

**Communications  
Workers of America**  
AFL-CIO, CLC

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December 20, 2011

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, S.W.  
Washington, DC 20554

**Re: Ex Parte Presentation: AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations, WT Dkt. No. 11-65**

Dear Ms. Dortch:

The Communications Workers of America (“CWA”) hereby responds to the Order and Staff Report (“Staff Report”) released on November 29, 2011 by the Federal Communications Commission (“FCC” or “Commission”), regarding the above-referenced AT&T and Deutsche Telekom AG applications for assignment of license or transfer of control.<sup>1</sup> The Staff Report concludes that “the effect on spectrum concentration as a result of the transaction would be so substantial – well beyond what the Commission has seen to date – that significant competitive concerns are raised.”<sup>2</sup> As explained below, the Staff Report fails to include a basic analysis that supports this conclusion.

The Staff Report suggests there is less spectrum available today for broadband than two years ago. CWA disagrees with this premise and strongly protests the Staff Report because it inexplicably reduces the amount of spectrum included in the spectrum screen and does not appear to consider the current mobile telephony/broadband services marketplace. The Staff Report even fails to respond to CWA’s comments that the spectrum screen should be raised. As CWA explained in its comments, the spectrum screen should be updated to reflect the reality of

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<sup>1</sup> *Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations, Order*, DA 11-1955 (rel. Nov. 29, 2011) (“Order”) with attached Staff Analysis and Findings (“Staff Report”).

<sup>2</sup> Staff Report, ¶45.

today's wireless marketplace and to incorporate currently available or soon to be commercially available spectrum that can support mobile telephony/broadband service, including 90 MHz of MSS/ATC spectrum, 194 MHz of BRS/EBS spectrum, and 25 MHz of WCS spectrum.<sup>3</sup> Moreover, reducing the spectrum screen runs counter to the FCC's precedent as the Commission has never lowered the screen once it has been raised,<sup>4</sup> and is inconsistent with the Commission's own recent efforts to identify additional spectrum to meet the goals of the National Broadband Plan.

In reviewing transactions that raise competitive concerns, the FCC normally "determine[s] the appropriate market definitions," "applies the Commission's initial screen," and then conducts a "case-by-case review of the markets identified by that screen."<sup>5</sup> The initial screen is designed "to be conservative and [to] ensure that [the Commission] do[es] not exclude from further scrutiny any geographic areas in which the potential for anticompetitive effects exists."<sup>6</sup> Specifically, the initial screen takes into consideration market concentration, market share data and "the input market of spectrum that is suitable for the provision of mobile telephony/broadband services because spectrum is a necessary resource for wireless service providers to compete effectively."<sup>7</sup> Moreover, this initial screen "is only the beginning" of the

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<sup>3</sup> Comments of CWA filed in Dkt. No. 11-65 at 47 (filed on May 31, 2011) ("CWA Comments").

<sup>4</sup> See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. For Consent to Transfer Control of Licenses and Authorizations, et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶81 (2004); *Applications of Western Wireless Corp. and ALLTEL Corp. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13053, ¶39 (2005); *Applications of Nextel Communications, Inc. and Sprint Corp. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, ¶61 (2005); *Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 11526, ¶31 (2006); *Applications of AT&T Inc. and Dobson Communications Corp. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 20295, ¶31 (2007); *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases, et al.*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 12463, ¶47 (2008); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act.*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶¶54-67 (2008) ("ALLTEL"); *Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, Memorandum Opinion and Order, 24 FCC Rcd 13915, ¶¶43-44 (2009) ("Centennial").

<sup>5</sup> ALLTEL, ¶75 and Centennial, ¶46.

<sup>6</sup> ALLTEL, ¶75.

<sup>7</sup> *Id.*

competitive analysis: “Subsequent sections examine on a case-by-case analysis those markets identified by the screen, where potential harm is possible, to determine whether harm is likely and a remedy needed.”<sup>8</sup> The FCC also normally describes in detail what changes, if any, it is making to any prior market analysis it has conducted.<sup>9</sup> In the Staff Report, the FCC failed to undertake any of these basic steps.<sup>10</sup>

In a 180-degree departure from this precedent, the Staff Report did not conduct a market-by-market analysis or make any other attempt to analyze the markets that triggered the screen. The Staff Report does not explain in detail the spectrum included in the spectrum screen and its rationale for why certain spectrum was excluded or reduced.<sup>11</sup> Nor does the Staff Report contain a market-by-market spectrum screen analysis, as the Commission conducted in other mergers.<sup>12</sup> Furthermore, the spectrum screen changes and presumptions were never disclosed, and were never made available for comment. CWA and others opposed to the FCC’s actions are left fighting shadows. It is arbitrary and capricious to change the spectrum screen to the detriment of the parties without setting forth a rationale for the change.

### **I. The Size of the Spectrum Screen Should Be Expanded, Not Reduced.**

Inexplicably, the Commission appears to have reduced the amount of spectrum it included when evaluating the spectrum screen. Hidden in footnote number 137, the Staff Report states: “In [the AT&T-Qualcomm] order, the Commission would reduce the amount of SMR spectrum used in the spectrum screen from 26.5 megahertz to 14 megahertz.”<sup>13</sup> This is the only indication of what spectrum may or may not be included in the spectrum screen for the AT&T–T-Mobile merger. Yet as the Staff Report notes, the spectrum screen proposed for the AT&T-Qualcomm Order is

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<sup>8</sup> *Id.* See also Centennial, ¶166 (“[W]ith regard to seven local mobile telephony/broadband services markets, our market-by-market analysis shows that likely competitive harms exceed likely benefits of the transaction, and we therefore require remedies to ameliorate the expected harm. We also find that it is in the public interest to condition this transaction on AT&T’s compliance with conditions discussed herein.”) and ALLTEL, ¶156 (“While we find that this transaction is likely to result in transaction-specific public interest benefits, we are not able ... to conclude that they are sufficiently large or imminent to outweigh the potential harms we have identified in certain individual markets. In those markets, therefore, remedies are necessary to ameliorate likely competitive harms.”).

<sup>9</sup> See Centennial, ¶¶43-44 and ALLTEL, ¶¶45-48.

<sup>10</sup> Staff Report, ¶¶29-47.

<sup>11</sup> *Id.*, ¶¶42-47.

<sup>12</sup> Centennial, ¶¶75-86 and ALLTEL, ¶¶91-113.

<sup>13</sup> Staff Report, ¶45 n.137.

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still under Commission consideration and could be changed before the Order is adopted.<sup>14</sup> This cryptic reference is not the well-reasoned analysis that courts demand from the FCC and it does not further the “transparency” under which the Staff Report was purportedly released.<sup>15</sup>

Moreover, the FCC’s decision – arbitrarily and without explanation – to reduce the amount of SMR spectrum contained in the spectrum screen has enormous consequences. According to press reports, this decision caused an additional 82 markets to trigger the screen, nearly one third of the total markets where the screen is triggered by the AT&T–T-Mobile merger.<sup>16</sup>

Even more disturbing, the FCC included all 26.5 MHz of SMR spectrum in its spectrum screen in its most recent merger reviews, including Centennial in 2009 and ALLTEL in 2008.<sup>17</sup> In the past, when analyzing similar transactions, the FCC included all of the spectrum “capable of supporting mobile service given its physical properties and the state of equipment technology, ... with a mobile allocation and corresponding service rules, [which is not] committed to another use that effectively precludes its use[ ] for mobile telephony/broadband service.”<sup>18</sup> Based on this standard, there should be more, not less, spectrum included in the screen compared to the screen most recently used by the Commission in *Centennial* in 2009.

The Commission last used a spectrum screen to evaluate a mobile telephony/broadband services market transaction in 2009. In that order, the Commission concluded that it must include in both the market-specific spectrum screen and in the market-by-market analysis all of the spectrum bands that the Commission determined to be “suitable” for the provision of mobile telephony/broadband services. At that time, the FCC included those bands designated for cellular, PCS, SMR, and 700 MHz services, as well as AWS-1 and Broadband Radio Service (BRS) spectrum where available.<sup>19</sup>

That was two years ago. Since then more spectrum has become available for mobile telephony and broadband services, not less. The FCC and the Administration have already begun moving forward on their commitment to make an additional 500 MHz of spectrum available for wireless

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<sup>14</sup> *Id.*, ¶45.

<sup>15</sup> Order, ¶8 (“releasing the staff report furthers transparency”).

<sup>16</sup> FCC plays fast and loose with the law...again, The Hill’s Congress Blog, *available at* <http://thehill.com/blogs/congress-blog/technology/198111-fcc-plays-fast-and-loose-with-the-lawagain>.

<sup>17</sup> See Centennial, ¶43 and ALLTEL, ¶53.

<sup>18</sup> ALLTEL, ¶¶53 & 62.

<sup>19</sup> Centennial, ¶43.

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broadband over the next ten years and 300 MHz of that spectrum available for wireless broadband over the next five years.<sup>20</sup> As a result of action taken by the FCC regarding the National Broadband Plan, today there is more, not less, spectrum available for mobile telephony and broadband services. For example, earlier this year, Chairman Genachowski touted the successful unleashing of an additional 25 MHz of mobile broadband spectrum in the Wireless Communications Service (“WCS”) band.<sup>21</sup> Also, the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) transition has now been completed in virtually all markets and the BRS and EBS substantial service deadlines have passed. BRS and EBS spectrum is now in commercial use across the United States by such companies as Clearwire, Sprint, Time Warner Cable and Comcast in order to provide 3G and 4G fixed and mobile broadband services to customers.<sup>22</sup> Therefore, BRS/EBS is clearly commercially available and all 194 MHz of BRS/EBS spectrum should be included in the spectrum screen.

The Staff Report also attributes the Qualcomm 700 MHz spectrum to AT&T even though the FCC has not yet adopted an Order consenting to the transaction. Yet, the FCC apparently fails to consider other spectrum that is currently in use, and that will be in use for mobile telephony and broadband services in the next two years, as was done in prior merger reviews. It is inconsistent for the FCC apparently to attribute the Qualcomm spectrum to AT&T for purposes of analyzing the competitive effects of the AT&T/T-Mobile merger and then exclude spectrum from the screen that is currently in use or will soon be in use to provide commercial service.

As stated in CWA’s detailed comments, the spectrum screen should be updated to include all 194 MHz of BRS/EBS spectrum, 25 MHz of WCS spectrum and 90 MHz of MSS spectrum.<sup>23</sup> An increasing number of providers have announced plans to use their MSS/ATC spectrum to

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<sup>20</sup> National Broadband Plan, at xii, *available at* <http://broadband.gov/> (“Make 500 megahertz of spectrum newly available for broadband within 10 years, of which 300 megahertz should be made available for mobile use within five years.”) and Memorandum on Unleashing the Wireless Broadband Revolution, 75 Fed. Reg. 38387, 38388 (July 1, 2010) (NTIA shall “collaborate with the Federal Communications Commission (FCC) to make available a total of 500 MHz of Federal and nonfederal spectrum over the next 10 years, suitable for both mobile and fixed wireless broadband use.”).

<sup>21</sup> “The Clock is Ticking: Remarks on Broadband,” Speech by FCC Chairman Julius Genachowski, Washington, D.C., dated Mar. 16, 2011, at 6, *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-305225A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305225A1.pdf).

<sup>22</sup> AT&T-Qualcomm Public Interest Statement, Dkt. No. 11-18, at 25-27.

<sup>23</sup> CWA Comments at 46-51; *see also* Letter from M. Berry, Patton Boggs LLP, to Marlene Dortch, FCC, Dkt. No. 11-65 at 2 (filed on July 7, 2011) (referring to attached Leslie Marx report explaining why the spectrum screen should include at least 181 MHz of BRS/EBS spectrum, 90 MHz of MSS spectrum and 25 MHz of WCS spectrum. *See* Marx Report at 9-12.).

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provide mobile broadband service in connection with their terrestrial networks, such as LightSquared and DISH Network.

When the FCC last updated the spectrum screen in 2009, it included 55 MHz of BRS spectrum in the screen. Since then, BRS and EBS services are now available in nearly every market and licensees have made their substantial service showings with the FCC. Moreover, unlike in 2009, it is clear that BRS and EBS spectrum is being used to provide wireless telephone and broadband services (i.e. Clearwire, Sprint, etc.). Similar to BRS and EBS, WCS now has technical and service rules that clearly state 25 MHz of spectrum is available for mobile telephony and broadband service. Finally, due to the merger condition imposed on the Harbinger-SkyTerra transaction, which requires the launch of a terrestrial broadband network by the end of 2012, MSS/ATC spectrum should be included in the screen because it will be used for wireless broadband service in less than a year.<sup>24</sup>

Furthermore, Sprint and Clearwire announced on December 1, 2011 that they entered into a new agreement worth up to \$1.6 billion in which Sprint will use Clearwire's WiMAX network through at least 2013 and possibly through 2015 to deliver 3G and 4G wireless services.<sup>25</sup> Clearwire also just completed a stock offering that raised \$734 million from the financial markets – including \$331 million matched by Sprint in order for Sprint to retain its current ownership interest.<sup>26</sup> Since Clearwire's network is largely constructed using BRS and EBS spectrum, it would be arbitrary for the Commission not to include all 194 MHz of BRS and EBS spectrum in the spectrum screen. The new \$1.6 billion agreement between Sprint and Clearwire and Clearwire's recent \$734 million in new capital is further evidence of the current and future commercial viability of BRS and EBS spectrum. And as CWA stated in its comments, BRS and EBS spectrum is currently used to provide commercial services and will be used to provide additional services over the next two year.

Moreover, the Staff Report is not even consistent with the FCC's most recent *Wireless Competition Report*. The Commission's *Fifteenth Wireless Competition Report*, which was released on June 27, 2011, describes the continued advancement of wireless broadband services

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<sup>24</sup> *SkyTerra Communications, Inc., Transferor and Harbinger Capital Funds, Transferee, Applications for Consent to Transfer Control of SkyTerra Subsidiary, LLC, Memorandum Opinion and Order and Declaratory Ruling*, 25 FCC Rcd 3059, ¶72 & App. B (2009).

<sup>25</sup> Sprint and Clearwire Announce New Agreements, Clearwire Press Release, dated Dec. 1, 2011, available at <http://corporate.clearwire.com/releasedetail.cfm?ReleaseID=629282>.

<sup>26</sup> Clearwire Announces Closings of Transactions Totaling \$734 Million in Gross Proceeds, Clearwire Press Release, dated Dec. 13, 2011, available at <http://corporate.clearwire.com/releasedetail.cfm?ReleaseID=633063>.

using MSS spectrum, BRS/EBS spectrum and WCS spectrum.<sup>27</sup> Specifically, as confirmed by the FCC in that most recent *Report*, all 194 MHz of BRS/EBS may be used for wireless broadband, which may also be used to provide wireless telephony.<sup>28</sup> In describing the spectrum available for wireless broadband, the *Wireless Competition Report* states that additional spectrum is now available: “Over the past several years, additional spectrum bands have become available – BRS and EBS in the 2.5 GHz band, AWS in the 1.7/2.1 GHz band, the 700 MHz band, and WCS in the 2.3 GHz band – which are beginning to enable the provision of additional competitive mobile voice and data services. By examining the history of the available frequency bands and associated service rules, it is possible to trace the growth of the mobile wireless industry and the introduction of new competition in the mobile wireless marketplace.”<sup>29</sup> The Commission noted that the WCS service rules were updated in May 2010 to permit the use of the spectrum for mobile broadband service.<sup>30</sup> Finally, the FCC stated that 90 MHz of MSS spectrum is licensed for ATC use, which may be used to provide wireless telephony and broadband services.<sup>31</sup> Accordingly, the staff must revisit its determination regarding how much MSS, BRS/EBS and WCS spectrum to add to the spectrum screen.

It is perplexing, and inconsistent with prior FCC orders, to use less spectrum for a spectrum screen analysis today than in a spectrum screen used two years ago even though new wireless broadband spectrum is now in commercial use.

## **II. The Staff Report Should Have Addressed CWA’s Spectrum Screen Comments.**

The Staff Report fails to address CWA’s recommended changes to the spectrum screen.<sup>32</sup> Indeed, given the changes to the spectrum marketplace and the additional spectrum that has been made available for mobile broadband, it is difficult to refute the comments filed in support of expanding the spectrum screen. Although the Commission purportedly released the Staff Report to provide transparency into the FCC’s analysis of the transaction, the public is actually left with little to no guidance as to how this transaction or future transactions will be evaluated with respect to the spectrum screen.

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<sup>27</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report*, 26 FCC Rcd 9664, App. A (2011) (“Wireless Report”).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, ¶269.

<sup>30</sup> *Id.*, App. A.

<sup>31</sup> *Id.*

<sup>32</sup> Staff Report, ¶262 & nn. 93, 100, 344, 682, 690.

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CWA reiterates that the spectrum screen must be updated to reflect more accurately today's marketplace, the FCC's own conclusions in its annual *Wireless Competition Report*, and the spectrum that will be commercially available in the next two years.<sup>33</sup>

In accordance with the Commission rules, this letter is being filed electronically with your office for inclusion in the public record.

Respectfully submitted,



Debbie Goldman  
Telecommunications Policy Director

cc:

Jim Bird, FCC  
Patrick DeGraba, FCC  
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<sup>33</sup> CWA Comments at 47.