

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

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

**REPLY TO JOINT OPPOSITION OF FREE PRESS, PUBLIC KNOWLEDGE,
MEDIA ACCESS PROJECT, CONSUMERS UNION, AND
THE OPEN TECHNOLOGY INITIATIVE OF THE NEW AMERICA FOUNDATION**

Mar. 28, 2011

SUMMARY

Spectrum is a public resource, and must be protected as such. The ability to hold and transfer spectrum licenses is a privilege, not a right. That privilege must be carefully and closely regulated by the Commission to ensure that the use of spectrum serves the public interest. Attempts to exercise the privilege of transfer face a substantial burden of proof - and Applicants have failed to meet that burden, as several petitioners have shown.

In opposition, Applicants raise seemingly contradictory arguments: first, that AT&T faces meaningful competition, and second, that AT&T needs the Qualcomm spectrum licenses to accommodate demand, alleviate capacity constraints, and remain competitive. Most of AT&T's alleged competitors possess far fewer and far less valuable spectrum holdings than AT&T. If AT&T's current holdings cannot support a robust competitor, then any carrier with lesser holdings certainly has no chance. Furthermore, both of these assertions are incorrect. There are many barriers to effective competition, entry, and growth in the wireless market, and allowing AT&T to grow larger and more dominant would further empower an already dominant carrier to harm horizontal competitors, vertical businesses, and end users. Additionally, this deal is not necessary. AT&T holds substantial reserves of spectrum yet to be deployed, and robust and efficient investment would help alleviate any capacity constraints in AT&T's network.

The Commission should deny the application and take steps to put the spectrum at issue to its most efficient and valuable use, as a nationwide baseline for unlicensed use.

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Introduction

Applicants make two principal arguments in their opposition to the collected petitions to deny the transfer of Qualcomm’s spectrum licenses to AT&T: first, that AT&T faces meaningful competition, and second, that AT&T needs the Qualcomm spectrum licenses to accommodate demand, alleviate capacity constraints, and remain competitive. Applicants’ logic is puzzling, because these arguments appear contradictory. Most of the alleged competitors mentioned by Applicants possess far fewer and far less valuable spectrum holdings than AT&T - and AT&T holds far more unused spectrum reserves in the 700 MHz band than any other carrier. If AT&T needs *even more* spectrum than it already has to compete effectively and to deal with growing demand, then its alleged competitors have no chance, and the wireless broadband market cannot be said to be competitive.

Moreover, both of the assertions Applicants raise are incorrect. The petitions to deny the transfer filed in this proceeding, the Federal Communications Commission’s most recent report

on wireless competition, and years of filings and public statements by public interest organizations and small wireless carriers all drive home the same point: There are currently many barriers to effective competition, entry, and growth for smaller companies in the wireless market. In practice, the dominant market shares and spectrum holdings of AT&T and Verizon Wireless, coupled with these two carriers' control over backhaul facilities and many popular devices needed by competitors to provide compelling alternative offerings, create an environment in which AT&T and Verizon Wireless enjoy significantly greater profit margins and significantly lower churn than their competitors. Allowing either of these carriers to grow larger and to exercise even more leverage over current or would-be competitors does not serve the public interest.

As to the second argument, this deal is not necessary for AT&T to remain competitive or to address its own alleged capacity constraints. AT&T holds substantial reserves of spectrum yet to be deployed, including its 700 MHz spectrum, AWS licenses, and others. AT&T has a history of underinvestment in its network, and is years behind its primary competitor Verizon in deploying LTE services - instead choosing to spend its money on advertising campaigns to rebrand its own, older technology as "4G." Robust and efficient investment in wireless technology and backhaul and rapid deployment of currently unused spectrum reserves would help alleviate significantly any capacity constraints in AT&T's current network. Additionally, such strategies would address AT&T's capacity problems without further entrenching an already dominant carrier by increasing disparity in spectrum holdings.

Overall, as petitioners contended in initial filings, this deal would harm competition and the public interest by further empowering an already dominant player in an increasingly uncompetitive market. It is neither necessary nor efficient as a solution to capacity constraints,

even in AT&T's network – yet, cognizable alternative dispositions could provide help to many carriers. Consequently, under the relevant public interest standard established by Congress, the Commission must reject the proposed transfer.

I. Applicants' Primary Arguments are Contradictory, as AT&T Cannot Face Effective Competition from Carriers With Fewer Spectrum Licenses While Requiring More Spectrum Itself to Remain Competitive.

Applicants simultaneously argue that AT&T needs even more spectrum rights to deal with capacity constraints, *and* that MetroPCS, Leap, Sprint, T-Mobile, and other carriers with vastly smaller reserves are effective competitors.¹ These arguments are fundamentally inconsistent, and the Commission should not consider this amalgamation of two inaccurate and contradictory arguments any demonstration of public interest benefits that Applicants claim them to be.

Applicants insist that AT&T requires more spectrum rights to deal with its constraints, and that “this transaction will help ease the looming spectrum crisis that the Commission is rightly so concerned about.”² But AT&T already has significant spectrum license holdings including billions of dollars of licenses that have yet to be deployed.³ Logically, if AT&T requires even more spectrum in the face of a “looming spectrum crisis,” even beyond its current vast reserves, its competitors would also need significant spectrum holdings to succeed.⁴

¹ See Joint Opposition of AT&T Mobility Spectrum LLC and Qualcomm Incorporated at 14-15 (“Opposition”).

² *Id.* at i.

³ Between its purchases in the 2008 Auction 73, and its acquisition of companies holding 700 MHz unlicensed spectrum from earlier auctions, including Aloha, Cavalier, DataCom, Harbor Wireless, and McElroy Electronics, AT&T already holds spectrum licenses in the 700 MHz band for which it paid at least \$9 billion. See, e.g., Phone Scoop, “A Visual Guide to 700 MHz,” at <http://www.phonescoop.com/articles/article.php?a=187&p=231>.

⁴ Although Applicants appear to largely avoid contending that AT&T deserves more spectrum holdings than its competitors because it has more customers, their original application implies

Some of AT&T's competitors do have comparable holdings to what the company would possess after a Qualcomm license acquisition.⁵ But the vast majority do not, including many companies named by Applicants as competitors. Furthermore, before the filing of Applicants' opposition, AT&T announced its intention to acquire T-Mobile, a transaction that if approved would further exacerbate the disparity of spectrum holdings, to a degree far greater than even this transaction. And yet, Applicants somehow contend "[c]ompetition will not diminish nationally" and "this transaction will stimulate competition," and refer to "vigorous competition" in the wireless market.⁶ This assertion cannot possibly be true if Applicants' "looming spectrum crisis" assertions are to be believed. If AT&T's need is real, then companies that cannot match AT&T's current holdings will not be spared, and will suffer "dire consequences,"⁷ substantially lessening their ability to exert any competitive pressure on AT&T.

The burden of proof in this proceeding lies with Applicants, who must affirmatively establish that the transaction has public interest benefits.⁸ The Commission must deny this transaction, as Applicants have failed to articulate an explanation of public interest benefits that is not internally inconsistent, and that recognizes both the concentration of the wireless marketplace and the needs of other carriers besides AT&T for additional spectrum to be

such an argument in arguing that T-Mobile holds "proportionately more" spectrum licenses than AT&T "given that T-Mobile supports a customer base slightly more than one third the size of AT&T's." Exhibit 1, Description of Transaction, Public Interest Showing and Related Demonstrations, at 31 ("Exhibit 1"). Such arguments, if given any credence by the Commission, would amount to direct government assistance in supporting the continued dominance of market incumbents - a true thumb on the scale in favor of companies with established market power, and against companies exhibiting rapid growth.

⁵ See, e.g., *id.* at 30-31 (noting significant spectrum holdings attributable to Clearwire and to Verizon Wireless, though the holdings of Clearwire are in a much higher band above 2.0 GHz).

⁶ See Opposition at i-ii.

⁷ See *id.* at 3, n.5 ("Failure to meet that demand will have dire consequences.").

⁸ See 47 U.S.C. § 310(d); see also Petition to Deny of Free Press, Public Knowledge, Media Access Project, Consumers Union, and the Open Technology Initiative of the New America Foundation at 2 ("Public Interest Petition").

meaningful competitors.

II. AT&T is a Dominant Player Exerting Significant Influence over an Increasingly Broken Mobile Broadband Market, and Further Empowering AT&T's Dominance Without Significant Ameliorative Conditions Would Further Harm Competition.

Above and beyond the fundamental inconsistency of Applicants' arguments, each argument individually is untrue. First, AT&T does not face substantial competition. AT&T is a dominant, vertically integrated provider with disparately large and valuable spectrum holdings. AT&T has significant control over backhaul and devices, and a history of leveraging that control to stifle competition.⁹ And, like some of its national competitors, AT&T has a history of trapping its subscribers into long-term contracts with exclusive devices and high ETFs.¹⁰

Applicants' assertions that the wireless market is competitive are mere empty rhetoric. For example, they say "As any consumer can tell, the wireless industry is highly competitive."¹¹ Such an assertion seems out of place when organizations representing consumers have demonstrated time and again that the wireless industry is not effectively competitive.¹² The wireless industry is not "highly competitive" by any measure. In fact, the industry is far less competitive than the oil, airline, banking, and auto industries.¹³

⁹ See, e.g., Marguerite Reardon, "Is AT&T playing gatekeeper to the Wireless Web?" *CNET News* (June 18, 2009), at http://news.cnet.com/8301-1035_3-10268319-94.html.

¹⁰ See, e.g., Public Interest Petition at 21-22.

¹¹ Opposition at 5.

¹² See, e.g., Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66 (filed June 15, 2009); Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66 (filed July 13, 2009); Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66 (filed Sept. 30, 2009); Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66 (filed Oct. 22, 2009).

¹³ Fact Sheet, "Why the AT&T-T-Mobile Deal Is Bad for America," Free Press, at 1 (last visited

Furthermore, the day before Applicants filed their opposition, AT&T made public its proposed acquisition of T-Mobile, one of other three national wireless carriers. T-Mobile also is the only other national GSM carrier in the United States. GSM is the standard used in most other countries in the world. If permitted, AT&T acquisition of T-Mobile acquisition would further reduce competition, producing a GSM monopoly in the United States¹⁴ and a near-duopoly in the wireless market.¹⁵ AT&T alone would have a post-merger market share equivalent to what would be produced if ExxonMobil were to merge with BP, Shell, Chevron-Texaco, and Citgo.¹⁶ Whatever the merit of all the emphasis placed on competition in the instant opposition, the proposed AT&T/T-Mobile merger was not mentioned in that filing made the day after the T-Mobile acquisition announcement - yet another indicator that AT&T's analysis of supposed competition is illusory if not intentionally misleading.

Aside from the rhetorical trick of frequently repeating the word "competition,"

Applicants focus their substantive response to competition concerns on the narrow argument that

Mar. 28, 2011), at <http://www.freepress.net/files/ATT-TMobile.pdf> (Free Press AT&T-T-Mobile Fact Sheet). The top two firms in the oil, airline, banking, and auto industries hold between 20% and 35.3% of their markets; the top four hold between 31.8 and 60.7%. *Id.* Currently, the top two wireless businesses, AT&T and Verizon Wireless, hold approximately 2/3 of the market, and coupled with Sprint and T-Mobile, the top four carriers together hold approximately 90% - far greater concentration than in these other industries.

¹⁴ *E.g.* Om Malik, "In AT&T & T-Mobile Merger, Everybody Loses," GigaOm (Mar. 20, 2011), at <http://gigaom.com/2011/03/20/in-att-t-mobile-merger-everybody-loses/>; Vlad Savov, "AT&T agrees to buy T-Mobile USA from Deutsche Telekom for \$39 billion," Engadget (Mar. 20, 2011), at <http://www.engadget.com/2011/03/20/atandt-agrees-to-buy-t-mobile-from-deutsche-telekom/> ("[T]he proposed network merger will create a de facto GSM monopoly within the United States.").

¹⁵ Estimates for the market share of AT&T and Verizon Wireless combined after a AT&T-T-Mobile merger are around 75%-80%. Wendy Kaufman, "AT&T Reveals Plans to Buy T-Mobile," *NPR* (Mar. 21, 2011), at <http://www.npr.org/2011/03/21/134742976/AT-T-Reveals-Plans-To-Buy-T-Mobile> ("The deal will put 80 percent of the wireless market in the hands of just two competitors, AT&T and Verizon."); Marguerite Reardon, "What does AT&T's T-Mobile mean to you? (FAQ)," *CNET News* (Mar. 23, 2011), at http://news.cnet.com/8301-30686_3-20046112-266.html ("Once AT&T adds T-Mobile's customers, AT&T and Verizon Wireless will control more than 75 percent of the cell phone market.").

all spectrum is equally valuable, and that no spectrum below 3.7 GHz is inherently superior to other spectrum for mobile broadband use or deserving of different treatment by the Commission.¹⁷ This argument is incorrect. Auction values for spectrum demonstrate a greater valuation for spectrum below 1 GHz, as the Commission has noted.¹⁸

As noted above, AT&T already owns a great deal of 700 MHz spectrum, considered “beachfront” for its high value. Allowing AT&T to gain even more such spectrum in this transaction would only further increase AT&T’s dominant market power and its ability to harm competitors. Applicants attempt to rebut these arguments by insisting that long-term capacity investment costs are greater in low-band spectrum networks, enough to offset the greater network coverage costs of high-band networks.¹⁹ However, to the extent these assertions are accurate, auctions presumably take the longer-term cost savings of higher frequency spectrum based networks into account - and yet, still result in substantially higher prices for beachfront spectrum.²⁰ Carriers with significant high frequency holdings can compete with a carrier with low frequency holdings. But, just as the price for the spectrum at auction is not identical, the

¹⁶ See Free Press AT&T-T-Mobile Fact Sheet at 2.

¹⁷ Opposition at 12 (citing Declaration of Jeffrey H. Reed and Nishith D. Tripathi).

¹⁸ E.g. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 09-66, *Fourteenth Report*, 25 FCC Rcd 11407, at para. 271 (2010) (“*Fourteenth Report*”) (“The higher value that many providers have placed on low-band spectrum with respect to the provision of mobile service – especially mobile broadband service – is demonstrated by a comparison of market valuations.... In the 2008 auction of 700 MHz spectrum, the average price for the 700 MHz spectrum was \$1.28 per MHz-pop. This unit price was more than twice the average price of \$0.54 per MHz-pop for AWS spectrum auctioned in 2006.”) (internal citations omitted).

¹⁹ Opposition at 12-13.

²⁰ Applicants attempt to use this same data point to prove their point, asserting that the overall cost of investment in networks is the same - that low-band networks have a higher auction price with a lower deployment cost, and high-band networks have a lower auction price but a higher deployment cost. But their argument misses the point, which is to evaluate the competitive impact of spectrum holdings currently held by market participants. Once held, low-band spectrum is more valuable, and more significant, than higher-band spectrum.

ability of carriers with such higher frequency licenses to compete is not identical to the value and utility associated with lower frequency licenses. More specifically, greater holdings within the 700 MHz band translate to greater power over competing carriers seeking data roaming agreements in the band, and greater negotiating influence over manufacturers of devices working within that band – influence that can be abused to harm competitors within the band.²¹

Applicants’ criticisms of the proposals for alternative tests raised by petitioners are inaccurate. Applicants assert that petitioners seek a competitive harm test “based on a carrier’s low-band spectrum holdings without considering other bands.”²² Applicants also imply that petitioners seek no restrictions on high-band carriers by saying that only low-band service providers “would face artificial capacity constraints.”²³ These arguments incorrectly characterize the positions of many petitioners, who do not contend that high-band carriers should face no restrictions, but merely that low-band spectrum possesses greater value and thus deserves distinct and separate examination.²⁴ Applicants are correct in noting that petitioners did not articulate how such examination should take place.²⁵ However, the Commission is best placed to formulate and then undertake such a determination.

Contrary to Applicants’ arguments, the disparity of spectrum ownership is highly germane to Commission consideration of this transaction, as are proposals for modifications in spectrum competition policy.²⁶ Issues of industry-wide significance that are relevant to a specific transaction are well within the proper scope of analysis.²⁷ High concentration of ownership in

²¹ See Petition to Deny of Cellular South, Inc., at 5 (“Cellular South Petition”).

²² Opposition at 13.

²³ *Id.* at 21-22 (referring to “high-band carriers whose low-band competitors would face artificial capacity constraints”).

²⁴ Public Interest Petition at 10-11.

²⁵ Opposition at 10 n.27.

²⁶ *Id.* at 13-14.

²⁷ See, e.g., Cellular South Petition at 9-10 (articulating conditions applied by the Commission in

beachfront spectrum, made higher by the proposed transaction, reduces competition by limiting the ability of other carriers to compete on a level playing field.

Similarly, the conditions sought by petitioners are germane, because the proposed transfer would increase the ability and incentive of AT&T to harm its horizontal competitors, vertical businesses such as upstream suppliers of AT&T and downstream businesses using AT&T's network to deliver their own products and services, and ultimate end users. Greater market dominance further empowers AT&T to refuse to enter into fair data roaming agreements with its competitors.²⁸ Greater dominance also further empowers AT&T to enter into exclusive agreements with device manufacturers, and to encourage manufacturers to focus their device development on band classes that operate only on AT&T's network.²⁹ High early termination fees harm not only end users, but also AT&T's competitors who face higher barriers in winning those subscribers away - and greater market dominance provides more opportunity to charge high fees.³⁰ Greater dominance increases AT&T's ability and incentive to raise prices for the essential special access services it provides to its competitors.³¹ Finally, greater dominance increases AT&T's ability to demand high fees from device manufacturers and providers of Internet content, applications, and services to reach AT&T's end user subscribers to broadband services - and further enables AT&T to give priority to its own vertically integrated services.³²

Proposed conditions directly address these harms.

past mergers, in which the conditions were relevant to industry-wide harms being evaluated in a then-current pending rulemaking).

²⁸ Public Interest Petition at 18-19.

²⁹ *Id.* at 19-21.

³⁰ *Id.* at 21-22.

³¹ *Id.* at 22.

³² *Id.* at 16-17.

III. AT&T Does Not Need Qualcomm's Spectrum Licenses To Address Its Alleged Capacity Constraints, Nor is the Proposed Transfer the Best Use of the Spectrum to Create Industry-Wide Benefits.

Applicants have not demonstrated that AT&T requires Qualcomm's spectrum licenses to address current or future network demands. Although AT&T has a history of network problems in urban areas such as New York City and San Francisco, the company has not demonstrated that these problems arise from insufficient spectrum holdings as opposed to AT&T's own engineering cost-cutting and delayed investment. Applicants reference public statements by government officials regarding a "spectrum crisis" as implicit support for the assertion that AT&T specifically requires more spectrum.³³ But a potential public need for greater available spectrum does not translate into a private need on the part of AT&T - particularly when evidence abounds that AT&T is not using its current holdings efficiently.³⁴

AT&T's network has experienced (and continues to experience) significant capacity problems in many areas of the country, but these problems may be attributable to other factors that do not relate to spectrum holdings or any shortage thereof. In fact, AT&T's historical capacity problems must be attributed to some extent to AT&T's underinvestment in its technical infrastructure, measured by some estimates to be a shortfall of several billion dollars.³⁵

Additionally, AT&T has delayed its deployment of modern LTE wireless communications technology, and instead has continued to push an older and less spectrally efficient technology in

³³ *E.g.* Opposition at i.

³⁴ One analyst calculates that AT&T is not using 70%-90% of possible capacity from its current spectrum holdings. Dave Burstein, "70%-90% of AT&T Spectrum Capacity Unused," Fast Net News (Mar. 22, 2011), at <http://www.fastnetnews.com/a-wireless-cloud/61-w/4193-70-90-of-atat-spectrum-capacity-unused>.

³⁵ Karl Bode, "Analyst: AT&T Not Spending Enough On Wireless," DSL Reports (Jan. 20, 2010), at <http://www.dslreports.com/shownews/Analyst-ATT-Not-Spending-Enough-On-Wireless-106493> (referencing statements by industry executives and analysts that AT&T needed to spend an additional \$10 billion on backhaul and \$5 billion on coverage to address its network problems).

HSPA+.³⁶ Yet, despite using old technology and inadequate backhaul with the result that its network performance is a fraction that of its competitors, AT&T advertises its network as “4G,” creating consumer expectations and usage habits on which its network cannot deliver.

In addition to underinvestment in the networks it has built, AT&T is not yet using all of the spectrum for which it currently holds licenses. AT&T holds substantial reserves of spectrum licenses yet to be deployed, including its 700 MHz and AWS licenses.³⁷ In particular, Verizon Wireless and AT&T acquired their 700 MHz spectrum licenses at the same time, and both companies are in similar financial and market positions - yet Verizon Wireless invested in rapid LTE deployment, and AT&T did not. And now AT&T seeks permission to acquire *additional* spectrum rights to put its current holdings into use.

Applicants warn of “dire consequences” if AT&T cannot meet rising demand,³⁸ implying that it needs this spectrum to do so - but again, if AT&T faces “dire consequences” without Qualcomm’s exclusive licenses, what hope can other carriers with smaller spectrum reserves have? The spectrum at issue in this proceeding is not nearly enough to have a significant impact for any individual carrier, if used in the traditional exclusive licensed fashion. However, as petitioners note, unlicensed use can allow for more widespread offloading of traffic to alleviate growing demand for all carriers, and at the same time stimulate the market for unlicensed devices, leading to greater innovation and further technical and economic benefits.

As petitioners have shown, the spectrum at issue in this transaction has significant

³⁶ See generally Kevin C. Tofel, “Need Proof That Not All 4G Is the Same? Here It Is.” GigaOm (Mar. 25, 2011), at <http://gigaom.com/mobile/4g-testing-rootmetrics/> (demonstrating AT&T’s “4G” network performance to be less than half that of Sprint or T-Mobile, and one tenth that of Verizon’s LTE network).

³⁷ AT&T plans to use these licenses for its future LTE network, which the company notes is not yet ready for use and will be “largely complete” only “by the end of 2013.” Joan Marsh, “Getting Real About Spectrum,” AT&T Public Policy Blog (Feb. 1, 2011), at <http://attpublicpolicy.com/government-policy/getting-real-about-spectrum/>.

potential value as a nationwide baseline for unlicensed use.³⁹ The Commission must consider this value in evaluating the public interest benefits of this transaction.⁴⁰ Applicants hinge their public interest showing in part on the assertion that the proposed transfer “advances the National Broadband Plan’s goal of putting spectrum to its most valuable and efficient use.”⁴¹ The Broadband Plan’s goal can only be achieved by putting the spectrum to its *most* valuable and efficient use – and unlicensed is a potential alternative option, one that offers significant potential benefit without also harming competition.

Applicants argue that the “plain words” of Section 310(d) prohibit consideration of unlicensed use of the spectrum in a public interest analysis.⁴² However, Applicants misread some of the “plain words” in the statute. Applicants interpret the language to say that the Commission must not consider any other ways in which the spectrum could be “made available” to other parties - but the words “made available” are not present in the statute. Rather, the statute prohibits Commission consideration of “the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee....”⁴³ Modifying a license or revoking it is

³⁸ Opposition at 3 n.5 (“Failure to meet that demand will have dire consequences.”).

³⁹ Public Interest Petition at 12-13.

⁴⁰ As with pro-competition conditions proposed by many petitioners, the potential value of Qualcomm’s spectrum licenses as a national baseline of unlicensed spectrum remains germane to evaluating the proposed transfer, even though the issue of unlicensed spectrum availability is broader than the instant transaction, and other proceedings are currently open that involve unlicensed spectrum. Separately, although Applicants emphasize the procedural language of section 310(d) in the text of their opposition, they present a brief argument on constitutional takings issues in a footnote. Opposition at 23 n.76. Should the Commission choose to restore Qualcomm’s bidding credits as part of a subsequent revocation proceeding, or otherwise make Qualcomm whole, petitioners would raise no policy objections, provided Qualcomm does not receive an unjust windfall in the process. However, constitutional takings analyses and the merits or procedures involved in providing compensation for Qualcomm are beyond the scope of this proceeding, which is limited to a determination of whether the proposed transfer serves the public interest.

⁴¹ Exhibit 1 at 1.

⁴² Opposition at 22.

⁴³ 47 U.S.C. § 310(d).

not equivalent to transferring, assigning, or disposing of the license to any other person.⁴⁴

Precedents cited by Applicants attempting to argue the contrary are inapplicable.⁴⁵

Conclusion

Spectrum is a public resource, and must be protected as such. The ability to hold and transfer spectrum licenses is a privilege, not a right. That privilege must be carefully and closely regulated by the Commission to ensure that the use of spectrum serves the public interest.

Attempts to exercise the privilege of transfer face a substantial burden of proof - and Applicants have failed to meet that burden.

In fact, Applicants cannot meet that burden because the transaction would further empower an already dominant carrier to harm horizontal competitors, vertical businesses, and end users. The Commission should deny this transaction and take additional steps to put the spectrum at issue to its most efficient and valuable use, as a nationwide baseline for unlicensed use. At a minimum, if the Commission decides to approve this transaction, substantial ameliorative conditions must be applied to prevent AT&T from abusing its market power to the detriment of others.

⁴⁴ Unlicensed use of spectrum plainly cannot be interpreted to be an implicit transfer, assignment, or disposal of an exclusive license to the eventual unlicensed user. In that scenario, there would be no license, and many of the rights associated with exclusive licenses - specifically against interference by other users - are not cognizable in the context of unlicensed spectrum use.

⁴⁵ See Opposition at 23-24. One source cited by Applicants, *MMM Holdings*, 4 FCC Rcd 6838, 6839 (aff'd 4 FCC Rcd 8243), deals with a request that the Commission compare the public interest benefits associated with use of the license by the current license holder to those associated with use by the would-be acquirer - a direct comparison of one potential holder to another, the sort of comparison prohibited by the clear language of 310(d). The other source, *Citadel and Act III*, 5 FCC Rcd 3842, deals with allegations that a hypothetical alternative owner, either one with fewer ownership interests or one that is more local, would be a better buyer in a sale. Neither of these cases cited by Applicants deals with the possibility of making the spectrum available for unlicensed use.

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Mar. 28, 2011

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I, M. Chris Riley, hereby certify that on this 28th day of March, 2011, a copy of the foregoing Reply to Joint Opposition is being sent via first class, U.S. Mail, postage prepaid, to the following:

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