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

In re Application of)
)
AT&T MOBILITY SPECTRUM LLC)
and QUALCOMM INCORPORATED) DA 11-252
) WT Docket No. 11-18
For Consent to Assign Eleven Lower)
700 MHz Band Licenses)
)
File No. 0004566825)

PETITION TO DENY OF CELLULAR SOUTH, INC.

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SUMMARY

Cellular South, Inc. (“Cellular South”) has been an active proponent of rules to preserve effective competition in the mobile wireless services marketplace in the face of the increasing industry concentration. It has urged the Commission to adopt rules: mandating automatic data roaming in WT Docket No. 05-265; banning exclusive dealing arrangements between wireless carriers and handset manufacturers in RM No. 11497; and requiring interoperable 700 MHz mobile devices in RM No. 11592.

Cellular South is opposing the unconditional grant of the application of AT&T Mobility Spectrum LLC (“AT&T”) and Qualcomm Incorporated (“Qualcomm”) for the Commission’s consent to the assignment of six D block and five E block licenses in the Lower 700 MHz band from Qualcomm to AT&T. AT&T’s proposed \$1.925 billion acquisition of Qualcomm’s Lower 700 MHz band spectrum threatens the competitive harms that are the subjects of the Commission’s data roaming, handset exclusivity and 700 MHz interoperability rulemakings. Consequently, Cellular South requests that the Commission consent to the proposed assignment subject to conditions it fashions to the effect that AT&T: (1) must enter into automatic data roaming agreements on reasonable and nondiscriminatory terms; (2) cannot enter into any exclusivity arrangement with a manufacturer of a wireless device; and (3) cannot engage in any anticompetitive 700 MHz equipment design and procurement practices or exclude Lower 700 MHz A block spectrum in LTE wireless devices that it offers to its subscribers.

The imposition of the conditions proposed by Cellular South would be consistent with the Commission’s practices and precedent. The Commission routinely exercises its plenary power under 47 U.S.C. §§ 303(r) and 310(d) to approve wireless transactions subject to a wide range of conditions, including conditions with little, if any, direct relation to the transaction.

Cellular South relies on a line of four cases in which the Commission approved transfers of Title III licenses subject to the condition that the transferees relinquish federal universal service support in order to sustain that Title II program. The four cases establish that a license condition need not remedy a transaction-specific harm, and that a condition can be imposed even when the need for the remedy on an industry-wide basis is the subject of an ongoing rulemaking. Under such case precedent, the Commission can impose the requested conditions on AT&T to prohibit conduct that causes competitive harms to competing carriers despite the fact the Commission is considering the promulgation of rules to prohibit dominant wireless carriers from engaging in the same conduct and causing competitive harms on an industry-wide basis.

In the first of the four precedents, the Commission imposed a condition on a Title III license to remedy a harm identified on the record of an ongoing Title II rulemaking. Consistent with that precedent, the Commission can determine the need for proposed conditions on the basis of a record that consists of the 101 sets of comments that were filed in the data roaming, handset exclusivity, and 700 MHz interoperability proceedings. That record is sufficiently full to support a reasoned Commission decision that the AT&T/Qualcomm assignment of 700 MHz licenses should be approved subject to the three pro-competitive conditions sought by Cellular South.

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Cellular South, Inc. (“Cellular South”), by its attorneys and pursuant to § 309(d)(1) of the Communications act of 1934, as amended (“Act”) and § 1.939(a)(2) of the Commission’s Rules (“Rules”), hereby petitions the Commission to deny the above-captioned application of AT&T Mobility Spectrum LLC (“AT&T Mobility”) and Qualcomm Incorporated (“Qualcomm”) for Commission consent to the assignment of six D block and five E block licenses in the Lower 700 MHz band from Qualcomm to AT&T Mobility.¹ In support thereof, the following is respectfully submitted:

INTRODUCTION

Cellular South is the nation’s largest privately-held wireless carrier. Through subsidiaries, Cellular South provides wireless services to approximately 880,000 customers throughout Mississippi, and in portions of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Tennessee and Virginia.²

¹ AT&T Mobility is an indirect, wholly subsidiary of AT&T Inc. (collectively with its subsidiaries and affiliates (“AT&T”).

² Cellular South provides cellular service in nine Cellular Market Areas (“CMAs”) in Mississippi, consisting of two Metropolitan Statistical Areas (“MSAs”) and seven Rural Service

Cellular South has been an active proponent of rules to preserve effective competition in the mobile wireless services marketplace in the face of the increasing industry concentration and the market power wielded by the nation's two largest wireless carriers, AT&T and Verizon Wireless. Cellular South has focused its advocacy on the need for: (1) a data roaming mandate;³ (2) a ban on exclusive handset agreements;⁴ and, most recently, (3) rules requiring interoperable 700 MHz mobile devices.⁵

Cellular South has urged the Commission to promulgate data roaming, handset exclusivity, and 700 MHz interoperability rules in accordance with the notice-and-comment requirements of the Administrative Procedure Act ("APA")⁶ and the Commission's own rules.⁷ Indeed, a subsidiary of Cellular South was one of the four Lower 700 MHz Band block A ("A Block") licensees that petitioned the Commission to initiate a rulemaking to generally prohibit anticompetitive 700 MHz mobile equipment design and procurement practices, and to specifically require that all mobile devices for the 700 MHz band be capable of operating on all of the paired, commercial 700 MHz frequency blocks.⁸ But the data roaming, handset

Areas. Cellular South also provides Personal Communications Service ("PCS") in twelve Mississippi Basic Trading Areas. In addition, Cellular South holds authorizations to provide PCS, Advanced Wireless Service and/or 700 MHz Service in portions of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Tennessee, and Virginia.

³ See, e.g., Letter from Eric B. Graham to Marlene H. Dortch, WT Docket No. 05-265, at 1-3 (Feb. 9, 2011); Comments of Cellular South, Inc., WT Docket No. 05-265, at 4-23 (June 14, 2010) ("Data Roaming Comments").

⁴ See, e.g., Comments of Cellular South, Inc., WT Docket No. 09-66, at 8-17 (June 15, 2009); Reply Comments of Cellular South, Inc., RM No. 11497, at 2-15 (Feb. 20, 2009).

⁵ See, e.g., Comments of Cellular South, Inc., RM No. 11952, at 2-6 (Mar. 31, 2010) ("700 MHz Comments").

⁶ See 5 U.S.C. § 553.

⁷ See 47 C.F.R. §§ 1.411-1.427.

⁸ See *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, 25 FCC Rcd

exclusivity and 700 MHz interoperability issues are interrelated and cannot await resolution in rulemakings, since they are directly implicated by AT&T's proposed \$1.925 billion acquisition of Qualcomm's Lower 700 MHz band spectrum.⁹

The urgent need for the Commission to address the 700 MHz interoperability issue is a matter of public record.¹⁰ And the relative urgency of a decision on the anticompetitive effects of an authorization is a "thoroughly appropriate factor for [the Commission] to consider when crafting its procedures."¹¹ Cellular South will show that the exigent circumstances, including the need for expedition requested by AT&T,¹² call for an exercise of the Commission's plenary authority under § 310(d) of the Act, 47 U.S.C. § 310(d), to consent to a proposed assignment or transfer of control of a license subject to conditions.¹³ If it imposes the conditions sought by Cellular South, but they are rejected by AT&T, the Commission must designate the subject application for hearing. *See* 47 C.F.R. § 1.110. Thus, by seeking the imposition of conditions, Cellular South is effectively asking the Commission to deny the AT&T/Qualcomm application. *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1403-04 (D.C. Cir.1996).

STANDING

By AT&T's count, Cellular South competes with AT&T in 66 CMAs.¹⁴ Cellular South's

1464, 1464 n.1 (2010).

⁹ *See* File No. 0004566825, Ex. 1 at 3 ("AT&T Application").

¹⁰ *See, e.g.*, 700 MHz Comments at 5.

¹¹ *United States v. FCC*, 652 F.2d 72, 96 (D.C. Cir. 1980) (en banc)

¹² *See* AT&T Application, Ex. 1 at 43.

¹³ *See* Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 7.3.4 at 608-10, § 7.5.4.7 at 641-46 (2d ed. 1999).

¹⁴ *See* AT&T Application, Ex. 1, App. B at 14-17, 23-25, 31, 33, 35, 37, 40, 45, 46, 48-52, 54-57, 61, 71-74, 76, 104-07, 111, 112, 124-29, 177-82, 198, 225-27, 231, 235-38, 240, 244-50, 252-54, 259-62, 275, 283, 292-94, 297, 323-25.

status as a direct and current competitor provides it with standing to file a petition to deny the AT&T/Qualcomm application under *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940) and its progeny. See *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002). Consistent with *Sanders Brothers*, the Commission developed a “generous” standing policy in assignment and transfer cases “so as to enable a competitor to bring to the Commission’s attention matters bearing on the public interest because its position qualifies it in a special manner to advance such matters.” *Stoner Broadcasting System, Inc.*, 74 F.C.C. 2d 547, 548 (1979). See *WLVA, Inc. v. FCC*, 459 F.2d 1286, 1298 n.36 (D.C. Cir. 1972) (standing under § 309(d)(1) “liberally conferred” where a competitor alleges economic injury). Under that policy, Cellular South clearly has standing under § 309(d)(1) to petition to deny the AT&T/Qualcomm application. See, e.g., *Channel 32 Hispanic Broadcasters, Ltd.*, 15 FCC Rcd 22649, 22651 (2000).

Despite recognizing that the administrative standard for establishing standing under § 309(d)(1) is “less stringent” than the judicial standard for establishing Article III standing to appeal, see *Paxson Management Corp. and Lowell W. Paxson*, 22 FCC Rcd 22224, 22224 n.2 (2007), and that Article III does not apply at all to administrative standing, see *Sagittarius Broadcasting Corp.*, 18 FCC Rcd 22551, 22554 n.20 (2003), the Commission nevertheless has applied the test for Article III standing to petitioners in transfer of control cases. See, e.g., *Shareholders of Tribune Co.*, 22 FCC Rcd 21266, 21268 (2007).¹⁵ If it does so again in this case, the Commission should recognize Cellular South’s Article III standing.

At a cost of approximately \$192 million, Cellular South acquired 24 Lower 700 MHz

¹⁵ To establish Article III standing, a party must allege specific facts showing that: (1) it will suffer injury-in-fact; (2) there is a “causal link” between the proposed transfer and the injury-in-fact; and (3) the injury-in-fact would be prevented if the transfer application is not granted. See *Shareholders of Tribune Co.*, 22 FCC Rcd at 21268.

authorizations, including fourteen Block A authorizations, to deploy a 700 MHz LTE network that will operate in all or portions of 62 CMAs in direct competition with mobile broadband services that AT&T will provide over its national LTE network.¹⁶ Consequently, Cellular South is likely to suffer injury-in-fact if AT&T acquires Qualcomm's Lower 700 MHz D and E block spectrum. AT&T proposes to employ supplemental downlink technology to bond the unpaired D and E block spectrum with AWS spectrum that it will use in its LTE network to increase the capacity of the network.¹⁷ According to AT&T, the integration of the Qualcomm spectrum into its LTE network "will provide faster download speeds and an enhanced user experience" for its broadband customers.¹⁸

If the Commission unconditionally approves the proposed \$1.925 billion sale, Cellular South will not only suffer the economic consequences of competing with AT&T's "more robust wireless broadband service" offering,¹⁹ but it will face the unfair competitive advantage that AT&T will gain by refusing to enter into automatic roaming agreements and by its anticompetitive 700 MHz equipment design and procurement practices. That injury can be redressed if the Commission approves the proposed assignment of Qualcomm's Lower 700 MHz band spectrum subject to the conditions that AT&T: (1) must enter into automatic data roaming agreements upon reasonable requests on reasonable and nondiscriminatory terms and conditions; (2) cannot enter into any exclusivity arrangement with a manufacturer of a wireless device that would restrict the distribution of the device to one or more service providers in the United States; and (3) cannot engage in any anticompetitive 700 MHz equipment design and procurement

¹⁶ See AT&T Application, Ex. 1, App. B at 14-17, 23-25, 31, 33, 35, 37, 40, 45, 46, 48-52, 54-57, 61, 71-74, 76, 104-07, 111, 112, 124-29, 177-82, 198.

¹⁷ See *id.*, Ex. 1, Decl. of Kristin S. Rinne at 2.

¹⁸ *Id.*, Ex. 1 at ii.

¹⁹ *Id.* at 1.

practices or exclude A Block spectrum in LTE wireless devices that it offers to its subscribers.

ARGUMENT

I. THE IMPOSITION OF THE REQUESTED CONDITIONS WOULD BE CONSISTENT WITH COMMISSION PRACTICE AND PRECEDENT

This is not the first time that Cellular South has petitioned the Commission to grant its consent to a transaction under § 310(d) of the Act subject to conditions to remedy exclusive handset arrangements and the lack of an automatic data roaming mandate.²⁰ In each case, the Commission either found that the conditions would not remedy a specific harm arising out of the proposed transaction (a “transaction-specific harm”)²¹ or that they were not “narrowly tailored to prevent a transaction-specific harm.”²² It also found that the need for the imposition of the proposed condition regarding exclusive handset agreements was more appropriately considered on the basis of the full record that was developed in response to the petition for rulemaking in RM No. 11497.²³

Cellular South filed comments supporting both the promulgation of rules in the so-called data roaming rulemaking in WT Docket No. 05-265 and the commencement of a rulemaking on handset exclusivity in RM No. 11497. Cellular South obviously recognizes that rulemaking is

²⁰ See *Cellco Partnership d/b/a Verizon Wireless and AT&T, Inc.*, DA 10-1554, at 28-30 (WTB & IB, Aug. 20, 2010) (“*VZW/AT&T*”); *AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless*, 25 FCC Rcd 8704, 8748-49 (2010) (“*AT&T/VZW*”); *AT&T Inc. and Centennial Communications Corp.*, 24 FCC Rcd 13915, 13967-69, 13971-72 (2009) (“*AT&T/Centennial*”); *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17526-27 (2008) (“*VZW/Atlantis*”).

²¹ See *VZW/AT&T*, DA 10-1554 at 29.

²² *AT&T/VZW*, 25 FCC Rcd at 8749; *AT&T/Centennial*, 24 FCC Rcd at 13972; *VZW/Atlantis*, 23 FCC Rcd at 17527,

²³ See *VZW/AT&T*, DA 10-1554 at 30; *AT&T/VZW*, 25 FCC Rcd at 8749; *AT&T/Centennial*, 24 FCC Rcd at 13972; *VZW/Atlantis*, 23 FCC Rcd at 17527-28.

the preferred process for making rules,²⁴ and it will not urge the Commission to circumvent notice-and-comment rulemaking requirements of the APA. However, Cellular South will show that the Commission can exercise its discretion to adopt and apply “rules” in this adjudication, and do so without prejudice to the ongoing data roaming rulemaking or its actions in RM No. 11497. Furthermore, it will also demonstrate that the Commission has not limited the exercise of its authority under § 303(r) of the Act to prescribing “narrowly tailored, transaction-specific conditions” that will only “remedy harms that arise from the transaction” and are related to its responsibilities under the Act and “related statutes.” *E.g., VZW/Atlantis*, 23 FCC Rcd at 17462, 17463.

A. The Conditions Are Consistent with Precedent and Can Be Prescribed Without Violating APA Rulemaking Requirements

The Commission’s discretion to develop rules through adjudication,²⁵ and outside the purview of the APA, reaches its zenith when it reviews telecommunications mergers and acquisitions either under § 214(c) or § 310(d) of the Act. In § 310(d) adjudications,²⁶ the Commission routinely consents to assignments and transfers of control of licenses subject to conditions, including “conditions with little, if any, direct relation to the actual license transfers before it.”²⁷ It often negotiates “elaborate conditions” from merging parties to comply with all

²⁴ See generally Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.7, at 261 (3rd ed. 1994) (“Over the years, commentators, judges, and Justices have shown near unanimity in extolling the virtues of the rulemaking process over the process of making ‘rules’ through case-by-case adjudication”).

²⁵ See *Central Texas Telephone Cooperative, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005); *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976).

²⁶ Under the APA, the process by which the Commission grants its consent to the assignment or transfer of control of a license is an “adjudication.” See 5 U.S.C. § 551(6)-(9).

²⁷ Huber, Kellogg & Thorne, *supra*, § 7.3.4, at 609-10.

sorts of regulatory mandates that it deems to be in the public interest.²⁸ The Commission's practice of conditionally approving license transfers has been described as "regulation by condition" or "de facto rulemaking."²⁹

For example, the Commission engaged in de facto rulemaking beginning in 2007, when it found that the proposed transfer of control of the licenses held by ALLTEL Corporation ("ALLTEL") to Atlantis Holdings LLC ("Atlantis") would not adversely affect competition, but did implicate the imposition of an interim, emergency cap on the amount of high-cost universal service support that a competitive eligible telecommunications carrier ("CETC") may receive — a matter that was under consideration in the notice-and-comment rulemaking in WC Docket No. 05-337.³⁰ Nevertheless, the Commission found that it should "immediately address" ALLTEL's continued receipt of CETC funding in the "context" of its consideration of the proposed transaction.³¹ It proceeded to impose an interim cap on the high-cost CETC support provided to ALLTEL as a condition to the grant of the transfer application.³²

A month after *ALLTEL/Atlantis*, the Commission granted its consent to the transfer of control of the licenses held by Dobson Communications Corporation ("Dobson") to AT&T subject to the condition that AT&T honor its "voluntary" agreement to the same interim cap on CETC high-cost support that had been imposed in *ALLTEL/Atlantis*.³³ At the time the *ALLTEL/Atlantis* interim cap condition was replicated in *AT&T/Dobson*, the recommendation

²⁸ Huber, Kellogg & Thorne, *supra*, § 7.3.4, at 610.

²⁹ *Id.*

³⁰ See *ALLTEL Corp. and Atlantis Holdings LLC*, 22 FCC Rcd 19517, 19520-21 & n.33 (2007) ("*ALLTEL/Atlantis*").

³¹ *Id.*

³² See *id.* at 19521, 19523.

³³ See *AT&T, Inc. and Dobson Communication Corp.*, 22 FCC Rcd 20295, 20329-30 (2007) ("*AT&T/Dobson*").

that an interim cap on CETC high-cost support be imposed on an industry-wide basis was still under consideration in the Commission's rulemaking in WC Docket No. 05-337. Indeed, the interim cap was not adopted by the Commission until May 1, 2008,³⁴ and it did not go into effect until August 1, 2008.

The cap on CETC high-cost support adopted in *Interim Cap Order* became a Commission rule that could not be amended or repealed except pursuant to an APA rulemaking.³⁵ Nevertheless, the Commission departed from its interim cap rule on November 4, 2008, when it adopted orders approving, with conditions, the transfer of control of the ALLTEL licenses from Atlantis to Verizon Wireless,³⁶ and the transfer of licenses held by Sprint Nextel Corporation ("Sprint") and Clearwire Corporation to a new corporation controlled by Sprint.³⁷ The Commission conditioned its approval of the two transactions on the carriers' "voluntary commitments" to *surrender* their already-capped high-cost CETC support — estimated as approximately \$530 million in 2008³⁸ — over a five-year period.³⁹ Thus, the merger conditions imposed in *VZW/Atlantis* and *Sprint/Clearwire* required the CETCs to relinquish their high-cost support and, therefore, were far more onerous than the interim cap rule that the Commission promulgated by rulemaking.

The harm that was remedied by the conditions imposed in *ALLTEL/Atlantis*, *AT&T/Dobson*, *VZW/Atlantis* and *Sprint/Clearwire* was characterized as the "explosive growth

³⁴ See *High-Cost Universal Service Support*, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*").

³⁵ See *High-Cost Universal Service Support*, 51 Communications Reg. (P&F) 434, 2010 WL 3484249, at *3 (Sept. 3, 2010).

³⁶ See *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444 (2008) ("*VZW/Atlantis*").

³⁷ See *Sprint Nextel Corp. and Clearwire Corp.*, 23 FCC Rcd 17570 (2008) ("*Sprint/Clearwire*").

³⁸ See *High-Cost Universal Service Support*, 2010 WL 3484249, at *2.

³⁹ See *VZW/Atlantis*, 23 FCC Rcd at 17529-32; *Sprint/Clearwire*, 23 FCC Rcd at 17611-12.

in high-cost universal service support disbursements” to CETCs.⁴⁰ The “explosive growth” that the Commission needed to control was the average annual growth rate in high-cost disbursements to CETCs of over 100 percent in the years from 2001 through 2007.⁴¹ Thus, the Commission imposed conditions to remedy what it perceived to be a pre-existing, industry-wide “harm” that was either being specifically addressed in the interim cap rulemaking or had already been remedied by the *Interim Cap Order*.

The Commission imposed the condition initially in *ALLTEL/Atlantis* based solely on the assessment of the Federal-State Joint Board on Universal Service (“Joint Board”) that, without immediate action to restrain the growth in CETC high-cost support, the federal universal service fund would be in “dire jeopardy of becoming unsustainable.”⁴² Thus, the Commission imposed a condition on a wireless carrier in a Title III licensing case to remedy a potential harm to a federal program established and administered under Title II of the Act.⁴³ The Commission eventually imposed conditions in four § 310(d) cases to remedy the potential collapse of the universal service fund. Needless to say, any harm that threatened the Title II universal service fund was wholly unrelated to the transfers of the Title III licenses in *ALLTEL/Atlantis*, *AT&T/Dobson*, *VZW/Atlantis* and *Sprint/Clearwire*.

By the very same orders by which it remedied an already-remedied harm in *VZW/Atlantis* and *Sprint/Clearwire*, the Commission refused to impose conditions that would have prevented the enforcement of existing exclusive handset arrangements on the grounds that the conditions were “not narrowly tailored to prevent a transaction-specific harm and are more appropriate for a

⁴⁰ *ALLTEL/Atlantis*, 22 FCC Rcd at 19520; *AT&T/Dobson*, 22 FCC Rcd at 20329; *VZW/Atlantis*, 23 FCC Rcd at 17529-30; *Sprint/Clearwire*, 23 FCC Rcd at 17611.

⁴¹ See *Interim Cap Order*, 23 FCC Rcd at 8837-38.

⁴² *ALLTEL/Atlantis*, 22 FCC Rcd at 19520.

⁴³ See 47 U.S.C. § 254.

rulemaking proceeding when all interested parties have the opportunity to file comments.”⁴⁴

In *Sprint/Clearwire*, the Commission even suggested that the issue of whether exclusive handset agreements cause competitive harm had been “improperly” raised, because the petitioner had “failed to demonstrate any nexus between the instant transaction and the harms it seeks to address.”⁴⁵ That suggestion proved to be ill considered when the Commission proceeded to condition its approval of the transaction on Sprint’s “voluntary commitment” to phase out its high-cost CETC support having found no nexus between the transaction and any harm to the universal service fund.⁴⁶ It even acknowledged both that an interim cap was already in place that “superseded” the cap “adopted” in *ALLTEL/Atlantis*,⁴⁷ and that the phase out of high-cost support was under consideration in its comprehensive high-cost reform rulemaking.⁴⁸

The *ALLTEL/Atlantis*, *AT&T/Dobson*, *VZW/Atlantis* and *Sprint/Clearwire* line of cases constitute precedent for approving the AT&T/Qualcomm assignment of licenses subject to the sought by Cellular South. The four cases establish that a license condition need not remedy a transaction-specific harm, and that a condition can be imposed even when the need for the remedy on an industry-wide basis is the subject of an ongoing rulemaking. Under such case precedent, the Commission can impose the requested conditions on AT&T to prohibit conduct that causes competitive harms to competing carriers despite the fact the Commission is considering the promulgation of rules to prohibit dominant wireless carriers from engaging in the same conduct and causing competitive harms on an industry-wide basis.

⁴⁴ *VZW/Atlantis*, 23 FCC Rcd at 17527; *Sprint Nextel*, 23 FCC Rcd at 17607.

⁴⁵ *Sprint/Clearwire*, 23 FCC Rcd at 17607.

⁴⁶ *Id.*

⁴⁷ *Id.* at 17612 n.289.

⁴⁸ *See id.* at 17612.

Finally, the Commission's adoption of an interim cap on high-cost CETC support by the imposition of conditions in *ALLTEL/Atlantis* and *AT&T/Dobson* demonstrated that the Commission can impose the requested conditions on AT&T without running afoul of the notice-and-comment requirements of the APA. The *Interim Cap Order* was challenged on appeal on the grounds that the Commission violated the APA by imposing the interim cap in *ALLTEL/Atlantis* and *AT&T/Dobson* before completing its notice-and-comment rulemaking in WC Docket No. 05-337, thereby prejudging the issue in its interim cap rulemaking.⁴⁹ The court shrugged off the APA challenge by noting that *ALLTEL/Atlantis* and *AT&T/Dobson* only imposed restrictions on the parties directly involved in the mergers,⁵⁰ and holding that the APA required nothing more of the Commission than to have compiled a record that included the comments of interested parties, considered those comments, and issued its *Interim Cap Order* after the rulemaking process was completed.⁵¹ Under *RCA*, the Commission can impose the requested conditions on AT&T without violating the APA so long as it ultimately complies with its notice-and-comment requirements in the conduct of its data roaming, handset exclusivity and 700 MHz interoperability rulemakings.

B. The Commission Can Impose the Conditions to Remedy Harms that Are Wholly Unrelated to the AT&T/Qualcomm Assignment

The *ALLTEL/Atlantis*, *AT&T/Dobson*, *VZW/Atlantis* and *Sprint/Clearwire* line of cases demonstrates the Commission's willingness to exercise its plenary power to impose conditions under § 310(d) that bear no relation to competitive or other concerns arising from the transactions. Any doubt as to that matter is dispelled by an examination of the eleven-page

⁴⁹ See *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1100-01 (D.C. Cir. 2009) ("*RCA*").

⁵⁰ See *id.* at 1100.

⁵¹ See *id.* at 1101.

laundry list of conditions that that the Commission imposed on its approval of AT&T's merger with BellSouth Corporation ("BellSouth") in 2007.⁵² The "merger commitments" that individual Commissioners "extracted" from AT&T/BellSouth⁵³ included the conditions that it: (1) "repatriate" 3,000 jobs that had been outsourced by BellSouth outside of the United States, at least 200 of the "repatriated" job had to be physically located within the New Orleans, Louisiana MSA;⁵⁴ (2) provide new customers with broadband Internet access service at speeds up to 768 kbps for \$10/month;⁵⁵ (3) "donate \$1 million to a [§] 501(c)(3) foundation or public entities for the purpose of promoting public safety;"⁵⁶ and (4) adhere to the "net neutrality" principles set forth in the Commission's policy statement in *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986 (2005).⁵⁷

Especially in light of the conditions it prescribed in *AT&T/BellSouth*, the Commission cannot continue to decline to "impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction." *E.g.*, *VZW/Atlantis*, 23 FCC Rcd at 17463. In practice, the Commission imposes a wide range of conditions under the public interest standard to achieve what it perceives to be among the "broad aims" of the Act.⁵⁸ The Commission should see that the imposition of the conditions requested by Cellular South will serve to preserve wireless competition in the 700 MHz band and thereby serve the pro-competitive goals of the Act.

⁵² See *AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd 5662, 5807-17 (2007) ("*AT&T/BellSouth*").

⁵³ *Id.* at 5827 (Joint Statement of Chairman Martin and Commissioner Tate).

⁵⁴ *Id.* at 5807.

⁵⁵ See *AT&T/BellSouth*, 22 FCC Rcd at 5808.

⁵⁶ *Id.*

⁵⁷ See *id.* at 5814.

⁵⁸ See Huber, Kellogg & Thorne, *supra*, § 7.5.1, at 625.

II. THE COMMISSION CAN PRESCRIBE THE PROPOSED CONDITIONS BASED ON THE RECORD COMPILED IN THE DATA ROAMING, HANDSET EXCLUSIVITY, AND 700 MHZ INTEROPERABILITY PROCEEDINGS

The conditional approval of the transfer of control in *ALLTEL/Atlantis* was an exercise of the Commission’s power to impose a condition in a Title III licensing case to remedy a harm identified on the record of an ongoing Title II rulemaking. If the record in the interim cap rulemaking was sufficient on October 26, 2007 to warrant the imposition of the cap on CETC high-cost support in *ALLTEL/Atlantis*, then the Commission can determine the need for the conditions sought by Cellular South based on the combined record that it has compiled in its data roaming (WT Dkt. No. 05-265), handset exclusivity (RM No. 11497) and 700 MHz interoperability (RM No. 11592) proceedings. The following two tables compare the state of the record in the interim cap rulemaking on the date the Commission imposed the condition in *ALLTEL/Atlantis* with the records in the three current notice-and-comment proceedings.

PROCEEDING	SUBJECT	COMMENTS	SUBMITTED	<i>ALLTEL/ATLANTIS</i>
WC 05-337	Interim Cap	113	6/21/2007	4 months 27 days

PROCEEDING	SUBJECT	COMMENTS	SUBMITTED	PENDING
WT 05-265	Data Roaming	39	7/12/2010	7 months 27 days
RM 11592	700 MHz Interoperability	31	4/30/2010	10 months 11 days
RM 11497	Handset Exclusivity	31	2/20/2009	2 years 19 days

The Commission acted in *ALLTEL/Atlantis* less than five months after receiving 113 sets of comments in the interim cap rulemaking. In contrast, the Commission has had at least seven months to weigh the 101 sets of comments that have been submitted on the need for regulation with respect to data roaming, handset exclusivity arrangements, and 700 MHz interoperability. Because all interested industry parties have had opportunity to file comments on the issues, the Commission can consider the comments filed as comprising the record upon which it can fairly determine whether the proposed conditions should be prescribed in this case. To that end,

Cellular South requests that the Commission exercise its discretion to take official notice⁵⁹ of the comments filed in response to the second further notice of proposed rulemaking in WC Docket No. 05-265,⁶⁰ as well as those filed in response to the public notices issued with respect to RM Nos. 11497 and 11592.⁶¹

The 101 sets of comments that were filed in the three proceedings comprise the consolidated record that is available to the Commission. That record is sufficiently full to allow the Commission to reach an informed decision as to the policy-related issue of whether AT&T should be subjected to the pro-competitive conditions sought by Cellular South. The record contains the following facts and policy considerations that favor the conditional grant of the AT&T/Qualcomm assignment application.

- AT&T proposes to acquire Lower 700 MHz D and E block licenses (6 MHz each) that cover more than 300 million people nationwide.⁶²
- Post-transaction AT&T will hold between 6 and 80 MHz of spectrum below 1 GHz.⁶³
- AT&T already has a powerful grip on spectrum in the 700 MHz bands. It holds 29 percent of all MHz-pops for active, paired licenses in the band (compared to 19 percent held by all other licensees, other than Verizon Wireless). AT&T also has spent 37 percent

⁵⁹ The Commission even has the discretion to take official notice of presentations made off-the-record to resolve issues raised under § 309(d) of the Act. *See, e.g., AT&T/VZW*, 25 FCC Rcd at 8770-71.

⁶⁰ *See Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181, 4207-24 (2010).

⁶¹ *See Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, 23 FCC Rcd 14873 (2008); *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, 25 FCC Rcd 1464 (2010).

⁶² *See AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, DA 11-252, at 1 (Feb. 9, 2011).

⁶³ *See id.*

of the entire amount expended for paired licenses in the bands (compared to 10 percent spent by all other licensees, other than Verizon Wireless).⁶⁴

- In his speech at the GSMA Mobile World Congress on February 15, 2011, AT&T's Chairman and CEO Randall Stephenson stated that "an open and interoperable environment ... will drive mobile broadband."⁶⁵ AT&T confirmed that it "believes that an open and seamless wireless ecosystem will fuel the future of mobile broadband."⁶⁶
- Nevertheless, AT&T opposes the adoption of data roaming standards, arguing that "[t]he Commission should avoid dictating the carriers or spectrum bands on which AT&T, Verizon [Wireless], or any other carrier should roam, as those decisions are best made by those carriers based on their spectrum holdings and business plans."⁶⁷
- Cellular South requested AT&T for assurance that it will be able to negotiate for 4G roaming at the appropriate time, but AT&T refused to provide such assurance.⁶⁸
- AT&T's tactics with respect to utilization of its 700 MHz spectrum are inimical to the interests of consumers, the operations of public safety agencies and organizations, and the promotion of wireless competition.⁶⁹
- The 700 MHz band class configurations have enabled AT&T to procure mobile devices that will operate only in Band Class 17, which is virtually a proprietary domain of AT&T. AT&T's purchasing decisions are making it extremely difficult for small rural and regional carriers to obtain affordable mobile devices for use with services these carriers would provide using Lower A Block spectrum.⁷⁰
- The dearth of affordable mobile devices for the Lower A Block leads to a chain of circumstances that poses substantial problems for small rural and regional carriers: without a variety of affordable mobile devices, they cannot provide 4G broadband services to their customers. This inability (1) could result in losing existing customers and failing to attract new customers; and (2) undermines the opportunities for these carriers to obtain the investments needed to build out their 700 MHz networks. This lack of

⁶⁴ See Reply Comments of 700 MHz Block A Good Faith Purchasers Alliance, RM No. 11592, at iv (Apr. 30, 2010) ("Alliance Reply").

⁶⁵ See Letter from Eric Graham to Marlene H. Dortch, WT Dkt. No. 05-265 & RM No. 11592, at 1 (Feb. 16, 2011).

⁶⁶ Letter from Joan Marsh to Marlene H. Dortch, WT Dkt. No. 05-265 & RM No. 11592, at 2 (Feb. 17, 2011).

⁶⁷ AT&T Reply Comments, RM No. 11592, at 17 (Apr. 30, 2010).

⁶⁸ See Letter from Eric Graham to Marlene H. Dortch, WT Dkt. No. 05-265 & RM No. 11592, at 3 (Feb. 9, 2011).

⁶⁹ See Alliance Reply at iv-v.

⁷⁰ See *id.* at v.

investment capital, as well as a shrinking customer base, in turn jeopardize the competitiveness of these small rural and regional carriers.⁷¹

- Goals established by the Commission for utilization of the 700 MHz Band are being jeopardized by AT&T's actions. AT&T has influenced the 3GPP LTE standard-setting process to establish Band Class 17, and has then decided to purchase equipment that will work only in that band.⁷²
- In part as a consequence of AT&T's actions, the Lower A Block is being turned into orphaned spectrum that will not be sufficiently utilized for the deployment of 4G services. This is severely undercutting the Commission's objective that 700 MHz spectrum should be used in a manner that achieves the Commission's pro-competitive and pro-consumer policies.⁷³
- Consumers in rural areas are being harmed by AT&T's practices in the 700 MHz band. The Commission's goal is to facilitate the deployment of mobile broadband services to consumers in rural and unserved areas. AT&T is frustrating this goal by creating a situation in which 700 MHz spectrum—which has superior propagation and other attributes making it particularly well suited for broadband deployment in rural areas—may not be used to bring 4G broadband to rural consumers anytime in the near future. AT&T will use its 700 MHz holdings to roll out its nationwide 4G services, but rural consumers will fall further behind urban consumers in their ability to access advanced mobile broadband services.⁷⁴
- AT&T's equipment procurement strategies in the 700 MHz band are preventing its customers from roaming on other 700 MHz frequency blocks, and are preventing customers of other carriers in rural areas from roaming on AT&T's 700 MHz networks.⁷⁵
- AT&T's practices have put competition on the ropes in the 700 MHz band. A key Commission goal in licensing the 700 MHz Band is to preserve and promote the competitiveness of small rural and regional carriers, enabling these carriers to invest in 4G mobile broadband networks, thus bringing advanced mobile broadband to consumers in rural and unserved areas. But AT&T—by using its dominance in the band to control the development and production of mobile devices—is hampering the competitiveness of small rural and regional carriers.⁷⁶
- AT&T's maneuvers in the 700 MHz Band have contributed to the lack of mobile devices usable across all the 700 MHz frequency blocks. This result hinders the ability of public

⁷¹ See Alliance Reply at vi.

⁷² See *id.* at v.

⁷³ See *id.* at 13.

⁷⁴ See *id.* at vi-vii.

⁷⁵ See *id.* at vii.

⁷⁶ See *id.*

safety organizations to realize the full potential of 4G mobile broadband because their equipment will be unable to roam within the 700 MHz Band.⁷⁷

- The restrictive manner in which mobile devices are currently being developed for broadband data in the 700 MHz band will have a harmful effect on consumers (especially those residing in rural and small regional markets), competition, and 4G deployment, in part because these devices will not be capable of roaming in the 700 MHz frequency blocks.⁷⁸

When it considers the foregoing, the Commission should recall that it faced a similar issue at the dawn of the cellular era. Having determined that there would be two 20 MHz cellular systems in each market, the Commission turned to the issue of ensuring a competitive market structure. It wisely decided in 1981, much as it should decide today, that all mobile units had to be capable of operating over the entire spectrum band:

With respect to mobile stations, all units must be capable of operating at least over the entire 40 MHz of spectrum (*i.e.*, 666 channels). This is necessary in order to insure full coverage in all markets and compatibility on a nationwide basis.⁷⁹

Finally, if it agrees that the exigent circumstances surrounding AT&T's acquisition of Qualcomm's Lower 700 MHz band D and E block spectrum warrant an exercise of its plenary authority to fashion and prescribe license conditions, the Commission can do so without prejudice as to the outcomes of its data roaming, handset exclusivity and 700 MHz interoperability proceedings. As the Commission recognized in *Sprint/Clearwire*,⁸⁰ any rule adopted in the process of an adjudication is subject to being superseded by one adopted by notice-and-comment rulemaking.⁸¹

⁷⁷ See Alliance Reply at 29-30.

⁷⁸ See Data Roaming Comments, at 23.

⁷⁹ *Cellular Communications Systems*, 86 F.C.C. 2d 469, 483 (1981).

⁸⁰ See *supra* note 47 & accompanying text.

⁸¹ See *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976) (en banc).

CONCLUSION

For all the foregoing reasons, Cellular South respectfully requests that the Commission consent to the proposed assignment of Qualcomm's Lower 700 MHz band spectrum subject to conditions to the effect that AT&T: (1) must enter into automatic data roaming agreements upon reasonable requests on reasonable and nondiscriminatory terms and conditions; (2) cannot enter into any exclusivity arrangement with a manufacturer of a wireless device that would restrict the distribution of the device to one or more service providers in the United States; and (3) cannot engage in any anticompetitive 700 MHz equipment design and procurement practices or exclude A Block spectrum in LTE wireless devices that it offers to its subscribers. If AT&T rejects the conditions, Cellular South requests that the Commission designate the subject assignment application for an evidentiary hearing.

Respectfully submitted,



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March 11, 2011

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary of the law firm Lukas, Nace, Gutierrez & Sachs, LLP, hereby certify that on this 11th day of March, 2011, copies of the foregoing PETITION TO DENY OF CELLULAR SOUTH, INC. were forwarded by e-mail, in pdf format, to the following:

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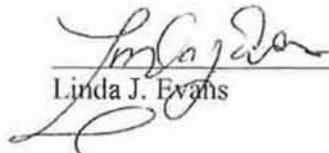
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