



February 2008

Wireless Spectrum, No Strings Attached

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The Commission approved AT&T's purchase of 281 licenses in the C Block of the much sought after 700 MHz band from Aloha Communications. This \$2.5 billion purchase may have spared AT&T from paying even higher prices in the ongoing 700MHz auction.

The transaction is noteworthy because, in approving the transaction, the Commission revised the market concentration threshold in its HHI merger analysis from 70 MHz to 95 MHz. In other words, the FCC will now not deem a wireless acquisition to be presumptively problematic unless the acquirer would be holding at least 95 MHz of wireless spectrum after the transaction closes. Even under this more expansive threshold, 11 markets did not pass the initial screening. However, the FCC found there would be no competitive harm after an individualized analysis and therefore did not require any divestiture.

In fact, the FCC didn't require much of anything at all. The order was unusually brief, a fact pointed out in a dissenting and a concurring opinion. Nowhere to be found were the conditions and public interest discussions in the Commission Orders a few months ago approving AT&T's purchase of Dobson Communication's licenses and ALLTel's privatization. Similarly, the much more recent approval of T-Mobile's acquisition of SunCom Wireless's licenses escaped without imposition of the conditions.

One hallmark of administrative law (or all law, really) is that there should be consistency. That's what precedents are all about – having everyone understand that similarly situated people will be treated the same. The FCC's actions in these recent cases unfortunately leave no one with the ability to predict when or whether special conditions may be imposed on a transaction.