

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

In the Matter of

Applications of AT&T Inc., Leap Wireless
International, Inc., Cricket License Company,
LLC, and Leap Licenseco, Inc.

for Consent to Transfer Control and Assign
Licenses and Authorizations.

WT Docket No. 13-193

PETITION TO DENY OF DAVID K. SMITH

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INTRODUCTION AND SUMMARY

David K. Smith, through his undersigned counsel, hereby petitions to deny the Applications of AT&T, Inc. (“AT&T”), Leap Wireless International, Inc. (“Leap”), Cricket License Company, LLC (“Cricket”), and Leap Licenseco Inc. (“Leap Licenseco,” and collectively, the “Applicants”) for consent to transfer control of licenses and authorizations held by Cricket and other wholly-owned and controlled subsidiaries of Leap to AT&T and for consent to assignment of a license from Cricket to Leap Licenseco. Applicants seek such consent to facilitate a proposed transaction (the “Proposed Transaction”) pursuant to which AT&T would acquire Leap as a wholly-owned subsidiary of AT&T.

Mr. Smith is a Cricket customer who lives in Douglasville, Georgia. He pays \$35 per month for a Cricket prepaid smartphone plan. The Proposed Transaction would cause significant harm to persons such as Mr. Smith and the public interest. The Proposed Transaction is problematic for many of the same reasons that AT&T’s unsuccessful attempt to acquire T-Mobile USA, Inc. (“T-Mobile”) failed to serve the public interest. Indeed, the Proposed Transaction appears to be part of an effort to achieve the same detrimental goals of that failed acquisition through a series of slightly smaller, but equally harmful, acquisitions. The Proposed Transaction would squash the still-emerging competitive forces in the prepaid wireless market and enable AT&T to further hoard precious quantities of spectrum. The competition that flows from multiple market participants and diversity of spectrum control is especially important in the prepaid market, which largely serves customers of low socio-economic status who will suffer disproportionate harm from the rising prices and constrained choices that would inevitably follow AT&T’s increased market share and spectrum control.

At the very least, the Commission should hold these proceedings in abeyance until it completes its rulemaking regarding mobile spectrum holdings. In response to criticism voiced

by Applicants and others, and based on the Commission's concerns about continued market concentration, the Commission is currently reconsidering its case-by-case approach to reviewing proposed wireless transactions. And that rulemaking will address the anti-competitive effects of spectrum aggregation and the threat posed by a wireless industry dominated by only a handful of providers—the precise concerns raised by the Proposed Transaction. There is no reason to permit this transaction to slip through the gates right before the Commission adopts new rules crafted to address those concerns.

I. THE PROPOSED TRANSACTION IS CONTRARY TO THE PUBLIC INTEREST.

The Proposed Transaction is clearly not in the public interest. Under the Communications Act of 1934, as amended, the Commission may not approve a proposed transfer of control of licenses and authorizations unless the Applicants demonstrate by a preponderance of the evidence that the proposed transaction “will serve the public interest, convenience, and necessity.”¹ This “public interest evaluation 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.”² “Congress has established the promotion of competition as a fundamental goal of the nation’s mobile wireless policy.”³ Consequently, the Commission’s analysis “is informed by, but not limited to, traditional antitrust principles.”⁴ The Commission’s analysis is “broader” than the antitrust review conducted by U.S. Department of Justice in that 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 its

¹ Mem. Op. and Order, Declaratory Ruling, and Order on Recons. ¶ 23, *In re Applications of SoftBank Corp., Starburst II, Sprint Nextel Corp., and Clearwire Corp.*, IB Docket No. 12-343 (July 3, 2013) (“*Sprint Nextel Order*”); *see also* 47 U.S.C. §§ 214(a), 310(d).

² *Sprint Nextel Order* at ¶ 24 (internal quotation marks omitted).

³ Notice of Proposed Rulemaking ¶ 3, *In re Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (Sept. 28, 2012) (“*Mobile Spectrum Holdings NPRM*”) (citing 47 U.S.C. § 332(a)(3), (c)(1)(C); *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*, Sixteenth Report, WT Docket No. 11-186, ¶ 410 (Mar. 21, 2013) (“*Sixteenth Wireless Competition Report*”) (“Promoting competition is a fundamental goal of the Commission’s policymaking.”).

⁴ *Sprint Nextel Order* at ¶ 25.

impact on the relevant market.”⁵ “The heart of our national economic policy,” after all, “long has been faith in the value of competition.”⁶ “The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”⁷ Thus, Applicants must affirmatively demonstrate that the Proposed Transaction will serve the public interest by promoting competition in the wireless market. They have failed to do so here.

A. The Proposed Transaction would harm competition by eliminating Leap as a direct rival and innovator in the wireless market.

The Proposed Transaction would lessen, rather than improve, competition in the wireless industry. Most obviously, the Proposed Transaction would undermine competition by removing one of the wireless market’s chief regional carriers and providers of prepaid, no-contract wireless services. “With 5 million customers, Leap is currently the fifth largest mobile carrier in the U.S., having moved up the ranks last spring when T-Mobile merged with MetroPCS.”⁸ If the

⁵ *Id.*

⁶ *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

⁷ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978).

⁸ Kevin Fitchard, *AT&T agrees to buy Leap Wireless: Will regulators let this one through?*, GigaOM (July 12, 2013), <http://gigaom.com/2013/07/12/att-wants-to-buy-leap-wireless-will-regulators-let-this-one-through/>. U.S. Cellular also claims to be the number five carrier. See Peter Svensson, *US Cellular embraces iPhone after rejecting it*, Boston.com (May 3, 2013), <http://www.boston.com/business/technology/2013/05/03/cellular-embraces-iphone-after-rejecting/bkxZGzIFtXLlrywu0GCoaO/story.html>. In fact, Sprint just recently purchased a chunk of spectrum and customers from U.S. Cellular, see News Release, Sprint Nextel Corp., *Sprint Closes Transaction to Acquire U.S. Cellular Spectrum and Customers in the Midwest* (May 17, 2013), <http://newsroom.sprint.com/news-releases/sprint-closes-transaction-to-acquire-us-cellular-spectrum-and-customers-in-the-midwest.htm>, and many predict U.S. Cellular could be the next regional carrier to step up to the auction block for a full acquisition from one of the big four, see *AT&T bid for Leap could lead to more telecom mergers*, Kansas City Star (July 15, 2013), <http://www.kansascity.com/2013/07/15/4345948/att-bid-for-leap-could-lead-to.html>.

Proposed Transaction occurs, Leap would be replaced with a smaller, less competitive fifth-place carrier, just as Leap replaced the more formidable MetroPCS.

Indeed, the Proposed Transaction may be the straw that would break the camel's back in wireless consolidation. As the Commission noted last year: "In 2003 ... , there were six mobile telephone operators that analysts then described as nationwide Today, as a result of mergers and other transactions, there are four nationwide providers."⁹ "At year-end 2011, the four nationwide service providers accounted for just over 90 percent of the nation's mobile wireless subscribers (including wholesale connections and machine-to-machine connections), with AT&T and Verizon Wireless together accounting for 64 percent."¹⁰ Just this week, T-Mobile's Chief Financial Officer suggested that a merger between Sprint and T-Mobile would be the "logical ultimate combination."¹¹ In the increasingly concentrated wireless market, the sequential offing of each rising "competitive force in the market is a cause for serious concern."¹² This constant

⁹ *Mobile Spectrum Holdings NPRM* at ¶ 14

¹⁰ Sixteenth Wireless Competition Report at ¶ 8.

¹¹ Dan Seifert, *T-Mobile executive calls potential Sprint merger the 'logical ultimate combination'*, The Verge (Sept. 25, 2013), <http://www.theverge.com/2013/9/25/4769794/t-mobile-executive-calls-potential-sprint-merger-the-logical-ultimate>.

¹² Staff Analysis and Findings ¶ 1, *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG*, WT Docket No. 11-65 (Nov. 29, 2011) ("AT&T/T-Mobile Staff Analysis and Findings"); *see also* Kevin Robinson-Avila, *AT&T Leaps Onto Cricket*, Albuquerque Journal (Aug. 11, 2013), <http://www.abqjournal.com/245368/biz/atampt-building-on-cricket.html> ("[T]he 10 percent market share held by smaller regional carriers like Cricket is shrinking. That's because the big guys are buying them up to capture more subscribers in market segments that they ignored before, such as the prepaid arena, while in the process acquiring more spectrum—the radio airwaves that connect mobile devices—to add bandwidth for expansion and service improvement."); Olga Kharif & Scott Moritz, *AT&T's Leap Deal Puts Pressure on Smaller Rivals to Pair Up*, Bloomberg (July 15, 2013), <http://www.bloomberg.com/news/2013-07-15/at-t-s-leap-purchase-puts-pressure-on-smaller-rivals-to-pair-up.html> ("'Everyone below the top four is pretty much done' because of the looming consolidation, [wireless industry analyst Chetan] Sharma said. 'I don't think they'll exist beyond the next 18 months.'").

consolidation is not healthy for competition.¹³

B. The Proposed Transaction would harm competition by further aggregating AT&T's already substantial spectrum holdings.

The obvious driving force in this deal is AT&T's thirst for more spectrum. Congress, the President, and the Commission have all recognized that wireless broadband services are a "game changer" for consumers, businesses, government agencies, schools, health care providers, and first responders. Yet the United States is rapidly running out of wireless spectrum, the critical public resource that supports broadband services. Spectrum is essentially a zero-sum game; AT&T's acquisition of more spectrum necessarily results in less spectrum held by AT&T's competitors. As the second-largest wireless provider in the United States, AT&T already has a considerable share of the nation's spectrum resources. But it wants more.¹⁴ And as Applicants' Description of Transaction explains, Leap holds a stockpile of spectrum that AT&T intends to convert to its own use if the transaction is approved.¹⁵

¹³ Applicants suggest the Proposed Transaction is necessary to improve Leap's lot in the market, but that does not mean it is in the public interest. Applicants state, in carefully couched terms, that Leap "is not a nationwide facilities-based provider," Description of Transaction, Public Interest Showing and Related Demonstrations at 10, *In re Applications of Cricket License Company LLC, et al., Leap Wireless International, Inc., and AT&T, Inc.*, WT Docket No. 13-193 (Aug. 1, 2013) ("Description of Transaction") (describing AT&T's thus-far unsatisfactory performance as a competitor with Leap in the prepaid, no-contract market); Decl. of S. Douglas Hutcheson, Chief Exec. Officer, Leap Wireless Int'l ¶ 2, *In re Applications of AT&T*, WT Docket No. 13-193 (Aug. 1, 2013), and that "intensifying competition in the wireless industry, particularly from carriers with nationwide LTE networks, is likely to negatively impact Leap's ability to attract and retain customers in the future," Description of Transaction at 11–12. But "the intensifying competition" to which AT&T vaguely alludes is, of course, its own skewed market power. And this Commission should not be persuaded by the notion that it serves the *public* interest to permit a dominant market participant, like AT&T, to *consolidate* its market power by "saving" smaller competitors from its perceived dominance.

¹⁴ See Kevin Fitchard, *A bird's eye view of the AT&T-Leap Wireless merger*, GigaOM (July 15, 2013), <http://gigaom.com/2013/07/15/a-birds-eye-view-of-the-att-leap-wireless-merger/> ("[T]oday mobile carriers are buying up their competitors for a single asset only, spectrum.").

¹⁵ Description of Transaction at ii–iii, 13–19.

The resulting spectrum aggregation would seriously harm competition. When AT&T was attempting to acquire T-Mobile, AT&T cited Leap's participation in the wireless marketplace as one of the chief protections against any anticompetitive effect of the AT&T/T-Mobile merger.¹⁶ In that filing, AT&T argued that after AT&T's merger with T-Mobile the "combined company will continue to face intense competition" from several competitors.¹⁷ One such competitor was Leap, which AT&T described as a "leading 'all you can eat' provider[]" that was "growing rapidly and w[ould] continue winning consumers with their low-priced service plans after [the AT&T/T-Mobile transaction] closes."¹⁸ But now AT&T proposes to eliminate this check on market power and spectrum aggregation. And other "checks" on consolidation that AT&T and T-Mobile cited have already disappeared: MetroPCS has been acquired by T-Mobile, Clearwire has merged with Sprint, and Lightsquared's proposed national broadband network was blocked by the Commission and the company has since filed for bankruptcy. Nearly all of the regional competitors (aside from Leap) that AT&T suggested would prevent spectrum aggregation from negatively affecting competition are now gone. Highlighting just how concentrated spectrum aggregation has become, the Commission recently reported that "[f]ive providers together—Verizon Wireless, AT&T, T-Mobile, as well as Sprint and Clearwire—hold close to 80 percent of all spectrum, measured on a MHz-POPs basis, that is potentially usable for the provision of mobile wireless services."¹⁹ (That list of dominant spectrum holders shrunk to four when Sprint completed its merger with Clearwire.) All the while, AT&T's storehouse of spectrum has grown. The trend is obvious. The Proposed

¹⁶ Description of Transaction, Public Interest Showing and Related Demonstrations at 12–13, *In re Applications of AT&T*, Docket No. 11-65 (Apr. 21, 2011).

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 12.

¹⁹ Sixteenth Wireless Competition Report at ¶ 118.

Transaction would only exacerbate this spectrum aggregation problem and drive yet another stake in the heart of meaningful competition in the wireless market.

The Proposed Transaction raises the same substantial threats as AT&T's failed acquisition of T-Mobile, and it should meet the same fate. As Leap itself stated in its petition to deny the AT&T/T-Mobile transaction, "[t]he truth is that, AT&T's cynicism notwithstanding, small, mid-sized and startup carriers are indeed the drivers of innovation in the wireless industry today. Providers such as Leap have developed novel and industry-changing products and services, including unlimited voice and data offerings at fixed price points, and unlimited mobile music services such as Leap's Muve Music."²⁰ Thus, like T-Mobile, Leap "has played an important role in the development of a more competitive mobile services marketplace by engaging in both pricing and technical innovation."²¹ The systematic elimination of these "small, mid-sized and startup carriers" would eliminate the wireless market's "drivers of innovation." Just two years ago, Leap howled at AT&T's assertion that "the wireless marketplace will actually become 'more competitive' once Number One swallows Number Four."²² It is just as far-fetched to think more competition will come from AT&T swallowing today's Number Five. On the contrary, there is a substantial risk that AT&T's elimination of Leap as a direct competitor would lead to "an increase in price (or a reduction in the rate of price decline), a reduction in output or service quality, or a reduction in the rate of new product development or other innovation."²³ The Commission should use its review of the Proposed

²⁰ Pet. to Deny of Leap Wireless Int'l, Inc. and Cricket Commc'ns, Inc. at 3, *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG*, WT Docket No. 11-65, DA 11-799 (May 31, 2011) ("Leap and Cricket Petition to Deny").

²¹ AT&T/T-Mobile Staff Analysis and Findings at ¶ 22.

²² Leap and Cricket Petition to Deny at 2–3 (emphasis in original; footnote omitted).

²³ AT&T/T-Mobile Staff Analysis and Findings at ¶ 14.

Transaction, just as it did with the failed AT&T/T-Mobile transaction, to protect innovation in the market and to protect the very role that Leap itself stated it plays in the market. If the Commission fails to take this opportunity, the wireless marketplace will take another step toward the overconcentration that animated the concerns with the AT&T/T-Mobile transaction.

C. The Proposed Transaction's anti-competitive effects will harm consumers.

Consumers, like petitioner, will bear the brunt of these anti-competitive effects. By decreasing competition, the remaining broadband providers will no longer be forced to maintain competitive prices or to offer new, innovative products. Instead, petitioner and other consumers who previously sought low-cost alternatives—such as Leap's Cricket prepaid services—will be left in need of affordable and reliable wireless service. While the Proposed Transaction would grant Leap customers access to AT&T's broader network, that access inevitably would come at a steep hike in prices or the obligation to trade prepaid services for long-term contracts.²⁴ But those are precisely the sorts of policies Leap's customers have chosen to avoid. The very reason that regional carriers like Leap provide cheaper service without long-term contracts is because their networks are not as extensive or fast as the national carriers; they offer an alternative market choice for customers who either do not want or cannot afford the high costs and commitment demanded by large carriers with national networks.²⁵ The Proposed Transaction

²⁴ Brendan Greeley, *AT&T Will Buy Leap for Spectrum and Get Low-Paying Customers*, BusinessWeek (July 15, 2013), <http://www.businessweek.com/articles/2013-07-15/at-and-t-buys-leap-for-spectrum-gets-low-paying-customers> (“On its national network, AT&T will now have regional customers, used to paying less with no contract. The way [AT&T spokesman Brad] Burns describes it, Leap's customers will be thrilled to get something more. But they are unlikely to be thrilled to pay more for it.”).

²⁵ *Id.* (“It's hard to see what Burns means by ‘making the prepaid market more competitive,’ since it was competition and the desire to win new customers that had already driven down prices in the prepaid market before AT&T showed up.”).

will eliminate that variety and thus reduce the choices available to consumers like petitioner, while likely hiking their prices as well.

Worse yet, the negative effects brought on by the Proposed Transaction would disproportionately harm the most vulnerable wireless customers, including minorities and low-income persons. Prepaid customers “are typically less educated and from lower income households” and “overwhelmingly cite monthly cost savings compared to landline or contract cell phones” as the reason for their choice of prepaid service.²⁶ The low-cost, no-commitment option provided by prepaid services, like Cricket, is essential for low-income individuals who “may have lost both landline and wireless phones, don’t have the credit to re-subscribe, and adopt prepaid as a way to rejoin the communications grid,” especially given that “far more blue collar workers than white collar professionals say their cell phone has helped them make money.”²⁷ Following the Proposed Transaction, Cricket’s low-income prepaid customers risk losing the lower prices and lack of contractual commitment that has enabled them to participate in the communication grid to better their economic status and has provided the means necessary to communicate during times of emergency. “If AT&T is allowed to remove Leap from the market, the customers it serves, particularly minority and low-income communities, will be

²⁶ Nicholas P. Sullivan, *Cell Phones Provide Significant Economic Gains for Low-Income American Households* at 4–5, 23 (April 2008), http://newmillenniumresearch.org/archive/Sullivan_Report_032608.pdf (“In many cases, prepaid users have been unable to keep up with large and unanticipated monthly phone bill[s] for postpaid phones and switched to prepaid phones.... Combining these savings with the income gains [from cell phone usage] significantly increases the already notable economic benefit to low-income households.”).

²⁷ *Id.* at 23; see also Marc Lifsher, *More cellphone users switch to prepaid plans*, L.A. Times (Feb. 19, 2013), <http://articles.latimes.com/2013/feb/19/business/la-fi-0220-prepaid-cellphone-boom-20130220> (“The U.S. switch to prepaid accelerated during the recession as nervous consumers decided not to get bogged down with lengthy contracts and phone charges they couldn’t predict.”).

disproportionately affected, and might have nowhere else to go.”²⁸ AT&T has said that it intends to continue to use the Cricket brand name, but it has given no assurances that after the Proposed Transaction AT&T will offer the same low-cost plans that Cricket customers now enjoy.²⁹ Moreover, because AT&T and Cricket utilize different network technologies, petitioner and other Cricket customers more than likely will have to replace their current Cricket cell phones with AT&T network compatible phones following the Proposed Transaction, which will be another financial burden on Cricket customers.

Applicants’ promises of increased efficiency and consumer choices are illusory. Applicants suggest that the Proposed Transaction will lead to expanded and improved consumer options while also allowing AT&T to make more efficient use of Leap’s spectrum holdings. But AT&T does not explain how eliminating a competitor would *increase* choices or efficiency, and it is axiomatic that market concentration tends to *decrease* consumer choices and *reduce* any incentive to put resources to efficient uses. As the U.S. Department of Justice recently explained, “[c]ompetition has been a major force in driving innovation in telecommunications, bringing consumers a wider range of choices of products and services and better prices” and “competition generally represents the best method of ensuring that consumers receive low-priced, high-quality products and services, greater choice among providers, and important innovation.”³⁰ To suggest otherwise ignores the historic effects of monopolistic behavior.³¹ As

²⁸ *AT&T Buying Leap Wireless Would Be a Bad Deal For Consumers, Competition, and Vulnerable Populations*, Public Knowledge (July 12, 2013), available at <http://www.publicknowledge.org/att-leap>.

²⁹ Letter from AT&T, Leap, and Cricket to Marlene Dortch at 2, *In re Applications of Cricket License Company LLC, et al., Leap Wireless International, Inc., and AT&T, Inc.*, WT Docket No. 13-193 (Aug. 20, 2013) (“AT&T’s integration plans at this time are preliminary, and, as such, any current plans remain subject to change.”).

³⁰ *Ex Parte* Submission of the U.S. Department of Justice at 5, 6, *In re Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (Apr. 11, 2013).

competition declines, AT&T would have less incentive to make its services better. And it would have less incentive to develop innovative services once it harnesses Leap's spectrum. Rather, its chief incentive would be to maintain its dominance and protect its spectrum holdings from other service providers.³² Such stagnant spectrum holding is exactly what the Commission is addressing through the *Mobile Spectrum Holdings NPRM*, as well as through its plan to use incentive auctions to unlock spectrum. At bottom, the Proposed Transaction's supposed benefits amount to the oft-repeated empty promises that precede the strangling of a market into control by one or two dominant participants.

Leap and Cricket seem to have forgotten the epigraph in their petition to deny the AT&T/T-Mobile transaction: **“Beware of habitual monopolists bearing gifts.”**³³ They were right then. The further consolidation of market power and aggregation of spectrum that AT&T seeks is not in the public interest. The application should be denied.³⁴

³¹ *See id.*

³² *See, e.g.,* AT&T/T-Mobile Staff Analysis and Findings at ¶ 15 (“As the Commission has consistently stated, transactions raise competitive concerns when they reduce the availability of substitute choices to the point that the merged firm has a significant incentive and ability to engage in anticompetitive conduct, either unilaterally or in coordination with other firms.”).

³³ Leap and Cricket Petition to Deny at 1 (boldface in original) (quoting *Not So Fast, Ma Bell: AT&T's Takeover of T-Mobile USA Would Damage Mobile-Phone Choice. It Should Be Stopped*, *The Economist* (Mar. 24, 2011), available at <http://www.economist.com/node/18440809>).

³⁴ Petitioner is not alone in this belief. Several public interest organizations have also stated that the Proposed Transaction is not in the public interest. Free Press, a public advocacy organization that promotes universal and affordable Internet access, panned the Proposed Transaction: “This is a smaller deal, but AT&T is sure to make the same false claims it tried with T-Mobile about how fewer competitors will be good for wireless customers. But this takeover would result in fewer choices, higher prices and job loses.” Statement for the Record of Free Press, *In re Applications of AT&T*, Doc. No. 13-193 (Sept. 6, 2013). Public Knowledge, a public advocacy organization that promotes the openness of the Internet, similarly criticized the Proposed Transaction: “The wireless marketplace does not need more mergers and more concentration. Rather, all carriers should compete to win customers through improving their network quality, price plans, customer service, and handset selection.” *AT&T Buying Leap*

II. AT THE LEAST, THE COMMISSION SHOULD HOLD THE APPLICATION IN ABEYANCE UNTIL THE COMMISSION COMPLETES ITS RULEMAKING ON MOBILE SPECTRUM HOLDINGS.

In the alternative, the Commission should hold these proceedings in abeyance until it completes its rulemaking on mobile spectrum holdings. The Commission is currently reconsidering its policies regarding spectrum aggregation. Nearly a year ago, the Commission issued a notice of proposed rulemaking stating its intent to “provide [new] rules of the road that are clear and predictable, and that promote the competition needed to ensure a vibrant, world-leading, innovation-based mobile economy.”³⁵ As the Commission explained, “[e]nsuring the availability of sufficient spectrum is critical for promoting the competition that drives innovation and investment,”³⁶ as the wireless industry undergoes “a transformation, from an industry providing predominantly voice services to one that is increasingly focused on providing data services, particularly mobile broadband services.”³⁷ And the need to reformulate spectrum aggregation policies is especially urgent given the rapid consolidation of market share and spectrum control in a small handful of dominant participants.

A. The Proposed Transaction presents the same spectrum-aggregation harms that the Commission is addressing in the rulemaking.

The prudent course would be to delay consideration of the Proposed Transaction until these new rules are in place. The very concerns that motivated the rulemaking are present here. The Commission initiated the rulemaking because the need for “greater bandwidth, spectrum—a

Wireless Would Be a Bad Deal For Consumers, Competition, and Vulnerable Populations, Public Knowledge (July 12, 2013), available at <http://www.publicknowledge.org/att-leap>; see also supra at 11 & n.28.

³⁵ *Mobile Spectrum Holdings NPRM* at ¶ 1; see also *id.* at ¶ 3 (“Congress has established the promotion of competition as a fundamental goal of the nation’s mobile wireless policy.”).

³⁶ *Id.* at ¶ 4.

³⁷ *Id.* at ¶ 11.

key input in the provision of mobile wireless services—is becoming increasingly critical for all providers.”³⁸ As the Commission noted in the NPRM, “[t]here have been many changes in the mobile wireless industry since we first started using a case-by-case approach to assess spectrum concentration, ... and we believe that these changes warrant reevaluating that approach.”³⁹ The Commission recognizes that spectrum aggregation is a problem, and it is working on the solution.⁴⁰ This proceeding can wait to ensure that the solution is not in vain.

The desire for broadband, after all, is a key factor behind the proposed transaction: AT&T wants to strip a regional competitor of its spectrum holdings in order to amass even greater spectrum for itself and its network. Thus, the Proposed Transaction presents *precisely* the question the *Mobile Spectrum Holdings NPRM* was set forth to address. For this reason, the Commission should issue a public notice in that proceeding seeking public comment on the Proposed Transaction. By doing so, the Commission would allow the public to examine and comment on the proposed spectrum aggregation rule through the lens of a specific example of spectrum aggregation. Linking these two dockets is also important because many members of the public, like petitioner, are unaware of the Commission’s ongoing *Mobile Spectrum Holdings NPRM*. This would allow the Commission to increase the public visibility of the important question of how to prevent excessive spectrum aggregation.

³⁸ *Id.* at ¶ 2.

³⁹ *Id.* at ¶ 20.

⁴⁰ Indeed, the continued market concentration was one of the chief reasons that the NPRM was issued: “In 2003 ... , there were six mobile telephone operators that analysts then described as nationwide[.]” *Id.* at ¶ 14. And in 2003, “the top six facilities-based nationwide providers served approximately 78 percent of total mobile wireless subscribers in the country.” *Id.* But “[b]y December of 2009, the top four facilities-based nationwide providers had increased their combined market share to 88 percent. Moreover, since 2003, a number of regional and rural facilities-based providers have exited the marketplace through mergers and acquisitions[.]” *Id.*

By approving the Proposed Transaction now, the Commission would further limit the availability of sufficient spectrum, thereby undercutting the very purpose of the NPRM, without the benefit of its forthcoming adjustments. Indeed, by approving the Proposed Transaction, the Commission would be exacerbating the exact problem that it seeks to address through the NPRM. Applicants should not be permitted to slip through the gates shortly before new rules are put forth to more accurately assess the harm their Proposed Transaction poses to the public interest.

B. The Commission should hold these proceedings in abeyance.

The Commission has clear authority to stop its 180-day clock for review. The Commission's self-imposed "180-day clock represents a good faith undertaking by the Commission to complete action on assignment and transfer of control applications within a certain timeframe and a means to keep interested parties informed of the progress of those applications."⁴¹ But the Commission has reminded parties that it always "retains the discretion to determine whether, in any particular review proceeding, events beyond the agency's control, the need to obtain additional information or the interests of sound analysis constitute sufficient grounds to stop the clock."⁴²

The circumstances here fall squarely within the Commission's discretion to stop the clock and withhold consideration until it issues new spectrum aggregation rules. The "interests of sound analysis" demand that a significant transaction threatening further market consolidation and spectrum aggregation receive the Commission's considered judgment under standards that

⁴¹ *180-Day Clock Stopped on Consideration of Applications for Consent to Transfer of Control Filed by SBC Commc'ns Inc. & AT&T Corp.*, 20 F.C.C. Rcd. 14579, 14579–80 (2005); *180-Day Clock Stopped on Consideration of Applications for Consent to Transfer of Control Filed by Verizon Commc'ns Inc. & MCI, Inc.*, 20 F.C.C. Rcd. 14727, 14728 (2005) (same).

⁴² *Id.*

account for current market conditions and demands. Applicants have set forth no reason why the public interest would be harmed by awaiting the new rules needed to conduct this more accurate analysis—except their own desire to close a deal that they feel is in their *own* best interests. If the Commission permits the Proposed Transaction to occur, and AT&T marches on toward the same spectrum aggregation and anti-competitive market power it sought through the failed T-Mobile acquisition, there will be no going back. The Commission indicated just last month that the “potential harm arising from [a] transaction” may “warrant holding [its] consideration of the[] applications in abeyance pending completion of the Commission’s mobile spectrum holdings proceeding.”⁴³ Given the potential—indeed, the likelihood—of harm arising from the Proposed Transaction, the Commission should do exactly that here and complete the mobile spectrum holdings rulemaking before it considers this proposed spectrum concentration.

Indeed, in similar circumstances, the Commission recently halted the 180-day clock on another of AT&T’s proposed acquisitions. In a smaller deal involving AT&T’s attempt to acquire Atlantic Tele-Network Inc.’s (“ATNI”) retail wireless business, the Commission “demanded that AT&T provide more information about how it will transition Alltel’s remaining prepaid customers to its network.”⁴⁴ Here, Commission Staff requested that AT&T and Leap provide supplemental information regarding “the plans for the post-closing migration of Leap customers to AT&T’s network[.]”⁴⁵ After suggesting that the transaction would protect these

⁴³ Mem. Op. and Order, *In the Matter of Applications of AT&T Inc. & Cellular South, Inc.* at ¶ 15, ULS File Nos. 0005597386 & 0005597395, 2013 WL 4476669 (WTB Aug. 20, 2103).

⁴⁴ Bill McConnell, *Leap Wireless review hangs on feds’ approach*, Daily Deal (Aug. 28, 2013), 2013 WLNR 22595348; *see also* Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau, to AT&T and Allied Wireless Communications Corp., WT Docket No. 13-54 (Aug. 27, 2013).

⁴⁵ Letter from AT&T, Leap, and Cricket to Marlene Dortch at 1, *In re Applications of Cricket*, Docket No. 13-193 (Aug. 20, 2013).

customers, Applicants undermined those assurances by stating that “AT&T’s integration plans at this time are preliminary and, as such, any current plans remain subject to change.”⁴⁶ In the ATNI matter, the Commission stopped the clock when AT&T failed to provide adequate supplemental information about its proposed acquisition of ATNI, and it should do the same here, where Applicants have failed to demonstrate that AT&T will protect the interests of Cricket customers—many of whom depend on access to low-cost, prepaid cellular services.

* * *

The Application at issue here is as premature as it is unproven. There is no reason to act on a transaction that poses serious risk to competition by absorbing the next competitor in line for the primary purpose of further consolidating already-skewed market power and aggregating already-scarce spectrum resources. The Commission’s reconsideration of mobile spectrum holding policies is necessary to account for the changed landscape in the wireless market. Allowing aggregation to continue unchecked before the new regime can be installed would be imprudent and detrimental to the public interest.

⁴⁶ *Id.* at 2.

CONCLUSION

For the foregoing reasons, the Commission should deny the Proposed Transaction or else hold it in abeyance pending the completion of the Commission's mobile spectrum holdings rulemaking.

Respectfully submitted,

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September 27, 2013

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition to Deny was served by electronic mail on September 27, 2013, to the following recipients:

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/s/ Brian J. Field
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DECLARATION OF DAVID K. SMITH

I, David K. Smith, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am a wireless service customer of Cricket Communications, Inc.
2. My address is 185 Sweetwater Church Road, Douglasville, GA 30134.
3. I am familiar with the contents of the foregoing Petition to Deny. The factual assertions made therein are true to the best of my knowledge and belief.
4. The foregoing Petition to Deny is filed for its stated purpose and no other.

9/27/2013

Date



David K. Smith