

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

In re)
)
Applications of AT&T Inc.) WT Docket No. 13-54
and Atlantic Tele-Network, Inc.)

To: Chief, Wireless Telecommunications Bureau

PETITION TO DENY

Buffalo-Lake Erie Wireless Systems Co., L.L.C. (“Blue Wireless”) hereby petitions the Commission to deny the above captioned applications for the reasons set forth below. As will appear, the transactions contemplated by these applications will have a serious adverse effect on competition in at least one of the markets (OH-3- Ashtabula) covered by the proposal. Accordingly, that portion of the applications cannot be found to be in the public interest. Because the transaction and the related applications are an integrated whole, however, either the Ohio-3 license must be divested from the package or the entire set of applications must fail.

I. Standing.

Blue Wireless is a provider of mobile communications services in New York state and Pennsylvania, including the Erie MSA which is immediately adjacent to the Ohio-3 CMA. The Block B cellular license in Ohio-3 is currently licensed to Ohio RSA #3 Limited Partnership, a subsidiary of Atlantic Tele-Network, Inc. (ATN), and is one of the licenses for whose transfer of control approval is sought. Blue Wireless operates on the CDMA protocol, as does the system currently owned and operated by ATN in Ohio-3. ATN, through its legacy roaming agreement with ALLTEL, is a roaming partner of Blue Wireless. Because of the adjacency of the market to

Blue Wireless' home territory in Erie, there is a high likelihood that its customers will travel in or through Ohio-3, particularly since Ashtabula is just off the main interstate highway route from Erie (and points east) to the Cleveland metropolitan area. The proposed transaction, if consummated, will have the effect of converting ATN's CDMA facilities to GSM facilities in order to be integrated into the AT&T system. The Commission is well aware of the roaming problems which smaller carriers like Blue Wireless are experiencing as the major national carriers gobble up regional carriers and expand their footprints, making it difficult, if not impossible, for carriers to reach reasonable roaming agreements with giant carriers which have no incentive to do so. The loss of a potential CDMA roaming partner in this key market will markedly reduce Blue Wireless and its customers' roaming options, access and capabilities. Accordingly, Blue Wireless has standing to file this petition.

II. The competitive landscape in Ohio-3

The mobile communications market in Ohio-3 is already dangerously close to a classic duopoly. The Competitors Chart¹ submitted by ATN and AT&T (the "Applicants") shows a stark dearth of competitors. AT&T, Verizon, Allied Wireless (the ATN entity) and Sprint are listed, with DISH Network, Aloha, Clearwire, and T-Mobile making cameo appearances. DISH, Aloha and T-Mobile are currently offering no service at all over their spectrum in the market, and Clearwire does not offer service in the Ashtabula zip codes.² Thus, although there are a number of firms with spectrum holdings that overlap Ohio-3, most of them are not a factor in the competitive analysis. In reality, there are currently only four active sources of mobile communications service in the market. The Commission has made it clear that it "will consider only facilities-based entities providing mobile telephony/broadband services using cellular, broadband

¹ Appendix B to File No. 0005632405 (the "Lead Application").

² Declaration of Brian Gelfand.

PCS, SMR, 700 MHz, AWS-1, BRS and WCS spectrum to be market participants.” *In re Applications of Deutsche Telekom AG, T-Mobile USA, Inc. and Metro PCS Communications, Inc.*, rel. March 12, 2013, DA13-384 at Para. 37 (“*T-Mobile/Metro PCS Order*”). It is therefore perfectly appropriate to evaluate this market based only on those entities that are actually “providing mobile telephony broadband service.”

The disparity in the pecking order among the few active providers is even more disturbing. According to Appendix A of the Lead Application, AT&T already has 130 MHz of the relevant mobile spectrum. Bringing up second is Verizon with 109 MHz of spectrum, while Sprint and ATN lag in the distant rear with 34.875 and 25 MHz, respectively. The competitive gap between the two industry giants and the rest of the field is already a chasm, and the instant transaction threatens to make it even worse.

III. The Spectrum Screen

The Applicants acknowledge in their Public Interest Statement that AT&T would exceed the spectrum screen threshold of 151 MHz in Ohio-3 if this transaction is allowed to go forward. In the Applicants’ view, because the screen would only be exceeded by 4 MHz, this does not pose a problem. We must seriously question the inputs they have used in arriving at the *de minimis* numbers, however. Under the Commission’s policies, the spectrum screen is triggered at the 132 MHz level when AWS-1 spectrum is available but BRS spectrum is not. Blue Wireless has been unable to verify whether AWS-1 spectrum has actually been cleared for use in Ashtabula and is therefore deemed “available”. To the best of Blue Wireless’s knowledge, no AWS service is being offered in Ohio-3. We invite the Commission to check that availability since it obviously affects the spectrum screen inputs.

Be that as it may, what *is* clear is that BRS is not “available” in the market. The Commission has indicated that BRS spectrum will be included in the spectrum screen where it is available. This spectrum is generally deemed available if it has been transitioned to the band

plan adopted by the Commission in 2004. “Under these circumstances, we are including BRS spectrum in a market-specific spectrum screen in those markets where the transition has been completed.” *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444 (2008) at Para. 65 (“*Verizon ALLTEL Order*”). However, the Commission assumed in the *Verizon-ALLTEL Order* that all BRS stations would be constructed *and operating* as of May, 2011, as required by the BRS rules. *Id.* In reality, no consumer in the Ashtabula area can subscribe to BRS service since it is deemed by Clearwire not to be within its reliable service area. (See screen shot from Clearwire’s “Clear” website indicating that service is not available in the Ashtabula (i.e., Ohio-3) zip code. (Clearwire is the sole licensee or lessee of BRS spectrum in Ohio-3, per the Commission’s Spectrum Dashboard.) Accordingly, despite the fact that BRS spectrum has been duly transitioned for some time in Ohio-3, the spectrum is not available to consumers for mobile broadband service, and should therefore not be considered “operating.”

The upshot of this analysis is that the spectrum screen threshold for this market should be set no higher than 132 MHz – not 151. Instead of exceeding the screen level by only 4 MHz, AT&T would exceed it by at least a whopping 25 MHz if this deal goes through. Indeed, at 130 MHz of current holdings, it is already just below the threshold at which alarm bells should sound. But whether the screen is exceeded by 4 MHz or 25, application of the screen automatically triggers the need for a more granular examination of the market involved, an examination which corroborates the severe effect which this transaction will have on competition in Ohio-3. See Section V, *infra*.

IV. The HHI Analysis

The Commission uses the Herfindahl-Hirschman Index (“HHI”) as a tool to identify situations in which market concentration may be an issue. If the HHI would be greater than 2800 and the change in HHI would be 100 or greater; or (2) the change in the HHI would be 250 or greater, regardless of the level of the HHI, the concentration is deemed problematic and requires detailed analysis. *See, e.g., AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8724-25 ¶ 42. Blue Wireless does not have at its disposal the inputs needed to conduct an HHI analysis itself, but urges the Commission to verify market share issues by its own HHI analysis. Blue Wireless can state, on information and belief, that Ohio-3 is a very densely concentrated mobile market. AT&T and Verizon, with their huge spectrum holdings, dominate the market now. But despite ATN’s recent loss of market share, ATN remains a very significant competitor in this small field. Blue Wireless’s own experience as a Tier III carrier in small to medium-sized markets has been that it can offer an attractive alternative to the majors by offering locally oriented, customer-friendly service at rates that undercut the majors. ATN has served a similar role in Ohio-3. Sprint, the fourth of the active mobile service providers in the market, offers 3G coverage in Ashtabula itself and along a few major highways, but offers no service itself in much of Ashtabula County. (See attached screen shots from Sprint website). Sprint has meager spectrum resources.³ It is a very weak competitor. We are confident that an HHI analysis will confirm the

³ The Applicants’ Public Interest Statement at p. 14 touts Sprint as holding 90 MHz of spectrum in this market. However, the Competitors Chart in the same application shows Sprint as holding only its SMR spectrum (14.875 MHz, plus two 10 MHz PCS blocks). We assume that Applicants in their Public Interest Statement were attributing Clearwire’s 55 MHz of BRS spectrum to Sprint. That attribution is premature to the extent it presumes that the Commission will approve Sprint’s pending application for acquisition of control of Clearwire, and misplaced to the extent it attributes to Sprint spectrum which it uses or has access to on a non-facilities-based basis.

relative lack of competition in this market today, a condition which will worsen if the transaction is approved.

V. The Proposed Transaction Will Minimize Competition

The most direct analog to the negative effects of this transaction maybe found in the case of Verizon's acquisition of ALLTEL back in 2008. We should first observe that at that time, Verizon, which had a lesser spectrum share than AT&T has now, voluntarily divested itself of the Ohio-3 license, recognizing that its acquisition would raise anti-competitive issues. The Commission did not even have to analyze the situation then because the parties themselves recognized the problem. The Commission did examine in detail several markets whose issues are identical to those presented here. *Verizon ALLTEL Order* at Paras 100 – 106. The Commission considered proximity to other markets and network coverage by the remaining competitors. But the foremost consideration was the reduction in active competitors from four to three: “Generally, we find that, in any market in which the transaction would reduce the number of genuine competitors to three or fewer, the proposed transaction may result in a significant likelihood of successful unilateral effects and/or coordinated interaction.” *Ibid.* at Para 101.

The Commission and the Department of Justice have a sound policy of retaining at least four genuine competitors in any market. This transaction would not only reduce the competitor field to three, but would leave Sprint, a weak and non-vibrant competitor, as the third. Verizon and AT&T would be free to raise prices and divide the market as they saw fit. The Commission identified as competitive threat the fact that “the post-transaction market share of the combined entity likely would make it profitable for the entity to raise prices and restrict output. We conclude that the presence and capacity of rival service providers, taking into account near-term opportunities to obtain access to additional spectrum, are such that the response of rival service

providers is likely to be insufficient to deter successful unilateral effects and/or coordinated interaction by the merged entity.” *Id.* These same concerns apply here in spades.

VI. Conclusion

Every available competitive indicator sounds loud alarms about the damage to competition in Ohio-3 which this transaction would cause. Blue Wireless urges the Commission to conduct an HHI review, analyze the characteristics of the market involved, and follow its well-grounded policy of not permitting consumers to be left with a choice among only three service providers. The applications should be denied.

Respectfully submitted,

Buffalo-Lake Erie Wireless Systems Co., L.L.C.



Donald J. Evans

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April 4, 2013

Its Attorneys

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Declaration of Brian Gelfand

I, Brian Gelfand, Chief Operating Officer of Buffalo-Lake Erie Wireless Systems Co., L.L.C., hereby declare under penalty of perjury that I have reviewed the attached Petition to Deny and the facts contained therein are true and correct to the best of my knowledge and belief. The screen shots attached hereto were taken from the publicly accessible websites of Clear and Sprint and the information contained therein is a product of those sites.

Brian Gelfand

Brian Gelfand

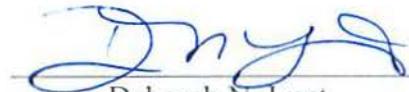
Date: 4/3/13

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, PLC, hereby state that true copies of the foregoing PETITION TO DENY was sent by first class mail, postage prepaid, this 4th day of April, 2013, to the following:

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