users should get priority access on commercial networks, including all networks using the 700 MHz band and potentially other networks as well."[52] It also recommended that the FCC consider requiring CMRS providers to "give public safety users the ability to roam on commercial networks in 700 MHz and potentially other bands."[53] Thus, imposing priority access and roaming conditions would ensure that no matter how much the transaction increases AT&T's dominance, public safety will still have the "necessary resiliency, capacity and redundancy" needed for its life-saving, mission-critical activities.[54]

C. The Commission Should Accelerate the Performance Requirements to Promote Mobile Broadband Deployment, Including in Rural Areas.

In his recent State of the Union address, President Obama announced a "National Wireless Initiative" to provide 98 percent of Americans with access to wireless broadband Internet services and "enable businesses to grow faster, students to learn more, and public safety

[52] *See National Broadband Plan* at 315-16.

[53] *Id.*

[54] *Id.* at 315.

officials to access state-of-the-art, secure, nationwide, and interoperable mobile communications."[55] In addition, a goal of the National Broadband Plan is for the United States to lead the world in mobile innovation, with every American having affordable access to robust broadband services, including those in rural America.[56]

To ensure that the proposed transaction advances the Commission's and the Administration's broadband deployment goals (especially in rural areas), and to ensure that AT&T does not warehouse additional spectrum, the Commission should condition any approval of the proposed transaction on AT&T's compliance with uniform, accelerated performance requirements for all of its 700 MHz licenses (including licenses acquired as part of this transaction). For example, for all licenses acquired as part of this transaction, the Commission should require AT&T to comply with the performance requirements established for 700 MHz licenses offered on an economic area ("EA") basis in Auction 73. AT&T would be required to provide signal coverage and offer service to at least 35 percent of the geographic areas of the licenses within four years of the end of the DTV transition, and at least 70 percent of the geographic areas of their licenses at the end of the license term.[57] For EAG licenses, AT&T would be required to meet this benchmark on an EA basis. Moreover, if AT&T fails to meet the interim requirement for any license, the license term should be reduced to eight years.[58] The licenses would also be subject to a "keep-what-you-use" provision for the end-of-license-term

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[55] *See* Fact Sheet, The State of the Union: President Obama's Plan to Win the Future (Jan. 25, 2011), *at* http://www.whitehouse.gov/the-press-office/2011/01/25/fact-sheet-state-union-president-obamas-plan-win-future (last accessed Feb. 2, 2011).

[56] *National Broadband Plan* at 9-10, Goals 2 and 3.

[57] *See* 47 C.F.R. 27.14(g).

[58] *See id.*

performance requirements (with the unused portion of the license terminating automatically without Commission action and made available for reassignment).[59]

III. CONCLUSION.

For the foregoing reasons, RTG respectfully requests that the Commission deny the above-captioned application or designate the application for hearing pursuant to 309(e) so that it may obtain additional information. If the Commission elects instead to approve the application, RTG requests that the Commission apply appropriate conditions on the grant of the application to ensure that the public interest is served.

Respectfully submitted,

The Rural Telecommunications Group, Inc.

/s/ Caressa D. Bennet

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March 11, 2011

[59] *See id.*

CERTIFICATE OF SERVICE

I, Colleen von Hollen, of Bennet & Bennet, PLLC, 4350 East West Highway, Suite 201, Bethesda, MD 20814, hereby certify that a copy of the foregoing Petition to Deny of the Rural Telecommunications Group, Inc. was served on this 11th day of March, 2011, by electronic mail, and via U.S. Mail, postage prepaid, where indicated, on those listed below:

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