

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

In re Application of	)	
	)	
AT&T MOBILITY SPECTRUM LLC	)	
and QUALCOMM INCORPORATED	)	WT Docket No. 11-18
	)	DA 11-252
For Consent to Assign Eleven Lower	)	
700 MHz Band Licenses	)	
	)	
File No. 0004566825	)	

**REPLY OF CELLULAR SOUTH, INC. TO JOINT OPPOSITION OF  
AT&T MOBILITY SPECTRUM LLC AND QUALCOMM INCORPORATED TO  
PETITIONS TO DENY OR TO CONDITION CONSENT AND REPLY TO COMMENTS**

Cellular South, Inc. (“Cellular South”), by its attorneys and in accordance with the pleading cycle established for this proceeding by Public Notice, DA 11-252 (Feb. 9, 2011), submits its reply to the joint opposition filed by AT&T Inc. (“AT&T”) and Qualcomm Incorporated (“Qualcomm”) <sup>1</sup> with respect to the above-captioned application for Commission consent to the assignment of six D block and five E block licenses in the Lower 700 MHz band (the “Qualcomm Spectrum”) from Qualcomm to AT&T Mobility Spectrum LLC.

**INTRODUCTION**

Cellular South asked the Commission to consent to AT&T’s acquisition of the Qualcomm Spectrum only on three conditions, the first of which is that AT&T must enter into automatic data roaming agreements on reasonable and nondiscriminatory terms and conditions.<sup>2</sup> It appears from the tentative agenda for the Commission’s upcoming open meeting that the

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<sup>1</sup> See Joint Opposition of AT&T Mobility Spectrum LLC and Qualcomm Incorporated to Petitions to Deny or to Condition Consent and Reply to Comments, WT Dkt. No. 11-18 (Mar. 21, 2011) (“Opposition”).

<sup>2</sup> Petition to Deny of Cellular South, Inc., WT Dkt. No. 11-18, at 19 (Mar. 11, 2011) (“Petition”).

Commission is on the verge of adopting a rule — over AT&T’s strenuous objections<sup>3</sup> — that will require “facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions.”<sup>4</sup> The adoption of such a rule obviously will moot Cellular South’s request for a data roaming condition, but establish the merits of the request. Out of an abundance of optimism, Cellular South will not address in this reply the need for a data roaming condition.

AT&T and Qualcomm (jointly, the “Applicants”) make one particularly baseless claim that can be dispensed with preliminarily. They not only contend that Cellular South appears to be driven by its desire to avoid “more vigorous competition from AT&T,”<sup>5</sup> but that it “candidly admit[ted] as much” by noting that it will “suffer the economic consequences of competing with AT&T’s ‘more robust wireless broadband service’ offering.”<sup>6</sup> Cellular South clearly made no such admission when it noted, *for the purpose of establishing its standing as a party in interest*, that it would face a more robust competitor as a result of AT&T’s acquisition of the Qualcomm Spectrum.<sup>7</sup> At no point in its pleading did Cellular South express a desire to avoid, or seek protection from, vigorous competition. As it indicated in the very sentence selectively quoted by AT&T, Cellular South seeks to avoid AT&T’s anticompetitive conduct.<sup>8</sup> Accordingly, it did not

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<sup>3</sup> See Reply Comments of AT&T Inc., WT Dkt. No. 05-265, at 5-22 (Nov. 28, 2007); Comments of AT&T Inc., WT Dkt. No. 05-265, at 4-17 (Oct. 29, 2007).

<sup>4</sup> *FCC Announces Tentative Agenda for April 7<sup>th</sup> Open Meeting*, FCC News Release, at 1 (Mar. 17, 2011).

<sup>5</sup> Opposition at 7.

<sup>6</sup> *Id.* (quoting Petition at 5).

<sup>7</sup> See Petition at 4-6. In particular, Cellular South was showing potential injury-in-fact under the Supreme Court’s tripartite test for Article III standing, *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), a showing that is sometimes required by the Commission to establish standing under § 309(d)(1) of the Communications Act of 1934, as amended (“Act”). *See Shareholders of Tribune Co. and Sam Zell*, 22 FCC Rcd 21266, 21268 (2007).

<sup>8</sup> See Petition at 5 (“Cellular South will not only suffer the economic consequences of competing

oppose the grant of the AT&T-Qualcomm assignment application, only the unconditional grant of the application.

Cellular South merely seeks the imposition of conditions that will mitigate the potential competitive harms that are likely to arise from AT&T's acquisition of the Qualcomm Spectrum. It is entirely appropriate for Cellular South to seek that remedy.<sup>9</sup> And the Commission unquestionably has the duty to consider the competitive effects of the AT&T/Qualcomm transaction as part of its public interest calculus under § 310(d) of the Act.<sup>10</sup>

### ARGUMENT

#### I. AN EVIDENTIARY HEARING MAY BE REQUIRED UNDER THE ACT AND THE COMMISSION'S RULES

The Applicants correctly state that there would be no basis for the Commission to designate their application for a hearing *if* it does not grant Cellular South's request for the imposition of conditions.<sup>11</sup> On the other hand, if the Commission does grant Cellular South's request, but AT&T rejects the conditional grant of its application, the Commission is bound by § 1.110 of its rules to "vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing." 47 C.F.R. § 1.110. To that extent, the Applicants are incorrect when they suggest that the Commission would not be

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with AT&T's 'more robust wireless broadband service' offering, but it will face the unfair competitive advantage that AT&T will gain by refusing to enter into automatic roaming agreements and by its anticompetitive 700 MHz equipment design and procurement practices" (footnote omitted).

<sup>9</sup> The Commission often prescribes merger conditions for the express purpose of mitigating competitive harms threatened by a transaction. *See News Corp. and Liberty Media Corp.*, 23 FCC Rcd 3265, 3293-94 (2008); *Adelphia Communications Corp. and Time Warner Cable, Inc.*, 21 FCC Rcd 8203, 8273-74 (2006); *AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, 20 FCC Rcd 19796, 19797 (2005).

<sup>10</sup> *See, e.g., United States v. FCC*, 652 F.2d 72, 86-87 (D.C. Cir. 1980) (en banc).

<sup>11</sup> *See* Opposition at 1 n.1.

required to hold a hearing in response to the “public policy concerns” raised by Cellular South.<sup>12</sup>

The Applicants are clearly wrong when they argue that “substantial and material questions of fact” must be raised before the Commission is required to hold a full hearing under § 309(e) of the Act.<sup>13</sup> It is clear from the face of the statute<sup>14</sup> that there are “two situations” in which a full hearing is required before the Commission is empowered or obligated to grant an application.<sup>15</sup> The Applicants ignore the second one, which “occurs when the Commission is ‘for any reason’ unable, on the basis of the application, pleadings, and officially noticeable matters, to make the requisite finding that the public interest would be served” by the grant of the application.<sup>16</sup> AT&T’s rejection of the conditional grant of its assignment application would create the second “situation” in which the hearing requirement of § 309(e) is triggered.

Section 1.110 of the Commission’s rules provides in mandatory terms that the Commission “will” vacate its conditional grant of an application and designate it for hearing if the applicant rejects the grant as made. 47 C.F.R. § 1.110. In the event AT&T rejects the conditional grant of its application, the requisite fidelity to § 1.100 would render the Commission unable to make its public interest finding without holding a hearing.<sup>17</sup> Thus, the Commission

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<sup>12</sup> See Opposition at 1 n.1.

<sup>13</sup> *Id.*

<sup>14</sup> Section 309(d)(2) provides that an application will be designated for a hearing as provided in § 309(e) “[i]f a substantial and material question of fact is presented *or* if the Commission for any reason is unable to find that grant of the application would be consistent with” the public interest as required by § 309(a). 47 U.S.C. § 309(d)(2) (emphasis added). Likewise, § 309(e) requires that an application be designated for a full hearing if “a substantial and material question of fact is presented *or* the Commission for any reason is unable to make the finding” that the grant of the application would be consistent with the public interest. *Id.* § 309(e) (emphasis added).

<sup>15</sup> *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259 (D.C. Cir. 1974) (en banc).

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> See, e.g., *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (“Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated” is required of the Commission).

would be required to designate the application for hearing both under § 1.110 of its rules and § 309(e) of the Act.

## II. THE IMPOSITION OF THE REQUESTED CONDITIONS WILL MITIGATE COMPETITIVE HARMS AND BE CONSISTENT WITH PRECEDENT

If the rule is that the Commission will only prescribe “narrowly tailored, transaction-specific” conditions in wireless merger cases,<sup>18</sup> Cellular South established that the rule is more honored in its breach.<sup>19</sup> The Applicants did not deign to address the case precedent that makes it obvious to Cellular South and many scholars that the Commission often imposes merger conditions to promote policy objectives that are unrelated to the transactions before it.<sup>20</sup> Nevertheless, they rely on various articulations of the “rule” no less than seven times to support their contention that the Commission should not even consider the imposition of conditions or

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<sup>18</sup> *E.g., Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17462 (2008) (“VZW/Atlantis”).

<sup>19</sup> *See* Petition at 6-13.

<sup>20</sup> *See* Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the “Public Interest” Standard*, 18 *CommLaw Conspectus* 329, 345 (2010) (Commission attempts to “advance a policy agenda through merger conditions”); Randolph J. May, *A Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 *Admin. L. Rev.* 895 (2008) (Commission “impose[s] ‘voluntary’ conditions on a merger that are unrelated to any alleged competitive impact of the specific transaction”); Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission*, 11 *Geo. Mason L. Rev.* 143, 153 (2002) (the Commission’s approach has been described as an effort “to promote policy objectives that are unrelated to any competitive harm associated with a merger”); Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 *U. Chi. Legal F.* 29, 63 (merger conditions “rarely reflect the Commission’s desire to address a particular ill effect directly caused by the license transfer before it”); Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy “Voluntary” Agreements*, 53 *Fed. Comm. L.J.* 49, 57 n.24 (2000) (Commission uses conditions to achieve “far-reaching and sometimes unrelated policy goals”); Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 7.3.4 at 609-10 (2d ed. 1999) (Commission has “impose[d] a wide range of conditions on mergers, including conditions with little, if any, direct relation to the actual license transfers before it”).

the harms that they will remedy.<sup>21</sup>

Rather than concede the obvious, the Applicants devote their footnote 110 to an attempt to distinguish the line of cases in which the Commission imposed conditions that either capped universal service support to competitive eligible telecommunications carriers (“CETCs”) or required them to relinquish such support in order to remedy a funding shortage that was unrelated to the transaction and the subject of an ongoing rulemaking.<sup>22</sup> First, they point out that the conditions imposed on the transferee’s CETC support in *Sprint/Clearwire*, *VZW/Atlantis* and *AT&T/Dobson* were “actually voluntary commitments” and therefore distinguishable from the relief sought by Cellular South.<sup>23</sup> One would have to be suffering from terminal naiveté to believe that the commitments of the CETCs to forgo high-cost support were truly “voluntary.” As one high-ranking Commission official put it:

In these mega-merger license transfers, the Commission and applicants typically engage in a high-stakes regulatory dance in which applicants “volunteer” to take

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<sup>21</sup> See Opposition at iii (“Various petitioners also complain about alleged harms that are not transaction-specific, and, thus, their proposed remedies should not be considered”), 13-14 & n.37 (calls to separately analyze spectrum in lower frequency bands should be addressed in the context of a pending petition for rulemaking “since they raise issues of industry-wide significance and are not specifically related to this transaction”), 25 (consideration of the need for spectrum for unlicensed uses would be inconsistent with the policy of not considering arguments in transaction proceedings that “are better addressed in other Commission proceedings”), 28 (same with respect to imposing “conditions to remedy pre-existing harms or harms that are unrelated to the transaction”), 30 n.110 (Cellular South has not provided the Commission with a reasonable basis “to depart from its clear policy of not imposing conditions addressing pre-existing, non-transaction-specific conditions in an assignment proceeding”), 32 (same with respect to conditions governing early termination fees, 700 MHz performance standards, and 700 MHz operating parameters), 33 (the Commission should summarily dismiss the requests for conditions and “consider them, if at all, in industry-wide proceedings where it ‘will be able to develop a comprehensive approach based on a full record’”).

<sup>22</sup> See *Sprint Nextel Corp. and Clearwire Corp.*, 23 FCC Rcd 17570, 17611-12 (2008) (“*Sprint/Clearwire*”); *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17529-32 (2008) (“*VZW/Atlantis*”); *AT&T, Inc. and Dobson Communication Corp.*, 22 FCC Rcd 20295, 20329-30 (2007) (“*AT&T/Dobson*”); *ALLTEL Corp. and Atlantis Holdings LLC*, 22 FCC Rcd 19517, 19520-21 & n.33 (2007) (“*ALLTEL/Atlantis*”).

<sup>23</sup> Opposition at 30 n.110.

certain actions or to refrain from taking certain actions as the quid pro quo for favorable agency consideration. The resulting “voluntary” conditions emerge from an elaborate and often secret process of demands and “negotiations.” The licensees are left with little choice but to engage in this process or face tremendous delays or outright rejection of the transfer. Indeed, there appears to be very little “voluntariness” about this process.<sup>24</sup>

The Applicants also point out that the imposition of the conditions that limited the transferee’s high-cost CETC support in *ALLTEL/Atlantis*, *AT&T/Dobson*, *VZW/Atlantis* and *Sprint/Clearwire* predated the Commission’s last three denials of Cellular South’s requests.<sup>25</sup> We are uncertain of the significance of that point, but we note that just one week ago the Commission conditioned its approval of the merger of CenturyLink Inc. (“CenturyLink”) and Qwest Communications International Inc. (“Qwest”) to require CenturyLink to surrender some universal service support.<sup>26</sup> The Commission imposed those conditions in a Title III licensing case for the purpose of advancing the reform of the Title II universal service fund despite the fact that it had just commenced a rulemaking to comprehensively reform and modernize the fund.<sup>27</sup> Moreover, the Commission imposed four categories of conditions in *CenturyLink/Qwest*, only one of which was for the purpose of protecting against “transaction-related harms.”<sup>28</sup>

As was the case in *ALLTEL/Atlantis*, *AT&T/Dobson*, *VZW/Atlantis* and *Sprint/Clearwire*,

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<sup>24</sup> Tramont, *supra* note 20, at 52-53. See Barkow & Huber, *supra* note 20, at 64 (because parties have no practical choice whether to agree to conditions, “it is a bit of a stretch to deem the conditions ‘voluntary’”).

<sup>25</sup> Opposition at 30 n.110.

<sup>26</sup> See *Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink*, FCC 11-47, at 20-21, 33-34 (Mar. 18, 2011) (“*CenturyLink/Qwest*”). In particular, the Commission made CenturyLink’s “voluntary commitments” binding and enforceable conditions requiring it to: (1) phase out local switching support over two years; (2) forgo federal safety net additive support; and (3) freeze interstate common line support on a per-line basis for its three remaining average schedule companies. See *id.*

<sup>27</sup> See *Connect America Fund*, FCC 11-13, at 9-15 (Feb. 9, 2011) (“*USF-ICC Transformation NPRM*”).

<sup>28</sup> *FCC Conditionally Approves CenturyLink/Qwest Merger*, FCC News Release, at 1-2 (Mar. 18, 2011).

the imposition of the universal service relinquishment conditions in *CenturyLink/Qwest* demonstrates that the Commission does not adhere either to a policy of declining to address “issues of industry-wide significance” that are better addressed in other proceedings, or a policy of not imposing conditions “to remedy pre-existing harms or harms that are unrelated to the transaction.”<sup>29</sup> As Commissioner Baker put it in her *CenturyLink/Qwest* concurrence:

There is no nexus between the relinquishment of universal service funding and this transaction, and none is claimed in the Order. We require CenturyLink to forego universal service funding it is entitled to prior to—and after this—transaction. Whether a company the size of CenturyLink and Qwest, separate or apart, should be entitled to universal service support intended for small carriers is an important policy question, and a question directly under review in a rulemaking proceeding.<sup>30</sup>

The imposition of a non-transaction-specific condition in *CenturyLink/Qwest* obviously post-dates the four times the Commission denied Cellular South’s request for the imposition of a merger condition to prohibit exclusive handset arrangements.<sup>31</sup> Precedent and the dictates of reasoned decision-making will no longer permit the Commission to summarily reject Cellular South’s proposed condition with the conclusory statements that it is “not narrowly tailored to prevent a transaction-specific harm” and it “would apply broadly across the industry and [is] therefore more appropriate for a Commission proceeding where all interested industry parties have an opportunity to file comments.”<sup>32</sup>

As opposed to the universal service conditions prescribed in *CenturyLink/Qwest*, there is a nexus between allowing AT&T to acquire the Qualcomm Spectrum and prohibiting it from

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<sup>29</sup> Opposition at 28.

<sup>30</sup> *CenturyLink/Qwest*, FCC 11-47, at 44 (footnote omitted).

<sup>31</sup> See *Cellco Partnership d/b/a Verizon Wireless and AT&T, Inc.*, 25 FCC Rcd 10985, 11014 (WTB & IB 2010) (“VZW/AT&T”); *AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless*, 25 FCC Rcd 8704, 8749 (2010); *AT&T Inc. and Centennial Communications Corp.*, 24 FCC Rcd 13915, 13972 (2009); *VZW/Atlantis*, 23 FCC Rcd at 17527-28.

<sup>32</sup> *VZW/AT&T*, 25 FCC Rcd at 11014.

entering into exclusive dealing arrangements with the manufacturers of handsets that will operate using that spectrum. Whereas the Commission imposed the universal service conditions in *CenturyLink/Qwest* before the first comments were filed in response to the *USF-ICC Transformation NPRM*, all interested industry parties had the opportunity to file comments on the need to prohibit handset exclusivity arrangements and 31 sets of comments were filed.<sup>33</sup> In contrast to *CenturyLink/Qwest*, where the Commission acted sua sponte without public input,<sup>34</sup> the full record on handset exclusivity has been available to the Commission for over 25 months.<sup>35</sup> Under these circumstances, the Commission must dispose of Cellular South's request on its merits as reflected in the AT&T/Qualcomm assignment application, the pleadings filed, and the officially-noticeable public record in RM No. 11497.

The Commission has yet to pass on a request for a merger condition similar to Cellular South's request for a condition prohibiting AT&T from engaging in any anticompetitive 700 MHz equipment design and procurement practices or excluding Lower 700 MHz Band block A spectrum ("A Block") in LTE wireless devices that it offers to its subscribers.<sup>36</sup> The imposition of a 700 MHz interoperability condition would not only mitigate potential competitive harms, but it would inure to the benefit of AT&T's customers. Requiring AT&T to procure LTE mobile devices that will also operate on A Block systems (as opposed to LTE Band 17-only devices)

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<sup>33</sup> See Petition at 14. See also Petition to Deny of Rural Cellular Ass'n, WT Dkt. No. 11-18, at 8 (Mar. 11, 2011); Petition to Deny of Free Press, Public Knowledge, Media Access Project, Consumers Union and the Open Technology Initiative of the New America Foundation, WT Dkt. No. 11-18, at 21 (Mar. 11, 2011).

<sup>34</sup> There is no record that any interested industry party requested the Commission to require CenturyLink to relinquish universal service support. See *CenturyLink/Qwest*, FCC 11-47, at 20-21.

<sup>35</sup> See Petition at 14.

<sup>36</sup> See *id.* at 19.

will not only allow AT&T's subscribers to roam on A Block systems, but facilitate the "portability" of their mobile devices should they change service providers. Thus, a 700 MHz interoperability condition will enhance the subscribers' right to make beneficial use of their mobile devices and, therefore, the quality of telecommunications services to consumers. Consideration of the transaction's likely impact on the quality of service to consumers is well within the Commission's public interest framework under § 310(d) of the Act.<sup>37</sup>

Finally, the Commission should not relegate the issue of the interoperability of 700 MHz devices to a rulemaking decision at some indeterminate future date under a non-existent policy. Action is best taken now while 700 MHz LTE standards and handsets are being developed. Unlike in *CenturyLink/Qwest*, the Commission currently has the benefit of the 31 sets of comments filed in RM No. 11591 when considering the need for a 700 MHz interoperability condition.<sup>38</sup> And it also has the benefit of AT&T's Randall Stephenson's view that "an open and interoperable environment ... will drive mobile broadband."<sup>39</sup>

Respectfully submitted,



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<sup>37</sup> See, e.g., *CenturyLink/Qwest*, FCC 11-47, at 6.

<sup>38</sup> See Petition at 14.

<sup>39</sup> *Id.* at 16.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary of the law firm Lukas, Nace, Gutierrez & Sachs, LLP, hereby certify that on this 28<sup>th</sup> day of March, 2011, copies of the foregoing REPLY OF CELLULAR SOUTH, INC. were forwarded by e-mail or first-class mail, postage prepaid, to the following:

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