April 20, 2011

<u>Via Electronic Delivery</u>

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations
WT Docket No. 11-65

Dear Ms. Dortch:

On Monday, March 28, 2011 the Rural Telecommunications Group, Inc. ("RTG") filed the attached *Reply to Joint Opposition to Petition to Deny* (*Reply*) in reference to the AT&T-Qualcomm proceeding currently before the Commission.[1] We are associating this *Reply* with the above referenced proceeding and docket because of the relevant subject matter.

Should you have any questions or require additional information, please do not hesitate to contact me.

Respectfully submitted,

Rural Telecommunications Group, Inc.

By: *<u>/s/ Caressa D. Bennet</u>*
Caressa D. Bennet
General Counsel

Attachment

[1] *In the Matter of AT&T Mobility Spectrum, LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Licenses*, Reply to Joint Opposition to Petition to Deny, WT Docket No. 11-18 (filed March 28, 2011) ("*Reply*").

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	)	

REPLY TO JOINT OPPOSITION TO

PETITION TO DENY

OF THE

RURAL TELECOMMUNICATIONS GROUP, INC.

RURAL TELECOMMUNICATIONS GROUP, INC.

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Date: March 28, 2011

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SUMMARY

AT&T and Qualcomm fail to adequately refute the adverse impact on competition and the public interest that would result from AT&T acquiring Qualcomm's spectrum assets or the need for the conditions proposed by RTG in its Petition to Deny. The limited public interest benefits of the proposed transaction are strongly outweighed by the many public interest harms that will result from allowing AT&T to exert its substantially increased market power, including its ability to use such power to prevent small and rural carriers from being able to realistically compete with AT&T through the denial of data roaming and locking up through exclusivity agreements of the handset models most desired by consumers. This further increase of AT&T's growing duopoly power harms competition and ultimately those consumers who work and travel through rural areas.

The FCC must investigate these competitive harms, regardless of whether the proposed transaction triggers its "spectrum screen." This screen does not allow carriers to hide from the competitive harm likely to result from a transaction that gives them substantially increased market power. In the case of the spectrum at issue here – 700 MHz spectrum, long considered the most desirable and efficient spectrum in existence – the FCC must consider the qualitative advantages of this particular spectrum when weighing the public interest impact of AT&T's continued spectrum aggregation.

Should the Commission decline to protect the public by denying the subject application or designating it for hearing, it should impose the following conditions or hold the application in abeyance pending the resolution of related rulemaking proceedings: (1) require all mobile wireless devices to be interoperable across the entire 700 MHz band; (2) require AT&T to offer data roaming on reasonable rates, terms and conditions; (3) prohibit all handset exclusivity

agreements; (4) require AT&T to comply with stringent performance requirements for its 700 MHz spectrum; and (5) require that public safety be given priority access and the ability to roam. AT&T and Qualcomm do not even attempt to refute the public interest need for such conditions, but argue only that such conditions are unnecessary because they are "not transaction-specific." In addition, the FCC should require AT&T to divest any acquired spectrum in excess of 50 megahertz below 1 GHz in all 515 counties in which it will exceed 50 MHz. These conditions are directly applicable to AT&T and, without such conditions, the competitive harms noted above cannot be prevented.

Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY TO JOINT OPPOSITION TO PETITION TO DENY

The Rural Telecommunications Group, Inc. ("RTG"), by its attorneys and pursuant to 47 C.F.R. § 1.939 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby responds to the Joint Opposition of AT&T Mobility Spectrum LLC ("AT&T") and Qualcomm Incorporated ("Qualcomm") to Petitions to Deny or to Condition Consent and Reply to Comments ("Opposition") filed by AT&T and Qualcomm on March 21, 2011. The Opposition fails to adequately refute the public interest and competitive harms that would result from the proposed transaction or the need for the conditions proposed by RTG.

I. THE HARM TO THE PUBLIC THAT WOULD RESULT FROM THE PROPOSED TRANSACTION STRONGLY OUTWEIGHS ANY PUBLIC INTEREST BENEFITS OF THE TRANSACTION

Contrary to AT&T's and Qualcomm's distorted view of the mobile wireless marketplace, the proposed transaction will be detrimental to competition in the mobile wireless marketplace, both on a national and local level. While AT&T and Qualcomm believe that "any consumer can

tell" that the wireless industry is highly competitive, the FCC's *Fourteenth Competition Report*,[1] which was unable to make a finding of effective competition in the mobile wireless marketplace, flatly contradicts such a misguided belief. The lack of effective competition in today's market will only be exacerbated by the approval of AT&T's proposed acquisition of Qualcomm spectrum.

AT&T and Qualcomm argue that because AT&T post-transaction would not exceed the FCC's current "spectrum screen," the proposed transaction will not diminish competition in any area. While the Commission has traditionally utilized a spectrum screen to determine transactions to which it will apply heightened scrutiny, the fact that a particular transaction may not be captured by the spectrum screen is not determinative of whether the transaction harms competition or is contrary to the public interest. The FCC has never used a spectrum screen analysis to ignore demonstrated harm to competition.

In blindly clinging to the FCC's dated spectrum screen, AT&T and Qualcomm ignore the demonstrated harms to competition set forth in RTG's petition. AT&T has exerted its existing market power to the detriment of small, rural wireless carriers and their customers. By warehousing spectrum[2] and choosing not to serve rural areas that fall outside of interstate

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[1] *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*, WT Docket No. 09-66, Fourteenth Report, FCC 10-82 (rel. May 20, 2010) ("*Fourteenth Competition Report*").

[2] The Opposition dismisses as "frivolous" RTG's suggestion that AT&T has the incentive to warehouse the Qualcomm spectrum. *See* Joint Opposition of AT&T Mobility Spectrum LLC and Qualcomm Inc., WT Docket No. 11-18, 26 (filed Mar. 21, 2011) ("*Opposition*"). However, AT&T historically has warehoused portions of spectrum in rural areas (AT&T currently covers only 97% of the population in its service territory (see AT&T Press Release "AT&T Sets the Record Straight on Verizon Ads," http://www.att.com/gen/press-room?pid=14002), and AT&T's contention that it "expects" to utilize this spectrum nationwide does not mean that it plans to or will do so in rural areas. For these reasons, as discussed further below, RTG proposes that, at a minimum, the Commission impose stringent performance requirements on AT&T in the event it approves the proposed transaction.

highways, and refusing to enter into data roaming agreements with small and rural carriers, AT&T has denied customers of these carriers the ability to get data roaming on a nationwide level, at the most advanced data-speeds available, and at fair and reasonable rates. This has forced customers of rural wireless carriers into the Hobson's choice of either forgoing wireless service at home, forgoing service when they travel, or incurring the dramatic expense of purchasing two devices and two service plans. Handset exclusivity agreements between AT&T and mobile device manufacturers further cripple small and rural carriers' ability to compete. The inability of their customers to get the advanced handsets they desire and obtain comparable data roaming at reasonable rates has caused customers to flee to AT&T and Verizon and driven numerous rural wireless carriers out of business. The additional market power gained by AT&T as a result of the acquisition of Qualcomm spectrum will only exacerbate this situation. The FCC's public interest evaluation "necessarily encompasses . . . a deeply rooted preference for preserving and enhancing competition."[3] Grant of the subject application without necessary conditions would fail both to preserve and to enhance competition, and the application should therefore be denied.

The aforementioned competitive harms greatly outweigh the limited public interest benefits to AT&T's customers that would be derived from the efficiencies resulting from the proposed spectrum acquisition. Moreover, the feasibility of pairing the Qualcomm spectrum with AT&T's cellular and PCS spectrum in every AT&T market by 2014 raises a substantial and

[3] *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer of Control*, WC Docket No. 10-110, Memorandum Opinion and Order (rel. March 18, 2011) ("*CenturyLink*").

material question of fact which, if the Commission chooses not to deny this transaction outright, requires the application to be designated for an evidentiary hearing.[4]

II. THE COMMISSION SHOULD CONSIDER QUALITATIVE DIFFERENCES IN SPECTRUM WHEN EVALUATING THE PUBLIC INTEREST IMPACT OF AT&T'S CONTINUED SPECTRUM AGGREGATION

No wireless carrier would seriously suggest that 700 MHz beachfront spectrum is equivalent to spectrum above 1 GHz, yet this is exactly what the Opposition appears to suggest.[5] Spectrum in the 700 MHz band is commonly characterized as "beachfront" spectrum for good reason – the extended propagation characteristics of such spectrum affords carriers tremendous cost savings, allowing them to provide the same coverage with far fewer cell sites. The qualitative difference between spectrum below 700 MHz and spectrum above 1 GHz is clearly reflected in the dramatic difference in the cost of acquiring such spectrum.[6]

For these reasons, the inability of carriers to access low-band spectrum is a competitive impediment, and a factor that further increases AT&T's dominant market power. AT&T and Qualcomm contend that "[n]umerous carriers are operating successfully in the wireless market

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[4] 47 U.S.C. §309(e).

[5] *Opposition* at 14.

[6] According to publicly available records, the average values of Lower A and B Block 700 MHz spectrum, which sold for approximately $2 per MHz/POP versus the average values of 1.7/1.9 GHz AWS spectrum, which sold for approximately $0.54 per MHz/POP (a nearly four-fold difference) is demonstrative of the difference in value of raw low band and high band spectrum. *See generally Auction of Advanced Wireless Services Licenses Closes, Winning Bidders Announced for Auction 66*, Public Notice, DA 06-1882 (released September 20, 2006); *Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 73*, Public Notice, DA 08-595 (released March 20, 2008). The valuable spectrum AT&T holds (and wants to acquire) is qualitatively different than the substantially less valuable spectrum that most other carriers hold. As a result, any "spectrum screen" or "cap" that truly seeks to address competitive effects and not simply serve as a smokescreen for greater and greater spectrum aggregation by a duopoly carrier must weight each spectrum band that falls under the screen/cap according to its market value. At a minimum, less valuable, higher-frequency spectrum bands cannot be counted on par with AT&T's 700 MHz spectrum.

with no or very limited holdings of low-band spectrum," pointing specifically to Sprint, T-Mobile, MetroPCS and Leap.[7] What AT&T and Qualcomm fail to point out is that these carriers may not be able to continue to compete without the addition of critical low-band spectrum. All of these carriers are making extensive efforts to acquire low-band spectrum, both at auction and as members of Connect Public Safety Now, an advocacy group pushing for the availability of D block spectrum.[8] Moreover, T-Mobile has given up entirely on the prospect of acquiring additional spectrum that will allow it to compete with AT&T, and instead opted to sell out to AT&T.[9] For these reasons, RTG continues to advocate for a spectrum cap of 110 megahertz below 2.3 GHz and for a cap of 50 megahertz on spectrum below 1 GHz.[10] If the FCC approves this transaction, AT&T will exceed RTG's proposed 50 megahertz cap of spectrum below 1 GHz in 515 counties across the United States. The figure below illustrates the spectrum holdings below 1 GHz where AT&T will exceed RTG's proposed spectrum cap. Accordingly, RTG implores the FCC to deny this transaction or at a minimum hold the transaction in abeyance pending the outcome of a decision on the outcome of RTG's Petition for Rulemaking on spectrum caps. Alternatively, the FCC should require AT&T to divest any spectrum in excess of 50 megahertz below 1 GHz in all of these 515 counties.

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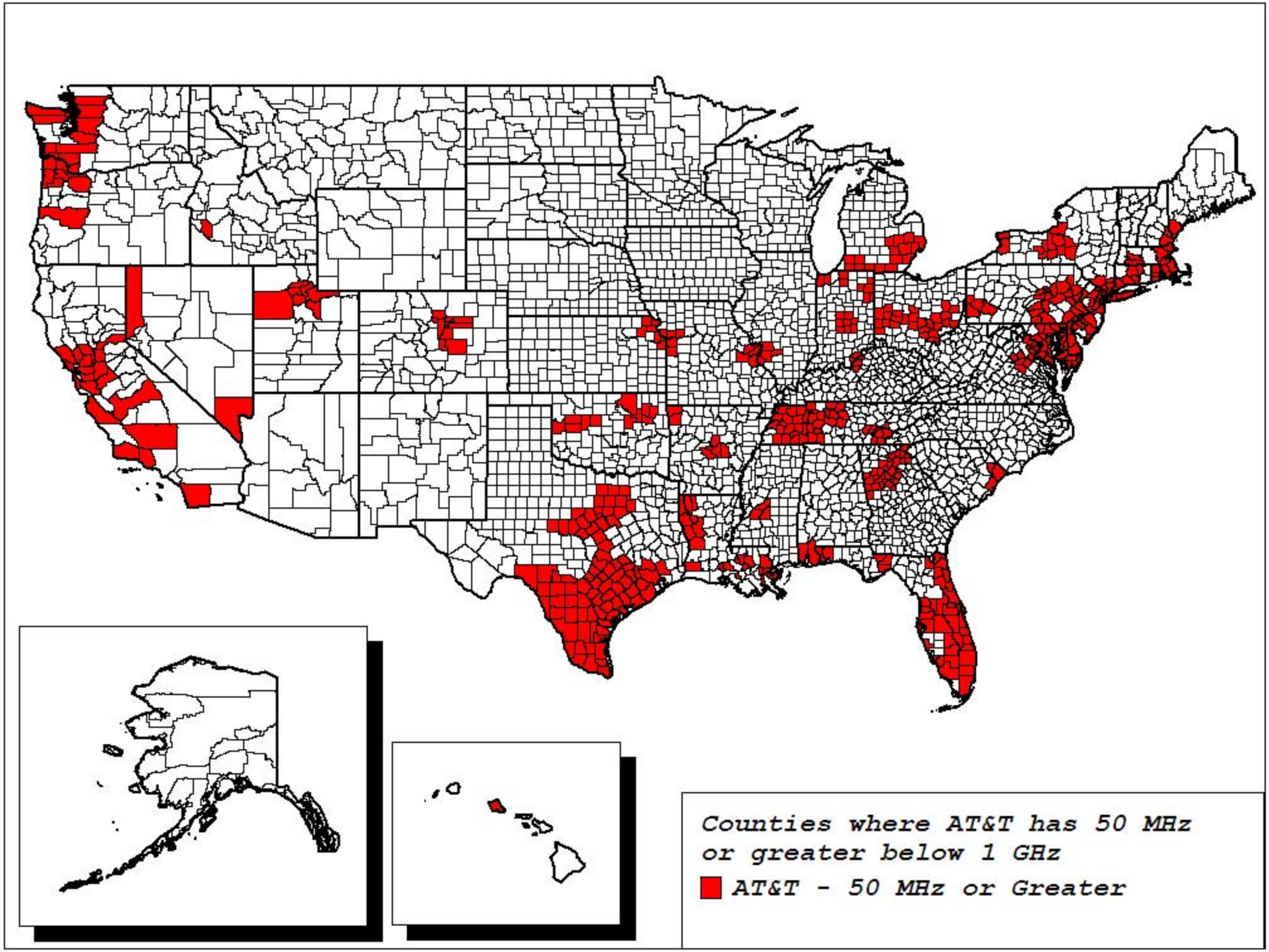
[7] *Id.* at p. 14.

[8] *See Ex parte* filing by Connect Public Safety Now, PS Docket No. 06-299 (filed Dec. 2, 2010). RTG is a member of Connect Public Safety Now.

[9] AT&T to Acquire T-Mobile USA from Deutsche Telekom," Press Release dated March 20, 2011 http://www.mobilizeeverything.com/home.php

[10] *See generally In the Matters of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et. al.*, Opposition of the Rural Telecommunications Group, Inc. to and Comments on Petitions for Reconsideration, WT Docket No. 06-150 (filed October 17, 2007); *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*, Ex Parte, RM No. 11498 (filed July 16, 2008).


Counties where AT&T has 50 MHz or greater below 1 GHz
AT&T - 50 MHz or Greater

III. THE FCC SHOULD IMPOSE THE CONDITIONS REQUESTED BY RTG OR HOLD THE APPLICATION IN ABEYANCE PENDING THE RESOLUTION OF RELATED RULEMAKING PROCEEDINGS

In its Petition, RTG requests that in the event the Commission concludes that any public interest benefits of the proposed transaction outweigh the substantial harms that will result from AT&T's acquisition of Qualcomm's 700 MHz licenses, approval of the proposed transaction should be conditioned on: (1) a requirement that all mobile wireless devices be interoperable across the entire 700 MHz band; (2) AT&T offering data roaming; (3) a prohibition on all handset exclusivity agreements; (4) AT&T's compliance with stringent performance requirements on all AT&T 700 MHz spectrum; and (5) a requirement that public safety be given priority access and the ability to roam.[11]

A. The Conditions Are Critical to This Transaction and Are Necessary to Prevent Harm to Competition and Consumers

The Opposition summarily dismisses the need for these conditions as "not transaction-specific."[12] While AT&T and Qualcomm are correct that many of these issues apply to other carriers in addition to AT&T, this does not mean that they are not issues specific to this transaction, nor does it give the Commission carte blanche to ignore the competitive harms that would be caused by a failure to impose such conditions on AT&T.[13] More importantly, the conditions recommended here are not affecting one "mere" player among many. As has been recognized, Verizon and AT&T dominate mobile spectrum holdings in the United States and this

[11] Where a proposed transaction may lead to both beneficial and harmful consequences, the FCC's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions to ensure that the public interest is served. *See, e.g., CenturyLink* at ¶ 10.

[12] *Opposition* at 28.

[13] *See* Petition to Deny of Cellular South, Inc., at 6-18 (filed Mar. 11, 2011).

transaction will only increase AT&T's share. Moreover, AT&T is situated uniquely among wireless carriers:

- Through the standards-setting efforts of 3GPP, which it has dominated,[14] it obtained a private chipset band class for its future LTE services;
- It totally opposes government-mandated data roaming (a position it shares only with Verizon among all carriers);
- It intends to remove T-Mobile, one of two remaining nationwide non-Big Two providers (and an advocate of competition) from the field; and
- It had a controversial exclusivity agreement related to Apple's iPhone.

As discussed above, the market dominance of AT&T in the event this transaction is approved will enable AT&T to stifle competition and harm consumers, especially those living and traveling in rural America. And unlike Verizon, AT&T is now seeking through its T-Mobile merger to reduce the number of potential significant partners for roaming and for volume handset contracts. The conditions sought here are without a doubt specific to the transaction as well as the company. Moreover, the conditions requested by RTG are necessary to prevent AT&T from using its newfound market power to harm competition and consumers.[15]

Failure to impose the requested condition on interoperability will allow AT&T to prevent data roaming, again to the detriment of rural carriers and their customers. Meanwhile, without a

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[14] While AT&T attempts to minimize its role in developing the 3GPP standards, it elsewhere has boasted that its "personnel routinely participate in the 3GPP standards groups . . . and many of the significant innovations in these standards were aided by AT&T science and contributions." *See* Comments of AT&T, Inc., GN Docket Nos. 09-157, 09-51, 35-36 (2009). For example, AT&T is not bashful about its efforts "to incorporate U.S. 700 MHz spectrum in the 3GPP LTE standards to ensure device . . . compatibility."

[15] The Opposition states that RTG fails to demonstrate standing by not identifying its affected members or substantiating claims of harm. *Opposition* at 28, n. 96. All of RTG's members would be competing against a post-transaction AT&T and the Petition and this reply make clear that they would all be harmed by the ability of AT&T to stifle competition.

condition that AT&T support all data roaming requests on reasonable terms and conditions, including reasonable rates, and on any compatible air-interface technology of the requesting carrier, small and rural carriers will be unable to offer comparable nationwide data coverage, and will therefore be unable to effectively compete with AT&T, to the harm of both RTG members and their customers. Similarly, if the Commission does not prohibit AT&T from entering into handset exclusivity agreements, customers of competing carriers who seek desirable handsets will have even more incentive to switch to AT&T, thus further distorting the competitive wireless marketplace. The Commission must also condition approval of the proposed transaction on AT&T's compliance with accelerated buildout deadlines to encourage deployment to rural areas. Finally, absent a condition that AT&T provide public safety with priority access and roaming on its networks, public safety will lack the necessary resiliency, capacity and redundancy needed for its critical activities. Clearly, the harms that would befall the public if AT&T is not subject to the requested conditions are transaction-specific, and the public interest would be disserved if the harms resulting from AT&T's acquisition of Qualcomm spectrum are not redressed prior to the completion of a broader rulemaking proceeding.

B. The Commission Should Require AT&T's 700 MHz Devices to be Interoperable Across the Entire 700 MHz Band

In its Petition to Deny, RTG urged the Commission to require all of AT&T's mobile handset devices to be interoperable across the entire 700 MHz band,[16] and the majority of petitioners also supported such a condition.[17] As discussed in more detail in Attachment A, the Commission should impose this condition because an interoperability requirement would

[16] RTG Petition to Deny at 20-23.

[17] Cellular South Petition to Deny at 14-18; Free Press et al. Petition to Deny at 18-19 (filed Mar. 11, 2001); RCA Petition to Deny at 8, 12 (filed Mar. 11, 2011).

promote competition, innovation, and economic growth, as well as increase consumer choice, enhance public safety, and provide additional public interest benefits.

Device interoperability across the entire 700 MHz band would bring economies of scale and other significant benefits to consumers and carriers, including both AT&T and Verizon as well as smaller rural and regional carriers. But limiting the benefits of economies of scale to AT&T and Verizon by allowing them to adopt private band classes for their own handsets would harm smaller carriers, competition and, ultimately, consumers.[18] Equipment manufacturers would have little incentive to innovate and provide compatible devices for smaller markets, particularly when providing interoperable devices would run contrary to their largest customers' desires. As a result, Lower 700 MHz A Block licensees and their customers will be the last to receive the benefits and opportunities afforded by innovative device technologies, if they receive them at all, and rural and regional carriers will be less able to compete with Verizon and AT&T.[19] An interoperability requirement is also critical for public safety users, as wireless broadband deployment for public safety, particularly in rural areas, will be substantially delayed and more costly without an interoperability requirement.[20]

An interoperability requirement is consistent with Commission precedent. The Commission has long supported interoperability,[21] recognizing that it must ensure that

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[18]*See* Peter Cramton, *700 MHz Device Flexibility Promotes Competition*, attachment to *Ex Parte* filing by the Rural Cellular Association, RM Docket No. 11-592 (filed Aug. 9, 2010) ("Cramton").

[19]*See id.*

[20]*See id.* at 7-8.

[21] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd. 4957 ¶ 162 (1994) ("*PCS Order*") ("[I]nteroperability for PCS is an important and beneficial goal. We believe, however, that acceptable interoperability is likely to emerge between PCS licenses in a timely manner without our intervention. Our decisions to provide for large regional MTA licenses, to move all PCS licenses to the lower band, and to permit further aggregation of spectrum blocks across geographic regions all foster wide-area roaming and

consumers and carriers are not harmed when interoperability is threatened by anti-competitive conduct or the lack of competitive market conditions.[22] The Commission has also repeatedly acknowledged the benefits of interoperability among spectrum blocks in the same service[23] and the benefits of large contiguous blocks of harmonized spectrum.[24] Similarly, European Union policy also recognizes the economies of scale and other benefits of interoperability.[25] Finally, AT&T itself has repeatedly acknowledged the benefits of interoperability and harmonization of

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interoperability. In addition, competitive bidding for PCS licenses will facilitate the development of regional or nationwide systems."); *Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd. 7988 ¶ 167 (1994) ("Based on the record, we conclude that there is no need to adopt any new interoperability standards for CMRS at this time. Although we adopted mandatory interoperability requirements at the inception of cellular service, we believe that competition in the CMRS marketplace now provides sufficient incentives for CMRS licensees to develop interoperable technology."); *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 3 FCC Rcd. 703 ¶ 52 (1998) ("*Auxiliary Cellular Services*").

[22] *See Cellular Communications Systems*, Report and Order, 86 F.C.C.2d 469 ¶ 26 (1981) (imposing interoperability and compatibility requirements in the early days of cellular because competitive market conditions were lacking); *PCS Order*, ¶ 165 ("We intend to monitor the industry's progress in developing and implementing PCS technical standards. . . . If we find that the development of PCS technology is not proceeding in a manner that will accommodate roaming and interoperability, we may revisit this issue and consider what actions the Commission may take to facilitate the more rapid development of appropriate standards."); *Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd. 7988 ¶ 168 (1994) ("Although we have concluded that there is no immediate need for the establishment of interoperability standards, we will initiate an inquiry in the near future to examine this issue in greater detail."); *Auxiliary Cellular Services*, ¶ 52; *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Third Report and Order, 9 FCC Rcd. 1337 n.11 (1994) ("The Commission will consider a waiver only in a case in which there is an overriding national objective that may be thwarted; such as if nationwide PCS interoperability were to be thwarted.").

[23] *PCS Order*, ¶ 164 (explaining that "[s]uch broad interoperability will increase the economies of scale in manufacturing PCS equipment such as handsets, will ma[k]e consumers more likely to subscribe to PCS because they can easily move from carrier to carrier without having to purchase new handsets, and will make it easier for PCS licensees to aggregate blocks of PCS spectrum up to 40 MHz and to create wide-area or national PCS systems").

[24] *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services Including Third Generation Wireless Systems*, Second Report and Order, 17 FCC Rcd. 23193, 23202 (2002).

[25] *See* COM(2004) 447; OJ L 117, 11.5.2010, Recital 7 and Art. 1.

wireless spectrum blocks.[26] Attachment A provides greater detail regarding these benefits of interoperability and related Commission precedent.

C. The Commission Should Require AT&T to Enter Into Data Roaming Agreements With Other Carriers on Reasonable Terms and Conditions

In its Petition to Deny, RTG strongly opposed the proposed transaction "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."[27] If the Commission decides to approve the transaction, however, RTG urged the Commission to condition such approval "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."[28] In response, despite the fact that they bear the burden of proving that the proposed transaction serves the public interest, AT&T and Qualcomm merely dismiss such claims as "unrelated to the transaction" without providing any further explanation in support of their position.[29]

AT&T and Qualcomm ignore the fact that in determining the competitive effects of a proposed transaction, the Commission considers the "broader public interest."[30]

> In addition to considering whether the [transaction] will reduce existing competition, we also must consider whether the [transaction] *will accelerate the decline of market power by dominant firms* in the relevant communications markets, and the [transaction's] *effect on future competition* . . . . For instance, combining assets may allow the merged entity to . . . create market power, create

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[26] *See* Comments of AT&T Wireless Services, Inc., RM-9920 (filed Aug. 28, 2000); Reply Comment of AT&T Wireless Services, Inc., ET Docket No. 00-258 (filed Mar. 9, 2001).

[27] RTG Petition to Deny at 19.

[28] *Id.*

[29] *Opposition* at 28.

[30] *Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, Memorandum Opinion and Order, 22 FCC Rcd 20295, ¶ 13 (2007) ("*AT&T-Dobson Merger Order*").

> or enhance barriers to entry by potential competitors, and increase opportunities to disadvantage rivals in anticompetitive ways.[31]

In particular, the Commission considers whether a proposed transaction *will enhance, rather than merely preserve, existing competition*."[32] Furthermore, the Commission will approve a transaction only if it is "convinced that [the transaction] will *enhance* competition."[33]

As RTG and others have articulated, approval of the proposed transaction will impede, rather than preserve or enhance competition, in particular with regard to data roaming.[34] The Commission has acknowledged that access to spectrum is a key input that may affect

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[31] *Id.* (emphasis added). *See also AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 21 (2007) ("*AT&T-BellSouth 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 and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶ 28 (2008) ("*Verizon Wireless-ALLTEL Merger Order*").

[32] *Verizon Wireless/Alltel Merger Order* at ¶ 28 (emphasis added). *See also 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*, WT Docket No. 07-208, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 12463, ¶ 32 (2008) ("*Verizon Wireless/Rural Cellular Merger Order*"); *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order, 23 FCC Rcd 17570, ¶ 21 (2008) ("*Sprint Nextel-Clearwire Order*"); and *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, ¶ 29 (2008) ("*XM-Sirius Merger Order*").

[33] *See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee*, 14 FCC Rcd 14712, ¶ 49 (1999) ("*SBC-Ameritech Order*") (emphasis added), *quoting Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 2 (1997) ("*Bell Atlantic/NYNEX Merger Order*"); *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, ¶ 21 (2001) ("*AOL/Time Warner Merger Order*").

[34] *See* RTG Petition to Deny at 14-17; RCA Petition to Deny at 9-10; Cellular South Petition to Deny at 14-18; and Free Press et al. Petition to Deny at 18-19.

competition in the provision of mobile wireless service.[35] A post-transaction AT&T, however, will hold an excessive amount of prime 700 MHz spectrum in both rural and urban markets, giving it greater leverage to raise barriers to entry and disadvantage rivals (and their customers) in anticompetitive ways with respect to data roaming.[36]

First, as the National Broadband Plan recognizes, "data roaming is important to entry and competition for mobile broadband services."[37] If the Commission permits AT&T to acquire this huge swath of spectrum, the Commission effectively eliminates the possibility that a new market entrant or non-dominant competitor could use this spectrum to provide additional and/or stronger competitive alternatives to AT&T. Additional competitive alternatives would increase the availability of data roaming at reasonable terms and conditions. In addition, providers seeking to expand their mobile broadband network deployment into new markets need data roaming to supplement service in support of such new build-out. Allowing AT&T to shut out competitors from accessing such a large quantity of spectrum for roaming purposes, however, allows AT&T to bar continued network deployment and thus mobile broadband competition. Therefore, a data roaming condition is necessary to preclude AT&T from "enhanc[ing] barriers to entry by potential competitors."[38]

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[35] *See 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, 25 FCC Rcd 11407, ¶¶ 249-50 (2010) ("*Fourteenth Wireless Competition Report*"). As Chairman Genachowski recognizes, spectrum is the "oxygen" of mobile broadband services. Prepared Remarks of Chairman Julious Genachowski, FCC Spectrum Summit, *Unleashing America's Invisible Infrastructure*, Oct. 21, 2010.

[36] RTG Petition to Deny at 14.

[37] *Connecting America: The National Broadband Plan*, The Federal Communications Commission (Mar. 2010) at 49 ("*National Broadband Plan*").

[38] *See supra* note 29.

Second, a data roaming condition is necessary to help mitigate potential anticompetitive conduct to the ultimate detriment of consumers. As the Commission has recognized, "given the superior propagation characteristics of spectrum under 1 GHz, particularly for providing coverage in rural areas and for penetrating buildings, providers whose spectrum assets include a greater amount of spectrum below 1 GHz spectrum may possess certain competitive advantages for providing robust coverage . . . ."[39] Allowing AT&T to command an even greater amount of beachfront spectrum below 1 Ghz gives AT&T an even greater competitive edge and enhanced market power, which it can leverage to the detriment of consumers. In particular, without a data roaming condition, approval of the proposed transaction would give AT&T license to deny non-AT&T consumers access to "robust coverage" over such a large amount of quality spectrum whenever they travel outside of their home markets. A data roaming condition, however, would help ensure consumers can access their mobile wireless data services wherever they may go.

Thus, without a data roaming condition, the proposed transaction both reduces the potential availability of effective roaming alternatives and allows AT&T to deny many consumers access to such spectrum for their roaming needs. Accordingly, the Commission should not permit the proposed transaction to proceed unless it requires AT&T to enter into data roaming agreements with other carriers on reasonable terms and conditions. Such a condition should extend not only to AT&T's current HSPA and HSPA+ mobile broadband services, but also to its future LTE network and beyond.

D. The Commission Must Put an End to Handset Exclusivity Agreements Between AT&T and Mobile Device Manufacturers

RTG members have encountered difficulties in acquiring smartphones desired by their customers, including the Apple iPhone, which until earlier this year was exclusively available

[39] *Fourteenth Wireless Competition Report* at ¶ 238.

only to AT&T. While rural carriers have attempted to obtain devices like the iPhone or similar smartphones from numerous handset vendors or distributors, they have been unable to acquire them, even where a commercial credit agreement is in place, sometimes due to a cited inability to meet a minimum volume requirement. AT&T's competitive advantage that resulted from its prior exclusive arrangement with Apple for the iPhone that was due to its dominant market position, as well as with other manufacturers of popular smartphones, have placed rural carriers at a competitive disadvantage. A direct result of such discriminatory access to handsets is the migration of customers from rural carriers to AT&T.

The exclusivity harms cited in RCA's Petition for Rulemaking[40], which has been pending before the FCC for nearly three years, remain true today. While handset devices have changed since the filing of RCA's Petition for Rulemaking and additional mobile broadband devices have become available, the fact remains that many of these devices are exclusively tied to AT&T. Already disadvantaged by having to compete against AT&T with its enormous resource advantages, rural carriers find the playing surface they compete on further tilted against them as a result of AT&T's ability to offer the latest generation of mobile devices demanded by consumers. In contrast to the hoopla surrounding the rollout of Apple's iPhone 4, no consumers are camping out overnight outside of rural carrier retail outlets to be the first to purchase the basic, low end handsets that are frequently the only handsets made available by vendors to small rural carriers and other carriers without exclusive arrangements with manufacturers and distributors.

For consumers, exclusivity arrangements mean higher prices for those who are able to purchase premium handsets because the carriers who benefit from such exclusivity face no

[40] *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM No. 11497 (2008).

competition that would drive the price of such handsets down. For consumers residing or working in rural areas not served by large carriers with exclusivity arrangements[41], such handsets are not even available, leaving these consumers without access to the advanced features offered by such handsets.

Exclusivity arrangements also impose impediments to rural carriers attempting to comply with FCC hearing aid compatibility (HAC) requirements. Such arrangements not only make compliance difficult, but because the new smartphones which host advanced applications and features that are the subject of these exclusive agreements tend to be HAC compliant, these arrangements mean smaller carriers are unable to obtain HAC compliant smartphones, ultimately resulting in hearing impaired customers being denied a choice of desirable smartphone models.

Exclusive handset agreements harm the public interest by distorting the competitive marketplace for wireless services and denying rural consumers the benefits of advanced telecommunications technology. To allow such agreements to remain in place is no different than permitting cable television service providers to enter into exclusivity agreements with flat screen TV manufacturers such that customers could only purchase a certain type of flat screen TV if they took video service from a certain provider. Neither arrangement would serve the public interest.

Due to the harm caused to small and rural carriers and the consumers they serve, exclusive arrangements between handset vendors and AT&T are contrary to the public interest. Accordingly, the FCC should utilize its authority under the Communications Act to condition approval of the above-captioned transaction to prohibit AT&T from entering into handset

[41] As RTG has noted in numerous proceedings before this Commission, many rural areas go unserved by large carriers holding licenses for such areas.

exclusivity agreements.[42] Alternatively, the Commission should hold the AT&T/Qualcomm application in abeyance pending the outcome of action on the Petition for Rulemaking filed by RCA.

E. The Commission Should Adopt Uniform, Accelerated Performance Requirements for All of AT&T's 700 MHz Licenses to Promote Mobile Broadband Deployment, Including in Rural Areas

The Commission must ensure that all licensed commercial spectrum is being used intensively; otherwise, it may be difficult to convince federal government and other spectrum users to relocate their active operations to provide additional commercial spectrum for mobile services. To incentivize more efficient spectrum use and encourage broadband deployment (particularly in rural areas), 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). By adjusting the build-out deadlines and requiring AT&T to construct its 700 MHz network and provide service more expeditiously, the Commission will encourage AT&T to maximize its spectrum use. It will also ensure that precious spectrum resources are put to their highest and best use more quickly. Moreover, imposing accelerated 700 MHz build-out requirements on AT&T would advance the Commission's and the Administration's broadband deployment goals, especially in rural areas.[43]

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[42] *See, e.g.*, 47 C.F.R. §§ 154(i), 254(b)(3), 303(r).

[43] *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 (announcing 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 officials to access state-of-the-art, secure, nationwide, and interoperable mobile communications"); *see also National Broadband Plan* at 9-10, Goals 2 and 3 (stating a goal for United States to lead the world in mobile innovation, with every American having affordable access to robust broadband services).

Accelerating AT&T's existing performance requirements is consistent with the FCC's recent trend of imposing rigorous build-out requirements for new licensed services. For example, in 2007, in order "[t]o better promote access to spectrum and the provision of service, especially in rural areas," the FCC replaced the substantial service requirements for 700 MHz Band licenses that had not yet been auctioned with significantly more stringent performance requirements.[44] The FCC also imposed significant penalties for licensees' performance requirement failures.[45] In 2008, the FCC continued to facilitate expeditious build-out by proposing stringent build-out requirements for the AWS-3 Block (combined with the upper half of the J Block) and the H Block.[46] In 2010, the Commission imposed enhanced build-out requirements on Wireless Communications Service ("WCS") licensees "[t]o ensure that the promise of mobile broadband is realized."[47] The Commission stated:

> Our adoption of enhanced performance requirements . . . will further the public interest by promoting the rapid deployment of new broadband services to the American public. Specifically, we find that requiring WCS licensees to meet enhanced performance requirements will serve the public interest by ensuring that

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[44] Under the new rules, Cellular Market Area ("CMA") and Economic Area ("EA") licensees are required to provide service sufficient to cover 35% of the geographic area of their licenses within four years, and 70% of this area within ten years, and Regional Economic Area Grouping ("REAG") licensees must provide service sufficient to cover 40% of the population of their license areas within four years and 75% of the population within ten years. 47 C.F.R. § 27.14(g), (h).

[45] If licensees fail to meet the applicable interim benchmark, the license term is reduced by two years and the end-of-term benchmark must be met within eight years. At the end of the license term, licensees that fail to meet the end-of-term benchmark will be subject to a "keep what you use" rule that makes unused spectrum available to other potential users. *Id.*

[46] For the AWS-3 Block (combined with the upper half of the J Block), the FCC proposed to require a nationwide licensee "to provide signal coverage and offer service to: 1) at least 50 percent of the total population of the nation within four years of commencement of the license term and 2) at least 95 percent of the total population of the nation at the end of the 10-year license term." *AWS-3 FNPRM* ¶ 3. For the H Block, the FCC proposed to require licensees "to provide signal coverage and offer service to: 1) at least 35 percent of the population in each licensed area within four years and 2) at least 70 percent of the population in each licensed area at the end of the license term." *Id.* ¶ 4.

[47] *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, Report and Order and Second Report and Order, 25 FCC Rcd 11710 ¶ 1 (2010).

> underutilized spectrum will be used intensively in the near future. The new requirements will . . . help ensure widespread system deployments.[48]

The Commission should continue its current approach of requiring expeditious build-outs of licensed spectrum bands. 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.[49] Moreover, if AT&T fails to meet the interim requirement for any license, the license term should be reduced to eight years.[50] The licenses would also be subject to a "keep-what-you-use" provision for the end-of-license-term performance requirements (with the unused portion of the license terminating automatically without Commission action and made available for reassignment).[51]

F. The Commission Should Require AT&T to Give Public Safety Priority Access on its Commercial Networks

In its Petition to Deny, RTG argued that the Commission should require AT&T to provide priority access to public safety because that condition would ensure that public safety continues to have the "necessary resiliency, capacity and redundancy" needed for its life-saving, mission-critical activities.[52] RTG noted that requiring AT&T to provide priority access was necessary given the increased scope of AT&T's spectrum holdings in the 700 MHz band that would result if this transaction is approved.[53] Cellular South expressed similar concerns related

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[48] *Id.* ¶ 195.

[49] Specifically, 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. For EAG licenses, AT&T would be required to meet this benchmark on an EA basis.

[50] *See* 47 C.F.R. § 27.14(g).

[51] *See id.*

[52] RTG Petition to Deny at 23 (quoting *National Broadband Plan* at 315).

[53] *Id.*

to the harm to the operations of public safety agencies that would stem from AT&T's utilization of its increased holdings in the 700 MHz band.[54]

Achieving cost-based roaming on an alternative band is important for public safety to ensure redundancy and affordable roaming, particularly in a highly concentrated market where much of the 700 MHz spectrum is held by a single carrier. For this reason, a condition requiring AT&T to provide public safety with priority access on its commercial networks at the lowest unit charge is critical to augment public safety interoperability with the 700 MHz band and to promote the deployment of a nationwide, interoperable public safety wireless broadband network, consistent with the Commission's public safety broadband goals. The National Broadband Plan recommended that "authorized public safety users should get priority access on commercial networks, including all networks using the 700 MHz band" and that the Commission require CMRS providers to "give public safety users the ability to roam on commercial networks in the 700 MHz" band.[55] This condition would also ensure that public safety continues to have the spectrum resources it needs for its life-saving, mission-critical activities, no matter how AT&T utilizes its increased holdings in the 700 MHz band.

IV. CONCLUSION

In the event the Commission concludes that it cannot deny the application or subject any grant to the conditions set forth above, the Commission should hold the application in abeyance, pending resolution of all pending FCC rulemaking proceedings that address the issues raised by the proposed conditions.[56] With respect to the data roaming proceeding, anticipated to conclude

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[54] *See* Cellular South Petition to Deny at 16.

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

[56] *In the Matter of Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, Public Notice, RM No. 11497, DA 08-2278 (released October 10, 2008); *In the Matter of Rural Telecommunications Group, Inc. Petition for Rulemaking to*

with the issuance of a Second Report and Order at the Commission's scheduled April 7, 2011 open meeting, the Commission should refrain from acting on the subject transaction until any such data roaming order becomes final and unappealable.

FOR THE FOREGOING REASONS, RTG respectfully requests that the Commission act in a manner consistent with the views expressed herein and in RTG's Petition to Deny.

Respectfully submitted,

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March 28, 2011

Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz, Public Notice, RM No. 11498, DA 08-2279 (released October 10, 2008); *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*, Public Notice RM No. 11592, DA 10-278 (released February 18, 2010); *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, WT Docket No. 05-265, FCC 10-59 (released April 21, 2010).

ATTACHMENT A

The Commission Should Require All of AT&T's 700 MHz Devices to be Fully Interoperable Across the Entire 700 MHz Band

1. An Interoperability Requirement Would Promote Competition, Innovation, and Economic Growth; Increase Consumer Choice; Enhance Public Safety; and Provide Additional Public Interest Benefits.

Competition, Innovation, and Economic Growth. Device interoperability in the 700 MHz band brings significant economies of scale to both carriers and consumers, facilitating enhanced competition in the band. For carriers, economies of scale can encourage manufacturers to build handsets with chipsets that work on the carriers' frequencies, increasing the availability of devices and competition among manufacturers, and reducing costs for carriers. AT&T and Verizon (the "Big Two") are overwhelmingly the preferred customers of equipment manufacturers, and their ability under the 3GPP standards to adopt "designer" private band classes for their handsets (and, in AT&T's case, to exclude the Lower 700 MHz A Block licensees from such band classes) means that none of the innovation, product development, feature design, or economies of scale of the forthcoming LTE equipment will benefit Lower 700 MHz A Block licensees. On other hand, the economies of scale provided by devices that work across the entire paired 700 MHz spectrum would benefit all 700 MHz service providers, including both AT&T and Verizon as well as smaller rural and regional carriers (which were overwhelmingly knocked out of the bidding for the majority of the 700 MHz spectrum).

Market conduct that weakens smaller carriers not only leads to even greater concentration among the Big Two (as this proposed spectrum acquisition would achieve), but it also further weakens the ability of smaller carriers to convince equipment manufacturers to produce devices that operate on all of the paired 700 MHz spectrum (because of the carriers' smaller relative size and market penetration). And there is an added incentive, difficult to detect by government

agencies, for AT&T (and Verizon) to discourage manufacturers from even cooperating with A Block licensees by favoring manufacturers that produce devices that only operate on their private band classes.

An interoperability requirement will also prevent AT&T from turning Lower 700 MHz A Block spectrum into essentially stranded spectrum capacity. As Professor Peter Cramton notes, "A Block bidders at the time of the [700 MHz] auction had no way of knowing that the Big Two post-auction would be allowed to adopt carrier-specific bands that would damage the value of the A Block."[57] Other established CMRS bands, including cellular, Personal Communications Services ("PCS"), and Advanced Wireless Services ("AWS"), are all within-band interoperable, and A Block bidders had every reason to believe that this market-driven interoperability practice would continue in the 700 MHz band.

Indeed, a device interoperability requirement will benefit customers of all carriers and spur additional product innovation. More than perhaps any other consumer or communications device, broadband-enabled smart phones have been the focus of wireless product innovation and design. This has led to a historic virtuous cycle resulting in almost a million applications available today that are used by millions of customers who gain productivity efficiencies in their professional and personal lives. One need only consider the torrent of innovation following the introduction of the first iPhone by every other manufacturer – and by Apple itself, as it has rolled out further iPhone (and iPad) models – to recognize how mobile devices can be key drivers for creating jobs and economic growth. Without across-the-band interoperability, that innovation will simply not reach customers of Lower 700 MHz A Block licensees. Equipment manufacturers will have little incentive to innovate and provide compatible devices, particularly

[57] Peter Cramton, *700 MHz Device Flexibility Promotes Competition*, attachment to *Ex Parte* filing by the Rural Cellular Association, RM Docket No. 11-592, 8 (filed Aug. 9, 2010) ("Cramton").

if such innovation runs contrary to the wishes of their two largest (by far) customers. This reduced innovation will not only make smaller rural and regional carriers less competitive, but it will also effectively deprive their customers of the innovation occurring on other 700 MHz devices and make those customers less productive; in short, the virtuous cycle will not touch those customers' lives and productivity.

There is no reason to believe that 700 MHz device interoperability is too costly or impractical. Indeed, the majority of petitioners support this condition.[58] As Doug Hyslop and Chris Helzer of Wireless Strategy, Inc. have demonstrated,[59] a device can use all the paired blocks in the 700 MHz spectrum (including the public safety spectrum), with just two duplexers (one for Band Class 12 and one for the new upper band proposed by the Coalition for 4G in America last year).[60] Far from presenting a cost or form factor issue, incorporation of a flexible design requirement for AT&T devices is eminently doable. And as Raul L. Katz, Javier Avila, and Giacomo Meille have demonstrated, interoperablity among all carriers operating in the 700 MHz band (along with data roaming) will lead to investment resulting in creating or retaining 117,000 jobs in the 19 states with the lowest broadband availability and penetration in the United States.[61]

Consumer Choice. Preserving interoperability will also enhance consumer choice. A customer who acquires a smart phone that operates on all paired bands can choose, and switch, among any provider on those bands and is not limited to operators in Band Class 17 (thus

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[58] Cellular South Petition to Deny at 14-18 (filed Mar. 11, 2011); Free Press et al. Petition to Deny at 18-19 (filed Mar. 11, 2001); RCA Petition to Deny at 8, 12 (filed Mar. 11, 2011).

[59] Wireless Strategy, *700 MHz Band Analysis*, attachment to *Ex Parte* filing by MetroPCS Communications, Inc. *et al.*, WT Docket No. 06-150 (filed May 10, 2010).

[60] *Ex Parte* filing by the Coalition for 4G in America, WT Docket No. 06-150 (filed Apr. 28, 2010).

[61] Katz, Avila & Meille, *Economic Impact of Wireless Broadband in Rural America*, Attachment to *Ex Parte* filing by RCA in WT Docket No. 06-150 (filed Feb. 24, 2011).

promoting pro-consumer churn). It is axiomatic that when there are more operators that can service a potential customer, each operator must raise its competitive offer. The interoperability of network operators in the mobile voice market has led to fierce competition, but that competition assumes that customers can switch among different providers of compatible technologies (CDMA, GSM, and iDEN).

Interoperability also leads to a more competitive roaming environment. Customers whose devices do not operate on the A Block (*e.g.*, future AT&T 700 MHz LTE customers) cannot have the choice of A Block operators as potential roaming providers. This reduces the competitiveness of the data roaming marketplace and may limit the availability of service entirely in rural markets where AT&T has not deployed service. More significantly, it reduces the ability of A Block operators to compete for roaming agreements for any non-A Block-equipped phones. This further weakens regional and rural operators operating in Band Class 17 and harms consumers living in and traveling to rural areas.[62]

Public Safety. An interoperability requirement is also essential for public safety users. Regardless of how public safety is ultimately accommodated in the D Block, there are myriad devices that comprise public safety communications, and these devices must interoperate. As the National Broadband Plan stressed, "[t]o ensure the necessary resiliency, capacity and redundancy, the public safety community should be able to roam and obtain priority access on other commercial broadband networks."[63] The Commission should fulfill the vision of the National Broadband Plan and ensure interoperable 700 MHz networks for public safety.[64]

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[62] Roaming issues are discussed in more detail in the Reply.

[63] Federal Communications Commission, *Connecting America: The National Broadband Plan*, 315 (rel. Mar. 16, 2010).

[64] AT&T has acknowledged that roaming between "public safety's 700 MHz footprint . . . and commercial networks . . . would be seamless and automatic" if "public safety entities and their

Moreover, as Professor Cramton observed, without design flexibility, "the build out of 4G to rural regions and for public safety will be substantially delayed and more costly when built. This is especially troubling given that the 700 MHz spectrum is ideally suited to provide rural and public safety coverage."[65]

2. AT&T Itself Has Acknowledged the Efficiency and Public Interest Benefits of Interoperability Requirements.

AT&T cannot credibly dispute the significant benefits of an interoperability requirement or the fact that RTG's proposed conditions are in the public interest. Indeed, AT&T has in the past made the exact arguments in favor of band harmonization that RTG makes here.[66] Urging the Commission to harmonize its 3G advanced wireless services allocation with international allocations, AT&T argued that "harmonization promotes global roaming, permits expanded interoperability, allows manufacturers to take advantage of economies of scale – leading to lower equipment and service costs – and minimizes 'the potential for technological divides' based on information haves and have nots."[67] AT&T argued that harmonization was critical to meet the growing demand for wireless broadband, to reduce the complexity and expense of devices, and to reduce the number of modes and bands that must be built into devices.[68]

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commercial partners can develop dual-band devices with standard commercial network codes." *See* Comments of AT&T, Inc., PS Docket No. 06-229 18 (filed Nov. 12, 2009). But if AT&T has its way here, public safety entities would either have to pay a premium to develop specialized devices capable of operating on all paired 700 MHz bands or reduce costs by relying on AT&T's or Verizon's economies of scale, but lose full interoperability and nationwide coverage.

[65] Cramton at 7-8.

[66] *See* Comments of AT&T Wireless Services, Inc., RM-9920 (filed Aug. 28, 2000) ("*AT&T WRC-2000 Comments*"); Reply Comment of AT&T Wireless Services, Inc., ET Docket No. 00-258 (filed Mar. 9,, 2001) ("*AT&T AWS Reply Comments*").

[67] *AT&T AWS Reply Comments* at 3 (citing Comments of Personal Communications Industry Association, ET Docket No. 00-258, 8 (filed Feb. 22, 2001)).

[68] *Id.* at 3-4 (citing Comments of Nortel Networks, Inc., ET Docket No. 00-258, 10 (filed Feb. 22, 2001); Comments of Nokia, Inc., ET Docket No. 00-258, 2-3 (filed Feb. 22, 2001) ("*Nokia AWS Comments*"); Comments of Siemens Corp., ET Docket No. 00-258, 19 (filed Feb. 21, 2001); Comments of

AT&T's stated reasons for harmonizing 3G allocations are nearly identical to the concerns expressed by RTG here. AT&T stressed that economies of scale are necessary to "ensure deployment of a greater array of 3G services" because "manufacturers have limited resources and will develop and build technologies first for the largest markets in order to maximize return on investment."[69] AT&T explained that entities in the "secondary" allocation are "treated as a lesser priority" and are "the last to receive innovative services" and "the cutting edge innovative products," which "tend to arrive later to market, if at all."[70] Finally, in urging the Commission to reject arguments by Cingular and Verizon that it should not delay 3G deployment in favor of spectrum harmonization, AT&T made clear that rushing to quell urgent pleas for 3G deployment would result in "inefficient spectrum planning."[71] To avoid the same result now that AT&T feared then, the Commission should not heed AT&T's pleas to favor its LTE deployment over establishing efficient and consumer friendly device interoperability conditions in the 700 MHz band.

3. An Interoperability Requirement is Consistent with Decades of Commission Precedent.

The Commission has consistently supported interoperability, and competitive concerns are the driving force behind the Commission's interoperability decisions. When competitive market conditions incentivize the industry to develop interoperable technology, the Commission

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VoiceStream Wireless Corp., ET Docket No. 00-258, 2 (filed Feb. 23, 2001) ("*VoiceStream AWS Comments*"); Comments of Orange, ET Docket No. 00-258, 2 (filed Feb. 23, 2001)).

[69] *Id.* at 4 (citing Comments of Motorola, Inc., ET Docket No. 00-258, 18 (filed Feb. 21, 2001) ("*Motorola AWS Comments*")); *AT&T WRC-2000 Comments* at 4 (noting that "manufacturers increasingly will concentrate their efforts on developing equipment for those . . . that operate on the same bands . . . in order to realize the production economies associated with larger markets").

[70] *AT&T AWS Reply Comments* at 4 (citing *Motorola AWS Comments* at 18; *Nokia AWS Comments* at 3; *VoiceStream AWS Comments* at 2).

[71] *Id.* at 4-5; *AT&T WRC-2000 Comments* at 3 (urging the Commission to ensure that spectrum "is allocated in the most efficient and pro-consumer manner feasible").

allows competition to spur development on its own. But when the goal of interoperability is threatened either by anti-competitive behavior or lack of competitive market conditions, the Commission has made clear that it will step in to ensure that consumers and carriers are not harmed. The FCC's authority to require all 700 MHz capable devices to operate on all paired 700 MHz bands is amply supported in comments filed in response to the Public Notice on the Good Faith Purchasers Alliance rulemaking petition,[72] and over the past 50 years Congress and the FCC have not hesitated to mandate technical standards to promote competition.

Wireless Service Interoperability. In the early days of cellular service, the Commission determined that, "[w]ith respect to mobile stations, all units must be capable of operating at least over the entire 40 MHz of spectrum . . . to insure full coverage in all markets and compatibility on a nationwide basis."[73] This was critically important because, at the time, there were only two competing cellular systems in each market.[74] The Commission also imposed compatibility requirements, mandating that all carriers "provide service exclusively in accordance with the then-existing compatibility standard for analog systems" in order to "accomplish two goals: 1) to enable subscribers of one cellular system to be able to use their existing terminal equipment (*i.e.* mobile handset) in a cellular market in a different part of the country (roaming); and 2) to facilitate competition by eliminating the need for cellular consumers to acquire different handset equipment in order to switch between the two competing carriers within the consumers' home market (thus ensuring reasonable consumer costs)."[75]

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[72] *See 700 MHz Block A Good Faith Purchasers Alliance Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM-11592, Public Notice, DA 10-278 (rel. Feb. 18, 2010) ("Public Notice") and comments filed therein.

[73] *Cellular Communications Systems*, Report and Order, 86 F.C.C.2d 469 ¶ 26 (1981).

[74] *Id.*

[75] *Year 2000 Biennial Regulatory Review*, Report and Order, 17 FCC Rcd. 18401, 18405 (2002).

Likewise, when determining whether to impose mandatory interoperability standards in other wireless service contexts, the Commission has maintained its general support for interoperability. Although the Commission has stated that it will rely on the market conditions rather than regulation to facilitate this when appropriate,[76] the Commission has made clear that it will intervene if progress is not being made.[77] In fact, interoperability has been so important that the Commission has granted waivers when the practical effect of not granting a waiver would be to thwart interoperability.[78]

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[76] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd. 4957 ¶ 162 (1994) ("*PCS Order*") ("[I]nteroperability for PCS is an important and beneficial goal. We believe, however, that acceptable interoperability is likely to emerge between PCS licenses in a timely manner without our intervention. Our decisions to provide for large regional MTA licenses, to move all PCS licenses to the lower band, and to permit further aggregation of spectrum blocks across geographic regions all foster wide-area roaming and interoperability. In addition, competitive bidding for PCS licenses will facilitate the development of regional or nationwide systems."); *Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd. 7988 ¶ 167 (1994) ("*CRMS Order*") ("Based on the record, we conclude that there is no need to adopt any new interoperability standards for CMRS at this time. Although we adopted mandatory interoperability requirements at the inception of cellular service, we believe that competition in the CMRS marketplace now provides sufficient incentives for CMRS licensees to develop interoperable technology."); *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 3 FCC Rcd. 703 ¶ 52 (1998) ("*Auxiliary Cellular Services Order*").

[77] *PCS Order*, ¶ 165 (1994) ("We intend to monitor the industry's progress in developing and implementing PCS technical standards. . . . If we find that the development of PCS technology is not proceeding in a manner that will accommodate roaming and interoperability, we may revisit this issue and consider what actions the Commission may take to facilitate the more rapid development of appropriate standards."); *CRMS Order* ¶ 168 (1994) ("Although we have concluded that there is no immediate need for the establishment of interoperability standards, we will initiate an inquiry in the near future to examine this issue in greater detail."); *Auxiliary Cellular Services Order* ¶ 52.

[78] *Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, and VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees*, Memorandum Opinion and Order, 15 FCC Rcd. 3341 ¶ 43 (2000) (explaining that waiver of the substantial use condition is justified because "[i]f we were to require Omnipoint to use IS-661 on a commercial basis in the New York MTA as a condition of its license, we would be mandating the use of a technology that is not interoperable with any other PCS system in any other market. At the same time, the practical effect today would be to thwart the potential for the nation's largest market to be part of any GSM network"); *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Third Report and Order, 9 FCC Rcd. 1337 n.11 (1994) ("The Commission will consider a waiver only in a case in which there is an overriding national objective that may be thwarted; such as if nationwide PCS interoperability were to be thwarted.").

In addition, the Commission has repeatedly acknowledged the benefits of interoperability among spectrum blocks in the same service. When considering the rules for PCS, it declared, "[i]nteroperabilty, not only nationwide on one block but also between PCS spectrum blocks, should be in the business interest of all PCS providers . . . [and] we believe that it is in the public interest for the industry eventually to achieve compatible interoperability standards for all PCS spectrum blocks."[79] The Commission also recognized "the general benefits of large contiguous blocks of harmonized spectrum, including economies of scale in equipment development and quicker deployment of advanced services," when allocating spectrum to support advanced wireless services ("AWS").[80]

UHF-VHF Tuner Interoperability. The 700 MHz device interoperability problem presented by the AT&T-Qualcomm transaction echoes a situation the United States television industry faced in the early 1960s. Competition to the entrenched VHF spectrum TV operators was being threatened by UHF TV broadcasters (ironically, the previous occupants of some of the spectrum at issue in this transaction). Congress recognized that receiver manufacturers had little incentive to include UHF tuners in television receivers. Under the All-Channel Receiver Act[81]

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[79] *PCS Order* ¶ 164 (explaining that "[s]uch broad interoperability will increase the economies of scale in manufacturing PCS equipment such as handsets, will ma[k]e consumers more likely to subscribe to PCS because they can easily move from carrier to carrier without having to purchase new handsets, and will make it easier for PCS licensees to aggregate blocks of PCS spectrum up to 40 MHz and to create wide-area or national PCS systems").

[80] *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services Including Third Generation Wireless Systems*, Second Report and Order, 17 FCC Rcd. 23193, 23202 (2002).

[81] 47 U.S.C. § 303(s); *see also* Longley, *The FCC and the All-Channel Receiver Bill of 1962*, 52 JOURNAL OF BROADCASTING 293 (1969) ("One of the persistent problems facing the Federal Communications Commission throughout the 1950's and early 1960's was that of UHF television. Introduced in 1952 on an intermixed basis with already flourishing VHF television, UHF television found itself unable to compete with VHF for advertisers or audience. While the Commission, during this period, repeatedly expressed its concern with the preservation and development of UHF television, it failed to implement any reliable plan for doing so. The result was that the FCC was faced, by 1961, with

and the FCC's implementing regulations, all new TV sets sold in the U.S. after 1964 were required to have built-in UHF tuners.

The Senate Report of 49 years ago described the UHF-VHF problem in terms strikingly similar to the situation here: "The practical effect of this scarcity of all-channel receivers is clear: It prevents effective competition between UHF and VHF stations which operate in the same market . . . . Nor has the viewing public shown any substantial willingness to buy receivers capable of receiving UHF signals, except in those areas hwere [sic] no VHF programs are available."[82] Substitute Lower 700 MHz A Block frequencies for UHF frequencies in this analysis and the situation facing A Block licensees is strikingly similar.

The FCC enhanced the tuner requirement by further imposing on set makers the duty to provide comparable tuning so that UHF channels were as easily tuned as VHF channels.[83] These "all channel" efforts reverberate in the request here that all blocks of the 700 MHz band be accessible on all broadband handsets. Indeed, Congressman Ayres described the advantages of VHF stations over UHF due to the lack of all-channel receivers in terms that resonate with the situation facing Lower 700 MHz A Block licensees and non-interoperable devices controlled by

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a failing broadcast service. It was in the All-Channel Receiver Bill of 1962 that the means were found for the rejuvenation of UHF television.").

[82] All-Channel Television Receivers, Sen. Rep. No. 1526, 87th Cong. 2d Sess., at 3 (May 24, 1962). Congress rejected the following Minority Views expressed in the Senate Report, and wisely so: "If, today, we force people to buy TV sets they don't want and can't use, where will we draw the line tomorrow, if, in fact, there is any line left to draw?" *Id.* at 9. Had UHF continued to fail, developments like the construction of hundreds of UHF educational stations and the advent of a fourth commercial TV network (i.e., Fox) would have never occurred. Curiously, the House Report, while declining to endorse the bill, nevertheless considered that sales of "any set which is not capable of performing in the manner described above [*i.e.*, all UHF and VHF reception] as being *a fraud on the public* and we would regard its shipment as being in violation of section 2 of this bill and subject to all the sanctions and penalties of any other violation of the Communications Act." All-Channel Television Receivers, H.R. Report No. 1559, 87th Cong. 2d Sess., at 13 (Apr. 9, 1962) (emphasis added).

[83] "If a continuous, detent or pushbutton system is provided for tuning the VHF channels, the same type of system must be provided for tuning the UHF channels." *All-Channel TV Receivers*, Report and Order, 18 R.R.2d 1577 (1970).

AT&T: "These single VHF stations have the same advantage over their UHF competitors that a man armed with a tommygun would have in a duel with an adversary who had only a bow and arrow."[84]

DTV Transition. The FCC engaged in a similar interoperability pursuit when it adopted the requirement that all TV broadcast receivers shipped after June 30, 2007 must be capable of receiving the signals of digital TV broadcast stations over the air.[85] By mandating a DTV tuner, the FCC again recognized its responsibility to insure that new services (DTV) would be accessible for all consumers, not just those who might choose to pay more for a DTV-equipped receiver. The public purpose of the DTV transition, in fact, involved different public policy considerations, namely readying the country for the DTV switch-over. But the policy animating the requirement applies readily here: providing for more consumer choice as well as lower prices for receivers. And adoption of DTV-tuner equipped sets led to more consumer choice, namely over-the-air services that digital TV broadcasters (including high definition and multicast digital programming) provide. The FCC subsequently modified its rules to *advance* the date on which smaller, and less expensive TVs, would have to comply with the DTV tuner requirement, recognizing that speeding up its "all digital channels" requirement served the public interest.[86]

4. An Interoperability Requirement is also Consistent with European Policy.

European policy towards their "digital dividend" spectrum (792-862 MHz, the "800 MHz" band) has consistently been to stress interoperability and device (or "terminal")

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[84] All Channel Television Receivers and Deintermixture, Hearings on H.R. 8031, before the Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess., at 323 (Statement of Cong. William H. Ayres).

[85] *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd. 15978 ¶¶ 8-46 (2002).

[86] *See Requirements for Digital Television Receiving Capability*, Second Report and Order, 20 FCC Rcd. 18607 (2005).

economies of scale. Technical regulations also have consistently been set for the band as a whole, seeking to avoid fragmentation.

The European regulatory framework explicitly calls for harmonization of the use of radio frequencies, "consistent with the need to ensure effective and efficient use . . . and in pursuit of benefits for the consumer such as economies of scale and interoperability of services."[87] Even before most recent amendments to this regulatory framework, European institutions have stressed the need for interoperable mobile equipment. In a 2004 Communication on "Mobile Broadband Services," the European Commission noted that "[i]nteroperability is critical for the deployment of mobile broadband services. It is a multi-faceted issue and is necessary at various levels: device to network (radio access and core network); device to device; network to network; and between content and/or applications."[88]

The European Commission acted consistent with this policy in its approach towards the 800 MHz band. The Commission Decision 2010/267/EU from May 6, 2010 harmonized technical conditions for the 800 MHz band on the basis of Conference on Postal and Telecommunications ("CEPT") reports.[89] The CEPT reports were based on a clear policy to avoid fragmentation and achieve economies of scale for equipment. CEPT Report 31, prepared in response to a Commission mandate and the basis on which the Commission decision was adopted, states that a "single preferred frequency arrangement for this band" should be adopted.[90] It further states that this policy is based on the "reduced development and operating

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[87] Electronic Communications Framework Directive 2002/21/EC, Article 9 (as amended by Directive 2009/140/EC).

[88] COM(2004) 447.

[89] *See* OJ L 117, 11.5.2010, Recital 7 and Art. 1.

[90] *See* CEPT Report 31, Report from CEPT to the European Commission in response to the Mandate on "Technical considerations regarding harmonisation options for the digital dividend in the European

costs for future radio infrastructure or terminal equipment to be used in the 790-862 MHz band by avoiding the fragmentation of the CEPT market in this frequency band that could occur with incompatible frequency arrangements."[91]

The CEPT report identifies objective cost savings from adopting a common band arrangement across Europe. It states that:

> "[a]n analysis undertaken by the GSMA shows the cost penalty in adopting a national approach: Having fragmented national bands for mobile will have a significant impact on handset costs, perhaps driving them up by 50% or more (depending on market size). . . . [T]here are significant economies of scale to be achieved in the production of terminals with internationally identified common frequency bands. Without the identification of common bands, handset costs would be prohibitively high, and the effect will be a significant reduction in the take-up of any mobile service. This will harm not only consumers and industry directly, but also the benefits that mobile offers to economies as a vital infrastructure."[92]

Earlier work by the Commission and CEPT related to the digital dividend 800 MHz band support this interoperability policy. For example, the 2009 Commission Staff Working Document on the digital dividend policies in numerous instances referred to this policy, stating:

> Virtually all of the expected potential uses of the digital dividend (whether these are new broadcasting or wireless broadband services) rely on the possibility to achieve critical mass and economies of scale. It is also essential to underline the importance of a coordinated approach to ensuring that these economies of scale throughout the EU are maximised, and that internal market objectives are achieved as much as possible by enabling interoperability and roaming between Member States. Both of these can best be furthered through a common frequency allocation and common adoption of technical conditions. Typically, it is significantly more cost-efficient for equipment manufacturers to produce network and consumer equipment to a single set of technical conditions, than to have multiple, smallerscale production lines for different markets.[93]

Union"; "Frequency (channelling) arrangements for the 790-862 MHz band"(Task 2 of the 2nd Mandate to CEPT on the digital dividend), Final Report on 30 October 2009, at 15.

[91] *See id*.

[92] *See id.* at 16-17.

[93] SEC(2009) 1436, 16.

> The cost-efficiency and feasibility of providing roaming services, particularly for wireless broadband, which enhances the value of the service to citizens, are greatly improved compared to a situation in which consumer equipment requires multi-band operation.[94]
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> [A] common frequency allocation and common adoption of technical conditions would result in economies of scale for equipment manufacturing. A harmonised choice of technology and frequencies would reduce development times, costs, create greater certainty and enable manufacturers to bring equipment to market faster.[95]
>
> There would be benefits arising from the single market dimension: pan-European interoperability and roaming, particularly in terms of economies of scale for end-user and network equipment. Based on Normalised Price of equipment, the Commission study estimated these economies at 40% of retail prices for the first 50 million users, and with additional 5% for the next 50 millions, and finally 1.5% more if the remaining parts of the EU can be subject to the same harmonised conditions of use.[96]

In addition, the CEPT ECC Decision (09)03 on the 800 MHz band that preceded EU action expressed the principle that "[c]ommon frequency arrangements have been defined, to the greatest extent possible, to facilitate roaming, border coordination and to achieve economies of scale for equipment, whilst maintaining the flexibility to adapt to national circumstances and market demand."[97] Section (e) notes that "harmonised frequency arrangements facilitate economies of scale and availability of low-cost equipment."[98] Taking into account this analysis, the decision established a preferred harmonized frequency arrangement.

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[94] *Id.* at 21.

[95] *Id.*

[96] *Id.*at 36.

[97] *See* ECC/DEC/(09)03, Explanatory Memorandum, 2.

[98] *See id.* at 4.

5. Conclusion

For the foregoing reasons, the Commission should require, as a condition of any approval in this transaction, that all of AT&T's 700 MHz devices be fully interoperable across the entire 700 MHz band. Doing so would promote competition, innovation, and economic growth; increase consumer choice; enhance public safety; and provide additional public interest benefits.