

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Rural Telecommunications Group, Inc.) RM-11498
)
Petition for Rulemaking To Impose a Spectrum)
Aggregation Limit on all Commercial)
Terrestrial Wireless Spectrum Below 2.3 GHz)

OPPOSITION TO PETITION FOR RULEMAKING

In response to the Commission’s October 10, 2008 *Public Notice*,¹ the Wireless Communications Association International, Inc. (“WCAI”) submits this opposition to the Petition for Rulemaking (“Petition”) filed by Rural Telecommunications Group, Inc. (“RTG”) seeking a hard spectrum cap of 110 MHz on holders of “commercial wireless terrestrial spectrum” below 2.3 GHz.² The Petition should be denied.

At the outset, it is important to recognize what this proceeding is *not* about. There is no question that the Commission should continue to guard against spectrum aggregations that harm the public interest. The only question is whether the Commission should abandon its current flexibility to analyze spectrum aggregation concerns on a case-by-case basis in favor of the inflexible hard spectrum cap that RTG proposes in the Petition. WCAI submits that the Commission should not, for doing so would jeopardize the Commission’s flexibility to give

¹ See Public Notice, “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,” RM-11498 (rel. Oct. 10, 2008).

² See Rural Telecommunications Group, Inc. Petition for Rulemaking, RM-11498 (filed July 16, 2008). WCAI is the trade association of the wireless broadband industry, representing, *inter alia*, entities that are operating (or interested in the operation of) nascent wireless broadband networks over spectrum allocated for commercial wireless service. WCAI thus has a direct and immediate interest in the Commission’s disposition of RTG’s Petition.

due consideration to the growing need of carriers to aggregate spectrum to meet the public's ever-increasing appetite for bandwidth.

Now more than ever, the Commission needs the flexibility to address spectrum aggregation issues through case-by-case review rather than an inflexible, prophylactic spectrum cap.³ If there has been one constant over the past decade, it is that the wireless communications marketplace rapidly changes. Today, that change is reflected in the efforts of service providers to meet the increasing consumer demand for access to a variety of new bandwidth-intensive applications. Consumers are no longer satisfied by mobile broadband offerings that are less robust than their wired broadband access. To meet the public's demand for broadband everywhere, new all-IP mobile networks are currently being deployed that are sufficiently robust to compete against wired broadband services, and mobile networks initially designed for voice communications are starting to give way to IP-based broadband networks.

In this evolving, nascent mobile wireless broadband environment, the flexibility provided by case-by-case review remains the best way for the Commission to promote competition, minimize barriers to deployment, and encourage additional investment in wireless broadband infrastructure. The Commission must preserve its ability to respond to rapid changes as they occur, rather than attempt to accurately predict them in advance and tie such predictions to hard and fast spectrum holding limits. Therefore, the Commission should reject RTG's Petition and continue its policy of evaluating spectrum aggregation issues on a case-by-case basis and ordering divestitures of spectrum holdings or other relief only where necessary to advance the public interest.

³ See 2000 Biennial Regulatory Review – Spectrum Aggregation Limits For Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668, 22670-71 (2001) [*"Spectrum Cap R&O"*].

Discussion

When the Commission eliminated its then-existing CMRS spectrum cap in 2001, it determined that the public interest would be better served by “mov[ing] from the use of inflexible spectrum aggregation limits to case-by-case review of spectrum aggregation and enforcement of other safeguards applicable to [CMRS] carriers based on evidence of [anticompetitive] misconduct.”⁴ The Commission explained that:

a bright-line approach can be inflexible, potentially permitting problematic transactions and precluding transactions that would serve the public interest. While possibly requiring greater resources on the part of both transacting parties and the reviewing agency, case-by-case review and enforcement mechanisms allow greater regulatory flexibility and greater attention to the actual circumstances of a particular transaction or alleged misconduct. Moreover, a substantial degree of certainty and efficiency can be maintained under a case-by-case approach that employs appropriate guidelines or that is based on established precedent.⁵

Since that time, the Commission has evaluated spectrum aggregation through a case-by-case review of individual wireless transactions and recently announced that it will apply the same method of analysis to spectrum acquired via auction.⁶

An indispensable benefit of case-by-case review (as opposed to a hard spectrum cap) is that it gives the Commission room to consider all pertinent public interest factors at the most relevant time, including whether the proposed transaction “will result in the provision of new or additional services to consumers,” as well as “technological and market changes,

⁴ *Spectrum Cap R&O*, 16 FCC Rcd at 22670-71.

⁵ *Id.* at 22670. See also *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078, 19117 (2004).

⁶ 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 and 0003382444, Memorandum Opinion and Order*, FCC 08-257, at ¶¶ 9-10 (rel. Nov. 13, 2008).

and the nature, complexity, and speed of change of, as well as trends within, the communication industry.”⁷ This flexibility also allows the Commission to evaluate, at the time each transaction is reviewed, whether newly-available spectrum bands should be included in a spectrum aggregation analysis for a given geographic market. As a result, the 700 MHz band, available Advanced Wireless Service (“AWS”) at 1710-1755/2110-2155 MHz, and certain Broadband Radio Service (“BRS”) spectrum at 2.5 GHz have been added to the analytical framework over time as those bands have become available.⁸ By using an evolving analytical framework applied on a case-by-case basis, the Commission ensures consistency in its overall approach to spectrum aggregation concerns while assuring that rapidly-changing marketplace conditions are fully-considered.⁹

This ability to recognize “technological and market changes” will be essential as the nascent wireless broadband market evolves. The emergence of wireless applications that

⁷ Sprint Nextel Corporation and Clearwire Corporation; Applications For Consent to Transfer Control of Licenses, Leases, and Authorizations, *Memorandum Opinion and Order*, WT Docket No. 08-94, FCC 08-259, at ¶ 20 (rel. Nov. 7, 2008) [“*New Clearwire MO&O*”] citing *XM-Sirius Order*, 23 FCC Rcd at 12364-65 ¶ 31; *Verizon Wireless-RCC Order*, 23 FCC Rcd at 12479 ¶ 28; *AT&T-Dobson Order*, 22 FCC Rcd at 20303-04 ¶ 12; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 20; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064-65 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

⁸ See Applications of AT&T Inc. and Dobson Communications Corporation, *Memorandum Opinion and Order*, 22 FCC Rcd 20295, 20312-13 (2007) (adding 700 MHz spectrum to initial spectrum screen); Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, *Memorandum Opinion and Order and Declaratory Ruling*, WT Docket No. 08-95, FCC 08-258, at ¶ 64 (rel. Nov. 10, 2008) [“*Verizon-Alltel MO&O*”] (adding AWS-1 and BRS spectrum to the initial spectrum screen in those markets where the spectrum actually is available for mobile telephony service). The Commission has recognized that the suitability of any given spectrum band for inclusion in the spectrum screen “is determined by the physical properties of the spectrum, the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its use” *Verizon-Alltel MO&O* at ¶ 62. In the case of the AT&T acquisition of Dobson Communications, for example, absent the Commission’s case-by-case flexibility to add the 700 MHz band to the analysis, that transaction would not have triggered any competitive analysis.

⁹ See, e.g. *Verizon-Alltel MO&O* at ¶¶ 26-27, 30; *New Clearwire MO&O* at ¶¶ 19-20.

more fully integrate broadband into our daily lives will generate even more demand for broadband spectrum than exists today. The Commission is well aware of this increase in consumer demand for bandwidth – indeed, as noted in the Commission’s current Strategic Plan, “[e]xplosive growth in new technologies – particularly handheld and wireless devices – has driven demand for new spectrum allocations.”¹⁰ Yet, given the evolving nature of the broadband marketplace, no one can today accurately predict how much spectrum will be required in the future to support robust wireless offerings in a fully interconnected world. The future allocation of additional spectrum for wireless broadband will not permit service providers to meet the public’s demand for greater bandwidth if the Commission employs a static spectrum cap that makes aggregation impossible because it was based on an under-estimation of consumer demand. By contrast, the current case-by-case approach affords ample flexibility for the Commission to permit aggregation of spectrum allocated in the future that facilitates the introduction of advanced services.

While a spectrum cap may have been appropriate in the pre-broadband era, when mobile wireless services were limited almost exclusively to narrowband voice and the technologies and amount of available spectrum for such services were relatively static, it is poorly suited for the evolving wireless marketplace that exists today. Conversely, the Commission’s case-by-case model is a more efficient and properly tailored mechanism for

¹⁰ Federal Communications Commission Strategic Plan for Fiscal Years 2009 to 2014, DOC-283196A1, at 11 (rel. June 25, 2008). *See also* See Wireless Communications Ass’n Int’l, “A National Wireless Broadband Strategy,” at 3 (2008), available at http://www.wcai.com/images/pdf/2008_wcai_wb_strategy.pdf (last viewed November 22, 2008) (“To support the most advanced wireless broadband services, wireless broadband networks require wider contiguous bandwidths than traditional cellular networks. The emergence of wireless applications that more fully integrate broadband into our daily lives will generate even more demand for contiguous wireless broadband spectrum than we have today. Although no one can accurately predict how much additional spectrum will be required to support robust competition in a fully interconnected world, more spectrum will likely be needed in wider contiguous bandwidths than have typically been made available.”).

overseeing the level of spectrum consolidation among wireless service providers in a dynamic market, while providing the Commission with a variety of tools for imposing safeguards in specific cases where the record clearly demonstrates a need for regulatory intervention.¹¹ This approach has proven successful, and the Petition presents no valid reason for the Commission to reverse course.

Conclusion

WHEREFORE, for the reasons set forth above, WCAI requests that the RTG Petition be denied.

Respectfully submitted,

**THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.**

By: /s/ Paul J. Sinderbrand

Paul J. Sinderbrand
Robert D. Primosch

Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037-1128
202.783.4141

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¹¹ See *Spectrum Cap R&O* at 22680 (“An important consideration in determining the necessity for regulation is the availability of other, less burdensome tools to achieve these ends. In the case of the CMRS spectrum aggregation limits, these tools include case-by-case review of transactions by the Commission and DOJ, as well as our ability to shape the initial distribution of licenses through service rules adopted with respect to specific auctions.”).

CERTIFICATE OF SERVICE

I, Karla E. Huffstickler, hereby certify under penalty of perjury that a copy of the foregoing Opposition to Petition for Rulemaking was served this 2nd day of December 2008 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

Caressa D. Bennet
Michael D. Bennet
Bennet & Bennet, PLLC
4350 East West Highway
Suite 201
Bethesda, MD 20814

/s/ Karla E. Huffstickler
Karla E. Huffstickler