

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
Application of AT&T Mobility Spectrum LLC and ) WT Docket No. 16-159
Fuego Wireless, LLC )
For Consent To Assign Licenses )

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 2016

Released: December 21, 2016

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we consider the application of AT&T and Fuego for Commission consent to the assignment to AT&T of three Lower 700 MHz B Block licenses and a Lower 700 MHz C Block license covering four local market areas in New Mexico. The Commission determined in the Mobile Spectrum Holdings Report and Order that increased aggregation of below-1-GHz spectrum would be treated as an "enhanced factor" under its case-by-case review of license transfers if post-transaction the acquiring entity would hold approximately one-third or more of the suitable and available spectrum below 1 GHz. In the proposed transaction, AT&T would increase its spectrum holdings, and in particular, would hold post-transaction more than one-third of the currently suitable and available below-1-GHz spectrum in all or parts of these four local market areas. After carefully evaluating the likely competitive effects of AT&T's increased aggregation of below-1-GHz spectrum in these four local market areas, as well as the other factors ordinarily considered in a case-by-case review, we find that the likelihood of competitive harm is low. Further, we find some public interest benefits are likely to be realized, such as increased network quality and a better consumer experience. Based on the record before us and our public interest review, we find that the proposed assignment of licenses would serve the public interest, convenience, and necessity, and therefore we consent to the proposed assignment.

II. BACKGROUND AND PUBLIC INTEREST FRAMEWORK

2. Description of the Applicants. AT&T Mobility Spectrum LLC is an indirect wholly-owned subsidiary of AT&T Inc. (together with AT&T Mobility Spectrum LLC, AT&T), which is headquartered in Dallas, Texas, and is a communications holding company that ranks among the leading providers of telecommunications services in the United States. Fuego Wireless, LLC (Fuego, and

1 Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, WT Docket No. 12-269, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6133, 6238-40, paras. 282-88 (2014) (Mobile Spectrum Holdings Report and Order), recon. denied, Order on Reconsideration, 30 FCC Rcd 8635 (2015).

2 AT&T Inc., SEC 2015 Form 10-K, at 1 (filed Feb. 18, 2016), http://www.sec.gov/Archives/edgar/data/732717/000073271716000147/ye15\_10k.htm.

together with AT&T, the Applicants), is a provider of fixed wireless Internet service in New Mexico and Texas.<sup>3</sup>

3. *Description of the Transaction.* On March 16, 2016, AT&T and Fuego filed the Application pursuant to Section 310(d) of the Communications Act of 1934, as amended (the Act),<sup>4</sup> seeking Commission consent to assign three Lower 700 MHz B Block licenses and a Lower 700 MHz C Block license to AT&T.<sup>5</sup> Through the instant transaction, AT&T would be assigned 12 megahertz of low-band spectrum from Fuego in 19 counties covering four Cellular Market Areas (CMAs): CMA 285 (Las Cruces, NM), CMA 555 (New Mexico 3 – Catron), CMA 556 (New Mexico 4 – Santa Fe), and CMA 558 (New Mexico 6 – Lincoln).<sup>6</sup> Post-transaction, AT&T would hold from 100 megahertz to 175 megahertz of spectrum in total, and in particular, it would increase its below-1-GHz holdings to hold from 18 megahertz to 55 megahertz in these four CMAs.<sup>7</sup>

4. *Standard of Review.* Pursuant to Section 310(d) of the Act,<sup>8</sup> we must determine whether the Applicants have demonstrated that the proposed license assignment would serve the public interest, convenience, and necessity.<sup>9</sup> In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Act,<sup>10</sup> other applicable statutes, and the Commission's rules.<sup>11</sup> If the proposed transaction does not violate a statute or rule, we next consider whether the proposed transaction could result in public interest harms by substantially frustrating or

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<sup>3</sup> Fuego Wireless, Availability & Coverage Map, <http://broadbandnow.com/Fuego-Wireless> (last visited Nov. 3, 2016).

<sup>4</sup> 47 U.S.C. § 310(d).

<sup>5</sup> Application of Fuego Wireless, LLC, and AT&T Mobility Spectrum LLC for Consent To Assign Licenses, ULS File No. 0007156616 (filed Mar. 16, 2016) (Application), Exhibit 1—Description of Transaction and Public Interest Statement (Public Interest Statement).

<sup>6</sup> *AT&T Mobility Spectrum LLC and Fuego, LLC, Seek FCC Consent to the Assignment of Four Lower 700 MHz Licenses in New Mexico*, WT Docket No. 16-159, Public Notice, 31 FCC Rcd 7278 (WTB 2016) (*Accepted for Filing Public Notice*); see also Application, Exhibit 3—Spectrum Aggregation.

<sup>7</sup> *Accepted for Filing Public Notice* at 1-2; Application, Exhibit 3—Spectrum Aggregation. As set out in the docket, the Bureau accepted the Application for filing and established a pleading cycle, released a public notice announcing that Numbering Resource Utilization and Forecast (NRUF) reports and local number portability (LNP) data would be placed into the record and adopted the associated protective order, adopted a protective order covering the submission of confidential and highly confidential information, and sent the Applicants information requests seeking further specific information relating to the proposed transaction.

<sup>8</sup> 47 U.S.C. § 310(d).

<sup>9</sup> See, e.g., *Applications of SprintCom, Inc., Shenandoah Personal Communications, LLC, and NTELOS Holdings Corp. for Consent To Assign Licenses and Spectrum Lease Authorizations and To Transfer Control of Spectrum Lease Authorizations and an International Section 214 Authorization*, Memorandum Opinion and Order, 31 FCC Rcd 3631, 3634, para. 6 (WTB/IB 2016) (*Sprint-Shentel-NTELOS Order*); *Applications of AT&T Inc., E.N.M.R. Telephone Cooperative, Plateau Telecommunications, Inc., New Mexico RSA 4 East Limited Partnership, and Texas RSA 3 Limited Partnership for Consent To Assign Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 5107, 5111, para. 8 (2015) (*AT&T-Plateau Wireless Order*); *Applications of AT&T Inc., Leap Wireless International, Inc., Cricket License Co., LLC and Leap Licenseco, Inc. for Consent To Transfer Control and Assign Licenses and Authorizations*, Memorandum Opinion and Order, 29 FCC Rcd 2735, 2741-42, para. 13 (WTB, IB 2014) (*AT&T-Leap Order*).

<sup>10</sup> Section 310(d) requires that we consider the application as if the proposed assignee were applying for the licenses directly under Section 308 of the Act. 47 U.S.C. §§ 308, 310(d); see, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634, para. 6 & n.15; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8 & n.27; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13 & n.45.

<sup>11</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634, para. 6; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

impairing the objectives or implementation of the Act or related statutes.<sup>12</sup> We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.<sup>13</sup> The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, would serve the public interest.<sup>14</sup>

5. The Commission has fully discussed the contours of the required public interest determination in several orders,<sup>15</sup> which we follow here. In general, the competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.<sup>16</sup> The Commission and the Department of Justice each have independent authority to examine the competitive impacts of proposed mergers and transactions involving transfers of Commission licenses, but the Commission's competitive analysis under the public interest standard is somewhat broader.<sup>17</sup> The Commission's public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.<sup>18</sup> If we are unable to find that the proposed transaction serves the public interest for any reason or if the record presents a substantial and material question of fact, we must designate the application(s) for hearing.<sup>19</sup>

6. *Qualifications of the Applicants.* As a threshold matter, the Commission must determine whether the applicants to a proposed transaction meet the requisite qualifications requirements to hold and transfer licenses under Section 310(d) and the Commission's rules.<sup>20</sup> We note that no issues were raised with respect to the basic qualifications of Fuego or AT&T, and in addition, AT&T previously and repeatedly has been found qualified to hold Commission licenses.<sup>21</sup> We therefore find there is no reason to reevaluate the requisite citizenship, character, financial, technical, or other basic qualifications under the Act and our rules, regulations, and policies, of Fuego or AT&T.<sup>22</sup>

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<sup>12</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634, para. 6; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

<sup>13</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634, para. 6; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

<sup>14</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634, para. 6; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

<sup>15</sup> See, e.g., *Applications of AT&T and DIRECTV for Consent To Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 29 FCC Rcd 9131, 9139-41, paras. 18-22 (2015); *Applications of GCI Communication Corp., ACS Wireless License Sub, Inc., ACS of Anchorage License Sub, Inc., and Unicom, Inc. for Consent To Assign Licenses to The Alaska Wireless Network, LLC*, Memorandum Opinion and Order and Declaratory Ruling, 28 FCC Rcd 10433, 10442-44, paras. 23-27 (2013) (*Alaska Wireless Order*).

<sup>16</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634-35, para. 7; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111-12, para. 9; *AT&T-Leap Order*, 29 FCC Rcd at 2742, para. 15.

<sup>17</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634-35, para. 7; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111-12, para. 9; *AT&T-Leap Order*, 29 FCC Rcd at 2742, para. 15.

<sup>18</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634-35, para. 7; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111-12, para. 9; *AT&T-Leap Order*, 29 FCC Rcd at 2743-44, para. 16.

<sup>19</sup> 47 U.S.C. § 309(e); see also, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3634-35, para. 7; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111-12, para. 9; *AT&T-Leap Order*, 29 FCC Rcd at 2743, para. 15; *Application of EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., and EchoStar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002).

<sup>20</sup> 47 U.S.C. § 310(d); 47 CFR § 1.948; *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3635, para. 8; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5112, para. 10; *AT&T-Leap Order*, 29 FCC Rcd at 2744, para. 17.

<sup>21</sup> See, e.g., *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5112-13, para. 11; *AT&T-Leap Order*, 29 FCC Rcd at 2745, para. 19.

<sup>22</sup> 47 U.S.C. § 310(d); 47 CFR § 1.948.

### III. POTENTIAL PUBLIC INTEREST HARMS

7. *Competitive Overview.* In its examination of a proposed transaction, the Commission evaluates the potential public interest harms and undertakes a case-by-case review of the competitive effects of any increase in market concentration or in spectrum holdings in the relevant markets.<sup>23</sup> In the past, the Commission has used a two-part screen to help identify those markets that provide particular reason for further competitive analysis, but has not limited its consideration of potential competitive harms solely to markets identified by its screen if it encounters other factors that may bear on the public interest inquiry.<sup>24</sup> In the *Mobile Spectrum Holdings Report and Order*, the Commission found that it is in the public interest to continue to use its spectrum screen and case-by-case review<sup>25</sup> and, in addition, to require that any increase in spectrum holdings of below 1 GHz be treated as an “enhanced factor” in its review if post-transaction the acquiring entity would hold approximately one-third or more of such spectrum.<sup>26</sup> The Commission stated that it anticipated “that any entity that would end up with more than one third of below-1-GHz spectrum as a result of a proposed transaction would facilitate our case-by-case review with a detailed demonstration regarding why the public interest benefits outweigh harms.”<sup>27</sup> The Commission further stated, however, that when the other factors ordinarily considered indicate a low potential for competitive or other public interest harm, the acquisition of below-1-GHz spectrum resulting in holdings of approximately one-third or more would not preclude a conclusion that a proposed transaction, on balance, furthers the public interest.<sup>28</sup>

8. The Commission stated in the *Mobile Spectrum Holdings Report and Order* that low-band spectrum is less costly to deploy and provides higher quality coverage than higher-band spectrum,<sup>29</sup> and that the leading two nationwide service providers hold most of the low-band spectrum available today.<sup>30</sup> The Commission found that if they were to acquire all, or substantially all, of the remaining low-band spectrum, they would benefit, independently of any deployment, to the extent that rival service providers are denied its use.<sup>31</sup> As the Commission found, without access to this low-band spectrum, rival service providers that may lack a mix of low-band and higher-band spectrum would be less able to provide a robust competitive alternative, and may not be able to quickly expand coverage or provide new

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<sup>23</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3635, para. 9; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5113, para. 12; *AT&T-Leap Order*, 29 FCC Rcd at 2745, para. 20.

<sup>24</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3635, para. 9; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5113, para. 12; see also *AT&T-Leap Order*, 29 FCC Rcd at 2752, 2753, 2755-56, paras. 39, 41, 47.

<sup>25</sup> *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6223-24, para. 231.

<sup>26</sup> *Id.* at 6240, paras. 286-88; see also, e.g., *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5113, para. 13.

<sup>27</sup> *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6240, para. 286. The Commission also set out a heightened standard of review for cases in which the proposed transaction would result in an entity that already holds approximately one-third or more of below-1-GHz spectrum in a market acquiring additional below-1-GHz spectrum in that market, especially with regard to paired low-band spectrum. In these cases, the Commission stated that the required demonstration of the potential public interest benefits of the proposed transaction would need to clearly outweigh the potential public interest harms associated with such additional concentration of below-1-GHz spectrum, irrespective of other factors. *Id.* at 6240, para. 287; see also, e.g., *Application of AT&T Mobility Spectrum LLC and Club 42CM Limited Partnership for Consent To Assign Licenses*, Memorandum Opinion and Order, 30 FCC Rcd 13055, 13057, 13062, 13072-73, 13077-78, 13078-79, paras. 7, 15, 37, 48, 51 (2015) (*AT&T-Club 42 Order*); *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, 5113, 5114, 5123, 5130, paras. 8 & n.31, 13, 15, 36 & n.114, 56.

<sup>28</sup> *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6240, para. 286.

<sup>29</sup> *Id.* at 6164, para. 60.

<sup>30</sup> *Id.* at 6156-57, 6162, 6164, paras. 46, 58, 60.

<sup>31</sup> *Id.* at 6164, para. 60.

services.<sup>32</sup> We consider below whether there would be an increased likelihood as a result of the proposed transaction that rival service providers or potential entrants would be foreclosed from expanding capacity, deploying mobile broadband technologies, or entering the market, and whether rivals' costs would be increased to the extent that they would be less likely to be able to compete robustly.<sup>33</sup>

#### A. Market Definitions

9. We begin our competitive analysis by determining the appropriate market definitions for the proposed transaction,<sup>34</sup> including a determination of the product market, the geographic market, the input market for spectrum suitable and available for the provision of mobile wireless services, and the market participants.

10. *Product and Geographic Market.* Consistent with recent transaction orders, we find that the relevant product market is a combined “mobile telephony/broadband services” product market that comprises mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services).<sup>35</sup> In addition, we find that the relevant geographic market is local.<sup>36</sup> The Applicants are seeking Commission approval of the proposed assignment of 12 megahertz of low-band spectrum that covers 19 counties in four local markets, accounting for well under one percent of the population of the United States.

11. *Input Market for Spectrum and Market Participants.* The Commission has determined in prior orders that the following bands, or portions thereof, should be included in the input market: cellular, broadband PCS, SMR, 700 MHz, AWS-1 and BRS on a market-by-market basis, WCS, the 600 MHz band (at the conclusion of the Incentive Auction), AWS-4, H Block, the majority of the EBS spectrum, and the AWS-3 band (on a market-by-market basis as it becomes “available”).<sup>37</sup> The *Sprint-Shentel-NTELOS Order* found that the AWS-3 1695-1710 MHz band satisfies the standard adopted by the Commission in the *Mobile Spectrum Holdings Report and Order* and “should now be considered available, as well as suitable, on a nationwide basis.”<sup>38</sup> Therefore, the total amount of spectrum suitable and available for the provision of mobile telephony/broadband services is now 595.5 megahertz, approximately one-third of which is 199 megahertz.<sup>39</sup> We consider facilities-based entities providing mobile telephony/broadband services using these spectrum bands as just described to be market participants.<sup>40</sup>

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<sup>32</sup> *Id.* at 6164-65, paras. 60-61; *see also, e.g., AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5113-14, para. 14.

<sup>33</sup> *See, e.g., AT&T-Club 42 Order*, 30 FCC Rcd at 13073, para. 37; *see also Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6154, 6164-65, 6168, paras. 41, 61, 68-69.

<sup>34</sup> *See, e.g., AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5115, para. 17; *AT&T-Leap Order*, 29 FCC Rcd at 2746, para. 22.

<sup>35</sup> *See, e.g., AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5115-16, para. 18; *AT&T-Leap Order*, 29 FCC Rcd at 2746, para. 23.

<sup>36</sup> The Commission has found that the relevant geographic markets for certain wireless transactions generally are local, but has held that a transaction's competitive effects should also be evaluated at the national level where a transaction exhibits certain national characteristics that provide cause for concern. *See, e.g., Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3636, para. 12; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5116, para. 19; *AT&T-Leap Order*, 29 FCC Rcd at 2748, para. 27.

<sup>37</sup> *See, e.g., Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3637, para. 13; *AT&T-Club 42 Order*, 30 FCC Rcd at 13064-65, para. 21; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5117, para. 23; *see also Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6169, para. 70.

<sup>38</sup> *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3637-38, para. 15.

<sup>39</sup> *Id.*

<sup>40</sup> *See, e.g., id.* at 3638, para. 16; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5117, para. 23; *AT&T-Leap Order*, 29 FCC Rcd at 2751, para. 35. The Commission has assessed the competitive effect of MVNOs and resellers in

## B. Competitive Effects of the Proposed Transaction

12. *Initial Review.* As discussed above, to help identify those local markets in which competitive concerns are more likely, initially we apply a two-part screen, and if the acquiring entity would increase its below-1-GHz spectrum holdings to hold approximately one-third or more of such spectrum post-transaction, we apply enhanced factor review.<sup>41</sup> The first part of the screen is based on the size of the post-transaction Herfindahl-Hirschman Index (HHI) and the change in the HHI.<sup>42</sup> The second part of the screen, which is applied on a county-by-county basis, identifies local markets where an entity would hold approximately one-third or more of the total spectrum suitable and available for the provision of mobile telephony/broadband services, post-transaction.<sup>43</sup> In instances where an applicant is acquiring spectrum below 1 GHz, we also carefully examine the possible competitive effects resulting from an increase in below-1-GHz spectrum holdings that would be above the threshold identified in the *Mobile Spectrum Holdings Report and Order*.<sup>44</sup>

13. As the instant transaction does not result in the acquisition of wireless business units and customers, we do not apply the initial HHI screen. No market triggers the total spectrum screen,<sup>45</sup> but in our review of the below-1-GHz spectrum holdings, we find that AT&T would hold more than one-third, or more than 45 megahertz, of the currently suitable and available below-1-GHz spectrum in 16 of the 19 counties post-transaction.<sup>46</sup> We therefore look more closely at the potential competitive effects that these proposed low-band spectrum holdings may have.

14. *Record.* The Applicants contend that the proposed transaction would have no adverse competitive effects, as it would neither cause an overall aggregation of spectrum that would pose an anticompetitive risk nor reduce competition in a meaningful way.<sup>47</sup> Further, AT&T maintains that the proposed transaction would not lead to an increase in market concentration or decrease the number of

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prior transactions, but noted that it will exclude MVNOs and resellers from consideration when computing initial concentration measures. *See, e.g., AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5117, para. 23 & n.78; *AT&T-Leap Order*, 29 FCC Rcd at 2752, para. 37. Further, as AWS-3 (1755-1780 MHz and 2155-2180 MHz on a market-by-market basis) and 600 MHz spectrum become available, we will also consider facilities-based entities providing mobile telephony/broadband services using that spectrum to be market participants. *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3638, para. 16.

<sup>41</sup> *See, e.g., AT&T-Club 42 Order*, 30 FCC Rcd at 13065-66, para. 23; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5118, para. 24; *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6240, paras. 286-88. The current total amount of below-1-GHz spectrum that is suitable and available is 134 megahertz, approximately one-third of which is 45 megahertz. *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6156-57, 6240, paras. 46, 286-88. As with our application of the initial total spectrum screen, we evaluate increases in below-1-GHz spectrum concentration on a county-by-county basis. *See, e.g., AT&T-Club 42 Order*, 30 FCC Rcd at 13065, para. 23 & n.82; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5121, 5123, paras. 31, 35.

<sup>42</sup> *See, e.g., Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3638-39, para. 17; *AT&T-Club 42 Order*, 30 FCC Rcd at 13065-66, para. 23; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5118, para. 24; *AT&T-Leap Order*, 29 FCC Rcd at 2753, para. 41 & n.140.

<sup>43</sup> *See, e.g., Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3638-39, para. 17; *AT&T-Club 42 Order*, 30 FCC Rcd at 13065-66, para. 23; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5118, para. 24.

<sup>44</sup> *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6233, 6240, paras. 267, 286-88. *See also, e.g., AT&T-Club 42 Order*, 30 FCC Rcd at 13065-66, para. 23; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5118, para. 24.

<sup>45</sup> *See supra* para. 11; *see also Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3637-39, paras. 15, 17 & n.52.

<sup>46</sup> *See supra* para. 8; *see also AT&T-Club 42 Order*, 30 FCC Rcd at 13066, para. 24; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5118-19, para. 25.

<sup>47</sup> Public Interest Statement at 4; *see also* Response of AT&T to the General Information Request Dated July 19, 2016, at 11-12 (July 19, 2016) (AT&T Information Request Response).

entities providing service to customers in the markets.<sup>48</sup> In addition, AT&T maintains that no subscriber transition issues are implicated as a result of the proposed transaction because it is a spectrum-only transaction.<sup>49</sup> No petitions to deny or comments were received.

15. *Market-Specific Review.* Generally, in undertaking our analysis, we consider various competitive variables that help to predict the likelihood of competitive harm post-transaction. These competitive variables include, but are not limited to: the total number of rival service providers; the number of rival firms that can offer competitive service plans; the coverage by technology of the firms' respective networks; the rival firms' market shares; the combined entity's post-transaction market share and how that share changes as a result of the transaction; the amount of spectrum suitable for the provision of mobile telephony/broadband services controlled by the combined entity; and the spectrum holdings of each of the rival service providers.<sup>50</sup>

16. We begin our analysis with our review of Las Cruces, NM, which is a rural market of approximately 209,000 people and a population density of 55 people per square mile.<sup>51</sup> The four nationwide service providers each have a significant market share: AT&T, Sprint, T-Mobile, and Verizon Wireless each hold approximately [REDACTED] percent of the market, respectively. Post-transaction, AT&T would hold 155 megahertz of spectrum in this CMA, including 55 megahertz of spectrum below 1 GHz, while the other three nationwide service providers hold 72 megahertz to 123 megahertz of spectrum.<sup>52</sup> With respect to below-1-GHz spectrum, Verizon Wireless holds 47 megahertz, Sprint holds 14 megahertz, and T-Mobile holds 12 megahertz. In terms of population and land area coverage, all four nationwide service providers have significant 3G population coverage and two have significant 3G land

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<sup>48</sup> AT&T Information Request Response at 11-12. Moreover, in the Applicants' information request responses, each asserts that other entities were actively solicited with respect to this business opportunity. AT&T Information Request Response at 13-14; Response of Fuego Wireless to the General Information Request Dated July 5, 2016, at 2-3 (July 19, 2016) (Fuego Information Request Response) (describing the efforts of an investment bank, which contacted a diverse group of potential buyers for the spectrum at issue).

<sup>49</sup> Public Interest Statement at 4; AT&T Information Request Response at 12-13.

<sup>50</sup> We derive market shares and HHIs from our analysis of data compiled in our December 2015 NRUF and LNP database, network coverage from January 2016 Mosaik data and 2010 U.S. Census data, and spectrum holdings from our licensing databases and the Application. We also utilized and analyzed additional data as provided by the Applicants through our information requests. *See, e.g., Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3641, para. 21 & n.66; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5120, para. 29 & n.98.

<sup>51</sup> The population density is measured by the number of people per square mile using Census 2010 data. Rural markets are generally characterized by 100 people per square mile or less. *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services et al.*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, 19086-88, paras. 10-12 (2004).

<sup>52</sup> In addition, we note that DISH holds 65 megahertz of above-1-GHz spectrum and 6 megahertz of unpaired below-1-GHz-spectrum, and Gabelli holds 10 megahertz of above-1-GHz spectrum.

area coverage.<sup>53</sup> In addition, all four nationwide service providers have significant LTE population coverage and two have significant LTE land area coverage.<sup>54</sup>

17. We find notwithstanding the fact that AT&T would hold, as a result of the proposed transaction, more than one-third of the below-1-GHz spectrum in Las Cruces, NM, that the likelihood of competitive harm is low after evaluating the particular factors ordinarily considered.<sup>55</sup> We note first that this is a rural market, and in addition to AT&T, the three other nationwide service providers each have a significant market share. Further, Sprint, T-Mobile, and Verizon Wireless each have access to low-band spectrum that would allow at least a 5×5 megahertz LTE deployment on below-1-GHz spectrum, as well as access to spectrum above 1 GHz to combine with their low-band spectrum holdings for LTE deployment. We also note that 26 megahertz of paired low-band spectrum remains held in this market by parties other than the two leading nationwide service providers. Further, in addition to AT&T, the three other nationwide service providers each have significant 3G and LTE population coverage and Verizon Wireless also has significant 3G and LTE land area coverage. We find that the acquisition of this below-1-GHz spectrum by AT&T is unlikely to foreclose rival service providers from entering or expanding in this local market, and is unlikely to raise rivals' costs. We find therefore that the proposed transaction is unlikely to materially lessen the ability of rival service providers to respond to any anticompetitive behavior on the part of AT&T in Las Cruces, NM.

18. We turn next to our review of the remaining three markets, each of which are very rural markets in New Mexico, with population densities of less than 20 people per square mile.<sup>56</sup> In each of these three markets, at least three service providers have a significant market share.<sup>57</sup> Across these three CMAs, AT&T would hold 100 megahertz to 175 megahertz of spectrum post-transaction, including 18 to 55 megahertz of spectrum below 1 GHz, while the other three nationwide service providers hold 35 megahertz to 159 megahertz of spectrum.<sup>58</sup> With respect to below-1-GHz spectrum, Verizon Wireless holds 22 megahertz to 72 megahertz, Sprint holds 14 megahertz, and T-Mobile holds 12 megahertz in all

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<sup>53</sup> It has previously been found that coverage of 70% or more of the population and 50% or more of the land area is presumptively sufficient for a service provider to have a competitive presence in the market. *See, e.g., Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3643, para. 25 & n.77; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5121, para. 31 & n.102; *AT&T-Leap Order*, 29 FCC Rcd at 2770, para. 81 & n.279.

AT&T covers 100% of the population and approximately 95% of the land area with its 3G network, while the comparable 3G population and land area network coverage percentages are 100% and approximately 96% for Verizon Wireless, approximately 99% and 43% for T-Mobile, and approximately 97% and 38% for Sprint.

<sup>54</sup> AT&T covers approximately 97% of the population and 66% of the land area with its LTE network, while the comparable LTE population and land area network coverage percentages are 100% and approximately 96% for Verizon Wireless, approximately 99% and 43% for T-Mobile, and approximately 90% and 25% for Sprint.

<sup>55</sup> *See supra* para. 15. *See also, e.g., AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5123, para. 36.

<sup>56</sup> New Mexico 3 – Catron contains approximately 110,000 people with a population density of six people per square mile, while New Mexico 4 – Santa Fe contains approximately 292,000 people with a population density of 13 people per square mile, and New Mexico 6 – Lincoln contains approximately 268,000 people with a population density of ten people per square mile

<sup>57</sup> AT&T's market shares range from approximately [REDACTED]%. In addition, Sprint's market shares range from approximately [REDACTED]%, while T-Mobile's market shares range from approximately [REDACTED]%, and Verizon Wireless's market shares range from approximately [REDACTED]%

<sup>58</sup> In addition, we note DISH holds 65 megahertz of above-1-GHz spectrum and 6 megahertz of unpaired below-1-GHz-spectrum in each of the markets. In New Mexico 3 – Catron, Gabelli holds 10 megahertz of above-1-GHz spectrum and Smith Bagley holds 20 megahertz of above-1-GHz spectrum in parts of the CMA. In New Mexico 4 – Santa Fe, Cleartalk holds 30 megahertz of above-1-GHz spectrum in parts of the CMA, while in New Mexico 6 – Lincoln, it holds 10 megahertz to 45 megahertz, and Leaco Wireless hold 20 megahertz of spectrum above 1 GHz in parts of that market.



or parts of the three CMAs.<sup>59</sup> In terms of 3G and LTE population and land area coverage, while land area coverage is substantially more limited, all four nationwide service providers have significant 3G population coverage, and at least three nationwide service providers have significant LTE population coverage.<sup>60</sup>

19. We find notwithstanding the fact that AT&T would hold, as a result of the proposed transaction, more than one-third of the below-1-GHz spectrum in all or parts of these three very rural markets, that the likelihood of competitive harm is low after evaluating the particular factors ordinarily considered.<sup>61</sup> We note first that in addition to AT&T, at least two other nationwide service providers have a significant market share. Further, Sprint, T-Mobile, and Verizon Wireless each have access to low-band spectrum in all or parts of these three markets that would allow at least a 5×5 megahertz LTE deployment on below-1-GHz spectrum, as well as access to spectrum above 1 GHz to combine with their low-band spectrum holdings for LTE deployment. Moreover, other licensees have access to additional low-band spectrum in parts of the markets at issue. In terms of population and land area coverage, in addition to AT&T, Verizon Wireless and T-Mobile have significant 3G and LTE population coverage, while Sprint has significant 3G and LTE population coverage in New Mexico 3 – Catron, and New Mexico 4 – Santa Fe. We find that the acquisition of this below-1-GHz spectrum by AT&T is unlikely to foreclose rival service providers from entering or expanding in these three local markets, and is unlikely to raise rivals' costs. We find therefore that the proposed transaction is unlikely to materially lessen the ability of rival service providers to respond to any anticompetitive behavior on the part of AT&T in any of New Mexico 3 – Catron, New Mexico 4 – Santa Fe, or New Mexico 6 – Lincoln.

#### IV. POTENTIAL PUBLIC INTEREST BENEFITS

20. We next consider whether the proposed transaction is likely to generate verifiable, transaction-specific public interest benefits.<sup>62</sup> Under Commission precedent, the Applicants bear the burden of demonstrating the potential public interest benefits of a proposed transaction.<sup>63</sup> The Commission applies several criteria in deciding whether a claimed benefit is cognizable. First, each claimed benefit must be transaction-specific.<sup>64</sup> Second, each claimed benefit must be verifiable.<sup>65</sup> Third,

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<sup>59</sup> In New Mexico 3 – Catron, ATN holds 25 megahertz of low-band spectrum and Smith Bagley holds 37 megahertz, each in parts of the CMA. In New Mexico 4 – Santa Fe, ATN holds 12 megahertz of low-band spectrum in parts of the CMA, and in New Mexico 6 – Lincoln, Leaco Wireless holds 25 megahertz and Fuego Wireless would continue to hold 12 megahertz of low-band spectrum, each in parts of the CMA.

<sup>60</sup> In the three markets, AT&T's 3G population coverage ranges from approximately 94% to 99%, while its 3G land area coverage ranges from approximately 37% to 88%. The respective 3G coverage percentages are approximately 97% to 99% population and approximately 70% to 74% land area for Verizon Wireless, approximately 93% to 98% population and approximately 29% to 84% land area for T-Mobile, and approximately 88% to 91% population and approximately 11% to 20% land area for Sprint.

Turning to LTE deployment, AT&T's LTE population coverage ranges from approximately 43% to 89%, while its LTE land area coverage ranges from approximately 4% to 48%. The respective LTE coverage percentages are approximately 97% to 99% population and approximately 73% to 84% land area for Verizon Wireless, approximately 93% to 96% population and approximately 28% to 77% land area for T-Mobile, and approximately 45% to 77% population and approximately 4% to 7% land area for Sprint.

<sup>61</sup> See *supra* para. 15. See also, e.g., *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5123, para. 36.

<sup>62</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Club 42 Order*, 30 FCC Rcd at 13074, para. 39; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5126, para. 43.

<sup>63</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 86; see also *AT&T-Leap Order*, 29 FCC Rcd at 2793, para. 131.

<sup>64</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Leap Order*, 29 FCC Rcd at 2793, para. 132; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 87.

<sup>65</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Leap Order*, 29 FCC Rcd at 2793, para. 132; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 87.

we calculate the magnitude of benefits net of the cost of achieving them and benefits must flow through to consumers, and not inure solely to the benefit of the company.<sup>66</sup> The Commission applies a “sliding scale approach” to evaluating benefit claims.<sup>67</sup> Under this approach, where potential harms appear “both substantial and likely, a demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”<sup>68</sup> Conversely, where potential harms appear less likely and less substantial, as is the case here, we will accept a lesser showing to approve the proposed transaction.<sup>69</sup>

21. *Record.* The Applicants assert, in their detailed demonstration of the claimed benefits, that the proposed transaction would enable AT&T to expand its system capacity to enhance existing services, better accommodate its overall growth, and facilitate the provision of additional products and services to its customers.<sup>70</sup> According to the Applicants, the additional spectrum would be used to deploy AT&T’s 4G network using LTE technology and would increase network capacity to the benefit of AT&T’s subscribers.<sup>71</sup> In particular, the Applicants maintain that the acquisition of this Lower 700 MHz spectrum would allow AT&T to support a 10×10 megahertz LTE deployment.<sup>72</sup> AT&T asserts that the capacity of a 10×10 megahertz block is greater than the total capacity of two separate 5×5 megahertz blocks,<sup>73</sup> and contends that the wider bandwidth results in noticeably better performance for users than a deployment using two 5×5 megahertz blocks.<sup>74</sup>

22. *Evaluation.* We have reviewed the Applicants’ asserted public interest benefits, as well as their detailed responses to our requests for additional information and documents regarding the potential benefits of AT&T acquiring, in particular, the below-1-GHz spectrum at issue in Las Cruces, NM, New Mexico 3 – Catron, New Mexico 4 – Santa Fe, and New Mexico 6 – Lincoln. The record provides general support for the Applicants’ contentions that the proposed transaction would likely result in some public interest benefits post-transaction. Specifically, as a result of the proposed transaction, customers likely are to benefit in the immediate future from access to improved LTE performance and a more robust network, resulting in a better customer experience.<sup>75</sup>

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<sup>66</sup> For example, we will more likely find marginal cost reductions to be cognizable than reductions in fixed cost because reductions in marginal cost are more likely to result in lower prices for consumers. See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Leap Order*, 29 FCC Rcd at 2793-94, para. 132; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 87.

<sup>67</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3648, para. 35; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5126-27, para. 44; see also, e.g., *AT&T-Leap Order*, 29 FCC Rcd at 2793-94, para. 132.

<sup>68</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3648, para. 35; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5126-27, para. 44; *AT&T-Club 42 Order*, 30 FCC Rcd at 13074, para. 40.

<sup>69</sup> See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3648, para. 35; *AT&T-Club 42 Order*, 30 FCC Rcd at 13074, para. 40; see also *AT&T-Leap Order*, 29 FCC Rcd at 2794, para. 131.

<sup>70</sup> Public Interest Statement at 2-3; see also AT&T Information Request Response at 10.

<sup>71</sup> Public Interest Statement at 2; see also AT&T Information Request Response at 9-11.

<sup>72</sup> Public Interest Statement at 2-3; see also AT&T Information Request Response at 3-4.

<sup>73</sup> Public Interest Statement at 2-3; AT&T Information Request Response at 6-9. AT&T asserts that the 10 megahertz block would have approximately 10% more capacity than two 5 megahertz blocks. Public Interest Statement at 3.

<sup>74</sup> AT&T Information Request Response at 5-6. AT&T cites the 10×10 megahertz LTE deployment’s greater trunking and signaling efficiencies, maintaining that these improvements result in higher system capacity, greater spectral efficiency, and better user throughput than is possible over two separate 5×5 megahertz blocks. AT&T Information Request Response at 6-9; see also AT&T Exhibits ATT-FUEG00007, ATT-FUEG000049-50.

<sup>75</sup> See, e.g., *AT&T-Club 42 Order*, 30 FCC Rcd at 13076-77, paras. 46-47; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5129, para. 53. As we noted in the *AT&T-Club 42 Order*, recognizing the public interest benefits of a 10×10 megahertz channel does not undermine our conclusion that 10×10 megahertz blocks are not required for effective

**V. BALANCING THE POTENTIAL BENEFITS AND THE POTENTIAL HARMS**

23. The Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transaction outweigh the potential public interest harms. After carefully evaluating the likely competitive effects of AT&T's increased aggregation of below-1-GHz spectrum in the relevant market areas, we find that the ability of rival service providers to offer a competitive response to any anticompetitive behavior on the part of AT&T is unlikely to be materially lessened. Further, we find that the record provides general support for the Applicants' claims that the proposed transaction would likely result in some public interest benefits. Therefore, under our sliding scale approach, we find that the likelihood of harm is low and the potential public interest benefits outweigh any potential public interest harms. As a result, based on the record before us and our competitive review, we find that consent to the proposed assignment would serve the public interest, convenience, and necessity.

**VI. ORDERING CLAUSES**

24. ACCORDINGLY, having reviewed the Application and the record in this proceeding, IT IS ORDERED that, pursuant to Sections 4(i) and (j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309, 310(d), the application for the assignment of four licenses held by Fuego Wireless, LLC, to AT&T Mobility Spectrum LLC is GRANTED.

25. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under Section 1.106 of the Commission's rules, 47 CFR § 1.106, or applications for review under Section 1.115 of the Commission's rules, 47 CFR § 1.115, may be filed within thirty days of the date of release of this Memorandum Opinion and Order.

26. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 CFR §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Jon Wilkins  
Chief  
Wireless Telecommunications Bureau