Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF VERIZON WIRELESS

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS

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November 28, 2012

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INTRODUCTION AND SUMMARY

Verizon Wireless agrees that a healthy and competitive wireless marketplace needs "clear and predictable rules of the road."[1] Applying a transparent and straightforward spectrum screen with a safe harbor for transactions below the screen will bring needed clarity and certainty to the Commission's review of spectrum acquisitions.

In 2001, the Commission determined that its review of spectrum acquisitions should no longer be constrained by an inflexible cap on the amount of commercial mobile spectrum a company could hold, but instead should evaluate the effect of each acquisition on the supply of spectrum available for other companies to compete. It concluded that the spectrum cap's underlying objectives – "promoting competition in the CMRS services, allowing review of CMRS acquisitions in an administratively simple manner, and lending certainty to the

[1] *Policies Regarding Mobile Spectrum Holdings,* Notice of Proposed Rulemaking, FCC 12-119 (rel. Sept. 28, 2012)("Notice")(Statement of Chairman Julius Genachowski); *see also* Notice ¶ 1 ("We initiate this proceeding to provide rules of the road that are clear and predictable, and that promote the competition needed to ensure a vibrant, world-leading, innovation-based mobile economy.").

marketplace"[2] – could be "better achieved" by "case-by-case review, properly performed."[3] In 2004, the Commission thus adopted a spectrum "screen," which established a safe harbor below which spectrum aggregation would not risk competitive harm, while enabling it to focus its scarce resources on spectrum acquisitions that might cause such harm.[4]

The spectrum screen framework initially provided a reasonable, transparent case-by-case means to conduct a spectrum aggregation review, but over the years administration of the screen has deviated from the Commission's original policy in two important ways. First, rather than apply the screen as a filter that frees the Commission from expending resources on evaluating spectrum acquisitions that pose no competitive risk,[5] recent reviews have spent resources to review aggregation that falls *below* the screen. The screen has become a black box that undercuts its goal: to provide certainty to the secondary market and to auction participants as to which spectrum acquisitions will be subject to detailed review for potential competitive harm. Second, rather than adjust the screen over time to reflect the increasing amount of spectrum that is in fact available to provide mobile services,[6] the Commission has left unchanged the smaller

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[2] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd 7988, 8105 ¶ 251 (1994) ("*CMRS Third Report and Order*").

[3] *2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668, 22695-96 ¶ 54 (2001) ("*Second Biennial Review Order*").

[4] *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21568-69 ¶¶ 109-10 (2004) ("*AT&T Wireless-Cingular Order*").

[5] *See AT&T Wireless-Cingular Order*, 19 FCC Rcd at 21569 ¶ 112 (noting that the screen was "meant to screen out those markets which … need[] no further examination").

[6] *See, e.g., Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd

amount of spectrum that made up the screen years ago. This amount includes only about two-thirds of the total spectrum that is suitable and available for mobile use today. Not only is much of the uncounted spectrum available – it is in use. And the Chairman has pointed to upcoming actions to make additional spectrum available for mobile services.[7] The spectrum screen should be adjusted to include that spectrum, and more.

To create an effective and sustainable mobile spectrum holdings review policy, the Commission should update the spectrum screen framework, building on the strengths of the initial spectrum screen approach – a safe harbor providing certainty for transactions that do not exceed the screen, while enabling more detailed review of markets triggered by the screen for potential competitive harm. The Commission should also reject any consideration of reimposing a spectrum cap, which is an inherently inflexible tool ill-suited to the dynamic spectrum market, and which can block spectrum transactions that are clearly pro-consumer. Rather, preserving the straightforward, transparent approach of the screen as it was initially adopted will enable the Commission to capture some of the benefits of a bright-line rule without depriving the Commission of the flexibility central to its case-by-case review.

20295, 20315 ¶ 35 (2007) ("*AT&T-Dobson Order*") (indicating that "we expect to continue to update our initial spectrum screen" as more spectrum becomes available).

[7] "Later this year, we will finish removing outdated rules and restrictions on 70 MHz of spectrum. This includes 40 megahertz of mobile satellite spectrum that I expect the Commission will repurpose for land-based mobile use, and 30 megahertz in the long-troubled Wireless Communications Service band that is now poised to be used for LTE service. We're also working with stakeholders to enable use of the portions of the mobile satellite spectrum in the L- and Big LEO bands for terrestrial service, and this would add to our megahertz total." "Winning the Global Bandwidth Race: Opportunities and Challenges for Mobile Broadband," Prepared Remarks of Chairman Julius Genachowski, University of Pennsylvania-Wharton, at 5 (October 4, 2012) ("October 4 Genachowski Remarks"), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db1005/DOC-316661A1.pdf (last visited Nov. 27, 2012).

This proceeding enables the Commission to review comprehensively the spectrum bands that should be included in the screen. The screen should include all spectrum that is suitable for mobile telephony/broadband services and available now or in the near term. The Commission should update the screen to include an additional 212 MHz of spectrum comprising WCS spectrum in the 2.3 GHz band, MSS/ATC spectrum in the S-Band and Big LEO band, and BRS/EBS spectrum in the 2.5 GHz band. Moreover, the Commission should create a process for timely updates to the screen by seeking comment on the inclusion of a given spectrum band when it issues the Notice of Proposed Rulemaking or other document which could enable the provision of mobile telephony/broadband services in the band.

The Commission should continue to treat all spectrum included in the screen equally and resist calls to make the screen into a far more complex, uncertain tool by adopting sub-screens or weighting spectrum. It would be impractical and arbitrary to attempt to make spectrum screen distinctions based on technical characteristics, specific frequency bands, or market values, given that different bands have advantages and disadvantages that vary among carriers depending on each carrier's needs and deployment plans.

The Commission should retain the spectrum screen threshold set to approximately one-third of the spectrum available. This is a conservative measure designed to ensure that there is no risk to competition posed by spectrum holdings below that level. This is particularly conservative considering the overall amount of spectrum in the market and the Government's commitment to repurposing an additional 300 MHz of spectrum for wireless broadband by 2015 and 500 MHz by 2020. While the screen threshold could reasonably be set at a higher level, it should not be set any lower and doing so would undermine the benefits of the screen.

This proceeding gives the Commission a fresh start to return the screen to its roots as a safe harbor, to review comprehensively the spectrum bands that should be included in the screen today, to create a process for timely updates going forward, and to provide guidance on the factors the Commission will consider in its review of transactions that exceed the spectrum screen. These reforms will facilitate the robust and predictable secondary spectrum market that policymakers, carriers, and the public all need to ensure spectrum flows to its highest and best uses, enabling the U.S. mobile market to remain a hotbed of competition, investment, and innovation.

DISCUSSION

I. THE COMMISSION SHOULD REAFFIRM THE SPECTRUM SCREEN SAFE HARBOR, PROVIDING CERTAINTY IN BELOW-SCREEN MARKETS AND FLEXIBILITY TO REVIEW MARKETS THAT EXCEED THE SCREEN.

A properly configured spectrum screen will achieve the primary objectives of this proceeding: (i) "provid[ing] rules of the road that are clear and predictable,"[8] (ii) "afford[ing] flexibility to consider different circumstances,"[9] and (iii) "promoting the competition needed to ensure a vibrant, increasingly mobile economy driven by innovation."[10] To meet these goals, the Commission should apply the spectrum screen framework as originally instituted – namely, as a safe harbor that eliminates further spectrum-related review of transactions that do not risk competitive harm, but with the flexibility to engage in a more detailed review of areas where the purchaser would aggregate spectrum above the screen. Under this approach, the Commission

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[8] Notice ¶ 1.

[9] *Id.* ¶ 18; *see also id.* ¶ 20 ("If we were to adopt bright-line limits, how could we do so in a manner that preserves our flexibility?").

[10] *Id.* ¶ 15.

approves spectrum transactions that do not exceed the spectrum screen without further spectrum-related review. If a proposed transaction triggers the spectrum screen in any markets, it does not necessarily indicate harm to competition and the screen does not operate as a *de facto* cap. The Commission instead reviews the individualized circumstances in those markets, and can take action based on those circumstances.

A. The Spectrum Screen Should Provide Marketplace Certainty and Eliminate Further Review of Below-Screen Markets.

The Commission, on a bipartisan basis, has long recognized that efficient and transparent secondary markets are essential to sound spectrum policy.[11] And it has stressed the need for its regulatory policies, including its review of spectrum transactions, to "provide parties with a reasonable degree of certainty and transparency."[12] Regulatory certainty enables companies to make efficiency-enhancing investments and thus facilitates those investments.

A transparent spectrum screen promotes competition and the public interest by reducing regulatory uncertainty, streamlining administrative review, and limiting the burden of review and

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[11] *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24178, ¶¶ 1, 18 (2000); William Kennard, Chairman, FCC, Secondary Market Forum, Tr. 7:11-14 (May 31, 2000) (explaining that "spectrum resource can be seen more as a commodity that can move freely in the marketplace, because that's how spectrum can best meet the market demands of today and of the future"), www.fcc.gov/realaudio/tr053100.doc (last visited Nov. 27, 2012); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003) (Joint Statement of Chairman Michael K. Powell and Commissioner Kevin J. Martin)(noting that "facilitating the ability to lease or transfer spectrum will expand spectrum access for innovators and entrepreneurs, increasing the number and variety of wireless applications available to consumers"); Remarks of FCC Chairman Julius Genachowski, 2012 Consumer Electronics Show, Las Vegas, NV, at 5 (Jan. 11, 2012) (noting that secondary markets is one of the key measures "to meet[ing] th[e] demand" for more spectrum); Connecting America: National Broadband Plan at 83 (Mar. 16, 2012) ("National Broadband Plan").

[12] *Second Biennial Review Order*, 16 FCC Rcd at 22693-94 ¶ 50.

analysis to those markets that may actually have competitive issues. To achieve these goals, the Commission must restore the spectrum screen's intended function as a safe harbor so that applicants will not be subjected to further spectrum-related review in below-screen markets, because there is no risk of competitive harm. Under this approach, the Commission retains flexibility to examine competitive conditions in those markets where the screen is exceeded to determine whether the transaction poses a risk to competition and whether remedies are warranted. As Dr. Allan L. Shampine explains in the attached declaration, "a safe harbor for spectrum transactions is a useful regulatory tool which can help reduce regulatory uncertainty while still preserving flexibility for the Commission."[13]

The Commission originally implemented the spectrum screen as a safe harbor below which further review was unnecessary. The 2004 *AT&T Wireless-Cingular Order* explained its application as follows:

> [By] analyzing any local area caught in [the initial screen], we ensured that we did not overlook any local area which deserved closer scrutiny in our case-by-case analysis. Conversely, application of the initial screen eliminated from further review any market *not* identified by the screen.[14]

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[13] Declaration of Allan L. Shampine, Ph.D, ¶ 27 (Nov. 26, 2012) (attached as Exhibit 1) ("Shampine Decl."). Dr. Shampine is an economist who has published numerous articles and submitted testimony on the economics of telecommunications and network industries.

[14] *AT&T Wireless-Cingular Order*, 19 FCC Rcd at 21568 ¶ 110 (emphasis in original); *id.* ¶ 109 ("[T]he function of [this initial screen] was simply to eliminate from further consideration any market in which there is no potential for competitive harm as result of this transaction ….").

Since then, the Commission has repeatedly reiterated that the spectrum screen was intended to act as a safe harbor, "to eliminate from further review those markets in which there is clearly no competitive harm."[15]

However, the Notice suggests that the Commission has moved away from the original purposes of the screen in some cases. For example, it notes that the Commission "does not … limit its consideration of potential competitive harms in proposed transactions solely to markets identified by its initial screen."[16] This approach potentially subjects any transaction – including spectrum-only transactions – to comprehensive case by case analysis, even when the screen is not exceeded. Two of the orders cited for this proposition, however, reaffirmed the screen as a safe harbor approach with respect to spectrum aggregation;[17] moreover, they involved mergers

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[15] *Applications of Cellco Partnership d/b/a Verizon Wireless and AT&T, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and Request for Declaratory Ruling on Foreign Ownership*, 25 FCC Rcd 10985, 10999 ¶ 29 (WTB/IB 2010) ("*Verizon Wireless-AT&T Order*"); *see also id.* at 11002 ¶ 37 ("[T]he Commission's initial screen is intended to excluded from further review those markets in which there is clearly no competitive harm relative to today's generally competitive marketplace."); *AT&T-Dobson Order*, 22 FCC Rcd at 20317 ¶ 39 ("[T]he purpose of this initial screen is to eliminate from further review those markets in which there is clearly no competitive harm relative to today's generally competitive marketplace. It is designed to … ensure that we did not exclude from further scrutiny any geographic areas in which the potential for anticompetitive effects exists."); *Applications of Western Wireless Corporation and ALLTEL Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13053, 13073, n.142 (2005) ("[T]he analytical purpose of the initial screen [is] to eliminate from review markets where there is no competitive harm rather than identifying markets where competitive harm may exist.").

[16] *See* Notice ¶¶ 8, 17.

[17] *Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, Memorandum Opinion and Order, 24 FCC Rcd 13915, 13936 ¶ 46 (2009) ("*AT&T-Centennial Order*") ("In evaluating the competitive effects of this transaction, our initial screen eliminates from further review those markets in which there is clearly no competitive harm relative to today's generally competitive marketplace…. A subsequent section examines on a case-by-case analysis those markets identified by the screen, where potential harm is possible, to determine whether harm is

where the concerns in below screen markets related not to spectrum aggregation but to the potential for coordinated interaction by the merged entity.[18] In mergers or other transactions involving aggregation of customers, the spectrum screen was not intended to eliminate any further review of whether a provider may acquire a sufficiently large market share or customer base to raise potential competitive concerns. On the contrary, the Commission has long employed a separate market concentration screen based on HHI figures to determine whether further review of these latter issues is warranted.[19] Where the spectrum screen is not exceeded, however, that should terminate further spectrum-related review; indeed that was the objective behind adopting a spectrum screen in the first place.

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likely and a remedy needed."); *Applications for the Assignment of License from Denali PCS, L.L.C., to Alaska Digitel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc*., Memorandum Opinion and Order, 21 FCC Rcd 14863, 14881 ¶ 36 (2006) ("*Alaska Digitel-GCI Order*") ("In evaluating this transaction, we apply the same screening criteria that the Commission has used in prior wireless industry merger orders to identify whether particular markets in any proposed transaction potentially are adversely affected. This initial analysis is designed to eliminate from further review those markets in which there is no competitive harm relative to today's generally competitive mobile telephony market.") (footnotes omitted).

[18] *See AT&T-Centennial Order*, 24 FCC Rcd at 13952 ¶ 85; *Alaska Digitel-GCI Order*, 21 FCC Rcd at 14898-89 ¶ 85.

[19] There are of course other elements of the Commission's Section 310 review. These include, for example, foreign ownership and licensee qualification issues. *See* 47 U.S.C. § 310(a), (b) (regarding foreign ownership limits); *id*. §§ 310(d) & 308 (directing Section 310 review to operate in the same manner as applications under Section 308, which permits the Commission to prescribe "citizenship, character, and financial, technical, and other qualifications" as conditions for license applications and renewals). As noted in the text, the Commission's initial screen also includes a market concentration prong that relies on the Herfindahl–Hirschman Index ("HHI"). *See* Notice ¶ 8. However, a transaction that does not involve an aggregation of market share and thus does not implicate the HHI should not be subject to further competitive review if it does not trigger the spectrum screen.

It is thus important for the Commission to confirm that, as to spectrum-only transactions, and as to spectrum aggregation in other transactions, the screen is a safe harbor.[20] Departing from that policy and applying a case-by-case approach to below-screen markets would defeat the very purpose of the screen, by throwing below-screen markets into uncertainty.[21] The Commission should affirm that the screen will operate as originally intended, whereby all spectrum transactions that do not trigger the screen will be approved without further spectrum-related review.

This safe harbor is an essential element of an efficient and effective screen, because it allows the Commission to capture some of the benefits of a bright line rule while retaining the flexibility to conduct a meaningful review of transactions that exceed the screen and could raise competitive issues. Dr. Shampine agrees that the screen must "specify[] a safe harbor below which firms can assume the transactions will not be subject to scrutiny," in order to "provide[] firms with assurance as to how particular transactions will be treated."[22] He notes the potential "chilling effects on investment" of an ambiguous and unclear government review process, as well as the higher expected cost of secondary market transactions contrary to the Commission's articulated objectives.[23] The safe harbor provides parties to a transaction a degree of certainty about the course of the Commission's review, which makes it more likely that parties will enter into those transactions, promoting a robust secondary market.

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[20] *See* Shampine Decl. ¶ 13 & n.16.

[21] *See id*. ¶ 7 ("Uncertainty about whether a particular transaction will be approved, when it will be approved, or under what conditions it will be approved, serves to deter otherwise efficient transactions to the detriment of the industry and consumers.").

[22] *Id*. ¶¶ 13, 7.

[23] *Id.* ¶ 8.

Further, a safe harbor helps mitigate the cost and complexity of case-by-case review by eliminating the need to review transactions (or markets within transactions) that fall under the screen.[24] Dr. Shampine explains that a safe harbor can "minimize the burden of case-by-case analyses on all parties" and help to moderate the "time-and resource-intensive" nature of a case-by-case review.[25] Absent a safe harbor, the Commission's review could become even more time- and resource-intensive without any countervailing benefit to consumers or interested stakeholders.

B. The Commission Should Reduce Uncertainty by Identifying the Factors It Will Consider in Reviewing Transactions that Exceed the Spectrum Screen.

An effective spectrum screen framework would also provide clear guidance about how the Commission will address those transactions that exceed the spectrum screen and thus prompt further review. Triggering the screen is not in and of itself an indicator of competitive harm, as spectrum is only one input in the relevant market.[26] Instead, it merely reflects the Commission's view that the spectrum aggregation elements of the transaction warrant further review. The Commission will then examine the individualized circumstances where the screen is exceeded to evaluate the transaction's impact.

In assessing the potential for competitive harm in these situations, the Commission has developed data on the spectrum available to competitors and the number of competitors. It has examined the number of operating service providers in the market, the extent of their geographic

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[24] *Second Biennial Review Order*, 16 FCC Rcd at 22693-94 ¶ 50.

[25] Shampine Decl. ¶¶ 9-10.

[26] Dr. T. Randolph Beard *et al., A Policy Framework for Spectrum Allocation in Mobile Communications*, 63 Fed. Comm. L.J., 639, 644-645 (2011) (explaining that "[s]pectrum is simply one input to production and cannot singularly determine the financial viability of firms offering mobile communications services").

coverage, and the spectrum they hold; the number of licensees that hold spectrum and could enter the market or make their spectrum available on the secondary market; and the degree to which the screen would be exceeded. In many cases, it has determined that spectrum aggregation above the screen poses no risk of competitive harm because of the presence of existing and potential competitors, and has approved holdings that exceed the screen. These are appropriate considerations, which underscore why the screen is and should remain a filter that leads to a detailed competitive review.

The Commission should also assess and give weight to the consumer welfare benefits of approving the transaction, as many above-screen transactions will benefit consumers and "are likely to be procompetitive."[27] For example, a spectrum purchaser may need additional spectrum so that it can serve its customers and attract new customers by offering new products or additional features and services, or by deploying a new technology. Under these circumstances, denying a provider the ability to acquire spectrum in excess of the screen would inflict significant costs. Where the purchaser needs additional spectrum to meet customers' demand or to deploy more advanced technologies, denying it that spectrum would harm consumer welfare. As Dr. Shampine states:

> Firms which cannot obtain sufficient spectrum to meet the demand by consumers for their services must ration their services by increasing price, reducing quality to stretch existing capacity further, or inefficiently substituting capital for spectrum, increasing costs and again raising the long-run competitive price. The price increases and reduced quality will impact not only the firm's own customers but wireless consumers generally.[28]

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[27] Shampine Decl. ¶ 10.

[28] *Id*. ¶ 4.

The Commission should thus, as part of its screen review, also consider the consumer welfare benefits of approving the transaction. For, as the Commission notes, "Facilitating access by all providers to valuable spectrum resources they need to serve their customers is essential given the current mobile wireless landscape."[29]

The Commission also should refrain from imposing a higher burden or presumption against approval of a transaction that exceeds the screen.[30] As noted above, many such transactions are likely to be pro-competitive. As Dr. Shampine observes, "a strong presumption against approval would operate in similar fashion to a hard cap and would share the same problems."[31]

Importantly, the Commission should apply these factors consistently across all carriers and transactions. For example, while all carriers would benefit from more spectrum, there is no basis to conclude that national carriers, with larger spectrum holdings and corresponding larger numbers of customers, do not need additional spectrum as much as smaller carriers.[32]

C. The Commission Should Not Return to a Spectrum Cap.

The Commission should reject any consideration of reverting to the rigid CMRS spectrum cap that it properly decided to repeal over a decade ago. A cap is an overbroad, intrusive form of regulation that can block spectrum transfers that would serve the public interest. It is unnecessary because there are other more narrowly tailored remedies to prevent

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[29] Notice ¶ 12.

[30] *See* Notice ¶ 22.

[31] Shampine Decl. ¶ 11.

[32] *Id*. ¶ 25 (observing that "the large national carriers, while holding, in general, more spectrum than smaller carriers, also appear to be making intensive use of that spectrum, even with their legacy networks").

potential competitive harms. And it is inherently inflexible and thus ill-suited for the dynamic wireless market, where more spectrum opportunities will become available as the Commission plans to free 300 MHz of spectrum for mobile broadband by 2015 and 500 MHz by 2020.[33] Moreover, the Commission determined that it should repeal the cap pursuant to its obligation under Section 11 of the Communications Act to remove unnecessary regulation, and there is no basis for reversing that statutory determination now.

First, a spectrum cap is an "overbroad" *a priori* limit "that may prevent transactions that are in the public interest," as the Commission concluded in 2001 when it decided to sunset the cap as of January 1, 2003.[34] It reaffirmed that conclusion three years later in removing the cellular cross-ownership rule, finding that a screen was "the better approach as compared to prophylactic limits," because it "reduced [the] likelihood of prohibiting beneficial transactions or levels of investment both in urban and rural areas."[35] Those conclusions remain equally valid today. A spectrum cap can distort investment and hinder efficient use of an important input in the wireless marketplace. Dr. Shampine explains that "caps can raise providers' costs and diminish the quality of their services by decreasing innovation, increasing prices, and delaying introduction of new services and technologies."[36] A cap, moreover, disadvantages the very

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[33] *See* National Broadband Plan at 10; *see also* October 4 Genachowski Remarks at 4 ("To have an actionable plan on spectrum, you need to have goals. In the Plan we set audacious targets for freeing up licensed and unlicensed spectrum for broadband: 300 MHz by 2015, and 500 MHz by 2020.").

[34] *Second Biennial Review Order*, 16 FCC Rcd at 22693-94 ¶¶ 50, 47.

[35] *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services,* Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, 19190 ¶ 67 (2004).

[36] Shampine Decl. ¶ 28.

providers that have been the most successful, because to maintain growth of existing services and simultaneously offer next-generation services a mobile wireless provider needs access to increasing amounts of spectrum.[37] The only "market certainty" generated by a spectrum cap is that providers may be unable to acquire enough spectrum necessary to support continued innovation in the wireless marketplace – a result that cannot be squared with the public interest. For example, the combination of spectrum held by Sprint and Clearwire could have been barred under a cap, because there were 43 markets in that transaction that exceeded the Commission's spectrum screen. The Commission, however, determined under the case-by-case approach enabled by the screen that the potential for competitive harm was not sufficient to deny the transaction.[38]

Second, as the Commission found when it sunset the spectrum cap, the objective of the cap – protecting CMRS competition – can be fully achieved through less burdensome means. As the Commission stated, "An important consideration in determining the necessity for regulation is the availability of other, less burdensome tools to achieve these ends."[39] In the case of the CMRS aggregation limits, these tools include application of the spectrum screen and separate review by the Department of Justice. Given such tools, the Commission concluded that it was "no longer appropriate to impose overbroad, *priori* [sic] limits on spectrum aggregation that may prevent

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[37] *See id*. ¶ 31 ("[A] spectrum cap would not only constrain the output of those carriers that have been most successful in attracting customers and offering new services, but would constrain many of the very firms that have most aggressively invested in spectrum conservation.").

[38] *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Opinion and Order, 23 FCC Rcd 17570, 17584-85 ¶ 30, 17601 ¶ 77, 17602-03 ¶¶ 79-84 (2008) ("*Sprint Nextel-Clearwire Order*").

[39] *Second Biennial Review Order*, 16 FCC Rcd at 22680 ¶ 29.

transactions that are in the public interest."[40] Again, nothing has changed; these less burdensome tools remain just as robust as they were when the cap was repealed and undercut any basis for reimposing an overbroad, intrusive cap.

Third, a cap is inherently rigid, a particular flaw of a regulatory restraint that would be applied in a market as dynamic and ever-changing as the mobile wireless market. As the Notice recognizes, a strict cap approach "would limit the Commission's flexibility to consider individualized circumstances and to respond swiftly to the changing needs of the mobile wireless industry and consumers."[41] This is particularly true given the evolving amounts of spectrum that are being used to provide mobile services, which makes reliance on a rule impractical. While the Commission asks how, if it were to adopt a cap, it could "preserve[] our flexibility,"[42] Dr. Shampine explains the simple answer is, it cannot: "A hard cap is inherently inflexible."[43] Only case-by-case review in markets that exceed the screen "gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case."[44]

Fourth, in considering a cap, the Commission would not be writing on a blank slate, but would be *reversing* its 2001 finding that a spectrum cap was "no longer necessary in the public interest" and should sunset.[45] Moreover, that decision was not made merely under the Commission's rulemaking authority. Rather, it resulted from the Commission's interpretation of

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[40] *Id*. at 22693-94 ¶ 50.

[41] Notice ¶ 20.

[42] *Id.*

[43] Shampine Decl. ¶ 29.

[44] *Second Biennial Review Order*, 16 FCC Rcd at 22693-94 ¶ 50.

[45] *See id*. at 22693 ¶ 47.

Section 11 of the Communications Act.[46] As the Commission found, the deregulatory paradigm Congress enacted in Section 11 *requires* it to repeal unnecessary regulations.[47] Reimposing a cap would require the Commission to reverse its own conclusion that a spectrum cap could not pass muster under Section 11. Given that re-imposing the cap would require the Commission to reverse a prior order – one that the agency expressly grounded on the statutory duty to repeal unnecessary rules – such an effort would create high factual and legal hurdles that cannot be overcome in this case.

For all these reasons, any proponents of returning to a cap bear the heavy burden of justifying an inflexible prophylactic rule that would bar an entire class of transactions. In order to do so, they would need to demonstrate that there is not a single potential transaction that triggers the limit – in a single market – that could be in the public interest. It is no answer to say that the Commission would be able to waive the cap in particular cases. A waiver process does not solve the problems with a cap and, worse, creates its own problems. It inevitably injects uncertainty and substantial transaction delay. Providers cannot formulate business plans or secure financing without a clear idea of how much spectrum they will be permitted to access, and the time and resources required to apply for and secure a waiver further complicate the process and add uncertainty. No waiver process, in any event, can cure an underlying rule that is itself not warranted. Because the cap would be unnecessary and overbroad, it should not be reinstated.

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[46] 47 U.S.C. § 161.

[47] *Second Biennial Review Order* at 22678-79 ¶ 25.

II. THE SPECTRUM SCREEN SHOULD INCLUDE ALL SPECTRUM THAT IS SUITABLE AND AVAILABLE FOR MOBILE TELEPHONY/ BROADBAND SERVICES AND SHOULD BE MODIFIED AS NEW SPECTRUM BECOMES AVAILABLE.

When it adopted the spectrum screen, the Commission decided that it should include all spectrum that is "suitable" and "available" for the "mobile telephony/broadband services"[48] product market, comprising "mobile voice and data services."[49] "Suitability" is determined by "whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its use for the relevant mobile service."[50] Spectrum is "available" if it is "fairly certain that it will meet the criteria for suitable spectrum in the near term."[51]

These are appropriate criteria to determine the bands of spectrum that should be included,[52] and the Commission should regularly update its spectrum screen when new spectrum becomes suitable and available for mobile telephony/broadband services. This proceeding

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[48] *See* Notice ¶¶ 25-26.

[49] *See id.* ¶¶ 24-25. This includes, but is not limited to, "mobile voice and data services provided over advanced wireless broadband networks." *Id*. ¶ 24.

[50] *Id*. at ¶ 26 (citing *Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589, 17605-06 ¶ 38 (2011) ("*AT&T-Qualcomm Order*"); *AT&T-Centennial Order*, 24 FCC Rcd at 13935 ¶ 43; *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17473 ¶ 53 (2008) ("*Verizon Wireless-ALLTEL Order*")).

[51] *Id.* (citing *AT&T-Qualcomm Order*, 26 FCC Rcd at 17606 ¶ 38).

[52] *See* Shampine Decl. ¶¶ 2, 32.

provides the opportunity to align the screen with regulatory and marketplace realities by modifying it to include all spectrum that is now available or will be in the near term. The Commission should ensure the screen catches up with spectrum that is available, because several substantial blocks of spectrum have not been included even though they meet both of the above criteria – that is, they are both suitable for the provision of mobile services and are available. In fact the most sizeable block of uncounted spectrum has for years been used to provide mobile services. These uncounted blocks account for nearly half again as much spectrum as has been counted. Specifically, at a minimum, the Commission should add to the spectrum included in the screen a total of 212 MHz, comprising spectrum in the Wireless Communications Service, the Mobile Satellite Service, and the Broadband Radio Service/Educational Broadband Service bands.

These bands, described further below, should be immediately included in the screen and, going forward, the Commission should adjust the screen to track additional bands as they become suitable and available for mobile services.

Wireless Communications Service ("WCS"). Last month, the FCC amended its rules to enable WCS licensees to use spectrum in the 2.3 GHz band for wireless broadband services.[53] As the Commission noted, the changes "allow for the development of vital new broadband services, and further our larger goal of making more spectrum available for broadband services

[53] *See Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, WT Docket No. 07-293, Order on Reconsideration, FCC 12-130, ¶ 103 (Oct. 17, 2012) ("*WCS Reconsideration Order*") ("Our rules now provide for all WCS blocks to be used for FDD downlink transmission . . . ."). Because the service rules appear to restrict the use of 10 MHz out of the 30 MHz of WCS spectrum, adding at least 20 MHz to the screen would be appropriate. *See* 47 C.F.R. § 27.50(a)(3)(ii).

in the highest value frequency ranges."[54] WCS spectrum is "suitable" for the provision of mobile broadband/telephony service because the spectrum is capable of supporting such service, the spectrum is licensed with a mobile allocation and corresponding service rules, and it is not committed to another incompatible use. And that spectrum is now "available" for the relevant mobile service in the near term. Indeed, as Chairman Genachowski recently noted, this spectrum is now "poised to be used for LTE service."[55] The Commission should thus add at least 20 MHz of WCS spectrum to the screen.

Mobile Satellite Service ("MSS"). The Commission should also include a total of 59.275 MHz of MSS/ATC spectrum in the spectrum screen, consisting of 40 MHz of S-Band spectrum and 19.275 MHz of Big LEO spectrum.

In the S-Band, the current licensee, DISH, has ancillary terrestrial component authority ("ATC") today which allows it to provide terrestrial mobile telephony/broadband services in direct competition with other mobile wireless providers.[56] Thus, the 40 MHz of S-Band MSS/ATC spectrum is both suitable and available for mobile telephony/broadband services and should be added to the screen. Furthermore, the Commission is poised to provide the S-Band additional terrestrial rights flexibility this year, renaming it the "AWS-4 band" to underscore that

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[54] *WCS Reconsideration Order* at ¶ 1.

[55] October 4 Genachowski Remarks at 5.

[56] *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Notice of Proposed Rulemaking and Notice of Inquiry, 27 FCC Rcd 3561, 3584 ¶ 71 ("*AWS-4 NPRM*") (referencing DISH's "existing ability to provide terrestrial service in the band"); *see TerreStar Networks Inc.*, Order and Authorization, 25 FCC Rcd 228, 238 ¶ 30 (IB/SD 2010) (noting that "TerreStar proposes to provide Commercial Mobile Radio Service ('CMRS') via its ATC facilities"); *see also New ICO Satellite Services G.P.*, 24 FCC Rcd 171, 171 ¶ 1 (IB 2009) (granting authority to "operate dual-mode mobile terminals that can be used to communicate either via ICO's geostationary-orbit Mobile Satellite Service ('MSS') satellite … or via ancillary terrestrial component ('ATC') base stations").

it would "enhance the licensee's ability to offer high-quality, affordable terrestrial wireless broadband services."[57] This flexibility removes any question that this spectrum is fully suitable and will be available in the near term. As Chairman Genachowski recently noted, this action "will repurpose [the 40 MHz] for land-based mobile use,"[58] and he recently circulated an order to that effect.[59] The notice of proposed rulemaking in that proceeding asked whether the AWS-4 band should be included in the spectrum screen,[60] and the order should expressly add all 40 MHz to the current screen.

The Big LEO Band also has a mobile-satellite allocation that permits operation with an ancillary terrestrial component.[61] MSS/ATC spectrum is also "available" in the Big LEO band for use in the near term to provide mobile telephony/broadband services. In this band, the Commission granted Globalstar ATC authority pursuant to certain interim waivers of the ATC gating criteria.[62] That ATC authority extends to 19.275 MHz of Globalstar's Big LEO spectrum

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[57] *Service AWS-4 NPRM*, 27 FCC Rcd at 3586 ¶ 78; *see also* National Broadband Plan at 87-88.

[58] October 4 Genachowski Remarks at 5.

[59] *See* Cecilia Kang, *FCC Chairman Backs Dish Network Plan to Compete with Wireless Giants*, Washington Post, Nov. 20, 2012, http://www.washingtonpost.com/business/technology/fcc-chairman-backs-dish-network-plan-to-compete-with-wireless-giants/2012/11/20/116110ae-334e-11e2-bb9b-288a310849ee_story.html (last visited Nov. 27, 2012)(reporting that "[t]he chairman of the Federal Communications Commission on Tuesday proposed to greenlight Dish Network's long-fought plan to create a wireless service that would compete with those of giants AT&T and Verizon Wireless").

[60] *AWS-4 NPRM*, 27 FCC Rcd at 3597 ¶ 111.

[61] 47 C.F.R. § 2.106 & Note US380.

[62] *Globalstar Licensee LLC*, Order and Authorization, 23 FCC Rcd 15975, 15975 ¶ 1 (2008).

in the 1610-1617.775 MHz and 2483.5-2495 MHz bands.[63] Pursuant to an ATC spectrum lease with Globalstar, Open Range earlier deployed a terrestrial broadband network on this spectrum covering several hundred thousand rural residents.[64] While Globalstar's ATC authority is currently suspended due to its troubled first-generation satellite network and compliance with the gating criteria,[65] Globalstar recently stated that expects to complete the deployment of its second-generation MSS constellation by mid-2013.[66] Globalstar has also filed a petition to enhance terrestrial use of the Big LEO band, with short- and long-term terrestrial service deployment plans.[67] The Commission should find that the 19.275 MHz of MSS/ATC spectrum is available for mobile telephony/broadband services in the near term, and this spectrum should also be included in the spectrum screen.[68]

Broadband Radio Service/Educational Broadband Service ("BRS/EBS").

The spectrum screen has not kept pace with marketplace developments in the BRS/EBS spectrum in the 2.5 GHz band since the Commission first included 55.5 MHz of BRS spectrum

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[63] *Globalstar Licensee LLC*, Order of Modification, 23 FCC Rcd 15056, 15056 ¶ 1 (2008); 47 C.F.R. § 25.149(a)(2)(iii).

[64] Open Range has declared bankruptcy. *See* Phil Milford, *Open Range, Rural Wireless Provider, Files for Bankruptcy*, Bloomberg, Oct. 6, 2011, http://www.bloomberg.com/news/2011-10-06/open-range-rural-wireless-provider-files-for-bankruptcy-1-.html (last visited Nov. 27, 2012). The Open Range service, however, showed that the MSS spectrum is suitable for terrestrial wireless service.

[65] *See Globalstar Licensee LLC*, Order, 25 FCC Rcd 13114, 13115 ¶ 1 (IB/WTB/OET 2010).

[66] Globalstar, Inc., Petition for Rulemaking to Reform the Commission's Regulatory Framework for Terrestrial Use of the Big LEO MSS Band, at 12 (Nov. 13, 2012) ("Globalstar Petition").

[67] *Id.*

[68] *See also* October 4 Genachowski Remarks at 5 ("We're also working with stakeholders to enable use of the portions of the mobile satellite spectrum in the L- and Big LEO bands for terrestrial service, and this would add to our megahertz total.").

in the screen back in 2008. As the Commission is well aware, the transition of BRS/EBS to the mobile broadband band plan adopted in 2004 is now complete across the country, save for a handful of areas,[69] and the spectrum is suitable and available for mobile telephony/broadband services – and, indeed, is in use. In light of these developments, the Commission should add 132.625 MHz of BRS/EBS spectrum – the remaining 21 MHz of BRS spectrum that is not currently included in the screen plus 95 percent of the 117.5 MHz of EBS spectrum available for commercial mobile use, *i.e.*, 111.625 MHz.[70] With the 55.5 MHz that was previously included in the screen, this would properly consider a total of 188.125 MHz as suitable and available for mobile telephony/broadband use and, thus, included in the screen.

Today's commercial mobile use of the BRS and EBS spectrum demonstrates that the BRS/EBS band is "capable of supporting mobile services."[71] For example, Clearwire, the largest holder of BRS spectrum licenses and EBS leases, states that it has "approximately 140 MHz of spectrum on average across [its] national spectrum footprint and approximately 160 MHz of

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[69] A few areas remain served by multichannel video programming distributors ("MVPDs") that the Commission permitted to "opt out" of the transition process, but these areas can be readily converted to the new, mobile-friendly band plan on short notice. *See Antilles Wireless, L.L.C. d/b/a USA Digital*, Memorandum Opinion and Order and Order on Reconsideration, 25 FCC Rcd 8052, 8058 (2010).

[70] *See* 47 C.F.R. § 27.1214(b)(1) (requiring an EBS licensee to reserve a minimum of 5% of the capacity of its channel for educational use, making 95% of the capacity of the EBS spectrum available for commercial mobile services).

[71] The BRS/EBS band clearly has a mobile allocation and corresponding service rules. *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, First Report and Order and Memorandum Opinion and Order, 16 FCC Rcd 17222 (2001); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14169 (2004) ("*BRS/EBS R&O and FNPRM*") (subsequent history omitted).

spectrum on average in the 100 largest markets," which "enables [it] to offer [its] subscribers significant mobile data bandwidth."[72] Notably, it does not distinguish between its BRS and EBS spectrum holdings or between different segments of the 2.5 GHz band. Clearwire is offering 4G mobile broadband service using the band in more than 70 markets nationwide and already has approximately 10.5 million wholesale and retail customers.[73] The BRS and EBS spectrum is thus plainly suitable and available for mobile telephony/broadband services today.

With regard to EBS, it is time for the Commission to acknowledge that the spectrum is suitable and available for mobile telephony/broadband use and should be included in the screen. There is no basis to treat spectrum leased from EBS licensees and used for commercial mobile services differently from any other spectrum used for commercial mobile services. The Commission's spectrum leasing policies state that general competition principles, including assessment of potential competitive effects of transactions, apply to leased spectrum.[74] Indeed, when the Commission extended its secondary markets leasing policy to BRS/EBS spectrum, it explained that doing so would allow for "more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country."[75] Thus, the fact that wireless providers make use of EBS spectrum via lease arrangements does not render the spectrum either unsuitable or unavailable. With the exception of five percent of EBS spectrum

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[72] Clearwire Corp. Form 10-K, at 14 (Feb. 16, 2012) (for period ending Dec. 31, 2011) ("Clearwire 10-K").

[73] *See* Clearwire Corp. Form 10-Q, at 34 (Oct. 26, 2012) (for period ending Sept. 30, 2012).

[74] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20657 ¶ 119, 20667 ¶ 147 (2003) (applied to spectrum manager and long term *de facto* leases).

[75] *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14233 ¶ 179.

reserved for educational use,[76] none of the EBS spectrum is "committed to another use" and, in light of commercial providers' significant use of the EBS spectrum, the Commission should include the 95 percent of EBS spectrum available for commercial mobile use in the screen. And, while there are areas of the country where not all EBS is licensed, those areas tend to be outside major metropolitan areas and do not preclude today's use of EBS spectrum for commercial mobile broadband service in the most populated areas across the country.

With these developments, spectrum in the Lower Band, Middle Band, and Upper Band segments of the BRS/EBS spectrum is suitable and available for commercial mobile use – and is in use. The following chart explains the 132.625 MHz of BRS/EBS spectrum that should be added to the 55.5 MHz of Upper Band BRS spectrum already included in the screen.

Additional BRS/EBS Spectrum to be Included in the Spectrum Screen

Band	**BRS MHz to Include in Screen**	**EBS MHz**	**95% of EBS to Include in Screen**	**Total to Include in Screen**
Lower Band Segment				
BRS Channel 1	6	0	0	6
LBS EBS	0	66	62.7	62.7
Middle Band Segment				
MBS BRS	12	0	0	12
MBS EBS	0	30	28.5	28.5
Guard Bands				
J Guard Band	0	4	3.8	3.8
K Guard Band	3	1	0.95	3.95
Upper Band Segment				
UBS EBS	0	16.5	15.675	15.675
Total				
	21	117.5	111.625	132.625

[76] *See* 47 C.F.R. § 27.1214(b)(1).

The Commission should include the following BRS/EBS spectrum in the screen:

- BRS Channel 1 – 6 MHz. Initially, the FCC did not include BRS Channel 1 because it was adjacent to EBS spectrum and not contiguous to other BRS spectrum.[77] Today, Clearwire uses BRS Channel 1 to provide mobile services to millions of Americans,[78] and, as noted above, there is no reason to exclude EBS spectrum. BRS Channel 1 is clearly suitable and available and it should be included in the screen.

- Lower Band EBS – 62.7 MHz. The Commission should include 95 percent of the 66 MHz of Lower Band Segment EBS spectrum, *i.e.*, 62.7 MHz. As noted above, with the exception of the 5 percent that is reserved for educational use, EBS spectrum is used in commercial mobile broadband networks and should be deemed suitable and available and included in the screen.

- Middle Band BRS – 12 MHz. Back in 2008, the Commission observed that "[a]t this time, we lack a sufficient record to determine the extent to which MBS is in fact available for mobile telephony/broadband services."[79] Yet the Commission also recognized, "nothing in our service rules precludes the potential use of the MBS channels for mobile telephony/broadband services."[80] Now, with years of experience under the new band plan, it is apparent that only a relatively few high-powered video systems remain in the Middle Band Segment. Thus, the diminished threat of interference no longer justifies a broad assumption that the Middle Band Segment should not be included in the screen. As a result, the 12 MHz of Middle Band Segment BRS spectrum should be added to the screen.

- Middle Band EBS – 28.5 MHz. For the reasons stated above with regard to EBS spectrum suitability and availability, as well as the unhindered access to the Middle Band Segment, the Commission should add 95 percent of the 30 MHz of Middle Band Segment EBS spectrum, *i.e.*, 28.5 MHz, to the screen.

- Guard Band – 7.75 MHz. Although the BRS/EBS guard band channels are secondary to high-powered video systems in the Middle Band Segment, the diminishing number of such high powered systems nationwide has made these channels far more useable. Commercial operators can combine these narrow channels to provide mobile

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[77] *See Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17598 ¶ 68.

[78] *See* Letter from Cathleen A. Massey, Vice President, Regulatory Affairs and Public Policy, Clearwire Corp., to Marlene H. Dortch, FCC Secretary, WT Docket No. 03-66, RM-11614, Attachment at 3, 4 (filed Oct. 19, 2012) ("CLWR currently operates WiMAX and pre-WiMAX technologies in the 2496-2500 MHz band").

[79] *See Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17598 ¶ 67.

[80] *Id*.

telephony/broadband services. The Commission should add 95 percent of the 4 MHz EBS J guard band, *i.e.*, 3.8 MHz; 95 percent of the 1 MHz EBS K guard band, *i.e.*, 0.95 MHz; and the 3 MHz BRS K guard band.

- Upper Band EBS – 15.675 MHz. Finally, for the reasons stated above with regard to EBS spectrum suitability and availability, the Commission should include 95 percent of the 16.5 MHz of Upper Band EBS spectrum, *i.e.*, 15.675 MHz, in the screen.

Thus, of the 194 MHz of BRS/EBS spectrum, the Commission should include all but 5 percent of EBS spectrum (5.875 MHz) dedicated for educational use, for a total of 188.125 MHz in the spectrum screen.

***Future Spectrum Blocks*.** In order to keep the screen current and accurate, the Commission should regularly update the input market for spectrum.[81] To make certain this occurs, the FCC should establish a mechanism by which the spectrum screen is consistently and accurately modified. In particular, the Commission should seek comment on the inclusion of a particular spectrum band when it issues the Notice of Proposed Rulemaking ("NPRM"), Public Notice or other document which could allow that spectrum to be used for mobile telephony/broadband services (whether by rulemaking or license modification that would permit such use). For example, the Commission recently used this approach in the context of its AWS-4 NPRM, where it asked whether "the current spectrum screen for mobile telephony/broadband services [should] be revised to include AWS-4 spectrum."[82] This approach should be applied consistently in similar proceedings going forward to ensure that the spectrum screen accurately reflects the spectrum that is suitable and available to provide mobile services. Under this approach, each time the Commission allocates additional spectrum for mobile services and adopts service and technical rules for the licensing of that spectrum, it should as part of its order

[81] *See* Shampine Decl. ¶ 16.

[82] *AWS-4 NPRM*, 27 FCC Rcd at 3597 ¶ 111.

adopting those rules add that spectrum to the screen. The Commission should also ensure such reviews happen regularly in the absence of a triggering event.[83] The annual wireless competition report required by Section 332 of the Act could be an appropriate vehicle for such reviews.

III. ALL SPECTRUM INCLUDED IN THE SPECTRUM SCREEN SHOULD CONTINUE TO BE TREATED EQUALLY.

The Commission should continue to treat all spectrum that is included in the screen equally, and decline to make arbitrary distinctions among bands.[84] In particular, the FCC should decline to evaluate mobile spectrum holdings based on technical/propagation characteristics, a non-existent "4G LTE" spectrum sub-market, or spectrum "value." As Dr. Shampine explains, attempting to make these distinctions "makes the screen highly situation specific and thus not useful as a clear policy to provide consistent guidance in the secondary market for spectrum."[85] There is no basis for weighting different spectrum differently, and it would prove highly complex because of the dynamic spectrum market. In any event, the Commission rejected this approach before. In approving the Sprint-Clearwire spectrum aggregation, it held:

> [E]ver since the Commission first determined to evaluate potential spectrum aggregation of 800 MHz cellular spectrum, 800/900 MHz SMR, and 1.9 GHz broadband PCS spectrum for purposes of competitive review, it has not differentiated among bands based on specific propagation characteristics or purported distinctions in trading value. Nor did we do so last year when we recently expanded the initial spectrum aggregation screen to include 700 MHz band spectrum. We decline to do here with respect to the

[83] *See* Shampine Decl. ¶ 16.

[84] *See* Notice ¶¶ 35-38.

[85] Shampine Decl. ¶ 15.

> particular BRS spectrum that we find, below, suitable for mobile telephony/broadband services.[86]

***Weighting Based on Technical Capabilities*.** Spectrum in different bands has varying advantages and disadvantages to individual licensees, which make distinctions based on the technical or propagation characteristics of particular frequency bands, *e.g.*, above or below 1 GHz, etc., meaningless. In general, however, higher bands provide greater capacity, while lower bands offer greater propagation. Wireless providers often seek a mix of both high and low band spectrum to meet the widely varying topographies and population densities that characterize the United States. There is thus no inherent comparative value between high- and low-band spectrum, let alone between various bands that are characterized as high- or low-band, because that value varies carrier to carrier and over time depending on the optimal mix of services and coverage it wants to achieve.

While the Notice seeks comment on whether below 1 GHz spectrum should somehow be weighted more heavily, that approach (aside from its complexity) cannot be squared with the reality that above 1 GHz spectrum has distinct capacity advantages – advantages that are particularly important given rising demand for more spectrum capacity. The Commission has repeatedly emphasized that substantial additional spectrum is needed to meet carriers' need to add capacity to their networks, particularly in urban areas. For example, as the Commission has stated in its most recent comprehensive review of the mobile services market, "higher frequency spectrum can be ideally suited for providing high capacity where it is needed, such as in high-

[86] Sprint/Clearwire Order ¶ 63 (footnote omitted). The Commission reached the same conclusion in the Verizon/Alltel transaction, declining to differentiate among bands. *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17479-80 ¶ 69.

traffic urban areas."[87] While mobile broadband services grew rapidly over the past few years and now cover almost the entire population, most demand for spectrum today and in future years is due to capacity constraints – a need that can be met more efficiently with higher-band spectrum.

Moreover, carriers that rely heavily or exclusively on spectrum above 1 GHz have emphasized the capacity benefits of higher band spectrum.[88] Clearwire's CEO, for example, has stated, "The 2.5 GHz band is best for mobile broadband services due to channel size and propagation characteristics," and that "[i]t's ideal for broadband because high bandwidth wireless networks have to deliver capacity, not just coverage."[89] These capacity benefits are also attributable to the larger blocks of contiguous spectrum available in the higher bands,[90] and some

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[87] *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd 9664, 9836-37 ¶ 296 (2011) ("*Fifteenth Report*").

[88] "There are certain circumstances where upper band spectrum is as effective as, or preferred to, lower band spectrum in providing competitive services, particularly for enhancing capacity in highly populated areas." *Ex Parte* Notice from Russell H. Fox, Counsel for T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-133 *et al*., at 2 (filed Dec. 2, 2010). Sprint Nextel's former Chief Technology Officer stated "[t]he 2.5 gigahertz band spectrum Sprint Nextel's WiMAX network will use compares favorably to 700 megahertz band spectrum. While the lower band enables coverage to be deployed more cheaply initially, the upper band allows greater overall capacity to handle more subscribers." Paul Kirby, *Sprint Nextel CTO Offers Vigorous Defense of WiMAX*, TR Daily, Apr. 22, 2008.

[89] *New Wireless Venture Seen Drawing Scant Regulatory Scrutiny*, Communications Daily, May 8, 2008.

[90] *See Fifteenth Report*, 26 FCC Rcd at 9836-37 ¶ 296; *see also* Clearwire 10-K at 14 ("Our deep spectrum position [160 MHz] in most of our markets enables us to offer our subscribers significant mobile data bandwidth, with potentially higher capacity than is currently available from other carriers."); John Saw, Clearwire, FCC National Broadband Plan Workshop, Spectrum, Tr. 35:19-21, 36:15-17 (Sep. 17, 2009) (testifying that "[y]ou're looking at 120 megahertz … of spectrum to really deliver true broadband services" and "you also need to have contiguous blocks of spectrum to really be able to deliver the true … broadband experience"), http://www.broadband.gov/docs/ws_25_spectrum.pdf (last visited Nov. 28, 2012).

radio systems "may perform better at higher frequencies."[91] In addition, while the fixed costs of setting up a higher frequency network may be higher, the incremental costs may be lower. In contrast, lower frequency spectrum can be well suited for providing coverage, making the fixed costs of setting up the network lower.[92] Such a network, however, would be more limited in its ability to provide high capacity, and therefore there is no basis for treating different bands differently.

***Weighting Based on Alleged 4G Capability*.** Second, there is no basis to differentiate mobile spectrum holdings based on a new "4G LTE" spectrum submarket consisting of spectrum in the AWS and 700 MHz bands, as some parties have advocated in other proceedings.[93] It would ignore the reality that 4G LTE services are, or will soon be, provided in a variety of bands up and down the table of allocations. For example, MetroPCS is deploying 4G LTE "on [its] AWS and PCS spectrum,"[94] and Sprint Nextel is deploying 4G LTE "in the G-Block of the 1900 MHz band."[95] Sprint Nextel also plans to deploy 4G LTE on its 800 MHz spectrum by 2014.[96]

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[91] *Fifteenth Report*, 26 FCC Rcd at 9836 ¶ 296.

[92] *See* Notice ¶ 35.

[93] *See, e.g.,* Petition to Condition or Otherwise Deny Transactions, RCA – The Competitive Carriers Association, WT Docket No. 12-4, at 14-15, 23, 49 (Feb. 21, 2012).

[94] MetroPCS, Annual Report 2010, at 43 (2010), http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAxNjZ8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1 (last visited Nov. 28, 2012).

[95] Phil Goldstein, *Sprint to launch LTE on 1900 MHz spectrum by mid-2012*, FierceWireless, Oct. 7, 2011, http://www.fiercewireless.com/story/sprint-launch-lte-1900-mhz-spectrum-mid-2012/2011-10-07 (last visited Nov. 28, 2012).

[96] Phil Goldstein, *Sprint to deploy LTE in iDEN spectrum in 2014*, FierceWireless, Apr. 12, 2012, http://www.fiercewireless.com/story/sprint-targets-2014-use-800-mhz-lte/2012-04-12 (last visited Nov. 28, 2012).

In addition, Clearwire plans to launch a high capacity LTE network by June 2013 using its BRS/EBS spectrum, which already carries 4G WiMAX service.[97]

Indeed, unlike Europe, the United States does not tie a particular technology to a specific spectrum band. Wireless operators can choose to deploy whatever technology they want in whatever band they hold. For example, Verizon originally deployed CDMA in the PCS band but upgraded services to EV-DO as demand for data increased. Likewise, AT&T first deployed GSM in its PCS spectrum but later refarmed a portion of its PCS and cellular spectrum with UMTS. And T-Mobile launched GSM in the PCS band and UMTS in the AWS-1 band, and plans to refarm its PCS spectrum with HSPA and its AWS-1 spectrum with LTE. These technology upgrades were done without permission from or direction by the FCC. And, of course, other 4G technologies such as WiMAX also can be provided across many bands. Any consideration of a technology-specific sub-band would ignore the technology neutral approach at the heart of U.S. spectrum policy and undermine the dynamic nature of mobile broadband services. Ultimately, any claim of "4G LTE" bands is nothing more than competitive posturing.

Moreover, as shown below, 3GPP's global review of bands for LTE has established no fewer than *10 separate bands* within which LTE can operate in the United States. These standards demonstrate that 4G LTE can operate across all bands that are currently allocated in the U.S. for mobile services, including cellular, PCS, WCS, BRS, EBS, and others – not merely AWS and 700 MHz – and is capable of expanding to an even broader range of bands.

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[97] Mike Dano, *Clearwire CTO: We'll offer VoLTE when we Launch TD-LTE Network,* FierceWireless, May 17, 2012, http://www.fiercewireless.com/story/clearwire-cto-well-offer-volte-when-we-launch-td-lte-network/2012-05-17 (last visited Nov. 28, 2012).

Band Class	Uplink Frequencies	Downlink Frequencies
2	1850 - 1910 MHz	1930 - 1990 MHz
4	1710 - 1755 MHz	2110 - 2155 MHz
5	824 - 849 MHz	869 - 894 MHz
12	699 - 716 MHz	729 - 746 MHz
13	776 - 787 MHz	746 - 757 MHz
14	788 - 798 MHz	758 - 768 MHz
17	704 - 716 MHz	734 - 746 MHz
18	815 - 830 MHz	860 - 875 MHz
25	1850 - 1915 MHz	1930 - 1995 MHz
41	2496 - 2690 MHz	

Source: *see* Table 5.5-1 "E-UTRA Operating Bands" and Table 5.6.1-1 "E-UTRA Channel Bandwidth" of 3GPP TS 36.101.

Further, the Commission should not adopt band-specific aggregation limits.[98] Such a granular approach is inappropriate because, as noted above, there is no evidence that a single, comprehensive spectrum screen is insufficient to capture any competitive concerns. Moreover, setting band-specific limits could have distortive and damaging effects on innovation. A policy that would artificially limit a provider's ability to use spectrum in particular bands runs counter to the Commission's own observation that technologies like LTE and LTE-Advanced operate more efficiently when used in larger continuous blocks.[99] The ability of operators to focus their deployment and investment in particular spectrum blocks also helps address chipset design complications, ecosystem development considerations, and encourages the utilization of additional spectrum bands for mobile broadband offerings. With an overall spectrum screen in

[98] Notice ¶ 21; *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Docket No. 12-268, Notice of Proposed Rulemaking, FCC 12-118, ¶ 384 (2012) ("*Incentive Auction Notice*") (seeking comment a potential one-third cap on 600 MHz spectrum in any given licensed area).

[99] *AWS-4 NPRM*, 27 FCC Rcd at 3572 ¶ 23; *Incentive Auction Notice* ¶ 130.

place, any band-specific limits would also raise regulatory parity and associated equity considerations if some operators were permitted to acquire spectrum available in the market and others were prohibited simply because of their current holdings in the band.

The harms from band-specific limits would be particularly acute for new spectrum that the Commission plans to bring to market through auction. Adopting such *a priori* limits could constrain the very providers who are most interested in acquiring (and paying the U.S. Treasury) for access to new spectrum. In this way limits would depress the valuation of spectrum that drives a successful auction, by either limiting the amount an interested party could acquire or barring that provider altogether. Either would result in lower auction bids and thus lower revenues that flow to the Government for other purposes (such as those identified in the recent spectrum legislation). Rather than ensuring that the auction yields full value, band-specific limits merely enable those bidders who are free to acquire spectrum without restriction to buy the spectrum at a lower price (and presumably to earn greater returns). While these bidders would be the winners, the Government and taxpayers would be the losers.

***Weighting Based on Spectrum Value*.** The Commission asks whether it should consider developing a process to weight different spectrum based on valuation, but at the same time identifies numerous reasons why doing so would be problematic.[100] The Commission is correct to flag these difficulties, which should quickly lead it to reject this approach. Attempting to weigh the value of spectrum – whether based on auction results, book value, or worth to a particular licensee – would be hopelessly complex and could not reflect with any accuracy

[100] Notice ¶¶ 37-39 (noting that license values vary with geographic location, the population density of a market, the location of a particular block of spectrum within its spectrum band, the technologies adopted by licensees, and other factors that constantly change).

market conditions at a given time.[101] Value is simply too variable – based on time, market conditions, interference conditions etc. – to provide an even remotely reliable or predictable tool for setting a spectrum screen. Parties in other proceedings have noted, for example, that prices paid at auction only reflect the value of spectrum at a particular point in time, often unrelated to the spectrum's technical characteristics.[102] If auction prices are considered in the context of all major mobile wireless spectrum auctions since 1995 and prices are adjusted for inflation, there is no discernible basis for placing a differing regulatory "value" on spectrum based on market prices for purposes of setting a spectrum holding limit. Rather, pricing varies greatly from one auction to the next, even for the same spectrum, as the chart below demonstrates:

[101] *See id*. ¶ 38.

[102] *See, e.g.*, Petition to Deny of Free Press, WT Docket No. 12-4, at 14-15 (Feb. 21, 2012) ("Spectrum valuations can vary within a specific spectrum band, and even within a spectrum block, as local markets have varying population density and customer demographics. Further, a specific carrier may place a higher valuation on any given block due to their own existing spectrum position, or their perceptions of their future position relative to competitors. And prices paid for specific blocks at auction may be heavily influenced by the geographic size of the block itself and the inflation (or deflation) caused by the presence of (or lack of) non-national carriers bidding for these specific blocks.").

Auction No.	Spectrum	Auction End Date	Net Price Per MHz-POP	CPI Adj. Net Price Per MHz-POP
4	PCS (1.9 GHz)	March-95	$0.46	$0.66
5	PCS (1.9 GHz)	May-96	$1.19	$1.65
10	PCS (1.9 GHz)	July-96	$1.55	$2.15
11	PCS (1.9 GHz)	January-97	$0.29	$0.40
22	PCS (1.9 GHz)	April-99	$0.13	$0.17
35	PCS (1.9 GHz)	January-01	$3.69	$4.58
71	PCS (1.9 GHz)	May-07	$0.21	$0.22
78	PCS (1.9 GHz)	August-08	$0.21	$0.21
66	AWS (1.7/2.1 GHz)	September-06	$0.54	$0.58
78	AWS (1.7/2.1 GHz)	August-08	$0.11	$0.11
44	700 MHz	September-02	$0.03	$0.04
49	700 MHz	June-03	$0.03	$0.04
73	700 MHz	March-08	$1.29	$1.32

Source: *see generally* http://wireless.fcc.gov/auctions/

Notes: Per MHz-POP prices all based on Population Census from 2000; prices based only on licenses from the 50 states (excludes Puerto Rico, American Territories and Gulf of Mexico[103]) and do not include licenses held by the FCC at end of each auction; CPI-adjusted prices reflect June 2010 dollar values (*see* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt)

Reliance on book value poses similar problems. As parties have previously recognized, there are inherent limitations in spectrum book values as they "reflect only each carrier's self-assessment of the value of its spectrum holdings in a given period of time."[104] The Commission cannot establish a screening mechanism that relies upon subjective and variable decisions of individual carriers. Indeed, any such approach would invite gamesmanship and abuse by parties trying to manipulate the Commission's review. Further, book values fluctuate over time as a result of changes in the marketplace and technological developments.[105]

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[103] This accounts for the difference between the $1.29 price per MHz-POP shown above for Auction No. 73 and the $1.28 price per MHz-POP cited by the FCC in the *Fifteenth Report*, 26 FCC Rcd at 9716 ¶ 62.

[104] *See* Comments of Sprint Nextel Corporation, WT Docket No. 12-4, at 18 n.45 (Feb. 21, 2012).

[105] *See id*.

Finally, the value of a spectrum band varies widely based on the licensee. Thus, the exact same spectrum may be much more valuable to one entity than another based on that entity's needs, its existing spectrum holdings, devices, and deployment plan. In other words, ascertaining the worth of a particular spectrum band to a particular carrier requires a mix of case-specific inputs and analysis, which is antithetical to the goal of a broadly applicable spectrum screen. For all these reasons, the Commission should decline to consider spectrum value as part of its spectrum screen calculus.

IV. THE SPECTRUM SCREEN SHOULD REMAIN SET AT NO LOWER THAN THE CURRENT ONE-THIRD OF AVAILABLE SPECTRUM.

The Commission's existing use of a spectrum screen set at approximately one-third of the spectrum available is a conservative measure designed to ensure that there is no material risk posed by spectrum holdings below that level. While the screen threshold could reasonably be set at a higher level, it should not be set any lower and doing so would undermine the benefits of the screen. As Dr. Shampine concludes:

> As the Commission makes more spectrum available to all firms, the threshold could be increased while preserving the same amount, or more, of spectrum for other firms. Leaving the percentage screen at the same level would, however, be a conservative approach. I have not seen any evidence that would suggest the percentage screen should be lowered, and there is certainly no justification for lowering the absolute level of spectrum allowed under the screen as total spectrum available is increased.[106]

When the Commission first established the spectrum screen in 2004, it determined that, "in line with the conservative approach embodied in this initial screen, the function of which was simply to eliminate from further consideration any market in which there is no potential for

[106] Shampine Decl. ¶ 21.

competitive harm as a result of [the] transaction, we subjected to further review any market in which one entity controls more than one-third of" the available spectrum.[107] In subsequent years, the Commission repeatedly confirmed that a single provider acquiring one-third of the available spectrum is the appropriate level at which the Commission should subject a transaction to review based on possible spectrum concentration concerns.[108] There is no basis to revisit this consistent policy nor to reduce the level of the screen. Acquisition of one-third of the available spectrum continues to be a conservative threshold for determining whether to conduct a Commission review of spectrum transactions.[109]

As noted above, one of the purposes of the screen is to promote competition. With nearly a decade of experience applying the one-third threshold, it is clear that the current framework has enabled markets to flourish with multiple providers *and* next-generation, bandwidth-intensive deployments, all redounding to the benefit of consumers.[110] The Commission's own data reflect that, even with the threshold set at one-third, local markets continue to have more than three – often far more than three – wireless providers, as well as other CMRS licensees who could choose to enter the market. In 2010, nearly 95 percent of the total U.S. population (excluding those on Federal lands) was covered by four or more facilities-based providers of mobile wireless service; 90 percent were covered by five or more facilities-based providers; and almost

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[107] *AT&T Wireless-Cingular Order*, 19 FCC Rcd at 21568-69 ¶ 109.

[108] *See, e.g.*, *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, 13994 ¶ 65; *AT&T-Dobson Order*, 22 FCC Rcd at 20312-13 ¶ 30; *Sprint-Clearwire Order*, 23 FCC Rcd at 17592 ¶ 54.

[109] *See* Shampine Decl. at ¶ 23.

[110] *See, e.g., id*. at ¶¶ 23-26 (explaining that the industry's performance under the one-third threshold has "worked well").

77 percent were covered by six or more facilities-based providers.[111] Furthermore, as of 2010 approximately 193 million people, or nearly 68 percent of the total population, were covered by four or more facilities-based providers of mobile broadband service.[112] These figures do not include holders of spectrum within a given area that are not yet providing service, MVNO providers, or MSS providers, all of whom have exerted or will exert additional competitive pressures on the market.

Moreover, the FCC is moving aggressively to make more spectrum available for mobile broadband: 300 MHz by 2015 and 500 MHz by 2020.[113] As more spectrum becomes available for mobile services, Dr. Shampine explains that "[t]he amount of spectrum reserved for other firms by the screen has increased significantly."[114] As a result, "[e]ven if a firm held up to one third of the available spectrum in an area, that would leave sufficient spectrum for a number of other competitors to operate and pose competitive threats."[115]

The *Fifteenth Report* reveals just how much the wireless marketplace has flourished to the benefit of consumers since the Commission adopted the spectrum screen and the one-third threshold in 2004. For example, revenue per voice minute, a proxy for mobile voice pricing, dropped by more than half since the Commission sunset the spectrum cap,[116] and the number of mobile wireless connections more than doubled, to over 290 million, from the spectrum cap days

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[111] *Fifteenth Report*, 26 FCC Rcd at 9705-06 ¶ 45 & Table 6.

[112] *Id*. at 9706 ¶ 46 & Table 7.

[113] *See* National Broadband Plan at 10; October 4 Genachowski Remarks at 4.

[114] Shampine Decl. ¶ 19.

[115] *Id.* ¶ 26.

[116] *Fifteenth Report*, 26 FCC Rcd at 9783, Table 20.

to 2009.[117] And capital expenditures by wireless service providers, totaling more than $125 billion from 2004-2009, have fueled network expansion, next-generation deployments, and the mobile revolution.

The Notice does not offer facts or data that support reducing the one-third threshold that has been in effect while the wireless industry generated such substantial consumer benefits. Proponents of a new more restrictive approach would have a substantial hurdle to document why change is necessary. Reducing the screen from the already conservative level would in fact undermine the benefits of the current screen. It would require expenditure of more Commission resources to review additional transactions – without a factual predicate for sweeping those transactions into detailed review. It would increase uncertainty in the secondary market – again without justification – and deter transactions that would enhance consumer welfare by moving spectrum to those who can use it more efficiently. And, for these reasons, it would risk depressing interest in upcoming spectrum auctions, by alerting prospective participants that they will face more restrictive reviews should they "win" spectrum at auction.

V. EXISTING ATTRIBUTION POLICIES SHOULD BE MAINTAINED, WITH TWO MODIFICATIONS.

Attribution policies are essential to the consistent application of a spectrum screen. As the Commission notes, attribution policies ensure that spectrum over which entities have significant influence is attributed to that entity.[118] Without such policies, the Commission and carriers could treat their subsidiaries', affiliates', and partners' spectrum differently.

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[117] *Id.* at 9672.

[118] Notice ¶ 40.

The Notice proposes a detailed set of attribution standards which would be codified in a detailed, binding rule. As an initial matter, the need for such a rule rather than maintaining an attribution policy is not apparent. For nearly a decade the Commission has applied the spectrum screen as a processing tool, applying its attribution policies, without having a specific attribution rule. Since the Commission should not, for all the reasons discussed above, adopt a new rule codifying other bright line restrictions on spectrum holdings, neither does it need to adopt an attribution rule. It can, as with the modifications to the spectrum screen it should make in this proceeding, adopt appropriate modifications to its attribution policies.

The Commission's existing approach to spectrum attribution has generally worked well and should be maintained with minor modifications. Specifically, the Commission should continue to attribute to a licensee's total spectrum holdings all controlling interests.[119] However, it should expand its current policy not to attribute ownership interests of less than 10 percent by also excluding from attribution limited partnership interests because such interests do not convey a right to control the operation of the business. Similarly, the Commission should also consider increasing the level of minority equity interests that are not attributed (e.g., to 20 percent) if, for example, the owner certifies that its interest does not convey an ability to control or influence the licensee's use of the spectrum.[120]

Similarly, leased spectrum holdings should be attributed to the lessee, not the licensee, where the parties have entered into a *de facto* transfer lease. Under the Commission's spectrum leasing rules, a *de facto* transfer lease transfers authority to make decisions as to the operation of

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[119] *Id*. ¶ 42 ("[W]e seek comment on what level of non-controlling interest should be attributable ….").

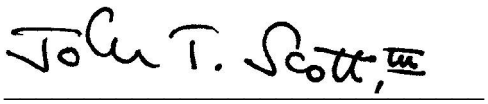
[120] *See id.* ¶ 41 n.132.

the spectrum from the licensee to the lessee. While the licensee retains ultimate responsibility for compliance with FCC technical and other operating rules, the lessee is deemed to "control" the spectrum. This policy ensures that the spectrum is attributed to the entity that is using it or has the ability to put it into use.

CONCLUSION

For the foregoing reasons, the Commission should reaffirm the use of a single spectrum screen as a safe harbor, and make the modifications to the screen as recommended in these comments.

Respectfully submitted,



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November 28, 2012