

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Implementation of the Commercial Spectrum)	WT Docket No. 05-211
Enhancement Act and Modernization of the)	
Commission's Competitive Bidding Rules and)	
Procedures)	

REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby submits its Reply Comments in the above-captioned proceeding.¹ Verizon Wireless agrees with those commenters that urge the Commission not to make any additional changes to its recently adopted rules governing designated entities (“DEs”).² Further changes are clearly premature. The Commission should allow time to assess the impact and effectiveness of those very new rules before it considers whether to make still more changes to the DE program. In addition, Verizon Wireless opposes Leap Wireless’ attempt to resurrect its proposal for a spectrum aggregation limit, this time applicable to the 700 MHz spectrum and all future auctions.³ The Commission rightly did not adopt that proposal before, and there is no basis to take the proposal up again.

¹ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd. 4753 (2006) (“Second Further Notice”). All comments of other parties referenced herein are to the Second Further Notice, unless otherwise noted.

² See, e.g., Comments of CTIA – The Wireless Association

³ See gen. Comments of Leap Wireless International, Inc.

I. THE COMMISSION SHOULD NOT MAKE ANY ADDITIONAL CHANGES TO ITS DESIGNATED ENTITY RULES.

In its initial comments in this proceeding, Verizon Wireless challenged the proposal for a designated entity (“DE”) eligibility restriction denying bidding credits to otherwise qualified DEs that have a “material relationship” with “large in-region incumbent service providers.”⁴ Verizon Wireless explained why imposing additional restrictions on relationships with a particular class of businesses would not address the Commission’s stated concerns about the DE program, but would conflict with its consistent findings on CMRS competition.⁵ The Commission clearly agrees with this view. As it states in the Second Further Notice, “[w]e now have a competitive wireless marketplace and any revisions to the designated entity rules that we seek to implement are for *the purpose of ensuring that designated entity benefits do not flow to ineligible entities.*”⁶ Yet, despite this strong statement to the contrary, many of the issues on which the Commission again seeks comment stem from the notion that the Commission should limit the aggregation of spectrum by certain DEs for competitive reasons.

As several commenters note, however, the Commission already has taken important steps in its recent Second Report and Order to address concerns that DE benefits not flow to ineligible entities.⁷ The Commission’s goals in this proceeding are to ensure a DE is bona fide and that it, rather than its partners, build and provide service. They have nothing to do with placing new restrictions on the specific entities with which a DE can partner. The fact that a DE is partnering

⁴ Comments of Verizon Wireless, WT Docket No. 05-211 (filed Feb. 24, 2006) (“Verizon Wireless Comments”) at 6-12.

⁵ *Id.* at 6-7.

⁶ Second Further Notice, ¶ 69 (emphasis added).

⁷ Comments of CTIA at 1-2, Comments of Cook Inlet Region, Inc. at 1.

with a large wireless carrier says nothing about whether the DE is bona fide or not – any more than a DE who happens to partner with smaller entity will be bona fide.

Put another way, an entity’s decision to partner with an investor who happens to fall below a “gross revenues” threshold says absolutely nothing about whether that entity will or will not exercise both *de jure* and *de facto* control, whether its agreements with that investor qualify under existing rules, or whether it will ever provide service to the public. Similarly, a DE can partner with a large wireless carrier, yet achieve all of the goals the Commission has set for its DE program.

Once again, the FCC suggests that it might limit the restrictions only to DEs with partners with revenues above a certain threshold⁸ and with particular spectrum interests, “for instance those that have licenses for ‘commercial mobile radio services spectrum’”⁹ However, restricting a DE’s ability to partner with an incumbent large wireless carrier, but not with other wireless carriers or other companies, will have no impact on whether that DE is legitimate or whether the Commission’s objectives for small businesses are fulfilled, but will only deprive DEs of access to capital from some experienced operators.

As Verizon Wireless noted in earlier comments to this proceeding, if the Commission decides to reform the program further, it should further limit small business discounts, by not permitting a DE with *any* large company investment, not just communications company investment, to take advantage of such discounts.¹⁰ Furthermore, the choice of any revenue threshold, except one that has been long tested such as the Entrepreneurs’ Block threshold of

⁸ Second Further Notice, ¶ 61.

⁹ Second Further Notice, ¶ 62.

¹⁰ Verizon Wireless Comments at 14-17.

\$125 million, is completely arbitrary, with no factual or public interest basis. Setting such an artificial threshold of \$5 billion, or even \$1 billion, would need to be based on a factual finding that a greater potential for abuse exists in relationships with companies with revenues above these amounts, but there is no record support for the Commission to make such a finding.

The Commission also strongly implies that entities with spectrum are more likely than those without to unlawfully influence the behavior of a DE.¹¹ Limiting DE relationships with entities that hold CMRS spectrum is nothing more than a spectrum aggregation cap, which has no purpose now that the CMRS market is effectively competitive. Moreover, in an era of multiple, overlapping geographic licenses, the rules to implement such a cap would be needlessly complicated and burdensome, and ultimately would do nothing to further the Commission's goal to ensure that these small business programs not be subject to potential abuse from large corporate entities.¹² Neither the FCC, nor any of the commenters, provides facts showing that existing CMRS providers are more likely than any other entity to abuse the program. Indeed it could be argued that those with spectrum assets have much more to lose from taking unlawful control over its designated entity partner. Clearly, the right course is the one the Commission has already chosen, which is to adopt changes that affect *all* DEs and *all* DE partners.

Verizon Wireless agrees with CTIA and others that correctly argue that the Commission should not reinstitute a "personal net worth" test.¹³ Such a limitation not only excludes individuals that likely have the CMRS business experience to be successful, and have the

¹¹ Second Further Notice, ¶ 81.

¹² *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Further Notice of Proposed Rulemaking, 21 FCC Rcd. 1753, ¶ 10 (2006).

¹³ See Comments of CTIA at 10.

financial means to make meaningful personal investments in the DE, it also does nothing to prevent situations where non-qualified investors seek to fraudulently control the DE. To the extent that the FCC and others have found evidence of abuse of the DE rules,¹⁴ these cases have not involved abuse of this longstanding exception to the financial control test.

II. THE COMMISSION SHOULD NOT REINSTITUTE A SPECTRUM CAP OF ANY KIND.

Even after the Commission correctly chose not to respond to Leap's untimely filed pleading,¹⁵ Leap once again has submitted its proposal that the Commission adopt a spectrum aggregation cap, this time for the 700 MHz and future auctions, and has included by reference its first filing in this proceeding. As Verizon Wireless noted previously,¹⁶ Leap's filing is a meritless attempt to transform this proceeding, which is focused on designated entity rules, into a full-blown reconsideration of spectrum aggregation limits. Leap's proposal is essentially an untimely petition for reconsideration of a 2001 order removing the spectrum cap and a 2003 order rejecting spectrum aggregation limits in the AWS Auction, and goes far outside the limited scope of this rulemaking, and is procedurally defective on this basis alone. But even were the proposal timely, Leap fails to demonstrate a change in competitive conditions that warrants revisiting the Commission's long-final decision to sunset the spectrum cap. Leap adds nothing to its arguments with its few sentences asserting the recent Advanced Wireless Service ("AWS")

¹⁴ See, e.g., *Application of Baker Creek Communications, L.P.*, Memorandum Opinion and Order, 13 FCC Rcd. 18,709 (1998), *order issued by Application of Baker Creek Communications, L.P.*, Order, 14 FCC Rcd. 11,529 (1999).

¹⁵ See, *gen.* Further Notice.

¹⁶ Reply Comments of Verizon Wireless, WT Docket No. 05-211, (filed March 3, 2006) ("Verizon Wireless Replies").

auction further consolidated the market.¹⁷ Indeed, as recently as three weeks ago the Commission held that the CMRS market is effectively competitive.¹⁸ To the extent Leap cites to the Commission's recent wireless merger orders to claim concentration in the CMRS market, those authorities are misused – a systemic problem with Leap's comments.¹⁹ In each of those cases, agency consent to the proposed transaction was based on a finding that, with limited conditions, the transaction was consistent with the public interest and *not* harmful to competition. Accordingly the Commission should reject Leap's call for re-imposition of the spectrum cap.

Leap's proposal for a one-time spectrum cap applicable to the 700 MHz and future auctions also ignores the Commission's grounds for sunset of the spectrum cap – vigorous

¹⁷ Leap asserts that prior to the AWS auction the top five carriers had ninety percent of the nation's MHz pops, and that those carriers have now acquired \$8 billion dollars worth of new spectrum. Leap Comments at 2. On their face these facts prove nothing. Not only is Leap making an "apples to oranges" comparison (MHz pops acquired versus dollars paid for spectrum), it fails to note that \$8 billion is barely half of the total of nearly \$14 billion worth of spectrum sold. Leap also ignores the fact that the second largest bidder in terms of licenses won and third largest bidder in terms of dollars bid, a consortium of cable companies, held no CMRS spectrum prior to Auction 66. Moreover, 104 different entities acquired spectrum in this auction, including at least 40 rural telcos. Finally, the addition of 90 MHz on top of the existing 180 MHz of spectrum previously made available for mobile wireless services necessarily reduces the percentage of spectrum held by most entities.

¹⁸ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eleventh Report, WT Docket No. 06-17 (rel. Sept. 29, 2006) ("Eleventh CMRS Competition Report") (2006).

¹⁹ For example, Leap cites Commissioner Jonathan Adelstein as suggesting that consolidation in the CMRS market, and access by only a limited number of entities to spectrum for 3G, could "impose an economic, cultural, and political agenda" on the public. Comments of Leap Wireless, Attachment 1 at 11 (citing Statement of Commissioner Jonathan S. Adelstein, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503, 2659-60 (2006) ("Twelfth Report"). Commissioner Adelstein said nothing of the kind. The Commissioner's statement does not pertain to wireless or 3G and comments positively on video competition trends. The full statement is: "Vast new distribution networks promise to limit the ability of any vertically integrated conglomerates from imposing an economic, cultural or political agenda on a public with few alternative choices." *Id.*

competition in the CMRS market²⁰ – without showing those conditions have changed. As Verizon Wireless showed in its initial comments, the recent CMRS Competition Report and merger decisions are current and consistent affirmations of a competitive CMRS marketplace.²¹

Notably, Leap does not propose that the cap should apply both in the auction and secondary markets, but to the auction only. If Leap were correct that the alleged CMRS spectrum aggregation warranted Commission intervention, it could have sought a new rule through a petition for rulemaking, but it chose to assert its proposal in the context of setting rules for designated entities to participate in spectrum auctions. Were Leap’s proposal adopted, it would clear the way for companies, such as itself, to purchase licenses and sell them on the secondary market to entities excluded from the auction.²² The prices paid at auction would likely be repressed because the “cap” would prevent many carriers from participating. This would have the effect of funneling dollars that rightfully should go to the U.S. Treasury into the hands of private parties.

In its initial comments, Leap relied on its ERS Report, filed in another proceeding, to show that “nationwide carriers’ relative share of the CMRS market, as compared to regional

²⁰ See *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd. 22,668, ¶ 50 (“We are persuaded that competition is now robust enough in CMRS markets that it is no longer appropriate to impose overbroad, *a priori* limits on spectrum aggregation that may prevent transactions that are in the public interest.”)

²¹ See Verizon Wireless Comments at 6-7.

²² This is a likely scenario for Leap, in that it has recently indicated its intent to sell a portion of its recently won, and not yet licensed AWS spectrum. See Paul Kirby, *Leap May Sell Some Spectrum Won In Recent AWS Auction*, TR Daily, Oct. 5, 2006.

carriers, is steadily increasing.”²³ Leap also argues that, after the Sprint-Nextel transaction, the nationwide carriers will have more subscribers than the regional, small and rural carriers combined.²⁴ Again, neither finding, if true, demonstrates the need for a spectrum aggregation limit. Leap’s argument conflates the FCC’s legitimate interest in protecting *competition* with an interest in protecting *competitors*. Without additional information about the number of competitors in a particular market and their market shares, it is not even the beginning of a competitive analysis. Even if such evidence and arguments were appropriate to raise here, which they are not, the Commission must reject calls for re-imposition of the spectrum cap that fail to show any change in the competitive conditions that justified the cap’s elimination.

The Commission should also note that Leap's assertions about a supposed lack of wireless competition stand in direct conflict with its own position before the California Public Utilities Commission (CPUC). Over the past two years, Leap, through its subsidiary Cricket Communications, Inc., repeatedly joined other wireless carriers in arguing that no new CPUC rules were needed, because consumers were protected by market forces in the vigorously competitive wireless industry. For example, Cricket's joint comments with other carriers in March 2005 stated, "A good part of the explosion in wireless usage must be credited to the high degree of competition within the wireless market, and the concomitant benefits such competition confers upon consumers. ... Moreover, the high level of competition in the wireless industry

²³ See Comments of Leap Wireless, Attachment 1 at 7 (citing “Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service: An Economic Analysis” (November 2005) (“ERS Report”) at 5).

²⁴ Comments of Leap Wireless, Attachment 1 at 7-8.

continues to drive the creation and marketing of new and innovative wireless products.”²⁵

Cricket joined other wireless carriers in filing similar comments throughout the CPUC's docket, which consistently pointed to strong wireless competition as driving benefits to consumers. As best as Verizon Wireless can determine, however, neither Cricket nor Leap ever retracted their position before the California Commission that the wireless industry is vigorously competitive.

III. CONCLUSION

Verizon Wireless urges the Commission not to adopt any new DE rules, and to reject Leap's proposal to impose a spectrum aggregation limit.

Respectfully submitted,

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²⁵ Comments of Cingular Wireless, LLC, Cricket Communications, Inc., Nextel of California Inc., Omnipoint Communications, Inc., Sprint Telephony PCS, L.P., Sprint Spectrum, L.P., Verizon Wireless and CTIA, on Assigned Commissioner's Ruling, CPUC Docket 00-02-004, March 25, 2006, at 2-3.