

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

In the Matters of	)	
	)	
Applications of AT&T Inc. and	)	WT Docket No. 11-65
Deutsche Telekom AG for Consent to	)	DA 11-799
Assign or Transfer Control of Licenses	)	ULS File No. 0004669383
and Authorizations	)	
	)	
Application for Assignment of Lower 700	)	WT Docket No. 11-18
MHz Band Licenses from Qualcomm	)	DA 11-252
Incorporated to AT&T Mobility Spectrum	)	ULS File No. 0004566825
LLC	)	
	)	
Applications for Assignment of Licenses from	)	DA 11-294
Whidbey Telephone Company to AT&T	)	ULS File Nos. 0004544863 and
Mobility Spectrum LLC	)	0004544869
	)	
Application for Assignment of License from	)	ULS File No. 0004621016
700 MHz, LLC to AT&T Mobility Spectrum	)	
LLC	)	
	)	
Application for Assignment of License from	)	ULS File No. 0004635440
Knology of Kansas, Inc. to AT&T Mobility	)	
Spectrum LLC	)	
	)	
Application for Transfer of Control of	)	ULS File No. 0004643747
Redwood Wireless Corp. to AT&T Inc.	)	
	)	
Application for Assignment of License from	)	ULS File No. 0004681773
Windstream Lakedale, Inc. to AT&T	)	
Mobility Spectrum LLC	)	
	)	
Application for Assignment of Licenses from	)	ULS File No. 0004681771
Windstream Iowa Communications, Inc. to	)	
AT&T Mobility Spectrum LLC	)	
	)	
Application for Assignment of License from	)	ULS File No. 0004699707
Maxima International, LLC to AT&T	)	
Mobility Spectrum LLC	)	
	)	

Application for Assignment of Licenses from ) ULS File No. 0004448347  
 D&E Investments, Inc. to New Cingular )  
 Wireless PCS, LLC )

### **OPPOSITION TO JOINT MOTION TO CONSOLIDATE**

Whidbey Telephone Company (“Whidbey”), by its attorneys, hereby submits its Opposition to Joint Motion to Consolidate filed by Cincinnati Bell Wireless, LLC, MetroPCS Communications, Inc., NTELOS, the Rural Cellular Association, the Rural Telecommunications Group, and Sprint Nextel Corporation (“Joint Parties”). For the reasons set forth below, the Commission should dismiss, without action, the Joint Motion to Consolidate (“Joint Motion”) and expeditiously grant the Whidbey applications that are included among the above-captioned matters.

#### **I. Introduction**

On December 30, 2010, Whidbey filed its applications for Commission consent to the assignment of its various 700 MHz radio licenses to AT&T Mobility Spectrum LLC (the “Whidbey Applications”).<sup>1</sup> Rather than merely listing these filings in its weekly application notices, the Commission announced the acceptance for filing of the Whidbey Applications by a special Public Notice, dated February 16, 2011, entitled “AT&T Mobility Spectrum LLC and Whidbey Telephone Company Seek FCC Consent to the Assignment of Lower 700 MHz B Block and Lower 700 MHz C Block Licenses” (DA 11-294) (the “AT&T/Whidbey Public Notice”). The AT&T/Whidbey Public Notice

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<sup>1</sup> See ULS File Nos. 0004544863 and 0004544869.

established a pleading cycle that allowed interested parties the opportunity to raise any issues concerning the Whidbey Applications up to and including March 2, 2011, in accordance with Section 1.939 of the Commission's Rules. During that period, no third party (including each and every party of the Joint Parties) made any filing whatsoever in opposition to, or otherwise regarding, the Whidbey Applications. The Commission can take official notice that no issues were raised with the Commission regarding the Whidbey Applications. Additionally, neither AT&T nor Whidbey was served with any objections. On March 20, 2011, after expiration of the public comment period with respect to the Whidbey Applications, AT&T, Inc. announced its proposal to acquire T-Mobile USA, Inc. and on April 28, 2011, the Commission released its Public Notice announcing the acceptance for filing of the applications for consent to the transfer of control of T-Mobile USA, Inc. *et. al.* to AT&T, Inc.<sup>2</sup>

## **II. The Joint Motion is Tantamount to a Late-Filed Petition to Deny and Must be Dismissed as Untimely.**

The instant Joint Motion is tantamount to the filing of a petition to deny. Even though the Joint Parties have not alleged any facts that, if true, would arguably warrant a denial of the Whidbey Applications, the motion infers that "there may be a need to deny the Whidbey Applications." Otherwise, there would be no need for consolidation. If granted, the Joint Motion would serve to inextricably tie the much smaller Whidbey transaction to the much larger, and unrelated AT&T/T-Mobile and AT&T/Qualcomm

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<sup>2</sup> AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc. (DA 11-799) (Rel. April 28, 2011) ("AT&T/T-Mobile Public Notice").

transactions (collectively, the “AT&T Transactions” or “AT&T Proceedings”). If the Commission were to consolidate the Whidbey transaction into the much larger AT&T Proceedings, it would unnecessarily delay the processing of the Whidbey Applications, which applications were not protested and are now ripe for grant. The Whidbey Applications do not raise any anti-competitive issues, since the proposed spectrum aggregation is well within the allowable spectrum screens (as demonstrated in the applications themselves). This delay would unnecessarily burden, and could irreparably harm, Whidbey, a small rural carrier that has deployed broadband services to be available to 100 percent of customer locations in its ILEC service territory and expects to continue to add new broadband loop carrier equipment closer to customer locations, when appropriate and possible, in order to shorten loop length and increase achievable speeds to its customer locations.

Moreover, a grant of the Joint Motion would create significant uncertainty in the Commission’s application processes by allowing parties to utilize alternative procedures to accomplish what otherwise should not be permitted under the Commission’s Rules – namely, the late-filing of a petition to deny.<sup>3</sup> In this case, consolidation of the Whidbey transaction with the larger AT&T/T-Mobile and AT&T/Qualcomm transactions would eliminate Whidbey’s ability to have the Whidbey Applications (which represent a

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<sup>3</sup> It is important to note that Joint Parties have not established standing with respect to the Whidbey Applications, i.e., they have not made “specific allegations of fact sufficient to make a *prima facie* showing that the [Joint Parties are] a party in interest and that a grant of [the Whidbey Applications] would be inconsistent with the public interest, convenience and necessity.” See Section 1.939(d) of the Commission’s Rules. Rather, the Joint Parties’ position seems to be that the Commission cannot make a fair assessment of the T-Mobile transaction unless all pending transactions are considered with the T-Mobile transaction in a single proceeding. As demonstrated herein, each transaction is entitled to its individual public interest evaluation. In any event, none of the Joint Parties have alleged that they would suffer any specific harm if Whidbey’s handful of licenses in the States of Washington and Idaho were to be assigned to AT&T.

relatively small transaction) processed on their own merits, without consideration being given to the much larger AT&T Transactions – which transactions may or may not ultimately receive regulatory approvals due to their size and scope. And, in this regard, neither the AT&T/T-Mobile transaction nor the AT&T/Qualcomm transaction was even entered into at the time that the transaction contemplated by the Whidbey Applications was entered into. If the Commission allows parties to employ such eleventh-hour end-run tactics, the Commission will be countenancing the severe disruption of its application processes and find that it will face increasing difficulty in clearing its already crowded dockets.

A review of the AT&T/Whidbey Public Notice reflects that it specified a clear pleading cycle in which petitions to deny were due. In the instant case, that deadline was March 2, 2011 – some 99 days prior to the date the Joint Parties filed the instant Joint Motion. Making the filing of the Joint Motion at this late date even more egregious is the fact that (a) the Joint Parties filed a similar motion to consolidate the Qualcomm and T-Mobile transactions on April 27, 2011 (almost six weeks prior to the instant filing) without seeking to include the Whidbey Applications and (b) the Joint Parties made no attempt to consolidate the Whidbey Applications as part of the T-Mobile transaction on or before the May 31, 2011 filing deadline specified in the AT&T/T-Mobile Public Notice. As a result, the Joint Motion is filed well out of time and should be dismissed.<sup>4</sup>

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<sup>4</sup> Indeed, the Public Notice setting the comment period for the Whidbey Applications noted the pendency of the Qualcomm transaction. Whidbey also notes that the Joint Motion does not demonstrate good cause, much less any cause that justifies the late filing with respect to the Whidbey Applications.

**III. Consolidation of the Whidbey Applications With the Other Pending AT&T Transactional Applications is Inconsistent with Prior Commission Precedent and is Inappropriate.**

The AT&T transactional applications should be processed in receipt date order. Consolidation of the Whidbey Applications into the AT&T Proceedings would be inappropriate and contrary to law and prior Commission precedent. Section 309(a) of the Communications Act of 1934, as amended (the "Act") states, in pertinent part, as follows:

[T]he Commission 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.

The question as to whether or not the Commission should consolidate multiple smaller transactions with pending larger transactions involving the same assignee/transferee is not new, and the Commission has previously fulfilled its obligations under Section 309(a) of the Act to make individualized decisions with respect to each and every transaction by repeatedly declining to consolidate transfer and assignment applications in the context of different proceedings. In *Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A., and C-Call Corp.*,<sup>5</sup> the Chief of the Wireless Bureau explained that "[i]n the past, the Commission has denied requests for consolidation when the business transactions involved are independent, and neither is conditioned on the consummation of the other." *Id.* at para. 17. The Bureau then concluded that "the Commission's duty [is] to ascertain whether a particular transfer or

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<sup>5</sup> *Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A., and C-Call Corp.*, Order, 10 FCC Rcd 3361, 3363 paras. 18-20 (1995 ("Nextel Transfer Order")).

assignment proposal is in the public interest, convenience and necessity,” and not to analyze “the cumulative impact of a number of proposed acquisitions by [the purchaser].”<sup>6</sup>

Even more recently, in the context of the Comcast acquisition of NBC Universal, a petitioner (the Mubahay Alliance) requested that the Commission consider the issues raised by Comcast’s proposed acquisition of the assets of CIMCO, a local exchange carrier. This protest was based on the grounds that “Comcast’s acquisition of NBC Universal is part of a larger and more comprehensive effort (and perhaps a quasi-monopolistic effort) by Comcast;” and that the proceeding “should be part of an evaluation of Comcast’s growing influence and its consequences on competition, lower prices, the public interest and corporate responsibility to underserved communities and minorities.”<sup>7</sup>

The Commission’s reasoning for its denial of the consolidation request in the Comcast/CIMCO case dictates the same outcome for the Joint Motion. In denying the Mubahay Alliance request, the Commission concluded, as follows:

We agree with the Applicants that the transaction involving CIMCO and Comcast is unrelated to the proposed transaction involving NBC and Comcast. Any potential public interest harms or benefits related to the proposed transaction involving NBC and Comcast may be raised in the course of Commission review of that transaction. Delaying our decision on the present transaction until the Commission completes its review of the NBC/Comcast transaction would unnecessarily burden CIMCO and

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<sup>6</sup> *Id.* at para. 19.

<sup>7</sup> Comments of Mubahay Alliance, *In the Matter of Application filed for the Acquisition of Certain Customer and Assets of CIMCO Communications, Inc. to Comcast Phone, LLC Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC*, WC Docket No. 09-183 at 3.

Comcast and delay the likely benefits of the instant transaction, and would not inform our review of the transaction involving Comcast and NBC.<sup>8</sup>

In the *Nextel Transfer Order*, the Wireless Telecommunications Bureau concluded, as follows:

OneComm and Motorola, the two applicants involved here, are distinct entities. They both happen to have entered into agreements with the same party, Nextel, but the agreements involve different business terms, are structured differently, and are neither interrelated nor dependent upon one another. We believe that it would not serve the public interest to delay consummation of the OneComm transaction simply because Motorola also requested permission to transfer licenses to Nextel four months later.<sup>9</sup>

The Commission's rulings in the *CIMCO Order* and the *Nextel Transfer Order* are clearly on point with the case at hand. Like CIMCO and Nextel, the Whidbey transaction is totally unrelated to the other AT&T Transactions. The agreements are different, the scope of the transactions is different, and neither transaction is interrelated with or contingent or dependent upon the other. Whidbey is a party to only one of the transactions for which consolidation is requested. The Commission, after weighing the public interest, could grant one transaction, some transactions or none at all. If the Commission grants the Whidbey Applications, it can take this grant into consideration when reviewing the applications for consent to the T-Mobile transaction or any other pending AT&T transactional application. As a result, the Commission should abide by its well-settled precedent and process the applications in the order in which they were

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<sup>8</sup> *Applications filed for the Acquisition of Certain Customer and Assets of CIMCO Communications, Inc. to Comcast Phone, LLC Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC*, Memorandum Opinion and Order and Order on Reconsideration, WC Docket No. 09-183, 25 FCC Red. 3401 at n.16 (2010) (emphasis added) (citations omitted) (*CIMCO Order*).

<sup>9</sup> *Nextel Transfer Order* at paras 18, 20.

received, based upon the then current facts at the time the applications were filed.<sup>10</sup> This is especially true in this case, where the Whidbey Applications encompass a transaction that is inconsequential in relation to the enormous scope of the AT&T Transactions and will have no significant impact on the Commission's evaluation of those transactions.

#### **IV. Conclusion**

For the foregoing reasons, the Commission should promptly dismiss the Joint Motion and process the pending AT&T transactional applications in the date order of receipt, including expeditiously granting the Whidbey Applications. A failure to promptly dismiss the Joint Motion could have the unintended consequence of significantly delaying the grant of transactional applications that are otherwise ripe for grant, and as demonstrated herein, are unrelated to the AT&T Transactions.

Respectfully submitted,

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<sup>10</sup> *Id.*

**CERTIFICATE OF SERVICE**

I, Richard D. Rubino, an attorney with the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, do hereby certify that on this 22<sup>nd</sup> day of June, 2011, I caused a copy of the foregoing Opposition to Joint Motion to Consolidate to be served via first-class U.S. mail and e-mail on the following:

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