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Federal Communications Commission
Office of the Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
Applications of Cellco Partnership d/b/a)	WT Docket No. 12-4
Verizon Wireless and SpectrumCo LLC and Cox)	
TMI, LLC for Consent to Assign AAWS-1)	
Licenses)	
)	
Application of Verizon Wireless and Leap for)	ULS File Nos. 0004942973,
Consent to Exchange Lower 700 MHz, AWS-1,)	0004942992, 0004952444,
And PCS Licenses)	0004949596, and 0004949598
)	
Application of T-Mobile License LLC and Cellco)	WT Docket 12-175
Partnership d/b/a Verizon Wireless for Consent to)	
Assign Licenses)	

To: The Commission

REPLY TO OPPOSITION FOR PETITION FOR RECONSIDERATION

NTCH, Inc. (“NTCH”), by its attorneys, hereby replies to the “Opposition to Petition for Reconsideration” (the “Opposition”) filed by Cellco Partnership d/b/a Verizon Wireless on behalf of itself and SpectrumCo, LLC, Cox TMI Wireless, LLC, Leap Wireless International, Inc., and its affiliates, and T-Mobile License LLC (collectively, “Verizon Wireless”) in response to the NTCH Petition for Reconsideration of the order granting the captioned applications (the “*Verizon-SpectrumCo Order*”).¹ NTCH herein reiterates that both procedural and substantive errors in the *Verizon-SpectrumCo Order* require the Commission to rescind the grants of the

¹ *Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses*, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95, released August 23, 2012. (the “*Verizon-SpectrumCo Order*”).

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captioned applications, initiate a Declaratory Ruling proceeding in compliance with its prescribed forbearance procedures, and take other steps necessary to address the history of unlawful license grants.

DISCUSSION

First Procedural Defect: Premature Application of Ineffective Order.

In the Opposition, Verizon Wireless argues that the Commission’s application in the *Verizon-SpectrumCo Order* of the forbearance approach adopted in the *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act, as Amended*, First Report and Order, FCC 12-93, (rel. Aug. 17, 2012) (the “*Foreign Ownership Order*”) was procedurally proper. NTCH respectfully disagrees. Irrespective of the claim by Verizon Wireless that the Administrative Procedure Act (“APA”) directs only that the requirements of an order, not its analysis or findings, become effective upon publication in the Federal Register, the *Foreign Ownership Order* specifically provided by its own terms that it “SHALL BE EFFECTIVE upon publication in the Federal Register.” *Id.*, at ¶ 40. Verizon Wireless’ argument, and the cases cited in support of this argument,² that publication is only required if a person’s substantive rights are adversely affective is inapposite; the Commission was explicit that the requirements of the *Foreign Ownership Order* – which necessarily includes the requirements of the forbearance approach adopted therein – would become effective only upon publication in the Federal Register. Further contrary to Verizon Wireless’ argument, Section 552(a)(1) of the Administrative Procedure Act

² Verizon Wireless inaccurately cites *Hogg v. US*, 48 F.2d 274 (6th Cir. 1970) for the proposition that the APA does not require publication unless failure to publish would adversely impact a member of the public. A close reading of the case reveals that the 6th Circuit referenced § 552 of the APA merely as additional support for the validity of an internal delegation of authority by Attorney General decision despite the lack of publication because the Attorney General was explicitly authorized by statute to make such determinations.

(“APA”) *requires* publication of rules of procedure, 5 U.S.C. § 552(a)(1)(C), and substantive rules of general applicability, § 552(a)(1)(D).³ The *Foreign Ownership Order*, which contained new procedures for seeking forbearance as well as substantive rule changes to the forbearance analysis generally applicable to all foreign ownership of telecommunications licensees, was published in the Federal Register on August 22, 2012, and therefore became effective upon that date. 77 Fed. Reg. 50628 (Aug. 22, 2012). In adopting the *Verizon-SpectrumCo Order* on August 21, the Commission erred in relying on and applying the forbearance analysis and requirements which were not yet effective.

Second Procedural Defect: Failure to Properly Adhere to Forbearance Requirements.

While it is clear that the Commission was premature in its application of the *Foreign Ownership Order* forbearance analysis to reach its preferred outcome in the *Verizon-SpectrumCo Order*, even if the Commission had been timely in this application, it was improper in its failure to adhere to the forbearance procedures prescribed therein. Under the new policy set out in the *Foreign Ownership Order*, the Commission must conduct a case-by-case analysis to determine whether the public interest warrants non-controlling foreign ownership interests above the 20% threshold set by the Communications Act. This analysis is to be done *prior* to the non-controlling foreign interest being acquired. *Foreign Ownership Order*, at ¶ 28. In fact, the Commission instructs that a licensee requesting forbearance under the new approach must “file a petition for declaratory ruling or similar request”, *id.*, which must thereafter be placed on public

³ Again, Verizon Wireless cites an inapposite case in *Ngyuen v. US*, 824 F.2d 967 (9th Cir. 1987). Here the 9th Circuit distinguishes between the situation befalling the plaintiff, who it found had not had his substantive rights affected by lack of publication of an administrative change in agency instructions, and the adverse effects which would be inherent in agency policy which “create[s] []or extinguishe[s] administratively made law” *Id.* at 702. The *Foreign Ownership Order* certainly modified administratively made law and therefore impacts substantive rights of licensees and competitors generally.

notice for public comment or be forwarded to the Executive Branch for review, *id.* at ¶ 30. Only after these steps have been completed may the Commission then “issue a declaratory ruling as to whether the proposed foreign ownership is in the public interest.” *Id.* The Commission failed to require compliance of Verizon Wireless with these procedures, and failed to adhere to its own procedural requirements. For these reasons, the *Verizon-SpectrumCo Order* must be rescinded as procedurally defective.

Substantive Error: Verizon’s Pre-Existing Licenses Were Acquired Unlawfully

Verizon attempts to brush off the substantive import of the Commission’s *Foreign Ownership Order* in two respects. First, it argues that the Commission did not conclusively resolve in that *Order* whether the Section 310(b)(3) prohibition applies to indirect non-controlling interests. Then it suggests that Verizon’s previous license grants while Vodafone held a non-controlling interest had all been lawfully approved pursuant to its earlier Section 310(b)(4) approvals. Both claims are demonstrably erroneous.

With respect to the first point, Verizon’s confusion is perhaps understandable due to the extraordinary path the Commission took to arrive at its forbearance decision. As Verizon notes, the Commission did “assume” in the *Foreign Ownership Order* that Section 310(b)(3) applies to the type of foreign ownership interest at issue here, presumably to accommodate Commissioner Pai’s concerns as expressed in his Statement. But the Commission then proceeded to apply this “assumption” in every way as though the Section 310(b)(3) prohibitions do apply. As noted in our original petition, at Paragraph 36 of the *Foreign Ownership Order*, the Commission expressly declared that its action “will remove a statutory constraint on common carrier licensees, by forbearing from applying the 20 percent ownership limit under Section 310(b)(3) to the class of common carrier licensees in which the foreign ownership is held in the licensee

through intervening U.S.- organized entities that do not control the licensee.” There would be no “statutory constraint” if Section 310(b)(3) does not apply in these circumstances. In short, there is no practical difference between (a) actually concluding that the section applies and (b) “assuming” that it applies while applying all the measures of law that would be required if the section did apply.

Moreover, if (b)(3) does not apply, the entire “regulatory flexibility certification” of the Order would be nonsensical – not to say contrary to law – since the Commission’s forbearance action would not have been *relieving* licensees of an existing burden but rather *adding* a completely unnecessary regulatory burden on licensees who are not actually subject to (b)(3). If (b)(3) does not apply, the Commission’s regulatory flexibility certification would actually have been patently untrue.

The FCC cannot impose regulations on the basis of “assumptions.” Either carriers like Verizon Wireless are subject to Section 310(b)(3) or they are not. If they are not subject to the section, then the extensive forbearance process which Verizon now contends the Commission undertook between August 17 and August 21 was a meaningless and unnecessary exercise. Why would the Commission have gone through that process – and required all similarly situated licensees to go through the process in the future – if the section does not apply? At best, such an action would be arbitrary and capricious, and at worst, irrational.

NTCH is in no sense seeking to challenge the *Foreign Ownership Order*, untimely or otherwise. Rather, we fully accept the *Order* as having expressed the Commission’s determination that Section 310(b)(3) does apply to indirect, non-controlling foreign ownership interests because no other interpretation of that *Order* makes sense. If this is not the case, then the Commission needs to reconsider and remove from the *Verizon-SpectrumCo Order* the entire

treatment of Section 310(b)(3) forbearance because it was not only wholly inapposite but erroneously imposed a forbearance obligation on Verizon Wireless' foreign ownership, including imposing the obligation to seek further forbearance if Vodafone increases its ownership above 45% and requiring other indirect owners of Verizon Wireless to seek forbearance if they acquire indirect, non-controlling interests over 20%.

Secondly, Verizon cavalierly dismisses the problem with pre-existing licenses issued to it while its non-controlling foreign ownership interests exceeded the 20% limit because "those grants were lawfully issued." That attitude is remarkably blithe given the fact that the FCC *itself* saw the problem with Verizon's existing non-controlling ownership interests. "We note that our action today removes any uncertainty as to whether the current foreign ownership of Verizon Wireless, as a common carrier licensee, complies with our foreign ownership policies." *Verizon-SpectrumCo Order*, at ¶ 177. The Commission, on its own motion, then went on to expressly *approve* Verizon Wireless' ownership of its existing licenses in addition to the new ones whose acquisition it was approving. *Id.* There would have been no need for the Commission to do that if the pre-existing foreign ownership had already been approved, as Verizon Wireless now contends.

As noted in NTCH's original Petition for Reconsideration, the Commission's determination that Section 310(b)(3) applies to indirect, non-controlling foreign ownership poses a thorny issue for Verizon Wireless and, to some extent, for the FCC, because the Commission approved numerous acquisitions by Verizon Wireless with full knowledge that Vodafone held the interests which we now know were prohibited by the Act. Presumably this is why the Commission sought to retroactively fix the prior unlawful grants by use of the forbearance

process. As NTCH noted in its Petition, however, forbearance relief can only be provided prospectively, not retroactively – a principle which Verizon Wireless does not contest.

Perhaps because of that position, Verizon Wireless now rather huffily rejects the Commission’s helpful attempt to grant absolution to its prior acquisitions. It notes, correctly, that the Commission’s action in that regard was “at most dicta” because Verizon Wireless’ existing licenses were not at issue in the applications before the Commission in the Verizon-SpectrumCo matter. Therefore, the Commission’s attempted retroactive repair job cannot be effective. On that much we agree. But such conclusion simply leaves the status of Verizon Wireless’ pre-existing licenses exactly where they were before the *Verizon-SpectrumCo Order* was adopted. And where is that?

Verizon Wireless’ position appears to be that the Commission’s earlier approval of Vodafone’s *controlling* interest under the Section 310(b)(4) procedures operates as an approval of its indirect *non-controlling* interests as well. But that cannot possibly be true. First, the FCC obviously did not consider that to be true since it went through the exercise of forbearing from Section (b)(3) in the context of the SpectrumCo transaction –had the earlier (b)(4) action had already covered the situation, the forbearance action would not have been warranted. The Commission expressly stated in the *Verizon-SpectrumCo Order* that Vodafone’s ownership interest does not fall within Commission precedent under Section 310(b)(4) because the Vodafone interest is not held by a company that controls Verizon Wireless. *Verizon-SpectrumCo Order*, at ¶ 174. Even Verizon Wireless accepts that the August forbearance action was necessary as a prerequisite to its ability to acquire the SpectrumCo licenses.⁴ See Opposition, pp. 3-6. If the previous (b)(4) finding had covered all future Verizon acquisitions in which Vodafone

⁴ It is unclear whether Verizon Wireless ever actually requested forbearance in connection with the SpectrumCo deal or the FCC simply granted it *sua sponte*.

would own a non-controlling interest, the entire (b)(3) analysis and action in the *Order* would have been superfluous.

The Commission plainly considers Section 310(b)(3) forbearance actions to be distinct from Section 310(b)(4) public interest determinations, as well it should. Under the statutory scheme, approval of controlling foreign interests under (b)(4) requires only a simple public interest finding by the Commission. A proponent does not even have to meet the high showing required for a waiver since such public interest determinations are expressly contemplated by and permitted by the statute. Conversely, indirect non-controlling foreign interests above 20% are flatly and unconditionally precluded by the statute. Approval of those types of interests therefore faces a much higher threshold and can only be obtained via the process outlined in the *Foreign Ownership Order*: a forbearance ruling founded upon consideration of the three necessary elements in the test set forth in Section 10 of the Act. These consist of: (i) a finding that regulation is not necessary to ensure that rates and charges by the subject carrier are just, reasonable and non-discriminatory, (ii) a finding that enforcement of the regulation is not necessary to protect consumers, and (iii) a determination that forbearance is in the public interest. 47 U.S.C. § 160(a)(1)-(3). The Commission obviously *did not* apply the Section 10 test or make the appropriate findings when it evaluated Vodafone's controlling interest under (b)(4) because it had no reason to. The Section (b)(4) determination therefore cannot possibly serve to authorize Verizon's non-controlling interest under Section (b)(3).

Verizon Wireless also asserts that the Commission's forbearance finding in the *Verizon-SpectrumCo Order* was itself a forbearance action independent from the forbearance action reflected in the adopted-but-not-effective *Foreign Ownership Order*. Opposition, at 5. Again, that is simply inaccurate. The Commission made no attempt in the *Verizon-SpectrumCo Order*

to even consider, much less make an affirmative finding regarding, the three elements necessary to justify forbearance under Section 10. Verizon Wireless acts as though the forbearance process is an irksome formality that just requires some boxes to be checked rather than a meaningful and serious evaluation of the potential impact of not enforcing a provision of the United States Code. The process should, and does, involve more than a *pro forma* wave at the requirements of Section 10. The Commission itself seemed to recognize this by establishing in the *Foreign Ownership Order* rigorous procedures involving a thorough public input and a vetting by other concerned public agencies before individual forbearances may be granted. None of that took place here because no one was even aware that a Section 310(b)(3) forbearance was under consideration.

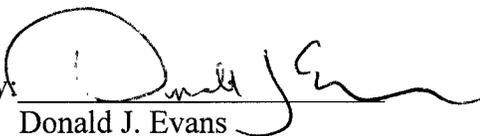
We are left then with the problematic situation that Verizon Wireless' licenses granted from 2000 through the present were granted in violation of Section 310(b)(3). Section 312 of the Act permits the Commission to revoke licenses when circumstances come to its attention that would have required the rejection of the license application in the first instance. That is certainly the case here. Because forbearance cannot be applied retroactively (a point Verizon Wireless does not dispute), we see no alternative to revoking these licenses. Harsh as that may seem, there is no other way to bring Verizon Wireless into compliance with the law.

CONCLUSION

NTCH therefore respectfully requests that the Commission rescind the grants to Verizon Wireless as being in conflict with Section 310(b)(3) of the Act and take other appropriate actions, as outlined in its original Petition for Reconsideration, to stop granting licenses to Verizon Wireless and to rescind those that were issued in contravention of the law.

Respectfully submitted,

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October 22, 2012

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 **REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION** sent by U.S. mail, postage prepaid, this 22nd day of October, 2012, to the following:

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