Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Establish a	)	RM-11498
Spectrum Cap Below 2.3 GHz	)	
	)	

To: The Commission

COMMENTS OF NTCH, INC.

NTCH, Inc., a provider of regional PCS service in diverse parts of the country, hereby offers these comments on the petition of the Rural Telecommunications Group to establish a spectrum cap for holdings below 2.3 GHz. NTCH agrees that a spectrum cap is called for, but we believe that the cap should include spectrum in the entire 2 GHz band, excluding spectrum used primarily for backhaul or other administrative purposes.

The impetus for RTG's petition is quite clear. Over the last five years there has been an accelerating spate of mergers and acquisitions of carriers, primarily by the companies that were already the largest carriers in the wireless business. The Department of Justice has taken an extremely lenient view of what constitutes a reduction in competition, and the Commission has tended to follow Justice's lead in approving such mergers. The result has been that virtually the entire middle tier of wireless carriers have been gobbled up by the big four. While the DoJ does not see this as a diminution of competition, the reality is that these Tier II carriers are the very

entities which might someday have grown large enough through spectrum acquisitions and other growth initiatives to become realistic national competitors. The mergers allowed by the DoJ have forestalled that possibility and effectively entrenched the wireless market in the current oligopolistic structure.

A spectrum cap -- the details of which will be detailed below -- would establish a bright-line, readily discernible, and easily administrable barrier to excessive consolidation. The premise of such cap should be familiar to the Commission from the multiple ownership rules that apply to broadcasters: a concentration of spectrum ownership in any one entity necessarily precludes others from competing effectively in that market. If the Commission has learned anything in recent years, it is that competition is the best regulator. Competition alone serves to drive down prices, improve service quality, and expand service offerings. However, in order for competition to exist and grow, the Commission must ensure that the raw materials for competition remain available. That's what a spectrum cap is all about.

I. Components of the Cap

In its recent analysis of the Verizon-ALLTEL merger, the Commission addressed the components of the wireless spectrum market that must be considered in establishing a spectrum cap. *Applications of Cellco Partnership dba Verizon Wireless and Atlantis Holdings, LLC*, FCC 08-258, rel. November 10, 2008. Briefly, the cap should limit the holdings of any one entity in the range of spectrum that can be used for mobile voice, data or broadband service. The Commission calculated the spectrum available for this purpose to include all cellular, broadband PCS, and SMR spectrum. It also added in 80 MHz of 700 MHz spectrum which will be coming on-line early next year. It then correctly added in spectrum in the AWS-1 band and portions of

the BRS band for an additional 145.5 MHz of spectrum. This adds up to a potential 425.5 MHz of spectrum.

To this we must add several other spectrum blocks. First, it is unclear why the Commission chose in the Verizon/ALLTEL context to exclude MDS channels 1 and the midband channels. These are both useful as data, voice and broadband delivery vehicles (though there are some interference constraints on Channel 1, as there are with many segments of the spectrum). Moreover, the midband will most likely not be used for high-powered operations but will simply be used as another element in the cellular type operations now envisioned for BRS/EBS. This 17.5 MHz of BRS spectrum should properly be included. Secondly, the Commission excluded EBS spectrum from the calculation because such spectrum is somewhat dedicated to educational uses. See *In the Matter of Sprint Nextel Corporation and Clearwire Corporation*, FCC 08-259, rel. November 7, 2008, at Para. 71. However, the fact of the matter is that when excess EBS spectrum is leased for commercial purposes, 95% of the capacity can be, and invariably is, devoted to commercial use. In order to make the spectrum equation honest, therefore, we must include 95% of the EBS spectrum in any market that is leased for commercial purposes. This amount will vary from market to market but it is usually available and is certainly an important component of any broadband spectrum analysis. It would add an additional 106.5 MHz to the spectrum mix. Finally, the Commission must include the 2.3 MHz WCS band in the calculation. The 2.3 band is already coming on line and much more is likely to come on line as build-out deadlines in 2010 loom for the incumbents. These incumbents represent some of the largest wireless spectrum holders in the country: AT&T, Nextwave, Comcast, and Nextel are all WCS license holders. This 30 MHz of spectrum will be used for broadband and associated services. It will therefore be an important element in the provision of

broadband nationally by early to mid-2009. Indeed, some licensees are already providing service over this band. It would make no sense whatsoever to include the 2.5 BRS spectrum in the calculation and exclude 2.3, which is functionally equivalent.

These spectrum classes are or will shortly be used for broadband, data, and voice -- services which are offered to consumers and business end users. We would not include spectrum like point-to-point microwave stations, LMDS, 39 GHz and other spectrum categories that are used primarily for backhaul or other internal uses and are not made available to the consumer in any direct way. What we are concerned with here is not gross spectrum holdings per se but rather spectrum that is offered to the public on a competitive basis and therefore could enhance or chill competition, depending on who owns it.

II. Cap Level

Having established the universe of what we may refer to as "competitive spectrum," what level would be appropriate for a cap. The Commission's analysis in setting up an "initial screen" is useful here. The Commission uses as a rule of thumb the holding of one-third of the available spectrum as a threshold for concern about diminution of competition. *Verizon/ALLTEL* at Para. 54. This benchmark is useful but needs to be broken down into broadband and voice categories to serve our purposes here. The basic principle espoused by the Commission is that if one firm holds a third of the available spectrum, that leaves enough spectrum for two other firms to also hold similar amounts, resulting in three roughly equivalent competitors. This is fine, except that (a) there are usually at least four spectrum-based competitors in today's minimally competitive markets, so there needs to be enough spectrum for *four* competitors, and (b) it is extremely likely that the other three competitors will not be able to amass the same amount of spectrum as the

first spectrum concentrator due to the presence of other smaller carriers, lack of spectrum, interference constraints, and other causes. So in order to foster the potential for at least four carriers with roughly equivalent spectrum holdings, the cap must be set low enough to allow multiple concentrators to exist and high enough for each concentrator to be able to offer a full range of voice and broadband services.

To do that, we must tailor the cap to address discrete spectrum segments -- those that are comprised of primarily voice spectrum on the one hand and primarily broadband spectrum on the other, always recognizing that in today's world there can and will be overlap between the two categories. When wireless communications was primarily voice-oriented, the Commission used 23.8% (roughly one quarter) (45 MHz out of the then available 189 MHz) as the threshold for spectrum holdings.[1] There is no need to deviate from that tried and tested standard. We need only modify the quantum of spectrum to reflect the increased amount of voice-based spectrum in today's market. If we use 200 MHz as today's universe for this category (cellular, broadband PCS and SMR), we can effectively set the voice threshold at 50 MHz of spectrum in the cellular, PCS and SMR bands. This squares well with our theory that there should be sufficient spectrum left available for three other carriers in any market to amass equivalent amounts.

We can apply the same threshold to broadband holdings (700 MHz, BRS, EBS, WCS and AWS). Out of the total of 279.5 MHz of broadband spectrum available, a single holder would be allowed roughly 75 MHz. These reasonable limits would permit any single entity to hold up to

[1] Implementation Of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment Of Mobile Services, GN Docket No. 93-252, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems In The 800 MHz Frequency Band PR Docket No. 93-144, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use Of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz And 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool PR Docket No. 89-553, *Third Report and Order*, 9 FCC Rcd. 7988, Paragraph 258 (1994).

120 MHz of spectrum in any one market -- a huge amount by any measure, yet also small enough to leave a sufficient quantum of spectrum for existing and potential competitors.

III Conclusion

A spectrum cap along the lines discussed above will provide a clear guideline for future acquisitions which will both simplify the Commission's task in assessing mergers and acquisitions and also establish a firm defense to the anti-competitive acquisitions which threaten to completely oligopolize the wireless industry. If there is to be any place at all in the industry for small or medium-sized players, the Commission must take strong steps to prevent further concentration.

Respectfully submitted,

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By _____/s/_____

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