Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC	)	WT Docket No. 08-95
	)	
For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Leasing Arrangements	)	File Nos. 0003463892, *et al*., ITC-T/C-20080613-00270, *et al*.
	)	

To: The Commission

PETITION FOR RECONSIDERATION
OF
THE PUBLIC INTEREST SPECTRUM COALITION

Media Access Project, on behalf of the Public Interest Spectrum Coalition (PISC),[1] hereby submits this *Petition for Reconsideration* in the above captioned proceeding. PISC seeks reconsideration of the Commission's decision to include Broadband Radio Service (BRS) spectrum in its "spectrum screen." In addition, PISC seeks reconsideration of the Commission's refusal to impose conditions necessary to protect the rights of subscribers to access the legal content of their choice, attach devices of their choice, run applications of their choice, and enjoy a competitive environment in accordance with the Commissions' *Internet Policy Statement*. Alternatively, PISC requests that the Commission clarify the manner in which it intends to protect VZ subscribers in light of its increased market power from expanded horizontal and vertical integration.

ARGUMENT

[1]The Public Interest Spectrum Coalition consists of, in alphabetical order: Common Cause, The CUWiN Foundation (CUWIN), Consumer Federation of America (CFA), Consumers Union (CU), EDUCAUSE, Free Press (FP), the International Association of Community Wireless Networks (IACWN), Media Access Project (MAP), the National Hispanic Media Coalition (NHMC), the New America Foundation (NAF), the Open Source Wireless Coalition (OSWC), Public Knowledge (PK), and U.S. PIRG.

Section 310(d) of the Communications Act requires that Commission make a determination on whether the transfer at issue will serve "the public interest, convenience and necessity." 47 U.S.C. §310(d). As the Commission has noted previously, Congress intended the Commission to consider not merely whether a proposed transaction would prove likely to reduce competition. Rather, in addition to promoting the broader goals of the Communications Act and the First Amendment, "the Commission must be convinced that it will enhance competition." *AOL Time Warner Merger Order*, 16 FCCRec 6547, 6555 (2001). Two aspects of the Commission's *Order* in this proceeding, however, fall far short of the Commission's duty to ensure that the merger enhances competition and protects the values of the Communications Act and the First Amendment: the decision to include BRS spectrum in the Commission's "spectrum screen," and the decision not to impose additional conditions requested by PISC to guarantee to all subscribers all the rights promised under the *Internet Policy Statement*. These two elements of the Commission's decision appear likely to reduce competition rather than enhance it, and place the "four freedoms" the Commission guarantees to all broadband users at risk.

I. THE COMMISSION SHOULD NOT INCLUDE BRS SPECTRUM IN THE SPECTRUM SCREEN.

First, PISC seek reconsideration of the decision to include BRS spectrum in the Commission's "spectrum screen." The screen already does too little to prevent the ongoing consolidation of the wireless industry. The Commission has further undermined the value of the screen in the last several years by altering it to permit pending transactions. *See AT&T-Dobson Order*, 22 FCCRec 20295, 20307-08 (2007). The inclusion of BRS spectrum in the screen effectively raises the screen to the benefit of the largest incumbents and to the detriment of and members of the public who benefit from greater competition and of potential competitors.

Providers already offering service, with access to cleaner spectrum unencumbered by leasing rights and with better propagation characteristics, may now acquire even more spectrum to solidify their advantage even before their competitors can really begin using their BRS spectrum to compete with well established incumbents. As explained in the *Order*, the Commission will include the 55 MHZ of BRS spectrum "as available for mobile telephony/broadband services where the transition has been completed." In other words, regardless of whether the holder of the BRS spectrum is genuinely ready to offer service and compete with well established incumbents offering services on the "beachfront" frequencies below 2.3 GHz, the Commission will consider this spectrum as part of its consideration of whether to allow incumbents to acquire even more spectrum.

The Commission based its determination to include BRS spectrum on the grounds that WiMax and other potential future mobile broadband services could potentially compete with existing mobile voice and mobile data services. The key word here, however, is ***potentially***. By including BRS spectrum before seeing any evidence that it will provide genuine competition to existing wireless providers, the Commission has transformed the pro-competitive intent of the screen into an anti-competitive gift to existing providers that actually penalizes competitors trying to make use of their BRS holdings.

The merger at issue highlights this problem. No one can doubt that the combination of Verizon and Alltel allows two existing networks that already exist, each with a vast national customer base and each with significantly greater usable spectrum capacity than Clearwire or any other BRS or even AWS holder can use at the moment, and allows them to combine these assets before New Clearwire or other potential competitor can acquire a single new customer. As AWS and BRS competitors clear more spectrum to prepare to offer competing services, they lay the

groundwork for their largest competitors to acquire still more spectrum capacity ***and*** additional customers to add to their pre-existing networks.

Certainly the Commission has generally included all spectrum available to applicants as part of its screen, even if the applicants have not completed build out. But this facially neutral application ignores the reality that ever since AT&T divested its BRS spectrum as part of the merger with BellSouth, *see AT&T-BellSouth Merger Order*, 22 FCCREC 5662 (2007), neither Verizon nor AT&T hold any significant BRS spectrum. As these two carriers now have dominant positions in the wireless service market – notably in their holding of spectrum below 2.3 GHz, as well as in the number of subscribers – the inclusion of BRS spectrum in the screen will have the effect of increasing the spectrum to which these two dominant players can acquire access. Every time a potential BRS competitor clears spectrum to begin offering competitive service, it increases the ability of the two most powerful, vertically integrated incumbents to acquire an even greater spectrum advantage. The instant merger, in which Verizon has now absorbed a critical roaming partner and national competitor, illustrates this anticompetitive dynamic.

No competing provider can hope to win such a race. To add insult to injury, the already established incumbent can increase its spectrum advantage even before the BRS competitor is ready to actually offer service. No matter how swift and smooth a transition – and the history of the BRS band is not reassuring on this score – it will take some time before the spectrum is ready and the competitor can begin actually offering a working service. To allow the two largest rivals to acquire even more spectrum during this period of vulnerability will kill the nascent competition the Commission purportedly wishes to encourage with a spectrum screen in the first place.

Finally, in those cases where a BRS provider actually offers real competition within a

geographic area, the Commission can allow the transaction to go forward. The Commission already allows transactions that trigger the spectrum screen to continue without divestitures if it finds that such transactions serve the public interest. *See AT&T-Aloha Order*, 23 FCCREC 2234 (2008). Rather than issuing an invitation for incumbents to swoop into a market as soon as a potential competitor clears BRS spectrum, the Commission should exclude BRS from the spectrum screen and require that any incumbent show that acquisition of additional spectrum access in the relevant markets will serve the public interest.

In short, the inclusion of BRS spectrum in the spectrum screen serves no purpose, and has significant anticompetitive effects. The Commission can already permit mergers that trigger the screen to go forward where it would serve the public interest. Including BRS will merely encourage further consolidation. The Commission should therefore reverse its decision to include BRS.

II. THE COMMISSION MUST ENSURE THAT VERIZON-ALLTEL DOES NOT THREATEN THE CONSUMER PROTECTIONS GUARANTEED BY THE *INTERNET POLICY STATEMENT*.

The Commission rejected PISC's request for conditions to ensure that Verizon's much-touted open development initiative (ODI), its compliance with the 700 MHZ C Block conditions, and the general operation of its wireless broadband network secure for wireless subscribers the "four freedoms" promised by the Commission in its *Internet Policy Statement*. The *Order* found that PISC had not demonstrated the likelihood of specific harms, and that the Commission had only imposed additional conditions "based on the *Internet Policy Statement*" absent a specific showing of harm where carriers had voluntarily offered to comply with such conditions. *Order* at ¶¶186-191. In making this determination, the Commission failed in its responsibility to ensure that the transfer of

licenses serves the "broad aims of the Communications Act," including the "decentralization of information production [which] serves values that are central to the First Amendment." *AOL Time Warner*, 16 FCCRec at 6555.

It is of no legal consequence whether, in previous mergers, the Commission imposed open network conditions on carriers only where carriers voluntarily agreed to these conditions. Certainly, as the Commission has often noted, the adoption of voluntary conditions by Applicants may eliminate the need for referral to an Administrative Law Judge to resolve whether a proposed merger meets the public interest standard by eliminating questions of material fact surrounding specific possible public interest harms. But the refusal of an Applicant to offer to take issues of material fact "off the table" by offering to accept conditions does not relieve the Commission of its obligation to determine whether public interest dangers exist, or whether conditions proposed by others would serve the public interest. Accordingly, the Commission's observation that it previously imposed open network conditions where carriers voluntarily offered to accept these conditions is utterly irrelevant.

Rather, what is relevant is that the Commission has previously found that the conditions requested by PISC "promote rather than restrict expressive freedom because they provide consumers with greater choice in the devices and applications they may use to communicate." *700 MHZ Second R&O*, 22 FCCREC 15289, 15369 (2007). *See also Complaint of Free Press and Public Knowledge for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518 at ¶21 (released August 20, 2008). To the extent the Commission offers any reasoned analysis for rejecting the proposed conditions, the *Order* notes that the potential harms are not "merger specific" and that requiring Verizon to manage its network in accordance with the C Block conditions "could

undermine our goal of not unduly burdening existing services and markets." *Order* at ¶188.

In reaching this determination, the Commission relied on its initial determination in the *700 MHZ Second R&O* that it should encourage the wireless industry to begin a gradual process of opening its wireless networks, a substantial change in how these networks traditionally operated. The Commission could not, at the time it decided the *700 MHZ Second R&*O, know Verizon would win the C Block or that Verizon would announce an intention to voluntarily open its entire wireless network under its ODI program. Nor could the Commission have anticipated then that Verizon would absorb one of its primary national competitors and dramatically affect the level of concentration in the mobile broadband market – particularly in rural areas.

In light of these changes, the Commission has an obligation to revisit the conclusion that it struck the appropriate balance by limiting it's the "any device/any app" condition to the 700 MHZ C block or that imposing additional explicit neutrality obligations would "unduly burden" Verizon. The burden the Commission imagined is greatly reduced by Verizon's need to integrate its network with Alltel's to comply with the ODI universally throughout its systems. The burden of placing teeth in this commitment to ensure that the public receives the benefits promised by the Applicants is therefore vastly reduced from the possible burden imagined by the Commission before the auction. At the same time, the elimination of Alltel as a national competitor, and the inclusion of Alltel's customers and spectrum capacity in Verizon's already dominant network, greatly increase the value of ensuring that Verizon will operate its network in an open and neutral manner.

The Commission must also include the very real danger that, given an ability to operate both open and closed wireless systems on the same network, Verizon will use its increased market power to force equipment manufacturers to forgo the open C Block in favor of more closely controlled

aspects of the Verizon-Alltel network. The merger thus substantially increases the danger that Verizon will "impair or frustrate" enforcement of the C Block conditions, impeding the development of open networks and depriving the Commission of a suitable benchmark for determining whether further intervention is warranted. *See Adelphia Transaction Order*, 21 FCCREC at 8243 (recognizing value of "benchmark" competitors to both regulators and consumers).

Finally, the Commission's failed to adequately consider the potential dangers to the "four freedoms" outlined in the *Internet Policy Statement*. As the Commission explained when it adopted the policy statement in 2005, it intended to "incorporate the [four] principles into its ongoing policymaking activities." While the Commission appears to assume that it has met its burden by reciting why it declined to adopt explicit conditions, nowhere in the *Order* does the Commission explain how its adjudication of the Verizon-Alltel transaction incorporates the principles of allowing consumers their choice of devices, applications, content and competitive providers. In the past, when parties have raised concerns over the ability of network operators to encroach on these principles, the Commission has explicitly addressed these factors in its public interest determination. *See Adelphia Transaction Order*, 21 FCCREC at 8297-99. At a minimum, the Commission's failure to explicitly address these concerns in the absence of explicit conditions requires express clarification of how it will "incorporate" the principles of the *Internet Policy Statement* as part of the adjudication of the applications for transfer.

CONCLUSION

As the Commission has previously found, the determination of whether a proposed license transfer serves the public interest in accordance with the requirement of Section 310(d) requires more than a mere avoidance of harm. The Commission must find that the merger will enhance

competition and further the broader goals of the Communications Act and the First Amendment. The Commission's inclusion of BRS spectrum in the spectrum screen has precisely the opposite effect. It will encourage further consolidation by the dominant wireless carriers, reducing competition and frustrating the goals of the Act. In addition, because the Commission did not adequately address the benefits of PISC's open network conditions, it should reconsider the decision to reject the proposed conditions. At a minimum, the Commission should clarify how it incorporated the four principles of the *Internet Policy Statement* into its adjudication of the merger.

WHEREFORE, the Commission should grant the *Petition for Reconsideration* filed by the Public Interest Spectrum Coalition.

Respectfully submitted,

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