Matthew A. Brill
Direct Dial: 202.637.1095
matthew.brill@lw.com

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: +1.202.637.2200 Fax: +1.202.637.2201
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES
Abu Dhabi, Barcelona, Beijing, Boston, Brussels, Chicago, Doha, Dubai, Düsseldorf, Frankfurt, Hamburg, Hong Kong, Houston, London, Los Angeles, Madrid, Milan, Moscow, Munich, New Jersey, New York, Orange County, Paris, Riyadh, Rome, San Diego, San Francisco, Shanghai, Silicon Valley, Singapore, Tokyo, Washington, D.C.

July 18, 2013

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation, *Promoting Interoperability in the 700 MHz Commercial Spectrum*, WT Docket No. 12-69

Dear Ms. Dortch:

On July 16, 2013, Steven Berry, Rebecca Murphy Thompson and Tim Donovan of Competitive Carriers Association ("CCA"), together with wireless technology consultant Doug Hyslop and the undersigned, met with Sean Lev, Peter Karanjia, and David Horowitz of the Office of General Counsel and Charles Mathias, William Stafford, and Paul D'Ari of the Wireless Telecommunications Bureau to discuss the above-referenced proceeding. We presented the attached slides and discussed the Commission's broad legal authority to restore interoperability in the Lower 700 MHz band and the substantial public interest justifications for such a legal requirement.

With respect to the Commission's statutory authority, we noted that CCA joins in the recent *ex parte* letter of Vulcan Wireless discussing the Commission's broad power to modify 700 MHz licenses pursuant to Section 316 of the Act.[1] We further explained that the Commission can "prescribe the nature of the service to be rendered by" Lower 700 MHz licensees pursuant to Section 303(b) by requiring that they provide service in a manner that ensures interoperability across the A, B, and C Blocks.[2] The D.C. Circuit's decision upholding the Commission's data roaming requirement, *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012), broadly construed the Commission's authority under Section 303(b), rejecting the cramped interpretation that Verizon and AT&T had advanced before the Commission. That holding was consistent with longstanding precedent recognizing that Title III confers "enormous discretion" on the Commission to promulgate licensee obligations that the agency determines

---

1 Letter of Michele Farquhar, Counsel for Vulcan Wireless, to Marlene H. Dortch, FCC Secretary, WT Docket No. 12-69, at 7-12 (July 15, 2013).

2 47 U.S.C. § 303(b).

will serve the public interest.[3] A mandate to provide interoperable service plainly falls within the Commission's power to "define[] the form . . . service must take for those who seek a license for it."[4] Indeed, we noted that if AT&T were correct that the Commission lacks authority to impose an interoperability mandate, then much of the Commission's foundational regulation of wireless services would be *ultra vires*, as interoperability has been a core regulatory requirement since the 1980s.[5]

While AT&T has argued that restoring interoperability would "dictate only the design of wireless apparatus,"[6] that overlooks the fact that an interoperability mandate would specify the obligations of licensees *without* dictating any particular equipment configuration. We noted at the meeting that it is routine for the Commission's imposition of obligations on regulated service providers to have incidental impacts on equipment design and on third parties. For example, CALEA requires telecommunications carriers to implement various "assistance capabilities" to facilitate electronic surveillance by law enforcement, 47 U.S.C. § 1002, but the fact that carriers generally cannot comply with those requirements without acquiring network equipment that performs the necessary functions does not transform the carrier obligations into equipment mandates. By the same token, when the Commission prohibited telecommunications carriers and cable operators from entering into exclusive contracts with owners of multiple dwelling units ("MDUs"), this did not constitute impermissible regulation of MDUs, notwithstanding building owners' contrary assertion; rather, the D.C. Circuit recognized that "most every agency action has relatively immediate effects for parties beyond those directly subject to regulation."[7] And when the Commission set benchmark rates for international settlements between domestic and foreign carriers, it did so by regulating the rates that U.S. carriers may pay, even though such regulation inevitably affected the rates that would be charged by foreign carriers that were beyond the Commission's jurisdiction.[8] The D.C. Circuit affirmed, and confirmed that the Commission does not exceed its authority simply because its regulatory action has consequences for third parties.[9]

---

3 *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

4 *Cellco P'ship*, 700 F.3d at 543.

5 *See, e.g.*, *Year 2000 Biennial Review—Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services*, Order on Reconsideration, 19 FCC Rcd 3239, 3241-42 ¶ 8 (2004); *see also An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, etc.*, Report and Order, 86 FCC 2d 469 ¶¶ 79-80, 92-93 (1981).

6 Letter of David L. Lawson, counsel to AT&T, to Marlene H. Dortch, FCC Secretary, WT Docket No. 12-69, at 6 (July 8, 2013).

7 *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 666 (D.C. Cir. 2009).

8 *See International Settlement Rates*, Report and Order, 12 FCC Rcd 19806 (1997).

9 *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

In any event, we explained that the statutory definition of "radio communications" expressly includes "all instrumentalities, facilities, [and] apparatus," thus undermining AT&T's claim that a regulation of "apparatus" would fall outside the Commission's authority over wireless services.[10] We further observed that the Commission has independent authority under Section 303(e) to "regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein," and that the plain language of that provision empowers the Commission to address a broad range of "external effects" including the various harms flowing from AT&T's Balkanization of the Lower 700 MHz band through the creation of Band Class 17.[11] Moreover, to the extent the Commission's action addresses interference concerns, Sections 303(f) and 302a(a) provide additional authority. And as the NPRM in this proceeding recognized, the Commission's ancillary authority under Sections 303(r) and 4(i) supplements these grants of direct authority to regulate wireless equipment.[12]

While AT&T argues that *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), bolsters its claim that the Commission is powerless to regulate wireless devices, its argument mischaracterizes the court decision as well as the proposed regulation at issue here. The court in that case invalidated a "broadcast flag" requirement applicable to consumer electronics products because the Commission relied solely on ancillary authority to implement the requirement, even though it was "ancillary to nothing," and the regulation took effect only *after* all transmission by wire or radio was complete, thus removing the activity from the Commission's subject matter jurisdiction under Title I of the Act. *Id.* at 699-703. The proposed interoperability rule, by contrast, (i) is grounded in the Commission's direct regulatory authority under Title III, (ii) rests on provisions that expressly encompass receiving devices, and (iii) governs the receipt of 700 MHz transmissions by wireless devices, rather than applying only to devices engaged in post-transmission activity.

In addition to reviewing the legal authority supporting an interoperability mandate, we discussed the many public interest benefits that will result from the Commission's restoration of interoperability and AT&T's exaggeration of the costs associated with such a requirement. Among other benefits, we explained how restoring interoperability will enable CCA's members to obtain LTE handsets at a reasonable cost and in turn to deploy broadband LTE services using their A Block licenses. We also discussed how most carriers' A Block licenses have effectively been rendered unusable as a result of AT&T's Balkanization of the Lower 700 MHz band, and how U.S. Cellular's limited success in obtaining some Band 12 devices cannot be replicated by smaller carriers (or even by U.S. Cellular in the long run).[13] We noted the extensive record

---

10 47 U.S.C. § 153(40).

11 47 U.S.C. § 303(e).

12 *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Notice of Proposed Rulemaking, 27 FCC Rcd 3521, 3546 ¶ 58 & n.153 (2012).

13 *See* Ex Parte Letter of Grant B. Spellmeyer, U.S. Cellular, to Marlene H. Dortch, FCC Secretary, WT Docket No. 12-69, at 2 (July 16, 2013) (explaining that "[w]hat U.S. Cellular has accomplished in terms of a device lineup is not replicable in the long run by

evidence demonstrating the benefits relating to increased competition, job creation, and economic growth that will flow from such increased spectrum utilization and facilities deployment. In fact, the record shows that the benefits of interoperability are substantial, widely shared, and especially meaningful to consumers—in particular, rural consumers.

In contrast, Mr. Hyslop discussed the technical studies in the record showing that AT&T's purported interference concerns relating to Channel 51 and the Lower E Block have no basis in fact. He also refuted AT&T's claim that a special internal switch would have to be installed in devices that support both Band 12 and Band 17. Mr. Hyslop explained that only an inexpensive new filter (similar to existing filters) would be required to restore interoperability, and that AT&T would not require significant lead time to work with its carrier partners to develop the necessary equipment specifications for Band 12 or Band 12/17 devices.[14] In addition, we explained that AT&T's argument about the purported need for devices to "fallback" to CDMA is unavailing, as AT&T ignores the many carriers that plan to rely on greenfield 4G networks or 3G GSM/UMTS networks, as well as CDMA-based carriers' options for migrating to 4G throughout their operating footprint. In short, the record confirms that any harms or costs associated with restoring interoperability, far from being substantial or irreparable (as AT&T claims), will be quite modest.

Finally, we emphasized the need for a *timely* solution to interoperability, consistent with the Commission's expectations in the NPRM. While most parties (including CCA) have expressed support for an industry-driven approach to interoperability—which would "allow[] the market greater flexibility in responding to evolving consumer needs,"[15] current market conditions have thwarted, rather than facilitated, any such solution.[16] Practically speaking, AT&T has no real incentive to reach a consensus on this issue. In fact, AT&T has a strong incentive not to incorporate inclusive technology into its devices because separating adjacent Band Class 12 frequencies from AT&T's devices increases consumer switching costs and reduces the likelihood of costly churn off of AT&T's network. And the Commission itself has previously expressed its concern that "individual private negotiations with other Lower 700 MHz licensees may not be able to successfully resolve these concerns in a timely and consistent

---

[that] company or by smaller carriers absent an order requiring interoperability due to time, effort, costs, and inefficiencies involved").

14 *See id*. at 2-3 (noting that "[l]ike AT&T, U.S. Cellular has had significant discussions with OEMs regarding its 2015 device roadmap" and that "the reality is that device specifications still remain flexible and subject to change for 2015, or 2014 for that matter"; *see also* Randall Stephenson, Opinion, *Spectrum and the Wireless Revolution*, Wall St. J., June 10, 2012 (confirming that "[AT&T] could put compatible spectrum to work in as little as 60 days.").

15 *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Notice of Proposed Rulemaking, 27 FCC Rcd 3521, 3543 ¶ 49 (2012).

16 *See, e.g.*, Ex Parte Letter of Rebecca Murphy Thompson, CCA, to Marlene H. Dortch, FCC Secretary, WT Docket No. 12-69, at 3 (June 28, 2013).

manner . . . ."[17] Nonetheless, CCA in its comments and reply comments in response to the NPRM suggested a framework through which the industry could work together to find technical solutions to legitimate interference concerns, with sufficient Commission oversight to prevent the process from becoming derailed by anticompetitive conduct. Rather than engage with CCA on this proposal, AT&T stated in reply comments that an industry solution is likely to emerge only after alleged Channel 51 and E Block interference issues are appropriately addressed.[18] Accordingly, AT&T's suggestions for addressing those issues do not involve an industry solution at all, but rather contemplate further regulatory action,[19] and there is no assurance that this regulatory action will occur in the near term. As then-Commissioner Clyburn pointed out in her statement accompanying the NPRM, "the industry has already had more than four years to find a solution. This industry knows how to arrive at interoperability . . . . If sufficient progress is not being made, [the Commission] should not hesitate to adopt these proposed rules. I look forward to an industry solution, or the adoption of rules, by the end of [2012]."[20]

In summary, as the attached presentation reflects, we explained that restoring interoperability throughout the Lower 700 MHz band will deliver substantial public interest benefits without imposing significant costs on AT&T—or, more importantly, on consumers. The Commission therefore should proceed to adopt a requirement to restore interoperability, consistent with its longstanding policy applicable to other spectrum bands.

Please contact the undersigned with any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill

cc: Sean Lev
Peter Karanjia
David Horowitz
Charles Mathias
William Stafford
Paul D'Ari

---

17 *Application of AT&T Inc. and Qualcomm Incorporated For Consent To Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589, 17617 ¶ 66 (2011).

18 Reply Comments of AT&T, WT Docket No. 12-69, at 63 (filed July 16, 2012).

19 *Id*. at 63-70. In fact, in an interesting about-face, AT&T cites to some of the same statutory provisions now cited to by CCA as giving the Commission the legal authority to "modify licenses even over the objection of the licensee if the Commission finds that such modification would be in the public interest to prevent interference from affecting other licensees." *Id*. at 70 & n.284 (*citing* 47 U.S.C. §§ 303(f), 302a(a), 303(e)).

20 *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Statement of Commissioner Mignon L. Clyburn, 27 FCC Rcd 3521, 3560 (2012).