

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 AWS-1 Licenses)	WT Docket No. 12-4
)	
Applications 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
)	
Applications of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses)	WT Docket 12-175
)	

OPPOSITION TO PETITION FOR RECONSIDERATION

Only a single party, NTCH, Inc. (“NTCH”), seeks reconsideration of the *Verizon Wireless-SpectrumCo et al. Order*,¹ raising a narrow – and meritless – issue regarding the indirect foreign ownership interest in Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”) long held by Vodafone Group Plc. (“Vodafone”).² The Commission has repeatedly reviewed and approved Vodafone’s ownership in prior transactions over the past decade, and NTCH’s challenges to the decision here once again approving that ownership are unavailing and provide no basis for reconsideration. For the reasons discussed below, Verizon Wireless, on behalf of itself and SpectrumCo, LLC, Cox TMI Wireless, LLC, Leap Wireless International,

¹ *Cellco Partnership d/b/a Verizon Wireless et al.*, 27 FCC Rcd 10698 (2012) (“*Verizon Wireless-SpectrumCo et al. Order*”).

² See NTCH, Inc., Petition for Reconsideration, WT Docket No. 12-4 *et al.* (filed Sept. 24, 2012) (“NTCH Pet.”).

Inc. and its affiliates, and T-Mobile License LLC, urges the Commission to deny the petition and affirm the license grants.³

DISCUSSION

The Commission has repeatedly approved the foreign ownership structure of Verizon Wireless over the past decade in decisions that have long since become final.⁴ For example, in the *Vodafone-Bell Atlantic Order* issued in 2000, the Commission authorized Verizon Wireless “to be indirectly owned by Vodafone in an amount up to 65.1 percent.”⁵ The Commission subsequently extended the ruling in the *Vodafone-Bell Atlantic Order* to include Advanced Wireless Services (“AWS”) licenses.⁶

Here, in the *Verizon Wireless-SpectrumCo et al. Order*, the Commission again approved the same ownership structure it previously approved on multiple occasions. Specifically, the Commission found that Verizon Wireless is qualified “under the foreign ownership provisions of Section 310(b) of the Communications Act” (the “Act”) with respect to all licenses the company holds.⁷ Accordingly, Verizon Wireless has held and continues to hold its licenses lawfully and in good stead.

³ See 47 C.F.R. §§ 1.106 (g), 1.4(e)(1), (h).

⁴ See, e.g., *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17456 ¶ 232 (2008); *Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp.*, 23 FCC Rcd 12463, 12521-26 ¶¶ 139-50 (2008); *Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless*, 18 FCC Rcd 6490, 6492 ¶¶ 5-6 & n.15 (WTB 2003); *Wireless Telecommunications Bureau and International Bureau Grant Consent for Assignment or Transfer of Control of Wireless Licenses and Authorizations from Price Communications Corporation to Cellco Partnership d/b/a Verizon Wireless*, 16 FCC Rcd 7155 (WTB/IB 2001); *Vodafone AirTouch, PLC and Bell Atlantic Corp.*, 15 FCC Rcd 16507, 16513-14 ¶¶ 16-19 (WTB/IB 2000) (“*Vodafone-Bell Atlantic Order*”); see also *International Authorizations Granted*, File No. ISP-PDR-19991203-00010, 15 FCC Rcd 116, 116 (IB 1999); *AirTouch Communications, Inc. and Vodafone Group, Plc.*, 14 FCC Rcd 9430, 9434 ¶ 9 (WTB 1999).

⁵ *Vodafone-Bell Atlantic Order*, 15 FCC Rcd at 16514 ¶ 19.

⁶ See, e.g., *International Authorizations Granted*, File No. ISP-PDR-20060619-00015, 21 FCC Rcd 13575, 13575 (IB 2006) (extending the ruling in the *Vodafone-Bell Atlantic Order* to cover AWS licenses).

⁷ See *Verizon Wireless-SpectrumCo et al. Order*, 27 FCC Rcd at 10766-67 ¶ 177. Any reference to “remov[ing] any uncertainty” regarding the company’s existing licenses is, at most, non-controlling dicta given

The decision in the *Verizon Wireless-SpectrumCo et al. Order* to reaffirm the ownership structure of Verizon Wireless is both a proper application of the forbearance approach set forth in the *Foreign Ownership Order*⁸ and a proper exercise of forbearance in its own right. First, the Commission’s references to the forbearance rationale in the *Foreign Ownership Order* were appropriate and timely under the Administrative Procedure Act (“APA”). Under the APA, it is the requirements of an order – rather than its rationale or findings – that become effective only upon publication in the Federal Register.⁹ In particular, Section 552(a)(1) of the APA provides that a person “may not ... be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.”¹⁰ Thus, the Section 552(a)(1) requirement for publication attaches only to matters which would adversely affect a member of the public if not published.¹¹

Here, the Commission referenced the forbearance rationale that *removed* possible restrictions, and did not did not seek to prematurely apply any new requirements against Verizon Wireless in a manner which would adversely affect the company. Since the August 22, 2012,

that Verizon Wireless’ existing licenses were not at issue in the applications before the Commission. *Id.*; see also *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998) (“[U]nless an issue is squarely presented in a case, any discussion of the question in the opinion (dicta) is only a preliminary view and therefore not to be given precedential weight.”).

⁸ *Review of Foreign Ownership Policies*, 27 FCC Rcd 9832 (2012) (“*Foreign Ownership Order*”).

⁹ See 5 U.S.C. § 552(a)(1); *Foreign Ownership Order*, 27 FCC Rcd at 9846 ¶ 40 (ordering that “the requirements of this First Report and Order SHALL BE EFFECTIVE upon publication in the Federal Register”).

¹⁰ 5 U.S.C. § 552(a)(1)(E).

¹¹ *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970) (“Under the provisions of 5 U.S.C. § 552, the requirement for publication attaches only to matters which if not published would adversely affect a member of the public.”); accord *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 9 (1st Cir. 1982); *New York v. Lyng*, 829 F.2d 346, 354 (2nd Cir. 1987); *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1388 & n.8 (5th Cir. 1979); *Establishment Inspection of Microcosm*, 951 F.2d 121, 125 & n.4 (7th Cir. 1991); *Lonsdale v. United States*, 919 F.2d 1440, 1445-46 (10th Cir. 1990); see also *Nguyen v. United States*, 824 F.2d 697, 700 (9th Cir. 1987) (finding that an unpublished rule which should have been published pursuant to § 552(a)(1) is effective unless it adversely affects a person’s substantive rights).

effective date of the *Foreign Ownership Order* is one day before the August 23, 2012, effective date of the *Verizon Wireless-SpectrumCo et al. Order*,¹² the FCC's *Verizon Wireless-SpectrumCo et al. Order*'s reference to the forbearance approach was appropriate, and complied with the FCC's rules.¹³

Moreover, the *Verizon Wireless-SpectrumCo et al. Order* constitutes an independent and legitimate exercise of forbearance in its own right. Section 10 of the Act directs the Commission to forbear from applying any provision of the Act if forbearance is in the public interest and enforcement is not needed to protect consumers or ensure just and reasonable rates.¹⁴ In this case, the Commission incorporated the *Foreign Ownership Order* analysis with respect to the elements of forbearance, concluding that "Vodafone's interests in Verizon Wireless are in the public interest."¹⁵

The applications included language indicating that Vodafone's interest in Verizon Wireless had been previously approved and there were no changes to that ownership;¹⁶ the applications were placed on public notice; and the public had an opportunity to comment. As the Commission noted, "[n]o commenters have identified any basis for rebutting the *Vodafone-Bell Atlantic* analysis, which identified no competitive concerns with respect to foreign ownership of

¹² The *Verizon Wireless-SpectrumCo et al. Order* became effective "upon release." See *Verizon Wireless-SpectrumCo et al. Order*, 27 FCC Rcd at 10770 ¶ 193.

¹³ See 47 C.F.R. § 1.103.

¹⁴ See 47 U.S.C. § 160(a).

¹⁵ *Verizon Wireless-SpectrumCo et al. Order*, 27 FCC Rcd at 10766-67 ¶ 177.

¹⁶ See *Foreign Ownership Order*, 27 FCC Rcd at 9843-44 ¶¶ 27-28 (calling for the filing of a petition for declaratory ruling "or similar request").

Verizon Wireless.”¹⁷ And, specifically, though it participated in the proceeding, NTCH did not itself raise any challenges to Verizon Wireless’ foreign ownership or to its existing licenses.¹⁸

Following the opportunity for comment, the Commission engaged in an analysis of whether Vodafone’s interests satisfy the public interest “under the policies and procedures we use for assessing foreign ownership under Section 310(b)(4).”¹⁹ With respect to competition, the decision referenced the Commission’s earlier finding, which “identified no competitive concerns with respect to foreign ownership of Verizon Wireless.”²⁰ And noting the absence of any basis for rebutting the previously approved structure, the Commission effectively recognized that enforcement is not necessary to protect consumers or to ensure just and reasonable rates.²¹ Consistent with its Section 310(b)(4) policy to accord deference to Executive Branch expertise on national security and law enforcement, the Commission conditioned approval of the license assignments on compliance with Verizon Wireless’ letter agreement with the U.S. Department of Homeland Security.²²

Thus, the *Verizon Wireless-SpectrumCo et al. Order* contained an independent forbearance review approving Vodafone’s indirect foreign interests in Verizon Wireless with respect to the pending license assignments. This review comports with established precedent holding that the Commission’s Section 10 forbearance analysis need not take any particular form and may “vary depending on the circumstances,” and rejecting efforts to place procedural

¹⁷ See *Verizon Wireless-SpectrumCo et al. Order*, 27 FCC Rcd at 10766 ¶ 175.

¹⁸ Cf. NTCH, Inc., Petition to Deny, WT Docket No. 12-4 (filed Feb. 21, 2012); NTCH, Inc., Reply, WT Docket No. 12-4 (filed Mar. 26, 2012); NTCH, Inc., Petition to Deny, File Nos. 0004942973 *et al.* (filed Feb. 21, 2012); NTCH, Inc., Reply, File Nos. 0004942973 *et al.* (filed Mar. 26, 2012).

¹⁹ *Verizon Wireless-SpectrumCo et al. Order*, 27 FCC Rcd at 10766 ¶ 175.

²⁰ *Id.*

²¹ *Id.*

²² See *id.* at 10767 ¶ 178.

roadblocks to forbearance grants.²³ In light of the Commission’s previous findings with respect to Vodafone’s interest in Verizon Wireless, no more analysis was necessary in this case.

NTCH’s claims to the contrary are unavailing. To the extent NTCH’s arguments are based on its incorrect view that the *Foreign Ownership Order* “conclusively establish[ed]” that Section 310(b)(4) does not apply to indirect foreign interests,²⁴ and that Section 310(b)(3) is a bar to indirect, non-controlling foreign ownership above 20 percent,²⁵ NTCH is wrong. The *Foreign Ownership Order* expressly stated that “we do not address” whether Section 310(b)(4) applies to indirect foreign investments held through a U.S.-organized entity, and merely “assume[d]” Section 310(b)(3) applies to such interests for purposes of its forbearance analysis.²⁶ Commissioner Pai’s separate statement reiterates that the order did not make specific findings with respect to these issues:

I cast my vote with the understanding that today’s order *does not resolve* the issue of whether section 310(b)(3) of the Act applies to indirect, non-controlling foreign interests in a licensee. Specifically, in footnote 26, today’s order makes clear that the Commission is only assuming this to be the case for purposes of resolving this proceeding and that it *is not addressing* the argument that section 310(b)(4) of the Act, rather than section 310(b)(3), applies to such foreign interests.²⁷

In effect, NTCH seeks to rewrite the *Foreign Ownership Order* and read into it phantom findings that the Commission simply did not make.

²³ See *Earthlink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); see also *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 300-01 (D.C. Cir. 2009).

²⁴ See NTCH Pet. at 7 (arguing that the *Foreign Ownership Order* made clear that “Section(b)(4) does not and cannot apply in circumstances where an alien entity has an indirect non-controlling interest in the licensee”).

²⁵ See *id.* at 4 (asserting that “[w]e must therefore take the *Foreign Ownership Order* as conclusively establishing that Section 310(b)(3) of the Act bars – *and always has barred* – indirect non-controlling alien interests above the 20 [percent] limit”).

²⁶ *Foreign Ownership Order*, 27 FCC Rcd at 9837 ¶ 10 n.26.

²⁷ *Id.* at 9847 (Statement of Commissioner Ajit Pai) (emphasis added).

Moreover, NTCH's revisionist claims are untimely because they challenge judgments the Commission made in the *Foreign Ownership Order*, not the *Verizon Wireless-SpectrumCo et al. Order*. Petitions seeking reconsideration of the *Foreign Ownership Order* were due September 21, 2012, three days *before* NTCH made its filing,²⁸ and the Commission must reject these claims as a late-filed request to reconsider that decision.²⁹

Even if, as NTCH claims, Section 310(b)(3) is relevant to an analysis of Verizon Wireless' foreign ownership, it is beside the point. The Commission forbore from applying it to the instant license assignments and did so properly, as explained above. NTCH is thus wrong that there was not "an effective forbearance" in this case,³⁰ as the *Verizon Wireless-SpectrumCo et al. Order* properly relied on the forbearance approach set forth in the *Foreign Ownership Order* and contained an independent forbearance review approving Vodafone's indirect foreign interests in Verizon Wireless with respect to the pending license assignments.

NTCH's assertion that the Commission improperly "retroactively absolve[d]" prior license grants under a Section 310(b)(3) framework is similarly flawed.³¹ As discussed above, those license grants were lawfully issued and there is nothing to address retroactively.

Finally, NTCH's claims that the Commission did not follow the procedures in the *Foreign Ownership Order* also lack merit,³² as the FCC effectively complied with those

²⁸ See 47 C.F.R. § 1.429(d) (requiring petitions to be filed 30 days after public notice, or publication in the Federal Register in this case). The *Foreign Ownership Order* was published in the Federal Register on August 22, 2012. See 77 Fed. Reg. 50628 (Aug. 22, 2012). The NTCH petition was filed on September 24, 2012 in the *Verizon Wireless-SpectrumCo et al.* dockets, WT Docket Nos. 12-4 and 12-175.

²⁹ See *Frequency Coordination in the Private Land Mobile Radio Services*, 14 FCC Rcd 12752, 12757-58 ¶ 11 (1999) ("[I]ndirect challenges to Commission decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied.") (citing *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, 5 FCC Rcd 216, 221 ¶ 41, 227-28 n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991)).

³⁰ See NTCH Pet. at 5 (citing *Foreign Ownership Order*).

³¹ See *id.* at 4.

procedures. As the Commission explained in the *Foreign Ownership Order*, under the new Section 310(b)(3) forbearance approach, “we will apply the same foreign ownership policies and procedures that we apply under section 310(b)(4).”³³ In the *Verizon Wireless-SpectrumCo et al. Order*, the FCC followed the very process NTCH alleges to be lacking here, and any differences are at most harmless error.³⁴

CONCLUSION

NTCH presents no credible basis for reconsidering the *Verizon Wireless-SpectrumCo et al. Order* or rescinding the underlying license grants. The Commission should deny its petition and affirm the license grants in these proceedings.

Respectfully submitted,

/s/

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³² *See id.* at 4, 8.

³³ *Foreign Ownership Order*, 27 FCC Rcd at 9837 ¶ 10; *see also id.* at nn.26-27 and 9838 ¶ 13, 9841 ¶ 20, 9842-44 ¶¶ 23, 25-31.

³⁴ *See, e.g., City of Arlington, Texas v. FCC*, 668 F.3d 229, 234 (5th Cir. 2012), *petition for cert. pending*; *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970)).

CERTIFICATE OF SERVICE

I, Bridget E. Anderson of Wilkinson Barker Knauer, LLP, hereby certify that the foregoing Opposition to Petition for Reconsideration was served this 10th day of October, 2012, by depositing a true copy thereof with the United States Postal Service, first class postage pre-paid, addressed to the parties listed below:

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