

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

In the Matter of)	
)	
AT&T, Cellco Partnership d/b/a/ Verizon)	
Wireless, Grain Spectrum, LLC, and Grain)	WT Docket No. 13-56
Spectrum II, LLC, for Consent to the)	
Assignment of Advanced Wireless Services)	
and Lower 700 MHz Band B Block Licenses)	
and to Long-Term <i>De Facto</i> Transfer)	
Spectrum Leasing Arrangements)	
)	

**REPLY OF DISH NETWORK CORPORATION TO JOINT OPPOSITION OF
AT&T, VERIZON, AND GRAIN**

I. INTRODUCTION

DISH Network Corporation (“DISH”) submits this reply to the Joint Opposition filed by AT&T, Verizon, and Grain (the “Applicants”) in this proceeding.¹ Verizon seeks to avoid or delay complying with its prior promise to divest its 700 MHz A and B Block licenses. Verizon’s actions (or lack thereof) to fulfill that promise are relevant to this transaction, regardless of whether the promise was formally enshrined as a condition to the *SpectrumCo* proceeding. Verizon should be held to its own commitment, which was not made idly, but rather in response to the spectrum warehousing concerns raised in that proceeding.

The Applicants also argue that any modification of the spectrum screen should be done by rulemaking, not adjudication. Yet, a few days ago, Verizon asked the Commission to revise the spectrum screen by adjudication in the Sprint-SoftBank proceeding.² The Commission

¹ Opposition of AT&T Inc., Cellco Partnership d/b/a/ Verizon Wireless Inc., Grain Spectrum, LLC, and Grain Spectrum II, LLC (Apr. 15, 2013) (“Opposition”).

² Letter from Tamara Preiss, Verizon Wireless, to Marlene H. Dortch, FCC, Docket No. 12-343 (Apr. 18, 2013) (“Verizon Ex Parte”).

should not entertain Verizon’s effort to reconcile its inconsistent positions. It should revise its spectrum screen in the present transaction as needed to serve the public interest instead of using a spectrum screen that may soon be revised in the open *Spectrum Screen NPRM* proceeding.³

II. THE COMMISSION SHOULD HOLD VERIZON TO ITS COMMITMENT TO DIVEST ITS 700 MHZ LICENSES

In the proceeding concerning approval of its controversial SpectrumCo transaction, Verizon made a promise to the Commission: “that it [would] sell its remaining 700 MHz A and B Block spectrum” and would “conduct an open sale process for [those] licenses if the AWS purchases [were] approved.”⁴ In Verizon’s words, this would “undercut[] the . . . ‘warehousing’ claims by several of [its] competitors”⁵ and make “[i]nteroperability concerns . . . irrelevant.”⁶

Verizon now appears to be walking away from its promise. In their Opposition, the Applicants argue that divestiture of those licenses is not necessary, because “the Commission did *not* condition its grant of the AWS spectrum transaction on Verizon Wireless selling any Lower 700 licenses” and, in any event, because “Verizon Wireless did precisely what it said it would do—hold an ‘open sale.’”⁷ In effect, the Applicants are faulting the Commission for believing Verizon: the most plausible reason why the Commission did not impose Verizon’s promise as a condition was that the Commission took Verizon at its word.

³ See Policies Regarding Mobile Spectrum Holdings, *Notice of Proposed Rulemaking*, 27 FCC Rcd. 11710 (2012) (“*Spectrum Screen NPRM*”).

⁴ Letter from Adam D. Krinsky, Wilkinson Barker Knauer, LLP, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1, 5 (May 22, 2012) (“Krinsky Ex Parte”).

⁵ Letter from Kathleen Grillo, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 4 (May 22, 2012) (“Grillo Ex Parte”).

⁶ Krinsky Ex Parte at 13.

⁷ Opposition at 8, 9 n.36.

Verizon argues that Section 310(d) of the Communications Act bars the Commission from requiring Verizon to divest the A and B Block licenses to someone other than AT&T.⁸ However, the Commission may indeed review whether a transfer to a particular party (AT&T) and in a particular form (swap) is adequate to address the competitive effects of a previous transaction.⁹ Reviewing each transaction on its own merits does not mean that the Commission must ignore a past promise—one that, to hear Verizon itself, would undercut the warehousing concern raised in the *SpectrumCo* proceeding. Nothing in Section 310(d) bars the Commission from requiring Verizon to satisfy its prior promises before allowing the company to obtain additional mobile broadband spectrum.

III. THE COMMISSION CAN AND SHOULD CONSIDER MODIFYING THE SPECTRUM SCREEN FOR THIS TRANSACTION IN ORDER TO SERVE THE PUBLIC INTEREST

The Applicants ask the Commission to approve this transaction without modifying the spectrum screen, principally on the ground that the Commission is already undertaking a holistic revision in the *Spectrum Screen NPRM*.¹⁰ But waiting is neither appropriate nor advisable.

The Commission has wide discretion to proceed either by adjudication or by rulemaking.¹¹ Consistent with that discretion, the Commission has always reviewed the

⁸ *Id.* at 7.

⁹ See, e.g., Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless; For Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement, *Memorandum Opinion and Order*, 25 FCC Rcd. 8704 (2010) (evaluating whether Verizon’s selection of AT&T through its divestiture bidding process “undercut the competitive objectives the Commission sought to implement by requiring divestitures in 105 markets” in the *Verizon-ALLTEL Order*); Buckley Broadcasting/WOR, LLC, *Letter Decision*, 27 FCC Rcd. 15219 (2012) (evaluating whether Clear Channel properly divested several stations, pursuant the FCC’s 2008 *Order* approving Clearwire’s transfer of control to two private equity firms, when it transferred those stations to the Aloha Station Trust).

¹⁰ Opposition at 4.

spectrum screen on a case-by-case basis,¹² and has stated in the *Spectrum Screen NPRM* that it will continue to do so during the pendency of that proceeding.¹³ Indeed, the Commission has used its discretion to revise the spectrum screen by adjudication even after issuing the *Spectrum Screen NPRM*, recently adding 20 MHz of WCS spectrum to the spectrum screen in the context of AT&T's transactions with 2.3 GHz WCS licensees.¹⁴

In addition, Verizon itself has urged the Commission to modify the screen by adjudication in another open proceeding—the Sprint-SoftBank transaction—without suggesting that change needed to await a rulemaking. In Verizon's words in that proceeding, “[f]ailure to update the screen . . . would leave intact a screen that fails its purpose of providing an accurate tool for the Commission to conduct its competitive analysis of this and future transactions.”¹⁵ That same concern applies to the spectrum swap at issue in this transaction. The Commission should reject Verizon's argument for immediate, transaction-based spectrum screen revisions where it suits Verizon's purposes (Sprint-SoftBank) while pleading for the Commission to use the status quo standard for the AT&T swap and leave broader reforms for a rulemaking.

Nor *should* the Commission wait for the conclusion of the spectrum screen rulemaking if more immediate changes are needed to preserve and protect the public interest. As the

¹¹ See *SEC v. Chenery*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”).

¹² See *Spectrum Screen NPRM*, 27 FCC Rcd. at 11718-11720 ¶¶ 17-21 (explaining that the Commission has used the case-by-case approach since eliminating the firm spectrum cap).

¹³ See *id.* at 11718 ¶ 16 n.59 (“During the pendency of this proceeding, the Commission will continue to apply its current case-by-case approach to evaluate mobile spectrum holdings during our consideration of secondary market transactions and initial spectrum licensing after auctions.”).

¹⁴ Applications of AT&T Mobility Spectrum LLC et al. for Consent to Assign and Transfer Licenses, *Memorandum Opinion and Order*, 27 FCC Rcd. 16459 ¶ 30 (2012).

¹⁵ Verizon Ex Parte at 2.

Department of Justice pointed out in the *Spectrum Screen NPRM* proceeding, “competition typically is best served by a thorough, case-by-case analysis of the competitive effects of each transaction.”¹⁶ And as DISH has argued, one problem with the current spectrum screen is that it does not capture the superior propagation characteristics of spectrum below 1 GHz, and the market dominance that is attendant upon one carrier controlling an inordinately large portion of that spectrum.¹⁷ It would thus only disserve the public interest for the Commission to apply its unchanged spectrum screen to a transaction as significant as this one, only to update it a few months later for future transactions. The Commission should either apply an up-to-date, modified screen along the lines suggested by DISH, or else hold this proceeding in abeyance until the *Spectrum Screen NPRM* rulemaking is concluded.

IV. CONCLUSION

For the reasons stated herein and in its Petition to Deny or Condition, DISH respectfully requests that the Commission deny its consent to this transaction or, at a minimum, apply appropriate conditions to mitigate the harm that the transaction would otherwise cause.

¹⁶ Ex Parte Submission of the Department of Justice, WT Docket No. 12-269, at 18 (Apr. 11, 2013).

¹⁷ DISH Network Corporation, Petition to Deny, WT Docket No. 13-56, at 5 (Apr. 4, 2013).

Respectfully submitted,

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April 22, 2013

DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Reply of DISH Network Corporation to Joint Opposition of AT&T, Verizon, and Grain are true and correct to the best of my information, knowledge and belief.

Executed on April 22, 2013.



Jeffrey H. Blum
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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of April 2013, I caused a copy of the foregoing Reply of DISH Network Corporation to Joint Opposition of AT&T, Verizon, and Grain to be filed electronically with the Commission using the ECFS system and to be served upon the following individuals by First Class Mail and/or electronic mail:

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