



October 9, 2014

The Honorable Thomas Wheeler
Chairman
445 12th Street S.W.
Washington, DC 20536

Subject: *Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269*

The undersigned write to encourage the Commission to conduct a thorough and robust review of several pending transactions proposed by AT&T that implicate the Commission’s recently-announced “enhanced factor” review for low-band spectrum acquisitions.

In the *Mobile Spectrum Holdings Report and Order*, the Commission recognized the need for multiple service providers to have access to below-1-GHz spectrum to “preserve and promote competition in the mobile wireless marketplace,” as well as the need to prevent further aggregation of below-1-GHz spectrum holdings.¹ To that end, the Commission determined that transactions resulting in concentration of greater than one-third of the available below-1-GHz spectrum in a given market (or forty-five megahertz) “will be subject to enhanced review” in the Commission’s case-by-case competitive evaluation of transactions.² The Commission declined to adopt a variety of alternative proposals for addressing the unique competitive concerns associated with concentration of low-band spectrum on grounds that the “enhanced factor” review would strengthen the Commission’s existing precedent involving acquisitions of below-1 GHz spectrum.³ In response, AT&T said that it hoped that the revisions would “put to rest the long-standing aggregation battles that emerged in almost every transaction.”⁴

Hopes for greater clarity have not borne out. Seizing on an as-yet undefined “enhanced factor” review for low-band spectrum concentration, AT&T recently filed for a number of transactions that, if granted, would result in AT&T holding more than forty-five megahertz of

¹ *Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133 ¶ 256 (2014) (“*MSH Report and Order*”).

² *Id.*

³ *Id.* ¶ 283.

⁴ Jim Cicconi, Senior Executive Vice President, AT&T, “AT&T Statement on FCC’s Spectrum Aggregation and Auction Eligibility Order” (May 15, 2014) available at <http://www.attpublicpolicy.com/fcc/att-statement-on-spectrum-aggregation-and-auction-eligibility-order/>.

low-band spectrum in numerous markets.⁵ AT&T is a dominant carrier nationally and in these regions; therefore, the Commission should carefully scrutinize such applications to give meaning to the high hurdle “enhanced factor” review creates and to protect against further anti-competitive concentration of low-band spectrum.

Low-Band Spectrum Is Critical to Wireless Competition. The Commission’s record is replete with evidence demonstrating the substantial importance of low-band spectrum for carriers seeking to provide competitive network coverage.⁶ AT&T and Verizon currently hold approximately 73 percent of all suitable below-1-GHz spectrum,⁷ and more than 90 percent of all cellular spectrum.⁸ As the Commission has recognized, this level of concentration is due in no small part to licenses granted at the very beginning of the wireless era.⁹ More recently, AT&T (and Verizon’s) accretion of low-band spectrum has occurred through countless secondary market transactions, which, in the aggregate, have restructured the wireless industry. The Commission has explained that absent Commission intervention, this increasing concentration of spectrum, particularly low-band spectrum, threatens consumer choice and service as well as investment and innovation in the wireless market.¹⁰

Enhanced Factor Review Imposes a Heightened Burden of Proof. The Commission has determined that transactions resulting in concentration of greater than one-third of the available below-1-GHz spectrum in a given market “will be subject to enhanced review” in its case-by-case evaluation.¹¹ While even in standard transactions applicants already “bear the burden of proving, by a preponderance of the evidence that the proposed transaction, on balance, will serve the public interest,”¹² “enhanced factor” review increases this already substantial burden of proof by requiring the applicant to provide a “*detailed demonstration*” of why the public interest benefits outweigh the obvious harms.¹³ Only where the applicant can demonstrate “a *low potential* for competitive or other public interest harm,” can it acquire the additional low-

⁵ AT&T’s pending transactions suggest that the prospect of enhanced review alone has not meaningfully altered the behavior or expectations of dominant operators as it relates to consolidating additional low-band spectrum. Other mechanisms would have sent better, clearer signals to the dominant carriers about permissible spectrum acquisitions. *See, e.g.*, Comments of Sprint Corp., WT Docket No. 12-269, at 17 (Feb. 11, 2014) (“A weighted screen would . . . permit carriers to acquire additional low-band spectrum, but it would alert them in advance that their acquisition decisions have important competitive consequences – and continued concentration of competitively-impactful low-band spectrum may as a consequence limit the amount of mid- and high-frequency spectrum they can acquire.”).

⁶ *See MSH Report and Order* ¶¶ 32, 54 (recounting the extensive record detailing the propagation benefits of low-band spectrum).

⁷ *Id.* ¶ 153.

⁸ *Id.* ¶ 46.

⁹ *Id.* (“Generally speaking, Verizon Wireless and AT&T each were the beneficiaries from their predecessors in interest of one of the two initial cellular licenses that were granted to an incumbent local exchange carrier and a new entrant in the 1980s, and have since further increased their spectrum holdings within this band.”).

¹⁰ *See id.* ¶ 60.

¹¹ *Id.* ¶ 256.

¹² *Id.* ¶ 285.

¹³ *Id.* (emphasis added).

band spectrum.¹⁴ Absent that detailed and persuasive demonstration, the Commission will find that the low-band transaction causes competitive harm and must be presumptively denied.

The Commission increases the applicant's obligation to show that approval of the transaction is in the public interest even further if the applicant already holds greater than one-third of the available low-band spectrum in a given market. Specifically, when an acquirer already holds approximately one-third or more of below-1-GHz spectrum and would acquire more, "the demonstration of the public interest benefits of the proposed transaction would need to *clearly* outweigh the potential public interest harms associated with such additional concentration."¹⁵ In particular, the Commission in such cases, will now require a "detailed showing . . . that [the applicants] currently are maximizing the use of their spectrum and how the proposed transaction is necessary to maintain, enhance, or expand services provided to consumers."¹⁶ Only by requiring this substantial showing can the Commission adequately "ensur[e] that the ability of rival service providers to offer a competitive response to any price increase or to offer new innovative services is not eliminated or significantly lessened."¹⁷

AT&T's Proposed Low-Band Acquisitions In Excess of 45 MHz Merit Careful Scrutiny under the Commission's Enhanced Factor Review. AT&T has steadily increased its spectrum holdings through secondary market transactions, and the transactions currently pending before the Commission triggering the enhanced review called for in the *Mobile Spectrum Holdings Report and Order* deserve careful scrutiny. Permitting AT&T, already the largest competitor in most of these markets, to purchase this low-band spectrum would deny competitors the opportunity to enter or expand services in the market and result in further concentration of market share in the affected geographic areas. As the Commission has explained, "ensuring that multiple providers are able to access a sufficient amount of low-band spectrum is a threshold requirement for extending and improving service in both rural and urban areas."¹⁸ Furthermore, allowing the dominant player in each market to acquire a competitor or its key assets in the market harms competition and, consequently, consumers. The Commission has long recognized that competition is "the most effective tool for driving innovation, investment, and consumer and economic benefits."¹⁹ The Commission must be especially mindful of any proposed transaction

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.* (emphasis added).

¹⁶ *Id.* ¶ 289.

¹⁷ *Id.* The Commission apparently has taken note of the issues raised by the proposed transactions and has requested that AT&T provide additional information supporting its assertions that its proposed transactions with Club 42 and Plateau Communications would benefit the public interest. *See, e.g.*, Letter from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, FCC to Michael P. Goggin, AT&T Inc., WT Docket No. 14-145 (Sept. 22, 2014) ("Club 42 Transaction Letter"); Letter from Roger C. Sherman, Chief, Wireless Telecommunications Bureau to Launa Waller, Plateau Telecommunications, Inc., WT Docket No. 14-144 (Sept. 22, 2014) ("Plateau Transaction Letter"). As a rule, AT&T has failed to affirmatively identify "enhanced factor" acquisitions on its own motion. AT&T should do so, and it should provide information about the marketplace to the Commission and the public before its applications are accepted for filing.

¹⁸ *MSH Report and Order* ¶ 3.

¹⁹ Remarks by Chairman Tom Wheeler, The Facts and Future of Broadband Competition (Sept. 4, 2014), *available at* <http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition>.

involving a dominant operator that would eliminate a competitor from the market and further concentrate competitively-impactful low-band spectrum.

Conclusion. Access to low-band spectrum by multiple carriers is essential to fueling robust competition in the wireless broadband market, promoting consumer choice, and encouraging investment and innovation. As available low-band spectrum is highly concentrated, secondary market transactions will become an increasingly important avenue for competitive carriers to acquire low-band spectrum. In light of the competitive issues we raise concerning AT&T's pending transactions below 1 GHz, the Commission should rigorously apply a heightened standard of review to their transactions as contemplated by the Mobile Spectrum Holdings Report and Order.

Respectfully submitted,

Kathleen O'Brien Ham
Vice President, Federal Regulatory Affairs
T-Mobile USA, Inc.

Harold Feld
Senior Vice President
Public Knowledge

Lawrence R. Krevor
Vice President, Legal and Government
Affairs
Sprint Corporation

Cathy Sloan
Vice President, Government Relations
Computer & Communications Industry
Association

Ellen Stutzman
Director of Research & Public Policy
Writers Guild of America, West

Matthew F. Wood
Policy Director
Free Press

Michael Calabrese
Director, Wireless Future Project
Open Technology Institute
New America Foundation

Angie Kronenberg
Chief Advocate and General Counsel
COMPTEL

cc: Commissioner Mignon Clyburn
Commissioner Michael O'Rielly
Commissioner Ajit Pai
Commissioner Jessica Rosenworcel
Daniel Ball
Jim Bird
Amy Brett
Brendan Carr

Neil Dellar
Gary Epstein
David Goldman
Renee Gregory
Michael Janson
John Leibovitz
Ramona Mann
Erin McGrath
Virginia Metallo
Roger Noel
Louis Peraertz
Joel Rabinovitz
Paroma Sanyal
Blaise Scinto
Roger Sherman
Howard Symons
Joel Taubenblatt