

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

In the Matter of)
)
AT&T Inc., Leap Wireless International, Inc.,)
Cricket License Company, LLC, and Leap)
Licenseco, Inc. Seek Consent to the Transfer of) WT Docket No. 13-193
Control of AWS-1 Licenses, PCS Licenses, and)
Common Carrier Fixed Point to Point Microwave)
Licenses, and International 214 Authorizations,)
and the Assignment of One 700 MHz License)

To: The Commission

COMMENTS OF THE RURAL WIRELESS ASSOCIATION, INC.

The Rural Wireless Association, Inc.

Caressa D. Bennet
Daryl A. Zakov
Bennet & Bennet, PLLC
6124 MacArthur Boulevard
Bethesda, MD 20816
(202) 371-1500

Its Attorneys

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Summary

The Rural Wireless Association, Inc. (“RWA”) opposes AT&T, Inc.’s (“AT&T”) acquisition of Leap Wireless International, Inc. (“Leap”). The transaction, as contemplated, is anticompetitive and not in the public interest. In addition to removing yet another facilities-based operator from the mobile wireless playing field (which reduces consumer choice) this proposed transaction also results in AT&T holding an even greater and even more disproportionate amount of spectrum in over a third of the country’s counties where both AT&T and Leap currently hold licenses.

A final resolution to the Commission’s current open proceeding on spectrum holdings would provide clarity on just how much spectrum companies like AT&T and Verizon Wireless may amass before genuine competition is tossed aside for good. Until such time as the FCC acts in that proceeding, RWA respectfully requests that the Commission review this proposed takeover through the prism of a spectrum aggregation rule that supports at least four equally healthy competitors per market. RWA has urged the Commission to set a spectrum cap so that post-transaction, AT&T cannot hold more than 25 percent of the suitable and available spectrum in any given county. Any spectrum above this amount should be required to be divested or leased to a third party. If the Commission decides to allow AT&T to keep the entirety of Leap’s spectrum, then RWA respectfully requests that the FCC require AT&T to divest or lease spectrum in excess of the 25% threshold or agree to comply with certain conditions after closing. Specifically, RWA asks that the FCC compel AT&T to commit in every county in which it exceeds the 25 percent threshold to: (1) offer data roaming at rates that are on par with what AT&T charges Mobile Virtual Network Operators; (2) offer fully interoperable devices to AT&T customers; and (3) ensure that all mobile devices sold by AT&T are capable of being unlocked by consumers and used on the networks of those carriers who utilize the same technology as AT&T.

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COMMENTS OF THE RURAL WIRELESS ASSOCIATION, INC.

The Rural Wireless Association, Inc. (“RWA”)¹ files these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) public notice regarding the above-captioned applications.² Before the Commission is a proposed transaction that would, if approved, allow AT&T Inc. (“AT&T”) to completely remove Leap Wireless International, Inc. (“Leap”) from the domestic mobile wireless marketplace. AT&T proposes to purchase Leap (which markets services under the brand name Cricket) outright, and in the process, acquire millions of Leap’s subscribers as well as vast amounts of Advanced Wireless Services (“AWS”)

¹ RWA, formerly known as the Rural Telecommunications Group, Inc., or “RTG”, is a 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies who serve rural consumers and those consumers traveling to rural America. RWA’s members are small businesses serving or seeking to serve secondary, tertiary, and rural markets. RWA’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies. Each of RWA’s member companies serves fewer than 100,000 subscribers.

² *In the Matter of AT&T Inc., Leap Wireless International, Inc., Cricket License Company, LLC, and Leap Licenseco, Inc. Seek Consent to the Transfer of Control of AWS-1 Licenses, PCS Licenses, and Common Carrier Fixed Point to Point Microwave Licenses, and International 214 Authorizations, and the Assignment of One 700 MHz License*, Public Notice, WT Docket No. 13-193, DA 13-1831 (released August 28, 2013) (“*Public Notice*”).

and Personal Communications Services (“PCS”) spectrum across the United States. As discussed in Section III below, if the Commission consents to the proposed transaction, it should require divestiture or lease of excess spectrum or impose certain conditions on AT&T to ensure the existence of a competitive mobile wireless marketplace.

Leap is currently the sixth largest mobile carrier in the United States. For the past four years, it was considered part of a larger group of regional players -- including Allied Wireless (Atlantic Tele-Network), Clearwire, MetroPCS and US Cellular -- that represented this country’s “regional” or “mid-tier” wireless carriers.³ With this transaction, all but US Cellular⁴ will have been acquired by nationwide carriers, leaving the sixth largest carrier, C-Spire, servicing a mere one million subscribers. Just as RWA correctly predicted that the absorption of Atlantis Holdings LLC (ALLTEL) in 2009 by Verizon Wireless and AT&T would be the beginning of the end of wireless competition and competitive roaming, RWA now strongly believes that the loss of Leap as an independent, facilities-based carrier will forever stratify the marketplace into two distinct groups: small, rural and local carriers on one side and no greater than four nationwide carriers on the other. All of this consolidation harms consumers in the long run. The FCC has been asleep at the wheel for the past few years, allowing the industry to dwindle so that market power rests in hands of the Twin Bells. Measures must be adopted by the FCC now to ensure checks and balances. Further delay of specific rulemakings that will improve wireless policy can no longer occur.

³ “Grading the Top U.S. Carriers in the Second Quarter of 2013,” FierceWireless (August 12, 2013); <http://www.fiercewireless.com/special-reports/grading-top-us-carriers-second-quarter-2013> (last viewed September 27, 2013).

⁴ RWA notes that US Cellular has been selling off wireless spectrum and assets shrinking its coverage area and competitive range. See U.S. Cellular Sells Select Midwest Markets to Sprint,” U.S. Cellular Information Resource Center (“In November 2012, U.S. Cellular announced that it had reached an agreement to sell its Chicago, St. Louis, central Illinois and three other Midwest markets to Sprint Nextel Corp. The Sprint sale closed on May 17.”); <http://www.uscellularinfo.com/> (last viewed September 27, 2013).

Specifically, RWA has long advocated that the Commission change its policies regarding mobile spectrum holdings so that no single carrier can hold more than 25 percent of all of the suitable and available commercial mobile radio service (“CMRS”) spectrum available in any given county and no more than 40 percent of all of the suitable and available CMRS spectrum below one Gigahertz (“GHz”) in any given county.⁵ If this deal is approved, AT&T will hold more than 25 percent of all of the suitable and available spectrum in the vast majority of the counties served by Leap. Only a change in Commission policy would stop the erosion of the once-competitive wireless marketplace, and barring an immediate change to how the Commission reviews spectrum holdings or, in the case of Leap, imposition of the proposed conditions, RWA predicts more anticompetitive behavior by AT&T and harm to consumers with respect to pricing and innovative services.

AT&T’s reasoning that Leap’s departure from the market serves the public interest because “[a]bsent this transaction Leap could not become a national, facilities-based carrier,”⁶ is self-serving. AT&T theorizes that Leap’s market decline stems from its inability “to gain the

⁵ See generally *In the Matter of AT&T Inc. and Cellular South, Inc. Seek FCC Consent to the Assignment of Cellular, Personal Communications Services, Lower 700 MHz C Block, and Microwave Licenses Covering Parts of Alabama, Georgia and Tennessee*, Comments of the Rural Telecommunications Group, Inc., ULS File Nos. 0005597386 and 0005597395 (filed March 8, 2013) (“*RTG AT&T-CSpire Comments*”); *In the Matter of AT&T, Inc. and Atlantic Tele-Network, Inc. Seek FCC Consent to the Transfer of Control and Assignment of Licenses, Spectrum Leasing Authorizations, and an International Section 214 Authorization*, Comments of the Rural Telecommunications Group, Inc., WT Docket No. 13-54 (filed March 5, 2013) (“*RTG AT&T-Allied Comments*”); *In the Matter of Policies Regarding Mobile Spectrum Holdings*, Comments of the Rural Telecommunications Group, Inc., WT Docket No. 12-269 (filed November 28, 2012) (“*RTG Spectrum Holdings Comments*”); *In the Matter of Rural Telecommunications Group, Inc. Petition for Rulemaking to Impose a Spectrum Aggregation Limit on All Commercial Terrestrial Wireless Spectrum*, Petition for Rulemaking of the Rural Telecommunications Group, Inc., RM No. 11498 (filed July 16, 2008). RTG sought to impose a spectrum cap of 110 megahertz on all spectrum below 2.3 GHz. RTG’s petition was dismissed following the Commission’s review of spectrum holdings in WT Docket No. 12-269 (See *In the Matter of Petition of Rural Telecommunications Group, Inc. to Impose a Spectrum Aggregation Limit on All Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, Order, RM 11498 (Terminated), DA 12-1702 (released October 23, 2012).

⁶ “Description of Transaction, Public Interest Showing and Related Demonstrations,” WT Docket No. 13-193 (filed August 1, 2013) (“*Public Interest Statement*”) at p. 10.

scale and scope of a national facilities-based provider.”⁷ What AT&T seems to imply is that only nationwide carriers have a chance to succeed in the long-run, and that regional carriers like Leap, and quite possibly any wireless carrier not in the Top Four (AT&T, Verizon Wireless, Sprint and T-Mobile), are ultimately doomed to fail. AT&T’s long-maintained abhorrence of bright-line spectrum holdings limits makes perfect sense given its apparent strategy: Step One – control as much spectrum as possible, and Step Two – promote industry consolidation by arguing that smaller competitors with less spectrum and smaller footprints are unable to survive in the marketplace and should be absorbed by AT&T. AT&T’s ominous viewpoint speaks volumes about why this transaction hurts competition and consumers. AT&T’s attempt to gobble up the competition should not be tolerated. Elimination of smaller players through consolidation is not a real life example of Darwinian “survival of the fittest” on a level playing field. AT&T’s argument that such consolidation serves the public interest is decidedly more the words of a paternalistic company practicing economic eugenics.

AT&T claims that this proposed transaction represents only a “modest increase in AT&T’s spectrum holdings” and “does not raise competitive concerns.”⁸ Nothing could be further from the truth. In fact, AT&T stands to inherit from Leap spectrum in no less than 1,355 counties (or county equivalents) across the country, which accounts for nearly 43 percent of the counties in the United States. Furthermore, the amount of spectrum AT&T stands to hold *post-transaction* will, in seven out of ten counties, exceed one-quarter (or 25 percent) of all suitable and available spectrum in that impacted county. Until the Commission concludes its review of spectrum holdings in WT Docket No. 12-269 with an eye towards bright line spectrum aggregation limits (*i.e.*, a spectrum cap), it should review any proposed spectrum transaction in

⁷ *Public Interest Statement* at p. 24.

⁸ *Public Interest Statement* at p. iv.

the interim (including the one entered into between AT&T and Leap) with a reduced spectrum screen and an analysis that fosters the existence of at least four separate carriers with sufficient spectrum in every affected county. Alternatively, the FCC should hold this transaction in abeyance pending the issuance of an Order in the spectrum aggregation proceeding and apply that Order to this transaction.

I. ALLOWING FEWER THAN FOUR CARRIERS IN A MARKET HARMS COMPETITION.

Both the Commission⁹ and the U.S. Department of Justice¹⁰ have recognized the competitive harms stemming from spectrum concentration that result in less than four nationwide carriers. Such competitive harm results from spectrum concentration that leaves *any* market with fewer than four carriers and occurs *regardless* of whether those carriers are nationwide or not. Ensuring the competitive presence of at least four carriers in a market is critical to maintaining competition in the market. Failure to do so does three things. First, it further entrenches the Twin Bells, and makes it exceedingly difficult for other competitive, regional or start-up carriers to develop a nationwide, regional, or even a local footprint that will allow them to truly compete with these spectrum behemoths. Second, it handicaps smaller carriers, including RWA members, by eliminating competitive pressure on those nationwide carriers to maintain reasonable roaming rates and compete fairly. Third, and most importantly, it denies consumers competitive pricing and innovative services and technologies. The only way to absolutely ensure that no fewer than four carriers can not only survive, but thrive, in a market is to cap the overall

⁹ *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, WT Docket No. 11-65, DA 11-1955 (released November 29, 2011) at ¶ 3; see <http://transition.fcc.gov/transaction/DA-11-1955.pdf> .

¹⁰ United States of America, Department of Justice, Antitrust Division, et. al., vs. AT&T Inc., T-Mobile USA, Inc., and Deutsche Telekom AG, Amended Complaint, Civil Action No. 11-01560 (ESH) at ¶36; see <http://www.justice.gov/atr/cases/f275100/275128.pdf>.

amount of spectrum each can hold at 25 percent of all suitable and available spectrum. To the extent that one of the four nationwide carriers does not approach this 25 percent cap, this leaves more spectrum for a fifth or sixth competitive presence in the market. To the extent a carrier already controls more than 25 percent of suitable and available spectrum in a market, if the Commission allows this preexisting, disproportionate level of spectrum aggregation to remain, it should require divestiture or lease of excess spectrum or impose conditions (discussed in Section III below) that limit the pernicious effects of reduced competition. The need for a minimum of four carriers per market is urgent in both rural and urban areas.

II. AT&T'S SPECTRUM POSITIONS POST-CLOSING THREATEN TO REDUCE MEANINGFUL COMPETITION.

In order to foster competition between no fewer than four separate carriers in each market, the FCC should continue to consider spectrum based on its suitability and availability for mobile telephony/broadband services. "Suitable and available spectrum" should include at this time the following spectrum:

- Cellular (824-849 MHz, 869-894 MHz) (50 megahertz total).
- Personal Communications Service (PCS) (1850-1915 MHz, 1930-1995 MHz) (130 megahertz total).
- Specialized Mobile Radio (SMR) (817-824 MHz, 862-869 MHz) (14 megahertz total).
- 700 MHz Band (698-757 MHz, 776-787 MHz) (70 megahertz total).
- Advanced Wireless Services-1 (AWS-1) (1710-1755 MHz, 2110-2155 MHz) (90 megahertz total).
- Broadband Radio Service (BRS) (2618-2673.5 MHz) (55.5 megahertz total).
- Wireless Communications Service (WCS) (2305-2315 MHz, 2350-2360 MHz) (20 megahertz total).

The transaction proposed by AT&T and Leap contemplates AT&T acquiring all of Leap's subscribers and network, as well as significant amounts of PCS and AWS-1 spectrum in 40 states or territories. More importantly, the deal eliminates Leap overnight from the industry's competitive playing field. In all but a handful of the 1,355 counties in which AT&T would be acquiring Leap spectrum, there currently exists 429.5 megahertz of spectrum in the seven bands

considered by the Commission to be suitable and available for mobile telephony/broadband services.¹¹ Any carrier holding one quarter (25 percent) of this suitable and available spectrum would control just over 107 megahertz of total spectrum from those seven bands.

AT&T already holds more than 25 percent of the suitable and available spectrum (*i.e.*, more than 107 megahertz) in nearly 950 counties included in this proposed transaction – well above 70 percent of the total markets involved in the deal. In some markets, such as Lake Charles, LA and McAllen, TX, AT&T will hold not just 40 percent or more of the suitable and available spectrum, but also nearly 60 percent of the suitable and available spectrum below 1 GHz (the so-called “beachfront” spectrum). It should also be noted that, even without the Leap spectrum, AT&T already holds spectrum in excess of these 25 percent and 40 percent thresholds in numerous markets today. The net result of this acquisition is that AT&T removes an independent facilities-based marketplace competitor (and a source of EVDO and LTE roaming for small and rural wireless carriers) and controls excessive amounts of spectrum in hundreds of counties. Enough is enough. AT&T must be forced to divest some of this spectrum to bring its spectrum holdings under 25 percent of the total suitable and available spectrum.

III. IF THE COMMISSION APPROVES THE APPLICATIONS, IT SHOULD REQUIRE DIVESTITURE OF SPECTRUM IN CERTAIN MARKETS OR ALTERNATIVELY GRANDFATHER AT&T AND REQUIRE CONDITIONS TO PRESERVE COMPETITION.

AT&T’s bid to remove yet another regional carrier (while simultaneously aggregating disproportionate amounts of spectrum) is not in the public interest. Accordingly, with respect to the markets where AT&T’s spectrum concentration post-closing would be greater than 107

¹¹ The seven bands with suitable and available spectrum are: Cellular, PCS, SMR, 700 MHz, AWS-1, BRS and WCS. While the amount of SMR spectrum deemed suitable and available is currently higher than 14 megahertz, the Commission’s *Notice of Proposed Rulemaking* in WT Docket No. 12-269 notes that “it may be appropriate to reduce the amount of suitable SMR spectrum from 26.5 megahertz to 14 megahertz to reflect the portion of SMR spectrum through which mobile broadband services can be provided.” (*Notice of Proposed Rulemaking* at ¶ 29.)

megahertz, the FCC should require AT&T to divest or lease spectrum exceeding the 25 percent threshold to an independent third party within an 18 month period. Alternatively, if the FCC does not order the spectrum to be divested or leased in these counties, the Commission should only approve the transaction with the conditions set forth below.

Until the Commission completes its review of spectrum holdings in WT Docket No. 12-269, all case-by-case reviews of spectrum holdings in the secondary marketplace should be conducted with an eye towards supporting a competitive environment for mobile telephony/broadband services wherein no fewer than four licensees/operators have access to a sufficient amount of spectrum to remain competitively viable. If AT&T desires to hold spectrum that exceeds 25 percent of all suitable and available spectrum in a county (or exceed 40 percent of that same spectrum below 1 GHz), then it should only be allowed to do so if it also commits to satisfy conditions that protect consumers.

In its comments filed in the FCC's proceeding on spectrum holdings – a docket which opened a year ago and still has not been resolved – RWA urged the Commission to impose rules that require all carriers to divest excess spectrum within 18 months of RWA's proposed rules coming into effect. While a typical divestiture of excess spectrum is the most efficient manner in which to allow competitors access to an otherwise scarce resource, RWA supports long-term spectrum leasing as an alternative to spectrum divestiture. Specifically, RWA proposes that carriers such as AT&T who may have excess spectrum in certain counties be permitted to enter into long-term spectrum leases as an alternative to divestitures, provided that such leases are with independent third parties at established market rates, and that such third parties do not themselves exceed either of RWA's proposed, applicable caps. Allowing for long-term spectrum leases in lieu of license divestitures avoids spectrum remaining fallow and permits the licensee to re-utilize the spectrum at a later date if the licensee falls below the applicable cap due either to

the sale of spectrum or to an increase in the amount of suitable and available spectrum existing in the marketplace.

Should the Commission allow AT&T to retain spectrum that exceeds the spectrum threshold discussed herein, the Commission should require AT&T to accept certain conditions in exchange for being allowed to keep more than 25 percent of suitable and available spectrum in that market (or 40 percent of all suitable and available spectrum below 1 GHz). In this particular instance, AT&T will hold excess spectrum in over 70 percent of the counties where it is acquiring PCS and AWS-1 licenses from Leap. Accordingly, the proposed spectrum consolidation should only be allowed if AT&T agrees to the following conditions. Specifically, in those markets where AT&T (after acquiring Leap) will hold 25 percent or more of the suitable and available spectrum, it must: (1) offer data roaming to any requesting carrier at commercially reasonable rates,¹² terms and conditions; (2) offer to its own customers devices that are fully interoperable (*i.e.*, the mobile device must work on all paired spectrum that is available and usable in that particular spectrum band, as well as any other spectrum band where the carriers offer service); and (3) work to ensure that the mobile devices it sells to its customers are capable of being unlocked by consumers and used on the networks of those carriers who utilize the same technology as AT&T so that any American consumer is free to choose their carrier-of-preference independently from whatever wireless device they desire to use.¹³

¹² RWA believes that a commercially reasonable roaming rate would be on par with the resale rates AT&T charges Mobile Virtual Network Operators (“MVNO”).

¹³ RWA notes that NTIA at the urging of the White House has filed a Petition for Rulemaking along these lines. *See In the Matter of Amendment of Part 20 of the Commission’s Rules and Regulations to Require Certain Providers of Commercial Mobile Radio Services to Unlock Wireless Devices Upon Request*, Petition for Rulemaking of the National Telecommunications and Information Administration (filed Sep. 17, 2013); see http://www.ntia.doc.gov/files/ntia/publications/ntia_mobile_devices_unlocking_petition_09172013.pdf (last viewed September 27, 2013).

IV. CONCLUSION

For the foregoing reasons, RWA urges the Commission to review AT&T's proposed takeover of Leap in a manner that ensures future competition between no fewer than four carriers in any given county. The best means to effectuate this policy is for the Commission to immediately promulgate new rules industry-wide pertaining to spectrum holdings so that no carrier can hold more than 25 percent of suitable and available spectrum in that market (or 40 percent of all suitable and available spectrum below 1 GHz). However, if the proposed transaction is reviewed prior to the promulgation of new rules on spectrum holdings, then the Commission should (1) require AT&T to divest or lease excess spectrum in excess of the 25 percent threshold, or (2) permit AT&T to hold greater than 25 percent of all suitable and available spectrum (or 40 percent of all suitable and available spectrum below 1 GHz) in any given market, but only if AT&T agrees to support commercially reasonable roaming rates with

requesting roaming partners on par with its MVNO, sell fully-interoperable mobile devices, and take the necessary steps to ensure that consumers are free to unlock any mobile device they purchase and use it on any wireless carrier's network.

Respectfully submitted,

RURAL WIRELESS ASSOCIATION, INC.

By: */s/ Caressa D. Bennet*

Caressa D. Bennet
Daryl A. Zakov
Bennet & Bennet, PLLC
6124 MacArthur Boulevard
Bethesda, MD 20816-3210
(202) 371-1500
Its Attorneys

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