

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Applications of AT&T Inc. and Deutsche Telekom AG)	WT Docket No. 11-65
)	DA 11-799
For Consent to Assign or Transfer Control of Licenses and Authorizations)	ULS File No. 0004669383
)	

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

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SUMMARY

DISH Network L.L.C. (“DISH Network”) thrives on competition. The company started out of the back of a pickup truck as a C-band, “big dish” satellite retailer, then transformed itself into a Direct Broadcast Satellite (“DBS”) “small dish” satellite provider when it was clear that the C-band business was dying. As an emerging DBS provider, DISH Network challenged the largest cable TV providers in the U.S. and today is the third-largest pay-TV company in the nation. Competition was and remains DISH Network’s driving force. Rather than sit back and defend its position, DISH Network elects to innovate, evolve, and improve, moving into new products, services, and ways to serve consumers.

The proposed combination of AT&T Inc. (“AT&T”) and T-Mobile USA, Inc. (“T-Mobile”) (collectively referred to herein as the “Applicants”) will harm consumers by gravely reducing competition in many sectors of the communications market, in part by raising barriers to entry for potential new competitors. The transaction would result in market concentration levels well beyond acceptable thresholds established by the courts and antitrust enforcement agencies. The Applicants’ professed benefits fall far short of the harms that would be inflicted by the proposed merger, and could threaten the efforts of DISH Network, and innovative new entrants like it, to drive competition and innovation. In particular, DISH Network is poised to potentially enter the wireless broadband market and bring the same kind of energetic competition that it brought to the pay-TV market. The proposed transaction, however, threatens to hamper or thwart such efforts. Moreover, the transaction would present a strengthened AT&T with the ability and incentive to leverage its power in the wireless broadband market to dominate the video market, diminishing competition not only in the wireless broadband market, but in another distinct market. Accordingly, the Commission should deny the application of AT&T and T-Mobile to merge.

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I. INTRODUCTION.

DISH Network L.L.C. (“DISH Network”) files this Petition to Deny because allowing AT&T Inc. (“AT&T”) and T-Mobile USA, Inc. (“T-Mobile”) (collectively referred to herein as the “Applicants”) to merge¹ will hinder competition and result in much more harm than benefit to the public interest.² Accordingly, the Commission should deny the application of AT&T and T-Mobile to merge.

¹ See Public Notice, Federal Communications Commission, Application of AT&T, Inc., Deutsche Telekom AG and T-Mobile USA, Inc. to Assign and Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. to AT&T, Inc. (rel. Apr. 28, 2011); Application for Consent to the Transfer of Control of License by T-Mobile USA, Inc. to AT&T, Inc., Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 11-65 (filed April 21, 2011) (“AT&T/T-Mobile Merger Application”).

² DISH Network is a potential new entrant in the wireless broadband market. DISH Network recently acquired spectrum in the 700 MHz band and is in the process of acquiring Mobile-Satellite Service (“MSS”) S-Band spectrum. With respect to the MSS spectrum, DISH Network plans to use the satellite and Ancillary Terrestrial Component (“ATC”) facets of the MSS spectrum for mobile broadband. In both instances, DISH Network is a potential competitor to AT&T and therefore is a party in interest within the meaning of Section 309(d)(1) of the Communications Act. See 47 U.S.C. § 309(d)(1).

II. THE COMBINATION OF AT&T AND T-MOBILE WOULD INFLICT INSURMOUNTABLE HARM UPON COMPETITION AND CONSUMERS.

If the proposed merger is consummated, the wireless market could ossify into a non-competitive near-duopoly. As one lawmaker put it, “[t]he AT&T, T-Mobile deal is like a telecommunications time machine that would send consumers back to a bygone era of high prices and limited choice.”³ The Commission should avoid that fate by rejecting the proposed transaction.

A. AT&T Has Admitted That the Relevant Market is National.

Any competition analysis begins with defining the relevant product and geographic markets.⁴ The proposed merger of AT&T and T-Mobile would impact competition within the wireless broadband and other relevant product markets on a nationwide level.

AT&T itself has stated in the context of other wireless merger proceedings that the wireless market is national in scope and that wireless mergers should be analyzed using a national relevant geographic area. AT&T has asserted that “the relevant geographic market is national, rather than local.”⁵ In fact, as recently as 2007 and 2008, AT&T stated in two different wireless merger dockets, using identical language, that the relevant geographic area is national, reasoning that:

³ Statement of Rep. Ed Markey on the AT&T/T-Mobile Merger (May 25, 2011), *available at* <http://www.wirelessweek.com/News/2011/05/Policy-and-Industry-Markey-ATT-T-Mobile-Deal-Historic-Mistake-Government/> (last visited May 31, 2011).

⁴ Application for Consent to the Transfer of Control of Licenses by General Electric Company, Transferor, to Comcast Corporation, Transferee, *Memorandum Opinion and Order*, MB Docket No. 10-56, FCC 11-4, ¶ 22 (rel. Jan. 20, 2011) (“Comcast/NBCU Merger Order”).

⁵ See Application for Consent to the Transfer of Control of Licenses by Dobson Communications Corp. to AT&T, Inc., Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 07-153, at 19 n.74 (filed July 13, 2007) (“AT&T/Dobson Merger Application”) (*citing United States v. Grinnell Corp.*, 384 U.S. 563, 575 (1966) (Relevant market for security services was nationwide where defendants had a

the predominant forces driving competition among wireless carriers operate at the national level. Therefore, examining market structure in [local or regional areas] does not accurately account for [competitive dynamics].⁶

AT&T also reasoned that the relevant geographic market is national because it and most other wireless carriers “set prices on a national basis and not at the level of individual [local license areas].”⁷ Thus, where “national competitive forces” set prices and where products are offered nationwide at the same price, “the relevant geographic market is national, rather than local.”⁸

The factual underpinnings AT&T used in support of its definition of the relevant geographic market in the AT&T/Centennial merger in 2008 or the AT&T/Dobson merger in 2007 do not seem to have changed. AT&T apparently still “establishes its rate plans and pricing on a national basis,” primarily in response to competitive pressures from other carriers also operating on a nationwide basis.⁹ Its competitors – as listed in the application for the proposed merger – apparently “offer their customers *nationwide* service plans.”¹⁰

“national schedule of prices, rates, and terms.”); Bell Atl. Mobile Sys., Inc. and NYNEX Mobile Commc’ns Co. Application for Transfer of Control of Eighty-Two Cellular Radio Licenses to Cellco P’Ship, *Order*, 10 FCC Rcd. 13368, 13375 ¶ 20 n.28 (1995). *See also* Application for Consent to the Transfer of Control of Licenses, AT&T, Inc. to Centennial Communications Corp., Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 08-246, at 30 n.149 (filed November 21, 2008) (“AT&T/Centennial Merger Application”) (containing the exact same language, verbatim, as the AT&T Dobson Merger Application filed in 2007).

⁶ AT&T/Dobson Merger Application at 18.

⁷ AT&T/Centennial Merger Application at 38.

⁸ AT&T/Dobson Merger Application at 19 n.74.

⁹ *Id.* at 19. *See also* AT&T/Centennial Merger Application, at 28-29 (using the same language, verbatim, as the 2007 pleading cited *supra*).

¹⁰ AT&T/T-Mobile Merger Application at 78 (in reference to the service providers listed as competitors to the combined company) (emphasis added).

B. A Combined AT&T/T-Mobile Would Exceed Acceptable Levels of Concentration.

The transaction would, if approved, merge two of the remaining four national wireless carriers and produce the single largest carrier, with an estimated 43% market share; at that point, the top two carriers would control almost 80% of the market.¹¹ Such concentration levels raise considerable concerns, particularly in an already highly concentrated industry with significant barriers to entry.¹² The Supreme Court has reasoned as much where mergers threaten to greatly heighten market concentration and significantly reduce the number of competitors.¹³

The proposed transaction also triggers the most serious concentration thresholds established by the Horizontal Merger Guidelines (“Guidelines”). In a highly concentrated market, such as the wireless market, an increase in the Herfindahl-Hirschman Index (“HHI”) of between 100 and 200 points will “warrant scrutiny” under the Guidelines. An increase in the HHI of more than 200 points, however, will be “presumed likely to enhance market power.”¹⁴ Here, the proposed merger of AT&T and T-Mobile would, by some estimates, increase the HHI

¹¹ Statement of U.S. Senator Herb Kohl on the proposed AT&T/T-Mobile Merger (May 11, 2011), *available at* http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=4452 (last visited May 31, 2011).

¹² See Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction*, May 22, 2011, at 10, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850103 (last visited May 31, 2011) (“Grunes/Stucke AT&T/T-Mobile Review”).

¹³ See, e.g., *U.S. v. Philadelphia Nat’l Bank*, 374 U.S. 321, 364-66, 83 S.Ct. 1715, 1742-43 (1963); *U.S. v. Continental Can Co.*, 378 U.S. 441, 461, 84 S.Ct. 1738, 1749 (1964).

¹⁴ U.S. Dep’t of Justice & Fed’l Trade Comm’n, Horizontal Merger Guidelines § 5.3 (2010), *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.html#1> (last visited May 31, 2011) (“Horizontal Merger Guidelines”).

by 600 to 700 points – more than 300% above the critical threshold established by the Guidelines.¹⁵

III. AT&T AND T-MOBILE FAIL TO DEMONSTRATE SUFFICIENT PUBLIC INTEREST BENEFIT TO OUTWEIGH THE HARM THAT WOULD BE INFLICTED BY THE PROPOSED TRANSACTION.

Under its competition analysis framework, the Commission must balance the obvious harm inflicted by the proposed transaction against any purported public interest benefits.¹⁶

Among other things, AT&T claims that the proposed transaction would enhance, rather than reduce, benefits to consumers;¹⁷ that the wireless market is inherently competitive and would remain so post-merger;¹⁸ and that Applicants' existing customers would receive better service.¹⁹ The benefits asserted by AT&T and T-Mobile are ephemeral at best but, even if true, fail to counter-balance the harms to competition and consumers that would be inflicted by the merger.

Indeed, one senior lawmaker exclaimed his inability to find a single reason for approving the proposed merger.²⁰ As he put it, "I am concerned that this merger is bad for consumers, bad

¹⁵ Stacey Higginbotham, *AT&T, T-Mobile Merger: A Regulatory Quagmire?*, GigaOM, March 20, 2011, available at <http://gigaom.com/2011/03/20/att-tmobile-regulators/> (last visited May 31, 2011) ("Chetan Sharma, a wireless analyst, has calculated that this merger would increase the HHI by about 600 to 700 basis points nationally").

¹⁶ See Comcast/NBCU Merger Order ¶ 22.

¹⁷ See AT&T/T-Mobile Merger Application at 61-64.

¹⁸ See *id.* at 68, 72.

¹⁹ See *id.* at 43-44.

²⁰ Todd Shields and Jeff Bliss, *AT&T Buying T-Mobile May Raise Prices: Lawmakers*, Bloomberg, May 26, 2011, available at <http://www.bloomberg.com/news/2011-05-26/at-t-s-bid-for-t-mobile-may-raise-wireless-prices-lawmakers-say.html> ("I see no redeeming reason' for federal regulators to approve the transaction, Rep. Conyers said today. 'Not even one.'").

for business, and bad for creativity and developing new products.”²¹ Another lawmaker declared in agreement that, “it would be a historic mistake for this merger to be approved.”²² Similarly, a prominent representative of smaller wireless competitors cautioned that “AT&T’s proposed takeover of T-Mobile would deal a mortal blow to competition and cause significant harm to consumers.”²³ More specifically, the representative warned that:

The net result of this transaction would be a far less vibrant wireless marketplace, marked by higher prices, lower service quality, and less innovation than if AT&T and T-Mobile remained separate competitors. The merger would also result in diminished infrastructure investment and fewer jobs, as AT&T would devote \$39 billion toward gobbling up a competitor and eliminating overlaps, rather than toward building out the broadband spectrum it won at auction while T-Mobile pursues its own investments and expansion.²⁴

Consequently, the professed consumer benefits are suspect at best²⁵ but, even if true, are cold comfort.

A. Applicants’ Professed Benefits to the Wireless Broadband Market Ignore the Foreclosure Effects on Potential Market Entrants Such as DISH Network.

DISH Network is in a position potentially to become an active participant in the wireless broadband market and thus has a stake in maintaining the competitiveness of that market to

²¹ Josh Smith, *House Panel Questions AT&T’s Promise to Expand Coverage*, National Journal, May 26, 2011, available at <http://www.nationaljournal.com/tech/house-panel-questions-at-t-s-promise-to-expand-coverage-20110526> (last visited May 31, 2011).

²² Statement of Rep. Ed Markey on the AT&T/T-Mobile Merger (May 25, 2011), available at <http://www.nationaljournal.com/tech/markey-conyers-oppose-at-t-t-mobile-merger-20110525>.

²³ Testimony of Steven K. Berry, President and CEO of Rural Cellular Association, before the House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet: “How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?” (May 26, 2011).

²⁴ *Id.*

²⁵ See *Grunes/Stucke AT&T/T-Mobile Review* at 11 (proposed merger “does not really expand wireless coverage area for customers [and allegations that it] gives T-Mobile a ‘clear path’ to 4G services . . . [are] not merger-specific”).

better serve consumers. The proposed transaction would present serious obstacles to the company's ability to enter and compete in the wireless broadband market.

DISH Network holds licenses for 6 MHz of 700 MHz spectrum covering most, but not all, of the U.S., which could be used to enter the wireless broadband market, potentially as a mobile video or other type of service provider. But DISH Network needs more spectrum and lacks a nationwide footprint. AT&T's pending acquisition of Qualcomm's²⁶ Lower 700 MHz band D and E block licenses would undermine DISH Network's efforts to offer truly robust competition.²⁷ DISH Network's 700 MHz E block spectrum covers the continental U.S., except for five of the largest U.S. metropolitan areas: New York, Boston, Philadelphia, Los Angeles, and San Francisco. If the AT&T/Qualcomm transaction is approved, AT&T will obtain the 700 MHz E Block licenses for those five markets, thus holding the missing puzzle pieces preventing DISH Network from achieving a nationwide footprint for its 700 MHz spectrum. This "gatekeeper" problem in five top markets would be exacerbated by AT&T's acquisition of T-Mobile, because AT&T would have eliminated one of the few remaining pathways for DISH Network to achieve nationwide coverage.

²⁶ DISH Network supports combining the T-Mobile and Qualcomm dockets, as suggested by multiple parties.

²⁷ See Petition to Deny of DISH Network L.L.C., *AT&T Mobility Spectrum and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, WT Docket No. 11-18, at 8 (filed Mar. 11, 2011) (noting that "[o]ther carriers, including regional and rural carriers in need of additional spectrum, may also be able to use the Qualcomm spectrum to enhance their networks and give them a better chance to truly compete with AT&T and Verizon."). See also Reply Comments of DISH Network L.L.C., WT Docket No. 11-18, at 2 (filed Mar. 28, 2011) (AT&T's proposed acquisition of T-Mobile only further undermines the assertion made by AT&T and Qualcomm that the wireless industry is highly competitive that the Qualcomm transaction will not diminish competition).

More generally, the barriers to entry in the wireless market – already high – will become that much higher by the foreclosure of the Qualcomm spectrum from all competition. The aggregation of nationwide spectrum posed by the combination of Qualcomm’s, AT&T’s, and T-Mobile’s spectrum will make it even harder to piece together national networks that would compete with those of AT&T and Verizon. This is of particular concern because a large number of consumers choose their wireless carrier based largely or partly on its ability to provide a seamless nationwide customer experience.

DISH Network also is in the process of acquiring a satellite company, DBSD, which holds 20 MHz of MSS S-Band spectrum that could be used to support deployment of a wireless broadband network. DISH Network anticipates using the satellite and ATC ability of the MSS spectrum for mobile broadband. That 20 MHz, along with the 700 MHz E Block spectrum licenses discussed above, could enhance the company’s ability to compete in the provision of wireless broadband services. DISH Network is exploring the amount of spectrum and availability of technologies, including the ability to obtain devices operable with DBSD’s spectrum, that will be required to launch a viable wireless broadband offering.²⁸

Any such entry could face even greater challenges and higher barriers to entry if AT&T is allowed to combine with T-Mobile and effectively create a duopoly of AT&T and Verizon that would collectively control nearly 80% of the market. As noted above, DISH Network has a history of taking on incumbents and bringing competition to new markets. Nonetheless, the resulting level of concentration from this proposed merger could so empower the top incumbent

²⁸ See Consolidated Application for Authority to Transfer Control, *ICO Global Communications (Holdings) Limited; DBSD North America, Inc., Debtor-in-Possession, New DBSD Satellite Services, G.P., Debtor in Possession, Transferors, and DISH Network Corporation, Transferee, For Authority to Transfer Control*, at 15 (filed Apr. 8, 2011).

providers that a new market entrant seeking to build a new network, such as DISH Network, would start at an immediate (and perhaps insurmountable) qualitative disadvantage. The Commission, if it approves the proposed transaction, risks dissuading would-be competitors from making the necessary effort to enter the wireless broadband market.

In particular, if DISH Network were to enter the market, it likely would compete either as a direct retail provider of services or as a wholesaler to other retail wireless service providers. In either case, the greater market concentration posed by the transaction would hinder DISH Network's ability to gain subscribers. At the retail level, almost 80% of subscribers would be controlled by the top two providers, who, in turn, would have the power to temporarily subsidize rates, withhold critical interconnection and roaming agreements, and otherwise abuse their market power to thwart a potential new competitor. Having eliminated new competitors, the incumbents could raise rates and curtail service quality at will.

At the wholesale level, the combined AT&T/T-Mobile could exercise its market power to drive smaller and regional wireless providers out of the market, thus reducing the number of potential enterprise customers for a new competitive wholesale wireless broadband network. If the only major potential customers left were AT&T and Verizon, they likely would refuse to do business with DISH Network, starving the new competitor at birth. The Commission should thus consider such secondary effects of the proposed merger.²⁹

The Commission also can and should examine the past behavior of the Applicants in determining whether there is a tendency towards anti-competitive behavior in coordinating with

²⁹ *See, e.g.*, Horizontal Merger Guidelines § 1 (agencies should “examine effects on either or both of the direct customers and the final consumers [and] presume, absent convincing evidence to the contrary, that adverse effects on direct customers also cause adverse effects on final consumers”).

competitors³⁰ or otherwise. In this case, there is. AT&T's past tactics and propensity to abuse its market power against DISH Network weigh against merger approval.

For many months in 2009, when AT&T held an exclusive contract with Apple as the sole wireless network provider for the iPhone, AT&T delayed and prevented DISH Network's Sling Media application for 3G from being included among iPhone "apps," even though DISH Network had shown that the application would be less bandwidth-consumptive than similar video streaming applications permitted by AT&T.³¹ DISH Network believed that AT&T felt a degree of competitive pressure from the Sling product and therefore sought to keep Sling at bay. Only when DISH Network brought AT&T's behavior to the attention of the Commission did AT&T respond. Even then, AT&T resisted allowing the Sling application until Commission staff made it clear that AT&T's behavior was unacceptable. While AT&T ultimately relented, its behavior in that context presages further, similar anti-competitive actions if AT&T is allowed to become even more of a gatekeeper.

B. Applicants' Professed Benefits Ignore the Harm to Competition in Markets Outside of Wireless Broadband, Including DISH Network's Ability to Compete in the Pay-TV and Related Video Markets.

The damage to competition posed by combining AT&T and T-Mobile would not be limited to just the wireless broadband market. DISH Network believes that competition within

³⁰ Horizontal Merger Guidelines § 7.1 (agency may challenge transactions that "pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place [particularly where the market] shows signs of vulnerability to coordinated conduct [and there is] a credible basis on which to conclude that the merger may enhance that vulnerability").

³¹ See Comments of Sling Media, Inc., *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 5-9 (filed Jan. 2010) ("Sling has also been rejected by AT&T and Apple for use on AT&T's 3G network," while at the same time AT&T has approved more bandwidth intensive streaming video apps from DIRECTV, YouTube, TV.com, MLB At Bat, Jaman, and Showtime.)

the pay-TV and related video markets would suffer as well. AT&T's market power in the wireless broadband market would give it the incentive and ability to abuse that market power by bundling its wireless product more aggressively with its pay-TV product, U-Verse. For example, AT&T could offer U-Verse free of charge to customers of AT&T Wireless.

DISH Network simply could not compete with that. It is one thing to compete against a pay-TV provider that also offers a "bundle" of telecommunications products. It is quite another to compete against a company with near-unchecked market power over one of those bundle elements that then uses such power to eliminate competition in the pay-TV market.

The Commission has recognized that firms with market power have the incentive and ability to abuse that power by bundling unrelated products, foreclosing competition in distinct markets. In the recent Comcast/NBCU merger proceeding, the Commission found that the transaction would enhance Comcast's ability to harm potential competition in the video distribution business. Specifically, the Commission was concerned that Comcast's dominant market position in the residential broadband market would allow it to bundle its broadband and video products, forcing consumers to purchase a bundle rather than enjoy the fruits of competition from DBS and online video distributors in the video market.³²

Just as Comcast could have used its dominant market position in residential broadband to eliminate competition against Comcast cable TV, so would AT&T be able to use its market power in the wireless broadband market to eliminate competition against U-Verse. DISH Network, which has helped spur competition on price, innovation, and quality in the pay-TV market, likely would suffer, as would consumers of pay-TV services nationwide.

³² Comcast/NBCU Merger Order ¶ 102 (explaining why the Commission imposed on Comcast the stand-alone broadband condition).

Moreover, AT&T could use its market power in wireless broadband to choke off valuable programming inputs to DISH Network. AT&T could demand that any programmers wanting access to its vast subscriber base grant exclusive distribution rights to AT&T, denying “must-have” programming to video competitors, including DISH Network. This would undermine DISH Network’s ability to compete in the pay-TV market. For example, it is not difficult to imagine a deal between AT&T and ESPN/Disney under which many sports events only would be available on AT&T, rendering DISH Network much less attractive to sports fans.

The same is true for any new, Internet-based wireless video product DISH Network might want to introduce. Simply by virtue of its newfound distribution muscle, AT&T could acquire exclusive rights to programming for wireless broadband distribution that would preclude DISH Network from offering such new, innovative, competitive video services over its own wireless video platforms.

C. Applicants’ Claims of Benefits Stemming From the Merger Ignore the Widely Divergent Values of Certain Spectrum Allocations.

Applicants assert that there will remain multiple competitors in the wireless market, fueling intense competition, even after a combination of AT&T and T-Mobile. They list a litany of such firms, including Sprint, MetroPCS, Leap, U.S. Cellular, Cincinnati Bell, Cellular South, Allied Wireless, Clearwire, and others.³³ The implication, of course, is that all of these carriers will be able to compete with the merged AT&T and T-Mobile.

Absent from this discussion, however, is an accurate description of the value of spectrum assets held by each of these firms. Simply stated, the vast majority of the most valuable

³³ AT&T/T-Mobile Merger Application at 78-94.

spectrum would be held by AT&T and Verizon, while the smaller competitors would hold inferior spectrum, as illustrated below based on what carriers paid:

Wireless Spectrum Prices (MHz/Pop)³⁴

Spectrum	700 MHz	PCS	AWS	2.5 GHz
Price per MHz-Pop	\$1.26	\$1.66	\$0.54	\$0.23
% Controlled by AT&T/ T-Mobile and Verizon³⁵	67%	61%	53.7%	0%

Lower-frequency spectrum, such as 700MHz and PCS, is most valuable due to its signal propagation characteristics, providing “superior coverage over larger geographic areas, through adverse climate and terrain, and inside buildings and vehicles.”³⁶ This translates into better service quality. It also results in much lower capital expenditure requirements to build a network, since relatively few cell towers are required to achieve signal coverage. Therefore, a licensee holding higher-frequency licenses, such as AWS and 2.5 GHz, “generally must construct more cell sites (at additional cost) than a licensee with primary holdings at a lower frequency in order to provide equivalent service coverage, particularly in rural areas.”³⁷

This disproportionate concentration of the best spectrum in the hands of the top two incumbents would present yet another major barrier to entry for potential competitors. Post-

³⁴ Kim Randolph, Financial Consulting, BIA Financial Network, Inc., Presentation to Wireless Communications Association (April 23, 2008), *available at* http://ns2.teamdws.net/images/ppt/2008/wca2008/Randolph_Kim_%20WCA%202008%20Slides.pdf.

³⁵ See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Mkt. Conditions with Respect to Commercial Mobile Servs., *Fourteenth Report*, 25 FCC Rcd. 11407, 11568-69, Table 25 (2010).

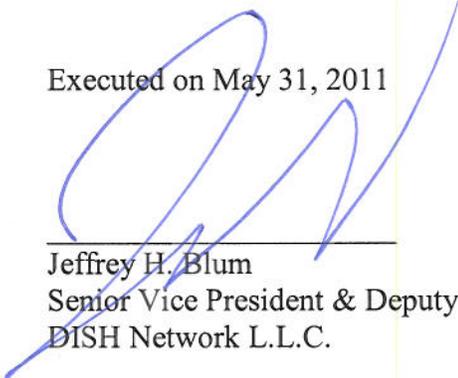
³⁶ *Id.* ¶ 269 (internal citations omitted).

³⁷ *Id.* ¶ 270.

DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Petition to Deny, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission, are true and correct to the best of my information, knowledge and belief.

Executed on May 31, 2011



Jeffrey H. Blum
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DISH Network L.L.C.

CERTIFICATE OF SERVICE

I, Vanessa L. Tran, hereby certify that on this 31st day of May 2011, I caused true and correct copies of the foregoing Petition to Deny to be served by First Class U.S. Mail to:

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