

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

In re Application of	)	
	)	
DEUTSCHE TELEKOM AG	)	WT Docket No. 11-65
QUALCOMM, INC.	)	
	)	
And	)	DA 11-799
	)	
AT&T, INC.	)	File No. 0004669383 et. al.
	)	
to Assign for Consent Eleven 700 MHz Band	)	
Licenses	)	

**PETITION TO CONDITION GRANT OF APPLICATION**

King Street Wireless, L.P. (“King Street”), by counsel and pursuant to the Commission’s Public Notice of April 28, 2011, DA 11-799 (the “Public Notice”), hereby submits its Petition to Condition Grant of Application (“Petition”) in the captioned proceeding.

**I. DISCUSSION**

AT&T, Inc. (“AT&T”) and Deutsche Telekom AG (“T-Mobile”) (collectively, AT&T & T-Mobile are the “Parties” and “Applicants”) have submitted an application (the “Application”) seeking consent to the transfer of control of the licenses and authorizations held by T-Mobile USA and its owned or controlled subsidiaries to AT&T. By its Public Notice, the Commission invited petitions to deny the Application.

King Street has been an active proponent of regulations 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. In the context of rulemakings, King Street has urged the Commission to promulgate rules that require interoperable 700 MHz mobile devices.<sup>1</sup> In the adjudicatory arena King Street has renewed its urging for interoperability noting that the Alliance’s petition for rulemaking has not been acted on in the twenty months since its filing.<sup>2</sup>

King Street requests that the Commission not consent the transfer of control of T-Mobile unless it imposes a condition that AT&T 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.

Unless the Commission imposes this condition, the Commission must designate the subject application for hearing. *See* 47 C.F.R. § 1.110. Thus, by seeking the imposition of this condition, King Street is effectively asking the Commission to deny the Application. *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1403-04 (D.C. Cir.1996).

## II. STANDING

King Street is licensed in the lower 700 MHz band in 152 markets. In the great majority of them, either AT&T, T-Mobile, or both, are also licensed. King Street’s status as a direct and current competitor provides it with standing to file a petition to deny the 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

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<sup>1</sup> King Street was one of the four Lower 700 MHz Band block A (“A Block”) licensees that, through an alliance (the “Alliance”) 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. *See Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, 25 FCC Rcd 1464, 1464 n.1 (2010).

<sup>2</sup> See Petition to Condition Grant of Application, WT Docket No. 11-18, File No. 0004566825, submitted March 11, 2011 by King Street.

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, King Street clearly has standing under § 309(d)(1) to petition to deny the AT&T/DT applications. *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 sometimes 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).<sup>3</sup> In the unlikely event it does so again in this case, the Commission should recognize King Street’s Article III standing.

At a cost of approximately \$300 million, King Street acquired 152 Lower 700 MHz authorizations, including 25 Block A authorizations. Commission records reflect that in the majority of them, King Street will operate in direct competition with mobile broadband services that AT&T will provide over its national LTE network. Consequently, King Street is likely to suffer injury-in-fact if AT&T acquires control of T-Mobile.

If the Commission were to unconditionally approve AT&T’s proposed \$39 billion acquisition of T-Mobile, King Street would not only suffer the economic consequences of competing with the combination of two of the nation’s four largest facilities-based wireless

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<sup>3</sup> 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.

service providers,<sup>4</sup> but it would face “intensified” and unfair competition from AT&T by virtue of its anticompetitive 700 MHz equipment design and procurement practices. That injury can be redressed if the Commission approves AT&T’s acquisition of T-Mobile subject to the condition that King Street requests.

### **III. RELIEF REQUESTED**

King Street does not agree with many of Applicants’ assertions regarding compliance with Commission rules and screens, or with the claimed public interest benefits. Moreover, King Street reminds the Commission that twenty months ago the 700 MHz Block A Good Faith Purchasers Alliance (the “Alliance”) (of which King Street is a member) pointed out the inappropriateness of certain of AT&T’s actions involving the 700 MHz band generally. Yet, King Street does not urge denial of the Application. Rather, it here only urges that the Commission protect and advance the public interest by including the following condition on any grant that it may render in this proceeding.

As noted above, King Street is a member of the Alliance. The Alliance submitted a Petition for Rulemaking, in what became RM-11592, on September 29, 2009. By that petition, the Alliance explained that AT&T and one other carrier dominate 700 MHz spectrum holdings. They acquired 85% of the nearly \$20 Billion of spectrum acquired through Auction No. 73. Prior to that auction, AT&T acquired another \$2.5 Billion of 700 MHz spectrum (i.e. 12.5% of total Auction No. 73 spectrum value) in the secondary market. And recently AT&T has sought to acquire yet another \$2 Billion of 700 MHz spectrum (i.e., another 10% of total Auction No. 73 spectrum value). Thus, an already excess in concentration would be increased substantively by grant of the Application.

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<sup>4</sup> See *Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 25 FCC Rcd 11407, 11438-39 (2010).

#### **IV. THE NATURE OF THE TRANSACTION AND RESULTING HARM**

To be clear, this is not an instance of a carrier seeking to fill its spectrum needs in a single market, or in a handful of markets. Those transactions generally both serve the public interest and the reasonable needs of a nationwide carrier. Here, in contrast, a single carrier is acquiring a nationwide license and, in a single transaction, acquiring spectrum valued by the parties at 200% of total Auction No. 73 revenues. As such, it single-handedly increases concentration in wireless in a meaningful way. It implicates the concerns raised by the Alliance regarding competition in the band. Simply put, without addressing and resolving those considerations, the Commission cannot find that grant would serve the public interest. Absent such a finding, the Application cannot be granted.

#### **V. A CONDITION IS NEEDED IN ORDER TO AVOID CRITICAL FCC RULES FROM BECOMING MEANINGLESS**

The Commission must appreciate that the market dominance established in transactions of this magnitude frustrates not only consumers and other carriers in the wireless industry, but also the Commission's very ability to regulate the industry. For instance, several years ago the Commission expressly ruled that all carriers must permit voice roaming, subject to equipment capability compatibility. But without the interoperability that King Street urges the Commission to here adopt, there is no compatibility of equipment, and mandatory roaming has no meaning to the largest carriers. The same applies to this Commission's more recent decision involving data roaming.<sup>5</sup> In essence, all that is left in either case is a mandate from which the largest carriers have effectively exempted themselves in the 700 MHz band. That would make no sense, and the Commission cannot reasonable countenance that.

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<sup>5</sup> See Re-examination of roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services, FCC 11-52, at N. 7 (April 7, 2011)

## **VI. CONCLUSION**

In view of the above, any grant of consent in this proceeding should be expressly conditioned upon AT&T committing to use only handset equipment capable of operating over all frequencies in the 700 MHz Band. The international standards group, 3GPP, has already established a band class, Band 12, that permits such service. Any grant included in this proceeding should require that AT&T utilize only Band 12 authorized equipment.

The transaction here at issue presents serious competitive, interference and other concerns. Unless resolved, their existence precludes grant of the Application. The imposition of the reasonable conditions set forth herein alleviate (not eliminate) those concerns. Thus, any grant of the instant Application must incorporate those conditions.

Respectfully submitted,

KING STREET WIRELESS, L.P.

By: /s/ Thomas Gutierrez\_\_\_\_\_

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Its Attorney

May 31, 2011

**DECLARATION  
of Allison Cryor DiNardo**

Pursuant to Section 47 U.S.C. § 309(d), I, Allison Cryor DiNardo, hereby state and declare:

1. I am President of the General Partner of King Street Wireless, L.P. and have a working knowledge of the facts set forth in the associated Petition to Condition Grant of Application.

2. I have reviewed the associated Petition to Condition Grant of Application and, to the best of my knowledge, all facts set forth therein, other than those that are a matter of public record, are true and correct in all material ways, hereby verify that the material facts set forth therein are true and correct to the best of my knowledge and belief, except that I do not (and need not) attest to those facts which are subject to official notice by the Commission.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 31<sup>st</sup> day of May, 2011.



Name: Allison Cryor DiNardo  
Title: President of General Partner  
King Street Wireless, L.P.

**CERTIFICATE OF SERVICE**

I, Gary L. Smith, a legal assistant of the law firm Lukas, Nace, Gutierrez & Sachs, LLP, hereby certify that on this 31st day of May, 2011, copies of the foregoing PETITION TO CONDITION GRANT OF APPLICATION were forwarded by e-mail to the following:

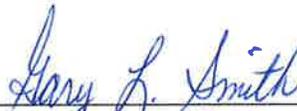
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Gary L. Smith