

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
)
RURAL CELLULAR CORPORATION and)
) DA 07-4192
CELLCO PARTNERSHIP d/b/a VERIZON)
WIRELESS) WT Docket No. 07-208
)
for Consent to Transfer Control of Licenses and)
Authorizations)
)
File No. 0003155487, *et al.*)

**SUPPLEMENT TO PETITION TO CONDITION APPROVAL OR DENY
OF THE
VERMONT DEPARTMENT OF PUBLIC SERVICE**

I. INTRODUCTION

Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”) and Rural Cellular Corporation (“RCC”) (collectively, “the Applicants”) have filed a series of applications pursuant to Sections 214 and 310(d) of the Communications Act, as amended, seeking Commission approval of the transfer of control of licenses, authorizations and spectrum manager leases held by RCC and its subsidiaries from RCC to a wholly-owned indirect subsidiary of Verizon Wireless (“Application”).¹ In response, this Commission issued a public notice creating a pleading cycle establishing November 13, 2007, as the petition to deny deadline.² However, on

¹ *Verizon Wireless and Rural Cellular Corporation Seek FCC Consent to Transfer Control of Licenses, Spectrum Manager Leases and Authorizations*, WT Docket No. 07-208, Public Notice (DA 07-4192, rel. Oct. 11, 2007) (“Public Notice”).

² *Id.*

November 13, 2007, the Commission extended the petition to deny deadline to February 11, 2008.³

The Vermont Department of Public Service (“the Department of Public Service” or “the Department”) is an executive branch agency in the State of Vermont with the mission of representing the public interest of the state in matters regarding energy, telecommunications, and water, including before the Vermont Public Service Board and federal regulatory agencies such as the Commission. On November 13, 2008, the Department filed a Petition to Condition Approval or Deny the Application (“Petition to Deny”).⁴ The Petition to Deny was timely filed, was accompanied by the required verification, and was served on the Applicants. The Department has standing under Section 309(d)(1) of the Communications Act.⁵ The Petition to Deny is incorporated herein by reference.

Material developments have occurred since the Department filed the Petition to Deny. First, Verizon Wireless has filed pleadings and notices concerning planned divestitures of certain overlapping cellular licenses. Second, since the Application was filed, the Commission changed the initial screen used in evaluating the impact of proposed transactions on individual local markets, but not in a way that would impact the results here. Finally, Verizon Wireless is currently participating in Auction No. 73 and could acquire spectrum that may increase the

³ *Verizon Wireless and Rural Cellular Corporation Seek FCC Consent to Transfer Control of Licenses, Spectrum Manager Leases and Authorizations*, WT Docket No. 07-208, Order (DA 07-4604, rel. Nov. 13, 2007) (“Order Extending Pleading Cycle”).

⁴ *Verizon Wireless and Rural Cellular Corporation Seek FCC Consent to Transfer Control of Licenses, Spectrum Manager Leases and Authorizations*, WT Docket No. 07-208, Petition to Condition Approval or Deny of the Vermont Department of Public Service (filed Nov. 13, 2007.)

⁵ *See* 47 U.S.C. § 309(d)(1)(2000). The Department can demonstrate that an injury will occur if the Application was approved as filed, and proposes possible preemptive solutions: denial of the Application, divestiture of the Vermont CMAs or conditions related to preserving and protecting the GSM network in Vermont.

competitive impacts of the Transaction. As a result of these developments, the Department seeks to supplement the Petition to Deny.

II. SUMMARY OF VERMONT DEPARTMENT OF PUBLIC SERVICE PETITION TO CONDITION APPROVAL OR DENY AND OTHER FILINGS OF RECORD

A. The Department's Petition to Condition Approval or Deny

The Department's Petition to Deny enumerates why the Transaction falls short of meeting the public interest standard required for Commission approval. The Department's main concern is that approval of the Transaction could result in the potential abandonment or degradation of Vermont's only GSM network. This is because the Applicants intend to overlay RCC's network with CDMA technology and then discontinue RCC's GSM network, the only GSM network in Vermont. The discontinuation of the GSM network severely threatens not only competition in the market for wireless telephone service in the State of Vermont, but the availability of mobile service at all to Vermont vacationers and business travelers with GSM handsets.

Moreover, the Application falls short of the public interest standard because certain of the claimed benefits that would result from the Transaction should be discounted. For instance, the Applicants' claimed benefit of improved service quality is not likely to be immediately available post-transaction. Instead, the Transaction could compromise Vermont's continuing progress to improve wireless telephone service across the state. Claimed benefits of improved service quality should not weigh against potential harms, such as the likelihood that Verizon Wireless will abandon the GSM network entirely, fail to upgrade or maintain it at current levels, or exert monopoly control over access to it. The Commission must ensure that, post-transaction and any

proposed transition period, visitors to the State of Vermont with GSM handsets are not cut-off from mobile phone service and have access to emergency services using their mobile phones.

The Commission should require that all of RCC's Vermont licenses be divested. Such divestiture should be structured in a manner that preserves Vermont's existing GSM network. Should divestiture of the Vermont CMAs not be a condition of approval, the Commission should require that Verizon Wireless maintain the existing GSM network in Vermont at the current level of investment for a period of at least six years. Without these conditions, the Application should be denied.

Many of the reasons set forth in the Petition to Deny, filed November 13, 2007, remain valid as to why without conditions, the Transaction seriously threatens the public interest.

B. The Department's Comments Filed in Response to Verizon Wireless' Petition for Reconsideration.

On November 16, 2007, Verizon Wireless filed a Petition for Reconsideration requesting that the Wireless Telecommunications Bureau reconsider its Order granting a ninety (90) day extension of the comment cycle in this proceeding.⁶ The Recon Petition revealed Verizon Wireless' commitment to the Department of Justice to divest RCC's cellular operations that overlap with those of Verizon Wireless.⁷ The Department filed Comments in response.⁸

In its Comments, the Department noted that a transaction that would enable one entity to control all cellular spectrum in any market is likely to "substantially lessen competition" and thus

⁶ *Rural Cellular Corp. and Cellco Partnership d/b/a Verizon Wireless for Consent To The Transfer Of Control Of Commission Licenses And Authorizations*, WT Docket No. 07-208, Order (DA 07-4604, rel. Nov. 13, 2007); see also *Rural Cellular Corp. and Cellco Partnership d/b/a Verizon Wireless for Consent To The Transfer Of Control Of Commission Licenses And Authorizations*, WT Docket No. 07-208, Verizon Wireless Petition for Reconsideration (filed Nov. 16, 2007) ("Recon Petition").

⁷ Recon Petition at p. 2.

⁸ *Cellco Partnership d/b/a Verizon Wireless for Consent To The Transfer Of Control Of Commission Licenses And Authorizations*, WT Docket No. 07-208, Comments of the Vermont Department of Public Service (filed Nov. 26, 2007) ("Comments").

require Clayton Act Review.⁹ The Department stated that Verizon Wireless' announcement of its divestiture plans left unresolved significant concerns expressed in the Petition to Deny. First, the divestiture plans were not formalized in any way.¹⁰ Second, the divestiture plans did not ensure the operation and maintenance of the GSM network in the entire State of Vermont, the primary concern of the Petition to Deny.¹¹ Specifically, the "divestiture plan" would leave Bennington, Windham, and southern Windsor counties with no GSM operator.¹²

Enabling Verizon Wireless to acquire RCC's cellular license in Bennington, Windham, and southern Windsor counties raises serious issues for competition, public safety, and economic development.¹³ In these counties where Verizon holds PCS spectrum and is planning to acquire RCC's cellular license, RCC is the only GSM operator. If Verizon Wireless, partial to CDMA technology, were to acquire the RCC cellular licenses in that area, it would only make sense for them to convert them to CDMA, leaving no licensees providing GSM service, and no available cellular spectrum for use in the provision of GSM service.¹⁴ For these reasons, the Department questioned whether the divestiture plan contained in Verizon Wireless' Recon Petition resolved the serious public interest threats posed by the Transaction.¹⁵

⁹ *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket 04-70, *Memorandum Opinion and Order* (FCC 04-255, rel. Oct. 26, 2003) ("*Cingular/AT&T Order*") at ¶ 39 (citing 15 U.S.C. § 18).

¹⁰ Comments at p. 3.

¹¹ *Id.*

¹² *Id.* at pp. 3-4.

¹³ *Id.* at p. 3.

¹⁴ *Id.*

¹⁵ *See generally, id.*

C. The Department's Response to Verizon Wireless' December 5 Letter

On December 5, 2007, Verizon Wireless filed a letter advising the Commission that on December 3, 2007, Verizon Wireless entered into a definitive agreement with AT&T to transfer overlapping cellular licenses, those RCC cellular licenses that overlap with those of Verizon Wireless, to AT&T, a carrier that employs GSM technology.¹⁶ Verizon Wireless confirmed that the license “swap” would not involve Bennington, Windham and part of Windsor counties in Vermont and stated that “Verizon wireless will continue to provide GSM service in this area until a GSM operator *begins to offer service there.*”¹⁷ In response, the Department noted its interest in gaining a better understanding of Verizon Wireless' commitment to maintain the GSM network in these Southern Vermont counties, because absent divestiture its concern about GSM handsets not working post-transaction remains.¹⁸

III. DEPARTMENT OF PUBLIC SERVICE RESPONSE TO MATERIAL DEVELOPMENTS SINCE INITIAL PETITION TO DENY DEADLINE

To date, Verizon Wireless' stated divestiture plans do not appear to mitigate all of the Department's concerns set forth in the Petition to Deny.¹⁹ Having filed the Petition to Deny some three months ago, the Department seeks to respond to interim developments.

Recently, in approaching similar transactions, the Commission applied a less stringent spectrum screen to flag individual markets for further review.²⁰ This change in Commission

¹⁶ See Letter of John C. Scott, III of Verizon Wireless to Marlene H. Dortch, WT Docket No. 07-208 (filed Dec. 5, 2007) at p. 1 (“Dec. 5th Letter”).

¹⁷ *Id* at p. 3 (emphasis added).

¹⁸ Letter of Holly Rachel Smith to Marlene H. Dortch, WT Docket No. 07-208 (filed Dec. 11, 2007).

¹⁹ On February 11, the petition to deny deadline here, Verizon Wireless notified the Department that it had filed some of the applications needed to effectuate the divestitures described in the Dec. 5th Letter and provided copies of some related documents.

²⁰ *Application of Aloha Spectrum Holdings Company LLC (Assignor) and AT&T Mobility II LLC (Assignee) seeking FCC Consent for Assignment of Licenses and Authorizations*, WT Docket No. 07-26, Memorandum Opinion and Order (FCC No. 08-26, rel. Feb. 4, 2008) at ¶ 10; and *Applications of AT&T, Inc. and Dobson Communications*

policy has no impact on the issues raised in the Petition to Deny for two reasons. First, a market-by-market analysis is not required to show that this Transaction would result in public harm. A public harm of the magnitude of potentially leaving an entire state devoid of a reliable GSM network could never be outweighed by any list of proclaimed public interest benefits.²¹

Second, the change in the spectrum screen does not change the result here because the spectrum screen is only one of three separate tests used by the Commission to identify those individual markets for which closer scrutiny on a case-by-case basis is necessary.²² The remaining two tests, based on HHI indexes -- which are extremely high across Vermont markets, would likely result in the Commission performing a case-by-case analysis of all Vermont CMAs that remain part of the Transaction.

A local market analysis of the Vermont CMAs is nonetheless instructive. The Petition to Deny's market-by-market analysis revealed that the Transaction, if approved without conditions, could result in potential harm to competition. In many Vermont counties, the Transaction would result in a reduction in the number of rival wireless carriers from three to two.²³ In the not so

Corporation for Transfer of Control of Licenses and Authorizations, WT Docket No. 07-153, Memorandum Opinion and Order (FCC 07-196, rel. Nov. 19, 2007) (“AT&T/Dobson Order”) at ¶ 39.

²¹ Divestiture of the Vermont CMAs to a GSM carrier is one of several ways to enable the Transaction to meet the statutory public interest standard. Alternatively, the Commission could require that Verizon Wireless maintain the portions of RCC's GSM network in Vermont that it acquires for a period of six years.

²² The Commission has in the past applied a three-part screen to eliminate from case-by-case analysis those markets that would be at least as competitive as the average market today using the following methodology. First, the Commission calculates the HHIs and the change in HHI that would result from a transaction for all CEAs and CMAs. It examines the market further if the post-transaction HHI would be greater than 2800 and the change in HHI would be 100 or greater or if the change in HHI would be 250 or greater regardless of the level of HHI, or if post-transaction, the Applicant holds a certain amount of spectrum. *Cingular/AT&T Order* at ¶ 106. The Commission has in its most recent decisions, employed 95 MHz in applying the third part of the screen.

²³ See *Applications of Western Wireless Corporation and Alltel Corporation*, WT Docket 05-50, Memorandum Opinion and Order (FCC No. 05-138, rel. Jul. 19, 2005) at ¶ 120 (the Commission requested divestiture of the entire Kansas 4 – Marshall CMA because the Transaction would otherwise reduce the number of rivals from three to two in three counties covering 30% of the population of the CMA).

distant past, a transaction that reduced the number of facilities-based wireless providers in a market to three or fewer warranted divestiture.²⁴

The Petition to Deny's market-by-market analysis also revealed that post-Transaction, in most areas of Vermont, a new or existing entrant without an existing network and without A or B block cellular holdings would have difficulty cobbling together enough spectrum to support a GSM platform with true geographic reach in Vermont. In terms of mobile voice service in Vermont "suitable spectrum" types are not interchangeable. In fact, in rural areas, having only PCS spectrum can be a barrier to entry. The Department of Justice agrees:

Due to propagation characteristics of 800 MHz cellular spectrum and 1900 MHz PCS spectrum, the 800 MHz signals can cover a substantially broader area than the 1900 MHz signals. The estimated coverage advantage of the 800 MHz spectrum in rural areas ranges from two to as much as five times greater than PCS. In rural markets, this difference results in higher build-out costs for PCS networks than for cellular networks. The high costs of constructing PCS networks in rural markets combined with the relatively low population density makes it less likely that carriers that own PCS spectrum would build out in the relevant geographic markets.²⁵

The Department of Justice followed similar reasoning in its decision to require divestitures in the AT&T Dobson Transaction, determining that PCS competitors were not equals to those holding the more robust cellular spectrum:

A mobile wireless telecommunications services provider with limited coverage in a geographic area typically does not aggressively market its services in that area because it can service customers only through a roaming arrangement with a more built-out competitor under which it must pay roaming charges to, and rely on, its competitor to maintain the quality of the network and to support new features. The mobile wireless businesses wholly or partly owned by [Applicants (with cellular spectrum)],

²⁴ See AT&T/Dobson Order at Appendix A (requiring divestiture of four Kentucky 6- Madison on grounds that post-transaction there would be three or fewer providers).

²⁵ *US v. Alltel, Competitive Impact Statement*, Case No. 1:05CV01345 (DDC 2005).

accordingly, are, for a large set of customers, likely closer substitutes for each other than the other mobile wireless telecommunications services in these markets provided by firms who own only PCS spectrum.²⁶

Approval of the Transaction absent conditions could stymie competition in Vermont because of the propagation characteristics that limit the substitutability of one type of “suitable spectrum” for another.

Additionally, the results of the Auction No. 73 might need be included with this inquiry. Under the 95 MHz spectrum screen, 700 MHz spectrum is “suitable spectrum” for mobile voice services. Verizon Wireless has filed a short application, and has been determined to be a qualified bidder, in Auction No. 73 for 700 MHz spectrum.²⁷ At minimum, prior to the Transaction closing, Verizon could with a single bid acquire an additional 22 MHz of “suitable” spectrum. By postponing the approval of this Transaction until the licenses included in Auction No. 73 are distributed, the Commission could avoid potentially revisiting these questions again in the immediate future.

* * * * *

Because of recent developments since it filed its Petition to Condition Approval or Deny, the Vermont Department of Public Service respectfully requests that the Commission consider this Supplement, timely filed according to the revised pleading cycle, as part of its Petition to Deny. In the absence of conditions to preserve and protect the GSM network in the State of Vermont, the applications for the transfer of control of licenses, authorizations and spectrum

²⁶ *US v. AT&T, Competitive Impact Statement*, Case No. 1:07CV01952 (DDC 2007).

²⁷ *Auction of 700 MHz Band Licenses*, WT Docket No. 07-157, Public Notice (DA 08-83, rel. Jan. 14, 2008) at Attachment A.

manager leases held by RCC and its subsidiaries from RCC to a wholly-owned indirect subsidiary of Verizon Wireless should be denied.

Respectfully submitted,

_____/s/_____
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February 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing SUPPLEMENT TO PETITION TO DENY to be served via First Class Mail, postage prepaid, upon:

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This 11th day of February, 2008.

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