

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
AT&T Mobility Spectrum and Qualcomm	)	WT Docket No. 11-18
Incorporated Seek FCC Consent to the	)	DA 11-252
Assignment of Lower 700 MHz Band	)	ULS File No. 0004566825
Licenses	)	

**PETITION TO DENY OF DISH NETWORK L.L.C.**

**I. INTRODUCTION AND SUMMARY**

DISH Network L.L.C. (“DISH”) files this Petition to Deny based on serious concerns that allowing AT&T Mobility Spectrum LLC (“AT&T”) to acquire all of Qualcomm, Incorporated’s (“Qualcomm”) Lower 700 MHz band D and E Block licenses will hinder competition and fail to provide adequate public interest benefits.<sup>1</sup> The transfer of this valuable spectrum to AT&T would further disadvantage regional carriers, rural carriers, and potential new entrants in the wireless marketplace as they seek to compete at the nationwide level. Rather than strengthen the growing duopoly in the wireless sector, the Commission should deny the transaction and provide an opportunity for other entrants to acquire Qualcomm’s spectrum, which potentially could

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<sup>1</sup> DISH is a potential new entrant in the provision of Commercial Mobile Radio Services (“CMRS”), having acquired spectrum in the E Block of the 700 MHz band at auction through its wholly-owned subsidiary Manifest Wireless LLC (“Manifest”). Manifest’s licenses extend throughout a large portion of the nation, except, among other markets, New York, Philadelphia, Boston, Los Angeles and San Francisco. DISH is interested in competing in these areas, too, and its standing as a prospective competitor therefore extends to all of the areas implicated in the instant proceeding. DISH is thus a party in interest within the meaning of Section 309(d)(1) of the Communications Act. *See* 47 U.S.C. § 309(d)(1).

introduce greater competition, lower prices, and enhanced technological innovation to the wireless marketplace.

The proposed transfer of critically important spectrum in the 700 MHz band currently held by Qualcomm to AT&T, including an extra 6 MHz in five of the largest U.S. metropolitan areas (New York, Boston, Philadelphia, Los Angeles, and San Francisco), goes too far and does nothing to foster competition in the wireless marketplace. To the contrary, as the Rural Telecommunications Group rightly observes, “allowing AT&T to acquire a nationwide swath of prime 700 MHz spectrum . . . will only further exacerbate the divide between the haves and the have-nots and lessen the marketplace choices for all American consumers.”<sup>2</sup> DISH, similarly, is worried that adding the Qualcomm spectrum to AT&T’s existing spectrum holdings will frustrate the Commission’s efforts to maintain a level playing field and to foster competition going forward. Specifically, the transaction will result in AT&T CMRS spectrum holdings of more than 100 MHz, and up to 136 MHz, in a number of markets. These holdings are as much as three times greater than would have been considered *per se* unlawful and anticompetitive under the erstwhile 45 MHz spectrum aggregation cap. While DISH is not calling for a return to caps, the abolition of the cap was not meant to be an invitation for unfettered spectrum accumulation to the levels proposed here.

DISH, therefore, urges the Commission to deny the license assignments outright, or at a minimum condition the transaction on AT&T divesting the Lower 700 MHz E Block licenses in five of the largest metropolitan areas so that such spectrum can be made available to competitors.

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<sup>2</sup> See Press Release, Rural Telecommunications Group, *RTG: AT&T’s acquisition of Qualcomm’s spectrum widens divide between haves and have-nots* (Dec. 20, 2010), available at <http://ruraltelecomgroup.org/2010/12/rtg-atts-acquisition-of-qualcomms-spectrum-widens-divide-between-haves-and-have-nots/> (last visited March 11, 2011).

## **II. AT&T'S COMPETITIVE ANALYSIS FAILS TO CONSIDER THE BENEFITS OF ALLOCATING CRITICAL "BEACHFRONT" SPECTRUM TO NEW ENTRANTS AND COMPETITORS**

AT&T has not met its burden under Section 310(d) of the Communications Act of 1934, as amended,<sup>3</sup> to demonstrate that the proposed transaction serves the public interest. The Commission's review of the Application must look to 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."<sup>4</sup> The Application fails to show why the need to enhance competition and promote a "diversity of licensing holdings" should be trumped by AT&T's desire to enlarge its already substantial spectrum holdings. In contravention of these statutory goals, the proposed transaction would enable AT&T to acquire 6 MHz of nationwide spectrum in the Lower 700 MHz D Block, increasing its nationwide CMRS footprint, in addition to another 6 MHz of spectrum in five top U.S. markets identified above.

Both of these types of aggregation present competitive problems. The barriers to entry in the largest U.S. markets -- high already -- will be rendered that much higher by the foreclosure of the Qualcomm spectrum from all competition. As to the aggregation of nationwide spectrum, it will make it even harder to piece together national networks that would compete with those of AT&T and Verizon. This is of particular concern because a large number of consumers choose

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<sup>3</sup> 47 U.S.C. § 310(d).

<sup>4</sup> See *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorization, and Spectrum Manager and De Facto Transfer Leasing Arrangements, and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd. 17444, 17461 (2008).

their local CMRS carrier based largely or partly on its ability to provide a seamless nationwide customer experience. Devoid of their own spectrum, regional carriers are left to rely upon the voice and data roaming services of AT&T and Verizon. Rather than enrich AT&T, this spectrum could be critically important to enabling a regional carrier to transform itself into a nationwide carrier, or provide an input to support a new market entrant.

**A. Applicants Fail to Demonstrate That the Public Interest Is Best Served by Increasing the Spectrum Holdings of an Already-Dominant Carrier**

DISH generally agrees with the Applicants that consumers benefit from “more robust wireless broadband service[s]” that meet the “demand for innovative, spectrum-intensive wireless data and content services.”<sup>5</sup> However, even if AT&T is correct that “there is a risk that [Qualcomm’s] unpaired Lower 700 MHz D and E Blocks will remain under-utilized unless they can be used in conjunction with other paired spectrum,”<sup>6</sup> the Applicants fail to establish that the public interest is best served by handing this spectrum to a dominant carrier. AT&T claims that, as a nationwide carrier, it is best suited to receive a package of licenses that comprise a nationwide footprint.<sup>7</sup> This logic reflects precisely the problem – if being a carrier with a nationwide footprint makes a company best suited to get more nationwide spectrum blocks, then the wireless duopoly will only become more entrenched, creating a vicious cycle whereby no

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<sup>5</sup> See Applications and Public Interest Statement of Qualcomm Incorporated, Assignor, to AT&T Mobility Spectrum LLC, Assignee (Jan. 13, 2011) (together, the “Application”) at 4. The Wireless Bureau placed the Application on public notice establishing a comment cycle for this proceeding. See *AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, Public Notice, WT Docket No. 11-18, DA 11-252 (rel. Feb. 9, 2011).

<sup>6</sup> Application at 7.

<sup>7</sup> *Id.*

new entrant could obtain enough spectrum to create a national footprint and compete on a nationwide level.

DISH also is not persuaded that this transaction poses “no competitive harm,” as the Applicants plead.<sup>8</sup> AT&T notes that “LightSquared is expected to begin the rollout of a wholesale mobile broadband service using MSS/ATC spectrum in 2011, and the Commission has recognized that such service will increase competition in mobile broadband services.”<sup>9</sup> The ability of LightSquared to introduce this critical competition to the mobile broadband market, however, was premised upon the condition that LightSquared not lease its spectrum to either AT&T or Verizon absent prior Commission approval.<sup>10</sup> If the Commission was concerned about spectrum concentration by the top two carriers and specifically singled out leasing arrangements in the LightSquared (formerly SkyTerra) spectrum as requiring different treatment, it should apply that same concern to its analysis of the present spectrum transaction.

DISH also is concerned about the implications of helping AT&T to amass additional “beachfront” spectrum given the Commission’s recent finding of increased wireless industry consolidation:

Over the past five years, concentration has increased in the provision of mobile wireless services. The two largest providers, AT&T, Inc. (AT&T) and Verizon Wireless, have 60 percent of both subscribers and revenue, and continue to gain share (accounting for 12.3 million net additions in 2008 and 14.1 million during 2009). The two next-largest providers, T-Mobile USA (T-Mobile) and Sprint Nextel Corp. (Sprint Nextel), had a

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<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Id.* at 25.

<sup>10</sup> See *SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, Memorandum Opinion and Order and Declaratory Ruling, 24 FCC Rcd. 3059, App. B (2010) (“*SkyTerra-Harbinger Order*”) (requiring as a condition of the transaction that “SkyTerra shall not, directly or indirectly, enter into any agreement to make its spectrum . . . available to an entity that, at the time the agreement is entered into, is the largest or second largest wireless provider without receiving prior Commission approval.”)

combined 1.7 million net loss in subscribers during 2008 and gained 827,000 subscribers during 2009. One widely-used measure of industry concentration indicates that concentration has increased 32 percent since 2003 and 6.5 percent in the most recent year for which data is available.<sup>11</sup>

Given these trends, the Commission's primary objective in ensuring that spectrum transactions serve the public interest ought to be creating growth opportunities for companies *other than* AT&T and Verizon. Adequate spectrum is the single most important input to be able to offer a robust mobile broadband network, and handing Qualcomm's spectrum to AT&T is not helpful in terms of equipping competitors with the tools needed to challenge the two dominant wireless carriers.

AT&T's reliance on the prospect of mobile broadband competition from current Mobile Satellite Services ("MSS") S-Band licensees New DBSD Satellite Services ("DBSD") and TerreStar Networks ("TerreStar") is equally misguided.<sup>12</sup> DISH recognizes the potential of this spectrum for some services that may in the future become partial substitutes for AT&T's CMRS services.<sup>13</sup> However, the 2 GHz MSS spectrum is unused today, and, with both of the operators in bankruptcy proceedings, its use is not imminent. Moreover, there certainly is no guarantee that the MSS S-Band would be used for terrestrial broadband service. Even if AT&T is correct

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<sup>11</sup> See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Annual Report ¶ 4, FCC 10-81, WT Docket No. 09-66 (rel. May 10, 2010) ("*Fourteenth Annual CMRS Competition Report*").

<sup>12</sup> Application at 26-27.

<sup>13</sup> DISH itself has announced an agreement with DBSD. If a transaction is brought to the Commission for approval, DISH will seek to develop this spectrum to its competitive potential. See Press Release, DISH Network L.L.C., *DISH Network to Purchase DBSD, Developer of U.S. Hybrid Communications System* (Feb. 1, 2011) available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=546691> (last visited Mar. 11, 2011).

that services using this spectrum may become a constraint on its conduct in the future, this prospect is not ripe for consideration here.<sup>14</sup>

The Commission should also reject the Applicants' attempt to deflect attention from potential competitive harms. The Applicants claim that because "Qualcomm made an independent decision to exit the mobile video business . . . there will be no loss of competition as a result of its selling the spectrum used for its FLO TV service to AT&T."<sup>15</sup> Just because Qualcomm did not offer wireless mobile broadband on this spectrum in the past does not prove that selling the spectrum to a dominant incumbent is neutral with respect to competition. How can the Applicants credibly claim that the "transaction will not affect other competitors' holdings of spectrum to provide 3G and 4G service"<sup>16</sup> when between 6 and 12 MHz of beachfront spectrum across the nation is not being made available either to other current carriers hoping for a chance to compete with AT&T and Verizon, or to a possible new entrant altogether? The Applicants have not demonstrated why enriching an already-dominant carrier with even more spectrum is more beneficial to the public than strengthening one of AT&T's competitors and thereby introducing more choice and potentially lower prices to consumers.

**B. AT&T's Planned LTE Buildout Will Continue Regardless of Whether It Obtains Qualcomm's Spectrum**

The Applicants also fail to demonstrate that the proposed transaction is necessary in order to protect AT&T's ability to compete in the mobile broadband market. As AT&T admits in the

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<sup>14</sup> Even if services in the MSS band emerge in the future, they are unlikely to serve as constraints on the pricing and availability of CMRS services. It is possible, though, that such services could themselves be constrained by the availability and pricing of CMRS services.

<sup>15</sup> Application at 29.

<sup>16</sup> *Id.* at 30.

Application, it already is building and deploying an LTE network using its current 700 MHz spectrum holdings.<sup>17</sup> In the Application, AT&T states that it “plans to begin LTE deployment in the middle of this year over its 700 MHz and AWS spectrum, which it expects largely to complete by the end of 2013.”<sup>18</sup> Although AT&T might find it useful to add the Qualcomm spectrum to its LTE build, it by no means represents that its LTE network will not be viable without that additional spectrum. Nor has AT&T established that it is uniquely suited to use this spectrum. As the Application notes, the Qualcomm spectrum could be bonded with AWS spectrum, as well as 850 or 1900 MHz spectrum.<sup>19</sup> Other carriers, including regional and rural carriers in need of additional spectrum, may also be able to use the Qualcomm spectrum to enhance their networks and give them a better chance to truly compete with AT&T and Verizon.

### **III. IF THE COMMISSION DOES NOT REJECT THIS TRANSACTION OUTRIGHT, IT SHOULD AT A MINIMUM REQUIRE DIVESTITURE OF THE E BLOCK LICENSES**

If the Commission allows this transaction to proceed, it should, at a minimum, require AT&T to divest the Basic Economic Area (“BEA”) licenses in the E Block that cover five of the largest U.S. cities:

- WQIZ617 BEA010 New York-North New Jersey-Long Island, NY-NJ-CT-PA-MA-VT
- WQIZ619 BEA160 Los Angeles-Riverside-Orange County, CA-AZ
- WQIZ618 BEA012 Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD
- WQIZ616 BEA003 Boston-Worcester-Lawrence-Lowell-Brockton, MA-NH-RI-VT
- WQIZ620 BEA163 San Francisco-Oakland-San Jose, CA

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<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.* at 15 (“In those areas where AT&T will rely on AWS spectrum for its LTE network, AT&T will bond existing AWS spectrum with the Qualcomm Spectrum to expand the downlink capacity. In addition, where AT&T currently does not hold 700 MHz or AWS spectrum, the transaction will enable AT&T to bond the unpaired Qualcomm Spectrum with 850 or 1900 MHz spectrum, which AT&T may clear for LTE as customers begin transitioning to LTE devices.”)

AT&T’s pre- and post-transaction holdings in these markets are set forth in the table below. AT&T’s CMRS holdings already constitute close to, or more than, one-third of the available spectrum in the cellular, PCS, 700 MHz, AWS and WCS bands (total of 350 MHz). The addition of 12 MHz of Qualcomm spectrum in these five BEAs would increase dramatically the concern that AT&T will be able to “exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum.”<sup>20</sup> Post-transaction, AT&T would hold more than one-third of the spectrum in those bands in six of the top ten markets and close to one-third in the other four. The Commission can at least mitigate these competitive harms by requiring AT&T to divest the Qualcomm E Block licenses, thus ensuring that it acquires no more than 6 MHz of new 700 MHz spectrum in any one market as a result of this transaction.

**AT&T Average Spectrum Holdings in Five Markets Where  
Qualcomm Currently Holds the 6 MHz E Block License**

Market Area	Average Spectrum Held by AT&T (MHz)					Qualcomm Spectrum Being Acquired (MHz)	Post-Transaction Average Spectrum (MHz)
	Cellular	PCS	700 MHz	AWS	WCS		
New York City-Newark, New York-New Jersey	38	30	24	0	0	12	104
Los Angeles-Anaheim, California	25	40	12	30	10	12	129
Philadelphia, Pennsylvania	25	40	24	0	0	12	101
Boston-Brockton-Lowell, Massachusetts-New Hampshire	25	60	24	10	5	12	136
San Francisco-Oakland-San Jose, California	25	30	24	10	20	12	121

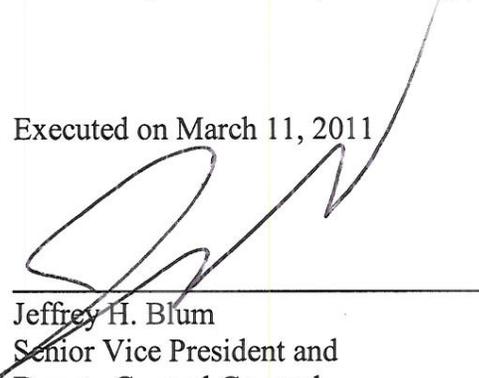
<sup>20</sup> See *Implementation of Sections 3(n) and 332 of the Communications Act*, Third Report and Order, 9 FCC Rcd. 7988, 8100 (1994); see also *Fourteenth Annual CMRS Competition Report* ¶ 282 n. 754 (“in reviewing proposed merger transactions that involve spectrum aggregation, the Commission examines market participants’ holdings of suitable spectrum to ensure that there is sufficient spectrum available to competitors.”)



## DECLARATION

The foregoing Petition to Deny of DISH Network L.L.C. has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on March 11, 2011



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