



PUBLIC NOTICE

Federal Communications Commission
45 L Street, NE
Washington, D.C. 20554

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DA 23-891

Released: September 22, 2023

WIRELESS TELECOMMUNICATIONS BUREAU AND OFFICE OF ECONOMICS AND ANALYTICS SEEK COMMENT ON AT&T PETITION FOR RULEMAKING AND MOBILE SPECTRUM HOLDINGS POLICIES

WT Docket No. 23-319
RM-11966

Comments Due: October 23, 2023

Reply Comments: November 8, 2023

The Commission's statutory mandate regarding mobile spectrum holdings policies is to "include safeguards to protect the public interest"¹ and to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible . . . by avoiding excessive concentration of licenses."² The Commission's "fundamental goal" guiding its mobile spectrum holdings policies has been to preserve and promote competition, which "enables consumers to make choices among numerous service providers and leads to lower prices, improved quality, and increased innovation."³ The Commission's spectrum aggregation policies reflect the need to ensure "that sufficient spectrum is available for multiple existing mobile service providers as well as potential entrants."⁴

AT&T filed a petition for rulemaking asking that the Commission establish a mid-band spectrum screen.⁵ As a broader development relating to competition policy, AT&T points to the July 2021 issuance by President Biden of an Executive Order that encouraged the Commission to consider actions to promote competition, including specifically to avoid excessive concentration of spectrum license holdings in the United States.⁶ In this Public Notice, the Wireless Telecommunications Bureau and the Office of Economics and Analytics first seek comment on AT&T's request that the Commission initiate a rulemaking proceeding. We then seek comment more broadly on whether we should recommend that the

¹ 47 U.S.C. § 309(j)(3).

² 47 U.S.C. § 309(j)(3)(B).

³ *Policies Regarding Mobile Spectrum Holdings Expanding the Economic Innovation Opportunities of Spectrum Through Incentive Auctions*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd 6133, 6143-44, para. 17 (2014) (*Mobile Spectrum Holdings Report and Order*).

⁴ *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6143-44, para. 17.

⁵ AT&T Petition for a Rulemaking to Establish a Mid-Band Spectrum Screen (filed Sept. 1, 2021) (AT&T Mid-Band Screen Petition).

⁶ Executive Order on Promoting Competition in the American Economy, White House Briefing Room, Presidential Actions, section 5(l)(ii) (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

Commission, in the context of initiating a rulemaking, propose other changes to its mobile spectrum holdings rules and policies.

Background. When the Commission reviews proposed secondary market transactions, it uses an initial spectrum screen to help identify, for case-by-case review, local markets where changes in spectrum holdings that would result from the transaction may be of particular concern.⁷ In 2004, the Commission for the first time articulated its framework for case-by-case review of spectrum aggregation and market concentration.⁸ In that 2004 order, the Commission established a spectrum screen “trigger” of approximately one-third of the total suitable and available spectrum for commercial mobile radio services,⁹ which was later expanded to mobile telephony/broadband services.¹⁰ Since that time, the Commission has continued to evaluate which bands of spectrum are “suitable and available” for use and should be included in the spectrum screen,¹¹ and it has continued to apply case-by-case review and the approximate one-third spectrum screen trigger in reviewing secondary market transactions.

In addition, the Commission in 2014 determined that it would treat as an “enhanced factor” in its case-by-case review any proposed increase in below-1-GHz spectrum holdings resulting in the acquiring entity holding approximately one-third or more of the suitable and available spectrum below 1 GHz.¹²

⁷ See, e.g., *Applications of T-Mobile US, Inc., and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 18-197, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 FCC Rcd 10578, 10607-08, paras. 70-72 (2019) (*T-Mobile-Sprint Order*); *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*, WT Docket No. 15-262, Memorandum Opinion and Order, 31 FCC Rcd 3631, 3638-39, para. 17 (WTB/IB 2016) (*Sprint-Shentel-NTELOS Order*); *Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations, Application of Cricket License Company, LLC and Leap Licenseco Inc. for Consent to Assignment of Authorizations*, WT Docket No. 13-193, Memorandum Opinion and Order, 29 FCC Rcd 2735, 2753, para. 41 (WTB/IB 2014) (*AT&T-Leap Order*); see also *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6169, 6221-22, paras. 71, 225.

⁸ *Applications of AT&T Wireless Inc. and Cingular Wireless Corporation For Consent To Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21525, para. 4 (2004) (*Cingular-AT&T Wireless Order*). In addition, the screen also identifies markets where changes in market concentration resulting from the transaction, as measured by the Herfindahl-Hirschman Index (HHI), may be of particular concern. See, e.g., *T-Mobile-Sprint Order*, 34 FCC Rcd at 10614-15, para. 87; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568, para. 106.

⁹ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69, paras. 106-12.

¹⁰ See, e.g., *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*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17469-70, paras. 45-46 (2008); *Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246, Memorandum Opinion and Order, 24 FCC Rcd 13915, 13931-32, 13935-36, paras. 34, 37, 43-44 (2009).

¹¹ See, e.g., *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, Report and Order and Order of Proposed Modification, 35 FCC Rcd 2343, 2381-84, paras. 83-89 (2020) (*3.7 GHz Report and Order*), *aff'd* *PSSI Global Services v. FCC*, No. 20-1142 (D.C. Cir. Dec. 8, 2020) (per curiam); *Incentive Auction Closing and Channel Reassignment*, AU Docket No. 14-252, Public Notice, 32 FCC Rcd 2786 (WTB 2017); *Sprint-Shentel-NTELOS*, 31 FCC Rcd at 3637-38, paras. 15-16; *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6172, paras. 82-134; *Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, Nextwave Wireless, Inc., and San Diego Gas & Electric Company for Consent to Assign and Transfer Licenses*, WT Docket No. 12-240, Memorandum Opinion and Order, 27 FCC Rcd 16459, 16470-71, para. 31 (2012).

¹² *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6233, 6240, paras. 267, 286-88. Since 2014, the Commission has analyzed numerous transactions in which the enhanced factor review standard was applied. See,

Further, where the acquiring entity already holds approximately one-third or more of the below-1-GHz spectrum in a particular market, the demonstration of the public interest benefits of the proposed transaction would need to clearly outweigh the potential public interest harms, irrespective of other factors.¹³ In 2016, the Commission adopted a separate millimeter wave (mmW) spectrum threshold that would apply to its case-by-case review of proposed secondary market transactions implicating mmW spectrum bands.¹⁴

In 2008, the Commission determined that its case-by-case review would also apply to the initial licensing of spectrum acquired at auction, similar to the Commission's analysis of secondary market transactions.¹⁵ Further, in the 2014 *Mobile Spectrum Holdings Report and Order*, the Commission determined that it would apply band-specific spectrum limits if it found that they were necessary.¹⁶ Since that order, the Commission has adopted pre-auction limits for certain spectrum bands (e.g., 3.5 GHz and 3.45 GHz bands)¹⁷ and post-auction, case-by-case review for other spectrum bands (e.g., the 24 GHz, 28 GHz, 37 GHz, 39 GHz, 47 GHz,¹⁸ and 3.7-3.98 GHz bands).¹⁹

AT&T's Petition for Rulemaking. AT&T argues that mid-band spectrum is essential for 5G deployment, and as such, the Commission must "ensure that every provider has a fair and efficient

e.g., *Application of AT&T Mobility Spectrum LLC and Club 42CM Limited Partnership for Consent to Assign Licenses*, WT Docket No. 14-145, Memorandum Opinion and Order, 30 FCC Rcd 13055 (2015) (*AT&T-Club 42 Order*); *Application 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*, WT Docket No. 14-144, Memorandum Opinion and Order, 30 FCC Rcd 5107 (2015); *Application of The Alaska Wireless Network, LLC, and T-Mobile License LLC for Consent to Assign License*, WT Docket No. 15-265, Memorandum Opinion and Order, 31 FCC Rcd 4447 (WTB 2016) (*AWN-T-Mobile Order*).

¹³ *Mobile Spectrum Holdings Report and Order*, 29 FCC at 6240, para. 287; see, e.g., *AWN-T-Mobile Order*; *AT&T-Club 42 Order*; *Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations*, WT Docket No. 11-18, Order, 36 FCC Rcd 17589 (2011).

¹⁴ *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services, et al.*, GN Docket No. 14-177, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014, 8081, 8083-84, paras. 184, 189 (2016) (*2016 Spectrum Frontiers Order*). The Commission's mmW spectrum threshold was updated in 2017 to include the 24 GHz and 47 GHz bands. *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services, et al.*, GN Docket No. 14-177, Second Report and Order, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, and Memorandum Opinion and Order, 32 FCC Rcd 10988, 11011, para. 74 (2017) (*2017 Spectrum Frontiers Order*).

¹⁵ *Applications of Union Telephone Company and Cellco Partnership d/b/a Verizon Wireless Applications for 700 MHz Band Licenses, Auction No. 73*, Order, 23 FCC Rcd 16787, 16791-92, 16796, paras. 9, 18 (2008).

¹⁶ *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6135, 6192-93, paras. 4, 139-45.

¹⁷ For more information on these classifications, see the relevant Commission items. See, e.g., *Facilitating Shared Use in the 3100-3550 MHz Band*, WT Docket No. 19-348, Second Report and Order, Order on Reconsideration, and Order of Proposed Modification, 36 FCC Rcd 5987, 6022-24, paras. 101-04 (2021); *Promoting Investment in the 3550-3700 MHz Band*, GN Docket No. 17-258, Report and Order, 33 FCC Rcd 10598, 10653-54, para. 107 (2018); *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Docket No. 12-354, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959, 3998-99, paras. 117-21 (2015).

¹⁸ See, e.g., *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, et al.*, GN Docket No. 14-177, Third Report and Order, Memorandum Opinion and Order, and Third Further Notice of Proposed Rulemaking, 33 FCC Rcd 5576, 5587-91, paras. 29-34 (2018) (eliminating the pre-auction, bright-line limit of 1250 megahertz for the 28 GHz, 37 GHz, and 39 GHz bands that had been adopted previously in the *2016 Spectrum Frontiers Order*, 31 FCC Rcd at 8018-19, 8081-83, paras. 4, 184-87); *2017 Spectrum Frontiers Order*, 32 FCC Rcd at 10990, 11010-11, paras. 4, 73-74.

¹⁹ See, e.g., *3.7 GHz Report and Order*, 35 FCC Rcd at 2381-84, paras. 83-89.

opportunity to acquire the mid-band spectrum it needs.”²⁰ AT&T asserts that foreclosure strategies are more likely to be successful in today’s competitive environment²¹ and asks that the Commission adopt a spectrum screen specific to mid-band spectrum in its review of proposed secondary market transactions.²² Specifically, AT&T requests that the Commission apply “enhanced review” and should apply even greater scrutiny to acquisitions of unpaired mid-band spectrum by an entity that already holds more than one-third of that spectrum in a particular area.²³ AT&T also asks that the Commission enforce any mid-band spectrum screen with “flexible but completely effective divestiture remedies.”²⁴ In particular, AT&T requests that the Commission undertake a case-by-case review of the long-form license applications filed for the spectrum and not adopt *ex ante* limits at the initial licensing stage.²⁵ AT&T also asks that any divestitures that the Commission would require as part of its case-by-case review should promote competition in a 5G environment.²⁶

We seek comment generally on AT&T’s petition for a rulemaking, including its request that the Commission initiate a proceeding to adopt a spectrum screen specific to mid-band spectrum. We seek comment on AT&T’s assertion that a mid-band specific screen in the secondary market context is needed to prevent anticompetitive foreclosure strategies. In particular, we seek comment on AT&T’s request that the Commission apply “enhanced factor review,” as it currently does for below-1-GHz spectrum, to any acquisition of unpaired mid-band spectrum (which AT&T would define as spectrum between 2.5 GHz to 6 GHz)²⁷ that would cause a service provider to hold more than one third of the total amount of mid-band spectrum available. We seek comment on AT&T’s proposed definition of mid-band spectrum, including AT&T’s suggestion that the lower end of mid-band spectrum should be 2.5 GHz and not 1 GHz.

We also seek comment on AT&T’s request that the Commission undertake case-by-case review of long-form license applications rather than adopt *ex ante* limits. We also request comment on AT&T’s assertion that the Commission play a greater role in structuring spectrum divestitures to require divestitures of contiguous spectrum. Specifically, we seek comment on AT&T’s “fix it first” approach as set forth in its petition, which proposes that the Commission would condition its approval of an acquisition on its approval of a divestiture transaction to address any competitive risks posed by the acquisition.²⁸ Should the Commission consider alternative proposals for structuring spectrum divestitures?

Mobile Spectrum Holdings Rules and Policies. In addition, we seek comment generally on whether and how we should recommend to the Commission that it propose additional amendments to its mobile spectrum holdings rules and policies, in light of evolutions in technology and market dynamics. We seek comment on amendments to the Commission’s rules or policies that might promote competition in the wireless marketplace to ensure that there is sufficient spectrum available for multiple existing mobile service providers as well as potential entrants. We invite comment on how the Commission’s policies and rules might preserve and promote competition, while also affording interested parties greater certainty, transparency, and predictability to make investment and transactional decisions. We seek comment on whether the Commission should modify its market definitions or other factors examined in

²⁰ AT&T Mid-Band Screen Petition at 1.

²¹ AT&T Mid-Band Screen Petition at 17-21.

²² AT&T Mid-Band Screen Petition at 1, 15.

²³ AT&T Mid-Band Screen Petition at 15.

²⁴ AT&T Mid-Band Screen Petition at 6.

²⁵ AT&T Mid-Band Screen Petition at 6, 23.

²⁶ AT&T Mid-Band Screen Petition at 6.

²⁷ AT&T Mid-Band Screen Petition at 2.

²⁸ AT&T Mid-Band Screen Petition at 27.

its competitive analysis for secondary market transactions. We seek comment on whether and how we should recommend to the Commission to take technological advances or other developing frameworks into account.

We seek comment on whether and how we should recommend that the Commission make changes to the spectrum screen that applies to the review of proposed transactions. For example, should we recommend to the Commission that it update the spectrum bands that are included in that spectrum screen, or adjust the approximate one-third trigger for the spectrum screen that the Commission currently applies? Are there other factors that the Commission should consider in establishing the spectrum screen trigger? Should we recommend to the Commission that it make changes to the standards that it applies to review proposed transactions involving specific band ranges, such as “enhanced factor review” for certain below-1-GHz spectrum aggregations or the separate mmW threshold for mmW spectrum bands? How should the Commission address spectrum aggregation as new bands become available? In the *Mobile Spectrum Holdings Report and Order*, the Commission stated that spectrum weighting had the potential to enhance our competitive analysis of proposed spectrum acquisitions. We seek comment on whether the Commission should consider spectrum weighting and, if so, what specific weighted factors should be considered.²⁹ Additionally, should we recommend to the Commission that it consider other factors, such as contiguity of spectrum holdings, in its evaluation of proposed secondary market transactions?

We also seek comment on whether and how we should recommend to the Commission that it make changes to the mobile spectrum holdings policies that apply at the initial licensing stage. For example, should there be more uniformity in applying *ex ante* bright-line limits (either band-specific or in the aggregate across multiple bands) or *ex post* case-by-case review to spectrum?

Further, we seek comment on whether and how we should recommend to the Commission that it reevaluate its attribution rules for determining ownership of mobile spectrum holdings.³⁰ We also request comment on whether and how we could recommend to the Commission that it evaluate the effectiveness of the various remedies it uses (such as spectrum divestitures) to facilitate the Commission’s goals of diverse spectrum ownership and ensuring a competitive marketplace. We seek comment on whether and how we should recommend to the Commission that it evaluate how its mobile spectrum holding policies and rules can promote competition in rural areas presently and in the future,³¹ as well as in urban areas, and how these policies and rules can help to bring affordable, reliable, high-speed broadband to everyone in the country. Finally, we seek comment on policies that we could recommend to the Commission to address digital equity concerns through its spectrum holding policies.

For this proceeding, we herein open a docket and assign a rulemaking number, as is typically assigned to petitions for rulemaking.

Filing Requirements. Pursuant to sections 1.403 and 1.405 of the Commission's rules,³² interested parties may file comments and reply comments on or before the dates indicated above and must

²⁹ *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6236, para. 274.

³⁰ 47 CFR § 20.22(b).

³¹ In November 2021, the Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States adopted a report that included a recommendation that the Commission address policies to facilitate access to spectrum in rural areas. Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States Adopted Report (Nov. 10, 2021), <https://www.fcc.gov/sites/default/files/precision-ag-report-11102021.pdf>. The Precision Agriculture Connectivity Task Force arose out of the Farm Bill of 2018 and continues until January 2025. Agriculture Improvement Act of 2018, Pub. L. 115-334, 132 Stat 4490, Section 12511 (Dec. 20, 2018).

³² 47 CFR §§ 1.403, 1.405.

reference WT Docket No. 23-319. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.³³

- *Electronic Filers*: Comments may be filed electronically using the Internet by accessing the ECFS: <https://www.fcc.gov/ecfs>.
- *Paper Filers*: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
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- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.³⁴

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Ex Parte Rules. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.³⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with section 1.1206(b) of the Commission's rules. In proceedings governed by section 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

³³ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998); 63 FR 24121 (1998).

³⁴ See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (OMD 2020), <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

³⁵ See 47 CFR § 1.1200 *et seq.*

Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

Additional Information. For further information regarding this Public Notice, please contact Monica DeLong, Attorney Advisor, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau, at Monica.DeLong@fcc.gov or Judith Dempsey, Associate Chief, Economic Analysis Division, Office of Economics and Analytics, at Judith.Dempsey@fcc.gov.