

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

In the Matter of )  
 ) WT Docket No. 12-269  
Policies Regarding Mobile Spectrum Holdings )

**COMMENTS OF NTCH, INC.**

NTCH, Inc., (“NTCH”), by its attorneys, hereby submits its comments on the Commission’s inquiry into permissible spectrum holdings. NTCH believes this is a critical policy inquiry for the Commission, and one which is long overdue. Frequently in the last few years, interested parties have objected to proposed assignments or transfers on the grounds that they will result in an inordinate concentration of spectrum in the hands of one party or another. Unfortunately, both the Commission and the public have been hampered in supporting and evaluating such claims by the lack of an agreed metric by which to measure how much spectrum is “too much.” The quantum of spectrum which a carrier can hold goes to the very heart of the competitive market structure that governs mobile services in this country, and in NTCH’s view, the Commission’s current policies have led to far too much concentration in the hands of the Big Two to the detriment of competition. The result is higher prices, less choice, and worse service for American consumers. This proceeding could be a major corrective – albeit a late one – for the spectrum imbalance which has come to dominate the market. NTCH has several suggestions for the Commission which may assist it in its deliberations.

**I. The Commission Should Adopt A Bright Line Spectrum Cap.**

A. It is always a useful regulatory approach to have clear, publicly stated rules that everyone can go by. The more “ad hoc” or “case by case” the approach, the greater the

uncertainty for all concerned. The investment community, of course, abhors uncertainty because investment decisions cannot be based on a known set of regulatory criteria evenly applied. To the extent there is uncertainty in that regard, it makes it harder, and more expensive, for telecommunications entrepreneurs to line up sources of financing for acquisitions and other projects. In this economic climate especially, the Commission should be doing everything possible to *encourage* capital investment – not *discourage* it by vague, vacillating, and unevenly applied standards.

Telecommunications companies themselves thrive on certainty. A major tool in any company's growth plan is normally the potential for new spectrum acquisitions to sustain projected service to consumers. Companies need to know whether they will or will not be able to acquire additional spectrum in a given market without regulatory angst. Armed with that information, they can plan intelligently for growth, attempt to use other spectrum-intensive methods to handle growth, or recognize that they have to cease growth altogether because they cannot handle the traffic. In all of these regards the current situation leaves the larger carriers in a quandary in many markets as to whether they will be allowed to acquire more spectrum in the markets that may need it most. In some cases, hard spectrum caps would have the effect of compelling the largest carriers to actually use spectrum that they have been warehousing or compel them to use their existing spectrum more efficiently.

Smaller telecom companies would benefit by hard caps because there would be a limit on the amount of spectrum that the majors can hold. This would necessarily leave more spectrum for smaller carriers to acquire so they can build competitive systems of their own, although on a smaller scale than the majors. History has taught us that small carriers serve an important disruptive role in the competitive marketplace. They not only drive innovation by developing

new service offerings (which the majors then reluctantly embrace years later) but also help to put price pressure on the majors by offering lower cost alternatives.

Consumers and public interest groups also benefit because the adoption of a bright line eliminates the need to litigate and relitigate the question of how much is too much every time a major spectrum acquisition is proposed. The public can have full input into the development of the spectrum cap, but after that any particular acquisition could be judged simply on its compliance with the rule. Major acquisitions would be simplified and accelerated immeasurably by not having to re-invent the spectrum aggregation wheel with each new deal. Of course, this kind of bright line also simplifies the task of the Commission and the Department of Justice since a deal either would or would not pass muster, at least from a spectrum aggregation standpoint.

On the other hand, leaving the cap spongy, as the current spectrum screen does, leaves everyone at a loss as to what is going to be considered acceptable and creates the perception that the standards may not be being evenhandedly applied. Indeed, “spongy” caps invite politically motivated or “raised eyebrow” decision-making that should be the antithesis of fair administrative practice.

B. Having a bright line cap need not mean that the cap could not be exceeded under any circumstances. There could be unusual situations where a carrier might be able to justify the need for additional spectrum in excess of a cap, but in that case the waiver process, with its high burden to meet, would set a difficult, but not impossibly high, bar to overcome. The Commission could and should establish some waiver factors at the outset, such as whether the waiver proponent has made roaming on its network realistically available, both historically and currently, whether the proponent has unused spectrum in its inventory, and whether the proponent has made antenna space available to others on its tower sites in the area at issue. Pro-

competitive and pro-active practices like these would concretely ameliorate the anti-competitive effects that would otherwise weigh heavily against granting a waiver of the spectrum cap.

C. Different treatment for auctioned spectrum is not appropriate. To be sure, as indicated above, auction participants need to know with certainty whether they can safely bid on spectrum without exceeding an unstated cap. That is one reason a bright line test is warranted. But if a spectrum cap is good policy in that context, there is no reason why it should not apply across the board. In other words, once the Commission decides that a certain quantum of spectrum in any given market is excessive, that determination should logically apply to all future acquisitions, not just auction-based ones.

## **II. More Sites = More Spectrum.**

The essence of cellular communications is that spectrum re-use effectively multiplies the amount of useful spectrum many times over. In effect, building tower sites for mobile base stations creates more spectrum. Because the major carriers have had virtually unlimited access to spectrum, including spectrum which they keep in their warehouses for future purposes, they have not had to bite the bullet of new tower construction as an alternative means of expanding their spectrum assets. Imposing a spectrum cap would not, as some will claim, slam the door in the face of growth, though of course there would eventually be a limit. Rather, a spectrum cap would compel spectrum holders who are approaching the cap to use their spectrum resources more efficiently, more effectively, more productively, and generally more wisely. While there is a cost associated with building more towers, it is greatly outweighed by the benefits of having spectrum be available to other carriers. Because a spectrum cap would apply to all carriers in a given market, all of them would have to be building or sharing more towers to squeeze the

utmost out of the resources they have. And in the end, everyone benefits by more intensive use of a scarce resource.

### **III. Which spectrum bands should be included in the cap assessment?**

The Commission has had to adjust the bands included in the spectrum screen process over the years to be sure it was including the right bands. The criterion is relatively straightforward: spectrum should be included in the cap if it is licensed and available for terrestrial commercial mobile service applications, both voice and broadband. This would embrace cellular, broadband PCS, AWS, 700 MHz, commercial SMR, and BRS.

NTCH does not believe at this time that mobile satellite spectrum should be included because under current rules such spectrum is not truly fungible with terrestrial communications networks and is not so viewed by the public. However, if the Commission elects to permit satellite carriers like Dish Network to effectively convert their satellite spectrum to terrestrial mobile use, then that spectrum would have to be included. Use of unlicensed spectrum would not be included, since such spectrum remains available for any operator or potential operator to use. Narrowband spectrum would also not be included, nor would spectrum devoted to public safety since these are not competitive with broadband commercial offerings. Finally, EBS spectrum should not be included. While this is a closer call since excess EBS spectrum is often leased to commercial operators and is functionally indistinguishable from BRS spectrum, it is also true that some EBS spectrum must be dedicated to educational purposes even when the majority is leased out. And leased EBS spectrum remains subject to partial recapture by the educators both now and at the 15 year mark of many leases under the Commission's rules. Accordingly, EBS spectrum cannot be accurately described as available for commercial use

since, unlike all other flexible-use mobile spectrum, some or all of it must either be devoted to educational purposes or must be available for that purpose.

Because the Commission is continuing to roll out new spectrum for commercial mobile applications, as prompted by the Broadband Plan, the “basket” of spectrum included in the cap cannot remain static. The Commission should make it a point to revisit the spectrum subject to the cap every three years to ensure that the cap is properly inclusive.

When evaluating compliance with the cap, a given spectrum holder should be charged not only with owned spectrum but with any spectrum *leased* in a given market since the point of the cap is not simply to impede concentration of spectrum ownership *per se* but rather concentration of use and control of spectrum by any means. For the same reason, MVNO operations which do not qualify as leases but are wholesale reseller arrangements should also be included in the aggregation assessment.

#### **IV. How much spectrum is too much?**

The final question NTCH wishes to address is the quantum of spectrum ownership or control that should be deemed acceptable. The current rule of thumb is that no single carrier should have more than one-third of the available spectrum. It is unclear what that rule of thumb was based on, but it clearly needs adjustment in today’s environment. NTCH suggests that 20% would be a much more effective benchmark. In a greenfields situation, a 20% limit would allow the two majors as well as Sprint and T-Mobile to each have 20% of the available spectrum while leaving 20% for local or regional operators. That 20% could be used by as many as three smaller operators to offer solid competition. In the real world, the national companies have already soaked up virtually all of the spectrum in the major and mid-major markets, so there are only small bits and pieces left for other carriers. The 20% rule would ensure that those small

remaining bits remain available for smaller carriers, and would also ensure spectrum access in smaller markets where smaller carriers compete most vigorously.

## **V. Conclusion**

The Commission should seize this opportunity to restore the imbalance that has come to skew the current mobile marketplace. By adopting a clear and prudent bright line approach to spectrum aggregation, the Commission can not only bring certainty and predictability to its auction and transactional proceedings, but simplify those proceedings considerably.

Substantively, the establishment of a bright line at the levels proposed above would give smaller carriers a fair chance to acquire spectrum both in auctions and in the secondary market so they can continue to innovate and compete in an increasingly duopolistic world.

Respectfully submitted,

NTCH, Inc.

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