

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**Comments of United States Cellular Corporation**

United States Cellular Corporation ("USCC") hereby submits its Comments on the above-captioned Petition for Rulemaking ("Petition") filed by Rural Telecommunications Group, Inc. ("RTG").<sup>1</sup> USCC believes that RTG has performed a great service in filing its well-reasoned Petition and strongly supports the idea of a market by market limitation on spectrum aggregation. However, in light of actions taken by the FCC with respect to its wireless spectrum "screen" since July 16, 2008, when the Petition the was filed,<sup>2</sup> USCC reserves judgment on the specific spectrum caps it would support, pending the issuance by the Commission of a Notice of Proposed Rulemaking on this subject, which we also support. In these Comments, we will discuss the considerations which USCC believes should inform the issuance of such an NPRM and the FCC's ultimate action in such a proceeding.

<sup>1</sup> See, "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," 73 Federal Register 63128, October 23, 2008. (Comments due December 2, 2008).

<sup>2</sup> See, e.g. In the Matter Sprint Nextel Corporation and Clearwire Corporation, Applications for Consent to Transfer of Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94, Memorandum Opinion and Order, FCC 08-259 (released November 7, 2008) ("Sprint-Clearwire Order"); In the Matter of Applications of Celco Partnership d/b/a Verizon Wireless and Atlantic Holdings, LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements, WT Docket 08-95, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258 (released November 10, 2008) ("Verizon Wireless Alltel Order"); In the Matter of Union Telephone Company, Celco Partnership d/b/a Verizon Wireless Applications for 700 MHz Band Licenses, Auction No. 73, File Nos. 000337116 et al, FCC 08-257, (released November 13, 2008), ("Verizon Wireless-Union Telephone Order").

**I. There Is A Need For FCC Action Beyond That Which It Has Recently Taken.**

Drawing on public sources, the Petition has made a powerful case for FCC action to protect wireless spectrum from growing and excessive concentration. It is undisputed that the number of both national and regional wireless carriers has been reduced in recent years and that the wireless industry has grown more concentrated, as measured by standard statistical methods such as the Herfindahl-Hirschman Index ("HHI").<sup>3</sup> It is also the case that those trends are accelerating. This is evidenced by the dominance of Auction 73, which involved 700 MHz authorizations, by Verizon Wireless and AT&T Mobility and the FCC's recent approval of the acquisition of the fifth largest wireless company, ALLTEL Corporation, by the second largest, Verizon Wireless.<sup>4</sup>

The FCC's response to these developments has been inadequate, in both concept and practice. From 1994 until January, 2003, the FCC employed highly effective 45 MHz and 55 MHz wireless spectrum "caps," applicable to cellular PCS, and SMR spectrum, to limit wireless spectrum concentration.<sup>5</sup> In 2004, as a substitute for caps, the FCC began to apply a 70 MHz spectrum "screen," applicable to the 200 MHz of available cellular, PCS and SMR spectrum.<sup>6</sup> The spectrum screen was not equivalent to a "cap," that is, an absolute limit on spectrum aggregation. Rather, if a proposed spectrum aggregation in a given market was caught in the screen, it was subject to further review for possible anticompetitive effects. In practical terms,

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<sup>3</sup> Petition, pp. 8-13. It may be noted that the average value of wireless HHI's declined slightly between December 2005 and 2006. See In the Matter of Implementation of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Twelfth Report, WT Docket No. 07-71, FCC 08-28, released February 4, 2008 ("Twelfth Report"); ¶¶49-54. However, we consider that development to be an anomaly, in light of other statistics discussed in the Petition. Moreover, it is undisputed that the trend toward concentration has accelerated once again since 2006, as evidenced by the many wireless mergers proposed and completed in 2007 and 2008. See Petition, pp. 8-9.

<sup>4</sup> Petition, p. 14; Verizon Wireless-ALLTEL Order, ¶9.

<sup>5</sup> Petition, pp. 7-8.

<sup>6</sup> See, In the Matter of AT&T Wireless Services and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations WT Docket 04-70, 19 FCC Rcd 21522, 215680 ¶109 (2004).

the screen allowed a wireless carrier to acquire up to approximately one third of available wireless spectrum (70 MHz/200 MHz). In 2007, the screen "numerator" was increased to 95 MHz, and the spectrum to which it was applicable was also expanded to include an additional 80 MHz of 700 MHz spectrum, creating a new spectrum screen fraction of 95/280.<sup>7</sup> Again, acquisitions above the screen were not automatically precluded, but were subject to further review.

In November 2008, the FCC announced that it would apply yet another screen, or, more accurately, set of screens. In the Verizon Wireless-ALLTEL Order and the Sprint-Clearwire Order the FCC stated that instead of applying in all CMAs the 95 MHz screen previously applicable to cellular, PCS, SMR, and 700 MHz spectrum it would apply a set of new market specific screens. In addition to the spectrum previously included in screen calculations, the FCC would henceforward also consider the 90 MHz of AWS-1 spectrum (1710-1755, 2110-2155 MHz) in a given market provided it were cleared and available for use. The FCC will also now consider 55.5 MHz of Broadband Radio Service ("BRS") spectrum in the 2.5 GHz band (i.e. all BRS spectrum except Middle Band Segment, BRS Channel 1, and J and K guard bands) in all markets where the BRS "transition" has been completed.<sup>8</sup>

The FCC, however, rejected the inclusion of Educational Broadband Service ("EBS") spectrum in the initial screen.<sup>9</sup> The AWS and BRS spectrum, where both are available, will add roughly 146 MHz to the denominator of the screen fraction. So the denominator will be now be 426 where both types of spectrum are available. In markets where both AWS-1 and BRS spectrum are available, the screen numerator will be 145 MHz, the fraction 145/426. Where

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<sup>7</sup> Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, Memorandum Opinion and Order, 22 FCC Rcd 20295 (2007), ¶30.

<sup>8</sup> Verizon Wireless-ALLTEL Order, ¶¶62-66; Sprint-Clearwire Order, ¶74.

<sup>9</sup> Sprint-Clearwire Order, ¶67.

AWS-1 only is available, the screen numerator would be 125 MHz, the fraction 125/370. Where only BRS spectrum is available the screen will be 115, the fraction 115/336. Where neither type of spectrum is yet available, the screen numerator will remain 95 MHz.

The FCC will also treat the HHI as an additional screen in markets in which the HHI would exceed 2800, post transaction, and the change in HHI would be 100 or greater or where the increase in HHI would be 250.<sup>10</sup> Once a market is caught in the screen, the FCC's analyzes such factors as market share (based on number utilization data), network coverage, additional competitors and amount of licensed spectrum still available. Finally, in the Verizon-Wireless-Union Telephone Order, released at the same time as the Verizon Wireless-ALLTEL and Sprint-Clearwire Orders, the FCC announced it would apply the existing 95 MHz screen to carriers acquiring 700 MHz spectrum in wireless auctions.<sup>11</sup>

"We intend to apply prospectively our standard competition analysis to spectrum acquired via auction as well as via transactions."

Thus, since 2004, the FCC has sought to preserve the principle that it would evaluate closely a carrier's acquisition of spectrum in any market where the carrier would have spectrum in excess of approximately one third of available and comparable wireless spectrum. However, in our view this has proven to be an insufficient protective standard.

First, while individual divestitures have been occasionally required by the FCC pursuant to post "screen" review, such review has obviously not prevented the massive industry consolidation which the Petition summarizes. Second, the screen has been applied leniently. In the Sprint-Clearwire Order, the FCC required no divestitures in any of the 43 markets "caught" by

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<sup>10</sup> Verizon Wireless-Alltel Order, ¶78; The HHI measures market concentration by first squaring each carrier's market share and then adding up those amounts. For example, if two carriers each had 50 percent market share, the HHI would be 5000, i.e. 2500 + 2500.

<sup>11</sup> In the Matter of Union Telephone Company, Cellco Partnership d/b/a Verizon Wireless Applications for 700 MHz Band Licenses, Auction No. 73, File Nos. 0003371176 et al., FCC 08-257, (released November 13, 2008), ¶9.

the screen.<sup>12</sup> In the Verizon Wireless-ALLTEL Order, the FCC required the divestiture of either the ALLTEL or Verizon Wireless Network in only five of the 118 CMAs it separately evaluated.<sup>13</sup> In theory, the FCC applies, post-screen, the standard measures of competition analysis, involving input and product markets as well as analysis of coordinated and individual effects, in determining whether to require divestitures. However, its analysis has not proven to be a barrier to acquisitions except in the most extreme cases.

In the Verizon Wireless-Union Telephone Order, as noted above, the FCC did not apply the newly created "screen" which includes BRS and AWS-1 spectrum, to spectrum acquired in 700 MHz auctions, though it notes the adoption of the new screens.<sup>14</sup> No reason for this decision was provided. The FCC also declined to apply any HHI analysis to the auctioned spectrum, because of its "greenfield" nature. It simply applied the standard 95 MHz CMA screen.<sup>15</sup> That analysis "caught" 17 CMAs in which Verizon Wireless would hold more than 95 MHz of the relevant spectrum. However, in only one CMA, where it would have held 111 MHz, was a "voluntary" divestiture of 10 MHz accepted.<sup>16</sup> All remaining applications were granted without divestitures. The FCC did note that had the new screen analysis been applied the result would not have been different.<sup>17</sup>

The net result of all the FCC's competition analysis since 2004 has been to allow the largest wireless carriers, AT&T Mobility and Verizon Wireless, to attain positions of dominance without precedent in wireless history. If wireless competition is to be preserved at a time when

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<sup>12</sup> Sprint-Clearwire Order, ¶43.

<sup>13</sup> Verizon Wireless-ALLTEL Order, ¶99. It should be noted that the parties had previously agreed with the Department of Justice to divest one or the other wireless network in 100 markets, which the FCC did not evaluate. Ibid, at ¶91. The majority of those markets involved cellular spectrum duopolies.

<sup>14</sup> Verizon Wireless-Union Telephone Order, ¶16, n. 49.

<sup>15</sup> Ibid, ¶¶15, 16.

<sup>16</sup> Ibid, ¶¶ 11, 17, n. 53.

<sup>17</sup> Ibid, ¶16, n. 49.

the amount of "greenfield" wireless spectrum will be severely circumscribed,<sup>18</sup> new approaches to safeguard it will have to be adopted by the FCC.

**II. A Rulemaking Proceeding Should Be Based on the Following Principles.**

USCC would propose the following principles to guide the FCC in approaching the issue of limits on spectrum aggregation.

**A. There Have To Be Upper Limits on Spectrum Aggregation By Market.**

The recent Verizon Wireless-Union Telephone Order provides a succinct description of the factors the FCC now considers, at least, in theory, after the CMA is caught by either the HHI or spectrum "screen":

"Consistent with our recent wireless transaction orders, further competitive review of each of these CMAs would include, among other things, the determination of: (1) the total spectrum available for mobile telephony use; (2) the particular applicant's portion of available spectrum; (3) licensees in the market and their spectrum holdings; (4) licensees currently providing service in the market; (5) whether current service providers, who may be capacity constrained in the near-term, can access additional spectrum in the market either through auction or on the secondary market; and (6) licensees currently holding spectrum that could enter the market to provide service."<sup>19</sup>

However, as noted above, the application of these criteria simply has not worked effectively to protect wireless competition.

What the FCC thus needs to do, in our view, is to establish a fixed, per county spectrum cap, applicable in all markets, as proposed by the Petition, and/or to adopt a special restrictive

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<sup>18</sup> The only newly allocated wireless spectrum below 3 GHz still to be auctioned is the 700 MHz D Block (758-763, 793-798 MHz) and AWS-2 and AWS-3 spectrum (1915-1920, 1995-1920, 2020-2025, 2175-2180, 2155-2175 MHz). That spectrum is also likely to be licensed under legal and technical constraints which will mean that it is not comparable to existing wireless spectrum.

<sup>19</sup> Verizon Wireless-Union Telephone Order, ¶18.

"cap" applicable in markets where market data confirms that there is significant concentration of the current providers' subscriber market shares.<sup>20</sup>

**B. All Spectrum Is Not Created Equal.**

The FCC's recent action including available BRS spectrum in the spectrum screen has obviously had the effect of increasing the amount of cellular, PCS, SMR, and 700 MHz spectrum which a carrier can hold in a given market, since all included spectrum is considered to be fungible. The FCC, in the Verizon Wireless-ALLTEL Order declined requests by commenters to place different "values" on spectrum included within the screen and disregarded arguments that BRS spectrum specifically should not be included within the screen.<sup>21</sup>

In the Verizon Wireless-ALLTEL Order, the FCC stated that inclusion of BRS spectrum within the screen was justified by the transition of BRS spectrum to its new band plan in most "BTA" markets.<sup>22</sup> However, it is fair to say that BRS systems, at present, barely exist in commercial terms, and are in no way competitive with cellular, PCS, 700 MHz or AWS services, whatever their potential may be. The presence of unused if theoretically "available" BRS spectrum in a market should not serve as a "shield" for additional cellular, PCS, 700 MHz and AWS spectrum acquisition by the largest wireless carriers. If the FCC does continue to apply a "screen," BRS spectrum either should not be included or should not be given the same weight as other included spectrum, at least for the next few years, during which all remaining wireless spectrum below 2.3 GHz will be allocated.

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<sup>20</sup> For example, the FCC might consider adopting a special "cap" lower than the newly adopted spectrum "screen" totals for mobile telephone/broadband services" applicable in markets when the HHI is above a certain threshold.

<sup>21</sup> Verizon Wireless-ALLTEL Order, ¶¶65, 69.

<sup>22</sup> Verizon Wireless-ALLTEL Order, ¶65.

**C. The FCC Should Apply HHI Measurements to "Greenfield" Spectrum.**

As noted above, the FCC recently decided it would not apply its "HHI" screen to the "acquisition of greenfield spectrum at auction"<sup>23</sup> while still applying the 95 MHz screen. USCC sees no reason for the FCC to remove one of the tools by which the Commission can determine the existence of possible anticompetitive effects. The Commission offered no reason why acquisitions of "greenfield" spectrum should be treated any differently than acquisition of already licensed spectrum and we can think of none. Spectrum remains the fundamental input for wireless service and spectrum-constrained carriers are inevitably limited to their ability to grow and acquire market share. Thus even "greenfield" spectrum, when delivered into the hands of already dominant providers can present a significant barrier to competition. If the HHI for a market suggests that competition is already limited, it makes sense for the FCC to apply a more rigorous screen or a cap.

**D. The FCC Has To Face The Verizon Wireless/AT&T Mobility Problem.**

During the past decade, the wireless industry has evolved from one in which there were six "national carriers," to an industry in which there are only two increasingly dominant carriers, namely Verizon Wireless and AT&T Mobility. Recently published customer data tell the story. At present, AT&T Mobility has approximately 74.9 million customers, Verizon Wireless 70.8 million.<sup>24</sup> Verizon Wireless will soon increase its customer base by the 13 million customers now served by ALLTEL.<sup>25</sup> AT&T Mobility has announced its intention to purchase Centennial Communications Corp., which will eliminate another wireless competitor and add another 1.1

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<sup>23</sup> Verizon-Wireless-ALLTEL Order, ¶15.

<sup>24</sup> See Allie Winter, "Verizon Wireless Posts Strong Subscriber Growth, But Higher Churn," RCR Wireless News, November 3, 2008.

<sup>25</sup> Ibid.

million customers to AT&T's total.<sup>26</sup> Both Verizon Wireless and ALLTEL added two million customers in the third quarter of 2008. By contrast Sprint Nextel, the nearest rival of Verizon Wireless and AT&T Mobility, lost customers in the most recent quarter and now has a customer base of 50.3 million.<sup>27</sup> T-Mobile gained relatively few subscribers in the third quarter and now has about 30 million customers.<sup>28</sup> After ALLTEL is absorbed by Verizon Wireless, the next largest wireless carrier will be USCC, which is a regional carrier serving approximately 6.2 million customers. Other remaining regional carriers, such as Leap Wireless and Metro PCS, are smaller than USCC. Leap Wireless now has approximately 3.4 million customers and MetroPCS approximately 5 million customers.<sup>29</sup>

The unprecedented wireless market structure now confronting the FCC involves two mammoth carriers, with one, Verizon Wireless, dominating the ranks of CDMA carriers and the other, AT&T Mobility, being the dominant GSM carrier.

This situation has large and negative implications for roaming, handset acquisition and every other aspect of wireless competition. We submit it is not in the public interest for the market power of those two carriers or any carrier similarly situated to be further augmented through relaxed regulation.

The FCC may be unlikely to require Verizon Wireless and AT&T Mobility to give up any spectrum they now hold or will hold as a consequence of the recent FCC orders and auctions. However, that makes it all the more important that the FCC act now to restrict the

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<sup>26</sup> See Mike Dano and Allie Winter, "Acquisition Frenzy Continues: Centennial Deal Might Not Be The Last" RCR Wireless News, November 18, 2008.

<sup>27</sup> See Allie Winter, "Big 4-2= Big 2: Sprint Nextel, T-Mobile USA Falling Behind Larger Rivals," RCR Wireless News, November 10, 2008.

<sup>28</sup> Ibid.

<sup>29</sup> See Press Release, "Leap Reports Results for Third Quarter 2008; Allie Winter," MetroPCS Expands in Michigan, Looks to Further Rollouts, RCR Wireless News, November 5, 2008.

amount of additional spectrum they can acquire in the future in those geographic areas where they already have sufficient spectrum to restrict competition.

At present, we are uncertain as to the best means by which this can be accomplished. It may involve restrictions on spectrum acquisition by carriers with more than a set percentage of customers either nationally, regionally or locally. Other commenters may have other innovative approaches. But there is no doubt that if wireless competition is to be preserved, the FCC must deal with this issue. We agree entirely with Commissioner Copps in his separate statement on the Sprint-Clearwire merger who urged a "comprehensive, industry-wide proceeding that would establish appropriate rules for valuing the relative desirability of different spectrum."

**CONCLUSION**

For the foregoing reasons, the FCC should adopt a Notice of Proposed Rulemaking and take action to preserve wireless competition by restricting the dominant carriers' ability to acquire additional spectrum.

Respectfully submitted,

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December 2, 2008

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