BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AAWS-1 Licenses	)	WT Docket No. 12-4
	)	
Application of Verizon Wireless and Leap for Consent to Exchange Lower 700 MHz, AWS-1, And PCS Licenses	)	ULS File Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598
	)	
Application of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses	)	WT Docket 12-175

FILED/ACCEPTED

SEP 24 2012

Federal Communications Commission
Office of the Secretary

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

The Commission's grant of the captioned applications is inconsistent with Section 310(b)(3) of the Communications Act and the procedures adopted by the Commission to deal with Section 310(b)(3) in several respects. The FCC determined in the *Foreign Ownership Order* adopted a few days before its action approving this application that the prohibition on alien ownership set forth in that Section precludes foreign ownership of the kind held by Vodafone in Verizon Wireless, absent an effective forbearance from the statutory requirement. This presents both procedural and substantive bars to the Commission's action.

First, the FCC relied upon forbearance from Section 310(b)(3) in order to be able to approve the proposed acquisitions. The forbearance action adopted by the Commission did not become effective until August 22, 2012, but the Commission adopted its Order approving the applications on August 21, before that effective date. At the time the Order was adopted, therefore, the Commission could not lawfully forbear from the 301(b)(3) requirement.

Second, in the *Foreign Ownership Order*, the Commission established certain procedures which are prerequisites to obtaining forbearance treatment, including the filing of a petition by the proponent, public notice of the proposal, an opportunity for the public to comment, and circulation to other federal agencies. The FCC ignored all of these procedures, and its declaratory ruling that Verizon Wireless is eligible for forbearance is therefore invalid.

Third, the Commission failed to address the plain fact that hundreds of licenses have been issued unlawfully to Verizon Wireless in the past decade while it has been 45% owned by Vodafone. This circumstance – and its potential consequences – should have been key elements in its determination as to whether to grant forbearance to Verizon Wireless now.

Finally, the Commission attempted to apply forbearance retroactively to legitimize the past grants of licenses to Verizon Wireless in direct contravention of Section 310(b)(3). Both the logic of the forbearance process and precedent from the DC Circuit make clear that forbearance only applies prospectively; it cannot be used re-write historical errors.

In view of these circumstances, the Commission must rescind the grants of the captioned applications, initiate a Declaratory Ruling proceeding in compliance with its prescribed procedures, and take other steps necessary to address the history of unlawful license grants.

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PETITION FOR RECONSIDERATION

NTCH, Inc. ("NTCH"), by its attorneys, hereby petitions the Commission to reconsider its grant of the captioned applications[1] for the reasons set forth below. NTCH filed a petition to deny against the assignment applications on numerous grounds. The issue raised here, however, is a new matter occasioned by the Commission's rapid adoption and then application of a new

[1] *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, Memorandum Opinion and Order and Declaratory Ruling*, FCC 12-95, released August 23, 2012. (the "*Verizon-SpectrumCo Order*").

forbearance policy which it applied to these transactions. Because the matters addressed here arose only in the last few days before the applications were granted, neither NTCH nor any other party had an opportunity to comment on them earlier in the proceeding. Nevertheless, because the Commission's order granting the applications was plainly unlawful under its own analysis, the grants must be rescinded.

I. Background

The captioned applications were filed last December and January. They contained boiler-plate foreign ownership exhibits that simply stated that Vodafone's 45% foreign ownerships in Cellco Partnership licenses "have been previously authorized by the FCC under the Communications Act."[2] It turns out that this is not quite true.

While the FCC was reviewing the Verizon-SpectrumCo deal and related transactions, it was also, by happenstance, conducting a review of the way that foreign ownership holdings are reviewed and approved. *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act, as Amended*, IB Docket No. 11-133, 26 FCC Rcd 11703 (2011) ("*Foreign Ownership NPRM*"). In that proceeding the FCC began by reviewing procedures applicable to foreign controlling ownership under Section 310(b)(4) of the Act. It later expanded its review to include the application of Section 310(b)(3) of the Act, which applies to non-controlling foreign interests. *International Bureau Seeks further Comment on Foreign Ownership Policies: Forbearance from Section 310(b)(3) for Common Carrier Licensees*, DA 12-573, 27 FCC Rcd 3946 (Int'l Bureau, 2012) ("Forbearance PN").

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[2] Application Exhibit entitled "Response to Alien Ownership Questions."

In the rulemaking proceeding, the Commission observed that past precedent supports the view that Section 310(b)(3) of the Act applies to indirect non-controlling interests held by aliens in common carrier and broadcast licensees. The Commission cited a host of cases, including at least one involving Verizon Wireless, in which the Commission had explicitly applied (b)(3) to such indirect interests. *See Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act, as Amended, First Report and Order*, IB Docket No. 11-133, FCC 12-93, n. 18 (rel. Aug. 17, 2012 ("*Foreign Ownership Order*"). Verizon Wireless and Vodafone vigorously contended that Section (b)(3) does not apply to indirect foreign interests such as those held by Vodafone in Verizon Wireless, but the Commission rejected that contention. Instead, it decided to adopt a forbearance approach to the issue. Under the new policy, the Commission will conduct a case-by-case analysis to determine whether the public interest warrants non-controlling foreign ownership interests above the 20% threshold set by the Act. This analysis is to be done *prior* to the non-controlling foreign interest being acquired. *Foreign Ownership Order*, at ¶ 28.

Interestingly, the Commission tip-toed around a forthright declaration that Section 310(b)(3) applies to non-controlling interests such as Vodafone's in Verizon, but its adoption of a forbearance approach to such interests would be utterly nonsensical if (b)(3) did not apply. Why require petitioners to seek formal forbearance from a statutory provision if it does not apply to the situation presented? Moreover, in the Regulatory Flexibility Certification portion of the Order, the Commission noted that its new approach "will remove a statutory constraint on common carrier licensees, by forbearing from applying the 20 percent ownership limit under Section 310(b)(3) to the class of common carrier licensees in which the foreign ownership is held in the license by intervening U.S.-organized entities that do not control the licensee." *Id.,* at ¶

35. This statement makes no sense whatsoever if (b)(3) does not apply to such interests. We must therefore take the *Foreign Ownership Order* as conclusively establishing that Section 310(b)(3) of the Act bars – *and has always barred* – indirect non-controlling alien interests above the 20% limit.

Having adopted the *Foreign Ownership Order* on August 17, the Commission then quickly adopted the *Verizon-SpectrumCo Order* on August 21, attempting to apply the new forbearance procedures to the applications which were then before it. Unfortunately, because the *Foreign Ownership Order* was adopted literally a few days before the Verizon deal was approved, the Commission did not seek, receive or entertain public comment on whether Section (b)(3) should be forborne from in the context of the Verizon-SpectrumCo deals. Although the procedures established by the *Foreign Ownership Order* require such petitions to be placed on public notice and forwarded to the Executive Branch agencies for comment, *see id.* at ¶ 30, here there was no Public Notice, no forwarding to Executive Branch agencies for review, and, indeed, no Petition filed by the alien seeking approval of the foreign ownership. The Commission simply *sua sponte* applied the forbearance policy without regard to any of the procedures which its own Order required. In addition, the Commission attempted to retroactively absolve Verizon Wireless of having acquired hundreds of licenses over the last twelve years in violation of Section 310(b)(3) of the Act. This legerdemain by the Commission on the eve of action on the Verizon-SpectrumCo applications effectively precluded any public involvement in that decision, one which has huge consequences for the industry, one which could require the revocation of numerous Verizon Wireless licenses, and one which has a direct effect on the captioned applications themselves.

II. The FCC Unlawfully Relied on an Ineffective Rule

In its haste to tie the adoption of the *Foreign Ownership Order* to its approval of the Verizon-SpectrumCo deals, the Commission ignored its own order. The *Foreign Ownership Order* provided by its own terms that its requirements "SHALL BE EFFECTIVE upon publication in the Federal Register." *Id.*, at ¶ 40. The *Foreign Ownership Order* was published in the Federal Register on August 22, 2012, and therefore became effective upon that date. 77 Fed. Reg. 50628 (Aug. 22, 2012). The Commission, however, adopted the *Verizon-SpectrumCo Order* on August 21. The Commission explicitly relied on and applied the forbearance order which was not yet effective. *Verizon-SpectrumCo Order*, at ¶¶ 170-78. As a matter of simple logic, the Commission could not lawfully apply to this transaction a policy which was not in effect, particularly a policy which overrides an express prohibition of the Communications Act. Stated another way, it was flatly contrary to Section 310(b)(3) of the Communications Act to grant the applications unless an effective forbearance under Section 10 of the Act permitted the FCC to do so. Here there was clearly no forbearance action in effect that permitted the FCC to do what it did. At a minimum, therefore, the Commission must rescind the *Verizon-SpectrumCo Order*, require the re-assignment of the subject licenses back to their original holders, and restore the status quo. Once the applications are returned to pending status, the Commission must conduct the Section 310(b)(3) public interest inquiry that its own rules now require. This matter is too grave to admit of short-cuts.

III. The Commission's Order is Substantively Wrong

Apart from the Commission's jumping the gun to grant an application based on an ineffective forbearance ruling, there are far deeper substantive issues with the action. The basic problem is that, as the FCC has affirmed, it is contrary to Section 310(b)(3) of the Act for an alien entity to directly or indirectly own a non-controlling interest of greater than 20% in a common carrier licensee. That has been the FCC's consistent interpretation of Section 310(b) and it remains its interpretation now. No change in Section 310(b) or the Commission's understanding of it has occurred. This presents us and Verizon Wireless with the stark (and awkward) reality that nearly two thousand of its licenses[3] have been unlawfully granted since Vodafone ceased its brief control of Verizon Wireless in 2000 and became a non-controlling 45% minority interest holder. See *In re Applications of Vodafone Airtouch, PLC and Bell Atlantic Corporation*, DA 00-72 (rel. March 30, 2000). Section 310(b)(3) of the Act instructs that "[n]o broadcast or common carrier ... station license shall be granted to or held by ... any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives ...." Since 2000, Vodafone's ownership interest has plainly and indisputably fallen within the flat prohibition of Section 310(b)(3) of the Act, making it unlawful for any licenses to be granted to, or held by, Verizon Wireless. How does this affect the FCC's action in the *Verizon-SpectrumCo Order*?

[3] By NTCH's informal count, there are upwards of 1800 licenses which have been issued to Verizon Wireless since 2000 and remain in its name. Numerous other licenses were probably granted to Verizon Wireless unlawfully but have now been assigned to other entities.

A. The Commission must undertake the substantive evaluation of Verizon's foreign ownership which is required by its own policy.

As noted before, Verizon Wireless presented a boilerplate alien ownership exhibit in its applications. That exhibit did not address the application of Section 310(b)(3) on its proposed new acquisitions. Rather, Verizon seemed to believe that its foreign ownership was governed by the earlier Section 310(b)(4) ruling that Verizon Wireless and Vodafone had received when Vodafone briefly held a controlling interest in Verizon. It is clear now, if it was not clear when the applications were filed, that Section (b)(4) does not and cannot apply in circumstances where the alien entity has an indirect non-controlling interest in the licensee. Nevertheless, the applicants blithely stated, "No new foreign ownership issues are raised by this filing."

Because the Commission chose to use this application as the vehicle to try to regularize Verizon's foreign ownership posture, the captioned applications have become a critical focal point in the Commission's evaluation of how to handle the entire 310(b)(3) situation as it applies to Verizon. But this matter of enormous public interest significance was handled most irregularly. Verizon did not even file a Petition for Declaratory Ruling seeking forbearance treatment as required by the procedures set out in the *Foreign Ownership Order*. Verizon therefore made no showing whatsoever that the non-controlling foreign ownership was in the public interest. Because that Order and the applicable procedures became effective after the FCC had already acted on the applications, no member of the public had an opportunity to comment on the situation. No Public Notice was issued as required by the new procedures. Nor does it appear that the Declaratory Ruling was vetted through Team Telecom, as happens with all other Declaratory Rulings and as the newly adopted procedures expressly prescribe. Succinctly stated, the FCC adopted a set of procedures which are to apply to all Section 310 (b)(3)

forbearance determinations and then it immediately proceeded to ignore every single one of them in approving the Verizon foreign ownership. This despite the fact that in the *Foreign Ownership Order* the Commission had expressly stated that the new procedures would have to be undergone by entities like Verizon Wireless which had previously received approval under Section 310(b)(4) for *controlling* foreign ownership interests. *Foreign Ownership Order*, at n.62. The Commission seems to have bent over backwards to accommodate Verizon here, but Verizon, no matter how big it is, should not be given VIP treatment in derogation of the rules that apply to everyone else.

Now that the procedures established by the *Foreign Ownership Order* are actually effective, the Commission must rescind the grant of these applications and go through the full process it established in that Order for considering and evaluating non-controlling alien interests. This will give interested members of the public and the pertinent federal agencies a full and fair opportunity to review the proposed ownership and comment meaningfully. Section 309 of the Act requires that all applications for license be placed on public notice so as to grant interested parties an opportunity to raise material concerns about the applicant and/or applications. The courts have repeatedly instructed that such "opportunity for comment must be a meaningful opportunity." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, (D.C. Cir. 2009). The Commission, applying the new Section 310(b)(3) forbearance interpretation, granted the Verizon Applications only two days after the adoption of the *First Report and Order*, and a full day before the *First Report and Order* appeared in the Federal Register. In doing so, the Commission denied interested parties a meaningful opportunity to comment on the applications with regard to the foreign ownership analysis.

We should add that this exercise is in no way an empty one, for in addition to evaluating whether Vodafone's ownership interest is in the US public interest, the Commission also must consider whether twelve years of flagrant disregard of Section 310(b)(3) by Verizon Wireless and Vodafone can be ignored. Moreover, the Commission must evaluate whether refusing to forbear would significantly *enhance* competition by reclaiming hundreds of cellular and broadband licenses and making these available to competing carriers. The effect on competition is an essential element of the Section 10 forbearance evaluation, 47 U.S.C. § 160(b), and the immediate, widespread availability of spectrum reclaimed from Verizon would open the door for new and existing competing carriers to obtain additional bandwidth.

B. The Commission Must Deal Forthrightly With the Unlawful Grant of Hundreds of Licenses

As noted above, the *Foreign Ownership Order* conclusively established that it was, and is, unlawful for licenses to be granted to Verizon so long as Vodafone holds a non-controlling interest in excess of 20%. Perhaps because the implications of this principle are potentially so disastrous to Verizon – the revocation of literally hundreds of licenses worth tens of billions of dollars – the FCC tried to finesse the issue in both the *Foreign Ownership Order* and the *Verizon-SpectrumCo Order*. Its only reference to the existing state of affairs was to note obliquely as follows: "We note that our action today removes any uncertainty as to whether the current ownership of Verizon Wireless, as a common carrier licensee, complies with our foreign ownership policies." *Verizon-SpectrumCo Order*, at ¶ 177. The Commission then went on to bless not only the acquisition by Verizon Wireless of the licenses at issue in the captioned applications, but the alien ownership of all other licenses currently held by Verizon Wireless. With no discussion whatsoever of the consequences or implications of Verizon's repeated

unlawful license acquisitions over the last twelve years, the Commission simply swept the entire matter under the administrative rug.

There are two problems with the Commission's action in this regard. First, it was disingenuous. For the Commission to suggest that there was some "uncertainty" about the status of Verizon's current licenses is directly at odds with the Commission's own determination four days earlier that exactly the type of indirect interests held by Vodafone are contrary to Section 310(b)(3). There was no uncertainty whatsoever about that point, and if there was, the *Foreign Ownership Order* surely eliminated it. The consequences of that ruling are staggering because it means that under the Act Verizon could not lawfully have been issued those licenses, and now cannot lawfully continue to hold them. Yet the FCC itself had been complicit in repeatedly granting licenses to Verizon with full knowledge that Vodafone held a prohibited interest. It is understandable that the Commission would want to magically wave the matter away, but an administrative agency charged with administering the Communications Act cannot escape its responsibilities that easily.

The second, and deeper, issue that stands as the elephant in the room is whether the Commission can retroactively legalize hundreds or thousands of unlawful license grants which occurred over the last decade by use of the forbearance process. Section 10 of the Act directs that the Commission "shall forbear" from applying regulations and statutory provisions upon a finding that the criteria enumerated in Section 10 have been met. The process is a forward-looking one because it is predicated on a finding based on today's facts and market conditions. The Commission cannot, and, of course, did not, go back and try to examine the market conditions and other public interest considerations that have existed over the course of the last twelve years in order to make the Section 10 finding retroactive to some earlier date.

Where that leaves us is that the Commission presumably has the authority under the Act to prospectively approve Verizon Wireless's acquisition of the captioned applications – once it has jumped through the procedural hoops it established for itself with full public input and once it has undertaken a genuine substantive analysis of the issues posed by the proposed alien ownership. It can prospectively forbear from the prohibition on Verizon Wireless "holding" common carrier licenses under the circumstances cited in Section (b)(3). But it cannot change the historical fact that licenses were unlawfully "granted to" Verizon Wireless. The past cannot be erased. The forbearance process cannot retroactively undo what was an unlawful action when it occurred. In adopting Section 10, Congress did not suggest in any way that the forbearance process could be applied retroactively. *See* S. REP. NO. 104-23 (1996). Unless such authority is explicitly granted by Congress, agencies do not have the power to promulgate retroactive rules, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), and no such authority was granted, or even hinted at, here.

To the contrary, the D.C. Circuit has accepted the principle that forbearance actions are *prospective-only*. *See Core Communications, Inc.*, 531 F. 3d 849 (D.C. Cir., 2008). "[F]orbearance offers only prospective relief: forbearance by the Commission 'from applying' the interim rules in the future." *Id.*, at 861 (citing 47 U.S.C. § 160(a)). In other words, the Commission cannot retroactively "fix" the unlawfully license grants by a post-hoc forbearance action.

The retroactive application of the new forbearance policy attempted by the Commission here has significant consequences for Verizon Wireless and the public. For one thing, the fact that Verizon Wireless acquired these licenses in violation of the Act is a factor that would normally be taken into account in connection with its renewals – even under the new renewal

process that the Commission is currently considering. Verizon Wireless has hundreds of renewal applications that have been conditionally granted pending the resolution of Docket 10-112, and it makes a huge difference in that context whether the unlawful acquisitions are effectively expunged from the record as though they never happened or a substantial black mark is placed on Verizon's record as a licensee. We have no doubt that the Commission will attempt to devise some forward-looking fix to the problem, but that fix must straightforwardly acknowledge the facts as they exist.

IV. Proposed Actions

In light of the forgoing considerations, the Commission should take the following actions to remedy and correct the errors inherent in both the *Verizon-SpectrumCo Order* and its earlier grants of licenses to Verizon Wireless:

1. Immediately rescind the grant of the captioned applications;
2. Initiate a proper Declaratory Ruling proceeding to consider whether forbearance from Section 310(b)(3) is justified, with due provision for normal public comment and participation by other federal agencies. The proceeding should include consideration of whether, with respect to previously granted licenses, competition would be better served by reclaiming those from Verizon Wireless and making them available to other applicants and whether forbearance can lawfully be applied to retroactive violations of the statute;
3. Defer action on any new license grants to Verizon Wireless until it has gone through the procedures prescribed by the *Foreign Ownership Order,* and only if the record then supports such an action, forbear from applying Section 310(b)(3) to Verizon Wireless's new acquisitions;

4. Deny or defer action on all Verizon Wireless license renewal applications that are pending or are in "conditionally granted" status. The Commission needs to sort out the effect of the initial unlawful grants before granting renewals;

5. For licenses which do not have pending or conditionally granted renewals, designate a hearing under Section 312 of the Act to determine whether the licenses unlawfully granted to Verizon Wireless during the period of Vodafone's 45% ownership should be revoked. Section 312 is properly invoked whenever conditions come to the attention of the Commission that would have warranted it in refusing to grant a license or permit on an original application. Given the fact that Section 310(b)(3) absolutely barred a license from being granted to Verizon while Vodafone held its 45% ownership interest, the Commission could not lawfully have granted those licenses at the time they were applied for, and must therefore now revoke them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, PLC, hereby state that true copies of the foregoing **PETITION FOR RECONSIDERATION** sent by U.S. mail, postage prepaid, this 24th day of September, 2012, to the following:

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