

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

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

Clearwire Corporation (“Clearwire”) hereby submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding.¹

I. SUMMARY

Clearwire commends the Commission for initiating this notice of proposed rulemaking to update its methodology for evaluating spectrum aggregation in the wireless marketplace. Clearwire recommends that the Commission continue its flexible, case-by-case analysis of transactions through use of the spectrum screen rather than reinstating a hard cap. While a hard cap would lead to greater certainty regarding the level of permitted spectrum aggregation, it might unduly restrict the ability of the Commission to consider unforeseen changes in the marketplace. Even without adopting a hard cap, the Commission can create greater certainty regarding its competitive analysis process by determining the elements of the screen through a rulemaking process rather than during the course of reviewing a proposed transaction. For example, as it establishes the regulatory framework for new or repurposed bands, the

¹ *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking, FCC 12-119 (rel. Sep. 28, 2012) (“NPRM”).

Commission could set a date certain for including the spectrum in the screen based on its assessment of when the spectrum will be available for use.

Clearwire encourages the Commission to once again reject proposals to add to the screen portions of the 2.5 GHz Band, including Educational Broadband Service (“EBS”) spectrum that historically have been excluded from the screen. The Commission has repeatedly confirmed that the unique licensing and regulatory characteristics of the 2.5 GHz band that caused the Commission to exclude Middle Band Spectrum (“MBS”), Broadband Radio Service (“BRS”) Channel 1, the J and K guard bands, and EBS spectrum from the screen remain unchanged.²

Finally, Clearwire encourages the FCC to increase its attribution threshold from 10% to 25% because today’s rule sweeps in non-controlling ownership interests that are too small to be competitively significant. The increase would bring the attribution rules in line with the Commission’s foreign ownership rules where Congress has determined that a 25% or greater foreign ownership interest is the appropriate trigger.³ Such an upward adjustment would potentially promote increased investment into the industry without compromising the FCC’s ability to examine competitively significant ownership levels.

II. BACKGROUND

In 2004, the Commission revised the regulations governing 2.5 GHz spectrum to create an environment conducive to the establishment of a capacity-rich 4G mobile broadband network.⁴ Since that time, Clearwire has deployed its network at record-breaking speed, launching its first greenfield 4G network in Portland, Oregon in early 2009. This phase of 4G

² *Application of AT&T Inc. and Qualcomm Inc.*, WT Docket No., 11-18, Order, FCC 11-188, ¶ 41 (rel. Dec. 22, 2011) (“AT&T/Qualcomm”); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC*, WT Docket No. 12-4, et. al., Memorandum Opinion and Order and Declaratory Rulemaking, FCC 12-95, ¶ 63 (rel. Aug. 23, 2012) (“Verizon/SpectrumCo”).

³ 47 U.S.C. § 310(d)(4).

⁴ *See 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, WT Docket No. 03-66 (rel. Jul. 29, 2004).

deployment has seen Clearwire grow to cover over 134 million POPs in approximately 80 markets. As of June 30, 2012, these networks serve approximately 11 million total subscribers consisting of 1.3 million retail subscribers and 9.6 million wholesale subscribers with high-speed residential and mobile Internet and interconnected voice over Internet protocol (“VoIP”) services. To support its network deployment, Clearwire owns BRS licenses and leases excess capacity from other BRS and EBS licensees. As part of its relationship with its EBS lessors, Clearwire assists its EBS lessors in meeting their obligations under FCC rules to use their spectrum to provide essential educational services to schools and colleges across the country.

In addition to its own customers, Clearwire offers its advanced wireless broadband service on a non-exclusive wholesale basis. It provides the broadband platform serving Sprint’s 4G customers along with a group of disruptive upstarts including FreedomPop, NetZero, Karma, Mobile Beacon, Mobile Citizen, Jolt Mobile, Leap Wireless, Cbeyond, MiTel and Locus Telecommunications. These newcomers are using Clearwire’s network to offer innovative pricing models, including free broadband to consumers.⁵ Clearwire’s aggregate wholesale 4G usage increased 50% year over year in the second quarter of 2012. On the retail side of the business, Clearwire offers a consumer-friendly “no contract” option and unlimited data plans under the brand name CLEAR®.

Clearwire also continues to position itself as a capacity-rich “off ramp” for other carriers facing spectrum constraints. Clearwire has announced a TDD-LTE 4G deployment that is

⁵ See Anton Troianovski, *Start-Up Skirts Cellphone Data Plans*, available at http://online.wsj.com/article/SB10000872396390443862604578028452045153628.html?mod=googlenews_wsj (Oct. 1, 2012); See also Myriam Joire, *NetZero launches ‘4G’ wireless service, we go hands on*, available at <http://www.engadget.com/2012/03/19/netzero-launches-4g-wireless-service-we-go-hands-on/> (Mar. 19, 2012); See also Karl Bode, *Karma Offers Wireless at \$14 a Gigabyte, Straight Latest MVNO Attempt to Disrupt Pricing*, available at <http://www.dslreports.com/shownews/Karma-Offers-Wireless-at-14-a-Gigabyte-Straight-119948> (Jun. 15, 2012); See also Tammy Parker, *WiMAX provider Mobile Beacon offers free Wi-Fi service*, available at <http://www.fiercebroadbandwireless.com/story/wimax-provider-mobile-beacon-offers-free-wi-fi-service/2012-09-23> (Sep. 23, 2012).

designed to provide wholesale capacity beginning in 2013 in dense urban markets where it is needed most.⁶ Clearwire initially is targeting high demand “hot zones” in 31 major urban centers such as New York City, San Francisco, Los Angeles, Chicago, and Seattle where demand for 4G mobile broadband is high and the need for deep capacity resources is most acute.

III. DISCUSSION

A. The Commission Should Continue To Use A Flexible Case-By-Case Approach

The communications industry is a fluid, fast-moving marketplace with various pieces and players constantly in motion. Before 2003, the Commission used a hard cap to “facilitate the developments of competitive markets for wireless services.”⁷ When it instituted the spectrum screen, the Commission acknowledged that both the cap and the screen have strengths and weaknesses.⁸ The Commission ultimately decided to utilize the screen as its analysis mechanism, determining that it is “preferable to the spectrum cap rule because it gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case.”⁹ The spectrum screen establishes a heightened level of scrutiny for those markets where the screen is triggered and allows the Commission to look at the characteristics of the specific market areas at issue as it weighs the public interest benefits of a proposed transaction.¹⁰ The Commission has used this flexible tool in evaluating many transactions, ranging from large to small, as it has overseen dynamic change within the wireless industry. Clearwire believes that a flexible case-by-case approach, rather than a hard cap, continues to have considerable merit. While a hard cap might provide certainty, its inflexibility

⁶ See Kevin Fitchard, *Clearwire breaking ground on new LTE network*, available at <http://gigaom.com/2012/09/20/clearwire-breaking-ground-on-new-lte-network/> (Sep. 20, 2012).

⁷ NPRM ¶6 (citing Second Biennial Review Order, 16 FCC Rcd at 22673 ¶ 13 (citation removed)).

⁸ 2000 Biennial Report ¶ 50.

⁹ *Id.*

¹⁰ *AT&T Inc./Qualcomm* ¶ 49 (focusing on AT&T’s aggregation of spectrum below 1 GHz in its case-by-case analysis).

might restrain the Commission from taking into account unforeseen technological or competitive developments that causes a transaction to tip the scales in favor of the public interest. In short, a hard cap may limit the Commission's ability to "respond swiftly to the changing needs" of the industry.¹¹

There may be, however, changes to the manner in which the spectrum screen is administered that could provide a greater degree of certainty to wireless carriers contemplating the acquisition of spectrum assets. For example, rather than determining what spectrum is included in the screen as part of the analysis of a transaction, the Commission could establish the elements of the screen through a rulemaking process or as it makes available new or repurposed spectrum assets for mobile broadband services. It could establish a date certain by which additional bands will be added to the screen based upon the Commission's assessment of when additional spectrum bands – such as the WCS bands or repurposed television broadcast spectrum -- will be available for use. This would result in greater certainty for wireless carriers regarding the level of scrutiny to be expected for future spectrum transactions.

B. The Commission Should Reaffirm Its Decision To Only Include A Portion Of The 2.5 GHz Band In The Spectrum Screen

The NPRM asks which spectrum bands should be included in its spectrum analysis.¹² At every opportunity Verizon and AT&T have called for the FCC to reverse its decision to exclude portions of the 2.5 GHz band from the spectrum screen.¹³ But as the Commission has repeatedly confirmed, the unique licensing and regulatory characteristics of the 2.5 GHz band that caused the Commission to exclude the MBS, BRS Channel 1, the J and K guard bands, and EBS

¹¹ NPRM ¶ 20.

¹² NPRM ¶ 28.

¹³ AT&T/Qualcomm ¶ 40; Verizon/Spectrum Co., ¶ 60.

spectrum from the screen remain unchanged.¹⁴ The 42 MHz of MBS at 2572-2614 is still used for high-site, high powered video service in some areas of the country, which can be incompatible with low-powered broadband operations. BRS Channel 1 licensees must share the 2496-2500 MHz band with co-primary mobile satellite services (“MSS”), broadcast auxiliary service and fixed microwave licensees.¹⁵ The J and K guard bands are assigned in small increments and are limited to secondary operations.¹⁶

Most importantly, the FCC licensing rules that limit EBS licensees to qualified educational and non-profit entities remain in place.¹⁷ Commercial entities are not eligible to acquire nor authorized to hold an EBS license.¹⁸ Consequently, while commercial operators such as Clearwire may lease excess capacity from EBS licensees, only educational entities are eligible to be licensed on the EBS channels.¹⁹ In addition, because the EBS spectrum is intended to “further the educational mission of accredited public and private schools, colleges and universities . . .”²⁰ the EBS licensees must demonstrate that a portion of their spectrum is meeting the Commission’s educational use requirements, an obligation unique to EBS.²¹ The

¹⁴ AT&T/Qualcomm ¶ 41; Verizon/Spectrum Co., ¶ 63.

¹⁵ Sprint and Clearwire described in detail the unique regulatory and licensing scheme associated with the 2.5 GHz band in their joint filings in the Commission’s 2008 proceeding regarding the transfer of Sprint’s licenses in that band to Clearwire. *See e.g., Joint Opposition to Petitions to Deny and Reply to Comments of Sprint Nextel Corporation and Clearwire Corporation*, WT Docket No. 08-94, at 24-25 (Aug. 4, 2008)(“Sprint-Clearwire Joint Opposition & Reply Comments”).

¹⁶ 47 C.F.R. §§ 27.5(i)(2) and 27.1222 (guard band operations are secondary).

¹⁷ 27 CFR § 27.1201(a).

¹⁸ There are a handful of EBS licenses, known as Commercial EBS licenses, which under the previous part 74 licensing rules were permitted to be held by commercial entities under very specific conditions. There are approximately 65 EBS licenses are still held by commercial entities but the former rule section that permitted such licensing has been removed from the rules, so no additional Commercial EBS licenses can be granted.

¹⁹ The complex and individualized nature of EBS leasing serves to further demonstrate the difficulty of including EBS licenses in the spectrum screen. In considering whether or not to include EBS spectrum in the screen, it is important to remember that not every EBS license is leased to a commercial operator. There are a number of EBS licensees that retain the entirety of their spectrum and meet their educational obligations on their own. Some licensees choose to lease less only a portion of their spectrum. Leasing is a choice made by the EBS licensee.

²⁰ *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order, 23 FCC Rcd 17570 ¶ 71 (2008) (“Sprint/Clearwire Order”).

²¹ 27 CFR § 1203(b).

Commission has also previously noted that other elements of the EBS licensing regime such as licensed service areas that are tailored for the educational services of licensees and the existence of significant areas of unlicensed white space “also complicate the use of this spectrum for commercial purposes.”²² The Commission has relied on these factors, all of which continue to apply today, to consistently exclude EBS licenses from its spectrum screen over the years.²³ Consequently, the Commission should reaffirm its exclusion of EBS and portions of BRS from the spectrum screen.

C. The Commission Should Adjust Its Attribution Rules

As part of its proposals for its spectrum analysis mechanism, the Commission asked whether and how it should adjust its attribution rules.²⁴ Clearwire believes that the Commission’s current attribution rule of 10% is set too low and may discourage important, but competitively insignificant investments in wireless carriers by companies concerned about the impact of spectrum attribution on their future spectrum acquisition plans. Clearwire recommends that the Commission adjust its attribution rules so that partial, non-controlling spectrum ownership interests of less than twenty five percent are not considered attributable. The increase would bring the attribution rules in line with the Commission’s foreign ownership rules where Congress has determined that a 25% or greater foreign ownership interest is the appropriate trigger.²⁵ Such an upward adjustment would potentially promote increased investment into the industry without compromising the FCC’s ability to examine competitively significant ownership interests.

IV. CONCLUSION

²² See 15th Mobile Wireless Competition Report ¶ 281 n. 815.

²³ Sprint/Clearwire Order ¶¶ 67-69, 71.

²⁴ NPRM ¶ 42.

²⁵ 47 U.S.C. § 310(d)(4).

