

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

RURAL TELECOMMUNICATIONS)	RM-11498
GROUP)	
)	
Petition for Rulemaking to Impose a)	
Spectrum Aggregation Limit on all)	
Commercial Terrestrial Wireless)	
Spectrum Below 2.3 GHz)	

REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby replies to comments filed in response to the Rural Telecommunications Group (“RTG”) Petition for Rulemaking to re-establish a Commercial Mobile Radio Service (CMRS) spectrum cap.¹ The Commission properly repealed the spectrum cap seven years ago and, as Verizon Wireless and others have demonstrated in their comments on the Petition, RTG has failed to provide any basis for the Commission to consider re-imposing such a constraint.² Several parties agree with Verizon Wireless that the Commission’s current case-by-case review is “effective and

¹ *Rural Telecommunications Group, Inc. Petition for Rulemaking To Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz* (filed July 16, 2008) (“Petition”); “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).

² Opposition of Verizon Wireless (filed Dec. 2, 2008); *see also* Comments of AT&T Inc. (AT&T); Comments of CTIA-The Wireless Association (“CTIA”); the Comments of Telecommunications Industry Association (“TIA”); Comments of Union Telephone Company (“Union Telephone”) and the Opposition of Wireless Communications Association International (“WCAI”).

appropriate”³ and there is no cause to adopt proscriptive limits on mobile spectrum ownership.⁴ On the other hand, commenters in favor of the Petition provide no relevant facts or legal or economic analysis in support of RTG’s Petition. Accordingly, the Commission should deny the Petition.

I. THERE IS NO BASIS IN THE RECORD TO INITIATE A RULEMAKING ON THE NEED FOR A SPECTRUM CAP.

Commenters supporting RTG’s Petition fail to provide a basis for the Commission to initiate a rulemaking to reverse its 2001 finding that a CMRS spectrum cap was “no longer necessary in the public interest as a result of meaningful economic competition.”⁵ Instead commenters assert, without supporting evidence or facts, that RTG’s Petition is well-reasoned and true and therefore should be acted upon. Assertions alone provide no basis for proceeding with a rulemaking.

Several commenters make unsubstantiated claims that a spectrum cap will serve the public interest and that the Commission’s current case-by-case methodology is inadequate.⁶ To counter the hundreds of pages of Commission analysis finding the current CMRS market effectively competitive,⁷ these commenters simply assert in a sentence or two that “[t]he Commission’s finding in 2001 that there was meaningful

³ Comments of Union Telephone at ii.

⁴ See *gen.* Comments of AT&T; Comments of CTIA; Comments of TIA; and Opposition of WCAI.

⁵ Opposition of Verizon Wireless 5-7 citing to *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, FCC 01-328, 16 FCC Rcd 22668 (2001) (“Spectrum Cap Sunset Order”).

⁶ Comments of Rural Independent Competitive Alliance (“RICA”) at 3; Comments of Leap Wireless International (“Leap”) at 4, 7; Comments of US Cellular at 2.

⁷ See Opposition of Verizon Wireless at 9-14; *see also* AT&T at 3-9.

competition in the CMRS industry has been overtaken by subsequent market events,”⁸ or “[a]ccording to data contained in the Commission’s CMRS Competition Reports, CMRS markets have become significantly less competitive between 2003 – when the Commission eliminated the spectrum cap – and 2006 in both rural and non-rural areas.”⁹ Unsubstantiated statements are insufficient grounds to commence a rulemaking.

Commenters that support the Petition also demonstrate considerable misunderstanding of the manner in which the Commission screens markets for review and of the meaning of the Herfindahl-Hirschman Index (HHI).¹⁰ The Commission’s market-by-market methodology requires a rigorous, fact-intensive review to support a finding of competitive harm. The review proceeds in two stages: an initial screen that examines concentration in local CMRS markets based on change in HHI and aggregate spectrum holdings, followed by a multi-factor review of all local markets that “trip” the initial screen. US Cellular claims that the Commission applied its screen “leniently” in the Verizon Wireless/ALLTEL merger, only requiring Verizon Wireless to divest five out of 118 markets identified.¹¹ First, in Verizon Wireless/ALLTEL the Commission

⁸ Comments of Leap at 5.

⁹ Comments of NTCA at 4.

¹⁰ For example, US Cellular also recommends that the Commission apply its HHI screens to auctioned spectrum. Comments of US Cellular at 9. The Commission cannot apply to auctions HHI screens developed in the context of merger reviews. The Commission’s two HHI screens are triggered when a merger would result in a particular *change* in concentration in the market. Acquisition of greenfield spectrum at auction does not increase a winning bidder’s market share and therefore would not result in a change in HHI in any market. The Commission’s HHI screens applied in the auction context would be meaningless.

¹¹ Comments of US Cellular at 4-5

identified 218, not 118, markets to investigate further.¹² Second, the Commission required Verizon Wireless to divest 105 markets, not five markets.¹³ The Commission conditioned its approval of the merger on Verizon Wireless divesting five markets *in addition* to divesting those 100 markets Verizon Wireless had already reached agreement with the Department of Justice (“DOJ”) to divest. Third, the Commission has made clear that the screens are conservative and capture more markets than ultimately would be required to be divested in the second multi-factor review of the markets. “[T]his initial screen was intended to eliminate from further review those markets in which there is clearly no competitive harm relative to today’s generally competitive marketplace – rather than to identify conclusively markets in which there *is* competitive harm.”¹⁴

Moreover, like RTG, some commenters incorrectly equate increased concentration as measured by HHI with competitive harm.¹⁵ Increased concentration does not necessarily indicate a competitive problem. Both the Commission’s and DOJ’s merger reviews view HHI as only one factor to consider in their analysis of the market and the impact of a merger on competition.¹⁶ As the Commission has cautioned, “[w]e

¹² *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258 ¶ 3 (rel. Nov. 10, 2008) (“Verizon Wireless/ALLTEL Order”).

¹³ *Id.*, ¶¶ 3-4.

¹⁴ *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, Memorandum Opinion & Order, FCC 04-255, 19 FCC Rcd 21522, 21568 ¶ 108 (2004) (emphasis in original).

¹⁵ See Comments of National Telecommunications Cooperative Association (“NTCA”) at 4.

¹⁶ Opposition of Verizon Wireless at 14-16.

have previously found that ‘an HHI analysis alone is not determinative and does not substitute for our more detailed examination of competitive considerations.’”¹⁷

None of the commenters can connect an increase in concentration in the CMRS market with a decrease in competition or harm to consumers. Nor do they provide support for their assertions that a spectrum cap is necessary to protect the consumer.¹⁸ Though Leap claims that the nation’s largest carriers have “used their market position to prevent entry and stifle competition, to the detriment of consumers,”¹⁹ it provides no evidence of such behavior or of any resulting harms to consumers.²⁰

In a strained attempt to justify the adoption of a spectrum cap, Leap also resurrects one of the Commission’s stated rationales for the cap when adopting it more than 14 years ago. It argues that a cap is necessary because the Commission’s case-by-case approach to merger review is difficult and provides less certainty to market

¹⁷ Spectrum Cap Sunset Order at 33 (footnotes omitted).

¹⁸ Comments of Leap at 4; Comments of RICA at 3; Comments of US Cellular at 4; Comments of Pioneer Telephone Cooperative at 2; Comments of WestLink Communications at 2; Comments of NTELOS at 2; Comments of Arctic Slope Telephone Association Cooperative at 2; Comments of Kaplan Telephone Company, d/b/a PACE Communications at 2; Comments of Mid-Rivers Cellular at 1-2; Comments of Pine Belt Communications at 2; Comments of NTCH at 1; Comments of Public Service Communications at 2; Comments of CT Cube, L.P. d/b/a West Central Wireless at 2; Comments of RSA 1 L.P. d/b/a Cellular 29 Plus and Iowa RSA 2 L.P. d/b/a Lyrix Wireless at 2.

¹⁹ Comments of Leap at 2.

²⁰ Leap cites as “evidence” of large carriers’ anticompetitive behavior and abuse of their market power its comments filed 3 years ago in the Commission’s roaming docket. However, the Commission subsequently found Leap’s arguments unconvincing and insufficient “to justify regulating the roaming rates of carriers, and that any harm to consumers in the absence of affirmative regulation in this regard is speculative.” *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143, 22 FCC Rcd 15817, 15832, ¶ 38 (2007).

participants than would a bright line spectrum cap.²¹ Much has changed since 1994, when there were two cellular providers in each market and the Commission had not yet auctioned PCS spectrum. The “bright line” certainty that the cap provided potential auction participants in 1994 is no longer meaningful or necessary today. Carriers have had well over a decade of experience with auctions and six years of experience with the Commission’s case-by-case analysis. The sheer number of transactions since the Commission first adopted its case-by-case approach is further evidence a cap is not necessary to provide certainty. On the other hand, were the Commission to begin a rulemaking proceeding to impose a bright line restriction on spectrum aggregation, it might well cause uncertainty in the market with respect to how carriers would be able to meet customers’ expanding needs for wireless broadband access.²² In particular, TIA, which represents the global information and communications industry, urges the Commission to “implement spectrum policies that are progressive in nature and ensure that wireless carriers can migrate their spectrum to broadband uses.”²³

²¹ Comments of Leap at 9. Leap also revives its 2001 arguments about administrative convenience, asserting that “with limited resources, an agency may be unable to examine all the relevant facts as carefully as is necessary under a case-by-case review, increasing the risk that the agency would reach a result that is contrary to its public policy objectives.” Comments of Leap at 9. Since 2001, the agency has reviewed hundreds of assignment and transfer of control applications and has proved that Leap’s earlier concerns about administrative convenience are unfounded.

²² See Comments of CTIA at 3-6. Included in Verizon Wireless’ opposition is a declaration by economist Michael Katz, who concluded that not only would a cap not *promote* competition, but that a cap would actually *limit* competition by restricting output and preventing a wireless operator from growing both as the industry grows and as a result of innovation. Declaration of Michael L. Katz, An Economic Analysis of the Rural Telecommunications Group’s Proposed Spectrum Cap, Attached to Opposition of Verizon Wireless, Appendix A at 4.

²³ Comments of TIA at 3.

US Cellular argues that the Commission should consider adopting a cap because the Commission's case-by-case analysis has not proved to be a barrier to acquisitions except in the most extreme cases.²⁴ This suggests that the purpose of Commission analysis is to prevent an acquisition as opposed to determine the acquisition is in the public interest. US Cellular also ignores that, while DOJ and the Commission ultimately may approve a transaction, they often require market divestitures, thus directly affecting the composition of the merged company and the nature of the acquisition. Finally, that wireless mergers tend to be approved might also show that the Commission's process is well understood and that parties generally only come forward with transactions that the Commission is likely to find in the public interest.

II. RECENT COMMISSION DECISIONS DO NOT VIOLATE 309(j)(3)(B)

Several commenters assert that the Commission's actions have led to excessive concentration of licenses and are thus in violation of Section 309(j)(3)(B) of the Communications Act.²⁵ Most of the commenters ignore that 309(j)(3)(B) sets a goal for the Commission's auction design, not secondary markets.²⁶ For example, with no further explanation, Leap claims that "[w]ithout a brightline rule of a spectrum cap the largest carriers have been able to eliminate many of their competitors, effectively undercutting

²⁴ Comments of US Cellular at 5. US Cellular also offers as a "principle" to guide the Commission's decision-making that it should "face the Verizon Wireless/AT&T problem," suggesting that each company has too many customers. Comments of US Cellular at 8-10. Given that the Commission continues to find the CMRS market competitive and that the Commission and DOJ recently found it in the public interest for Verizon Wireless to acquire ALLTEL, it's not clear what problem US Cellular believes the Commission needs to face.

²⁵ Comments of Leap at 6; Comments of NTCA at 6; Comments of RICA at 4;

²⁶ 47 CFR 309(j)(3)(B).

these important congressional objectives.”²⁷ Leap is clearly arguing that the congressional language applies to secondary market activity. Moreover, it is suggesting that there has been ineffective DOJ or Commission oversight since the repeal of the cap, without providing any substantive evidence of excessive concentration of licenses.²⁸

RICA claims that the Commission’s spectrum bidding designs have failed to fulfill the mandate that Congress gave to the Commission and that there is “excessive concentration of licenses” in the hands of a relatively few carriers” in direct violation of the Communications Act.²⁹ RICA does not define “excessive concentration,” but does provide some limited analysis of the most recent auction, including an accounting of larger carriers’ percentage of both winning *bids* and *pops* won in the recent 700 MHz auction. From these data RICA incorrectly asserts that “the large majority of the B Block licenses were obtained by large national carriers.”³⁰ In fact, nearly 60 percent of the B Block licenses were won by other than large national carriers. More than 70 percent of the Rural Service Areas (RSAs), the areas that are likely of the most interest to RICA’s membership, were purchased by bidders other than large carriers.³¹

²⁷ Comments of Leap at 6.

²⁸ Indeed, FCC analysis indicates that there is not a concentration of licenses in the CMRS industry. The most recent CMRS Competition Report states that more than 150 companies in the United States identified themselves as terrestrial mobile wireless carriers. *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, FCC 08-28, 23 FCC Rcd 2241, ¶ 3 (2008).

²⁹ Comments of RICA at 4.

³⁰ *Id* (emphasis added).

³¹ *See generally* FCC Integrated Spectrum Auction System results for Auction No. 73, available at <https://auctionsignon.fcc.gov/signon/index.htm>.

Indeed, Union Telephone Company, a small wireless carrier serving mostly rural areas, offers an opposing perspective. In its view, a bright line spectrum cap would have affected Union's ability to participate in the 700 MHz auction and "would have undermined the Commission's statutory objective under 309(j)(3)(B)."³²

III. THE COMMISSION SHOULD DISREGARD CALLS FOR ONEROUS REGULATION.

A few commenters propose variations of or additions to RTG's proposal that would make it even more unwieldy and onerous. For example, NTCH would have the Commission create two spectrum caps, one for voice that would cap at 50 MHz all cellular, broadband PCS and SMRS spectrum holdings and one for broadband that would cap at 75 MHz all AWS, 700 MHz, BRS, EBS and WCS spectrum holdings.³³

Distinguishing between voice and broadband spectrum makes no sense. Not only would NTCH's proposal make an already rigid proposed rule more inflexible, it would create an arbitrary distinction that is completely at odds with the evolution of technology. Most carriers today offer broadband services on what NTCH calls voice-based spectrum, and Leap already has begun offering voice services in the recently auctioned AWS band, on what NTCH calls broadband spectrum.³⁴

NTCH's proposal also ignores that the Commission recently rejected arguments that it should to treat voice and broadband as separate markets. In both the Sprint/Clearwire and Verizon Wireless/ALLTEL merger decisions the FCC made clear

³² Comments of Union Telephone at 11.

³³ Comments of NTCH at 5-6.

³⁴ See <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1143345&highlight=>

that it was treating “the provision of mobile broadband services using more recent and advanced networks (e.g., 3G, 4G) and the provision of mobile voice and data services over earlier generations of wireless networks as part of a combined mobile telephony/broadband services market, rather than separate markets, based on consideration of various factors, including the nature of these services and their relationship with each other. . .”³⁵

Other parties propose equally inflexible additions to RTG’s proposed cap. RICA proposes that the Commission consider, in addition to a cap, 1) auctioning only CMA size licenses 2) restricting eligibility in future auctions in rural areas and 3) permitting rural carriers to use licensed spectrum purchased by another carrier at auction.³⁶ US Cellular proposes that the Commission cap spectrum holdings of licensees whose market share exceeds a set level.³⁷ These proposals would reduce a licensee’s flexibility to respond quickly to market conditions, which has been at the core of the Commission’s deregulatory approach to the mobile wireless industry – an approach that has proved hugely successful for the American economy and for consumers. As WCAI states, “[t]he 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.”³⁸

³⁵ *Sprint Nextel Corporation and Clearwire Corporation Applications For Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Opinion and Order, FCC 08-259, ¶ 40 (rel. Nov. 7, 2008); *see also* Verizon Wireless/ALLTEL Order, ¶ 47

³⁶ Comments of RICA at 2.

³⁷ Comments of US Cellular at 6-7.

³⁸ Comments of WCAI at 2.

IV. CONCLUSION.

As outlined above, there is no basis in the record to begin a rulemaking to consider reinstating a spectrum cap. Accordingly, the Commission should deny RTG's Petition.

Respectfully submitted,

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