

**Before the
Federal Communications Commission
Washington, DC 20554**

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|---|---|-------------------------|
| In re Applications of |) | |
| |) | |
| VERIZON WIRELESS and LEAP WIRELESS |) | File Nos. 0004942973, |
| For Consent to the Exchange of Lower 700 |) | 0004942992, 0004952444, |
| MHz Band, A Block, AWS-1, and Personal |) | 0004949596, 0004949598 |
| Communications Service Licenses |) | |
| |) | |
| VERIZON WIRELESS and SPECTRUMCO |) | File No. 0004993617 |
| LLC for Consent to the Assignment of AWS |) | |
| Licenses |) | |
| |) | |
| VERIZON WIRELESS and COX TMI |) | File No. 0004996680 |
| WIRELESS, LLC for Consent to the Assignment |) | |
| of AWS Licenses |) | |

PETITION TO DENY

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SUMMARY

These applications in combination call for a serious concentration of spectrum in this country that will exacerbate the already dominant position of Verizon in the US market vis a vis its competitors. NTCH petitions the Commission either to reject the proposed assignments or carefully condition any grant so as to ameliorate the anti-competitive effects.

Specifically, the Commission should impose these conditions:

- A. To prevent warehousing of Verizon's concentrated spectrum holdings, Verizon should be required to put the spectrum into operation not later than 18 months from consummation of the assignments.
- B. To ensure that CDMA carriers have reasonable access to spectrum for the customers while roaming, Verizon should be required to cap its roaming rates at a level equal to its wholesale prepaid rates.
- C. To ensure interoperability with other carriers, Verizon should be required to use 700 MHz handsets that permit operation across the entire spectrum band and AWS handsets that permit both voice and data functionality.
- D. To ensure that Verizon competitors have access to handsets, require Verizon to require its equipment suppliers to agree to make similar handsets available to other carriers in volume sizes of 1000 units and increase its AWS-compatible handset sales ratably to at least 75% of its new sales over the next three years.
- E. Include review of the multi-channel video/wireless cross-sales arrangement between Verizon and the cable companies and require Verizon to rescind those contracts if they would impede competition.
- F. Require the cablecos and Verizon to offer broadband backhaul to competitors at a monthly charge not to exceed \$150 per month per gigabit between a cell site and a local switch.

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PETITION TO DENY

NTCH, Inc. (“NTCH”), by its attorneys, hereby petitions the Commission to deny or condition the grant of the above-referenced applications.¹ NTCH is a Tier III telecommunications carrier which currently and potentially competes with Verizon Wireless in several markets around the United States.² As a CDMA operator, NTCH would roam with Verizon in many markets where NTCH itself does not hold spectrum if Verizon offered just and reasonable roaming rates. NTCH has become increasingly concerned about the consolidation of spectrum by the two major national carriers and other indicia of anti-competitive behavior exhibited by Verizon. The Commission recently recognized that the proposed merger of AT&T and T-Mobile raised serious public interest issues, not the least of which was whether the degree of spectrum consolidation contemplated by that deal violated the public interest. That transaction sank under its own weight when it could not bear the scrutiny of both FCC and Justice Department regulators. Verizon’s proposed transactions raise similar alarms.

The three-step accumulation of spectrum by Verizon proposed here would give Verizon anywhere from 10 to 40 additional MHz of spectrum in nearly 200 markets around the United States. This swelling of Verizon’s holdings would render Verizon’s dominance over the wireless market even greater than it already is, exacerbating further the seriously anti-competitive conditions that already exist. It would also remove serious prospective competition from those

¹ NTCH previously filed a Petition to Deny with respect to the Verizon-Leap transaction on the original deadline for such petitions. This petition reiterates some of the same points raised initially, points which apply even more strongly to the combined adverse effects which will result from the SpectrumCo and Cox transactions.

² In particular, NTCH operates in the Florence and Orangeburg, SC markets where Verizon will acquire additional spectrum from Leap. It is also a potential roaming partner with Verizon.

markets. The result is that current competitive forces will be stifled and incipient competitive forces will be foreclosed to the detriment of the public interest.

The Commission's Staff Report released in connection with the AT&T/T-Mobile merger proposal found that Verizon accounts for fully 45% of the wireless industry's EBITDA, with AT&T accounting for another 35%.³ These two behemoths stand astride the domestic wireless landscape like colossi, and all other carriers fall into their shadow. The reality of this duopolistic industry structure is highly problematic, given the Commission's emphasis in recent decades on competition as the invisible force which will restrain abusive behavior by industry participants. The bigger, the more ubiquitous and the more spectrum-rich these titans become, the harder it is for the smaller regional or incipient national carriers to effectively compete. This duopolistic situation just became worse as the Commission's decision to pull the plug on the LightSquared waiver eliminates a potentially significant national player from the competitive scene.

This is borne out by Verizon's own justification in support of this transaction. Verizon demonstrates in its public interest statement in the SpectrumCo application that the rate of demand on wireless spectrum is increasingly sharply driven by both multiple devices used by customers and the spectrum-hungry applications used by smartphones. Yet Verizon currently has an average spectrum "depth" of 88 MHz per market to spread this increased demand over. By contrast, Verizon's competitors are struggling to deal with this same explosion of demand with 30 MHz or less to distribute the load. All of the factors used by Verizon to support its need for additional spectrum apply even more acutely to smaller carriers who will not have access to additional spectrum if this deal goes through. No one disputes that the need for spectrum is great

³ Staff Report at Para. 37.

and growing greater all the time, but satisfying that need must be accomplished equitably over the competitive landscape. If Verizon and AT&T are allowed to corner the spectrum market by secondary market acquisitions, the Commission will have undercut one of the key pillars of its spectrum policy: spreading the spectrum wealth to ensure that competitive forces remain viable. The Commission should not allow Verizon to do in the secondary market what it could not do in an initial offer situation.

Verizon's market dominance is virtually a monopoly in the sub-category of CDMA carriers. Sprint, whose network is far less widely distributed than Verizon's, generates only a third of Verizon's share of industry-wide EBITDA revenues, with all other CDMA carriers necessarily representing an even smaller fraction of the total.⁴ This means that in the four critical categories of spectrum availability, roaming, interoperability, and handset access, Verizon has a chokehold on the other CDMA carriers which are its ostensible competitors. In NTCH's view, the situation has become so grave that it may be time to consider actually *breaking up* the two entities which loom menacingly over the wireless landscape, much as the Justice Department did with their Bell System forebear a quarter of a century ago. Feeding one of these financial Gargantuas additional spectrum can only make things worse, unless firm and stringent conditions are placed on Verizon to ameliorate the negative effects of these transactions.

A. Spectrum Concentration and Use Issues

While Verizon's holdings in the 700 MHz band would drop slightly by its transfer of its Chicago license to Leap, it will acquire vast new AWS holdings, much of it in small to medium-

⁴ *Ibid.*

sized markets across the US. These are markets where a competing carrier could gain a foothold if it had access to handsets and a reasonable roaming agreement. AWS is currently the only band we are aware of where a small carrier can effectively deploy LTE technology. This is because Metro PCS has led on this technology in this band and the devices are not locked up to a specific sub-band as they are in Verizon's deployment. While this spectrum is not quite so desirable as the under 1 GHz band, it falls squarely in the "under 3 GHz" territory which the President, the Commission, and Verizon itself have acknowledged as being particularly critical to meet broadband needs in the coming years. The concentration in this band will only get worse with Verizon's consummation of the transactions contemplated here.

Verizon emphasizes that the spectrum is currently not being used for anything by its current holders, but this ignores the enormous potential of the band which has been identified by Verizon itself. While Leap may be a smallish competitor to Verizon, it nevertheless challenges Verizon in a market segment (prepaid) where Verizon has traditionally been weak but is currently being extremely aggressive through an MVNO channel.

Similarly, SpectrumCo and Cox are both deep-pocketed enterprises with existing telecommunications interests that could have been natural tie-ins to the provision of wireless broadband. While they both declare that they are ready to exit the market before they even get in, their very presence as incipient entrants served as a real check on Verizon's ability to gouge consumers and other carriers. With the threat of a new, lower cost entrant gone, Verizon can feel free of any new competition on the immediate horizon. The spectrum sale to Verizon also

precludes any other existing or potential competitor from getting access to these precious megahertz. Because the auction process is always dominated by the big money players, many smaller competitors simply cannot get access to spectrum through that avenue. The swap with Leap and the acquisition of SpectrumCo's and Cox's spectrum not only eliminates them as potential competitors but also precludes sales of that spectrum to others who would be willing to challenge Verizon, including NTCH.

To help address the spectrum concentration, the Commission should condition grant of these applications on Verizon putting the acquired spectrum into commercial service within eighteen months to avoid further warehousing. This would not only stimulate Verizon to put the spectrum to immediate use itself but would also encourage it to lease or sell spectrum to others willing to use it.

B. Roaming Rates Offered by Verizon Must Be Made Just and Reasonable

The Commission recently wrestled in the AT&T-Qualcomm context with the difficulty that smaller carriers are having reaching fair and reasonable roaming agreements with the Big Two and some of the other large carriers. A host of Tier III carriers have repeatedly complained that despite the Commission's rules requiring fair roaming access and despite the Big Two's assurances that no problem with access to roaming exists, the problem *does* exist – and will get worse as data roaming increases. While roaming is “offered” by the Big Two, it is offered on terms that are economically irrational for the smaller roaming partner. More importantly, the terms offered bear no relationship whatsoever either to costs or even the retail rates offered by the Big Two to other companies. Verizon offers prepaid retail and wholesale unlimited voice,

text and data monthly rate plans in the \$40 to \$50 range. Yet the rates it offers to potential roaming partners exceed those rates by a wide margin. Because Verizon dominates the CDMA roaming market and there is no effective regulatory or competitive check on the rates it can charge, it does exactly what a monopoly is expected to do: it charges exorbitant and predatory rates. This condition threatens the viability of all of Verizon's CDMA roaming partners, and necessarily results in additional costs to their customers.

Similarly, roaming agreements fail to provide for "hand-off" of calls in progress when roaming occurs. Dropped calls and a poor customer experience result – both of which are completely and easily preventable by simply arranging for hand-offs. Verizon typically refuses to arrange for such hand-offs. Hand-off has, since the very inception of cellular radio in the early '80's, been required by the Commission as a fundamental element of the mobile communications experience. Without hand-off capability, a mobile phone call or data connection loses the defining advantage of cellular technology: the ability to have a seamlessly connected continuous communication while travelling. Current technology permits intercarrier hand-off, so there is no excuse for consumers to be denied this capability just because they are in roaming mode.

The Commission could ameliorate this situation by conditioning any grant to Verizon as follows. Wholesale roaming rates for voice and data must be capped at the level set by Verizon's retail or facilitated MVNO rates, assuming reasonable monthly usage levels. A reasonable usage assumption here is that an unlimited use retail smartphone customer will use 1500 minutes of voice, 1200 text messages, and 500 Mbps of data per month. Since Verizon must be generating an acceptable rate of return on its wholesale and retail offerings, the rate

charged by Verizon for roaming should not exceed what it is charging for the same package of services on a retail or wholesale basis. Using the wholesale prepaid rate as a cap on roaming rates thus ensures accountability and reasonableness in the roaming rates that are being offered. In addition, seamless “hand-off” of roaming calls between carriers should be required, so long as it is technically feasible.

C. Interoperability Issues

In considering the AT&T/Qualcomm transaction, the Commission was presented with the grave problem posed by the lack of handset interoperability in the 700 MHz band and the anti-competitive efforts of the Big Two to preclude roaming in that band. Verizon has striven to limit handset interoperability so as to prevent smaller 700 MHz licensees from having critical roaming access to Verizon’s spectrum. While the Commission ultimately decided not to impose interoperability conditions on AT&T in the Qualcomm transaction, but rather to open a rulemaking proceeding to consider the matter more generally, NTCH urges the Commission not to follow that course here.

As the deadline for 700 MHz build-outs looms closer and closer, the disadvantage that 700 MHz competitors face in the handset market becomes more immediate and more pressing. A rulemaking is certainly an academic exercise that would permit a leisurely exposition of the issues, but the industry no longer has that luxury. The crisis posed by the lack of handset interoperability has been aired at length in recent AT&T forums; the Commission fully understands and appreciates the problem; what is required now is decisive action to prevent smaller 700 MHz competitors from withering on the vine. Action in a rulemaking two years from now or even a year from now is as good as no action at all.

The interoperability issue extends beyond the 700 MHz band. In order to be fully useful to consumers, AWS handsets must be capable of providing both voice and data functionality. If Verizon rolls out handsets that are limited to “data-only” applications on AWS frequencies, it would preclude its customers from being able to roam in markets that have only AWS spectrum available for both voice and spectrum. The Commission is doing its utmost to ensure that currently unserved areas get access to mobile communications services. The Mobility Fund is intended to advance that prospect. We anticipate that in many areas eligible for Mobility Funding, AWS spectrum will be the only spectrum available for willing carriers to build-out and offer such services. But if Verizon’s huge customer base is limited to data-only operation when roaming in these areas due to artificial constraints on the voice capabilities of Verizon’s handsets, a major objective of the Commission’s initiative will have been thwarted. The local population in these rural areas will get access to voice and data service, but millions of Verizon customers will be denied that same benefit. If both voice and data are actualized on AWS handsets, all AWS licensees can complete their AWS build-outs with the confidence that the spectrum can be accessed by all consumers. Consumers and competition both benefit.

The Commission should condition grant of Verizon’s applications as follows: Any device operated by Verizon or Leap on paired spectrum in the lower 700 MHz band must operate on *all* paired spectrum in the lower 700 MHz Band. At the same time, both Verizon and Leap should be prohibited from engaging in 700 MHz equipment design and procurement practices that impede competition in that band or that exclude access to A Block spectrum in LTE wireless devices. To further ensure interoperability, at least 50% of Verizon’s LTE devices sold over the next two years must be operable across all 700 MHz bands, including first responder bands.

As explained above, a condition is also necessary to ensure universal access by roamers to the AWS band. Unless Verizon's handsets accommodate both voice and data functionality, the full utility of AWS spectrum will not be realized. If Verizon is allowed to acquire this spectrum, therefore, the acquisition must be conditioned on its devices having full two-way voice and data functionality across the AWS band. That will not only permit the use of AWS to expand over the entire competitive landscape but will also permit Verizon's customers to roam on other people's networks when they are out of their home areas.

D. Access to Handsets

Apart from the interoperability issue, exclusive handset deals continue to impede smaller carriers from getting access to handsets that consumers desire. Large players in the wireless space can command such deals from manufacturers by committing to large volume orders which are infeasible or impossible for smaller carriers. These exclusive or quasi-exclusive arrangements (the original AT&T - iPhone arrangement being the prime example) permit the largest carriers either by contract or by *de facto* exclusivity to obtain and market the hottest new handsets while preventing smaller competitors from having access to those same units. This is an illustration of sheer market power being employed to establish an unwarranted competitive advantage. Unless all carriers in the market have access to the phones that the public most wants to buy, not only does the public suffer but competition suffers.

As a condition to grant of these applications, the Commission should require that Verizon acquire handsets and devices in a manner that makes these devices available to other smaller wireless carriers at similar prices and in order volumes as low as 1000 devices. In addition, Verizon should be required to ratably increase the percent of AWS-compatible devices that it

sells to 75% over a three-year period. This will significantly accelerate the roll out of AWS spectrum by other spectrum holders.

E. Video-Broadband Cross-Arrangements

Verizon and its co-parties SpectrumCo and Cox allude obliquely to “separate” commercial agreements under which the two cable companies and Verizon will cross-sell each other’s products as agents. As briefly explained by the applicants in their public interest exhibit, this means that wireless customers who are brought in by the cable company would become Verizon customers and cable companies brought in by Verizon would become customers of the cable company. The applicants insist that these arrangements “are not subject to Commission review,” and they therefore have not provided any further particulars in the application. The difficulty here is that this wholly inadequate description raises more questions than it answers.

First of all, to the extent that these arrangements are part and parcel of the spectrum deal, they are necessarily part of the calculus which the Commission must consider in evaluating the public interest merits of the license transactions. Clearly, even though the documents may be on “separate” packets of paper, the arrangements are related to each other, were negotiated as part of a single package, and are interdependent. (For example, if the proposed license acquisition was rejected by the Commission and Cox decided to go forward and become a wireless competitor to Verizon, would it still be acting as Verizon’s agent for the sale of Verizon’s competing service? Not likely.) The Commission must evaluate the public interest of the entire deal, and if a key component of the arrangement between the parties disservices the public by reducing competition, the Commission can and must review those elements.

Second, the applicants’ description of the deal fails to address the obvious conflict between Verizon and the cable companies: Verizon itself offers Fios in competition with the

cable people. Indeed, in many markets (like Washington DC), Fios is one of the few alternatives to Comcast's pricey service. One of the Commission's primary policy objectives over the last two decades has been to create additional pipes to the home so that consumers would have some choice among competitors for video services. Competition in the video market, the Commission correctly reasoned, would effectively discipline price increases while stimulating greater variety in service offerings and bundles. The proposed arrangements between Verizon and the cable companies would totally undermine that policy. How could Verizon be selling Comcast service (presumably for some consideration) while also selling its own competitive product? Would Comcast be telling Verizon what its promotional plans were in advance so that Verizon could offer those promotions or would it keep the promotions secret to preclude Verizon from making similar offerings? The situation seems utterly unworkable as a business arrangement, and in any event it of necessity reduces or eliminates competition between the two video providers. They would now be working in concert, not in competition, and consumers must necessarily suffer.

Third, it is unclear whether these arrangements are exclusive or are, rather, like the Best Buy and Radio Shack examples offered by the applicants. If the arrangement is an exclusive one where the cable companies only offer Verizon's wireless service, that would deprive other carriers (who, unlike Verizon, do not have their own video service to offer) of a key opportunity to bundle their wireless offerings with other attractive customer services like multi-channel video. Now that the cable companies have decided not to get into the wireless market, they could legitimately explore non-exclusive marketing arrangements with other wireless carriers in their markets. But the deal they have reached with Verizon would leave them at an even greater competitive disadvantage to Verizon than they are already.

The Commission should require the parties to make the full terms of these agreements available for its own review and that of the public. If the effect is either to reduce competition between Fios and the cable companies or to preclude competition between other carriers and Verizon in the bundling of multi-channel video services, the Commission should condition its grant of the SpectrumCo and Cox applications on the rescission of these agreements.

F. Backhaul

Over and above the deleterious effect on competition in the consumer market which a cooperation pact between Verizon and its erstwhile cable competitors will cause, there is likely to be a serious adverse impact on the backhaul market. The local landline telephone company and the local cable company are the two primary (sometimes the only) sources of backhaul capacity for modern cell sites. In many markets, these sources are Verizon and the cable companies to whom it has now snuggled up.

Here is the problem. With Verizon and the cablecos now cross-selling each other's products, both of them have strong commercial incentives to stifle or disadvantage Verizon's wireless competitors. A cable company which is promoting Verizon's cellular service and profiting from its sales certainly does not want to see a prospective competitor expand its coverage and undercut Verizon on price or quality of service. Simply stated, under the cooperation pact, helping a Verizon competitor now hurts or threatens to hurt the participating cable companies' bottom lines. Yet Verizon and the cable companies control the throttle on approximately 70% of the backhaul capacity in markets where both are franchised providers.

As the Commission has discovered in recent years, backhaul capacity is as critical a component of broadband and voice service as actual mobile spectrum. Backhaul is a chokepoint on the ability of any mobile carrier to operate its network effectively and efficiently. The deal

between Verizon and the cablecos creates a monopoly in this key submarket which is almost as powerful and menacing as the monopoly which AT&T once held over the communications marketplace. Yet here there are no constraints at all on the cablecos in terms of non-discriminatory access or just and reasonable rates, and very few on Verizon since the marketplace had heretofore been considered competitive. The Commission should make no mistake: permitting the cooperation pact to proceed will create serious structural anti-competitive dynamics in the backhaul marketplace.

The situation is especially disconcerting because both Verizon and the cablecos built out their systems as authorized monopolies – whether as a LEC or a cable franchisee. This circumstance permitted them to recover their constructions costs from the public with little or no competitive pressure. Having received the benefits of authorized monopoly status, they should be required to return a portion of those benefits to the public by making their facilities available on just and reasonable terms. The Verizon deal with the cablecos should therefore be conditioned on ensuring competitive access to their backhaul facilities on reasonable terms. For this purpose, a monthly charge of \$150 per month per gigabit between a cell site and a local switch would be reasonable, with one-time connection fees limited to \$1,000 per cell site. Putting actual numbers in the condition is a must. Simply requiring Verizon and the cablecos to “be reasonable” will spawn years of litigation as they wrangle with competitors over what constitutes a reasonable charge while enjoying the benefits of their mutual monopoly. While a structural solution – not permitting Verizon and the cablecos to combine in the first place – would be the best course, firm conditions on the terms that can be exacted from competitors are the next best hope for continued competition in the mobile space.

Conclusion

The proposed transactions between Verizon and its assignors promise to make an already critical competitive situation even worse. The Commission should either reject the proposed assignments or impose suitable conditions on the assignments to ameliorate the damper on full and free competition which Verizon is already casting.

Respectfully submitted,

NTCH, INC.

_____/s/_____
Donald J. Evans

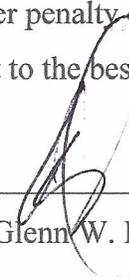
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Its Attorney

DECLARATION OF GLENN ISHIHARA

I, Glenn W. Ishihara, hereby declare under penalty of perjury that the facts set forth in the foregoing "Petition to Deny" are true and correct to the best of my knowledge and belief.



Glenn W. Ishihara

2/21/12
Date

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, PLC, hereby state that true copies of the foregoing **PETITION TO DENY** sent U.S. mail, postage prepaid, this 21st day of February, 2012, to the following:

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