

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

In the Matter of)
)
Applications of) MB Docket No. 14-90
AT&T Inc. and)
DIRECTV)
For Consent to Assign or Transfer Control)
of Licenses and Authorizations)

To: The Commission

**COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”) hereby comments on the application (“Application”) of AT&T Inc. (“AT&T”) and DIRECTV (“DIRECTV”) (collectively, the “Applicants”) seeking to transfer control of certain licenses and authorizations.¹

WISPA expresses concern about three aspects of the proposed merger. First, it appears that AT&T’s data concerning the presence and location of existing fixed broadband providers, particularly fixed wireless broadband providers, may be inaccurate, leading to an overstatement of its claims about the number of unserved and underserved locations that could receive its proposed Wireless Local Loop (“WLL”) service. Second, the proposed introduction and deployment of WLL service is not merger-specific and should not be the basis for Commission approval. Third, if the Commission consents to the merger, it should impose a condition that AT&T will not utilize Connect America Fund (“CAF”) subsidies to deploy its WLL service.

¹ See *Public Notice*, “Commission Seeks Comment on Applications of AT&T and DIRECTV to Transfer Control of FCC Licenses and Other Authorizations,” MB Docket No. 14-90, DA 14-1129 (rel. Aug. 7, 2014).

Background

WISPA is the trade association that represents the interests of wireless Internet service providers (“WISPs”) that provide IP-based fixed wireless broadband services to consumers, businesses and anchor institutions across the country. WISPA estimates that WISPs serve more than 3,000,000 people, many of whom reside in rural, unserved and underserved areas where wired technologies like FTTH, DSL and cable Internet access services may not be available. In some of these areas, WISPs provide the only terrestrial source of fixed broadband access. In areas where other broadband options are available, WISPs provide a local access alternative that fosters competition in service, cost and features. As a general matter, WISPs that provide fixed broadband service have not been eligible for federal Universal Service Fund (“USF”) support because they are classified as “information” service providers and not as providers of “telecommunications.” As a result, and unlike the telephone companies that have relied on taxpayer-supported federal subsidies for years, WISPs have funded construction and operation of their fixed wireless networks with private financing.

Discussion

I. THE APPLICATION APPEARS TO BE PREMISED ON INACCURATE DATA ABOUT THE LOCATION OF AREAS THAT ARE UNSERVED OR UNDERSERVED BY FIXED BROADBAND.

In the Application, AT&T boasts of its plan to deploy an LTE-based fixed wireless product it calls “Wireless Local Loop,” or WLL.² According to AT&T, WLL would be offered as a home broadband service using 20 megahertz of dedicated spectrum.³ AT&T contends that “the transaction will benefit millions of these customers by making it economically attractive for AT&T to expand its deployment” and that WLL service will arise from “synergies from the

² See Application, FCC Form 312, Exhibit A, Description of Transaction, Public Interest Showing, and Related Demonstrations (“Public Interest Exhibit”), at 43.

³ See *id.*

transaction.”⁴ AT&T also asserts that the merger “favorably alters the economics of deploying fixed WLL services for AT&T.”⁵

According to AT&T, its WLL service will be offered to an estimated 13 million rural customer locations in 48 states, both in and out of AT&T’s wireline footprint, within four years.⁶ It further claims that almost 20 percent of these locations have no fixed terrestrial broadband service and 27 percent have only one terrestrial option, “and in most instances that single option is DSL or a relatively slow cable modem service.”⁷ AT&T provides a post-transaction map of its proposed coverage area,⁸ which elsewhere it describes as a “best estimate of the coverage of this broadband expansion.”⁹

The scant information about AT&T’s planned broadband coverage raises a number of questions that must be answered for its claims to be verifiable. For example, it is unclear whether AT&T considered the presence of *fixed wireless* broadband providers when it estimated the number of locations that are unserved or are served by only one terrestrial provider.¹⁰ AT&T notes that satellite providers offer broadband service in some areas, but it never once mentions the fixed wireless services that WISPs provide throughout the country, or attempts to identify the areas that WISPs serve.¹¹ AT&T’s acknowledgement of DSL, cable and satellite Internet technologies and its failure to note the presence of fixed wireless providers suggests that its data may be incorrect. The Application also does not provide a definition for “broadband” or “rural

⁴ *Id.* at 43, 44.

⁵ *Id.* at 45.

⁶ *See id.* at 44.

⁷ *Id.*

⁸ *See* Application, FCC Form 312, Exhibit A, Declaration of John T. Stankey (“Stankey Declaration”), at ¶ 54, Figure 1.

⁹ Statement of Randall Stephenson, AT&T Chairman, CEO and President, United States Senate, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (June 24, 2014) (“Stephenson Senate Testimony”), at 4.

¹⁰ The areas where WISPs offer broadband service are depicted on the December 31, 2013 (Round 9) version of the National Broadband Map in the “Terrestrial Fixed Wireless-Unlicensed” and “Terrestrial Fixed Wireless-Licensed” layers. *See* <http://www.broadbandmap.gov/technology> (last visited Sept. 10, 2014).

¹¹ *See* Stankey Declaration, at ¶ 47 n.22.

area.” Further, AT&T does not delineate which of the locations on its small post-transaction map are unserved by any provider and which are served by only one provider, making it very difficult to analyze and verify its claims. In sum, AT&T simply has failed to provide the necessary data and supporting explanation to demonstrate whether 20 percent of the locations it proposes to serve are indeed “unserved” or 27 percent are actually in areas served by only one “slow” provider.

To address these shortcomings, the Commission should require AT&T to (1) submit information concerning the presence and location of fixed wireless broadband service in its analysis, (2) differentiate in its post-transaction footprint among those areas that are unserved, served by a single provider and served by multiple providers, and (3) provide its definition of “broadband” and “rural area.”¹² Only with this more detailed information can the Commission properly assess the accuracy of AT&T’s data and the validity of its claims, as the Bureau Data Request suggests.

II. AT&T’S PROMISE TO DEPLOY WIRELESS LOCAL LOOP FIXED BROADBAND SERVICE IS NOT MERGER-SPECIFIC.

Pursuant to Sections 214(a) and 310(d) of the Communications Act of 1934, as amended, the Commission must determine whether the Applicants have demonstrated that the proposed merger will serve the public interest, convenience and necessity.¹³ To make this finding, “the Commission’s review focuses on the potential for harms and benefits to the policies and

¹² WISPA notes that the Commission recently requested that AT&T provide additional information and documentation concerning information contained in the Applications. *See* Letter from William T. Lake, Chief, Media Bureau, to Robert W. Quinn, Jr., Senior Vice President – Federal Regulatory & Chief Privacy Officer, AT&T Services Inc., MB Docket No. 14-90 (Sept. 9, 2014) (“Bureau Data Request”). Item 4 of the attached request asks AT&T to “[s]ubmit all maps, plots, or other visual aids, in electronic format, that depict where the Company or any of its competitors has the ability to offer MVPD Service, Internet Access Service, or Telephony Service.” Among other things, Item 58 seeks information concerning the licenses AT&T plans to use for its WLL service, polygons depicting the proposed geographic coverage area, projected download and upload speeds and the areas that qualify as “rural.”

¹³ 47 U.S.C. §§ 214(a), 310(d).

objectives of the Communications Act that flow from the proposed transaction – i.e., harms and benefits that are ‘merger-specific.’”¹⁴ The Commission has emphasized that “[c]laimed efficiencies, however, must be merger-specific, and, therefore, efficiencies that could be achieved through means less harmful to the public interest than the proposed merger cannot be considered true benefits of the merger.”¹⁵

AT&T argues that its deployment of WLL will, in combination with DIRECTV’s multichannel video business outside of AT&T’s U-verse footprint, create a video and broadband bundle that “will attract significantly more subscribers with lower churn than a fixed WLL broadband offering would on its own.”¹⁶ It also claims that high deployment costs have impeded AT&T’s ability to deploy its WLL service and that “[f]ixed WLL service is a relatively untested technology . . . and [i]ts success in the market place is unproven.”¹⁷

WISPA has a number of concerns regarding these claims. First, although it does not publicly disclose in the Application the spectrum it proposes to use for WLL, WISPA believes that AT&T plans to utilize the 20 megahertz of Block A (2305-2310 MHz and 2350-2355 MHz) and Block B (2310-2315 MHz and 2355-2360 MHz) Wireless Communications Service (“WCS”) spectrum.¹⁸ Commission records indicate that AT&T, through various subsidiaries,¹⁹ holds the vast majority of this spectrum in the continental U.S. AT&T has held this spectrum for years, in some cases since at least 2005, and has spent millions of dollars (presumably) acquiring

¹⁴ See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6550 (2001).

¹⁵ *GTE/BellAtlantic Merger Order*, 15 FCC Rcd 14032, 14141 (2000).

¹⁶ Public Interest Exhibit, at 45.

¹⁷ Stankey Declaration, at ¶ 51.

¹⁸ See Bureau Data Request, Item 58.b.i. WISPA notes, however, that AT&T states in another Commission proceeding that it “has moved forward with plans to use the WCS A and B Blocks in its *mobile* wireless LTE network.” Petition for Rulemaking, RM-11731 (filed Aug. 8, 2014), at 2 (emphasis added).

¹⁹ According to the Commission’s Universal Licensing System, these include AT&T Mobility Spectrum LLC (35 Block A and Block B licenses), BellSouth Mobile Data, Inc. (30 Block A and Block B licenses), SBC Telecom, Inc. (23 Block A and Block B licenses) and New Cingular Wireless PCS, LLC (14 Block A and Block B licenses).

it without any merger with DIRECTV in mind. AT&T could have deployed its WLL service, or any other fixed broadband service, on this spectrum in the absence of the proposed merger.

Second, WISPA disputes AT&T's claims that its WLL service relies on untested technology. Since the mid-1990s, WISPs have utilized unlicensed spectrum in the 900 MHz, 2.4 GHz and 5 GHz bands and lightly licensed spectrum in the 3650-3700 MHz band to deliver fixed wireless broadband service to millions of rural Americans. A number of companies manufacture equipment for these bands, and WISPs have deployed this equipment across the country. Since 2001, AT&T itself has held equipment authorizations for fixed wireless base stations in the WCS Block A and Block B bands.²⁰ If AT&T was so interested in serving rural consumers, it had plenty of opportunity to use unlicensed spectrum or its own exclusive WCS spectrum to do so, yet it chose to focus its broadband deployment efforts on different locations and different technology platforms. AT&T's technology may be untested, but plenty of off-the-shelf equipment has been available for the last 20 years, as the success of WISPs demonstrates. A more accurate view is that AT&T chose to develop its own technology and the timing of the merger provided a convenient opportunity for it to go public with its deployment plans.

Third, the success of fixed wireless broadband is proven, not unproven as AT&T contends. Without the benefit of federal USF subsidies, WISPs have economically deployed service using unlicensed spectrum and lightly-licensed spectrum in a cost-efficient manner. As a recent Commission report found, the number of fixed wireless connections of at least 3 Mbps downstream and 768 kbps upstream increased from 64,000 in June 2009 to 337,000 in June

²⁰ See Grant of Equipment Authorization to AT&T Wireless Services, Inc., FCC Identifier OF2FWBASE15WCS (for 2305-2315 MHz band); Grant of Equipment Authorization to AT&T Wireless Services, Inc., FCC Identifier OF2WCSR30 (for 2350-2360 MHz band).

2013.²¹ This five-fold increase far exceeds the increases of other terrestrial fixed broadband technologies over the same time period. Thus, while AT&T may have demonstrated caution in deploying *its* WLL technology, fixed wireless broadband is neither untested nor unproven.

AT&T estimates that it will be able to provide customers with peak speeds greater than 10 Mbps.²² AT&T admits that this estimate is based on lab trials and that it has not yet conducted field trials much less undertaken any commercial deployment.²³ No doubt, AT&T was considering and developing WLL long before it entered into its merger agreement with DIRECTV. Moreover, in addition to using its existing spectrum, AT&T plans to utilize its existing LTE network infrastructure for its WLL roll-out.²⁴ AT&T's plans are an incremental outgrowth of its existing spectrum and infrastructure, not a merger-specific benefit.

AT&T appears to be using the proposed merger as a timely opportunity to tout its “new” service and claim that consumer “stickiness” resulting from the combination of DIRECTV’s video service creates a merger-specific benefit. Significantly, however, AT&T and DIRECTV fail to offer alternatives, such as a joint venture or a joint marketing agreement, to achieve their goals.²⁵ The merger thus is not necessary for the AT&T to deploy its LTE-based WLL service, but should instead be viewed as an opportunity to publicly announce a product line AT&T has been planning all along. Any ancillary marketing benefit available exclusively to AT&T is not a

²¹ See FCC Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2013* (June 2014) at 25 (Table 7). The data for this Report is based solely on information reported in FCC Form 477.

²² See Stankey Declaration, at ¶ 49.

²³ See *id.* Item 58.h. of the Bureau Data Request asks for information concerning AT&T’s lab simulations.

²⁴ See *id.* at ¶ 48.

²⁵ See Horizontal Merger Guidelines, issued by the U.S. Department of Justice & Federal Trade Commission, August 19, 2010, at 30 (credit only to those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects).

public interest benefit that might provide support for the transaction. The Commission should therefore follow its precedent and discount the claimed merger-specific benefit.²⁶

III. IF THE COMMISSION APPROVES THE MERGER, AT&T SHOULD BE PROHIBITED FROM USING CONNECT AMERICA FUNDS FOR AREAS THAT ARE ALREADY SERVED BY FIXED BROADBAND.

The above discussion indicates that AT&T has not met its burden to show the benefits that its WLL service will bring as a consequence of the merger. Significant questions remain concerning the extent to which AT&T is planning to serve unserved and underserved rural areas, and the claimed benefits appear to be unrelated to the merger.

WISPA also is concerned about how AT&T proposes to fund its WLL build-out. The Application does not include specific information on the amount of money that AT&T proposes to spend,²⁷ and asserts that its technology is “relatively untested” and its “success in the market place is unproven.” This raises questions about AT&T’s intent to seek federal CAF Phase II support, either by accepting the statewide commitment and/or participating in competitive bidding, in order to meet its WLL deployment commitment. As the American Cable Association observed, AT&T’s merger commitment “*precedes* any election it might make to access Connect America Fund Phase II support in high-cost areas.”²⁸ WISPA further notes that AT&T did not indicate which of the census blocks in its proposed WLL deployment are within “unserved” areas as preliminarily determined by the Commission.²⁹

²⁶ See *Application of EchoStar Communications Corporation, et al., Transferor, and EchoStar Communications Corporation, Transferee*, Hearing Designation Order, 17 FCC Rcd 20559, 20645-47 (2002).

²⁷ In testimony before the United States Senate, AT&T’s top executive referred to a “multi-billion dollar commitment.” Stephenson Senate Testimony, at 2.

²⁸ See Letter from Thomas Cohen, Counsel for the American Cable Association, to Marlene H. Dortch, FCC Secretary, MB Docket No. 14-90 and WC Docket No. 100-90 (filed June 19, 2014), at 1 (emphasis added).

²⁹ A list of the census blocks the Commission preliminarily determined to be available for CAF Phase II support is available at <http://transition.fcc.gov/wcb/SS20140414CAM411%20Support%20Locations.csv> (last visited Sept. 10, 2014). A map depicting the eligible census blocks is available at <http://www.fcc.gov/maps/fcc-connect-america-fund-phase-ii-initial-eligible-areas-map> (last visited Sept. 10, 2014).

AT&T did not condition its WLL deployment on receipt of CAF funds. Instead, AT&T's commitment, though lacking a specific monetary amount, was not contingent on AT&T receiving CAF money. Because this is an unconditional commitment, AT&T should not be permitted to seek CAF Phase II funding for its claimed merger-specific buildout. Further, the Commission should impose as a specific condition of any approval it may give to the merger a requirement that AT&T not accept CAF Phase II support.

Conclusion

The Application lacks the specificity and completeness necessary for the Commission to determine the areas where AT&T has committed to deploy its WLL service. Further, the claimed benefits of AT&T's new service are not merger-specific, but simply represent a convenient coincidence between the launch of its proposed new service and the merger. If the Commission approves the merger, it should preclude AT&T from accepting any CAF Phase II support to help fund its fixed wireless broadband commitment.

Respectfully submitted,

**WIRELESS INTERNET SERVICE
PROVIDERS ASSOCIATION**

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