

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

In the Matter of	)	
	)	
The State of Mobile Wireless Competition	)	WT Docket No. 11-186
	)	

**REPLY COMMENTS OF AT&T INC.**

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AT&T Inc. submits the following reply comments in response to the Public Notice released by the Wireless Telecommunications Bureau on November 3, 2011.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

As discussed in our opening comments, the wireless ecosystem ranks among the most intensely competitive sectors of the American economy. Industry output is exploding with the surge in demand for mobile broadband services. Every year, revolutionary new mobile devices, applications, and technologies relentlessly reshape the marketplace. Quantity-adjusted prices—for voice, messaging, and, most of all, data—have plummeted for years. Network providers invest tens of billions of dollars each year to meet surging demand, despite a severe recession. Wireless advertising is aggressive and ubiquitous. And competition in the wireless ecosystem is multi-dimensional, involving endless permutations of networks, devices, operating systems, and mobile applications, as well as great variety in service characteristics, price levels, price structures, and other terms and conditions of service.

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<sup>1</sup> Public Notice, *The State of Mobile Wireless Competition*, WT Docket No. 11-186 (rel. Nov. 3, 2011).

Virtually every commenter in this proceeding acknowledges that the wireless industry has generated enormous consumer benefits. And larger and smaller providers alike urge the Commission to call the industry what it so plainly is: competitive. As MetroPCS explains:

The retail mobile wireless services marketplace is *unquestionably competitive*, with five to six retail facilities-based competitors and numerous mobile virtual network operators in most metropolitan areas. Mobile services continue to ignite an economic spark in a down economy, and the wireless industry should be commended for its continued investment and robust competition at the retail level. *Contrary to the Commission's findings in the prior two mobile wireless competition reports, MetroPCS submits that "effective competition" currently does exist in the retail wireless industry.*<sup>2</sup>

The Commission itself has found that an overwhelming and still-increasing percentage of Americans—approximately 90 percent by mid-2010—lived in census blocks covered by *five or more* facilities-based providers. These facts undermine any claim that the industry is in danger of excessive concentration or will somehow veer towards “duopoly” unless the Commission subjects it to intrusive regulation.<sup>3</sup>

The “duopoly” rhetoric, repeated here by RCA and embodied in retrograde proposals to inflict “dominant carrier” regulation on AT&T and Verizon Wireless,<sup>4</sup> is as familiar as it is empty. For years, the same industry actors have invoked that rhetoric in pushing for a broad range of market-altering regulations, all promoted ostensibly to foster “competition” but

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<sup>2</sup> MetroPCS Comments at 1 (emphasis added). Unless otherwise indicated, all references to a party’s “Comments” signify the opening comments that party filed in this docket in December 2011.

<sup>3</sup> Fifteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 26 FCC Rcd 9664, 9705 ¶ 45 Table 6 (2011) (“*Fifteenth Report*”).

<sup>4</sup> *See, e.g.*, RCA Comments at 4; MetroPCS Comments at 33-34. Citing the rise of competition, the Commission exempted wireless carriers from the hallmark of dominant carrier regulation—tariffing requirements—in 1994. *See* Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1463-93 ¶¶ 124-219 (1994). The marketplace is immeasurably more competitive now than then.

designed in fact to help insulate those industry actors from the very pressures of competition. For example, in its pitch for new regulatory advantages, NTCA laments that “competition from national carriers is a concern” to three-quarters of its members, particularly when “[c]onsumers in rural areas see the advertisements of national carriers and expect their local providers to offer the same prices” and other terms of service.<sup>5</sup> Of course, what NTCA describes here, and seeks regulatory help in suppressing, is pro-consumer competition itself. Meanwhile, each technological development and Commission inquiry is met with claims that the industry will hurtle towards “duopoly” unless the Commission distorts the basic dynamics of this highly competitive marketplace. But each time the Commission rejects proposals for regulatory intervention, what follows in the real world is further proof that the marketplace remains intensely competitive: output rises, prices fall, smaller competitors grow, new firms enter, innovation accelerates, and consumers benefit.

Undaunted, a few commenters use this opportunity to dust off their regulatory wish-list, renewing their proposals for everything from handset “interoperability” mandates to increased backhaul regulation. These proposals are misplaced here; this is not a rulemaking proceeding, but an empirical inquiry into the state of competition generally. In any event, these proposals lack merit for the reasons AT&T has already exhaustively explained in the other proceedings devoted to them. For example, there is no basis for intrusive new regulation of the highly competitive backhaul marketplace. Such regulation would be particularly inapt now that escalating mobile demand is forcing the entire industry—including Sprint—to move rapidly to alternative Ethernet-based backhaul services, which ILECs enjoy no particular advantage in

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<sup>5</sup> NTCA Comments at 3 (internal quotation marks omitted).

supplying.<sup>6</sup> There is likewise no basis for various parties' attacks on exclusive handset arrangements. Such arrangements are engines of innovation, as the Android response to the iPhone vividly illustrates, not competitive threats to be stamped out.<sup>7</sup> We have discussed each of those issues in detail in our opening comments and do not repeat that discussion here.

As explained in Section II below, there is no greater merit to the other pro-regulatory proposals floated in a handful of opening comments. *First*, the Commission would subvert consumer welfare, and rob taxpayers of billions of dollars, if it rigged future spectrum auctions to hinder the participation of larger providers and thus keep spectrum winners from paying the full market price for new spectrum. *Second*, proposals to make the data-roaming rules yet *more* intrusive, before the ink is even dry on the *Data Roaming Order*, are as unripe as they are substantively untenable. *Third*, the Commission would have no plausible basis for imposing mandatory "interoperability" rules on 700 MHz handsets, particularly before resolving interference concerns relating to Channel 51 and the Lower E Block, and such rules would succeed only in setting back the LTE migration, to the detriment of American consumers.

Finally, as discussed in Section III, the Commission should promptly open a rulemaking proceeding to update its spectrum screen and, in particular, to reflect new spectrum that has been freed up for mobile voice and data services. The spectrum screen has assumed a central (if flexible) role in both merger and post-auction licensing proceedings, but it is currently applied in

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<sup>6</sup> See AT&T Comments at 42-48; Comments of AT&T Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, AT&T Corp. *Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25 & RM-10593, at 14-15 (filed Jan. 19, 2010).

<sup>7</sup> See AT&T Comments at 25-27; Comments of AT&T Inc., *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, at 7-21 (filed Feb. 2, 2009); see also Mercatus Center Comments at 2 ("These wildly popular products were met by a storm of market reactions, including the creation of new platforms such as the fast-growing, Google-backed Android software partnership involving a phalanx of device makers and a burgeoning universe of application writers.").

an ad hoc, party-specific manner without comprehensive public participation. Given transparency concerns and ongoing disputes about what spectrum categories should be included in the screen, the Commission should now conduct its spectrum-screen analysis through industry-wide rulemaking proceedings subject to full public comment and judicial oversight.

## DISCUSSION

### I. THE WIRELESS INDUSTRY IS STRONGLY COMPETITIVE.

As discussed in our opening comments, the wireless ecosystem is a paragon of intense, multi-dimensional competition. The percentage of Americans who live in census blocks with five or more facilities-based wireless competitors has been rapidly increasing over the past several years, from 57 percent in 2007 to 90 percent in 2010.<sup>8</sup> And quite apart from that facilities-based competition, MVNOs provide independent price-disciplining competition despite the Commission's now-obsolete rationales for assuming otherwise.<sup>9</sup> As a result of all this competitive rivalry, effective prices—for voice, text, and data—continue to decline.<sup>10</sup> Carriers also compete across a wide variety of price and non-price dimensions, challenging one another to provide the best networks, devices, and operating systems to their customers.<sup>11</sup> In Chairman Genachowski's words, “[i]t's hard to imagine an industry that's produced more game-changers than the wireless industry.”<sup>12</sup> And investment in wireless networks grows by billions of dollars each year, even as America struggles to emerge from the grimmest recession in decades.<sup>13</sup>

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<sup>8</sup> AT&T Comments at 5-6; see *Fifteenth Report*, 26 FCC Rcd at 9705-06 ¶ 45 Table 6.

<sup>9</sup> AT&T Comments at 15-18.

<sup>10</sup> *Id.* at 19-24.

<sup>11</sup> *Id.* at 24-30.

<sup>12</sup> Chairman Julius Genachowski, Remarks at CTIA Wireless 2011, at 2, 4 (Mar. 22, 2011), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-305309A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305309A1.pdf) (“*Genachowski CTIA Remarks*”).

<sup>13</sup> See AT&T Comments at 30-32.

With the customary and now-trivial exception of Free Press,<sup>14</sup> all commenters acknowledge the obvious: the modern wireless industry has generated immense consumer benefits. In MetroPCS’s words, the mobile services marketplace is “unquestionably competitive.”<sup>15</sup> The Telecommunications Industry Association, on behalf of some 600 member companies across the broadband ecosystem, likewise characterizes the marketplace as “both highly competitive and a center of technological innovation.”<sup>16</sup> CTIA asserts, and provides extensive empirical analysis proving, that “[t]he wireless marketplace has been, and continues to be, robustly competitive.”<sup>17</sup> Verizon similarly explains why, “[m]ore than ever, the various sectors of the mobile ecosystem are deeply intertwined, resulting in ‘effective competition’ that is more robust than ever before.”<sup>18</sup> And even Sprint agrees that the “2010-2011 period in mobile wireless has been characterized by network upgrades, product innovations, improved environmental stewardship, and customer value.”<sup>19</sup>

The comments further confirm that competition in this industry is local; that carriers without nationwide networks are nonetheless fierce competitors in the local markets where they compete; and that no-contract upstarts like MetroPCS and Leap (Cricket) now exert intense

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<sup>14</sup> Free Press claims that “the market for mobile wireless services in the United States has become increasingly broken,” that “the market failures . . . have continued to worsen”; that “carriers generally show few signs of being able . . . to offer better or cheaper service,” and that every provider other than AT&T and Verizon “struggles to grow or even to survive.” Free Press Comments at ii, 1. As usual, Free Press offers no evidence to support these claims, and they are completely false. Effective prices have plummeted by any measure for years, *see* AT&T Comments at 19-24; smaller carriers like MetroPCS and Leap are among the fastest-growing providers today, *see id.* at 15; and the wireless ecosystem is a source of relentlessly “game-chang[ing]” innovation, *Genachowski CTIA Remarks* at 2.

<sup>15</sup> MetroPCS Comments at 1.

<sup>16</sup> TIA Comments at 2.

<sup>17</sup> CTIA Comments at i.

<sup>18</sup> Verizon Comments at iv.

<sup>19</sup> Sprint Comments at 1.

competitive pressure on larger “postpaid” providers like AT&T, Verizon, Sprint, and T-Mobile.<sup>20</sup> MetroPCS, for example, owns or has access to licenses covering approximately 142 million people; it “currently offers service in many of the largest metropolitan areas in the United States”; it offers LTE smartphone services in all of its major markets; and by virtue of its roaming arrangements with Leap/Cricket (among others), it offers its customers nationwide coverage.<sup>21</sup> And as MetroPCS confirms, “prepaid” services compete with, and are expanding at a faster rate than, postpaid services, even as the lines between those two service categories blur.<sup>22</sup> Other “regional” and no-contract competitors have achieved striking success as well. These include Leap/Cricket (which holds licenses covering 184.6 million people) and U.S. Cellular (covering 90.5 million), as well as scores of others.<sup>23</sup> These smaller providers are not only launching next-generation smartphone services, but in some cases pioneering them; for example, MetroPCS was the first U.S. provider to offer LTE.<sup>24</sup>

Again, this competition bestows enormous benefits on consumers in the form of falling effective prices and ever-increasing innovation. The price of voice minutes has plummeted, from nearly 18 cents a minute in 2000 to less than a nickel today,<sup>25</sup> with more recent estimates

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<sup>20</sup> See generally AT&T Comments at 8-15.

<sup>21</sup> MetroPCS Comments at 6-7; AT&T Comments at 10 & n.16.

<sup>22</sup> MetroPCS Comments at 7, 15-17; see also AT&T Comments at 11-15 (describing industry-altering growth of no-contract services); Verizon Comments at iv (“Prepaid providers continue to offer aggressive pricing, prompting competitive responses in the postpaid segment.”); *id.* at 18 (“[O]ver the last four years, prepaid subscriptions have increased from 15.2 to 21.2 percent of all wireless subscriptions. Much of this gain has come from postpaid subscribers switching to a prepaid offering.”) (footnote omitted).

<sup>23</sup> See Verizon Comments at 48-49; AT&T Comments at 10-15.

<sup>24</sup> AT&T Comments at 12-13 (discussing LTE offerings of MetroPCS, Leap, C-Spire, and U.S. Cellular).

<sup>25</sup> See *id.* at 19 (citing *Fifteenth Report*, 26 FCC Rcd at 9782-83 ¶ 191 Table 20).

indicating that it is now below 4 cents.<sup>26</sup> In addition, “[f]or voice service, the revenue per customer (a proxy for what consumers pay each month) declined 30 percent over the five year period between 2005 and 2010 from \$47.46 to \$33.02 per month.”<sup>27</sup> Text and data rates have fallen even faster. As explained in our opening comments, the effective price per text has dropped for the fifth consecutive year to \$0.009 in 2009, a 25 percent decline from 2008.<sup>28</sup> And the effective price per megabyte of data has fallen fastest of all—by approximately 90% between 2008 and 2010.<sup>29</sup> Again, the only threat to these downward price trajectories is the nation’s spectrum crisis; as demand outstrips supply, providers will need to rely more heavily on usage tiers and throttling to constrain demand.<sup>30</sup> The Commission can avoid that outcome only by freeing up more spectrum for broadband use and allowing market transactions that optimize the efficiency of available spectrum.

While prices are falling across the board, carriers are further competing to attract customers by offering the most attractive and innovative handsets and operating systems. As CTIA notes, “[t]he number of device manufacturers and devices has flourished in response to

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<sup>26</sup> Phil Kendall & Sue Rudd, Strategy Analytics, *US Wireless Market Outlook 2011-2016*, at 5 (2011).

<sup>27</sup> Verizon Comments at 9.

<sup>28</sup> AT&T Comments at 21 (citing *Fifteenth Report*, 26 FCC Rcd at 9784 ¶ 193); *see also* Verizon Comments at 9.

<sup>29</sup> AT&T Comments at 22; *see also* Verizon Comments at iv (“The trend towards lower prices and greater value has intensified, with voice revenue per customer declining 30 percent between 2005 and 2010, price per message declining from 5.7 cents to 0.9 cents over that same period, and price per megabyte of data service declining from 47 cents to 5 cents between 2008 and 2010, fueling mobile broadband adoption.”).

<sup>30</sup> AT&T Comments at 23-24; *see also* Mobile Future Comments at 3 (“Wireless operators urgently need more spectrum to continue to compete effectively and provide consumers with access to the fastest, most innovative mobile services and products.”).

competitive pressures in the ecosystem.”<sup>31</sup> According to CTIA’s estimates, there are at least 32 device manufacturers and over 630 devices populating the U.S. market.<sup>32</sup> No single device has a dominant position in the market, and wireless providers compete aggressively on the basis of device offerings.<sup>33</sup> The same is true of the major operating systems—including Android, iOS, Windows, BlackBerry, and Palm—and the applications stores associated with each. As CTIA explains, “[t]he market for mobile operating systems remains robustly competitive,”<sup>34</sup> with strong fluctuations in the market shares of competing operating systems.<sup>35</sup> Indeed, Google boasts that Android’s share of the market has “grown exponentially” in the few years since its release.<sup>36</sup> During only the past year and a half, Android’s share of the market has risen dramatically, from 7.1% to 46.3%.<sup>37</sup>

Network investment figures further underscore the intensity of wireless competition.<sup>38</sup> According to CTIA, wireless carriers invested more than \$20 billion in “structures and equipment” in 2009 and then almost \$25 billion in capital expenditures in 2010.<sup>39</sup> These

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<sup>31</sup> CTIA Comments at 16.

<sup>32</sup> *Id.*; see also Verizon Comments at 75 (“In this competitive marketplace, manufacturers face few if any impediments to entering the market or growing market share by offering devices that satisfy consumer demand.”).

<sup>33</sup> AT&T Comments 24-27; see also Verizon Comments at 73 (“[C]arriers, manufacturers, application developers, content providers, and other participants in the wireless ecosystem both compete and collaborate to design, manufacture, and distribute devices consumers desire.”).

<sup>34</sup> CTIA Comments at 27.

<sup>35</sup> See *id.* at 28; see also Verizon Comments at 79-80 (describing the “rapid fluctuation of various smartphone OSs”).

<sup>36</sup> Google Comments at 1.

<sup>37</sup> CTIA Comments at 28.

<sup>38</sup> *Id.* at 4 (“Ongoing investment in advanced networks by wireless providers is at the core of wireless competition.”).

<sup>39</sup> *Id.* at 5; see also AT&T Comments at 28-29 (detailing AT&T investments); Verizon Comments at 32 (noting that Verizon invested more than \$8.4 billion in 2010). These figures do

investments included the immense sums that providers have spent on towers and next-generation mobile broadband technologies, as each provider seeks to keep pace with growing demand for mobile broadband services and provide the best possible networks to their customers.<sup>40</sup> TIA predicts that these network upgrades “will boost spending on basic wireless infrastructure equipment by a projected 12.1 percent compounded annually.”<sup>41</sup> These investment figures confirm what should be obvious: precisely because this industry is strongly competitive, all providers must constantly invest to keep up with the network achievements of their rivals.

Finally, there is no merit to RCA’s reliance on HHI figures or accounting statistics to draw these competitive conclusions into question.<sup>42</sup> As discussed in our comments this year and last, HHI figures have limited relevance to fast-changing, diverse, and capital-intensive industries like this, and accounting statistics like EBITDA neither measure economic profit nor account for the vast disparities in capital investment among providers and from year to year.<sup>43</sup> RCA offers no meaningful response to those observations.

## **II. THE COMMISSION SHOULD REJECT VARIOUS COMMENTERS’ PROPOSALS FOR NEW REGULATORY INTERVENTION.**

A few commenters seek once again to use this annual competition-assessment inquiry as a platform for repeating their familiar requests for substantive regulatory intervention. These

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not include the additional multi-billion-dollar investments that providers make to acquire spectrum licenses.

<sup>40</sup> See CTIA Comments at 6-16; *see also* Sprint Comments at 1 (“Sprint and other mobile wireless carriers have and are continuing to deploy 4G networks and make major upgrades to 3G networks in hundreds of communities nationwide.”); TIA Comments at 8 (“Wireless carriers are upgrading their infrastructure to increase capacity and to launch LTE services to take advantage of the more lucrative data market.”); Verizon Comments at iv (“Competitive rivalry is . . . driving billions of dollars into 3G and 4G network deployments[.]”).

<sup>41</sup> TIA Comments at 8.

<sup>42</sup> RCA Comments at 4-5.

<sup>43</sup> AT&T Comments at 32-39.

regulatory proposals all share a common theme: they would all keep some providers—and AT&T and Verizon in particular—from competing as effectively as possible to serve their customers as well as possible. That outcome might benefit individual wireless companies, but it would thwart the public interest.<sup>44</sup>

**A. The Commission Should Reject Proposals to Limit Auction Eligibility.**

“[S]pectrum is the oxygen that ultimately sustains the mobile revolution.”<sup>45</sup> As noted in our opening comments, the “oxygen” requirements of any given provider depend on its customers’ bandwidth demands, and the Commission should therefore avoid artificial limitations on any provider’s ability to meet those demands. Claiming that AT&T has “too much” spectrum, however, some commenters ask the Commission to resurrect the functional equivalent of a spectrum cap, which the Commission rightly abandoned ten years ago,<sup>46</sup> and apply that cap against AT&T by limiting its participation in future spectrum auctions.<sup>47</sup> Other commenters, such as MetroPCS, seek to achieve essentially the same outcome through a self-interested

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<sup>44</sup> As noted, our opening comments address that point with respect to proposals for regulation of backhaul and handset exclusivity. *Id.* at 25-27 (handset exclusivity); *id.* at 42-48 (backhaul). Because the advocates of such proposals offer no new support for them, we respectfully refer the Commission to our earlier discussion.

<sup>45</sup> Chairman Julius Genachowski, Remarks at Telecommunications Industry Association 2011 Summit, at 2 (May 19, 2011), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306768A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306768A1.pdf).

<sup>46</sup> Report and Order, *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, 22693-94 ¶ 50 (2001); *see also* Notice of Proposed Rulemaking, *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, 22 FCC Rcd 17035, 17079 ¶ 101 (2007) (noting that the Commission eliminated the spectrum cap because it “found that the cap, by setting an *a priori* limit on spectrum aggregation without looking at the particular circumstances of specific proposed transactions, was unnecessarily inflexible and could be preventing beneficial arrangements that promote efficiency without undermining competition”).

<sup>47</sup> *See* RCA Comments at 2, 10-11; NTCA Comments at 5; *see also* Sprint Comments at 16-17 (urging Commission to manipulate the spectrum screen against AT&T and Verizon).

scheme of auction-distorting “bidding credits.”<sup>48</sup> These proposals are untenable on several independent levels.

*First*, they run headlong into the Commission’s longstanding policy of allowing market forces, rather than regulation, to shape the development of wireless services.<sup>49</sup> The Commission has long recognized that the best means of efficiently allocating new spectrum to the benefit of consumers is to auction it to the highest bidder and facilitate a secondary marketplace where providers may purchase or sell spectrum rights.<sup>50</sup> For example, in adopting rules for the Upper 700 MHz Band, the Commission rejected proposed eligibility limitations because, it found, “opening this spectrum to as wide a range of applicants as possible will encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure the

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<sup>48</sup> See MetroPCS Comments at 4, 37-38.

<sup>49</sup> See Third Report and Order, *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, 16 FCC Rcd 2703, 2720 ¶ 42 (2001); Second Report and Order and Third Notice of Proposed Rulemaking, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 9462, 9477 ¶ 27 (1996); Policy Statement, *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, 14 FCC Rcd 19868, 19870-72 ¶¶ 9-13 (1999); accord Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 Fed. Comm. L.J. 87, 94-95 (1997).

<sup>50</sup> See, e.g., Report and Order and Further Notice of Proposed Rulemaking, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 FCC Rcd 8064, 8150 ¶ 235 (2007) (“Congress and the Commission have determined that using competitive bidding mechanisms for assigning spectrum licenses offers significant public interest benefits. For example, the competitive bidding process ensures that spectrum licenses are assigned to those who place the highest value on the resource and will be suited to put the licenses to their most efficient use.”); Policy Statement, *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, 15 FCC Rcd 24178, 24181 ¶ 9 (2000) (“[A]n active secondary market will facilitate full utilization of spectrum by the highest value end users.”); Report, *Bringing Broadband To Rural America: Report On A Rural Broadband Strategy*, 2009 WL 1480862, at \*42 ¶ 146 (May 22, 2009) (“The Commission’s rules permit licensees to transfer their licenses, or partition or disaggregate their licenses, in the secondary market with Commission approval. The Commission’s secondary markets rules also provide flexibility to a wide array of wireless licensees, including broadband providers, to enter into spectrum leasing arrangements with other providers that seek access to spectrum in rural areas.”).

most efficient use of the spectrum.”<sup>51</sup> Two years later, when the Commission considered service rules for the Lower 700 MHz Band, it repeated that “open eligibility will enhance the opportunities for licensees to provide service in any market or combination of markets” and that “[a] policy of open eligibility for the Lower 700 MHz Band will best serve the public interest[.]”<sup>52</sup> And the Commission reaffirmed these conclusions in the *National Broadband Plan* by stressing the importance of spectrum flexibility and the need to remove—not erect—regulation that “impedes the free flow of spectrum to its most highly valued uses.”<sup>53</sup>

In the teeth of this precedent, RCA and others urge the Commission to limit auction participation as a means of equalizing network assets and thereby keeping any given provider from becoming too big and successful.<sup>54</sup> But “[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of ‘equalizing competition among competitors.’”<sup>55</sup> In particular, the “big is bad” rationale championed by some smaller providers would affirmatively harm consumers. Larger providers by definition serve more customers than

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<sup>51</sup> First Report and Order, *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, 15 FCC Rcd 476, 497 ¶ 49 (2000) (footnote omitted).

<sup>52</sup> Report and Order, *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC Rcd 1022, 1074 ¶ 134 (2002) (footnote omitted); *see also* Report and Order, *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162, 25178 ¶ 42 (2003) (noting that carriers should be entitled “to tailor their acquisition of spectrum . . . to meet their individual business plans” and that “market forces rather than the Commission [will] ultimately determine how this spectrum is licensed”).

<sup>53</sup> FCC, *Connecting America: The National Broadband Plan*, at 78 (2010).

<sup>54</sup> RCA Comments at 2, 10-11; NTCA Comments at 5; MetroPCS Comments at 4, 37-38.

<sup>55</sup> *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995); *see also* *Competitive Telecomms. Ass’n v. FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996) (striking down “interim” rule designed to protect smaller IXCs at expense of AT&T); *Western Union Tel. Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *see also* *United States v. Western Elec.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (rejecting efforts to “aid the minnows against the trout”).

smaller providers and thus may approach spectrum exhaust more rapidly than smaller carriers, even though the larger carriers might hold more spectrum in absolute terms. It would serve no sensible purpose for the Commission to deny larger providers access to the public resources they need to serve the bandwidth demands of their customers. To this, RCA responds that larger carriers are not actually spectrum-constrained at all but merely “hoard spectrum to keep it out of competitors’ hands.”<sup>56</sup> As Chairman Genachowski has aptly explained, however, it is “just not true” that “wireless companies are just sitting on top of, or ‘hoarding,’ unused spectrum . . . . The looming spectrum shortage is real—and it is the alleged hoarding that is illusory.”<sup>57</sup>

*Second*, auction-eligibility restrictions would distort the operation of secondary spectrum markets and give smaller carriers multi-billion-dollar windfalls at the expense of the American taxpayer. As discussed, the current regime reflects basic free-market principles: it allocates spectrum assets to the highest bidder, which is then generally free to lease some or all of those assets to third parties in the secondary market. If the Commission maintains its current flexible, market-oriented regime for secondary-market transactions, auction-eligibility restrictions would not keep spectrum out of the hands of the carriers (including large ones) that value it most highly. Such restrictions would instead create a wasteful extra step in the process, enabling smaller carriers to obtain spectrum at auction at an artificially low price and then lease it out, at its full market value, to the carriers that were excluded from the auction. That approach would rob taxpayers of the many billions of extra dollars that the auctions would have generated in the absence of eligibility restrictions. If, on the other hand, the Commission tried to extend any auction-eligibility restrictions to the secondary market itself, it would cause even more severe

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<sup>56</sup> RCA Comments at 10-11.

<sup>57</sup> FCC Chairman Julius Genachowski, *The Clock Is Ticking*, Remarks on Broadband, at 7-8 (Mar. 16, 2011), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0316/DOC-305225A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0316/DOC-305225A1.pdf).

harm to the wireless marketplace. By definition, such restrictions would keep smaller providers from selling spectrum assets to larger providers that can put those assets to uses more valued by consumers, such as alleviating severe network congestion in urban markets. The Commission would simply deprive consumers of those higher-valued uses—and consign them to ever-worsening wireless performance—if it arbitrarily kept large providers from obtaining the spectrum they need to meet the escalating bandwidth demands of their customers.

*Third*, even if it made sense to exclude some providers from future spectrum auctions on the ground that they already have “too much” spectrum, AT&T would not qualify as such a provider in the first place. In particular, AT&T is not, as RCA contends, “the carrier with the most spectrum in the country.”<sup>58</sup> That distinction belongs instead to Sprint/Clearwire, and any spectrum cap would therefore have to disqualify those companies from future spectrum acquisitions before it could possibly affect AT&T. In particular, because “Sprint Nextel holds a 54 percent [economic] interest in Clearwire and has the ability to nominate seven of Clearwire’s thirteen directors,” it is appropriate to “attribute Clearwire to Sprint Nextel when discussing spectrum holdings and network coverage.”<sup>59</sup> And as the *Fifteenth Report* determined, Sprint/Clearwire holds about twice as much spectrum as either AT&T or Verizon.<sup>60</sup>

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<sup>58</sup> RCA Comments at 7.

<sup>59</sup> *Fifteenth Report*, 26 FCC Rcd at 9682 n.19. On June 8, 2011, a few weeks before the *Fifteenth Report* was issued, Sprint announced that it was reducing its voting rights in Clearwire to 49.8 percent from 54 percent while nonetheless “keeping its 54 percent economic interest in Clearwire.” Reuters, *Sprint reduces voting rights in Clearwire* (June 8, 2011), <http://www.reuters.com/article/2011/06/08/us-sprint-clearwire-idUSTRE75758V20110608>. Notably, even a 10 percent holding triggers the Commission’s attribution rules. See, e.g., Memorandum Opinion and Order, *Sprint Nextel Corp. and Clearwire Corp.*, 23 FCC Rcd 17570, 17601 ¶ 77 (2008).

<sup>60</sup> See *Fifteenth Report*, 26 FCC Rcd at 9832 Chart 38 (showing that Sprint and Clearwire together account for approximately 52 billion MHz/pops, whereas Verizon and AT&T each have 25 billion MHz/pops or below).

In presentations to investors, Sprint wholeheartedly agrees with these conclusions. When explaining to the public why Sprint is “in the strongest place for the future,” CEO Dan Hesse deems it appropriate to “combine Sprint’s spectrum position with Clearwire’s spectrum position” for purposes of analysis.<sup>61</sup> And a page from Clearwire’s own website further states that, *even apart* from Sprint’s own licensed spectrum, “Clearwire Has More Spectrum Than Anyone”.<sup>62</sup>



Source: <http://www.clearwire.com/company/our-network>

Indeed, as Clearwire told investors in May 2011, it “has the best spectrum position in the industry, on average, 160-megahertz of spectrum in the top markets. That’s more than the combined AT&T/T-Mobile . . . company would have if their merger is approved”—not even including Sprint’s own spectrum.<sup>63</sup>

Sprint tells a different story, however, when it is talking to regulators rather than investors. Sprint denigrates its joint spectrum holdings with Clearwire on the ground that the companies’ spectrum all lies in bands above 1 GHz and thus “propagates much less favorably through walls and over long distances than AT&T’s low-frequency 700 MHz spectrum

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<sup>61</sup> Andrew Munchbach, *CTIA 2010’s day two keynote with Sprint CEO Dan Hesse*, BGR (May 24, 2010), <http://www.bgr.com/2010/03/24/live-from-ctia-2010%E2%80%99s-day-one-keynote-with-sprint%E2%80%99s-dan-hesse/>; see also Eric Zeman, *Will Sprint Dump WiMax For LTE?*, InformationWeek (Mar. 7, 2011) (quoting Sprint CEO’s observation that Sprint has “the spectrum resources where we could add LTE if we choose to do that, on top of the WiMAX network. The beauty of having a lot of spectrum is we have a lot of flexibility.”), <http://www.informationweek.com/news/mobility/wifiwimax/229300496>.

<sup>62</sup> Clearwire, *Our Network: Clearwire Has More Spectrum Than Anyone*, <http://www.clearwire.com/company/our-network> (visited December 16, 2011) (emphasis added).

<sup>63</sup> Conference Call Tr., *CLWR – Q1 2011 Clearwire Corp. Earnings*, Thomson StreetEvents, at 5 (May 4, 2011).

holdings.”<sup>64</sup> As an initial matter, this claim contradicts not only Sprint’s and Clearwire’s representations to investors about the superiority of their spectrum holdings, but also Sprint’s ubiquitous marketing message that it “ha[s] the most satisfied customers in the wireless industry.”<sup>65</sup> And the claim is simply wrong on the merits. It is true that lower-band spectrum has certain *coverage* advantages: because of its propagation characteristics, it is technically possible to use lower-band spectrum to provide service over a larger geographic area with a single cell site.<sup>66</sup> That is why, as Sprint points out,<sup>67</sup> low-band spectrum tends to attract higher bids at auction: some carriers decide to pay more up front for low-band spectrum with wider coverage, while other carriers decide to build more cell sites in exchange for paying less up front for high-band spectrum. The higher “book value” of low-band spectrum simply reflects that economic trade-off (among many other variables), and it provides no basis for concluding that it is any more or less expensive *on the whole* to meet any given level of consumer demand.

Finally, this “larger area” advantage is irrelevant in densely populated urban areas, where providers must deploy more and smaller cells simply to increase network capacity. As the Commission has recognized, moreover, higher-band spectrum above 1 GHz can provide greater *capacity* in the geographic area it covers,<sup>68</sup> which can present advantages in urban and suburban

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<sup>64</sup> Sprint Comments at 16.

<sup>65</sup> News Release, *Sprint Unbeaten Among Major Wireless Carriers for Customer Satisfaction* (May 17, 2011), [http://newsroom.sprint.com/article\\_display.cfm?article\\_id=1901](http://newsroom.sprint.com/article_display.cfm?article_id=1901).

<sup>66</sup> *Fifteenth Report*, 26 FCC Rcd at 9833-34 ¶ 292.

<sup>67</sup> Sprint Comments at 16-17 (discussing “book value” of spectrum).

<sup>68</sup> *Fifteenth Report*, 26 FCC Rcd at 9836 ¶ 296 (“[H]igher-frequency spectrum may be just as effective, or more effective [than lower-band spectrum], for providing significant capacity, or increasing capacity, within smaller geographic areas.... In addition, capacity enhancement technologies such as multiple-input and multiple-output (MIMO) may perform better at higher frequencies. ... Thus, higher-frequency spectrum can be ideally suited for providing high capacity where it is needed, such as in high-traffic urban areas.”) (footnotes omitted).

areas where demand is greatest. Higher-band spectrum is also available in larger blocks, and there is more of it.<sup>69</sup> In short, Sprint can point to no plausible rationale (beyond its own self-interest) for disparaging its own spectrum holdings for purposes of any spectrum-aggregation analysis. *See also* Section III, *infra* (discussing Clearwire’s EBS/BRS spectrum, Sprint’s G Block spectrum, and the need for rulemaking proceedings on spectrum screen).

**B. The Commission Should Reject Proposals to Make Its Newly Adopted Data-Roaming Rules Even More Intrusive.**

In one of its most interventionist moves in recent memory, the Commission imposed data-roaming rules in early 2011 over the strong objection of AT&T and others. Some commenters, however, do not think these newly minted rules went far enough, and they now ask the Commission to make those rules yet more rigid and intrusive.<sup>70</sup> The short answer to these proposals is that the Commission has already considered and rejected them, and there is no basis for reviving them now.

The data-roaming rules require all wireless broadband providers to negotiate data roaming agreements in good faith and to offer rates and terms that are “commercially reasonable.”<sup>71</sup> In general, AT&T and other carriers have every incentive to offer commercially reasonable deals when negotiating roaming arrangements. Such arrangements are typically reciprocal, and AT&T is in fact a net purchaser of roaming services overall. That is because, although AT&T has a larger network than its roaming partners, AT&T also has more customers

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<sup>69</sup> *Id.* (“[T]here currently is significantly more spectrum above 1 GHz that is potentially available for use . . . , and, in many parts of these higher bands, spectrum is licensed in larger contiguous blocks[, which]... can enable operators to deploy wider channels and simplify device design.”).

<sup>70</sup> *See, e.g.*, MetroPCS Comments at 23-25; RCA Comments at 16.

<sup>71</sup> *See* Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411, 5423-24 ¶ 23 (2011) (“*Data Roaming Order*”).

who roam on its partners' networks and generate more minutes and megabytes on those networks than vice versa. As a result, AT&T has strong incentives to *lower* roaming rates because, on balance, higher rates would only increase the outflow of money from AT&T to its roaming partners.

When roaming disputes do arise, the Commission has specified that they are to be assessed under the “totality of the circumstances,” not according to any rigid formula.<sup>72</sup> Some commenters suggest that the Commission should reverse that policy and require roaming rates to be “cost”-based or no higher than retail rates.<sup>73</sup> But the Commission expressly rejected such standards in the *Data Roaming Order*, and for good reason: those rates would embroil the Commission in complex ratemaking proceedings and—worse—give carriers incentives to free ride on other carriers' networks and thus refrain from making their own broadband investments.<sup>74</sup> In any event, to the extent that these commenters believe (as they evidently do) that the terms they have been offered are commercially unreasonable, they have every opportunity to raise those claims in the case-by-case complaint proceedings authorized by the *Data Roaming Order*. It is entirely premature to conclude that those proceedings are somehow inadequate to achieve the Commission's objectives.

MetroPCS separately urges the Commission to adopt Blanca's proposal for a sixty-day “shot clock” in roaming negotiations.<sup>75</sup> But the Commission already properly rejected that

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<sup>72</sup> *Id.* at 5452-53 ¶¶ 85-86 (listing factors to be considered). Indeed, the *Data Roaming Order* is quite clear that, in the context of data roaming, “providers can negotiate different terms and conditions, including prices, with different parties, where differences in terms and conditions reasonably reflect actual differences in particular cases.” *See id.* at 5452 ¶ 85.

<sup>73</sup> *See, e.g.,* MetroPCS Comments at 25.

<sup>74</sup> *See Data Roaming Order*, 26 FCC Rcd at 5423, 5434-35, 5437-46 ¶¶ 22, 48, 55-68.

<sup>75</sup> *See* MetroPCS Comments at 25.

proposal in the *Data Roaming Order*.<sup>76</sup> The Commission noted that, because “some data roaming negotiations may be more complex or fact-intensive than others and are likely to require more time,” a “single time limit for all negotiations would not be appropriate.”<sup>77</sup> The Commission also assured carriers that, where bad faith is alleged, a carrier “may ask the Commission to set a time limit,” and the Commission will consider such requests on a case-by-case basis.<sup>78</sup> In any event, carriers who seek the Commission’s help in obtaining data roaming need not negotiate for sixty days before filing a complaint with the Commission, but may do so at any time.

**C. The Commission Should Reject Proposals for Handset Interoperability Rules.**

Some commenters renew a proposal for intrusive FCC intervention in the LTE handset market, asking the Commission to ban any handset that operates only on certain blocks within the 700 MHz band and require all 700 MHz handsets to support all paired frequencies within that band.<sup>79</sup> That proposal lacks merit and, if adopted, would constitute an unprecedented intervention into device design and the standards-setting process.

This “700 MHz interoperability” proposal rests on a fictitious history of the industry’s standard-setting process, as AT&T has previously explained in detail.<sup>80</sup> In a nutshell, the LTE device standards upon which new 700 MHz handsets are made today were adopted in the 3rd Generation Partnership Project (“3GPP”) standards-setting process in 2009. Those standards

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<sup>76</sup> See *Data Roaming Order*, 26 FCC Rcd at 5452 ¶ 84.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; see also *id.* at 5450-51 ¶ 80.

<sup>79</sup> See Sprint Comments at 19; MetroPCS Comments at 30-31; RCA Comments at 12-13.

<sup>80</sup> See Comments of AT&T Inc., *Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM-11592 (filed Mar. 31, 2010) (“AT&T Mar. 31, 2011 700 MHz Equipment Comments”).

were shaped by Motorola and a host of companies throughout the wireless ecosystem, not by AT&T and Verizon in isolation, and they address what everyone agrees are significant interference issues that are unique to the 700 MHz A Block spectrum.<sup>81</sup> Specifically, A Block transmissions are vulnerable to interference from Channel 51 broadcasters and high-power Lower E Block broadcasts, and such interference degrades performance on handsets whose filters allow A Block transmissions, even when those handsets are operating on other 700 MHz frequencies. All parties understood before the 700 MHz auction that the A Block spectrum would face these unique interference issues, and A Block licensees obtained this spectrum at auction at a reduced price that reflected those concerns.<sup>82</sup> As it turns out, moreover, real-world experience now refutes the predictions of these licensees that they would be unable to obtain 700 MHz handsets. For example, C-Spire, one of the major proponents of overriding the international standards-setting body, is deploying its own LTE network and has contracted with Samsung to introduce two new 700 MHz (Band 12) LTE handsets.<sup>83</sup>

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<sup>81</sup> See Comments of Motorola, Inc., *Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM-11592, at 3-4 (filed Mar. 31, 2010).

<sup>82</sup> See Letter from Joseph P. Marx (AT&T) to Marlene H. Dortch (FCC), WT Docket No. 06-150; PS Docket No. 06-229; GN Docket No. 09-51; RM-11592, at 1, 4 (filed June 3, 2010); see also Letter from Joan Marsh (AT&T) to Marlene Dortch (FCC), WT Docket No. 11-18, at 3-4 (filed Dec. 9, 2011) (“12/9/2011 Marsh Letter”).

<sup>83</sup> Press Release, *Cellular South announces strategic alliance with Samsung Telecommunications to build LTE 4G high-speed wireless broadband data network infrastructure* (Nov. 17, 2010), <http://www.fiercemobilecontent.com/press-releases/cellular-south-announces-strategic-alliance-samsung-telecommunications-buil-0>; see also Phil Goldstein, *Cellular South details network enhancements ahead of LTE launch*, FierceWireless (Aug. 19, 2011), <http://www.fiercewireless.com/story/cellular-south-details-network-enhancements-ahead-lte-launch/2011-08-19>. As Verizon has noted, “Cellular South’s launch of its LTE network and procurement of Band 12 devices only further confirms that the interoperability mandate lacks any factual justification.” Letter from Tamara Press (Verizon) to Marlene Dortch (FCC), RM-11592, at 2 (filed Dec. 1, 2010).

Moreover, if the Commission imposed mandatory 700 MHz interoperability requirements, it would not only subject consumers to unresolved interference problems, but also harm them by substantially delaying the availability of LTE services. Within a year, half a dozen service providers likely will have sold, in the aggregate, millions of LTE handsets that are tailored for specific spectrum blocks within the 700 MHz band. At this point, forcing providers to sell only “interoperable” devices through regulatory mandates would succeed only in slowing consumer access to LTE services. The 3GPP standards were established years ago, and AT&T and others have planned and developed their networks in accordance with these standards. If the Commission compelled manufacturers to change course now, carriers would have to start over as well and conduct a new round of development, testing, trials, and implementation, setting LTE deployment back substantially.<sup>84</sup> That said, AT&T would not rule out a migration to interoperable Band 12 handsets if the Commission adopted the rule modifications needed to resolve Channel 51 and Lower E Block interference concerns. But providers should remain free to plan and manage any such migration in a way that would not increase costs (which ultimately are borne by consumers), disrupt existing services, or cause unnecessary delays.<sup>85</sup>

### **III. The Commission Should Open A Rulemaking Proceeding to Consider Adjustments to the Spectrum Screen.**

The Commission’s spectrum screen has assumed broad significance in a range of proceedings, from merger reviews to the post-auction authorization of spectrum licenses.<sup>86</sup> That screen is now in need of prompt reform, both substantively and procedurally.

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<sup>84</sup> See, e.g., Comments of Verizon Wireless, *Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM-11592, at ii (filed Mar. 31, 2010); *AT&T Mar. 31, 2011 700 MHz Equipment Comments* at 10.

<sup>85</sup> See *12/9/2011 Marsh Letter* at 3-4.

<sup>86</sup> See, e.g., Staff Analysis and Findings, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No.

First, as a substantive matter, the Commission should update the screen to reflect spectrum that is now used or potentially usable for mobile voice and data services,<sup>87</sup> as it has long noted the need to do as more spectrum becomes available.<sup>88</sup> In particular, it should reflect three categories of new spectrum that, as the Commission has acknowledged, are now used or usable for commercial mobile services—

- all 194 MHz of BRS/EBS spectrum, used by Clearwire and its partners, and not just the 55.5 MHz the Commission has considered before;
- 90 MHz of MSS/ATC spectrum, which will be used by DISH (once it finalizes its acquisitions of TerreStar and DBSD North America) and LightSquared (once GPS interference concerns are resolved); and
- the 10 MHz of PCS G Block spectrum that Sprint will use for its imminent LTE deployment.<sup>89</sup>

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11-65, ¶¶ 45-46 (rel. Nov. 29, 2011); Memorandum Opinion and Order, *Sprint Nextel Corp. and Clearwire Corp. Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, 23 FCC Rcd 17570, 17592-17600 ¶¶ 53-74 (2008) (“*Sprint/Clearwire Order*”); Memorandum Opinion and Order, *Union Tel. Co. and Cellco Partnership D/B/A Verizon Wireless Applications for 700 MHz Band Licenses, Auction No. 73*, 23 FCC Rcd. 16787, 16792-16896 ¶¶ 9-18 (2008).

<sup>87</sup> As the Commission reaffirmed in 2009, the spectrum screen properly “include[s] all spectrum suitable for the provision of wireless broadband over broadband networks, in addition to spectrum suitable for *mobile voice and data services*.” Memorandum Opinion and Order, *Applications of AT&T Inc. and Centennial Commc’ns Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, 24 FCC Rcd 13915, 13935 ¶ 43 (2009) (“*AT&T/Centennial Order*”) (emphasis added).

<sup>88</sup> AT&T Comments at 39-42; *see, e.g., Sprint/Clearwire Order*, 23 FCC Rcd at 17596 ¶ 61 (2008) (updating spectrum screen to include AWS-1 and certain BRS spectrum); Memorandum Opinion and Order, *Applications of AT&T Inc. and Dobson Commc’ns Corp. for Consent to Transfer Control of Licenses and Authorizations*, 22 FCC Rcd 20295, 20307-08, 20315 ¶¶ 17, 35 (2007) (updating spectrum screen to include 700 MHz spectrum “given its availability and suitability on a nationwide basis for the provision of mobile telephony services”).

<sup>89</sup> *See* AT&T Comments at 40-41 (citing *Fifteenth Report*, 26 FCC Rcd at 9823-26 ¶¶ 270-77; Report and Order, *Fixed and Mobile Servs. in the Mobile Satellite Service Bands*, 26 FCC Rcd 5710, 5720-21 ¶ 23 (2011)); *see also* FCC, *Connecting America: The National Broadband Plan*, at 84-85 & Exh. 5-F (2010) (identifying the full 194 MHz of BRS/EBS spectrum as part of today’s 547 megahertz “[s]pectrum [b]aseline” that “is currently licensed as flexible use spectrum” and “can be used for mobile broadband”).

These broader spectrum categories “meet the criteria for suitable spectrum within two years” and are thus appropriately considered “a relevant input” for purposes of the Commission’s spectrum screen.<sup>90</sup> At this point, any application of the spectrum screen that excludes these spectrum categories would flatly contradict the *Fifteenth Report* and other Commission orders analyzing the wireless marketplace generally, which take proper account of competition arising from the use of this spectrum.

Second, as a procedural matter, too much is at stake here to relegate these critical determinations to ad hoc, party-specific proceedings, shielded from full public participation and judicial oversight. Accentuating that concern are the apparent efforts within the Commission to *lower* the amount of spectrum contained in the screen for the first time, without any record basis in the relevant proceedings, without *any* upward adjustment for new eligible spectrum, and without regard for Commission precedent requiring the inclusion of *all* spectrum “suitable for mobile voice and data services.”<sup>91</sup>

Particularly given these process concerns, the Commission should now make adjustments to its screen in an open rulemaking, conducted and concluded annually, allowing participants to file comments on what spectrum categories are appropriate for inclusion in the screen. Any changes to the screen would then be based on a factual record after all interested parties have had notice and an opportunity for full participation. And given the central role the spectrum screen

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<sup>90</sup> Memorandum Opinion and Order and Declaratory Ruling, *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*, 23 FCC Rcd 17444, 17477 ¶ 62 (2008). In contrast, the Commission should *not* include WCS spectrum within the spectrum screen analysis because, given severe regulatory restrictions designed to prevent interference with satellite radio providers, that spectrum remains unsuitable for mobile voice and data services. *See* AT&T Comments at 41-42.

<sup>91</sup> *See* Letter from Robert W. Quinn (AT&T) to Marlene H. Dortch (FCC), WT Docket No. 11-18, at 1-2 (filed Dec. 16, 2011) (quoting *AT&T/Centennial Order*, 24 FCC Rcd at 13935 ¶ 43).

now plays in the Commission’s competitive analysis, the ensuing rulemaking order would constitute “final agency action” subject to judicial review under the APA, even though the Commission will continue to apply it flexibly in merger and licensing orders.<sup>92</sup> These twin features of a rulemaking process—full public participation and the prospect of judicial oversight—will bring much-needed transparency and accountability to the spectrum-screen analysis.

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<sup>92</sup> See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988) (agency use of model that it characterized as merely “one of many tools” it employed in evaluating hazardous waste delisting petitions “created a norm with present day binding effect,” and model was accordingly a rule subject to APA rulemaking requirements and judicial review); see also *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (“A document will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as . . . denial of an application. . . . In some circumstances, if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter.”) (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 *Duke L.J.* 1311, 1328-29 (1992)).

**CONCLUSION**

The Commission should find that wireless markets are intensely competitive and should reject the various proposals for new regulatory intervention, and it should promptly open a rulemaking proceeding to consider adjustments to the spectrum screen.

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