

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

In the Matter of	)	
	)	
Applications of AT&T Inc. and	)	WT Docket No. 11-65
Deutsche Telekom AG	)	DA 11-799
	)	ULS File No. 0004669383
For Consent to Assign or Transfer	)	
Control of Licenses and Authorizations	)	
	)	
	)	
In the Matter of	)	
	)	
AT&T Mobility Spectrum LLC and	)	WT Docket No. 11-18
Qualcomm Incorporated Seek FCC	)	DA 11-252
Consent to the Assignment of	)	ULS File No. 0004566825
Lower 700 MHz Band Licenses	)	

**JOINT REPLY TO OPPOSITIONS**

Cincinnati Bell Wireless, LLC, MetroPCS Communications, Inc., NTELOS, the Rural Cellular Association, the Rural Telecommunications Group, and Sprint Nextel Corporation hereby jointly reply to the oppositions filed by AT&T Mobility Spectrum LLC (“AT&T”), Qualcomm Incorporated (“Qualcomm”), and Deutsche Telekom AG (“Deutsche Telekom”) (collectively, “Oppositions” or “Applicants”).<sup>1</sup>

Contrary to Applicants’ claims, the FCC has ample legal authority to consolidate the above-captioned application proceedings, as requested in Joint Motion to Consolidate.<sup>2</sup> Indeed,

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<sup>1</sup> Joint Opposition of AT&T Mobility Spectrum LLC and Qualcomm Incorporated to Joint Motion to Consolidate, WT Docket Nos. 11-65 & 11-18 (May 4, 2011) (“AT&T/Qualcomm Opposition”); Opposition of Deutsche Telekom to Requests to Consolidate Proceedings, WT Docket Nos. 11-65 & 11-18 (May 4, 2011) (“Deutsche Telekom Opposition”).

<sup>2</sup> Cincinnati Bell Wireless, LLC, MetroPCS Communications, Inc., NTELOS, the Rural Cellular Association, the Rural Telecommunications Group, and Sprint Nextel Corporation, Joint Motion to Consolidate, WT Docket Nos. 11-65 & 11-18 (Apr. 27, 2011). *See also* Joint *Ex Parte*

statutory provisions and precedents militate in favor of consolidation where, as here, the applications involve a common party and propose related transactions whose effects on competition and the public can best be assessed holistically. Moreover, the later-filed application *assumes* the grant of the first application. Applicants' arguments to the contrary are unavailing, and the Commission therefore should consolidate the instant proceedings.

**I. THE COMMISSION HAS A STRONG LEGAL BASIS TO CONSOLIDATE THE AT&T/QUALCOMM AND AT&T/T-MOBILE PROCEEDINGS**

In section 4(j) of the Communications Act of 1934, as amended ("Act"), Congress granted the Commission broad authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."<sup>3</sup> Consistent with this grant, the Commission has exercised wide discretion in how it structures proceedings before it, including by consolidating particular proceedings when doing so would promote administrative efficiency or elucidate the combined effects of transactions on the public interest, convenience,

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Letter of Consumers Union, Free Press, Media Access Project, Open Technology Initiative of the New America Foundation, and Public Knowledge, WT Docket Nos. 11-65 & 11-18 (Apr. 27, 2011) (if the FCC does not immediately deny the proposed Qualcomm application, it should consolidate the Qualcomm and T-Mobile proceedings).

<sup>3</sup> 47 U.S.C. § 154(j); *see also* 47 U.S.C. § 154(i) (FCC may "perform any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions"); 47 C.F.R. § 1.1 ("Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings."). Courts have interpreted section 4(j) expansively. *See, e.g., FCC v. Schreiber*, 381 U.S. 279, 289 (1965) ("This Court has interpreted [section 4(j) of the Act] as 'explicitly and by implication' delegating to the Commission power to resolve 'subordinate questions of procedure . . . [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions.'") (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)); *see also Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) ("[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload."); *Telocator Network of America v. FCC*, 691 F.2d 525, 552 (D.C. Cir. 1982) (the FCC need not embark on a course of multiple hearings but rather, "[s]o long as the Commission remains within the bounds of its statutory authority, it may pursue a procedural route it deems superior to one it fears will be unduly time-consuming or burdensome.").

or necessity. In recent years, the Commission has consolidated multiple license applications filed at different times by different parties, including applications for transfers of control or assignment of FCC licenses.<sup>4</sup> For example, in the *Solar Broadcasting Order*, the Commission consolidated consideration of the application to assign licenses from Solar to Cumulus with consideration of the separate application to assign licenses from Cumulus to Clear Channel:

These transactions are closely related and petitions raise issues concerning both the Clear Channel and Solar Applications. Accordingly, we have consolidated these proceedings to facilitate an expeditious resolution of any outstanding issues.<sup>5</sup>

The outstanding issues that motivated the consolidation are strikingly similar to those arising in the AT&T/T-Mobile and AT&T/Qualcomm proceedings: the potential acquisition by one party of spectrum through multiple, related transactions proposed in separately filed applications.<sup>6</sup>

Despite the FCC's broad authority under section 4(j) and supporting case law, Applicants argue that it would be "unlawful" for the Commission to consolidate proceedings that involve applications governed by section 309 of the Act.<sup>7</sup> Applicants do not identify any language in

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<sup>4</sup> See, e.g., *Solar Broadcasting Co. and Cumulus Licensing Corp.; Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467 (2002) ("*Solar Broadcasting Order*") (consolidating assignment applications with a common applicant to facilitate an expeditious resolution of ownership concentration issues); *British Telecommunications plc, BT Group plc, AT&T Corp., Violet License Co., LLC; Authority to Transfer Control of Concert Global Networks USA LLC*, Memorandum Opinion and Order, 17 FCC Rcd 3643 (2002) (multiple separate but interrelated transfer of control applications consolidated into a single docket "for convenience"); *Shareholders of Tribune Co. and Sam Zell*, Memorandum Opinion and Order, 22 FCC Rcd 21266 (2007) (consolidating transfer of control applications "in the interest of administrative efficiency"); *Forty-one Late-Filed Applications for Renewal of Educational Broadband Service Stations*, Memorandum Opinion and Order, 22 FCC Rcd 879 (2007) (affording consolidated treatment to renewal applications and associated waiver requests filed by forty-one discrete licensees on different dates over a two-year period).

<sup>5</sup> *Solar Broadcasting Order* ¶ 1.

<sup>6</sup> See *id.*, n.21.

<sup>7</sup> AT&T/Qualcomm Opposition at 8.

section 309 that prohibits consolidation, nor do they distinguish the numerous precedents in which the FCC has consolidated applications that were subject to section 309.<sup>8</sup> Instead, Applicants argue that subsection (a) of section 309 requires the Commission “to make *individualized* transfer and assignment decisions” for each application filed with it, without the possibility of consolidating separate application proceedings.<sup>9</sup> This argument cannot withstand scrutiny.

Section 309(a) states, in relevant part, that the FCC “shall determine, in the case of each application filed with it . . . , whether the public interest, convenience, and necessity will be served by the granting of such application.”<sup>10</sup> Applicants contend that the FCC’s obligation to reach a determination for “each application” is incompatible with its exercise of discretion to consolidate multiple application proceedings. Yet consolidation and individualized determinations are not incompatible: the Commission can simultaneously consolidate applications for consideration and make an individualized decision on the merits of each one, as FCC precedent amply illustrates. Indeed, in numerous instances, AT&T and other parties have themselves submitted consolidated applications for transfer of control or assignment, and the Commission has considered these applications on a consolidated basis without any suggestion that doing so might violate the “each application” mandate of section 309(a).<sup>11</sup> Consolidation, in

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<sup>8</sup> See, e.g., n.4, *supra*.

<sup>9</sup> AT&T/Qualcomm Opposition at i (emphasis in original); see also *id.* at 8.

<sup>10</sup> 47 U.S.C. § 309(a).

<sup>11</sup> See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations; Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses; Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses*, Memorandum Opinion and Order, 19 FCC Rcd 21522 (2004); *Applications Filed by Frontier Communications Corporation and Verizon*

other words, does not erode the Commission's ability to make individual decisions, but instead ensures that such decisions take account of all relevant factors, including those raised in a related application. Indeed, here, since the two transactions contemplate that AT&T's consolidated holdings in certain markets will exceed the Commission's spectrum screen, it would conduce to the proper dispatch of business and to the ends of justice for the FCC to consolidate its review of these transactions.

The Applicants do not explicitly argue, nor could they credibly contend, that the FCC may never look outside the four corners of a particular transfer or assignment application. (Indeed, if that were the case, parties would have an incentive to game the system by filing multiple applications in an effort to shield their cumulative effect on competition and the public from the Commission's scrutiny.) Nothing in section 309(a) or any other provision in the Act requires the Commission to turn a blind eye in this manner. To the contrary, section 309(a) directs the FCC to grant an application only if it finds that the public interest would be served based "upon examination of such application *and upon consideration of such other matters as the Commission may officially notice.*"<sup>12</sup> Thus, contrary to Applicants' claim, section 309(a) itself gives the Commission authority to consider the AT&T/Qualcomm application in analyzing the AT&T/T-Mobile application, and vice versa.

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*Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972 (2010); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006).

<sup>12</sup> 47 U.S.C. § 309(a) (emphasis added).

Lacking a sound statutory argument, Applicants contend that the Commission “has consistently denied requests to consolidate its review of separate transactions.”<sup>13</sup> Yet the selective precedents cited by Applicants show only that the FCC has refused to consolidate proceedings that are “unrelated,”<sup>14</sup> or that involve agreements that “are neither interrelated nor dependent on one another”<sup>15</sup> or that are “independent, [with] neither [being] conditioned on the consummation of the other.”<sup>16</sup> These and similar precedents – which are cited by Applicants as dispositive – are simply inapplicable to proceedings that share a common party; that raise related issues regarding competition, consumer welfare, and the public interest; and that implicate

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<sup>13</sup> Deutsche Telekom Opposition at 2; *see also* AT&T/Qualcomm Opposition at 4, 8-11. Applicants also suggest that consolidation is appropriate only for applications that are mutually exclusive. AT&T/Qualcomm Opposition at 10-11. In the sole precedent cited for this suggestion, however, the FCC addressed mutual exclusivity only because a petitioner (Consumers Union) claimed that two applications were mutually exclusive. *Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 9816, ¶ 179 (2000) (“MediaOne/AT&T Order”). The FCC found that Consumers Union had failed to establish that the two applications were mutually exclusive, *id.* ¶ 181, but did not hold or suggest that consolidation is appropriate only when applications are mutually exclusive.

<sup>14</sup> *Applications Filed for the Acquisition of Certain Assets of CIMCO Communications, Inc., by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC*, Memorandum Opinion and Order on Reconsideration, 25 FCC Rcd 3401, n.16 (2010) (quoted in AT&T/Qualcomm Opposition at 9).

<sup>15</sup> *Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corp., N.A., and C-Call Corp.*, Order, 10 FCC Rcd. 3361, ¶ 18 (1995) (“Nextel Order”), *quoted in* AT&T/Qualcomm Opposition at 10 and Deutsche Telekom Opposition at 3. In their zeal to portray this precedent as standing for a broader proposition, two of the Applicants mischaracterize the Nextel Order as holding that *the Commission* had no duty to analyze “the cumulative impact of a number of proposed acquisitions by [the purchaser].” AT&T/Qualcomm Opposition at 8-9 (selectively quoting Nextel Order ¶ 19). In fact, the Nextel Order held something far different: that an antitrust analysis by *the U.S. Department of Justice* on the “cumulative competitive impact of a number of proposed acquisitions by Nextel” was “irrelevant” to the FCC’s analysis under the Communications Act. Nextel Order ¶ 19.

<sup>16</sup> *Communications Satellite Corp. et al. Application for Consent to Assign Commission Authorizations from COMSAT International Communications, Inc. to COMSAT Earth Stations, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 7202, ¶ 22 (1987).

broader competition and policy goals when considered together than when considered in isolation.

**II. THE AT&T/T-MOBILE AND AT&T/QUALCOMM PROCEEDINGS RAISE CLOSELY RELATED ISSUES THAT SHOULD BE EXAMINED IN A CONSOLIDATED MANNER**

Contrary to Applicants' claims, the AT&T/T-Mobile and AT&T/Qualcomm proceedings raise closely related and intertwined issues whose assessment on a consolidated basis would be administratively efficient and conducive to the ends of justice. As an initial matter, the proposed transactions share a common transferee/assignee, AT&T, which already is the second largest wireless provider in the United States and is dominant in the provision of special access and local exchange services in its wireline service territories. Each application, if approved, would greatly increase AT&T's spectrum holdings such that they may exceed the spectrum screen, and the combined effect of the two transactions will be even greater than the impact of each viewed in isolation.

In their Opposition, AT&T and Qualcomm highlight the close relationship between the two proposed transactions. As these parties point out, the AT&T/T-Mobile Application claims that the transaction "will enable the combined company to increase its LTE [Long Term Evolution] deployment from AT&T's current plans of 80 percent of Americans to more than 97 percent...."<sup>17</sup> Relatedly, the Qualcomm transaction allegedly would allow AT&T to acquire Qualcomm's Lower 700 MHz D and E block spectrum "which AT&T proposes to bond with paired spectrum in its nationwide LTE network . . . ."<sup>18</sup> In other words, the key alleged public interest benefit of the two transactions is that the acquired spectrum would facilitate AT&T's planned national deployment of LTE. Given this asserted common purpose of the two

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<sup>17</sup> AT&T/Qualcomm Opposition at 5.

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

transactions, the competitive effects of the transactions should be examined in a single, coherent proceeding rather than in the piecemeal fashion proposed by Applicants.

More generally, each transaction contemplates the acquisition by AT&T of spectrum in overlapping markets.<sup>19</sup> It makes sense for the Commission to use a single proceeding to examine the comprehensive effects of this spectrum aggregation by an entity that is seeking to become the nation's largest wireless provider and largest holder of spectrum. A consolidated review not only would be more administratively efficient than separate, sequential analyses, but also would allow the Commission to assess with greater accuracy the impact of the combined aggregation on the input market for spectrum available for the provision of mobile telephony and broadband services and the effect of the combined holdings on competition, the public, and consumers.

In response, Applicants claim that consolidation would serve no purpose because “the Commission is fully capable of taking into account in its competitive analysis in the separate AT&T/T-Mobile proceeding the impact of AT&T's acquisition of the Qualcomm spectrum.”<sup>20</sup> The Applicants miss the point. Consolidating the two proceedings is the best way for the Commission to address closely related competition and spectrum aggregation issues in each proceeding without treating the grant of the Qualcomm proceeding as a foregone conclusion.<sup>21</sup>

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<sup>19</sup> Specifically, in the Qualcomm transaction, AT&T seeks to acquire Qualcomm's six Lower 700 MHz D Block (6 MHz) licenses, which collectively have a nationwide footprint, and five Lower 700 MHz E Block (6 MHz) licenses in five large markets. The proposed T-Mobile transaction includes the acquisition of an additional 50 MHz on average in the same geographic areas covered by the contemplated Qualcomm transaction.

<sup>20</sup> AT&T/Qualcomm Opposition at 2, n.3 (explaining that the “spectrum screen analysis in the AT&T/T-Mobile Public Interest Statement, and the spectrum aggregation chart submitted with that statement, assume the consummation of the AT&T/Qualcomm transaction”); *see also id.* at 6; Deutsche Telekom Opposition at 3-4.

<sup>21</sup> The AT&T/T-Mobile Public Interest Statement refers to the spectrum that AT&T “is purchasing from Qualcomm,” as if the Qualcomm transaction were already approved. Public Interest Statement at 49, attached to Applications of AT&T Inc. and Deutsche Telekom AG for

The issues raised by the proposed concentration of beachfront spectrum by AT&T within the 700 MHz band are magnified by the related transactions contemplated in the AT&T/T-Mobile application.

Consolidating the AT&T/T-Mobile and AT&T/Qualcomm proceedings would not give rise to “chaos” or other dire consequences predicted by Applicants.<sup>22</sup> First, a decision to consolidate would simply be a prudent exercise of discretion under section 4(j) and prior case law, not a chaotic overthrow of some venerable process, as Applicants contend.<sup>23</sup> Applicants also warn that consolidation would delay a decision on the AT&T/Qualcomm application, thereby impeding the alleged public benefits of that transaction and “delay[ing] Qualcomm from recovering any of its losses from FLO TV,” a business Qualcomm decided to exit “because of disappointing consumer uptake.”<sup>24</sup> But it is far from certain that consolidation would delay an FCC decision on the AT&T/Qualcomm Application. To the contrary, consolidation often *expedites* the Commission’s review process by allowing it to take notice of all relevant facts and issues in an efficient way.<sup>25</sup> Finally, the fact that Qualcomm, or any company, did not meet revenue expectations for a particular product (like FLO TV) has no bearing on whether the grant of related applications will serve the public interest, and certainly does not outweigh the arguments described herein that militate in favor of consolidating the instant proceedings.

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Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65 (April. 21, 2011) (emphasis added).

<sup>22</sup> AT&T/Qualcomm Opposition at i.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 3, 6-7.

<sup>25</sup> *See Solar Broadcasting Order* ¶ 1.

### III. CONCLUSION

Consistent with section 4(j) of the Act and precedent, the Commission should consolidate the AT&T/Qualcomm and AT&T/T-Mobile proceedings. Doing so will allow the Commission to assess the proposed transactions in an efficient manner that takes notice of their combined impact on the public interest, convenience, and necessity.

Respectfully submitted,

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May 16, 2011

**Certificate of Service**

I hereby certify that on this 16th day of May, 2011, I caused true and correct copies of the foregoing Joint Reply to be mailed by first class U.S. mail to:

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