

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**REPLY OF DISH NETWORK L.L.C. TO JOINT OPPOSITION OF
AT&T MOBILITY SPECTRUM LLC AND QUALCOMM INCORPORATED TO
PETITIONS TO DENY OR TO CONDITION CONSENT AND REPLY TO COMMENTS**

I. INTRODUCTION AND SUMMARY

In their Joint Opposition,¹ AT&T Mobility Spectrum LLC (“AT&T”) and Qualcomm, Incorporated (“Qualcomm”) do nothing to allay the concerns raised by DISH Network L.L.C. (“DISH”) and others regarding the direct threat to competition and the public interest if AT&T is allowed to acquire Qualcomm’s Lower 700 MHz band D and E Block licenses.² To the contrary, these concerns have been exacerbated by AT&T’s recent announcement of its intent to acquire T-Mobile USA (“T-Mobile”). DISH therefore urges the Commission to deny its approval for the AT&T-Qualcomm spectrum deal outright. If even a portion of the T-Mobile acquisition were to be approved by the Commission, albeit with conditions, an obligation of AT&T to divest some of the Qualcomm spectrum would no longer be enough to ameliorate the combined competitive

¹ See Joint Opposition of AT&T and Qualcomm to Petitions to Deny or to Condition Consent and Reply to Comments, WT Docket No. 11-18, DA 11-252, ULS File No. 0004566825 (Mar. 20, 2011) (“Joint Opposition”).

² See Applications and Public Interest Statement of Qualcomm Incorporated, Assignor, to AT&T Mobility Spectrum LLC, Assignee at 4 (Jan. 13, 2011) (together, the “Application”) at 4. The Wireless Bureau placed the Application on public notice establishing a comment cycle for this proceeding. See *AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, Public Notice, WT Docket No. 11-18, DA 11-252 (rel. Feb. 9, 2011).

effects of the two transactions. Moreover, the Joint Opposition does not, and cannot, refute the fact that AT&T's spectrum holdings, should the Qualcomm transaction be approved, would be as much as three times greater than would have been considered *per se* unlawful and anticompetitive under the erstwhile 45 MHz spectrum aggregation cap. While DISH does not advocate a return to the cap, its abandonment was not meant to be a "carte blanche" for unfettered Commercial Mobile Radio Service ("CMRS") spectrum concentration.

II. THE COMMISSION SHOULD DENY THE AT&T-QUALCOMM SPECTRUM TRANSACTION OUTRIGHT

The Commission's consideration of AT&T's proposed acquisition of Qualcomm's 700 MHz spectrum must be evaluated within the context of AT&T's spectrum holdings should it succeed in acquiring T-Mobile. DISH has already demonstrated how the AT&T-Qualcomm transaction, standing alone, raises serious concerns about AT&T's excessive CMRS spectrum holdings. Now, the AT&T/T-Mobile merger, which was not yet announced at the time the Qualcomm transaction was placed on public notice, could give AT&T up to 51 MHz of additional spectrum nationwide.³ This new spectrum accumulation only further undermines the assertion made by AT&T and Qualcomm that "the wireless industry is highly competitive, and this transaction will not diminish that vigorous competition either nationally or in any Cellular Market Area ('CMA') or Basic Economic Area ('BEA')."⁴ Both of these premises were inaccurate to begin with: in its most recent review of the wireless industry, the Commission refused to declare that the wireless industry is competitive. And, as Rural Telecommunications

³ See, e.g., AT&T's Acquisition Of T-Mobile: Wireless Is A Game Of Scale, *Wireless Networks Online* (Mar. 11, 2011), available at <http://www.wirelessnetworksonline.com/article.mvc/ATTs-Acquisition-Of-T-Mobile-Wireless-Is-0001> (last visited Mar. 28, 2011).

⁴ Joint Opposition at 5.

Group notes, with just the Qualcomm transaction, “AT&T and Verizon will control all of the Cellular and 700 MHz bands in the [most of] the Top 10 largest markets in the United States.”⁵

The potential T-Mobile acquisition renders the Applicants’ statements more indefensible still.

AT&T and Qualcomm also misconstrue the competition-related concerns raised by DISH and other parties. The Joint Opposition attempts to discredit these concerns as “driven by [these parties’] desire to avoid more vigorous competition from AT&T.”⁶ Far from fearing a fair fight, the parties opposing this transaction simply hope for the opportunity to compete at all by having access to adequate CMRS spectrum.⁷ No transaction opponents have advanced arguments inconsistent with AT&T’s observation that the Commission’s “statutory duty is to protect efficient competition, not competitors.”⁸ By denying its approval for AT&T’s acquisition of Qualcomm’s spectrum, the Commission will neither benefit nor protect any one competitor. DISH’s suggestion that AT&T be required to divest the E Block licenses was not a suggestion

⁵ Rural Telecommunications Group Petition to Deny at 11-12.

⁶ Joint Opposition at 7.

⁷ See, e.g., Rural Telecommunications Group Petition to Deny at 12 (“[a]s 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”); Rural Cellular Association Petition to Deny at 5 (“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”); Petition to Deny of Free Press, Public Knowledge, Media Access Project, Consumers Union, and the Open Technology Initiative of the New America Foundation at 7 (“improving AT&T’s already dominant market position does not serve the public interest, particularly when the spectrum can be put to more beneficial use”).

⁸ Joint Opposition at 8 (citing AT&T Inc. & BellSouth Corp. Application for Transfer of Control, *Memorandum Opinion and Order*, 22 FCC Rcd. 5662, 5759 ¶ 195 (2007), *recons. denied*, *Memorandum Opinion and Order*, 23 FCC Rcd. 15040 (2008); SBC Communications Inc. & AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 FCC Rcd. 18290, 18371, ¶ 151 (2005).

that such spectrum should be given to DISH, as AT&T implies,⁹ but rather a plea that someone other than an already dominant carrier have the opportunity to acquire the spectrum and spur competition in those five metropolitan areas. And if a portion of the T-Mobile deal were to be approved, even such a divestiture condition would not be adequate; the Commission should reject the Qualcomm transaction outright rather than approve it subject to conditions.

III. THE JOINT OPPOSITION FAILS TO REFUTE DISH'S CONCERNS REGARDING AT&T'S POST-TRANSACTION SPECTRUM HOLDINGS

The Commission should disregard AT&T and Qualcomm's attempt to undermine DISH's estimate of AT&T's spectrum holdings in certain markets. Although the Joint Opposition attempts to fault that analysis for inconsistency with the spectrum screen calculation, DISH never claimed to be applying the spectrum screen standard in the first place. Rather, DISH took into account the bands in which AT&T holds licenses and calculated the percentage of *these* frequencies held by AT&T. Moreover, AT&T downplays the size of its spectrum holdings.¹⁰

⁹ Joint Opposition at 26.

¹⁰ AT&T claims that DISH is overstating AT&T's spectrum holdings, suggesting its PCS spectrum in Boston is "30-40" MHz rather than 60 MHz and its cellular spectrum is 25 MHz, not 38 MHz. *See* AT&T Opposition at 9 n.24. To begin with, AT&T's claim of "30-40" MHz of PCS spectrum in Boston, whatever this range means in this context, is inconsistent with AT&T's own claim that it holds 40 MHz of PCS spectrum in each Boston CMA county. *See* AT&T FCC Form 603 Appendix A at 2. A review of the FCC ULS and Spectrum Dashboard databases, moreover, suggests that these figures should be higher. Specifically, the FCC databases show that, in each of the Boston CMA counties, AT&T holds 30 MHz of PCS spectrum in both Block A and Block C under separate licenses, bringing the total PCS spectrum for the CMA to 60 MHz. *See* New Cingular Wireless PCS, LLC, Radio Station Authorization, Call Sign WPOI214 (granted July 7, 2005); New Cingular Wireless PCS, LLC, Radio Station Authorization, Call Sign KNLF216 (granted July 7, 2005); New Cingular Wireless PCS, LLC, Radio Station Authorization, Call Sign WPZY689 (granted Feb. 28, 2007). For New York, according to the FCC's Spectrum Dashboard, there are counties where AT&T's 25 MHz Block A coverage overlaps with that of its 25 MHz Block B coverage originating from other areas. In these areas of overlap, AT&T holds 50 MHz of cellular spectrum, bringing AT&T's average cellular spectrum holdings above the 25 MHz that it claims. *See* FCC, Spectrum Dashboard, Call Signs KNKA310 and KNKA256, (Mar. 22, 2011), <http://reboot.fcc.gov/reform/systems/spectrum-dashboard>. DISH has taken into account the areas of overlap by averaging the 25 MHz held in areas where Block A and Block B do not appear to overlap and the 50 MHz held in areas where they do appear to overlap.

But AT&T does not, and cannot, refute this: its spectrum holdings, post-transaction, will be as much as three times greater than would have been considered *per se* unlawful and anticompetitive under the erstwhile 45 MHz spectrum aggregation cap. When coupled with AT&T's consolidation strategy and market share, AT&T's large spectrum holdings are, as the Commission has acknowledged recently in another proceeding, a potential threat to competition that should be addressed.¹¹

These concerns are vastly greater today in the light of the T-Mobile deal. One of the more troubling aspects of that announcement is that, if the transaction is not approved, AT&T reportedly will pay a breakup fee that includes giving "T-Mobile certain AWS spectrum that's not needed by AT&T for its initial LTE rollout..."¹² Far from needing more spectrum, this suggests that AT&T may be acquiring spectrum, not to deploy consumer services, but rather to strategically eliminate competitors through consolidation, which clearly runs counter to the Commission's public interest objective.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny its consent to the proposed transaction.

¹¹ See SkyTerra Communications, Inc. and Harbinger Capital Partners Funds Applications for Consent to Transfer Control of SkyTerra Subsidiary, LLC, *Memorandum Opinion and Order and Declaratory Ruling*, 25 FCC Rcd. 3059, 3098 (2010) (conditioning the transaction on the Applicants not making spectrum available to either AT&T or Verizon without Commission approval).

¹² Bill Myers et al., *FCC Review of AT&T/T-Mobile to be Granular, May Take More Than Year*, *Official Says*, Communications Daily, Mar. 22, 2011, at 1.

Respectfully submitted,

/s/

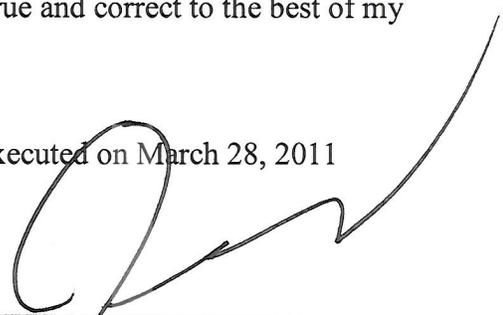
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March 28, 2011

DECLARATION

The foregoing REPLY OF DISH NETWORK L.L.C. TO JOINT OPPOSITION OF AT&T MOBILITY SPECTRUM LLC AND QUALCOMM INCORPORATED TO PETITIONS TO DENY OR TO CONDITION CONSENT AND REPLY TO COMMENTS has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on March 28, 2011



Jeffrey H. Blum
Senior Vice President and
Deputy General Counsel
DISH Network L.L.C.

CERTIFICATE OF SERVICE

I, Latoya Brisbane, hereby certify that on this 28th day of March, 2011, I caused the foregoing Reply of DISH Network L.L.C. to be served by first class mail, upon the following:

Paul Margie
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In addition, I hereby certify that on this 28th day of March, 2011, Alison Minea of DISH Network L.L.C. caused the foregoing Reply of DISH Network L.L.C. to be served by electronic upon Mr. Margie and Mr. Goggin.

_____/s/_____
Latoya Brisbane