

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of )  
 )  
Rural Telecommunications Group, Inc. )  
 )  
Petition for Rulemaking to Impose a ) RM No. 11498  
Spectrum Aggregation Limit on all )  
Commercial Terrestrial Wireless )  
Spectrum Below 2.3 GHz )  
 )

To: The Commission

**COMMENTS OF UNION TELEPHONE COMPANY**

By:

Shirley S. Fujimoto  
David D. Rines  
McDERMOTT WILL & EMERY LLP  
600 Thirteenth Street, N.W.  
Washington, D.C. 20005-3096  
T: 202.756.8000  
F: 202.756.8087

Attorneys for Union Telephone Company

Dated: December 2, 2008

## **EXECUTIVE SUMMARY**

As a smaller wireless carrier serving mostly rural country in the western United States, Union believes that it would not be appropriate for the Commission to impose a spectrum aggregation limit on wireless carriers and therefore opposes the Petition submitted by the Rural Telecommunications Group (RTG). Union believes that the Commission's current "case-by-case" approach, which takes into account a wide range of factors beyond bandwidth numbers, is the most effective and appropriate means to safeguard and promote competition, encourage diversity among licensees, and provide guidance to carriers' transactional and investment decisions.

In particular, Union is concerned that RTG's requested spectrum cap is too rigid and fails to take into account the wide variety of circumstances and factors that affect competition in each market, as well as how the public interest in each market may best be served. Union is especially concerned that a spectrum cap could have unintended consequences that could deprive regional and rural carriers of the very tools they need to compete with the large nationwide carriers and to provide quality wireless services and coverage to consumers, particularly those in rural areas.

As described in detail in these comments, Union's own experience in the recent 700 MHz auction presents a perfect illustration of the effectiveness of the Commission's use of a spectrum screen and case-by-case review of spectrum aggregation as a means of safeguarding competition while at the same time not inadvertently and arbitrarily preventing a transaction that is in the public interest – namely, the acquisition by a rural carrier of new spectrum that will enable it to provide mobile wireless services, including broadband services, to the rural customer base that it exists to serve. Such an outcome is

possible because the Commission has adopted a system that provides it sufficient flexibility to reach the appropriate decision based on the circumstances of this case.

By contrast, an arbitrary “bright line” spectrum cap would have compelled Union to go through a complicated process of divesting spectrum in one or two counties before bidding on or being granted access to this 700 MHz spectrum in a significant portion of its rural service area, or could have discouraged Union from even entering the 700 MHz auction in the first place. Either way, the result would have been to frustrate or discourage investment by a small rural carrier in spectrum that would allow it to offer a compelling and competitive alternative to the large nationwide carriers and to provide service and coverage to rural consumers.

Moreover, by diminishing Union’s ability to fully utilize its spectrum or to have participated in the 700 MHz auction, a spectrum cap would have undermined the Commission’s statutory objective of “disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies...”, 47 U.S.C. § 309(j)(3)(B).

Accordingly, for the reasons set forth herein, the Commission should reject RTG’s request for a spectrum aggregation limit and should dismiss the Petition.

**TABLE OF CONTENTS**

<b>I.</b>	<b>UNION TELEPHONE COMPANY .....</b>	<b>1</b>
<b>II.</b>	<b>THE COMMISSION SHOULD REFRAIN FROM IMPOSING ANY “BRIGHT LINE” CAP ON SPECTRUM.....</b>	<b>3</b>
	A. The Commission’s Case-by-Case Approach is Effective and Appropriate .....	3
	B. Market Conditions Vary Widely Across the Country, Thus Requiring Flexibility in Any Competition Analysis .....	5
	C. The Commission’s Review of Union’s 700 MHz Application Illustrates Why the Public Interest is Better Served by Case-by- Case Review of All Market Conditions.....	8
<b>III.</b>	<b>CONCLUSION .....</b>	<b>11</b>

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of )  
 )  
Rural Telecommunications Group, Inc. )  
 )  
Petition for Rulemaking to Impose a ) RM No. 11498  
Spectrum Aggregation Limit on all )  
Commercial Terrestrial Wireless )  
Spectrum Below 2.3 GHz )  
 )

To: The Commission

**COMMENTS OF UNION TELEPHONE COMPANY**

Union Telephone Company (“Union”) hereby submits its comments in the above-captioned proceeding regarding the Petition for Rulemaking (“Petition”) filed with the Commission by the Rural Telecommunications Group, Inc. (“RTG”).<sup>1</sup> Specifically, as discussed herein, Union opposes RTG’s request that the Commission impose on wireless carriers a spectrum aggregation limit of 110 MHz of commercial terrestrial wireless spectrum below 2.3 GHz and hereby urges the Commission to dismiss the Petition.

**I. UNION TELEPHONE COMPANY**

Union was founded in 1914 and has a long-standing history of providing vital telecommunications services in underserved rural areas. Based in Mountain View, Wyoming, Union provides local telephone service to approximately twenty-five rural communities in parts of Wyoming, Colorado, and Utah. In 1990, Union expanded to

---

<sup>1</sup> / Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking of Rural Telecommunications Group, Inc. to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz, Public Notice, DA 08-2279 (rel. Oct. 10, 2008) (“Public Notice”).

wireless telecommunications service and now provides, or is licensed to provide, coverage to an area encompassing over 123,611 square miles of mostly rural country.

Although Union commenced operations with only eight cell sites, the demand for cellular service has caused this number to multiply to over 200 cell sites placed throughout Wyoming, northwestern Colorado, and parts of Utah. Besides basic telephone and cellular service, Union also offers long distance, Internet, and cable television service.

Union is the type of wireless carrier that the RTG Petition is apparently seeking to protect. Like the members of RTG, Union is a small rural business “serving or seeking to serve secondary, tertiary, and rural markets.”<sup>2</sup> Union serves an expansive, sparsely populated, and largely rural area, yet it also competes directly with the nationwide carriers. As a smaller rural carrier, Union resides in its service area, is adept at providing the service and coverage that rural consumers desire and need, and can meet its customers’ needs on a personal level.<sup>3</sup>

Nevertheless, Union disagrees with RTG and believes that it would not be appropriate for the Commission to impose a spectrum aggregation limit on wireless carriers. Union believes that the Commission’s current “case-by-case” approach, which takes into account a wide range of factors beyond bandwidth numbers, is the most effective and appropriate means to safeguard and promote competition, encourage diversity among licensees, and provide guidance to carriers’ transactional and investment decisions.

---

<sup>2</sup> / Petition at 6.

<sup>3</sup> / Petition at 19.

Union is concerned that RTG's requested spectrum cap is too rigid and fails to take into account the wide variety of circumstances and factors that affect competition in each market, as well as how the public interest in each market may best be served. Union is especially concerned that a spectrum cap could have unintended consequences that could deprive regional and rural carriers of the very tools they need to compete with the large nationwide carriers and to provide quality wireless services and coverage to consumers, particularly those in rural areas.

## **II. THE COMMISSION SHOULD REFRAIN FROM IMPOSING ANY "BRIGHT LINE" CAP ON SPECTRUM**

The purpose of RTG's request is to rein in the expansion of the nation's largest wireless carriers and provide smaller regional and rural carriers the opportunity to "offer compelling alternatives to the large, nationwide carriers,"<sup>4</sup> particularly in rural areas. However, the adoption of a new "bright line" cap on spectrum is an unnecessarily broad and arbitrary solution that could thwart the very public interest goals that RTG is seeking to achieve.

### **A. The Commission's Case-by-Case Approach is Effective and Appropriate**

Since the sunset of the original spectrum cap in 2003 – as well as the subsequent lifting of the cellular cross-interest rule – the Commission has utilized a case-by-case approach to analyze the competitive effects of wireless transactions. The Commission first applies a two-part initial "screen" consisting of (1) a review of the post-transaction Herfindahl-Hirschman Index ("HHI") of market concentration, and (2) a review of post-

---

<sup>4</sup> / Petition at 18.

transaction spectrum aggregation utilizing an initial spectrum “screen.”<sup>5</sup> This screen is only the first step in the Commission’s review and is used to identify markets that require further case-by-case competitive analysis.

The Commission’s further competitive analysis then looks at additional factors in each market identified by the initial screen, including, but not limited to: (i) the total number of rival service providers; (ii) the number of rival firms that can offer competitive nationwide service plans; (iii) the coverage of the firms’ respective networks; (iv) the rival firms’ market shares; (v) the applicant’s post-transaction market share and how that market share changes as a result of the transaction; (vi) the amount of spectrum suitable for the provision of mobile telephony/broadband services controlled by the applicant; and (vii) the spectrum holdings of each of the rival service providers.<sup>6</sup>

The Commission “balance[s] these factors on a market-specific basis, and consider[s] the totality of the circumstances in each market.”<sup>7</sup> This approach therefore provides the Commission with the flexibility necessary to determine whether a particular wireless transaction is in the public interest and prevents potentially beneficial transactions from being blocked by an across-the-board numerical limit that ignores local market realities and consumer needs. In addition, the Commission’s recent decision to

---

<sup>5</sup> / See, e.g., *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258 (rel. Nov. 10, 2008) ¶ 78 (“*Verizon/Alltel Order*”).

<sup>6</sup> / *Id.* at ¶ 91.

<sup>7</sup> / *Id.*

expand its initial screen and standard competitive analysis to spectrum acquired through auction adds yet another layer of oversight to carriers' spectrum holdings.<sup>8</sup>

While RTG asserts that its Petition is necessitated by increased consolidation in the wireless market, the Petition fails to describe or provide any causal link between this increased consolidation and the Commission's case-by-case competitive review process. The Petition also provides no evidence that the Commission's current approach has failed or is otherwise insufficient and must therefore be replaced by an arbitrary and inflexible "bright line" spectrum cap. In contrast, Union's own recent experience in the 700 MHz auction, which is discussed in more detail in Section II.C. below, demonstrates the effectiveness of the Commission's use of a spectrum screen and case-by-case review of spectrum aggregation as a means of safeguarding competition while at the same time not inadvertently or arbitrarily preventing transactions that are in the public interest.

**B. Market Conditions Vary Widely Across the Country, Thus Requiring Flexibility in Any Competition Analysis**

Although the wireless industry has experienced consolidation in recent years, there is no single "national" market for wireless services, but rather numerous local markets, each with its own distinct characteristics, market profiles, market conditions, and consumer needs. The Commission has long recognized this fact and has thus consistently considered the appropriate geographic market to be local when reviewing wireless transactions for potential competitive effects.<sup>9</sup> With respect to spectrum, the

---

<sup>8</sup> / See *Union Telephone Company and Cellco Partnership d/b/a Verizon Wireless Applications for 700 MHz Band Licenses, Auction No. 73*, File Nos. 0003371176, 0003382435, 0003382444, Memorandum Opinion and Order, FCC 08-257 (rel. Nov. 13, 2008) ¶ 9 ("700 MHz Review Order").

<sup>9</sup> / See, e.g., *Verizon/Alltel Order* at ¶¶ 49-52 and cases cited therein.

geographic fragmentation of the wireless market is further exacerbated by the wide variety of often-overlapping licensing areas that the Commission has used in issuing licenses for various CMRS bands, such as BTAs, RSA/MSAs, EAs, REAs, and REAGs. As a result, a wireless carrier's relative spectrum position – and thus its ability to provide competitive services to local consumers – can vary widely, even over a few miles, depending on the specific types of licenses it holds.

The wide variation in circumstances among local markets demonstrates the need for the Commission to remain flexible to effectively safeguard and promote competition while not “inadvertently discourag[ing] transactions ... that could be found to be in the public interest.”<sup>10</sup> As the Commission stated in 2001, “[W]e conclude that case-by-case review ... is now preferable to the spectrum cap rule because it gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case.”<sup>11</sup>

The Commission has reviewed numerous wireless transactions and has consistently found that “reliance on case-by-case review for aggregation of spectrum and cellular cross-interests better serves the public interest than utilizing a prophylactic rule,” such as the spectrum cap requested by RTG.<sup>12</sup> According to the Commission, “[C]ase-

---

<sup>10</sup> / *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, 19 FCC Rcd 19078, 19115 ¶ 67 (2004) (“*Rural Report and Order*”).

<sup>11</sup> / *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, Report and Order, 16 FCC Rcd 22668, 22693 – 94 ¶ 50 (2001) (“*Spectrum Cap Sunset Order*”).

<sup>12</sup> / *Verizon/Alltel Order* at ¶ 70 (citing the *Rural Report and Order*, 19 FCC Rcd at 19113 ¶ 63).

by-case review [has a] 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 [the] ability to account for the particular attributes of a transaction or market.”<sup>13</sup>

Conversely, “bright line” limits on spectrum aggregation “may prevent transactions that are in the public interest,”<sup>14</sup> especially if such limits were to be applied on a county-by-county basis without regard to other local market conditions. For example, RTG’s Petition describes large nationwide carriers who “simply allow their spectrum in rural areas of the country to lie fallow when there are carriers willing to develop such spectrum.”<sup>15</sup> According to RTG, a spectrum cap would encourage these large carriers “to divest some of their spectrum in rural areas to small, rural carriers who will actually use it.”<sup>16</sup>

But what if the small, rural carrier that intends to use this spectrum to provide service to rural customers in one county cannot acquire this spectrum without exceeding the spectrum cap, however minimally, in a neighboring county? Would this rural carrier then be required to itself undergo a potentially complicated and burdensome divestiture process with respect to its existing spectrum in that county? Because RTG’s requested spectrum cap would apply across the board to *all* carriers, regardless of size or status, the rural carrier could effectively be discouraged or prevented from acquiring this spectrum. Such an outcome would certainly not be in the public interest.

---

<sup>13</sup> / *Rural Report and Order*, 19 FCC Rcd at 19115 ¶ 67; *Verizon/Alltel Order* at ¶ 70.

<sup>14</sup> / *Spectrum Cap Sunset Order*, 16 FCC Rcd 22693 – 94 ¶ 50.

<sup>15</sup> / Petition at 19.

<sup>16</sup> / *Id.*

**C. The Commission’s Review of Union’s 700 MHz Application Illustrates Why the Public Interest is Better Served by Case-by-Case Review of All Market Conditions**

The scenario described above is not merely hypothetical, but is based on Union’s own recent experience in connection with the auction of 700 MHz spectrum in Auction 73. In that auction, Union was the winning bidder on one of the 12 MHz “A Block” EA licenses (out of 176 available) and one of the 12 MHz “B Block” CMA licenses (out of 734 available).

Following the close of bidding, the Commission reviewed certain of the winning bidders’ applications under the standard competitive analysis the Commission uses for reviewing the potential competitive effects of wireless transactions.<sup>17</sup> This included “apply[ing] an initial screen to the spectrum holdings of the applicants” and “conduct[ing] a market-by-market analysis of the markets captured by the initial screen.”<sup>18</sup> Although the Commission stated that it was not applying its standard competitive analysis to determine whether these applications should be granted,<sup>19</sup> it nevertheless discussed how this analysis “would” apply in the case of these applications.

The Commission first applied its two-part initial “screen” consisting of a market concentration review of the post-auction HHI and a review of post-auction spectrum

---

<sup>17</sup> / See *700 MHz Review Order*. Union does not have any information or knowledge regarding the actual scope of the Commission’s review of the 700 MHz applications submitted by winning bidders in Auction 73 – *i.e.*, whether all applications were reviewed or only some – or what criteria the Commission may have used in determining which specific applications to review.

<sup>18</sup> / *700 MHz Review Order* at ¶ 9.

<sup>19</sup> / *Id.*

aggregation utilizing the then-applicable initial screen of 95 MHz.<sup>20</sup> Because the acquisition of “greenfield” spectrum at auction does not result in service overlaps, the Commission determined that the HHI screen would not be triggered by these 700 MHz applications.<sup>21</sup>

However, when it applied the 95 MHz initial spectrum screen, the Commission determined that one market for Union would require further competitive review.<sup>22</sup> Specifically, the Commission determined that further competitive review of Union’s spectrum holdings in CMA720 “would be triggered by the 95 MHz initial screen and the range of spectrum holdings for Union Telephone on a county-by-county basis,” which, according to the Commission, ranged from 37 to 99 MHz in this CMA.<sup>23</sup>

The Commission then applied its further competitive review to Union’s Auction 73 licenses to more closely analyze the competitive effects of these licenses in this particular market. According to the Commission, the application of its further competitive review to Union “would find that it is unlikely that the grant of the application[] of Union Telephone ... would result in competitive harm” in the CMA identified by the initial spectrum screen.<sup>24</sup> Specifically, the Commission stated that it “would find” that, in this market, “there are at least at least two, and as many as four, other providers that currently have sufficient market share and spectrum throughout the

---

<sup>20</sup> / *700 MHz Review Order* at ¶¶ 15 – 16. After the adoption of this Order, the Commission revised its initial spectrum screen by adopting a new initial spectrum screen that varies on a market-by-market basis depending on the availability of AWS-1 and/or BRS spectrum in that market. *See Verizon/Alltel Order* at ¶¶ 53 – 64.

<sup>21</sup> / *700 MHz Review Order* at ¶ 15.

<sup>22</sup> / *Id.* at ¶ 17.

<sup>23</sup> / *Id.*, note 52.

<sup>24</sup> / *Id.*

CMA to compete in the provision of mobile telephony services,” that “[f]urther, several additional firms currently hold sufficient spectrum that would enable them either to expand their provision of services or to enter the market and begin providing services,” and “[f]inally, if a current provider in any of these markets is capacity constrained, or if a new entrant would like to enter [this] market[], then there is sufficient unused spectrum available that could be obtained in the secondary market.”<sup>25</sup>

Union’s experience in the 700 MHz auction thus presents a perfect illustration of the effectiveness of the Commission’s use of a spectrum screen and case-by-case review of spectrum aggregation as a means of safeguarding competition while at the same time not inadvertently and arbitrarily preventing a transaction that is in the public interest – namely, the acquisition by a rural carrier of new spectrum that will enable it to provide mobile wireless services, including broadband services, to the rural customer base that it exists to serve. Such an outcome is possible because the Commission has adopted a system that provides it sufficient flexibility to reach the appropriate decision based on the circumstances of this case.

By contrast, if the 95 MHz threshold had represented a “bright line” spectrum cap rather than an initial screen triggering further review, Union could have been faced with the prospect of having to go through a complicated process of divesting spectrum in one or two counties before bidding on or being granted access to this 700 MHz spectrum in the other significant portion of its rural service area, or Union may have been discouraged from even entering the 700 MHz auction in the first place. Either way, the result would have been to frustrate or discourage investment by a small rural carrier in spectrum that

---

<sup>25</sup> / *Id.*

would allow it to offer a compelling and competitive alternative to the large nationwide carriers and to provide service and coverage to rural consumers.<sup>26</sup> Moreover, by diminishing Union's ability to fully utilize its spectrum or to have participated in the 700 MHz auction, a spectrum cap would have undermined the Commission's statutory objective of "disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies ..."<sup>27</sup>

### III. CONCLUSION

For the reasons set forth above, the Commission should reject RTG's request for a spectrum cap and should dismiss the Petition. Union is concerned that RTG's requested spectrum cap is too broad and inflexible, and that the imposition of such a cap could have unintended consequences that could deprive regional and rural carriers of the very tools they need to compete with the large nationwide carriers and to provide quality wireless services and coverage to consumers, particularly those in rural areas.

Instead, the Commission should retain its current "case-by-case" approach, which takes into account a wide range of factors beyond spectrum numbers and is the most effective and appropriate means to safeguard and promote competition, encourage diversity among licensees, and provide guidance to carriers' transactional and investment decisions.

---

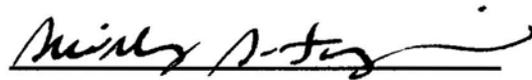
<sup>26</sup> / Given RTG's concern over the amount of spectrum won by the large nationwide carriers in the recent auctions, it is somewhat ironic that, had Union been prevented or discouraged by a spectrum cap from participating in the 700 MHz auction, these licenses would likely have gone instead to a large nationwide carrier (Verizon Wireless was the next highest bidder) rather than to a rural telephone company. *See* Auction 73 webpage at <[http://wireless.fcc.gov/auctions/default.htm?job=auction\\_summary&id=73](http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73)> (last visited Dec. 2, 2008).

<sup>27</sup> / 47 U.S.C. § 309(j)(3)(B).

**WHEREFORE, THE PREMISES CONSIDERED,** Union respectfully requests the Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

**UNION TELEPHONE COMPANY**

A handwritten signature in black ink, appearing to read "Shirley S. Fujimoto", written over a horizontal line.

Shirley S. Fujimoto  
David D. Rines  
McDERMOTT WILL & EMERY LLP  
600 Thirteenth Street, N.W.  
Washington, D.C. 20005-3096  
T: 202.756.8000  
F: 202.756.8087

Its Attorneys

Dated: December 2, 2008