

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

In the Matter of)
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)
Cellco Partnership D/B/A Verizon Wireless,)
SpectrumCo, LLC and Cox TMI Wireless, LLC) WT Docket No. 12-4
)
For Consent To Assign Licenses and Authorizations)

**COMMENTS OF
THE FREE STATE FOUNDATION***

I. Introduction and Summary

These comments are submitted in response to the Commission's request for comments concerning its review of the applications for assignment of licenses resulting from Verizon Wireless's proposed acquisitions of spectrum from SpectrumCo and Cox Communications.

In recent years, the wireless marketplace has been characterized by major investment, rapid innovation, continuously changing consumer habits, and consistently declining prices – all indications of a competitive market. The proposed transactions are both a reaction to and a reflection of these characteristics of the wireless market. By acquiring additional spectrum and putting it into commercial use for wireless services, Verizon seeks to speed up and expand its deployment of 4G LTE services to meet growing consumer demands for data-rich wireless broadband services. The enhanced technological capabilities of 4G networks make them an ideal platform for launching and diffusing future waves of disruptive innovations in wireless products

* These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Research Fellow of the Free State Foundation. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

and services, while promising wireless consumers lower prices. Therefore, the Verizon/SpectrumCo and Verizon/Cox transactions offer a number of potential public benefits.¹

The Commission should evaluate proposed transactions involving transfers of wireless spectrum licenses with a view towards the innovative forces and disruptive change that presently characterize the wireless market. This means acknowledging the competitive conditions and processes for delivering breakthrough products and services, including ongoing migration of competing wireless networks to 4G standards. It also means the Commission's public interest analysis should acknowledge, in assessing competition, the substitutability of services offered by regional and local wireless providers, as well as cross-platform competition.

Existing competition and the economic efficiencies created by network expansion and capacity upgrades are both factors weighing in favor of both the Verizon/SpectrumCo and Verizon/Cox transactions. Significantly, neither transaction reduces the number of existing marketplace competitors. Meanwhile, Verizon/Cox would not exceed the current spectrum screen triggers in any cellular market area (CMA) and Verizon/SpectrumCo triggers spectrum screen analysis in only a handful, by small amounts, and where other wireless providers offer competing services.

The Commission must not manipulate its review standards through *ad hoc*, arbitrary adjustments to its public interest analysis or to its spectrum screen. Moving the analytical goalposts in novel ways in the course of reviewing specific transactions undermines the integrity of the Commission's processes. The Commission should adhere to its precedents in which it declined to single out particular bands of spectrum and subject them to special conditions or

¹ Consistent with our general practice, the purpose of these comments is not to specifically endorse the proposed transactions. Rather, it is to address the context in which the FCC properly should evaluate Verizon/SpectrumCo, Verizon/Cox, or, for that matter, similar transactions, in light of relevant principles and perspectives that ought to be considered.

regulatory burdens. Any changes in policy having industry-wide implications should be undertaken, if at all, only through the Commission's rulemaking process.

Finally, as the Commission is aware, the applicant parties have reached separate business agreements for selling each other's services, as well as for jointly developing innovative technologies. These separate commercial agreements, which do not involve the transfer of any licenses, are not contingent on approval of the proposed transfers of spectrum licenses, or vice versa, and by their terms they do not call for Commission review. Sales agency and resale arrangements such as those reflected in the subject commercial agreements appear to be common in the communications marketplace. For example, AT&T and DIRECTV have been parties to such an agreement for many years. As far as we have been able to determine, commercial sales agency and reselling agreements, such as those entered into by the parties herein, generally have not been reviewed by the Commission. The present commercial agreements should *not* be subject to the Commission's review either.

Instead, the Commission should follow its precedents where it has refrained from imposing conditions where any public interest concerns involve broader industry-wide practices and do not directly arise out of the transaction under review. On balance, we believe the commercial agreements may offer public benefits, for example, through increased consumer choice by virtue of new bundled packages of services that otherwise would not be available, or not be available as conveniently on a one-stop basis. But, in any event, any supposed concerns about business arrangements that are extraneous to the proposed license transfers can be considered, to the extent appropriate, by authorities other than the FCC. For example, any claimed anti-competitive concerns raised by the commercial agreements possibly may be within the purview of the U.S. Department of Justice, or by private parties with proper legal standing, but not the FCC.

II. The Commission Must Credit the Competitive and Dynamic Nature of the Wireless Market

Today's wireless industry should be examined with a dynamic market-minded outlook that accounts for market conditions conducive to continuing investment and innovation. A dynamic market analysis involves a forward-looking evaluation of the market's underlying competitive conditions and processes for delivering new generations of products and services. This means taking stock of market conditions related to ongoing migration of competing wireless networks to 4G standards, including investment in network infrastructure upgrades and the achievement of spectrum efficiencies. 4G networks will provide the platform for future waves of disruptive innovations in wireless products and services. And the enhanced performance capabilities of 4G networks – including increased capacity, lower latency, and stronger security – promise reduced costs per megabit. Thus, 4G networks have the potential to deliver superior service choices at lower prices than regulation-enforced measures to reduce market concentration concerns among existing nationwide wireless providers.

Growth in spectrum use and efficiency is incontrovertibly necessary to accommodate exploding consumer demand for bandwidth-hungry wireless services, especially video. As Cisco projects, "[m]obile video will increase 25-fold between 2011 and 2016, accounting for over 70 percent of total mobile data traffic by the end of the forecast period."² And "[i]n 2016, a 4G connection will generate 9 times more traffic on average than a non-4G connection."³ The Commission must recognize the need for wireless providers to acquire additional spectrum to meet the capacity challenges posed by wireless data demands that are growing exponentially. Here, the proposed transactions, which will facilitate a more rapid and extensive LTE 4G

² Cisco, "Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2010-2015" (February 1, 2011), at 3, available at: http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf.

³ *Id.*

deployment roll-out, should enable Verizon to enhance spectrum efficiency, increase output, and improve performance to the benefit of consumers.

Technologically dynamic markets are often characterized by the "innovator's dilemma," whereby competitors offering lower-end innovations rather than high-end services gain critical market share. The Commission's public interest analysis should factor in the competitive and potentially competitive effects of disruptive regional and local wireless providers, as well as the competitive impacts of cross-platform substitute technologies.

Regional wireless carriers offer 3G and even 4G LTE wireless services, often priced competitively or at a discount compared to major wireless carriers. Regional carriers' wireless service offerings typically include unlimited bucket plans for voice, video, and data use when local, and provide out-of-territory coverage through roaming. As the Commission has previously observed, "[b]ecause mobile wireless consumers are generally not willing to search for competitive alternatives that do not serve their local areas, the relevant geographic area is a local area."⁴ Regional providers offering service to consumers seeking service for their respective local areas are therefore entirely relevant to the Commission's competitive analysis. And regional providers are especially relevant to any analysis of individual CMAs.

III. The Transactions Fare Favorably Even by the Commission's Static Indicators

The static market tests that the FCC has recently emphasized in analyzing the wireless market – namely, Herfindahl-Hirschman Index (HHI) market concentration estimates and the agency's spectrum screen – may be factors for the FCC to consider. But they certainly are not the be-all and end-all. In any event, those static market indicators should have little or no impact on the Commission's public interest analysis in this instance. Neither of the proposed transfers of

⁴ *Fourteenth Report*, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66 (2010), at 53, ¶ 24.

spectrum licenses will reduce the number of national or local competing wireless providers. So the Commission should follow past practice by deeming HHI market concentration estimates irrelevant to its analysis.

Both proposed transactions also fare positively under the Commission's spectrum screen. Verizon/Cox does *not* trigger further spectrum screen analysis in any CMA. And Verizon/SpectrumCo would *not* trigger the Commission's applicable 145 MHz screen in some 102 of 120 CMAs.⁵ For those CMAs where the spectrum screen is *not* triggered, the Commission's inquiry should end because there is "clearly no competitive harm."⁶

For those CMAs that do call for additional analysis under the screen, the Commission should recognize that the spectrum screen is not a cap or a *de facto* cap. The agency should not regard spectrum screen thresholds as a presumption against the transaction's competitiveness. On prior occasions, the Commission has approved mergers and acquisitions where the spectrum screen was triggered.⁷ This is because the screen is simply an economizing analytical device that may be helpful in identifying certain market segments for further review.

Thus, for the CMAs that Verizon/SpectrumCo triggers under its spectrum screen, the Commission should take the competitive dynamics of each CMA into account. It should consider the actual amount of spectrum aggregation that exceeds the screen's triggers. The Commission should also consider the effects of existing and potential competitors on a CMA-by-CMA basis.

Regarding the CMAs where Verizon/SpectrumCo triggers the Commission's spectrum screen, a general observation or two can be made. First, spectrum aggregation overages resulting

⁵ See Verizon-SpectrumCo (VZ-SC) Public Interest Statement, at 1-2, 24-27.

⁶ In the Matter of Sprint Nextel Corporation and Clearwire Corporation, Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, 23 FCC Rcd 17570, 17601, ¶ 76 (2008).

⁷ See, e.g., Sprint-Nextel/Clearwire Order, 23 FCC Rcd at 17604 ¶ 83, In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, 19 FCC Rcd 21522 at 21607-08 ¶¶ 226-27 (2004).

from Verizon/SpectrumCo appear small. In 8 CMAs the overage is 4MHz or less and in 6 CMAs the overage is between 5 and 9 MHz.⁸ Second, there are plenty of marketplace competitors in nearly every CMA where the spectrum screen is triggered. In 17 of the 18 CMAs there are at least 4 wireless service providers.⁹ The limited extent of the spectrum overages and the presence of market competitors suggest that no competitive concerns are likely present in any or all of those 18 CMAs. In the unlikely event the Commission nevertheless concludes that competitive concerns somehow exist in a few such CMAs, any conditions it might place on Verizon/SpectrumCo should be limited to the individual CMAs so identified.

IV. The Commission's Review Process and Policies Must Have a Principled Basis and Not Be Subject to Unpredictable Alterations

Regulatory predictability and certainty should be key components of the Commission's review process. The Commission must not manipulate its public interest analysis – or its spectrum screen analysis, in particular – through unpredictable *ad hoc* changes. It should not use its review process to impose policy changes that lack a principled basis.

The Commission should adhere to agency precedents in which it has treated all spectrum in a non-discriminatory manner and declined to undertake separate analyses of different spectrum bands or to impose restrictions for specific spectrum bands.¹⁰ Although different spectrum bands approved for commercially licensed use may have different propagation characteristics, disparate regulatory treatment by the Commission in orders reviewing proposed transfers of spectrum licenses amounts to unjustifiable industrial policy.

The sorting out of near-term versus long-term deployment efficiencies, or differing capacity constraints unique to low or high spectrum bands, for instance, should be left to the

⁸ See Verizon Wireless-SpectrumCo, Public Interest Statement, at 24-27.

⁹ See *id.* at 28-29.

¹⁰ See, e.g., In the Matter of Sprint Nextel Corp. and Clearwire Corp. Applications For Consent To Transfer Control of Licenses, Leases, and Authorizations ("Sprint/Clearwire Order"), 23 FCC Rcd 17570, at ¶ 63 (2008).

price mechanism. For spectrum licenses granted through auctions this means winning bid amounts. And for secondary market transactions it means bargained-for sale amounts. While the relative merits of low-band and high-band spectrum may be debated, the associated trade-off considerations should be made by wireless carriers actually in the business of using the spectrum to provide wireless services.

This also means that the Commission should not brush aside the likely consumer welfare-enhancing benefits of Verizon/SpectrumCo and Verizon/Cox as non-transaction specific simply because the spectrum at issue has technical attributes that competitors or new entrants could conceivably find beneficial. The Commission cannot cavalierly disregard the economic benefits of transactions proposed by wireless providers that actually bear the expenses and risks involved. Nor does conceiving hypothetical scenarios in which competing providers or new entrants might instead acquire the spectrum licenses at issue provide any basis for finding anticompetitive harm and imposing conditions on any transaction. It would be misguided for the Commission to impose conditions or other regulatory restraints on wireless providers by doing little more than imagining additional competitors that might (in theory, but not in fact) raise and risk their own capital for necessary inputs to expand market share or gain entry. Such conjectural approach would stretch the FCC's already rubbery "public interest" review standard beyond any meaningful boundaries.

V. The Commission Should Promote Flexible Use Spectrum in Secondary Markets

The Commission should re-commit itself to promoting flexibility in spectrum use and easing the exchange of spectrum in secondary market transactions. Flexible-use spectrum licenses are crucial to ensuring that wireless providers can adapt and expand their services rapidly in an innovative manner.

Improving flexibility in spectrum use and exchange was an ostensible goal of the National Broadband Plan. The Plan declared that "[t]he goal of the FCC's current secondary market policies is to eliminate regulatory barriers that might hinder access to, and permit more efficient use of, valuable spectrum resources."¹¹ And it recommended policies that would "promote access to unused and underutilized spectrum."¹² But *ad hoc* regulatory restrictions on the use of spectrum, particularly in the case of transactions that pose no threat of consumer harm, or even reduce the number of existing competitors, have a chilling effect on secondary market functioning. Regulatory uncertainty hampers the ability of the limited spectrum market that now exists to facilitate efficiency-enhancing exchanges that will put spectrum to its highest commercial use. However, a more certain process better incentivizes wireless providers to engage in efficient and output-enhancing market transactions for spectrum licenses.

VI. The Commission's Review Should Not Include Non-Transaction Specific Commercial Dealings

The Commission's review should be disciplined, focusing on the transfers of spectrum licenses and the likely competitive effects of such transfers. As the Commission has said: "The goal of our license transfer application review process is to allow parties to realize the economic efficiencies associated with the transaction, while ensuring that any harms resulting from the license transfer are mitigated and some portion of the benefits of the transfer are passed on to the public."¹³ "The Commission," in other words, "is charged with determining whether *the transfer of licenses* serves the broader public interest."¹⁴

As the Commission is aware, the parties have reached separate business agreements for

¹¹ Connecting America: The National Broadband Plan, at 83 (Recommendation 5.7).

¹² *Id.*

¹³ In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control, 19 FCC Rcd 473, 531, ¶ 131 (2004).

¹⁴ In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, 17 FCC Rcd 23246, 23256, ¶28 (2002) (emphasis added).

selling each other's services, as well as for jointly developing innovative technologies.¹⁵ These separate commercial agreements, which do not involve the transfer of any licenses, are not contingent on approval of the proposed transfers of spectrum licenses, or vice versa, and by their terms they do not call for Commission review.¹⁶ Sales agency and resale arrangements such as those reflected in the subject commercial agreements appear to be common in the communications marketplace. For example, AT&T and DIRECTV have been parties to such an agreement for many years, and CenturyLink offers its customers Verizon Wireless devices and service plans. As far as we have been able to determine, commercial sales agency and reselling agreements, such as those entered into by the parties herein, generally have not been reviewed by the Commission. The present commercial agreements should *not* be subject to the Commission's review either.

The Commission should follow those precedents where it has refrained from imposing conditions where any putative public interest concerns involve broader industry-wide practices and do not directly arise out of the transaction under review.¹⁷ We believe that the commercial agreements may offer public benefits, for example, through increased consumer choice through new bundled packages of services that otherwise would not be available, or not be available as conveniently on a one-stop basis. But, in any event, any supposed concerns about business arrangements that are extraneous to the proposed license transfers can be considered, to the extent appropriate, by authorities other than the FCC. For example, any claimed anti-competitive concerns raised by the commercial agreements possibly may be within the purview of the U.S.

¹⁵ See Verizon Wireless-SpectrumCo, Public Interest Statement, at 23-24.

¹⁶ See Verizon Wireless-Cox Communications, Public Interest Statement, at 20; Ex Parte Letter to FCC from Michael Hammer, WT Docket 12-4, January 18, 2012.

¹⁷ See, e.g., Applications of Shareholders of AMFM Inc. and Clear Channel Communications, Inc. to the Transfer of Control of AFMF Texas Licenses Limited Partnership, et al., 15 FCC Rcd. 16062, 1076-1078 (2000) (declining to condition merger on transferor's contractual termination with third party).

Department of Justice,¹⁸ or of private parties with proper legal standing, but not the FCC.

VII. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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¹⁸ See *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406, 124 S. Ct. 872 (2004) (Section 601(b)(1) of the 1996 Act is an antitrust-specific savings clause providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws") (quoting 47 U.S.C. § 152, note).