

**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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REPLY COMMENTS OF CLEARWIRE CORPORATION

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

I. SUMMARY

Clearwire encourages the Commission to once again reject proposals by AT&T and Verizon to add to the spectrum screen portions of the 2.5 GHz Band, including Educational Broadband Service (“EBS”) spectrum that historically have been excluded from the screen.² 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.³ Many carriers, other than the “Big Two,” support the continued exclusion of portions of the 2.5 GHz band.⁴

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

² *See e.g.*, Comments of AT&T, WT Docket No. 12-269, (filed Nov. 28, 2012) (“AT&T Comments”); *See also* Comments of Verizon, WT Docket No. 12-269 (filed Nov. 28, 2012) (“Verizon Comments”).

³ *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 Order”); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo*

In addition, Clearwire notes that there is broad support across many segments of the industry for increasing the FCC’s attribution threshold from 10% to 25%.⁵ Clearwire and many commenters agree that today’s rule sweeps in non-controlling ownership interests that are too small to be competitively significant. The increase proposed by Clearwire and others 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.⁶ 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. DISCUSSION

A. The Unique Characteristics Of The 2.5 GHz Band Continue To Support The Commission’s Decision To Exclude A Portion of The 2.5 GHz Band From The Spectrum Screen

In establishing the components of its spectrum screen, the Commission looks at the “practical availability of spectrum...and adjusts its screen accordingly.” In looking at the 2.5 GHz band, the Commission has decided to exclude a portion of the 2.5 GHz band to due to its unique characteristics. This decision has been reaffirmed several times, including most recently in the AT&T/WCS spectrum transactions.⁷ In fact, Chairman Genachowski used 2.5 GHz

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 Order”).

⁴ See Comments of the Competitive Carriers Association, WT Docket No. 12-269 (filed Nov. 28, 2012) (“CCA Comments”); See also Comments of the Rural Telecommunications Group, Inc., WT Docket No. 12-269 (filed Nov. 28, 2012) (“Rural Telecommunications Group Comments”); See also Comments of NTCH, Inc. dba Cleartalk, Inc., WT Docket No. 12-269 (filed Nov. 28, 2012) (“NTCH Comments”).

⁵ See Comments of Clearwire Corporation, WT Docket No. 12-269, (filed Nov. 28, 2012) (“Clearwire Comments”); See also AT&T Comments at 12; See also CCA Comments at 16, See also Comments of MetroPCS at 18, WT Docket No. 12-269, (filed Nov. 28, 2012) (“MetroPCS Comments”).

⁶ 47 U.S.C. § 310(d)(4).

⁷ See e.g., *Sprint Nextel Corp. and Clearwire Corp. Application for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WB Docket No. 08-94, (rel. Nov. 7, 2008) ¶¶ 71-74 (“Sprint-Clearwire Order”); See also *Application 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 Lease Arrangements*, Memorandum Opinion and Order and Declaratory Ruling, WB Docket No. 08-95, (rel. Nov. 10, 2008) ¶¶ 62-65 (“Verizon-ALLTEL Order”); See also *Staff Analysis and Findings, AT&T and T-Mobile Merger*

spectrum as an example to explain that “with respect to certain spectrum – BRS spectrum, for example - the Commission has found that ‘specific features associated with [certain] spectrum,’ such as interference concerns, may result in all or part of that spectrum not being ‘suitable’ for mobile telephony/broadband services.”⁸ The specific features of the 2.5 GHz band that caused the FCC to exclude portions of the band from the screen have not changed. Consequently, Clearwire and many small and rural carriers have called for the Commission to once again reaffirm its decision.⁹

As Clearwire noted in its comments, the 42 MHz of MBS at 2572-2614 is still used by EBS licensees to transmit educational programming via high-site, high powered systems. These systems are 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.¹⁰ The J and K guard bands are assigned in small increments and are limited to secondary operations.¹¹

Most importantly, the FCC licensing rules that limit EBS licensees to qualified educational and non-profit entities remain in place.¹² Commercial entities are not eligible to

Proceeding WT Docket No. 11-65 (filed Nov. 30, 2011) (“Staff Report”); *See also* AT&T-Qualcomm Order ¶ 31; *See also* Verizon-SpectrumCo Order ¶ 48; *See also* *Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company For Consent To Assign And Transfer Licenses*, Memorandum Opinion and Order, WT Docket No. 12-240, (rel. Dec. 18, 2012) (“AT&T WCS Order”).

⁸ Letter from Julius Genachowski, Chairman, Federal Communications Commission to Honorable Fred Upton, Chairman, Committee on Energy and Commerce, United States House of Representatives, (Dec. 20, 2011) (*available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311873A1.pdf) (citing Sprint-Clearwire Order ¶¶ 67-70).

⁹ *See* CCA Comments at 15; *See also* Rural Telecommunications Group Comments at 5.

¹⁰ 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”).

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

¹² 27 CFR § 27.1201(a).

acquire nor authorized to hold an EBS license.¹³ 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. In addition, because the EBS spectrum is intended to “further the educational mission of accredited public and private schools, colleges and universities . . .”¹⁴ the EBS licensees must demonstrate that a portion of their spectrum is meeting the Commission’s educational use requirements, an obligation unique to EBS.¹⁵ The 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.”¹⁶ 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.¹⁷

Despite no change to the unique features of the 2.5 GHz band, AT&T and Verizon again request that the Commission include all EBS and BRS spectrum in the screen. This request should be rejected as a transparent attempt by the “Big Two” to pad the screen’s denominator with spectrum that is not a part of their sizeable spectrum inventories to create headroom for their acquisition of even more spectrum. Verizon, for example, states that “with the exception of five percent of EBS spectrum that is reserved for educational use, 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

¹³ 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.

¹⁴ Sprint-Clearwire Order ¶ 71.

¹⁵ 27 CFR § 1203(b).

¹⁶ See 15th Mobile Wireless Competition Report ¶ 281 n. 815.

¹⁷ Sprint-Clearwire Order ¶¶ 67-69, 71.

commercial mobile use in the screen.”¹⁸ Verizon’s assertion that only 5% of EBS spectrum is committed to education is incorrect. FCC rules provide that EBS licensees must reserve “a *minimum* of 5%” of their spectrum for educational use.¹⁹ The amount of capacity actually reserved – as well the actual or contemplated use of reserved capacity – are all matters of negotiation that vary among EBS licensees. Some licensees reserve more than the mandatory minimum, and others have rights to recapture EBS capacity over time to meet their changing educational needs. In addition, many EBS licensees are not parties to excess capacity leases, and are using all of their spectrum for educational purposes.

Even in cases where stations are leased and 5% capacity is reserved, it is overly-simplistic to state (as both AT&T and Verizon do) that all of the remaining capacity is fully available for commercial use. This is because EBS leases often provide for the provision of wireless broadband access, video, and other telecommunications services (using both reserved and non-reserved capacity) to meet the evolving needs of EBS licensees – many of whom play an active, long term role in the management and use of their spectrum for education. In addition, the Commission’s rules require that EBS licensees have the right after the first 15 years of a lease, and every 5 years thereafter, to reassess their educational needs in cooperation with their commercial lessees.²⁰

AT&T also argues that the fact that higher power operations are “authorized” in the MBS portion of the BRS/EBS spectrum should not remove such spectrum from the screen. However, in many locations, including some of the largest metropolitan areas of the country, high power video services are still provided in the MBS, making the MBS spectrum in those areas and surrounding areas unusable for mobile wireless services.

¹⁸ Verizon Comments at 24-25.

¹⁹ 47 C.F.R. § 27.1214(b)(1).

²⁰ 47 C.F.R. §27.1214(e).

AT&T and Verizon fail to show any change to the specific features of the 2.5 GHz band that the Commission relied upon to determine the components of its spectrum screen. Because there have been no changes to the spectrum screen since it was last updated,²¹ the Commission should, once again, reaffirm its long-standing decision to include only a portion of the 2.5 GHz band in the spectrum screen.

B. The Commission Should Increase Its Attribution Threshold

In the NPRM, the Commission asked whether it should codify its proposed attribution rules.²² In response, the large number of commenters across the industry recommended that it adjust its attribution threshold upwards.²³ Clearwire agrees with these commenters. Adjusting the attribution threshold to accurately reflect only competitively significant ownership interests would allow for increased investment and growth in the industry. For the reasons set forth in its comments, Clearwire believes that 25% or higher is the correct threshold.²⁴ Due to the lack of opposition to adjustment of the attribution threshold, Clearwire encourages the Commission to quickly act on this proposal.

C. CONCLUSION

For all of the above reasons, the Commission should reaffirm that only a portion of the 2.5 GHz band is included in the spectrum screen and should adjust its attribution threshold upward to reflect only competitively significant ownership interests.

²¹ See e.g., AT&T WCS Order.

²² NPRM ¶ 42.

²³ See AT&T Comments at 79; See also CCA Comments at 15-16; See also MetroPCS Comments at 18.

²⁴ Clearwire Comments at 7.

Respectfully submitted,

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