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

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In the Matter of)
)
Application of AT&T Inc. and) WT Docket No. 11-18
Qualcomm Incorporated)
)
For Consent To Assign Licenses and)
Authorizations)

ORDER

Adopted: December 22, 2011

Released: December 22, 2011

By the Commission: Commissioner Copps dissenting and issuing a statement; Commissioner Clyburn concurring and issuing a statement.

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I. INTRODUCTION

1. In this Order, we consider the application of AT&T Inc. and Qualcomm Inc. (the "Applicants") for Commission consent to the assignment of all 11 of Qualcomm's D and E Block licenses in the Lower 700 MHz band to AT&T, for which AT&T will pay \$1.925 billion. If approved, AT&T would acquire six megahertz of unpaired 700 MHz spectrum nationwide and an additional six megahertz of unpaired 700 MHz spectrum in five major metropolitan markets (New York, Boston, Philadelphia, Los Angeles, and San Francisco) with population totaling 70 million. The Applicants assert that this transaction is in the public interest because it will enable AT&T to repurpose Qualcomm's underutilized Lower 700 MHz D and E Block spectrum for the deployment of mobile broadband services by using supplemental downlink technology to couple it with paired spectrum that AT&T already holds.

2. To determine whether the proposed transaction serves the public interest, we analyze, on balance, whether it will result in public interest benefits that outweigh any potential harm. Because this transaction involves only the transfer of spectrum licenses and not the acquisition of wireless business units and customers, our competitive analysis considers only the effects associated with AT&T's spectrum aggregation and use. We therefore carefully examine the effect on the marketplace, if any, of AT&T acquiring additional 700 MHz spectrum, as well as the implications on other mobile wireless providers of AT&T operating on that spectrum.

3. Our analysis suggests that AT&T's proposed acquisition of Qualcomm's Lower 700 MHz D and E Block licenses has the potential to cause some competitive and other public interest harms. We conclude, however, that these potential harms from AT&T's acquisition of this unpaired spectrum can be mitigated with certain targeted conditions to prevent or limit any potential anticompetitive behavior.¹ In particular, we conclude that our competitive concerns can be mitigated by ensuring that AT&T's use of the newly acquired spectrum does not impede actual and potential competitors' operation on neighboring spectrum in the provision of broadband services, and that AT&T cannot use the Qualcomm spectrum in a way that deprives other providers of the benefits of the Commission's roaming rules.

4. We also anticipate that the proposed transaction could well facilitate the transition of underutilized unpaired 700 MHz spectrum towards mobile broadband use, thereby supporting our goal of expanding mobile broadband deployment throughout the country.² AT&T expects to deploy the acquired spectrum as supplemental downlink on its nationwide LTE network using carrier aggregation technology. This pairing will, according to the Applicants, enable customers to download data more quickly, and will provide them with faster and better service. The record suggests that customers are likely to experience these benefits as faster and more consistent download time, a more seamless video or gaming experience, and better resolution, particularly during periods of peak use.

¹ Specifically, as set forth in the discussion below, we condition the assignment of these licenses at issue on compliance with the following requirements post-transaction: (1) AT&T must operate on the newly acquired Qualcomm spectrum under the same power limits and antenna height restrictions that apply to the Lower 700 MHz A and B Block licensees; (2) AT&T may not use these licenses for uplink transmissions; (3) AT&T's operations on the newly acquired Qualcomm spectrum in areas in which they do not hold the Lower A, B or C Block license are conditioned on obligations, discussed in detail below, to avoid interference to the operations of those Lower A, B or C Block licensees; and (4) AT&T may not configure its network so that the supplemental downlink technology creates a barrier to roaming under the Commission's existing roaming rules.

² See generally In the Matter of Joint Statement on Broadband, GN Docket No. 10-66, Joint Statement on Broadband, 25 FCC Rcd 3420 (2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-42A1_Rcd.pdf (last visited on Dec. 21, 2011).

5. Accordingly, in light of our targeted conditions to address the potential for competitive harm and the likely public interest benefits flowing from the use of the spectrum at issue, we approve the proposed transaction, subject to the conditions set forth below.

II. BACKGROUND

A. Description of Applicants

1. AT&T Inc.

6. AT&T, incorporated in Delaware and headquartered in Dallas, Texas, is a communications holding company.³ With its subsidiaries, affiliates, and operating companies, AT&T notes that it ranks among the leading providers of telecommunications services in the United States and around the world.⁴ AT&T states that, as of December 31, 2010, it was a leading provider of wireless data in the U.S. wireless industry based on subscribers⁵ and the largest communications company in the world by revenue.⁶ The company reported more than \$124 billion in revenues in 2010.⁷

7. AT&T has four main operating segments: wireless, wireline, advertising solutions, and other.⁸ The wireless segment consists of AT&T's wholly-owned subsidiary, AT&T Mobility, which provides wireless services to both business and consumer customers.⁹ This segment represents approximately 47 percent of 2010 total segment operating revenues.¹⁰ AT&T has more than 95.5 million wireless subscribers.¹¹ It uses High Speed Downlink Packet Access/Universal Mobile Telecommunications System ("HSDPA/UMTS") and HSDPA+ network technology, with HSDPA+ providing 4G speed when combined with AT&T's upgraded backhaul.¹²

8. AT&T's wireline subsidiaries provide both retail and wholesale communications services (both voice and data) domestically and internationally.¹³ This segment represents approximately 49 percent of 2010 segment operating revenues.¹⁴ AT&T's U.S. wired network includes 23 million retail

³ AT&T Inc., SEC Form 10-K, at 1 (filed March 1, 2011) ("AT&T 10-K"), available at <http://www.sec.gov/Archives/edgar/data/732717/000073271711000014/0000732717-11-000014-index.htm>.

⁴ *Id.* at 1.

⁵ *Id.* at 3.

⁶ AT&T, About Us, Corporate Profile, Key Facts About AT&T ("AT&T Corporate Profile Key Facts"), available at <http://www.att.com/gen/investor-relations?pid=5711> (last visited Dec. 21, 2011).

⁷ AT&T Inc., AT&T Inc. 2010 Annual Report, Ex. 13 (filed March 1, 2011), available at <http://www.sec.gov/Archives/edgar/data/732717/000073271711000014/0000732717-11-000014-index.htm>.

⁸ AT&T 10-K at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ AT&T, About Us, Corporate Profile, U.S. Presence, available at <http://www.att.com/gen/investor-relations?pid=5711> (last visited Dec. 21, 2011).

¹² AT&T 10-K at 2. AT&T offers customers Wi-Fi access at more than 190,000 hot spots around the world. AT&T Corporate Profile Key Facts.

¹³ AT&T 10-K at 4.

¹⁴ *Id.*

consumer, 19 million retail business, and 2 million wholesale access lines,¹⁵ and more than 17.8 million broadband customers.¹⁶

9. The advertising solutions segment includes AT&T's directory operations, which publish Yellow and White Pages directories and sell directory advertising and Internet-based advertising and search.¹⁷ This segment represents approximately three percent of 2010 segment operating revenues.¹⁸

10. The "other" segment includes operator services, corporate, and other operations.¹⁹ It represents approximately one percent of 2010 segment operating revenues.²⁰

2. Qualcomm Inc.

11. Qualcomm, incorporated in Delaware and headquartered in San Diego, California, states that it is a leader in the development and commercialization of next generation mobile broadband technologies, including Code Division Multiple Access ("CDMA") and Orthogonal Frequency Division Multiplexing Access ("OFDMA") technologies.²¹ For 2010, it reported \$10.99 billion in revenues.²² It generates revenues by licensing its intellectual property to manufacturers of wireless products.²³ Qualcomm reported that 95 percent of the company's consolidated revenues for 2010 were from international customers and licenses.²⁴

12. Qualcomm also sells products and services, including: (1) CDMA-based integrated circuits and Radio Frequency and Power Management chips; (2) software products and services for content enablement; (3) equipment, software, and services used by companies for wireless connection of their assets and workforce; (4) software products and services for mobile commerce; (5) services to wireless operators delivering multimedia content; and (6) software and hardware development services.²⁵

¹⁵ AT&T 10-K at 4.

¹⁶ AT&T, About Us, Corporate Profile, Networks, *available at* <http://www.att.com/gen/investor-relations?pid=5711> (last visited Dec. 21, 2011).

¹⁷ AT&T 10-K at 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Qualcomm Inc., SEC Form 10-K, at Cover Page, 1 (filed Nov. 3, 2010) ("Qualcomm 10-K"), *available at* <http://www.sec.gov/Archives/edgar/data/804328/000095012310100207/a57478e10vk.htm>.

²² Qualcomm, Investor Relations, Financial Information, Quarterly Results, Fourth Quarter 2010, *available at* http://files.shareholder.com/downloads/QCOM/1355436857x0x415196/34ccc0a0-2950-4267-95ff-2be628942a15/QCOM_Q410_ER_Final.pdf (last visited Dec. 21, 2011).

²³ Qualcomm 10-K at 1.

²⁴ *Id.* at 6.

²⁵ *Id.* at 2.

B. Description of Transaction

13. The Applicants seek Commission consent to the assignment of all 11 of Qualcomm's D and E Block licenses in the Lower 700 MHz band to AT&T Mobility Spectrum LLC.²⁶ AT&T will pay \$1.925 billion for the acquired licenses.²⁷

14. The Applicants state that this transaction will enable AT&T to repurpose Qualcomm's underutilized Lower 700 MHz D and E Block spectrum for the implementation of cutting-edge broadband services that are most demanded by customers.²⁸ The Applicants state that AT&T plans to use supplemental downlink technology (also referred to as carrier aggregation technology) to bond this unpaired spectrum with paired spectrum that AT&T already holds.²⁹ According to the Applicants, AT&T will be able to use the spectrum it proposes to acquire from Qualcomm to add substantial capacity on its LTE network once the LTE Advanced standards are released.³⁰ In AT&T's view, the asymmetric aggregation of spectrum on the downlink side will help the company to address the asymmetric flow of data that results from wireless broadband consumers using more downlink than uplink capacity in the consumption of, for example, video and other data-heavy media content.³¹ The Applicants assert that using the supplemental downlink technology will permit AT&T to manage its spectrum more efficiently and to more effectively serve consumers by providing them with higher download speeds and improved service.³²

15. The licenses at issue include the unpaired Lower 700 MHz D and E Block licenses held by Qualcomm and cover all of the United States with six or 12 megahertz of Lower 700 MHz spectrum.³³ Specifically, Qualcomm holds all six of the Lower 700 MHz D Block licenses (six megahertz).³⁴ In addition, Qualcomm holds five of the 176 Economic Area ("EA") licenses³⁵ (also six megahertz) in the Lower 700 MHz E Block, providing coverage in five of the top 15 metropolitan areas (New York, Boston, Philadelphia, Los Angeles, and San Francisco), covering more than 70 million people.³⁶

²⁶ Application of Qualcomm Incorporated and AT&T's Mobility Spectrum LLC for Assignment of Authorization, File No. 0004566825 (filed Jan. 13, 2011, amended Feb. 9, 2011) ("Application"), Public Interest Statement at 3. Qualcomm had been using this spectrum for the FLO TV mobile television offering, but according to the Applicants, this business model proved not to be viable and was shut down. *Id.* at 2.

²⁷ *Id.* at 3.

²⁸ *Id.* at i-ii, 7.

²⁹ *Id.* at ii, 7.

³⁰ *Id.* at 14.

³¹ *Id.* at 14-15.

³² *Id.* at 15, 17.

³³ Qualcomm, News and Media, AT&T Agrees to Acquire Wireless Spectrum from Qualcomm at 1 ("AT&T Press Release Regarding Acquisition from Qualcomm"), available at <http://www.qualcomm.com/news/releases/2010/12/20/att-agrees-acquire-wireless-spectrum-qualcomm> (last visited Dec. 21, 2011).

³⁴ *Id.*

³⁵ Application, Public Interest Statement at 2.

³⁶ Qualcomm, News and Media, AT&T Agrees to Acquire Wireless Spectrum from Qualcomm at 1 ("AT&T Press Release Regarding Acquisition from Qualcomm"), available at (continued....)

C. Transaction Review Process

16. On January 13, 2011, the Applicants filed an application,³⁷ pursuant to section 310(d) of the Communications Act of 1934, as amended,³⁸ seeking Commission approval to assign six D Block and five E Block licenses in the Lower 700 MHz band from Qualcomm to AT&T Mobility.³⁹ On February 9, 2011, the Commission released a public notice seeking comment on the proposed transaction.⁴⁰ The *Comment Public Notice* established a pleading cycle for the application, with petitions to deny due March 11, 2011, oppositions due March 21, 2011, and replies due March 28 2011.⁴¹

17. In response to the *Comment Public Notice*, the Commission received five petitions to deny – filed by Cellular South, Inc. (“Cellular South”), Dish Network LLC (“Dish Network”), Free Press, Public Knowledge, Media Access Project, Consumer Union, and the Open Technology Initiative of the New America Foundation (“Free Press”), Rural Cellular Association (“RCA”), and Rural Telecommunications Group, Inc. (“RTG”)⁴² – and a letter filed by T-Mobile USA, Inc. (“T-Mobile”).⁴³ King Street Wireless, L.P. (“King Street Wireless”) and United States Cellular Corp. (“U.S. Cellular”) filed petitions to condition consent.⁴⁴ The Applicants filed a Joint Opposition on March 21, 2011.⁴⁵ The Commission received replies to the Joint Opposition from Cellular South, Dish Network, Free Press, King Street Wireless, RCA, RTG, U.S. Cellular, and Vulcan Wireless LLC.⁴⁶ Several parties have made a number of written *ex parte* filings and submitted notifications of *ex parte* meetings.

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<http://www.qualcomm.com/news/releases/2010/12/20/att-agrees-acquire-wireless-spectrum-qualcomm> (last visited Dec. 21, 2011).

³⁷ The application was amended on February 9, 2011.

³⁸ 47 U.S.C. § 310(d).

³⁹ FCC File No. 0004566825 (assignment from Qualcomm Incorporated to AT&T Mobility Spectrum LLC).

⁴⁰ AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses, WT Docket No. 11-18, *Public Notice*, 26 FCC Rcd 1336 (2011) (“*Comment Public Notice*”).

⁴¹ See *Comment Public Notice* at 1336.

⁴² Petition to Deny of Cellular South, Inc., filed March 11, 2011 (“Cellular South Petition”); Petition to Deny of Dish Network LLC, filed March 11, 2011 (“Dish Network Petition”); Petition to Deny of Free Press, Public Knowledge, Media Access Project, Consumer Union, and the Open Technology Initiative of the New America Foundation, filed March 11, 2011 (“Free Press Petition”); Petition to Deny of Rural Cellular Association, filed March 11, 2011 (“RCA Petition”); Petition to Deny of Rural Telecommunications Group, Inc., filed March 11, 2011 (“RTG Petition”).

⁴³ Letter from Thomas J. Sugrue, Senior Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (March 11, 2011) (“T-Mobile Letter”).

⁴⁴ Petition to Condition Consent of King Street Wireless, L.P., filed March 11, 2011 (“King Street Wireless Petition”); Petition to Condition Consent of United States Cellular Corp., filed March 11, 2011 (“U.S. Cellular Petition”).

⁴⁵ Joint Opposition of AT&T Mobility Spectrum LLC and Qualcomm Incorporated to Petitions to Deny or to Condition Consent and Reply to Comments, filed March 21, 2011 (“Joint Opposition”).

⁴⁶ Reply to Joint Opposition of Cellular South, filed March 28, 2011 (“Cellular South Reply”); Reply to Joint Opposition of Dish Network, filed March 28, 2011 (“Dish Network Reply”); Reply to Joint Opposition of Free Press, filed March 28, 2011 (“Free Press Reply”); Reply to Opposition of King Street Wireless, filed March 28, 2011 (“King Street Wireless Reply”); Reply to Joint Opposition of RCA, filed March 28, 2011 (“RCA Reply”); Reply to Joint Opposition of RTG, filed March 28, 2011; Erratum to Reply to Joint Opposition of RTG, filed March (continued...)

18. In addition to these pleadings, Cincinnati Bell Wireless, LLC (“Cincinnati Bell”), MetroPCS Communications, Inc. (“MetroPCS”), NTELOS, RCA, RTG, and Sprint Nextel Corporation (“Sprint Nextel”) filed a joint motion to consolidate⁴⁷ our consideration of this application with the subsequently filed AT&T/T-Mobile applications,⁴⁸ and another motion expanding the consolidation request to additional license assignment and transfer applications filed by AT&T.⁴⁹ The Wireless Telecommunications Bureau (“Bureau”) declined to formally consolidate this transaction with the AT&T/T-Mobile transaction; however, the Bureau determined that it would consider the two transactions in a coordinated manner.⁵⁰

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28, 2011 (“RTG Reply”); Reply of U.S. Cellular, filed March 28, 2011 (“U.S. Cellular Reply”); Reply Comments of Vulcan Wireless, filed March 28, 2011 (“Vulcan Wireless Reply”).

⁴⁷ Joint Motion to Consolidate of Cincinnati Bell Wireless, LLC, MetroPCS Communications, Inc., NTELOS, RCA, RTG, and Sprint Nextel Corporation, filed April 27, 2011 (“Joint Motion to Consolidate”). The Applicants filed an opposition. Joint Opposition of AT&T Mobility Spectrum LLC and Qualcomm Incorporated to Joint Motion to Consolidate, filed May 4, 2011 (“Joint Consolidation Opposition”). Deutsche Telekom AG (“Deutsche Telekom”) also filed an opposition. Opposition of Deutsche Telekom to Requests to Consolidate Proceedings, filed May 4, 2011 (“Deutsche Telekom Opposition”). Cincinnati Bell, MetroPCS, NTELOS, RCA, RTG, and Sprint Nextel filed a joint reply. Joint Reply to Oppositions of Cincinnati Bell, MetroPCS, NTELOS, RCA, RTG, and Sprint Nextel, filed May 16, 2011 (“Joint Consolidation Reply”).

⁴⁸ AT&T and T-Mobile filed the applications for their proposed transaction on April 21, 2011. See AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc., WT Docket No. 11-65, *Public Notice*, DA 11-799 (rel. Apr. 28, 2011).

⁴⁹ Joint Motion to Consolidate of Cincinnati Bell Wireless, LLC, MetroPCS Communications, Inc., NTELOS, RCA, RTG, and Sprint Nextel Corporation, filed June 9, 2011 (“Second Joint Motion To Consolidate”). The Applicants filed an opposition. Joint Opposition of AT&T Mobility Spectrum LLC and Qualcomm Incorporated to Second Joint Motion to Consolidate, filed June 22, 2011 (“Second Joint Consolidation Opposition”). Five other parties filed an opposition. Opposition of Deutsche Telekom to Joint Motion to Consolidate Proceedings, filed June 22, 2011 (“Second Deutsche Telekom Opposition”); Opposition to Joint Motion to Consolidate by Redwood Wireless Corp., filed June 20, 2011 (“RWC Opposition”); Opposition to Motion to Consolidate by D&E Investments, Inc., Windstream Iowa Communications, Inc., and Windstream Lakedale, Inc., filed June 22, 2011 (“D&E Investment Opposition”); Opposition to Joint Motion to Consolidate by Whidbey Telephone Company, filed June 22, 2011 (“WTC Opposition”); Opposition to Joint Motion to Consolidate by 700 MHz, LLC, filed June 22, 2011 (“700 MHz Opposition”). Cincinnati Bell, MetroPCS, NTELOS, RCA, RTG, and Sprint Nextel filed a joint reply. Joint Reply to Oppositions of Cincinnati Bell, MetroPCS, NTELOS, RCA, RTG, and Sprint Nextel, filed July 5, 2011 (“Second Joint Consolidation Reply”).

⁵⁰ Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Michael P. Goggin, AT&T Mobility Spectrum LLC, and Dean Brenner, QUALCOMM Incorporated (Aug. 8, 2011) (“WTB Transactions Letter”). In light of the Bureau’s Order granting AT&T’s and T-Mobile’s request to withdraw their applications without prejudice, see generally 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, *Order*, DA 11-1955 (rel. Nov. 29, 2011) (“AT&T/T-Mobile Dismissal Order”), and AT&T’s statements shortly thereafter that it expected to file new applications in order to acquire control of T-Mobile, RTG filed a request that the Commission hold the above-referenced application pending until final resolution of any proposed merger, acquisition, or similar transaction between AT&T and T-Mobile. RTG Motion To Hold in Abeyance, filed Nov. 30, 2011 (“RTG Abeyance Motion”). Qualcomm and AT&T filed a joint opposition to the RTG Abeyance Motion. Qualcomm and AT&T Joint Opposition to Motion To Hold in Abeyance, filed Dec. 2, 2011 (“Qualcomm/AT&T Abeyance Opposition”). RTG replied, reiterating its request. RTG Reply to Joint Opposition to Motion To Hold in Abeyance, filed Dec. 15, 2011. On December 19, 2011, AT&T announced that “it has agreed with Deutsche Telekom AG to (continued....)

19. *Confidential Materials*. On May 20, 2011, the Bureau issued a protective order to ensure that any confidential or proprietary documents submitted to the Commission in connection with this proceeding would be adequately protected from public disclosure and announcing the process by which interested parties could gain access to confidential information filed in the record.⁵¹ On June 10, 2011, the Bureau released a second protective order, as requested by the Applicants,⁵² to provide additional protection to those documents and to make clear that information contained in AT&T's and Qualcomm's responses to the Bureau's information request are highly sensitive and confidential.⁵³ The Bureau revised the *Second Protective Order* on June 22, 2011.⁵⁴ The Bureau received acknowledgements pursuant to the *Protective Order* from fifteen individuals.⁵⁵

20. On May 20, 2011, the Bureau released a public notice announcing that Numbering Resource Utilization and Forecast ("NRUF") reports and local number portability ("LNP") data would be placed into the record and adopted a protective order pursuant to which the Applicants and third parties would be allowed to review the specific NRUF reports and LNP data placed into the record.⁵⁶ The Bureau received

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end its bid to acquire T-Mobile USA." See AT&T Ends Bid To Add Network Capacity Through T-Mobile USA Purchase, December 19, 2011, available at <http://www.att.com/gen/press-room?pid=22146&cdvn=news&newsarticleid=33560&mapcode=corporate|wireless-networks-general> (last visited Dec. 21, 2011). RTG subsequently filed a motion for leave to withdraw its Abeyance Motion, concluding that there is no longer any need to consider the AT&T/T-Mobile transaction in tandem with the subject transaction. RTG Motion for Leave to Withdraw Motion to Hold in Abeyance, filed Dec. 20, 2011. We will grant this latest motion.

⁵¹ Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated For Consent to the Assignment of Lower 700 MHz Band Licenses, WT Docket No. 11-18, *Protective Order*, 26 FCC Rcd 7506 (WTB 2011) ("*Protective Order*").

⁵² Letter from Paul Margie, Wiltshire & Grannis LLP, Counsel to Qualcomm, and Peter J. Schildkraut, Arnold & Porter LLP, Counsel to AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 7, 2011).

⁵³ Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated For Consent to the Assignment of Lower 700 MHz Band Licenses, WT Docket No. 11-18, *Second Protective Order*, 26 FCC Rcd 8441 (WTB 2011) ("*Second Protective Order*").

⁵⁴ Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated For Consent to the Assignment of Lower 700 MHz Band Licenses, WT Docket No. 11-18, *Second Protective Order (Revised)*, 26 FCC Rcd 8791 (WTB 2011) ("*Second Protective Order (Revised)*"). See also Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated For Consent to the Assignment of Lower 700 MHz Band Licenses, WT Docket No. 11-18, *Order*, 26 FCC Rcd 8790 (WTB 2011).

⁵⁵ Letter from Aparna Sridhar, Policy Counsel to Free Press, to Marlene H. Dortch, Secretary, Federal Communications Commission (May 26, 2011) (acknowledgements of confidentiality for Chris Riley, Aparna Sridhar, Corie Wright, Joel Kelsey, Derek Turner); Letter from Rachel W. Petty, Counsel to Qualcomm Incorporated, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 8, 2011) (acknowledgements of confidentiality for Paul Margie, Patrick O'Donnell, Walter Anderson, Jacinda Lanum, Rachel Petty, Renee Wentzel, Madeleine Lottenbach, Christine Lutz, Marielle Moore, Jason St. John).

⁵⁶ Proposed Assignment of Lower 700 MHz Band Licenses from Qualcomm Incorporated to AT&T Mobility Spectrum LLC – Numbering Resource Utilization and Forecast (NRUF) Reports and Local Number Portability Reports Placed Into the Record, *Subject to Protective Order*, WT Docket No. 11-18, CC Docket No. 99-200, *Public Notice*, 26 FCC Rcd 7518 (WTB 2011); Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated For Consent to the Assignment of Lower 700 MHz Band Licenses, WT Docket No. 11-18, *Protective Order*, 26 FCC Rcd 7512 (WTB 2011) ("*NRUF Protective Order*").

acknowledgements pursuant to the *NRUF Protective Order* from forty-four individuals seeking to review the NRUF and LNP data that is in the record.⁵⁷

21. *Bureau Requests for Documents and Information.* On May 20, 2011, pursuant to section 308(b) of the Communications Act,⁵⁸ the Bureau requested a number of documents and additional information from the Applicants by June 3, 2011.⁵⁹ Among other things, the Bureau asked Applicants to provide more details and information about AT&T's Long Term Evolution ("LTE") deployment plans, supplemental downlink technology, its network spectrum and capacity constraints, trunking and other efficiencies, interference mitigation plans, interoperability, service offerings and coverage and capacity, and use of Lower 700 MHz D and E Blocks.⁶⁰ The Applicants provided documents and information beginning June 3, 2011 and continuing to August 1, 2011,⁶¹ some of which were provided subject to the provisions of the *Protective Order* and the *Second Protective Order*.

⁵⁷ Letter from Aparna Sridhar, Policy Counsel to Free Press, to Marlene H. Dortch, Secretary, Federal Communications Commission (May 26, 2011) (acknowledgements of confidentiality for Chris Riley, Aparna Sridhar, Corie Wright, Joel Kelsey, Derek Turner); Letter from Peter J. Schildkraut, Arnold & Porter LLP, Counsel to AT&T, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (June 1, 2011) (acknowledgements of confidentiality for Scott Feira, Patrick Grant, Richard L. Rosen, Michael Bernstein, Maureen R. Jeffreys, Wilson Mudge, Donna E. Patterson, Stephanie M. Phillipps, Jason C. Ewart, Anita Kalra, John Rackson, Kelly C. Smith, Dzmitry Asinski, Brian Sardon, Erica Benton, Dennis Carlton, Jackie C. Cravens, Otto Hansen, Jonathan M. Orszag, Kevin C. Green, Yair Eliat, Allan Shampine, Hal S. Sider, Elizabeth Stare, Thomas A. Stemwedel, Robert D. Willig, Jay Ezrielev, Hilla Shimshoni, Alice Kaminski); Letter from Rachel W. Petty, Counsel to Qualcomm Incorporated, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 8, 2011) (acknowledgements of confidentiality for Paul Margie, Patrick O'Donnell, Walter Anderson, Jacinda Lanum, Rachel Petty, Renee Wentzel, Madeleine Lottenbach, Christine Lutz, Marielle Moore, Jason St. John).

⁵⁸ 47 U.S.C. § 308(b).

⁵⁹ Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Michael P. Goggin, AT&T Mobility Spectrum LLC (May 20, 2011) ("AT&T Information Request"); Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Dean Brenner, Qualcomm Incorporated (May 20, 2011) ("Qualcomm Information Request"). The Applicants requested an extension of the time to respond to their Information Requests until June 10, 2011. *See* Letter from William E. Cook, Jr. Arnold & Porter LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 2, 2011); Letter from Paul Margie, Wiltshire & Grannis LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 2, 2011).

⁶⁰ *See* AT&T Information Request at AT&T Attachment; Qualcomm Information Request at Qualcomm Attachment.

⁶¹ Letter from William E. Cook, Jr., Arnold & Porter LLP, Counsel to AT&T Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (June 3, 2011) ("AT&T First Partial Response of June 3, 2011"); Letter from William E. Cook, Jr., Arnold & Porter LLP, Counsel to AT&T Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (June 10, 2011) ("AT&T Complete Response of June 10, 2011"); Letter from William E. Cook, Jr., Arnold & Porter LLP, Counsel to AT&T Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (June 13, 2011) ("AT&T Response of June 13, 2011"); Letter from William E. Cook, Jr., Arnold & Porter LLP, Counsel to AT&T Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (June 23, 2011) ("AT&T Response of June 23, 2011"); Letter from Paul Margie, Wiltshire & Grannis LLP, Counsel to Qualcomm Incorporated, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 10, 2011) ("Qualcomm First Partial Response of June 10, 2011"); Letter from Paul Margie, Wiltshire & Grannis LLP, Counsel to Qualcomm Incorporated, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 1, 2011) ("Qualcomm Second Partial Response of July 1, 2011"); Letter from Paul Margie, (continued....)

22. By letter dated August 8, 2011, the Bureau advised the Applicants that it was stopping the Commission's informal 180-day timeline for consideration of the Application, given the relationship between the proposed transaction and AT&T's proposed acquisition of T-Mobile USA.⁶² The letter also stated that the Commission had concluded that it is in the public interest to consider the two transactions in a coordinated manner, but without formally consolidating them.⁶³ By letter dated December 9, 2011, the Bureau advised the Applicants that it was restarting the Commission's informal 180-day timeline for consideration of the instant Application, as of November 29, 2011, in light of the Bureau's Order granting AT&T's and T-Mobile's request to withdraw their applications.⁶⁴

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

23. Pursuant to section 310(d) of the Communications Act, we must determine whether the Applicants have demonstrated that the proposed assignment and transfer of control of licenses and authorizations will serve the public interest, convenience, and necessity.⁶⁵ In making this assessment, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act,⁶⁶ other applicable statutes, and the Commission's rules.⁶⁷ If the transaction does not violate a statute or rule, we next consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or

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Wiltshire & Grannis LLP, Counsel to Qualcomm Incorporated, to Marlene H. Dortch, Secretary, Federal Communications Commission (August 1, 2011) ("Qualcomm Third Partial Response of August 1, 2011").

⁶² WTB Transactions Letter.

⁶³ WTB Transactions Letter at 1 n. 5.

⁶⁴ Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Michael P. Goggin, AT&T Mobility Spectrum LLC, and Dean Brenner, QUALCOMM Incorporated (Dec. 9, 2011). See also *AT&T/T-Mobile Dismissal Order*.

⁶⁵ 47 U.S.C. § 310(d).

⁶⁶ Section 310(d), 47 U.S.C. § 310(d), requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. See, e.g., *AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless Seek FCC Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, *Memorandum Opinion and Order*, 25 FCC Rcd 8704, 8716 ¶ 22 (2010) ("*AT&T-Verizon Wireless Order*"); *Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246, *Memorandum Opinion and Order*, 24 FCC Rcd 13915, 13927 ¶ 27 (2009) ("*AT&T-Centennial 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, 17460 ¶ 26 (2008) ("*Verizon Wireless-ALLTEL 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, 17578 ¶ 19 (2008) ("*Sprint Nextel-Clearwire Order*"); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21542 ¶ 40 (2004) ("*Cingular-AT&T Wireless Order*").

⁶⁷ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8716 ¶ 22; *AT&T-Centennial Order*, 24 FCC Rcd at 13927 ¶ 27; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17460 ¶ 26; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17578-79 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21542-43 ¶ 40.

related statutes.⁶⁸ We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.⁶⁹ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.⁷⁰

24. Our public interest evaluation also necessarily encompasses the “broad aims of the Communications Act,” which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.⁷¹ Our public interest analysis also often entails assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.⁷² In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.⁷³

25. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.⁷⁴ The Department of Justice’s (DOJ) review is limited solely to an examination of the competitive effects of the acquisition, without reference to various public interest considerations.⁷⁵ In addition, DOJ’s competitive review of communications mergers is pursuant to section 7 of the Clayton Act: if it wishes to block a merger, it must demonstrate to a court that the merger may substantially lessen competition or tend to create a monopoly.⁷⁶ By contrast, the Commission’s review of the competitive effects of a transaction under the public interest standard is

⁶⁸ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8716 ¶ 22; *AT&T-Centennial Order*, 24 FCC Rcd at 13927 ¶ 27; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17460 ¶ 26; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17578-79 ¶ 19.

⁶⁹ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8716 ¶ 22; *AT&T-Centennial Order*, 24 FCC Rcd at 13927 ¶ 27; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17460 ¶ 26; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

⁷⁰ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8716 ¶ 22; *AT&T-Centennial Order*, 24 FCC Rcd at 13927 ¶ 27; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17461 ¶ 26; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

⁷¹ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8717 ¶ 23; *AT&T-Centennial Order*, 24 FCC Rcd at 13928 ¶ 28; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17461 ¶ 27; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17580 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

⁷² See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8717 ¶ 23; *AT&T-Centennial Order*, 24 FCC Rcd at 13928 ¶ 28; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17461 ¶ 27; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17580 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

⁷³ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8717 ¶ 23; *AT&T-Centennial Order*, 24 FCC Rcd at 13928 ¶ 28; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17461 ¶ 27; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17580 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

⁷⁴ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8717 ¶ 24; *AT&T-Centennial Order*, 24 FCC Rcd at 13928 ¶ 29; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17461 ¶ 28; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17580 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42.

⁷⁵ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8717 ¶ 24; *AT&T-Centennial Order*, 24 FCC Rcd at 13928 ¶ 29; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17462 ¶ 28; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17581 ¶ 21.

⁷⁶ 15 U.S.C. § 18.

broader: for example, it considers whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and the impact on the relevant market, including longer-term impacts.⁷⁷ If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we must designate the Application for hearing.⁷⁸

26. Our analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences.⁷⁹ Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Communications Act.⁸⁰ In using this broad authority, the Commission has generally imposed conditions to remedy specific harms likely to arise from the transaction or to help ensure the realization of potential benefits promised for the transaction.⁸¹

IV. QUALIFICATIONS OF APPLICANTS

27. As noted previously, when evaluating applications for consent to assign or transfer control of licenses and authorizations, section 310(d) of the Communications Act requires the Commission to determine whether the proposed transaction will serve “the public interest, convenience and necessity.”⁸² Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”⁸³ Therefore, as a threshold matter, the Commission must determine whether the applicants to the proposed

⁷⁷ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8717 ¶ 24; *AT&T-Centennial Order*, 24 FCC Rcd at 13929 ¶ 29; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17462 ¶ 28; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17581 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

⁷⁸ 47 U.S.C. § 309(e); see also Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, *Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd 12348, 12364 ¶ 30 (2008) (“*Sirius-XM Order*”); News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, *Memorandum Opinion and Order*, 23 FCC Rcd 3265, 3277 ¶ 22 (2008) (“*Liberty Media-DIRECTV Order*”); General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, *Memorandum Opinion and Order*, 19 FCC Rcd 473, 483 n.49 (2004) (“*News Corp.-Hughes Order*”); Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee), Hearing Designation Order, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) (“*EchoStar-DIRECTV HDO*”).

⁷⁹ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8717 ¶ 25; *AT&T-Centennial Order*, 24 FCC Rcd at 13929 ¶ 30; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17462 ¶ 29; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17581 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

⁸⁰ 47 U.S.C. § 303(r); see also, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8718 ¶ 25; *AT&T-Centennial Order*, 24 FCC Rcd at 13939 ¶ 30; *Verizon Wireless/Alltel Order*, 23 FCC Rcd at 17463 ¶ 29; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17581 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43.

⁸¹ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8718 ¶ 25; *AT&T-Centennial Order*, 24 FCC Rcd at 13929 ¶ 30; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17463 ¶ 29; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17582 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43. We consider only those harms and benefits that are related to the Commission’s responsibilities under the Communications Act and related statutes.

⁸² 47 U.S.C. §§ 214(a), 310(d).

⁸³ *Id.* §§ 308, 310(d). See also, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8718 ¶ 26; *AT&T-Centennial Order*, 24 FCC Rcd at 13930 ¶ 31; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17464 ¶ 31; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17582 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

transaction meet the requisite qualifications requirements to hold and transfer licenses under section 310(d) of the Communications Act and the Commission's rules.⁸⁴

28. Conversely, section 310(d) obligates the Commission to consider whether the proposed transferee is qualified to hold Commission licenses.⁸⁵ No issues have been raised with respect to the basic qualifications of the proposed assignee, AT&T, which has previously and repeatedly been found qualified, through its subsidiaries, to hold Commission licenses. We therefore find that there is no reason to re-evaluate the basic qualifications of AT&T.

V. COMPETITIVE ANALYSIS

A. Overview

29. The Applicants seek Commission consent to the assignment from Qualcomm to AT&T of six megahertz of unpaired 700 MHz spectrum nationwide and an additional six megahertz of unpaired 700 MHz spectrum in five major metropolitan markets covering more than 70 million people. This transaction does not result in the acquisition of wireless business units and customers or change the number of firms in any market, so our competitive analysis considers only the competitive effects associated with the increases in spectrum that would be held by AT&T post-transaction.⁸⁶ As discussed below, our analysis includes a review of the potential competitive effects, on a local and national level, of post-transaction total and below 1 GHz spectrum holdings.

30. The Communications Act requires the Commission to examine closely the impact of spectrum aggregation on competition, innovation, and the efficient use of spectrum. Spectrum is the lifeblood of the wireless industry; to compete effectively and innovate, a wireless provider must have access to adequate spectrum.⁸⁷ The Commission has a unique responsibility to ensure that spectrum is allocated in a manner that promotes actual and potential competition and that incentives are maintained for innovation and efficiency in the mobile services marketplace.⁸⁸ Our public interest analysis must

⁸⁴ See 47 U.S.C. §§ 214(a), 310(d); 47 C.F.R. § 1.948; see also, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8718 ¶ 26; *AT&T-Centennial Order*, 24 FCC Rcd at 13930 ¶ 31; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17464 ¶ 31; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17582 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

⁸⁵ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8720 ¶ 29; *AT&T-Centennial Order*, 24 FCC Rcd at 13931 ¶ 33; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17466 ¶ 33; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

⁸⁶ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8720 ¶ 30; *AT&T-Centennial Order*, 24 FCC Rcd at 13931 ¶ 34; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17468 ¶ 40; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17583 ¶ 24; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 68.

⁸⁷ See e.g., *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17481-82 ¶ 75; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21569 ¶ 109. See also 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. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9820 ¶ 266 (2011) ("*Fifteenth Annual Mobile Wireless Competition Report*").

⁸⁸ See, e.g., 2000 Regulatory Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, FCC 01-328, 16 FCC Rcd 22668, 22695 ¶ 54 ("*Biennial Review of CMRS Spectrum Aggregation Limits*"). As part of the Commission's public interest review, we have unique statutory obligations, distinct from DOJ, to consider the potential anticompetitive effects of proposed acquisitions of spectrum that is used in the provision of mobile services. See *Biennial Review of CMRS Spectrum Aggregation Limits*, 16 FCC Rcd at 22699-22700 ¶¶ 62-63. Our goals relating to spectrum concentration include discouraging anticompetitive conduct and (continued....)

consider not only the near-term, but also the long-term, impacts of the proposed transaction on the implementation of Congress's pro-competitive, deregulatory policies aimed at developing and encouraging competitive markets.⁸⁹

31. The Commission examines the effects of spectrum aggregation on the marketplace on a case-by-case basis.⁹⁰ To do so, the Commission has used an initial screen to identify markets where the spectrum amounts held by a transferee post-transaction provide reason for further competitive analysis of spectrum concentration.⁹¹ In addition, the Commission recently has begun to look more closely at spectrum holdings below 1 GHz, which enable firms to significantly reduce the costs of building and maintaining a network compared to higher-band spectrum, as well as spectrum that is specifically suited for the provision of mobile broadband services.⁹² As discussed in greater detail below, our spectrum concentration review suggests that AT&T's proposed acquisition of Qualcomm's Lower 700 MHz D and E Block licenses has some potential to cause competitive harm.

B. Market Definition

32. We establish at the outset the appropriate market definitions for our evaluation of the proposed transaction. This includes establishing the product and geographic market definitions that we will apply. Market definition focuses on the customer and its ability to and willingness to switch to a different product in response to an increase in price or reduction in quality.⁹³ The relevant product market includes "all products 'reasonably interchangeable by consumers for the same purposes.'"⁹⁴ In this order, as in the Commission's most recent transactions, we will evaluate the proposed transaction using a

(Continued from previous page)

ensuring that incentives are maintained for innovation and efficiency in the mobile services marketplace. *See, e.g., Biennial Review of CMRS Spectrum Aggregation Limits*, 16 FCC Rcd at 22695 ¶ 54.

⁸⁹ *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20586 ¶ 56 (discussing the Commission's general spectrum management policies).

⁹⁰ *AT&T-Centennial Order*, 24 FCC Rcd at 13938 ¶ 50; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21525 ¶ 4; *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078, 19113 ¶ 63 (2004) ("*Rural Report and Order*").

⁹¹ *See, e.g., AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8720-8721 ¶ 32; *AT&T-Centennial Order*, 24 FCC Rcd at 13935 ¶ 43; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17468-69 ¶ 41 n.193; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17583-17584 ¶ 26; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21552 ¶ 58. Because the instant transaction does not result in the acquisition of wireless business units and customers or change the number of firms in any market, we do not apply an initial screen based on the size of the post-transaction Herfindahl-Hirschman Index ("HHI") of market concentration and the change in the HHI.

⁹² *See Fifteenth Annual Mobile Wireless Competition Report*, 26 FCC Rcd at 9832-37 ¶¶ 289-297, 9840-41 ¶¶ 305-307; *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourteenth Report*, 25 FCC Rcd 11407, 11571-72 ¶¶ 269-270, 11577 ¶ 283 (2010) ("*Fourteenth Annual Mobile Wireless Competition Report*").

⁹³ *See, e.g., Horizontal Merger Guidelines*, issued by the U.S. Department of Justice and the Federal Trade Commission, August 19, 2010, at § 4 ("*2010 DOJ/FTC Horizontal Merger Guidelines*") available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (last visited Dec. 21, 2011).

⁹⁴ *United States v. E.I. du Pont de Nemours & Co.* 351 U.S. 377, 395 (1956) (The relevant product market is composed of products that have reasonable interchangeability); *see also United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001).

combined “mobile telephony/broadband services” product market.⁹⁵ Because AT&T is acquiring Qualcomm’s unpaired spectrum to expand its capacity for the mobile broadband services, and because the provision of mobile broadband service is becoming increasingly critical to competition in the mobile marketplace, our analysis of spectrum concentration focuses in part on spectrum suitable and available in the near term to be used for provisioning of mobile broadband services. Similarly, consistent with the Commission’s past analysis, we will primarily use Cellular Market Areas (“CMAs”)⁹⁶ as the local geographic markets in which we analyze the potential competitive harms arising from the spectrum concentration as a result of this transaction.⁹⁷ In addition, as discussed below, we find that there are certain national characteristics to this transaction that warrant a competitive analysis on the national level. Accordingly, we will evaluate, as appropriate, competitive effects of this spectrum acquisition both locally and nationally.

33. *Product Market.* We evaluate this proposed transaction using the product market most recently used by the Commission – a combined “mobile telephony/broadband services” product market, which is comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services).⁹⁸ Although the Commission has determined that there are separate relevant product markets for interconnected mobile voice services and mobile data services, and also for residential services and enterprise services,⁹⁹ it has found it reasonable to analyze all of these product markets under the combined market for mobile telephony/broadband services.¹⁰⁰ We find that AT&T provides services in the product market for mobile telephony/broadband services, and note that no party in the proceeding has suggested that we use a different product market definition. We also note that AT&T states that its proposed use of Qualcomm’s unpaired spectrum as supplemental downlink is particularly relevant to expand its capacity for the mobile broadband services part of this market.¹⁰¹ Our analysis of spectrum concentration focuses specifically on spectrum suitable and available in the near term to be used for provisioning mobile voice or broadband services.

⁹⁵ See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8721 ¶ 35; *AT&T-Centennial Order*, 24 FCC Rcd at 13932 ¶ 37; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17469-70 ¶ 45; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17583-84 ¶ 26.

⁹⁶ CMAs are the areas in which the Commission initially granted licenses for cellular service. See 47 C.F.R. § 22.909. In past orders, as a cross-check to ensure that we do not miss any markets where competitive harm may occur, the Commission also has calculated HHIs for Component Economic Areas (“CEAs”). CEAs are designed to represent consumers’ patterns of normal travel for personal and employment reasons and may therefore capture areas within which groups of consumers would be expected to shop for wireless service.

⁹⁷ See, e.g., *AT&T-Centennial Order*, 24 FCC Rcd at 13934 ¶ 41; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17472 ¶ 52; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

⁹⁸ See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8721 ¶ 35; *AT&T-Centennial Order*, 24 FCC Rcd at 13932 ¶ 37; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17469-70 ¶ 45; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17583-84 ¶ 26.

⁹⁹ See, e.g., *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,470 ¶ 45 n.198; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,586 ¶ 38 n.106.

¹⁰⁰ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8721 ¶ 35; *AT&T-Centennial Order*, 24 FCC Rcd at 13,932 ¶ 37; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,469-70 ¶ 45; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,583-84 ¶ 26.

¹⁰¹ Application, Public Interest Statement at 7-8; Joint Opposition at 2-5. See also AT&T Complete Response of June 10, 2011 at 9-10, 17-19.

34. *Geographic Markets.* In its wireless transaction orders, the Commission has previously applied the “hypothetical monopolist test” and found that the relevant geographic markets are local, larger than counties, may encompass multiple counties, and, depending on the consumer’s location, may even include parts of more than one state.¹⁰² The Commission in these orders has primarily used CMAs¹⁰³ as the local geographic markets in which to analyze the potential competitive harms arising from the spectrum concentration as a result of the transaction.¹⁰⁴ Consistent with these other transactions, we will primarily use CMAs¹⁰⁵ when applying the initial spectrum screen to identify those markets in which spectrum concentration clearly raises potential concerns and therefore require further case-by case review.¹⁰⁶ Nothing in our record causes us to doubt that, in the event of a price increase limited to one CMA, or, more likely, in the event of a reduction in service quality in one CMA that has the effect of raising the quality-adjusted price in that locality,¹⁰⁷ too few buyers would switch to purchasing mobile wireless services in another area to make that quality-adjusted price increase unprofitable.

35. We find that it is appropriate also to analyze both the local markets in which consumers purchase mobile wireless services and the potential national competitive impacts of this transaction. Defining local geographic markets for retail wireless services does not preclude us from recognizing that two key competitive variables – prices and service plan offerings – do not vary for most providers across most geographic markets. The four nationwide providers of retail wireless services (AT&T, Verizon Wireless, Sprint, and T-Mobile) as well as some other providers set the same rates for a given plan everywhere and do not alter the plans they offer depending on the location.¹⁰⁸ The vast amount of provider advertising is national,¹⁰⁹ and nationwide retail stores such as Wal-Mart, Best Buy, and RadioShack, which sell plans at the same rates in every store, play an important role marketing retail

¹⁰² See *AT&T-Verizon Wireless Order*, 25 FCC Rcd 8722 at ¶ 36; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17470-71 ¶ 49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21562-63 ¶¶ 89-90.

¹⁰³ As noted above, in past orders, as a cross-check to ensure that the Commission does not miss any markets where competitive harm may occur, the Commission also has calculated HHIs for Component Economic Areas (“CEAs”).

¹⁰⁴ See, e.g., *AT&T-Centennial Order*, 24 FCC Rcd at 13934 ¶ 41; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17472 ¶ 52.

¹⁰⁵ The Commission has found that for Puerto Rico and the U.S. Virgin Islands each are a separate relevant geographic market. See *AT&T-Centennial Order*, 24 FCC Rcd at 13934 ¶ 42.

¹⁰⁶ *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8724-25 ¶ 42; *AT&T-Centennial Order*, 24 FCC Rcd at 13936 ¶ 46; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17481-82 ¶ 75; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd 17601 ¶ 76.

¹⁰⁷ Service quality might fall, for example, if the firms do not expand service in response to increases in demand, leading to more problems associated with network congestion (such as slow data transmission speeds or more frequent dropped calls).

¹⁰⁸ See, e.g., Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny or to Condition Consent and Reply to Comments, filed June 10, 2011 at Christopher Decl. ¶ 8 (“AT&T/T-Mobile Joint Opposition”); Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations, Description of Transaction, file no. 0004669383, WT Docket No. 11-65 (“AT&T/T-Mobile Transaction”), Sprint Petition to Deny at 21, 23 (noting that handsets developed for a national market); see also *AT&T/T-Mobile Transaction*, Leap Wireless Petition to Deny at 9-10. Moreover, every plan these firms offer today provides coverage over at least the provider’s entire network. (At one time, providers offered local or regional plans with rates and coverage differing depending on where it was sold.)

¹⁰⁹ See, e.g., *Fifteenth Annual Mobile Wireless Competition Report*, 26 FCC Rcd at 9748-50 ¶¶ 129-136. See also *AT&T/T-Mobile Transaction*, Sprint Nextel Petition to Deny at 23-24, Appendix A.

wireless services.¹¹⁰ In addition, under the current market structure certain key elements, such as the development and the deployment of mobile broadband equipment and devices, are largely developed and deployed on a national scale. Because of the important national characteristics, competition that occurs at a local level is unlikely to affect, for example, the pricing and plans that the nationwide providers offer unless there is enough competition in enough local markets to make a nationwide pricing or plan change economically rational. Moreover, evaluating this proposed transaction not only on a local level but also on a national level is particularly appropriate in this instance because AT&T is seeking to acquire Qualcomm's *nationwide* footprint of unpaired spectrum. Indeed, AT&T's stated intention is to use Qualcomm's nationwide spectrum to bond with its existing nationwide spectrum to be used for AT&T's LTE network.¹¹¹

36. Many commenters agree that we should analyze both the local and national competitive impacts. RTG contends that "the proposed transaction will be detrimental to competition in the mobile wireless marketplace, both on a national and local level" because AT&T would exercise the additional market power gained as a result of this transaction and post-transaction AT&T will hold a substantial spectrum interest in markets throughout the United States.¹¹² DISH argues that a large number of consumers choose their service providers based partly on the providers' ability to provide a seamless nationwide customer experience, and this spectrum would enable a regional carrier to transform itself into a nationwide carrier, or provide an input to support a new market entrant.¹¹³ We note that in its prior proposed transactions before the Commission, AT&T has consistently advocated that the Commission examine the national market in our relevant geographic market analysis.¹¹⁴

37. Accordingly, we find it is in the public interest not only to consider the local markets, but also to consider the effect of this transaction at the national level.

38. *Input Market for Spectrum.* In evaluating this transaction, we consider AT&T's holdings that the Commission has found in recent transactions to be "suitable" and "available" in the near term for the provision of mobile telephony/broadband services.¹¹⁵ We also analyze the spectrum concentration associated with this transaction by focusing on spectrum suitable for mobile data services over broadband networks because that spectrum is likely to be a critical input as the market continues its transition to mobile broadband services. As the Commission previously has explained, suitability is determined by whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for

¹¹⁰ See *AT&T-Mobile Transaction*, Sprint Nextel Petition to Deny at 24-25.

¹¹¹ AT&T Complete Response to Information Request (June 10, 2011) at 9. See also Application, Public Interest Statement at 14 (stating "[t]he 6 MHz of Lower 700 MHz D block spectrum nationwide complements AT&T's existing holdings and will provide additional capacity everywhere").

¹¹² RTG Reply at 1; RTG Petition to Deny at 7.

¹¹³ DISH Petition to Deny at 3-4.

¹¹⁴ See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8722 ¶ 37, Application, Public Interest Statement at 22-23 (filed May 22, 2009); *AT&T/Centennial Order*, 24 FCC Rcd at 13933 ¶ 39, Application, Public Interest Statement at 28-29 (filed Nov. 21, 2008).

¹¹⁵ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8723-24 ¶ 39; *AT&T-Centennial Order*, 24 FCC Rcd at 13935 ¶ 43; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17473 ¶ 53; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17591-92 ¶ 53; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21560-61 ¶ 81.

the relevant mobile service.¹¹⁶ With respect to availability, we consider particular spectrum to be a relevant input if it is fairly certain that it will meet the criteria for suitable spectrum in the near term.¹¹⁷

39. Using the suitability criteria, the Commission has previously determined that spectrum suitable for the provision of mobile telephony and mobile broadband services should include cellular, PCS, SMR, and 700 MHz band spectrum, as well as AWS-1 and BRS spectrum where available.¹¹⁸ The Commission has, in the past, considered, but declined to include in its analysis, several other spectrum bands – including EBS, MSS/ATC, AWS-2/3, WCS, 3650-3700 MHz, and 2155-2175 MHz.¹¹⁹

40. The Applicants request that we revise the current spectrum screen in our consideration of this transaction. Specifically, the Applicants urge us, as AT&T has in the past, to include all BRS¹²⁰ and EBS spectrum in the spectrum screen, arguing the BRS/EBS transition is complete¹²¹ and that Clearwire and its partners (including Sprint Nextel and Time Warner Cable) are currently using BRS/EBS spectrum to provide mobile broadband services.¹²² In addition, the Applicants argue that we should include an additional 90 megahertz of MSS/ATC spectrum in the screen, claiming that MSS/ATC providers, including LightSquared, will soon be providing mobile wireless services similar to services provided by

¹¹⁶ See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8723-24 ¶ 39; *AT&T-Centennial Order*, 24 FCC Rcd at 13935 ¶ 43; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17473 ¶ 53; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17591-92 ¶ 53.

¹¹⁷ In the past, the Commission has considered the spectrum to be a relevant input if it met the criteria for suitable spectrum in the near term or within two years. The Commission has emphasized that regarding the presence and capacity of rival service providers, we will look at “the near-term opportunities to obtain access to additional spectrum.” See, e.g., *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 174596 ¶ 98; *Application of AT&T Inc. and Dobson Communications Corp. for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, *Memorandum Opinion and Order*, 22 FCC Rcd 20295, 20323-24 ¶ 56 (“*AT&T-Dobson Order*”). At the time that these transaction orders were released, the *DOJ/FTC Merger Guidelines* used a two-year time frame for the entry to be considered timely for determining a significant market impact. See *Horizontal Merger Guidelines*, issued by the U.S. Department of Justice and the Federal Trade Commission, at § 3.2 (Apr. 2, 1992, revised Apr. 8, 1997) (“*DOJ/FTC Merger Guidelines*”). In 2010, the DOJ released the new *DOJ/FTC Horizontal Merger Guidelines*, and the guidelines removed the two-year period for timeliness of availability. Under these new guidelines, the relevant section states that “in order to deter the competitive effects of concern, entry must be rapid enough.” See *2010 DOJ/FTC Horizontal Merger Guidelines* at § 9.1. Accordingly, we consider the spectrum to be a relevant input if it will meet the criteria for suitable spectrum in the near term.

¹¹⁸ See *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17591-92 ¶ 53.

¹¹⁹ See *AT&T-Centennial Order*, 24 FCC Rcd at 13935-36 ¶ 44; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17479 ¶¶ 67-68; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17599 ¶¶ 71, 73.

¹²⁰ In prior transactions, the Commission decided to include 55.5 megahertz of BRS spectrum in those markets in which the transition to a new band plan suited for the provision of mobile broadband has been completed. *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17478 ¶ 65, *Sprint Nextel-Clearwire Order*, 23 FCC Rcd 17596-99 at ¶¶ 62-70. In those decisions, the Commission excluded BRS spectrum associated with the Middle Band Segment (MBS) channels, BRS Channel 1, and the J and K guard bands.

¹²¹ Application, Public Interest Statement at 24. See also Letter from Joan Marsh, Vice President, Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 9, 2011) (“*AT&T December 9, 2011 Letter*”), at 2.

¹²² Application, Public Interest Statement at 22-25. See also *AT&T December 9, 2011 Letter* at 2.

terrestrial firms.¹²³ Meanwhile, RCA argues that we should revise the spectrum screen to include WCS spectrum, asserting there is no longer a valid basis to exclude AT&T's WCS spectrum holdings from the Commission's spectrum concentration analysis in light of statements in the National Broadband Plan regarding WCS spectrum's suitability for broadband services and because of the Commission's recent *WCS Report and Order*.¹²⁴ While the Applicants oppose including WCS spectrum, they assert that, even if WCS were included, AT&T's attributable spectrum would still be below any initial screen that included WCS spectrum except in a small number of counties.¹²⁵

41. As discussed in greater detail below, because under any version of the overall spectrum screen relatively few, or no, local markets are triggered for further competitive analysis, we determine that there is no need to formally address what spectrum should be included in the Commission's spectrum screen at this time.

42. While we are not revisiting the spectrum screen for the purposes of evaluating this particular transaction, we anticipate that as we consider the input market for spectrum in future transactions, revisions to the screen may be necessary. For instance, as the provision of mobile broadband services becomes increasingly central to wireless transactions, the Commission may find it appropriate to reduce the amount of suitable Specialized Mobile Radio ("SMR") spectrum included in the screen from 26.5 megahertz to 14 megahertz to reflect the relevant portion of SMR spectrum through which mobile broadband service can be provided.¹²⁶ Further, the Commission will continue to monitor any technological or market-driven developments, including those issues raised in the instant record, and will adjust the screen where appropriate to accommodate these changes.

C. Spectrum Concentration

43. Given the importance of spectrum as a resource for wireless providers to compete effectively, we review the spectrum concentration that would result if this transaction is approved.¹²⁷ In particular,

¹²³ Application, Public Interest Statement at 27. See also AT&T December 9, 2011 Letter at 2 (urging the Commission to also include "the PCS G block in which Sprint has announced it will launch LTE service in 2012, as well as MSS spectrum"). In addition to the industry developments that the Applicants describe, they state that, through a rulemaking, the Commission is seeking to add further flexibility in the use of MSS spectrum for the provision of mobile broadband services. Application, Public Interest Statement at 27 (citing Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz, *Notice of Proposed Rulemaking and Notice of Inquiry*, ET Docket No. 10-142, 25 FCC Rcd 9481 (2010)). See also AT&T December 9, 2011 Letter at 2.

¹²⁴ RCA Petition to Deny at 10-11 (citing *the National Broadband Plan* and the *WCS Report and Order*).

¹²⁵ Application, Public Interest Statement at 21.

¹²⁶ In prior transactions, the Commission has included 26.5 megahertz of SMR spectrum. See *Fifteenth Annual Mobile Wireless Competition Report* at Appendix A, 230-31 n. 13. On July 8, 2004, the Commission adopted a new band plan for the 800 MHz band (See FCC Adopts Solution to Interference Problem Faced by 800 MHz Public Safety Radio Systems, *News Release*, FCC, July 8, 2004), whereby 14 megahertz of ESMR spectrum is becoming available on a contiguous basis that is suitable for commercial mobile broadband use. According to the Quarterly Progress Reports filed with the Commission by the 800 MHz Transition Administrator, a substantial number of markets have already been completely rebanded, (http://www.800ta.org/content/reporting/QPR_06.30.11.pdf), with virtually all the rest of the country expected to be transitioned in the next couple of years. Thus, when conducting competitive analysis in the future, the Commission may decide to include only the 14 megahertz of SMR spectrum suitable and available for mobile broadband services.

¹²⁷ As the Commission stated in its *2000 Biennial Review of CMRS Spectrum Aggregation Limits*, which sunset the Commission's spectrum cap, "[w]e find that, under the statutory regime set out by Congress, the Commission has an (continued....)

we evaluate the competitive effects of AT&T's post-transaction spectrum holdings on both a local and national level. We find that the proposed spectrum acquisition, without any mitigation measures, has the potential to harm competition in the wireless marketplace. In subsequent sections, however, we conclude that adopting certain conditions will alleviate these concerns and that, in light of these conditions, the public interest benefits of the proposed transaction will outweigh potential competitive harm.

44. Our market-specific analysis of spectrum aggregation generally yields the same bottom-line results under a number of variations of the spectrum screen. While some variations result in up to three markets being triggered, a closer look at each of the markets triggered reveals little concern for direct competitive harm from general spectrum aggregation in those markets.

45. At the national level, AT&T and Verizon have the most substantial spectrum holdings. There are a number of different ways to attempt to measure nationwide holdings. For example, if we look at providers' holdings on a MHz*POPs basis,¹²⁸ AT&T holds approximately 21 percent of the relevant spectrum, Qualcomm would hold approximately 2 percent of this spectrum, Verizon Wireless would hold approximately 22 percent, Sprint Nextel, 13 percent, T-Mobile, 12 percent, and Clearwire, 12 percent.¹²⁹ Under this measure, implementation of this transaction would still leave available for competitors at the national level more than three quarters of the spectrum suitable for mobile voice or broadband service.

46. A number of petitioners also urge the Commission to address concentration of below 1 GHz spectrum and argue that below 1 GHz spectrum is particularly valuable for providing mobile broadband services.¹³⁰ For example, T-Mobile points to the Commission's *Fourteenth Annual Mobile Wireless Competition Report* for support, where the Commission noted that the characteristics of spectrum below 1 GHz make it particularly suitable for wireless broadband services, and that lower-frequency spectrum possesses superior propagation characteristics that create certain advantages in the provision of mobile service, especially in rural areas.¹³¹ RCA contends that low-frequency spectrum is particularly valuable

(Continued from previous page)

obligation, distinct from that of DOJ, to consider as part of the Commission's public interest review the anticompetitive effects of acquisitions of CMRS spectrum, including those that occur in the secondary market." *Biennial Review of CMRS Spectrum Aggregation Limits*, 16 FCC Rcd at 22699 ¶ 62.

¹²⁸ The "MHz*POPs" metric allows the aggregation of spectrum holdings from different areas by multiplying the megahertz of spectrum held in an area by the population in that area. Metrics that reflect the different values per megahertz of different bands would yield similar results.

¹²⁹ The MHz*POPs percentages in this paragraph were calculated based on data in the Commission's Universal Licensing System regarding providers' current holdings in the following spectrum bands: 700 MHz Lower Band (A-E Block); 700 MHz Upper Band (C & D Blocks); AWS-1; Broadband PCS (including spectrum licensed to Sprint Nextel in the 800 MHz rebanding process); Cellular; BRS (excluding BRS spectrum associated with the MBS channels, BRS Channel 1, and the J and K guard bands); and SMR (26.5 megahertz). Spectrum amounts were estimated on a county basis.

¹³⁰ See, e.g., DISH Petition to Deny at 4-5 ("if being a carrier with a nationwide footprint makes a company best suited to get more nationwide spectrum blocks, then the wireless duopoly will only become more entrenched, creating a vicious cycle whereby no new entrant could obtain enough spectrum to create a national footprint and compete on a nationwide level"); King Street Reply at 4 ("upon consummation of the transaction, AT&T and Verizon will have more than 80% of all 700 MHz spectrum"); Free Press Petition to Deny at 3; RCA Petition to Deny at 11.

¹³¹ See T-Mobile March 11, 2011 Letter at 2 (citing the *Fourteenth Annual Mobile Wireless Competition Report*). See also Free Press Petition to Deny 11-12; RTG Petition to Deny at 8-9 ("the current spectrum screen ignores all differences among the included bands in terms of propagation characteristics, infrastructure expenses, technical and service rules, international harmonization, and licensing arrangements").

in reaching rural areas and point out that even Applicants' experts concede that "all else being equal, lower-frequency signals carry further and may penetrate buildings more readily than higher frequency signals."¹³²

47. Applicants argue, however, that the Commission has not formally distinguished between spectrum below and above 1 GHz in the context of licensee transfer applications, and should not begin to do so now.¹³³ While they acknowledge that spectrum below 1 GHz has superior propagation and can allow for cost savings when building out a network, especially in rural areas, they argue any such cost savings are already reflected in higher prices paid for the spectrum at auction or in the secondary market.¹³⁴ The Applicants also contend that higher band spectrum has several advantages, including its use for adding needed capacity.¹³⁵ With respect to addressing capacity-constrained areas, they argue that "both coverage *and* capacity must be considered in concert with one another in any effective wireless deployment."¹³⁶

48. We note that, by adding the Qualcomm spectrum to its portfolio, AT&T would have substantial holdings under 1 GHz. Specifically, in 134 CMAs, AT&T's post-transaction below 1 GHz holdings would range from between one third to approximately one half of the below 1 GHz spectrum that is potentially available in the near term for mobile voice or broadband services, and 66 of these CMAs are in the top 100 CMAs ranked by population. Further, AT&T would hold more than one-third of below 1 GHz spectrum nationwide, measured on a MHz*POPs basis.¹³⁷ We note as well that, nationwide, AT&T holds 44 percent of the Cellular spectrum and, before this transaction, 25 percent of the 700 MHz spectrum, and Verizon Wireless holds 48 percent of the Cellular spectrum and 43 percent of the 700 MHz spectrum, measured on a MHz*POPs basis. Post-transaction, AT&T would hold nationwide 35 percent of 700 MHz spectrum and 34 percent of below 1 GHz spectrum, measured on a MHz*POPs basis. AT&T and Verizon Wireless combined would hold nationwide approximately 73 percent of below 1 GHz spectrum, measured on a MHz*POPs basis.

49. Based on the record in this proceeding – and the Commission's analysis in the *Fifteenth Annual Mobile Wireless Competition Report* – we find that it is prudent to inquire about the potential impact of AT&T's aggregation of spectrum below 1 GHz as part of the Commission's case-by-case analysis. In the United States, there are frequency bands suitable for mobile broadband services at very different frequencies: for example, the 700 MHz and Cellular (850 MHz) bands fall below 1 GHz, and the AWS, PCS, BRS, and EBS bands – at around 2 and 2.5 GHz – are well above 1 GHz. As both the

¹³² RCA Reply at 7. In addition, Free Press indicates that "[l]icenses to use 'beachfront' spectrum below 1 GHz confer significant advantages relative to other holdings because broadband networks using that spectrum can be built more cheaply than those that rely on spectrum above 1 GHz. Free Press Petition to Deny at 3; *see also* Free Press Petition to Deny 11-12.

¹³³ Joint Opposition at 11-12.

¹³⁴ Joint Opposition at 12-13. *See also* Joint Opposition at 20.

¹³⁵ Joint Opposition at 15-18 (also citing Joint Declaration of Jeffrey H. Reed and Nishith D. Tripathi).

¹³⁶ The Applicants contend that such capacity-driven network design increasingly is required in urban and suburban areas with high data traffic demand and will be required in those rural areas where there are capacity constraints. Joint Opposition at 19.

¹³⁷ The MHz*POPs percentages set forth in this paragraph for below 1 GHz spectrum were calculated based on data in the Commission's Universal Licensing System regarding providers' current holdings in the following spectrum bands: 700 MHz Lower Band (A-E Block); 700 MHz Upper Band (C & D Block); Cellular; and SMR (26.5 megahertz). Spectrum amounts were estimated on a county basis.

Commission and DOJ have recognized, spectrum resources in different frequency bands can have widely disparate technical characteristics that affect how the bands can be used to deliver mobile services.¹³⁸ The more favorable propagation characteristics of lower frequency spectrum, (*i.e.*, spectrum below 1 GHz) allow for better coverage across larger geographic areas and inside buildings.¹³⁹ The Commission has expressly contrasted the value of lower frequency spectrum – which has “excellent propagation” characteristics – with higher frequency bands such as PCS and AWS spectrum, which “make it ideal for delivering advanced wireless services to rural areas.”¹⁴⁰ AT&T itself has recognized this distinction in the context of its bid to acquire T-Mobile, where it asserted that a significant benefit to T-Mobile customers would be their newly acquired access to AT&T’s spectrum below 1 GHz, enabling those

¹³⁸ *Fifteenth Annual Mobile Wireless Competition Report*, 26 FCC Rcd at 9832-37 ¶¶ 289-297. In its consideration of mobile wireless competition issues, the DOJ has noted the differences between the use of lower and higher frequency bands. See *United States of America et al. v. Verizon Communications Inc. and ALLTEL Corporation*, Competitive Impact Statement, Case No. 08-cv-1878, at 5-6 (filed Oct. 30, 2008), available at <http://www.justice.gov/atr/cases/f238900/238947.pdf> (stating that “because of the characteristics of PCS spectrum, providers holding this type of spectrum generally have found it less attractive to build out in rural areas”); *United States of America v. AT&T Inc. and Dobson Communications Corporation*, Competitive Impact Statement, Case No. 1:07-cv-01952, at 5, 11, 13 (filed Oct. 30, 2007), available at <http://www.justice.gov/atr/cases/f227300/227309.pdf> (asserting that “the propagation characteristics of [1900 MHz PCS] spectrum are such that signals extend to a significantly smaller area than do 800 MHz cellular signals. The relatively higher cost of building out 1900 MHz spectrum, combined with the relatively low population density of the areas in question, make it unlikely that competitors with 1900 MHz spectrum will build out their networks to reach the entire area served by” the two 800 MHz Cellular providers).

¹³⁹ See, *e.g.*, Service Rules for the 698-746, 747-762 and 777-792 MHz Band, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephone, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket No. 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Declaratory Ruling on Reporting Requirement Under Commission’s Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289, 15349 ¶ 158, 15354-55 ¶ 176, 15400-401 ¶ 304 (2007) (recognizing the excellent propagation characteristics of 700 MHz band spectrum) (“700 MHz *Second R&O*”); Unlicensed Operation in the TV Broadcast Bands, ET Docket No. 04-186, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, ET Docket No. 02-380, *Second Report and Order and Memorandum Opinion and Order*, 23 FCC Rcd 16807, 16820-21 ¶ 32 (2008) (propagation characteristics of the TV bands enable service at greater ranges than in the 2.4 GHz band). In the *TV White Spaces Second Memorandum Opinion and Order*, the Commission noted that this particular spectrum has excellent propagation characteristics that allow signals to reach farther and penetrate walls and other structures. Unlicensed Operation in the TV Broadcast Bands, ET Docket No. 04-186, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, ET Docket No. 02-380, *Second Memorandum Opinion and Order*, 25 FCC Rcd 18661, 18662 ¶ 1 (2010).

¹⁴⁰ *700 MHz Second R&O*, 22 FCC Rcd at 15349 ¶ 158; see also *Fifteenth Annual Mobile Wireless Competition Report*, 26 FCC Rcd at 9832-37 ¶¶ 289-297; *Fourteenth Annual Mobile Wireless Competition Report*, 25 FCC Rcd at 11570-76 ¶¶ 268-280. The Commission also recognizes, as the Applicants suggest, the value in holding spectrum assets in *different* frequency bands. Specifically, we acknowledge that the combination of spectrum below 1 GHz and higher frequency spectrum may be helpful for the development of an effective nationwide competitor that can address both coverage and capacity concerns. See *Fifteenth Annual Mobile Wireless Competition Report*, 26 FCC Rcd at 9837 ¶ 297.

customers to receive both extended rural coverage and “superior in-building and in-home service” due to access to AT&T’s spectrum below 1 GHz.¹⁴¹ We also note that there is significantly less below 1 GHz spectrum available for mobile broadband service than above 1 GHz spectrum.¹⁴²

50. Our case-by-case analysis must also take into account that AT&T asserts that it plans to bond the unpaired Qualcomm 700 MHz spectrum primarily with its paired spectrum above 1 GHz for downlink purposes.¹⁴³ Such bonding likely would not result in the full range of benefits associated with spectrum below 1 GHz, such as increased coverage and in-building penetration. We note, however, that AT&T’s bonding of unpaired 700 MHz spectrum with AWS-1 would achieve significant increases in downlink capacity associated with the use of below 1 GHz spectrum. In addition, AT&T could bond the Qualcomm spectrum with cellular spectrum at 850 MHz and fully achieve benefits of increased coverage and in-building penetration associated with below 1 GHz spectrum.¹⁴⁴

51. *Conclusion.* After considering all of the factors discussed above, we find that AT&T’s proposed acquisition of Qualcomm’s Lower 700 MHz D and E Block licenses raises some competitive concerns. Post-transaction, AT&T would hold a significant proportion of the available spectrum suitable for the provision of mobile voice or broadband services, particularly below 1 GHz spectrum, that has technical attributes important for other competitors to meaningfully expand their provision of mobile broadband services or for new entrants to have a potentially significant impact on competition. As explained below, however, we conclude that this potential harm can be mitigated with certain targeted conditions to help prevent anticompetitive harm. In particular, we adopt conditions to help ensure that AT&T’s use of the newly acquired spectrum does not impede the use of neighboring 700 MHz spectrum by potential competitors in the provision of broadband services and by limiting AT&T’s ability to use the Qualcomm spectrum in a way that deprives other carriers of the benefits of the Commission’s roaming rules.

¹⁴¹ Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations, Description of Transaction, file no. 0004669383 (“Application”), Description of Transaction, Public Interest Showing, and Related Demonstrations (“Public Interest Statement”) at 44 (filed April 21, 2011). AT&T states that “. . . customers will enjoy improved coverage, including superior in-building and in-home service, because of the denser grid and access to 850 MHz spectrum.” *AT&T-Mobile Transaction*, Application, Public Interest Statement at 44; see *AT&T-Mobile Transaction*, Application, Declaration of William Hogg at 33 ¶ 63 (stating that “in-building coverage will improve for both GSM and UMTS subscribers due to the denser cell grid and the benefits of low-band 850 MHz cellular spectrum.”).

¹⁴² Except in limited areas where AWS-1 or BRS is not yet available, there is 270 megahertz of suitable spectrum available above 1 GHz, and 144 megahertz below 1 GHz – including 50 megahertz of cellular spectrum, 14 megahertz of SMR spectrum, and 80 megahertz of 700 MHz spectrum, including the unpaired spectrum at issue here.

¹⁴³ Application, Public Interest Statement at 15 (“In those areas where AT&T will rely on AWS spectrum for its LTE network, AT&T will bond existing AWS spectrum with the Qualcomm Spectrum to expand the downlink capacity.”); Joint Opposition at 2.

¹⁴⁴ See Application, Public Interest Statement at 15 (stating that “where AT&T currently does not hold 700 MHz or AWS spectrum, the transaction will enable AT&T to bond the unpaired Qualcomm Spectrum with 850 or 1900 MHz spectrum”).

VI. OTHER ISSUES

A. Roaming

52. *Background.* Roaming occurs when the subscriber of one mobile wireless provider travels beyond the service area of that provider and uses the facilities of another mobile wireless provider to place an outgoing call, to receive an incoming call, or to continue an in-progress call.¹⁴⁵ The Commission has adopted roaming rules for voice and data services. The Commission's voice roaming rules, adopted in 2007, provide that upon a reasonable request, CMRS carriers are obligated to provide automatic roaming to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to sections 201 and 202 of the Communications Act.¹⁴⁶ This obligation applies to any real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls, as well as push-to-talk and text messaging services offered by CMRS carriers.¹⁴⁷ The data roaming rule, adopted in April 2011, requires facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations.¹⁴⁸

53. In petitions and other filings in this proceeding submitted before the Commission adopted the *Data Roaming Order*,¹⁴⁹ several parties contended that an increase in AT&T's spectrum holdings will adversely affect the market for data roaming.¹⁵⁰ For example, RCA asserts that the record in the Commission's voice and data roaming docket and in other AT&T transactions reveals widespread industry complaints of impediments to securing roaming arrangements with AT&T.¹⁵¹ More specifically, RCA contends that the extent of AT&T's ability to impede data roaming is directly correlated to the

¹⁴⁵ See, e.g., *AT&T-Verizon Wireless Order* at 25 FCC Rcd at 8741 ¶ 87; *AT&T-Centennial Order*, 24 FCC Rcd at 13963 ¶ 120; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21586 ¶ 166; see also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket Nos. 05-265, 00-193, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047, 15048 ¶ 2 (2005).

¹⁴⁶ 47 C.F.R. § 20.12(d). See also *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8742 ¶ 88; Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 25 FCC Rcd 4181, 4190 ¶ 18 (2010) ("*Roaming Order on Reconsideration*"); Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15826 ¶ 23 (2007).

¹⁴⁷ 47 C.F.R. § 20.12(a)(2). See also *Roaming Order on Reconsideration*, 25 FCC Rcd at 4184 ¶¶ 5-6.

¹⁴⁸ 47 C.F.R. § 20.12(e); see also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-264, *Second Report and Order*, 26 FCC Rcd 5411, 5432 ¶ 43 (2011) ("*Data Roaming Order*").

¹⁴⁹ The Commission adopted the *Data Roaming Order* on April 7, 2011. See *Data Roaming Order*, 26 FCC Rcd 5411 (2011).

¹⁵⁰ See RTG Petition to Deny at 14-17; RTG Reply at 8-9; RCA Petition to Deny at 9-10; RCA Reply at 8; Free Press Petition to Deny at 18-19.

¹⁵¹ RCA Petition to Deny at 9; see also RTG Petition to Deny at 14 (AT&T and Verizon have "fought vociferously" to prevent mobile users who are not their customers from engaging in 3G data roaming, and every indication is that they will do the same when it comes to 4G and future IP-based mobile wireless technologies).

leverage it enjoys as a result of its spectrum holdings.¹⁵² Several parties request that, if the Commission approves the proposed transaction, it require conditions relating to data roaming. RTG urges the Commission to require AT&T to enter into data roaming agreements with other carriers on reasonable terms and conditions.¹⁵³ Similarly, RCA asserts that the Commission should require AT&T to provide commercially reasonable data roaming agreements to any requesting carrier,¹⁵⁴ and Cellular South argues in its Petition to Deny that the Commission should require AT&T to enter into automatic data roaming agreements on reasonable and nondiscriminatory terms.¹⁵⁵ Free Press asserts that the Commission should require AT&T to enter into data roaming agreements on commercially reasonable terms and conditions with “any and all interested parties” for its current HSPA and HSPA+ mobile broadband services and for its future services built on LTE.¹⁵⁶

54. RTG also urges the Commission to require AT&T to provide public safety with priority access on its commercial networks¹⁵⁷ and argues that this would augment public safety interoperability with the 700 MHz band and promote the deployment of a nationwide, interoperable public safety wireless broadband network, consistent with the Commission’s public safety broadband goals.¹⁵⁸

55. In response, the Applicants argue that petitioners’ roaming arguments apply broadly across the industry and are not transaction-specific.¹⁵⁹ Moreover, the Applicants assert that they have already responded to these arguments in the roaming rulemaking proceedings.¹⁶⁰ Further, they assert that imposing the requested conditions on AT&T alone would harm the public interest by constraining AT&T’s ability to compete, discouraging it from investing, and disadvantaging customers.¹⁶¹ In addition, they assert that imposing such conditions on assignment applications would impede the functioning of the secondary market for spectrum.¹⁶²

56. *Discussion.* As discussed earlier, we find this transaction results in spectrum concentration that raises the potential for competitive harm, and thus we must carefully consider whether to impose a roaming condition in the context of this transaction. We decline here to apply the roaming conditions requested by RTG, RCA, Cellular South, and Free Press, which would impose a general data roaming requirement on AT&T,¹⁶³ but we do impose the more circumscribed roaming condition described below.

¹⁵² RCA Reply at 8.

¹⁵³ RTG Petition to Deny at 19; *see also* RTG Reply at 15.

¹⁵⁴ RCA Petition to Deny at 12.

¹⁵⁵ *See* Cellular South Petition to Deny at ii, 19. *See also* note 163 *infra*.

¹⁵⁶ Free Press Petition to Deny at 18.

¹⁵⁷ RTG Petition to Deny at 19-23; *see also* RTG Reply at 20-21 (urging Commission to adopt a condition requiring AT&T to provide public safety with priority access on its commercial networks at the lowest unit charge).

¹⁵⁸ RTG Reply at 21.

¹⁵⁹ Joint Opposition at 28.

¹⁶⁰ *See* Joint Opposition at 29-30.

¹⁶¹ *Id.* at 32-33.

¹⁶² *Id.* at 33.

¹⁶³ We note that our decision is consistent with the Reply filed by Cellular South in this proceeding, which notes that the Commission is “on the verge” of adopting a data roaming rule that would require facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially (continued....)

As noted above, in April 2011, after the completion of the pleading cycle in this proceeding, the Commission adopted a data roaming rule that applies to facilities-based providers of commercial mobile data services, including AT&T.¹⁶⁴ Under this rule, all facilities-based providers of commercial mobile data services must offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations.¹⁶⁵

57. The adoption of the rule does not, however, obviate the need to consider whether there is any potential roaming-related harm that might arise out of this transaction. To mitigate the potential anticompetitive effects of this transaction described below, we adopt a more circumscribed condition to ensure that AT&T does not use the Qualcomm spectrum in a way that deprives other providers of the benefits of the Commission's roaming rules. Just as we noted in the *Data Roaming Order* that issues may arise when one of two overlapping frequency bands is a subset of the other, such as exists in the Lower 700 MHz Band,¹⁶⁶ we recognize the potential for AT&T to incorporate the Qualcomm spectrum into its network in such a way as to preclude roaming on spectrum it chooses to bond through supplemental downlink technology to the Lower 700 MHz D and/or E Blocks. For example, if AT&T bonds the Qualcomm spectrum with AWS-1 spectrum, AT&T cannot use that bonding as a basis to decline to offer roaming to providers offering service on AWS-1 spectrum. We condition our approval of this transaction on the requirement that AT&T may not configure its network so that the supplemental downlink technology creates a barrier to roaming under the Commission's existing roaming rules. Thus, AT&T may not incorporate the Qualcomm spectrum into its network in such a way as to preclude roaming by a provider that otherwise supports the same primary spectrum, e.g., AWS, Cellular, or PCS, but does not support the supplemental downlink technology.¹⁶⁷ In addition, AT&T may not use supplemental downlink technology in the Lower 700 MHz D and/or E blocks to deprive other providers of the benefits of roaming onto AT&T's other spectrum holdings in the Lower 700 MHz band.

58. We deny RTG's request for a condition requiring priority access for public safety. While RTG raises an important issue, we find that it is not related to any specific harm arising out of this transaction.¹⁶⁸ In conclusion, we find that the roaming condition we are imposing herein is sufficient to address any potential roaming-related harm that might arise out of this transaction.

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reasonable terms and conditions and states that the adoption of such a rule "obviously will moot Cellular South's request for a data roaming condition." Cellular South Reply at 1-2.

¹⁶⁴ See 47 C.F.R. § 20.12(e).

¹⁶⁵ See 47 C.F.R. § 20.12(e)(1); see also *Data Roaming Order*, 26 FCC Rcd at 5432-33 ¶¶ 42-43.

¹⁶⁶ See *Data Roaming Order*, 26 FCC Rcd at 5433 ¶ 46 n.128 (stating that the Commission "expect[s] that, when one of two overlapping frequency bands is a subset of the other, a mobile device with a compatible air interface technology that supports the larger of the two bands will be capable of communicating with a network deployed in the smaller band").

¹⁶⁷ AT&T has stated that it intends to use the spectrum it acquires to provide supplemental downlink in conjunction with other spectrum, such as AWS and PCS. See, e.g., Letter from Michael Goggin, General Attorney, AT&T, to Marlene Dortch, FCC, WT Docket No. 11-18, RM-11592, RM-11626, filed July 29, 2011, at 5 ("AT&T plans to use the Lower D and E Block spectrum for supplemental downlink only in conjunction with AWS, 850 MHz, or 1900 MHz spectrum as primary carriers.") (emphasis in original).

¹⁶⁸ See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8747 ¶ 101; *AT&T-Centennial Order*, 24 FCC Rcd at 13929 ¶ 30; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17463 ¶ 29; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17582 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.