

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)
)
Western Wireless Corporation,)
Transferor, and ALLTEL Corporation,) WT Docket No. 05-50
Transferee,)
) File Nos.: 0002016468, 0002016892,
) 0002016459, 002016476, 0002016889 and
) 0002018539
Applications for Transfer of Control)
Of Licenses and Authorizations)
)
To: The Commission

COMMENTS IN OPPOSITION

The Rural Telecommunications Group, Inc. (“RTG”),¹ by its attorneys and pursuant to Section 309(d) of the Communications Act of 1934, as amended (“Communications Act”),² and Section 1.939 of the Commission’s rules,³ hereby petitions the Federal Communications Commission (“FCC” or “Commission”) to deny the above-referenced applications (“Applications”) of Western Wireless Corporation (“WWC”) seeking Commission approval of the transfer of control of WWC’s license holding subsidiaries to ALLTEL Corporation (“ALLTEL”) (collectively, “Applicants”).

¹ RTG is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. RTG’s members have joined together to speed delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG’s members provide wireless telecommunications services, such as cellular telephone service and Personal Communications Services, among others, to their subscribers. RTG’s members are small businesses serving or seeking to serve secondary, tertiary and rural markets, including markets currently served by Western Wireless Corporation and ALLTEL Corporation. RTG’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies.

² 47 U.S.C. § 309(d).

³ 47 C.F.R. §1.939.

RTG members are concerned about the likely anticompetitive affects which would occur as a direct result of the proposed transaction which would result in the establishment of the nation's largest rural wireless company. Specifically, the acquisition of WWC by ALLTEL will create a post-merger entity with such a large share of market concentration in many wireless markets that it will result in significant harm to consumers in those markets. In addition, the transaction will create the opportunity for ALLTEL to engage in anticompetitive roaming practices. Finally, the Applications do not disclose sufficient information to allow the FCC or parties that will be impacted by the proposed transaction to analyze the transaction. As explained in greater detail below, grant of the Applications is inconsistent with the public interest and the Applications should therefore be dismissed or denied.

I. BACKGROUND

ALLTEL and WWC both provide, among other services, local exchange carrier ("LEC") service and commercial mobile radio service ("CMRS") in numerous regions of the United States. ALLTEL is predominantly in the southeastern portion of the country and the Great Lakes area. WWC operates in 19 states predominantly in the Central and Western portions of the United States.

ALLTEL announced on January 10, 2005 that it would purchase WWC for \$6 billion and filed the above-referenced Applications for Commission consent to the transaction on January 24, 2005. If the transaction is approved, ALLTEL will add 1.4 million domestic subscribers, giving it a total of 10 million domestic subscribers. ALLTEL would also have wireless customers in 33 states and cover a population of 72 million, making ALLTEL the nation's fifth largest wireless carrier and the single largest rural wireless provider.

II. ARGUMENT

A. The Applications Lack Important Information to Identify Spectrum Overlap.

Under the recently eliminated cellular cross interest rule, ALLTEL was prohibited from holding an interest of five percent or more in a cellular license on a different channel block in the same RSA.⁴ However, the Commission eliminated the cellular cross-interest rule in favor of the case-by-case analysis used in reviewing the competitive effects of all assignment and transfer of control applications pursuant to Section 310(d) of the Communications Act.⁵ In addition, the Commission changed its rules to allow a party with a controlling or otherwise attributable interest in a cellular licensee to have a non-controlling or otherwise non-attributable direct or indirect ownership interest of up to and including ten percent in the other cellular licensee in an overlapping CGSA without notification to the Commission. However, the Commission continues to require a party with a controlling interest in one cellular licensee in a CGSA to apply for prior Commission approval of the acquisition of a controlling interest in the other licensee in the market.⁶

RTG agrees that a case-by-case review is important in determining the competitive affects of a transfer of control. However, critical to any Commission review is the availability of sufficient information to allow for a reasoned and educated decision on the competitive impact of

⁴ 47 C.F.R. § 22.942 (2003).

⁵ See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-166 (rel. Sept. 27, 2004) (“*Rural Report and Order*”). The Commission opted to utilize a case-by-case review of aggregations of spectrum and cellular cross interests because it determined that the “the public interest is better served by the benefits of case-by-case review with its greater degree of flexibility to reach the appropriate decision in each case, reduced likelihood of prohibiting beneficial transactions or levels of investment both in urban and rural areas, and ability to account for the particular attributes of a transaction or market.” *Id.* at 38 ¶ 67.

⁶ *Id.* at ¶ 64.

the transaction. Of equal importance, such information must be available to interested parties prior to the deadline for contesting the transaction so that they have sufficient information on which to base the determination as to whether it is necessary to contest the transaction.

In the proposed transaction, the Applications do not disclose the spectrum aggregation for those markets where ALLTEL's proposed ownership of the licensee will be less than ten percent. As a result of ALLETL's omission of this data from the Applications, even though the information is not required, the Applications do not contain sufficient information for prospective petitioners to challenge the transaction. If this were simply an individual market transaction, then such an omission might be understandable, but in light of an FCC merger review, the Applicants should be obligated to be forthcoming with all relevant ownership information, not just the ownership information related to markets where ALLTEL's proposed ownership would be ten percent or more. Moreover, the Applicants indicate that while they intend for the Applications to be complete and to include all of the licenses and authorizations held by the respective licensees that are subject to the transaction, some licenses may have been inadvertently omitted.⁷ Nevertheless, ALLTEL requests that inadvertent omissions be included in the Commission approval.

ALLTEL simply does not provide enough information to the FCC or interested parties to allow for a sufficient analysis. Therefore, the Commission should either deny the Applications or, in the alternative, require the Applicants to supplement their Applications with spectrum aggregation information for those markets where the proposed ownership will be less than ten percent. If the Commission chooses the latter alternative, the proposed transaction should again be put on Public Notice.

⁷ Applications, Exhibit 1 at 19.

B. The Acquisition of WWC by ALLTEL Would Result in Significant Public Interest Harms that are not Outweighed by the Alleged Benefits of the Transaction.

Under Section 310(d) of the Communications Act, the Applicants must demonstrate to the Commission that the proposed transfer of control would serve the public interest. In making this decision, the Commission must weigh the potential public interest harms of the proposed transaction against the public interest benefits to ensure that, on balance, the transaction serves the public interest, convenience and necessity.⁸ In order to make this determination, the Commission considers the competitive effects of the proposed transfers and whether such transfers raise significant anti-competitive issues. Consideration of the competitive effects of the proposed transfer is a key factor in the Commission's public interest analysis.⁹ The Applicants bear the burden of proving that the transaction, on balance, serves the public interest.¹⁰

The harm to consumers caused by the market concentration that would result from the proposed transfer of control will clearly outweigh any alleged benefits to consumers stemming from the transaction. The Applications identify few public benefits from the proposed acquisition. Nor do the Applicants cite to a single service that they will provide consumers that they could not provide as separate entities. The competitive concentration caused by this acquisition will do far more to harm consumers than the alleged benefits of expanding

⁸ *Voicestream Wireless Corporation, Powertel, Inc. Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310 of the Communications Act*, Memorandum Opinion and Order, 16 FCC Rcd 9779, ¶ 17 (2001).

⁹ *General Motors Corporation and The News Corporation Limited General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, ¶ 16, MB Docket No. 03-124, FCC 03-330, (2004) (“*DirecTV Order*”).

¹⁰ *DirecTV Order* at ¶ 15.

ALLTEL's footprint and creating operating synergies. Moreover, there is no evidence to support ALLTEL's claim that advanced services will be deployed more quickly as a result of the merger. When the benefits of the transaction, which are few, are weighed against the competitive harms, which are significant (and which are discussed fully below), it is clear that the proposed transfer of control would not serve the public interest, convenience and necessity and should be dismissed or denied.

1. Wireless market concentration post-transfer will result in harm to wireless consumers.

In conducting a market concentration analysis, the Commission must first identify the relevant market that will be impacted by the proposed transaction. In the *Cingular/AWS Order*, the Commission used the hypothetical monopolist test, which requires identifying the smallest geographic area in which a hypothetical monopolist could profitably and permanently impose a small but significant price increase, and concluded that interconnected mobile voice and data services should be analyzed in the context of a combined voice and data market for mobile telephony services.¹¹ Moreover, the Commission found that the proper geographic market was a local, not national, one.¹² Accordingly, the relevant market that the Commission must consider in the proposed transaction is not the nationwide market, but rather the local market.

The Commission has found that the degree of concentration in a market provides insight into the competitive impact of a particular transaction.¹³ In conducting its market analysis the Commission analyzes carrier data by two sets of geographic areas, Component Economic Areas

¹¹ *In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, ¶ 74, WT Docket No. 04-70, et. al., FCC 04-255 (October 22, 2004) (“*Cingular/AWS Order*”).

¹² *Id.* at ¶ 86.

¹³ *Id.* at ¶ 96.

(CEAs) and Cellular Market Areas (CMAs).¹⁴ The Commission determines those markets that raise special concern and require further scrutiny by identifying those CMAs and CEAs that would increase the applicant's spectrum holdings to 70 MHz or more.¹⁵

The Applicants assure the Commission that after the acquisition competition will be strong and the transfer of control will not adversely affect the wireless telephony market.¹⁶ However, market data indicates that the acquisition will result in market concentration requiring special Commission scrutiny. Specifically, the Applicants identify 27 CMAs and 39 CEAs where there is market overlap between the Applicants. In a number of these markets, post-merger, ALLTEL would hold 70 MHz of spectrum. Given this level of market power – ALLTEL would have more than one-third of the spectrum available in the market – ALLTEL would have many anticompetitive opportunities and incentives. Moreover, this level of market concentration would create a potential barrier to entry impeding new competitors. Market spectrum is already expensive, but if the transaction is approved, then spectrum in those markets where ALLTEL holds more than 70 MHz of the available spectrum will be at even more of a premium. Since additional spectrum is necessary to deploy additional services, and the new entity will hold over one-third of the available spectrum in many markets, carriers that wish to expand their service offerings may find it difficult to do so.

The Commission noted in the *Cingular/AWS Order* that it is as concerned with the harm market consolidation causes to consumers as to particular carriers.¹⁷ Consumers will suffer as a result of a lack of market competition. Specifically, in those areas where there is market overlap

¹⁴ *Id.* at ¶ 104.

¹⁵ *Id.* at ¶ 109.

¹⁶ Applications, Exhibit 1 at 10.

¹⁷ See *AT&T/Cingular Order* at ¶ 181.

between ALLTEL's current licenses and those it is acquiring from WWC, a competitor will be eliminated. Eliminating a competitor in small and rural markets will reduce pricing pressures to the detriment of consumers. Moreover, as discussed more fully below, this concern is compounded by the fact that some carriers are dependent on competitors for access to the market through roaming agreements.

2. Acquisition of WWC would allow ALLTEL to engage in anticompetitive roaming practices.

The Commission should not be persuaded by the Applicants' argument that regional and local carriers can readily provide nationwide coverage.¹⁸ Quite to the contrary, regional and local carriers offer a small footprint and are therefore limited to partnering with other carriers, like ALLTEL and WWC, through automatic roaming agreements. As the Commission accurately noted, the ability to enter into roaming partnerships in a given geographic market is limited by technological incompatibility and frequency bands.¹⁹ Therefore, a small or regional carrier's coverage is only as good as the coverage area it is able to provide through roaming agreements with other technologically compatible carriers. Any obstacles small and rural carriers face in entering into roaming agreements with other carriers may result in an inability to provide additional coverage. Since coverage area is a priority for consumers when selecting a wireless provider, wireless carriers with limited coverage area are at a competitive disadvantage and eventually face elimination altogether. If rural carriers are effectively forced to sit on the market sidelines, or are eliminated, competition is lessened and consumers pay the price.

The two-to-one reduction in analog carriers in many markets will result in a significant adverse effect on the roaming market. As a number of carriers and organizations have indicated,

¹⁸ Applications, Exhibit 1 at 12.

¹⁹ See *AT&T/Cingular Order* at ¶ 175.

market consolidation might cause larger carriers to engage in discriminatory acts such as charging rural carriers roaming premiums, leveraging increased subscriber share to exact discriminatory roaming rates, or favoring one another in “sweetheart” roaming agreements.²⁰ Such actions have caused a substantial loss of revenue to rural wireless carriers who are often the only source for wireless service in the truly rural parts of the nation. These discriminatory acts are only exacerbated by further market consolidation, which has had the effect of lessening competition in rural areas. Additionally, since ALLTEL is under no obligation to enter into automatic roaming agreements and small rural carriers are generally viewed as unimportant to the larger carriers’ business plans, rural carriers may be unable to enter into automatic roaming agreements with ALLTEL.

The Commission must fully consider the impact of the proposed transaction on rural carriers and the subscribers that they serve and deny the Applications. At a minimum, the Commission should condition the proposed merger to require that ALLTEL allow roaming access to the merged network by all carriers at rates no less favorable than it has been charging WWC since the merger was announced.

²⁰ *Id.* at ¶ 171. *See also* Kaplan Telephone Company, Informal Objection and Request for Commission Action, WT Docket No. 04-70, filed September 27, 2004; Public Service Communications, Notice of Ex Parte Presentation, WT Docket No. 04-70, filed September 9, 2004; Snake River Personal Communications Services, Informal Request for Commission Action, WT Docket No. 04-264, filed September 13, 2004.

CERTIFICATE OF SERVICE

I, Linda L. Braboy, with the law firm of Bennet & Bennet, PLLC, hereby certify that copies of the foregoing Comments in Opposition were served this 9th day of March, 2005, by U.S. Mail unless otherwise indicated on the following:

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