



May 9, 2013

EX PARTE VIA ECFS

Chairman Julius Genachowski
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269
*Expanding the Economic and Innovation Opportunities of Spectrum through
Incentive Auctions*, Docket No. 12-268

Dear Chairman Genachowski and Commissioners,

Competitive Carriers Association (“CCA”) submits this letter in response to AT&T’s recent *ex parte* criticizing the April 11, 2013 submission of the United States Department of Justice (“DOJ”) in the above-captioned docket.¹ CCA represents over 100 competitive wireless carriers (in addition to more than 200 associate members who provide an array of products and services essential to today’s wireless ecosystem), all of whom compete against AT&T and Verizon, the two largest, entrenched carriers. The *DOJ Submission* appropriately urged the Commission to adopt spectrum aggregation rules and policies that promote competition and innovation in the wireless industry. AT&T’s objections to DOJ’s expert input are not only unsubstantiated and misleading but betray a troubling hostility to longstanding procompetitive policies endorsed by Congress, the Commission, and the antitrust agencies. Far from seeking to “rig” the upcoming incentive auction or to pick winners and losers in the marketplace, the *DOJ Submission* plainly has the opposite intent: It recognizes the well-documented dangers of today’s highly concentrated wireless market and underscores the resultant need to maintain safeguards that will ensure meaningful opportunities for *all* wireless carriers, not just for AT&T and Verizon.

¹ Letter from Wayne Watts, AT&T Inc., to FCC Commissioners, WT Docket No. 12-269 (filed April 24, 2013) (“*AT&T Letter*”); *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269 (filed April 11, 2013) (“*DOJ Submission*”).

As an initial matter, AT&T’s assertion that DOJ is asking the Commission to “rig the upcoming 600 MHz incentive auction” is nonsense.² DOJ correctly recognized that there is “significant nationwide concentration in the wireless industry,” and that “with highly concentrated telecommunications markets” there are “substantial advantages to making available new spectrum in order to enable smaller or additional providers to mount stronger challenges to large wireless incumbents.”³ Indeed, that premise lies at the core of the Commission’s procompetitive spectrum policies, which it has long enforced through limits on the amount of spectrum any individual carrier may hold, both through the prior spectrum cap and the subsequent adoption of the spectrum screen and case-by-case review of spectrum acquisitions.⁴ Based on the obvious benefits that flow from a robustly competitive marketplace,⁵ DOJ urged the Commission to adopt clear and objective spectrum aggregation policies—both for secondary market transactions and for upcoming spectrum auctions—that will “preserve and promote competition” and “ensure that the largest firms do not foreclose other rivals” from acquiring low-frequency spectrum that will make them stronger competitors.⁶ Adopting neutral, generally applicable spectrum aggregation rules to increase competition and prevent foreclosure of competitive opportunities for non-dominant carriers is precisely what Congress directed in the Spectrum Act,⁷ and is also consistent with well-established Commission precedent.⁸

AT&T’s principal response to these well-settled tenets of competition policy is to pretend that wireless competition is thriving, thus obviating the need for regulation. But by any objective measure, the wireless industry is highly concentrated and the foundations for competition are imperiled, as the Commission and DOJ have both recognized. The Commission’s most recent Wireless Competition Report again demonstrates increasingly high industry concentration as

² *AT&T Letter* at 1.

³ *DOJ Submission* at 8, 11-12.

⁴ *See Amendment of the Commission’s Rules to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd 7700, ¶¶ 61, 106 (1993); *Implementation of Sections 3(n) and 332 of the Communications Act, et al.*, Third Report and Order, 9 FCC Rcd 7988, ¶ 263 (1994); *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668, ¶¶ 47-58 (2001).

⁵ *DOJ Submission* at 5-8.

⁶ *Id.* at 18.

⁷ *See* 47 U.S.C. § 309(j)(17)(B) (authorizing the Commission “to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition”) (emphasis added).

⁸ *See supra* n.4; *see also Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, et al.*, WT Docket No. 12-4, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95 (rel. Aug. 23, 2012) at ¶ 48; *Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589, 17602 ¶ 31 (2011); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21552 ¶ 58 (2004).

measured by the Herfindhal-Hirschman Index (“HHI”).⁹ It also confirms that AT&T and Verizon maintain overwhelmingly dominant spectrum holdings below 1 GHz, including approximately 90 percent of the Cellular spectrum and 84 percent of the Cellular and 700 MHz bands combined.¹⁰ This low band spectrum is vital to industry competition and can provide competitive carriers with improved network coverage, especially in rural areas.¹¹ Consistent with these findings, the recent FCC staff analysis issued in connection with AT&T’s now-abandoned proposal to acquire T-Mobile observed that Verizon and AT&T together accounted for over 60 percent of total subscribers and industry revenue by the end of 2010, and together accounted for an astounding 80 percent of industry EBITDA.¹² Both this Commission and DOJ took action to block that transaction precisely because of concerns that industry concentration was already harming competition. DOJ’s considered judgment that “there is already significant nationwide concentration in the wireless industry”¹³ therefore has ample evidentiary support, particularly since these figures have continued to increase.

AT&T’s letter, by contrast, rests on unsupported assertions and wishful thinking regarding the level of competition and the resultant impact on consumer welfare. AT&T sweeps aside the foreclosure incentives and effects created by the twin super carriers’ dominant holdings of spectrum below 1 GHz, their refusal to enter into commercially reasonable data roaming agreements, among other conduct, and AT&T’s manipulation of the standards-setting process to thwart interoperability in the Lower 700 MHz band. Thus, while AT&T obviously would prefer that the 600 MHz auction include no eligibility rules or spectrum screen of any kind, the *DOJ Submission* cogently responds that such a starkly deregulatory approach would be appropriate only “when market power is not an issue.”¹⁴ In today’s concentrated and duopolistic wireless market, however, AT&T’s preferred approach is unlikely to result in “market outcomes that would ordinarily maximize consumer welfare.”¹⁵ To the contrary, only by ignoring the “foreclosure value” that AT&T would derive from “forestalling entry or expansion that threatens to inject additional competition into the market” can AT&T present its auction-design proposals as consistent with procompetitive, proconsumer policies.¹⁶

⁹ *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. 11-186, Sixteenth Report, FCC 13-14, ¶ 2 (rel. Mar. 21, 2013) (“*16th Wireless Competition Report*”).

¹⁰ *16th Wireless Competition Report* ¶ 2.

¹¹ *DOJ Submission* at 12.

¹² *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Staff Analysis and Findings, 26 FCC Rcd 16184 ¶ 37 (WTB 2011) (“*AT&T-T-Mobile Staff Analysis*”).

¹³ *DOJ Submission* at 8.

¹⁴ *DOJ Submission* at 10.

¹⁵ *Id.*

¹⁶ *Id.* at 11.

AT&T's further claim that DOJ is seeking to promote the narrow interests of Sprint and T-Mobile is another straw man.¹⁷ Although the *DOJ Submission* draws illustrative contrasts between the dominance of AT&T and Verizon and the relative weakness of the other two nationwide carriers, the critical point is that the remedies DOJ proposes would create meaningful opportunities for *all* competitors, including rural, regional, and midsize carriers. As DOJ made clear, it recommends spectrum policies that broadly "promote competition and enhance the potential for entry and expansion in the wireless market."¹⁸ Indeed, DOJ's recommendations are fully consistent with the structural reforms that CCA has advocated for years, such as improving the spectrum screen, designing auction rules that enable all carriers to have reasonable opportunities to acquire spectrum, licensing spectrum in small geographic license areas like Cellular Market Areas (CMAs), and ensuring interoperability. Such structural reforms are manifestly not about picking winners and losers, as AT&T claims, but rather about creating a policy framework to enable robust market competition with opportunities for all carriers to compete on a level playing field.

In fact, it is AT&T's preferred approach to spectrum holdings and auction policies, absent *any* basic regulatory framework, that would pick winners and losers. Abandoning procompetitive policies would have the certain effects of further entrenching the dominance of AT&T and Verizon and robbing smaller rivals of meaningful opportunities to compete, thereby reducing competition in the auction, overall number of bidders, and in turn revenues generated. Only by maintaining basic competitive safeguards can policymakers appropriately protect the interests of consumers and fulfill the goals of the Communications and Spectrum Acts. As DOJ rightly emphasizes, policymakers' reliance on market forces will succeed in expanding consumer welfare only where competition is not hobbled by undue market concentration and predatory conduct. AT&T plainly would prefer an approach to auction design and secondary market transactions that gives it a free hand to expand its dominance, but that effort to rig the process in its favor would come at the expense of competition and the public interest.

For these reasons, and for the reasons set forth in CCA's prior submissions on spectrum aggregation and the 600 MHz incentive auction, CCA urges the Commission to reject AT&T's skewed portrayal of the wireless marketplace and its self-serving attacks on DOJ's expert recommendations for promoting competition.

Sincerely,



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¹⁷ *AT&T Letter* at 3-5.

¹⁸ *DOJ Submission* at 8.