

**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

**REPLY OF DAVID K. SMITH IN
SUPPORT OF PETITION TO DENY**

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INTRODUCTION AND SUMMARY

David K. Smith, through his undersigned counsel, hereby submits this reply in support of his petition 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”) (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.

The Commission should deny the Proposed Transaction or, at the least, hold these proceedings in abeyance until it completes its rulemaking regarding mobile spectrum holdings. That rulemaking will address the harmful threats of greater market power and spectrum consolidation in the wireless industry—the same threats posed by the Proposed Transaction. The Commission should not let this transaction slip through the gates when an impending rule will address the very concerns raised by a number of petitioners. Indeed, the Proposed Transaction demonstrates precisely why case-by-case review of wireless transactions is no longer the best approach. While the anti-competitive effects of the Proposed Transaction are clear even within a narrowed focus on this transaction, the harm is even more apparent when the lens is widened. The prudent course in these circumstances is to hold the Proposed Transaction until the Commission has developed the complete picture required for these circumstances. Applicants offer no substantive response to this commonsense approach.

In all events, the Commission should deny the Proposed Transaction to prevent the anticompetitive harm that it will cause in both the national and local wireless markets. Not long ago, AT&T and Leap emphasized to the Commission the innovative role that Leap’s Cricket

prepaid wireless service plays in the national and local wireless markets. In fact, AT&T specifically promoted Leap's role in the national wireless market as a force for innovation and competition. Those statements were true then, and they remain true today. The Commission should deny this transaction in order to protect Leap's important role in the local and national markets. The Commission should also deny the Proposed Transaction to protect Leap customers from financial harm. Applicants have admitted that the Proposed Transaction will cause Leap's current customers, like Petitioner Smith, to pay more for wireless service and devices. This is a far cry from the low-cost, flexible options that led Petitioner Smith and other consumers to Cricket. Finally, the Commission should reject Applicants' suggestion that the Commission should approve all transactions where a large national carrier seeks to acquire a smaller competitor. Applicants are incorrect that the Commission's approval of the T-Mobile/MetroPCS transaction compels approval here. Under Applicants' view, that earlier Commission order categorically supports the approval of any large carrier acquiring a smaller carrier. That, of course, is not true—as AT&T's failed attempt to acquire T-Mobile confirmed. That failed transaction, not the T-Mobile/MetroPCS transaction, is the better analogy here. The Proposed Transaction should reach the same fate.

I. THE COMMISSION SHOULD HOLD THESE PROCEEDINGS IN ABEYANCE UNTIL IT COMPLETES ITS RULEMAKING ON MOBILE SPECTRUM HOLDINGS.

The Commission should hold these proceedings in abeyance until it completes its rulemaking on mobile spectrum holdings. The Commission has undertaken a rulemaking process to “provide 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.”¹ This rulemaking is aimed at “[e]nsuring the availability of sufficient spectrum ... for promoting the competition that drives innovation and investment”² during the wireless industry’s “transformation, from an industry providing predominantly voice services to one that is increasingly focused on providing data services, particularly mobile broadband services.”³ In particular, the Commission is considering new methods to prevent the anti-competitive effects of excessive spectrum aggregation and market consolidation.⁴ The Proposed Transaction squarely implicates those concerns.

¹ Notice of Proposed Rulemaking ¶ 1, *In re Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (Sept. 28, 2012) (“*Mobile Spectrum Holdings NPRM*”); see also *id.* at ¶ 3 (“Congress has established the promotion of competition as a fundamental goal of the nation’s mobile wireless policy.”).

² *Id.* at ¶ 4.

³ *Id.* at ¶ 11.

⁴ See, e.g., *id.* at ¶ 3 (noting that recent congressional action “reaffirms the Commission’s authority ‘to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition’”) (quoting Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6404); *id.* at ¶ 14 (“[T]here also have been other changes in the wireless industry that warrant reexamination of our policies. 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 As of December 2003, the top six facilities-based nationwide providers served approximately 78 percent of total mobile wireless subscribers in the country. By 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”).

Thus, the prudent course is to delay consideration of the Proposed Transaction until the new rules are in place. AT&T's attempt to acquire Leap is chiefly driven by its desire to increase its spectrum holdings.⁵ And its means for achieving that goal—snatching up another competitor—is doubly troubling: it both aggregates spectrum holdings and further consolidates AT&T's market power. There is no reason to allow AT&T to aggregate more spectrum *and* accumulate more anti-competitive force while the Commission crafts a modern approach to those very issues. This proceeding can wait.⁶

Applicants have no substantive response to this judicious approach. They do not argue that conducting a more appropriate analysis under the Commission's upcoming rules would harm the public interest. Nor could they. Spectrum aggregation and consolidation of market power will inevitably harm the public by reducing competition and consumers' choices.⁷ Thus, while the Commission has found it reasonable to apply its existing case-by-case approach to other recent transactions, where the threat of harm has not been as significant, the “potential harm

⁵ Paul Barbagallo, *In Cutting Deal for Leap Wireless, AT&T Not Waiting for FCC to Auction More Spectrum*, Bloomberg BNA (July 16, 2013), <http://www.bna.com/cutting-deal-leap-n17179875264/> (“On a macro level, the merger deal is the latest example of consolidation in the U.S. wireless industry, as companies seek to stockpile spectrum assets to meet the surging demand from smartphone users and gain competitive advantage.”).

⁶ The Commission has clear authority to stop its 180-day clock for review. *See, e.g., 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, 14580 (2005) (stating that the Commission 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”).

⁷ *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (“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.”); *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>.

arising from *this* transaction ... warrant[s] holding [the Commission’s] consideration of these applications in abeyance pending completion of the Commission’s mobile spectrum holdings proceeding.”⁸

If anything, AT&T’s recitation of the transactions it has consummated since the Commission’s Notice of Proposed Rulemaking illustrates why the Commission should withhold judgment on this significant transaction.⁹ It is no secret that AT&T desires more spectrum and has embarked on a mission to buy up large and small competitors to obtain it.¹⁰ Applicants acknowledge this fact but suggest it is no reason to await the Commission’s updated rules. What they fail to acknowledge, though, is that the Commission has not given AT&T a blank check to acquire competitors. In fact, the Commission did *not* permit AT&T to acquire a significant competitor—an outcome Leap itself supported based on the same kind of anti-competitive harms posed here.¹¹ Allowing the second largest wireless provider to march along aggregating spectrum and solidifying market dominance before the Commission adopts new rules to address those anti-competitive practices risks mooting those rules right out of the box. The Commission

⁸ Mem. Op. and Order, *In the Matter of Applications of AT&T Inc. & Cellular South, Inc.* ¶ 15, ULS File Nos. 0005597386 & 0005597395, 2013 WL 4476669 (WTB Aug. 20, 2103) (emphasis added).

⁹ See Joint Opp’n of AT&T Inc. and Leap Wireless Int’l, Inc. to Pets. to Deny and Condition and Reply to Comments at 17-18 nn. 61-63 (“Opp.”) (Redacted Version) (citing earlier AT&T transaction that the Commission has not held in abeyance).

¹⁰ See, e.g., Pet. to Deny of Leap Wireless Int’l, Inc. and Cricket Commc’ns, Inc., *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations* at 2, WT Docket No. 11-65, DA 11-799 (May 31, 2011).

¹¹ See *id.* (“The proposed transaction would greatly exacerbate the trend of concentrating market power, spectrum resources, cash flow, and capital” and “threatens to unleash a litany of competitive harms.”); see also Staff Analysis and Findings, *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG* ¶ 1, WT Docket No. 11-65 (Nov. 29, 2011) (“The potential loss of this competitive force in the market is a cause for serious concern.”).

should recognize that its proposed rulemaking is concerned with exactly this type of transaction and thus hold the applications in abeyance.

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

If the Commission does address the Proposed Transaction on the merits, it should deny the applications. Leap is an important innovator in the wireless market. When it was to their advantage, both AT&T and Leap emphasized to this Commission the role that Leap's Cricket prepaid service plays in the national and local wireless markets. By eliminating Leap, the Proposed Transaction would remove another check on consolidation in the wireless industry, which stifles innovation and necessarily reduces consumer choice. The Proposed Transaction would also cause Petitioner Smith and tens of thousands of similarly situated individuals to realize an immediate increase in their wireless expenses. And Applicants' attempt to paint the Proposed Transaction as similar to the recently approved T-Mobile/MetroPCS transaction disguises the fact that the more proper analogy is to the failed AT&T/T-Mobile transaction.

A. The Proposed Transaction will eliminate a market innovator.

The Proposed Transaction will eliminate the fifth-largest provider of wireless services in the United States.¹² As a significant market participant, Leap serves a valuable function at both the national and local levels, challenging the existing market leaders to offer competitive prices and innovative services. Rather than acknowledging Leap's important role in the wireless market and explaining how the Proposed Transaction will benefit consumers, Applicants ask the Commission to conclude that the Proposed Transaction will have no effect at either the national or local level. On the national level, Applicants ask the Commission to conclude that the only

¹² Pet. to Deny of David K. Smith at 4 ("Smith Petition").

relevant carriers are “AT&T and the other three national wireless carriers,”¹³ and thus that there is no need to consider the national effect of the Proposed Transaction. And on the local level, Applicants ask the Commission to ignore Leap’s role in offering innovative prepaid services because Leap has suffered a recent decline in customers. But these reductionist arguments ignore that “the health of the entire mobile industry hinges on the competitive presence of carriers of all sizes: from the four nationwide carriers to the various regional carriers down to the much smaller, but vital to competition, rural carriers.”¹⁴

As Petitioner Smith and several other petitioners explained, Leap plays a critical role at the national level.¹⁵ As Leap itself explained when it opposed AT&T’s attempt to acquire T-Mobile, “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.”¹⁶ These innovations and alternatives are the sort of benefits that attract consumers like Petitioner to Leap’s Cricket brand. Indeed, despite the fact that Applicants now disparage this notion, it was *AT&T* and *Leap* who first “argue[d] that Leap is a ‘disruptive’ ‘maverick’ that affects competition at the national level.”¹⁷ In its March 2012 petition to deny the AT&T/T-Mobile transaction, Leap described Cricket as “a

¹³ Opp. at 17–18.

¹⁴ *AT&T’s Grab for Leap Wireless is Anti-Competitive, Anti-Consumer*, Wireless Symposium (July 15, 2013), <http://ruralwireless.org/2013/07/atts-grab-for-leap-wireless-is-anti-competitive-anti-consumer/> (“*AT&T’s Grab for Leap*”).

¹⁵ See Smith Petition at 9–12.

¹⁶ 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).

¹⁷ Opp. at 20 (citing Youghioghny Petition at 18, 20, 21 and Smith Petition at 8–9).

disruptive and innovative competitive force in the wireless industry for many years, offering industry-altering products and services.”¹⁸ And when trumpeting Leap 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 proposed AT&T/T-Mobile transaction, AT&T called its now-maligned target a *nationwide* service provider and a “*maverick*” within the wireless industry that served as an important competitive threat to the market leaders.¹⁹ Applicants walk away from their prior statements to this Commission without explanation. But if Leap will “no longer [be] present to provide the ‘competitive threat’ to large carriers, then AT&T should at the least have the courtesy to tell the Commission—and more importantly American consumers—who it believes will assume that role as a serious competitor.”²⁰ The truth, of course, is that the Proposed Transaction will have the opposite effect of increasing the “pressure on smaller competitors ... to bulk up through mergers and acquisitions of their own.”²¹

The Proposed Transaction will also harm competition on the local level. Collapsing a chief local competitor into AT&T necessarily will reduce competition and eliminate consumer choices.²² Worse yet, low-income and minority consumers—who rely heavily on no-contract

¹⁸ Joint Opp. to Pet. To Deny of Verizon Wireless, Leap Wireless Int’l, Inc., and Cricket Commc’ns, Inc. at 10, *In re Application of Verizon Wireless and Leap Wireless Int’l, Inc.*, ULS File No. 0004952444, (Mar. 2, 2012).

¹⁹ See Description of Transaction, Public Interest Statement and Related Demonstrations at 12–13, 86, *Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, (filed Apr. 21, 2011) (emphasis added).

²⁰ *AT&T’s Grab for Leap*.

²¹ 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>. See also *id.* (“The move adds to the drumbeat for a merger between Sprint and T-Mobile US Inc., the third- and fourth- largest carriers[.]”).

²² See Smith Petition at 9–10.

prepaid services like Cricket—will disproportionately feel the brunt of these anti-competitive effects.²³ Applicants seek to obscure these facts by assuring the Commission that “all of the national competitors [like AT&T] are present and competing in the vast majority of the CMAs that Leap serves.”²⁴ But this suggestion only proves that the Proposed Transaction will harm competition. By acquiring Leap, AT&T is necessarily *decreasing* the number of competitors (or potential competitors) in local markets. The Proposed Transaction will trade an innovative, low-cost competitor for the rigid, costly offerings of a dominant firm.

B. Leap customers will be harmed by the Proposed Transaction.

Petitioner Smith is a current Cricket customer who pays \$35 per month for his prepaid smartphone plan.²⁵ He and other Cricket customers made a conscious decision to purchase prepaid, no-contract services instead of more expensive contract services from one of the larger providers.²⁶ But the Proposed Transaction will nullify that choice and increase Petitioner Smith’s wireless expenses: “A dearth of [regional and small operators] leads to higher prices for network equipment, a lack of interoperable mobile devices, higher roaming costs, and dozens of other systemic problems—all of which inevitably leads to higher consumer prices and fewer marketplace choices.”²⁷ Applicants’ promise of a \$40 per month plan for 18 months *admits* that customers like Petitioner Smith—who currently pays \$5 less per month—will see their service rates increase. And Applicants do not guarantee the new entity will continue any similar plans after the 18 months expire.

²³ *See id.* at 10–11.

²⁴ *Opp.* at 32.

²⁵ *See* Smith Petition at 1 and Declaration of David K. Smith.

²⁶ *See* Smith Petition at 10 (describing reasons why many customers select prepaid carriers).

²⁷ *AT&T’s Grab for Leap*; *see also* Smith Petition at 9.

Applicants' similar promise to "[h]onor the existing rate plan of each Leap customer" is illusory. Under the Proposed Transaction, an existing Cricket customer may keep his or her current plan only so long as the customer "does not suspend or terminate his or her service for that plan, or choose to upgrade to a device or plan that is not comparable to his or her current device or plan."²⁸ In other words, Applicants will honor the flexible, no-commitment plans Leap customers have already chosen only if those customers accept what amounts to a *contract* not to change the terms of their service arrangement. That is exactly the type of fixed agreement that Petitioner and other Leap customers consciously sought to avoid in the first place. If AT&T thinks an 18-month contract is a sufficient substitute for true no-contract service, one can only imagine the changes it will make if the Proposed Transaction is completed and the Commission's searching gaze is no longer fixed upon it.

The Proposed Transaction most perniciously would harm lower economic status individuals. Petitioner Smith's concern regarding the obligation to purchase a new phone remains unanswered.²⁹ In fact, Applicants admit that the transaction will require Cricket's existing customers—who sought to *reduce* their costs and *increase* their flexibility—to purchase new equipment that is compatible with AT&T's network.³⁰ Applicants offer only the flippant response that requiring such purchases is a negligible harm because "prepaid subscribers typically upgrade their devices frequently."³¹ The problem is that the Proposed Transaction forces *all* Cricket customers to "upgrade" their phones—even if they do not want to, or cannot afford to. And Applicants have no principled response to that.

²⁸ Opp. at 7.

²⁹ See Smith Petition at 11.

³⁰ See Opp. at 8 n.26.

³¹ See *id.*

C. Applicants' reliance on the Commission's approval of the T-Mobile/MetroPCS transaction is misplaced.

Applicants would have the Commission believe that its approval of the T-Mobile/MetroPCS transaction requires similar action here. Not so. For starters, Applicants are incorrect to read the approval of the T-Mobile/MetroPCS deal as blessing any attempt by a large national carrier to acquire a smaller market participant. Such a rule would be a monopolist's dream. But it, of course, is not the reality. Indeed, if the Proposed Transaction is to be compared to any recent deal, the AT&T/T-Mobile deal is the more apt precedent. After all, it involved the same national carrier. And it raised the same concerns with the number-two provider aggregating spectrum and consolidating market-power. Applicants' failure to grapple with these similarities betrays the reality that this transaction is a mere second-best to AT&T's unsuccessful play for T-Mobile—the latest movement in a plan to achieve the same result.

In all events, the Proposed Transaction is vastly different from the T-Mobile/MetroPCS transaction. In that transaction, the fourth-largest wireless provider (T-Mobile) sought to acquire the largest of the second-tier carriers. One of the prime reasons that the Commission was willing to approve the transaction was the fact that acquiring MetroPCS would help T-Mobile compete with the top two carriers.³² The opposite is true here: The Proposed Transaction will hasten consolidation at the top of the market. Applicants provide no explanation of how aggregating more spectrum within AT&T's already dominant spectrum position will stem its market dominance or increase competition in the ever-shrinking wireless market. That is because no such explanation exists.

³² Mem. Op. and Order ¶ 2, In the Matter of Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Commc'ns, Inc., WT Docket No. 12-301 (Mar. 12, 2013) (emphasizing the public interest of “the strengthening of the fourth largest nationwide service provider's ability to compete in the mobile broadband services market”).

* * *

There is no reason to approve the Proposed Transaction. The Commission should exercise its discretion to hold these proceedings in abeyance until it has completed its proposed rulemaking on spectrum aggregation. The Proposed Transaction will harm consumers like Petitioner by placing greater spectrum holdings and market power into the hands of AT&T. And those are precisely the sort of threats that led the Commission to reconsider its mobile spectrum holding policies. Allowing yet another AT&T transaction to slip through the gates on the eve of that new rule would be imprudent and harm the public interest.

CONCLUSION

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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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition to Deny was served by electronic mail on October 31, 2013, to the following recipients:

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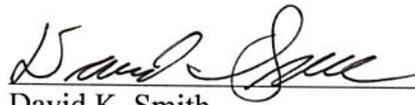
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DECLARATION OF DAVID K. SMITH

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 Reply. The factual assertions made therein are true to the best of my knowledge and belief.
4. The foregoing Reply is filed for its stated purpose and no other.

10-30-13
Date



David K. Smith