Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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In the Matter of	)	
Policies Regarding Mobile Spectrum Holdings	)	WT Docket No. 12-269
	)	

COMMENTS OF FREE PRESS

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EXECUTIVE SUMMARY

Mobile broadband providers simply cannot exist without adequate access to spectrum. And competition cannot exist if too few control too much of the public's airwaves. This is why Congress gave the Commission the responsibility of allocating spectrum in a manner that protects competition and promotes the public interest. But the Commission has too frequently abdicated this responsibility. Concentration in the spectrum input market is now at a level that stifles meaningful competition in the mobile services output market.

The Commission's current spectrum screen is partly to blame for the sorry state of competition in America's wireless market. This is a relatively recent policy failure, brought on by the agency's unwillingness and inability to remain a vigilant antitrust enforcer and a misguided belief that competition in naturally uncompetitive markets will thrive in the absence of regulatory oversight. But the Commission can rectify this failure by returning to sensible spectrum allocation policies based in antitrust theory and practice.

In these comments, we propose a straightforward three-stage analytical approach that the Commission could use to determine if a license acquisition is in the public interest. In the first stage of this analysis, the Commission would determine if the proposed acquisition would result in an applicant controlling more than 35 percent of the suitable and available spectrum in a given local market. If the applicant's holdings would not exceed this amount, the Commission would move to the second stage of the analysis and consider the impact of the proposed transfer on the concentration of spectrum holdings in a given local market, measured by the well-established standards described in

the Department of Justice's (DoJ) *Horizontal Merger Guidelines*. Using these guidelines, the Commission would determine whether the proposed transfer is presumed to serve the public interest or presumed not to.

Under our proposed framework, applicants or outside parties could petition to overcome these presumptions in the third stage of the analysis. If a transfer were presumed not to be in the public interest, applicants could overcome this negative presumption with clear and convincing evidence that the transfer would promote competition in the retail market and would not increase the applicant's market power. This third stage evaluation would consider factors such as the applicant's particular spectrum holdings (including its holdings below 1 GHz, which would be subjected to a separate cap); the impact of the transaction on retail market competition; the applicant's non-acquisition alternatives to meet its stated needs; the potential for future market entry by other competitors; and other factors that impact market competition. If a transaction were presumed to be in the public interest, it would receive expedited treatment; but parties seeking to rebut the favorable presumption would have an opportunity to make a clear and convincing case that the transfer is not in the public interest, utilizing the same third-stage factors.

Our proposed analytical framework offers the market the certainty it needs, while protecting actual and potential competition and giving the Commission the flexibility it needs to apply its reasoned judgment in complicated cases. We urge the Commission to utilize DoJ's well-tested analytical tools in order to ensure its spectrum allocation polices are an effective guard against anticompetitive concentration in the critical spectrum input market.

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I. Introduction

Over the past decade, the U.S. mobile wireless market has transformed from a market dominated at a regional level by a handful of carriers in each region to a market dominated at a national level by just two companies: AT&T and Verizon Wireless. In 2001, the top two carriers' combined share of total U.S. wireless subscriptions was 43 percent.[1] Today, AT&T and Verizon control two-thirds of all wireless subscriptions and 70 percent of the more lucrative post-paid market, where they are pulling away from the rest of the pack.[2]

The U.S. wireless market, which at one point was a competitive contrast to the monopoly wireline market, is now considered "highly concentrated"[3] by the standards in the Department of Justice's *Horizontal Merger Guidelines*.[4] And AT&T and Verizon enjoy all of the expected outcomes that go along with that concentration: market power, supra-competitive profits, the ability to increase prices and the power to dictate the pace of market innovation. Over the past several years both AT&T and Verizon have grown their share of the market (measured by subscribers, revenues and profits) even as each

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[1] *See* Petition to Deny of Free Press, In the Matter of Applications of AT&T, Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65 (May 31, 2011), at Figure 2.

[2] *SNL Kagan Wireless Industry Benchmarks*.

[3] *See, e.g.*, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9680 (2011) (*Fifteenth Annual Competition Report*). ("As of mid-2010, the weighted average of the HHIs has increased to 2848, slightly higher than the year-end 2008 level.").

[4] *See* Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (2010) (*Horizontal Merger Guidelines*).

carrier implemented price hikes on individual texts,[5] text bundles,[6] mobile data,[7] and its bundles of these products with voice services.[8] AT&T and Verizon's Average Revenues Per User (ARPU) are substantially higher than those of the other national carriers.[9] AT&T's wireless profit margins (EBITDA) are substantially higher than all other carriers

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[5] AT&T Wireless Services Company (a subsidiary of the former AT&T Corp.) used to offer free text messaging service prior to its merger with Cingular in the fall of 2004. Two years later AT&T along with all the other major wireless providers nearly simultaneously increased per-text prices to 15 cents, followed by another increase in 2008 to 20 cents. *See* Testimony of Joel Kelsey, Policy Analyst, Consumers Union, Before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, Regarding "Cell Phone Text Messaging Rate Increases and the State of Competition in the Wireless Market" (June 16, 2010).

[6] In early 2011, AT&T dropped its lowest priced, $5 monthly texting option in favor of a $10 plan. A few months later AT&T dropped that option too, leaving consumers a choice of paying the a la carte rate or adding a $20 unlimited SMS plan to their monthly bills. *See* Gregg Keizer, "AT&T to kill $10/month texting plan," *Computerworld*, Aug. 18, 2011. Verizon soon followed in AT&T's footsteps, first eliminating its $5 SMS plan and forcing customers to choose between paying $10 for 1000 messages, or paying $20 for an unlimited texting plan. Then earlier this year Verizon scrapped all of its monthly text and voice minute "bucket" plans in favor of its higher-priced "Share Everything" plans that require users to purchase unlimited SMS and voice minutes. *See* Roger Cheng, "Why Verizon's shared data plan is a raw deal," *CNET News,* June 12, 2012.

[7] For example, in January AT&T raised its data prices by as much as 33 percent, while the monthly price for its most popular data tier increased by 20 percent. *See* Kevin Fitchard, "AT&T boosts mobile data caps but hikes prices as well," *GigaOm*, Jan. 18, 2012.

[8] For example, when the iPhone first launched in 2007, AT&T's entry-level plan was $59.99 per month, which included unlimited data, 450 voice minutes, and 200 texts. Today the lowest-priced comparable monthly iPhone plan on AT&T – comparable but for AT&T's abandonment of unlimited data plans, at least – is $89.99 ($39.99 for 450 voice minutes, $30 for 3 gigabytes (GB) of data, and $20 for unlimited texts. *See* "Three iPhone Service Plans Announced," *Mobile Tech News*, June 27, 2007. When Verizon launched its iPhone service in January 2011, the entry-level monthly price was $74.99 ($39.99 for 450 voice minutes, $5 for 250 texts, $30 for unlimited data). Today a comparable iPhone plan on Verizon would run $100 per month (with unlimited voice and texts, but just 2 GB of data).

[9] *See* Petition to Deny of Free Press, *In re* Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC, WT Docket No. 12-4 (Feb. 21, 2012), at Figure 3 (Free Press Verizon/SpectrumCo Petition to Deny) (showing 2011 ARPUs (pre and postpaid) for Verizon, AT&T, Sprint, and T-Mobile to be $53.80, $51.02, $45.89, and $46.00 respectively).

except Verizon's.[10] AT&T and Verizon together control four-fifths of the entire wireless industry's profits, and are the only two carriers to control double-digit shares of the industry's total profits.[11] And over the past three years, AT&T's and Verizon's combined share of total industry profits has steadily increased while everyone else's has declined.[12]

The current woeful state of wireless competition was aptly summarized in a recent report from SNL Kagan:

> It is getting increasingly hard for small, regional operators to effectively compete in a wireless world defined by fatly subsidized devices and enormous demand on the network, especially in the biggest metros. The biggest competitors preempt them on access to the winning devices, outbid them on spectrum, underspend them on infrastructure and supplier costs, and outspend them on marketing. And MVNO competitors live on razor-thin margins that cannot sustain network-based operators.[13]

These data lead to one indisputable conclusion: the U.S. wireless market is functioning as a duopoly, with AT&T and Verizon possessing substantial market power that the smaller national and regional carriers are unable to adequately discipline. This outcome is not natural, and is not the result of the invisible hand of the free market. Because of their inherent advantages as legacy monopolists, it is wholly unsurprising that the former baby Bell companies dominate the wireless market. One of those advantages is an early lead in spectrum, a lead that the Twin Bells were able to parlay into a position of spectrum dominance, facilitated by Commission polices that do little to promote the efficient allocation of these valuable public resources.

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[10] *SNL Kagan Wireless Financials 2008-2011*.

[11] *Id.*

[12] *SNL Kagan Wireless Financials 2008-2011* (showing AT&T's and Verizon's combined share to be 69 percent in the third quarter of 2008, increasing to a 79 percent share by the third quarter of 2011).

[13] See Sharon Ambrust, "AT&T expands, US Cellular shrinks – both away from major metros," SNL Kagan, Nov. 9, 2012.

The Commission's spectrum allocation policies are a proven failure in this regard. These policies do not encourage the most efficient use of the public airwaves and thus deny consumers the benefits of a competitive market. In these comments we offer a sensible policy solution, grounded in antitrust theory and law, that will give competition the potential to thrive in this market.

II. Discussion

A. The Commission's Spectrum Screen Is Deeply Flawed

The Commission adopted the original Spectrum Cap in 1994 because it recognized "the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum."[14] The Commission stated its goal in adopting the cap was to "discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency."[15] When it affirmed the policy three years later the Commission stated the CMRS spectrum cap would "ensure that multiple service providers would be able to obtain broadband PCS spectrum and thereby facilitate the development of competitive markets for wireless services."[16]

The Commission did not abandon these purposes and goals when it replaced the cap with a screen and case-by-case review process in 2003. Though the Commission

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[14] *See* Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8100 ¶ 239 (1994) (*CMRS Third Report and Order*).

[15] *Id.* at 8105 ¶ 251; *see also id.* at 8100 ¶ 238.

[16] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, WT Docket 96-59, *Report and Order*, 11 FCC Rcd 7824, 7869 ¶ 94 (1996) (*CMRS Spectrum Cap Report and Order*), *aff'd*, 12 FCC Rcd 14031 (1997) (*BellSouth MO&O*), *aff'd sub nom. BellSouth Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999).

based its decision to change its allocation policy in part on data showing increasing market competition, the agency still recognized that "CMRS markets do meet many of the criteria that make tacit collusion sustainable."[17] The Commission also rightly noted that "tacit collusion becomes more likely as the number of competitors is reduced."[18]

But in direct contrast to the findings that the Commission cited when it decided to "sunset" the spectrum cap, today's wireless market is far less competitive and trending towards greater consolidation. Over the past decade the number of competitors declined and the market shares of the top two carriers increased dramatically. At the time the Commission made its decision, the top two carriers controlled 43 percent of the market's customers. Today that figure is approaching 70 percent.

This trend away from a competitive *output* market (*i.e.*, customers buying services from wireless carriers) mirrors the increasing consolidation in the *input* market (*i.e.*, the spectrum wireless carriers use to offer services). When the Commission abandoned the spectrum cap due to supposedly increased competition and chances for potential competition, the spectrum-share concentration values (measured using the Herfindahl-Hirschman Index, or HHI)[19] for the largest 50 markets ranged from 1,270 to 1,801[20] – right around the level at which the Department of Justice considers a market to be unconcentrated to moderately concentrated.[21] Now, nearly all of these areas have

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[17] *See* 2000 Biennial Regulatory Review – Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, *Report and Order*, 16 FCC Rcd 22668, 22693 ¶ 45 (2001) (*Second Biennial Review Order*).

[18] *Id.*.

[19] The HHI is calculated by summing the squares of each firm's market share. This gives greater proportional weight to larger market shares. A market with 10 equal sized competitors has an HHI of 1,000, while a monopoly has the maximum HHI of 10,000.

[20] *Id.* at 22683 ¶ 33.

[21] *Horizontal Merger Guidelines* at 19.

spectrum-share HHIs that approach or exceed 2,500, a value at which the DoJ considers a market to be highly concentrated.[22]

The Commission reasoned that its move away from the spectrum cap to a case-by-case review would not harm the public interest, because it believed that there were "other tools" to achieve its statutory goals, "including case-by-case review, as well as prescribing license area designations and bandwidth assignments, and using bidding credits to create opportunities for new entrants."[23] But the Commission's track record in fostering competition and enabling new entrants since 2001 is quite poor. Its case-by-case review process has been a one-way street, with the Commission approving all the transactions that have come before it, largely as proposed, with the notable exception of the AT&T/T-Mobile merger. The Commission's bidding credit rules were partially struck down by the courts,[24] and have failed to achieve their stated purpose. There are no new facilities-based entrants providing service today in the wireless market, only speculators.

In short, the data now clearly shows that the Commission's decision to remove the spectrum cap was terribly shortsighted. It reflects the typical pattern of decisions over the past decade: The Commission removes rules that have prevented the worst market harms

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[22] For example, the New York City CMA has a spectrum-share HHI value of 2,584 (assuming the approval of the pending AT&T WCS deals, and the approval of the T-Mobile-Metro PCS merger). The spectrum-share HHI value for the Los Angles CMA with these pending deals is 2,640. Assuming the approval of the AT&T WCS deals and Sprint's acquisition of U.S. Cellular's spectrum, the value for Chicago CMA is 2,575. These data are based on spectrum-share data that considers the total universe of available spectrum to include: Lower 700 MHz (48 MHz), Upper 700 MHz (22 MHz), SMR (14 MHz), Cellular (50 MHz), PCS (130 MHz), AWS-1 (90 MHz), WCS (30 MHz) and BRS (55.5 MHz), for a total of 439.5 MHz. This is identical to the spectrum included in the current screen, with the inclusion of WCS, the exclusion of 12.5 MHz of SMR, and the exclusion of the upper 700 MHz D-Block spectrum.

[23] *Second Biennial Review Order* at n.76.

[24] *See Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1784 (2011).

based on the absence of those harms, only to see those harms arise in the absence of the rules that prevented them.[25] In this case the Commission removed its main policy to promote competition in the wireless markets because of growing competition, only to predictably see a massive decline in competition.

However, the flaw in the Commission's current policy is not case-by-case review itself, but in *how* the Commission applies the spectrum screen policy in the context of those reviews. The particular screen the Commission uses is *itself* the root of the problems, and these problems work against the public interest.

First, the Commission's spectrum screen weighs all spectrum equally. This may have been a reasonable approach when the Commission was concerned only with Cellular, SMR and PCS spectrum. But today this simplistic method ignores the large differences in value and utility between bands like 700 MHz and BRS.[26] The Commission should not expect robust national competition, particularly in suburban, exurban and rural markets, if its policies let the Baby Bell carriers control more than four-fifths of the available spectrum below 1 GHz. If the Commission maintains a case-by-case evaluation approach, it has the flexibility and the duty to consider the difference in value between spectrum blocks, which is determined by wavelength, contiguous block size, block pairing, interference issues, market density and market demographics.

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[25] For example, the Commission's predictions about ISP competition in the absence of open access rules were famously wrong. *See* S. Derek Turner, *Dismantling Digital Deregulation*, Free Press, at 42-52 (2009).

[26] Recent spectrum sales and other market data place the per MHz value of the 700 MHz band at a figure some five to twenty times more valuable than BRS/EBS spectrum, and more than twice as valuable as the AWS-1 band spectrum. *See* Free Press Verizon/SpectrumCo Petition to Deny at n.6.

Second, the current screen set at 33 percent of the available spectrum encourages the market to move to duopoly, especially since this is a soft line that carriers are permitted to exceed. If the primary purpose of the screen is to promote competition and efficient use of the public airwaves, the Commission should ground its screen in well-tested antitrust enforcement practices, not rely solely on soft limits.

B. The Commission Must Ground its Spectrum Allocation Policies in Antitrust Theory in Order to Prevent Harmful Levels of Concentration in the Spectrum Input Market

Spectrum is a natural resource that may not be exhaustible, but interference issues can make it excludable at certain times and places. Congress gave the Commission the power to allocate spectrum in part to avoid the tragedy of the commons that could arise if access to the public airwaves were a free-for-all. And because Congress rightly tasked it with promoting competition, the Commission has to do more than just simply let the parties with the deepest pockets buy as much spectrum as they desire. Thus, the Commission needs a spectrum allocation policy that is primarily grounded in competition theory. Fortunately, the Department of Justice's experiences reviewing mergers in numerous industries offers the Commission a theory tested in practice.

The Commission's spectrum allocation policies seek to answer one central question: how much concentration of spectrum – not just by a single entity, but across all entities – is too much? Because spectrum is an indispensible input for the wireless market, this question is tailor-made for horizontal merger analysis, which is concerned with identifying when the concentration of a particular market is likely to produce abuses of market power in violation of our nation's antitrust laws.[27] The analytical approach that

[27] *See, e.g.*, 15 U.S.C. § 18 (Section 7 of the Clayton Act, which prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the

the Department of Justice and the Federal Trade Commission (FTC) use to evaluate horizontal mergers is published in the *Horizontal Merger Guidelines*, a document issued in 1992, then revised in 1997 and again in 2010.

The first step in a horizontal merger analysis is to define the boundaries of the product market (which includes consideration of the geographic market).[28] After the product market is properly defined, the analysis considers the size of the firms in the market, expressed in terms of market concentration. When the number of firms in a market is small, or one or two firms control a large share of the market, the potential for market power abuse is high. The DoJ's *Horizontal Merger Guidelines* specify that where the post-merger Herfindahl-Hirschman Index will increase by more than 100 points and will exceed 1500, a transaction "potentially raise[s] significant competitive concerns and often warrant[s] scrutiny."[29] Mergers that increase HHI by 200 or more points and result in a post-merger HHI of 2,500 or greater "will be presumed to be likely to enhance market power."[30]

The Commission's current spectrum screen does utilize an HHI test, but it is a test of the *output* market (i.e. how a merger changes the concentration of wireless customers), not the critical spectrum *input* market. This is a fatal flaw of the Commission's analytical

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country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.").

[28] In determining whether a group of products in a candidate market is sufficiently broad to constitute a relevant antitrust market, the Department of Justice and the Federal Trade Commission employ a hypothetical monopolist test. Specifically, the agencies define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and non-transitory increase in price" (SSNIP), presuming no change in the terms of sale of other products. *See Horizontal Merger Guidelines* at 8.

[29] *Id.* at 19.

[30] *Id.*

approach, because it fails to recognize that the very same harms the agency looks for in the output market begin with the anticompetitive concentration of spectrum in the input market.[31] Competitors cannot compete if they lack the indispensible resources that enable competition.

C. A Better Way: An Antitrust Approach to Spectrum Allocation Policy

The Commission can provide the certainty firms desire while preserving its ability to promote competition if it modifies its current spectrum allocation policies to better conform to the DoJ's horizontal merger analytical approach. We urge the Commission to adopt a three-stage analysis that begins with a generous bright-line cap, and then proceeds to an HHI-based screen establishing a rebuttable presumption for whether a potential license transfer is in the public interest.

i. First-Stage Analysis: A 35 Percent Spectrum Cap

First, to bring certainty to the market and discourage carriers from pursuing transactions that are plainly not in the public interest, we urge the Commission adopt a first-pass spectrum cap that prohibits any carrier from controlling more than 35 percent of the available spectrum in any local market.[32] In a four-carrier national market, a 35

[31] The Commission's current HHI approach is flawed because this test is not applied in the cases of spectrum auctions or transactions that do not involve the transfer of retail customers, but nonetheless have a tremendous impact on potential competition. It is also flawed because the Commission sets aside the DoJ's HHI thresholds for its own. The Commission is not concerned with concentration in the product market so long as the market HHI is below 2,800 and the merger-related increase is less than 100 points. When the Commission established this threshold, the DoJ guidelines considered HHI increases of 50 or more points in markets with HHIs above 1,800 likely to raise significant concerns about potential abuses of market power.

[32] We suggest the appropriate geographic market boundary for applying the spectrum cap and spectrum-share HHI test described herein should be the Cellular Market Area (CMA). However, because the Commission issues licenses for geographies smaller than this, these tests in some instances may have to be conducted using population weights.

percent cap would help prevent concentration in the spectrum input market from reaching extremely dangerous territory.[33] A 35 percent cap draws the line at the edge of duopoly, and helps to prevent any *single* carrier from gaining *substantial* unilateral market power through its control of spectrum.[34] As a first-pass analytical tool set at a level above what carriers currently hold in most markets, a 35 percent cap would prevent the worst harms to competition while providing firms certainty without disrupting the existing market, three key goals of this proceeding.[35]

ii. Second-Stage Analysis: A Spectrum-Share HHI Screen Establishing a Presumption For or Against a Transfer

However, because there are many transactions that would not run afoul of a 35 percent cap but that nonetheless could lead to anticompetitive outcomes, the Commission must also adopt a second-stage screen that considers concentration in the spectrum input market through an antitrust lens. As a second-stage test, the Commission should presume any transfer that increases spectrum-share HHI by 100 or more points in local markets that already or will exhibit spectrum-share HHIs above 2,500 is not in the public interest.

Furthermore, while it is appropriate to consider spectrum holdings at the CMA level when evaluating license transfers, the Commission should also consider the impact of transactions on competition at a national level. We propose that this be one of the factors the Commission considers in the third-stage analysis proposed herein.

[33] A per-carrier cap of 35 percent would keep the market HHI from exceeding 3,350 in a three-carrier market. In a four-carrier market, this cap will likely keep the market HHI from exceeding 3,000.

[34] We recognize that a cap at 35 percent will permit the market to approach a duopoly. But unlike the Commission's current 33 percent *screen*, a cap is a clear and unambiguous line that cannot be crossed. This first-stage cap is a final barrier to prevent the market from completely descending into duopoly. The second-stage HHI screen discussed herein will act over time to move the market away from duopoly. We stress that the first-stage cap alone is not enough to ensure the wireless market has a chance to become competitive.

[35] *See* In the Matter of Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269, *Notice of Proposed Rulemaking*, 27 FCC Rcd 11710, 11712 ¶ 1, 11733 ¶ 49 (2012) (*Notice*).

Transfers in these highly concentrated markets that increase spectrum-share HHI by more than 50 points but less than 100 points would not receive a presumption for or against, but would receive further scrutiny as described below. Transfers that increase spectrum-share HHI by less than 50 points in any market would be presumed to be in the public interest and would receive expedited review.[36] As we explain below, we set the threshold for concern at this level in order to prevent "transaction creep."

iii. Third-Stage Analysis: Further Considerations to Overcome the Presumption For or Against a Transfer

If a transfer is presumed *not* to be in the public interest, applicants may overcome this negative presumption in a third stage evaluation with clear and convincing evidence that the transfer would promote competition in the retail market and would not increase the applicant's market power. The Commission's third stage evaluation would consider factors such as a carrier's particular spectrum holdings (including its holdings below 1 GHz), the impact of the transaction on the retail market, the potential for future market entry by other competitors, the transfer's potential for foreclosure or potential to increase rivals' costs,[37] the applicant's non-acquisition alternatives to meet its stated needs,[38] and

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[36] However, parties seeking to rebut the presumption in favor of a transfer may petition the Commission to deny. These petitions must make a clear and convincing case that the transfer is not in the public interest, utilizing the same analytical framework described in the third-stage analysis. The Commission will consider the application and these petitions on an expedited basis.

[37] *See* Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses, WT Docket No. 12-4, *Memorandum Opinion and Order and Declaratory Ruling*, 27 FCC Rcd 10698, 10726 ¶ 72 (2012).

[38] This list includes factors the Commission currently considers in its case-by-case reviews, such as "the number of rival service providers, firms' network coverage, rival firms' and the licensee's market shares, the applicant's post-transaction spectrum holdings, and the spectrum holdings of each of the rival service providers." *Notice* at 11729 ¶ 39.

other factors that impact market competition or could offset the likely harms from the underlying spectrum aggregation.[39]

Because each carrier needs a balanced mix of high- and low-frequency spectrum in order to compete effectively nationwide,[40] and because the concentration of sub-1 GHz spectrum is already incredibly high,[41] the third stage test must include a bright-line cap on the amount of this spectrum a single entity can hold. We urge the Commission to cap the amount of sub-1 GHz that any entity can control in a given local market, and suggest that 35 percent is an appropriate level for this cap. However, since this spectrum does not exist in a separate product input market, it would not be unreasonable for the Commission to set a sub-1 GHz cap at 40 percent – a slightly higher level than that applied to the broader spectrum input market. But setting the cap above 40 percent of the available sub-1 GHz spectrum in a given local market would completely undermine the purposes of the policy. A 40 percent sub-1 GHz cap acts as a last barrier protecting the

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[39] As the Commission notes, it has in the past applied behavioral conditions to license transfers in addition to divestiture. *See Notice* at 11732 ¶ 46. In the framework we describe herein, an applicant may argue that adherence to certain behavioral obligations would promote competition and reduce concerns about increased market power to a level where the initial negative presumption should be overturned. However, given the high bar to overturning the negative presumption, the Commission would have to determine that such conditions would clearly and convincingly protect the public interest as effectively as simply rejecting the transfer.

[40] The Commission has recognized that the technical characteristics of sub-1 GHz spectrum make it a cost-effective solution for serving rural areas and increasing in-building penetration. *See* Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations, WT Docket No. 11- 18, *Order*, 26 FCC Rcd 17589, 17609-11 ¶ 49 (2011).

[41] Verizon and AT&T control as much as 90 percent of the available sub-1 GHz spectrum in many markets, with Sprint's SMR making up the balance. In markets where other regional carriers or speculators control some lower 700 MHz spectrum, Verizon and AT&T's total share of sub-1 GHz spectrum is still above 75 percent.

potential for effective competition by preserving the ability of the non-legacy carriers to access *some* of the low frequency spectrum needed to compete effectively nationwide.[42]

It is important to note however that in considering transfers that violate the second stage spectrum-share HHI test we propose above, the mere fact that an applicant holds less than 40 percent of the sub-1 GHz of spectrum does not mean the Commission should reverse the negative presumption against the transfer. For example, in a market where two carriers control 70 percent of the sub-1 GHz spectrum, a transaction that increases that two-firm share to 80 percent may raise serious competitive concerns. This is why the third stage analysis includes consideration of other factors that impact competition.

We believe this three-stage analytical approach to spectrum allocation will help ensure that the mobile market does not descend further into an uncompetitive duopoly. However, even under this framework there still exists the possibility of "transaction creep," where approvals of successive series of small transactions over time result in uncompetitive markets. To guard against transaction creep, the Commission must give thorough consideration to those transactions in highly concentrated markets that increase the spectrum-share HHI by more than 50 points but less than 100 points. While these transactions should not be presumed to be against the public interest, they do raise enough concerns to warrant further scrutiny, utilizing the third stage evaluation described above. Applicants would not have as high a barrier to overcome as those transactions

[42] While we continue to believe that it is appropriate for the Commission to consider the value of individual spectrum blocks when evaluating transfers (and would support a value-weighted HHI analytical approach), we recognize the Commission's desire for simplicity. *See, e.g.*, *Notice* at 11729 ¶ 38. A cap on the amount of sub-1 GHz spectrum, in concert with the rebuttable presumption framework we outline above, and it offers the Commission the ability to consider the distribution of spectrum among carriers across the various bands while ensuring that the most valuable spectrum is not monopolized.

presumed to be against the public interest, but they still would be required to make a case that the transaction would not harm competition.

iv. Only Spectrum that is Suitable and Available for the Provision of Mobile Data Services Should Be Included in the Commission's Analysis

The Commission's current "suitability" standard for determining which spectrum to include in its spectrum screen analysis is appropriate.[43] We suggest that the Commission maintain the suitable and available standard, applied to spectrum suitable for the mobile data services product market. Under this definition, the current universe of suitable and available spectrum would be identical to the spectrum included in the current screen, but with the inclusion of WCS, the exclusion of 12.5 MHz of SMR, and the exclusion of the upper 700 MHz D-Block spectrum.[44]

In the *Notice* the Commission ponders whether it should "adopt a regular process to add or remove existing or newly allocated spectrum bands for purposes of assessing spectrum concentration."[45] As this question implies, the problem is not in the Commission's suitability standard, but in how the Commission adds or removes blocks from the list of suitable and available spectrum. We do not object to the Commission making changes to the list of suitable and available spectrum when appropriate (*i.e.*, in context of an auction proceeding or the evaluation of a license transfer application), so long as it applies a consistent, rational and timely logic to this process. This starts with a

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[43] *Notice* at 11723 ¶ 26.

[44] The universe of available and suitable spectrum would therefore be 439.5 MHz, comprised of the following blocks of spectrum: Lower 700 MHz (48 MHz), Upper 700 MHz (22 MHz), SMR (14 MHz), Cellular (50 MHz), PCS (130 MHz), AWS-1 (90 MHz), WCS (30 MHz) and BRS (55.5 MHz).

[45] *Notice* at 11723 ¶ 27.

clear statement from the Commission that the suitability standard will be applied to the mobile data product market.

v. Limited Grandfathering is Appropriate, But Cannot Be Used to Undermine the Commission's Overarching Policy Goals

In the *Notice* the Commission indicates that it would be inclined to grandfather a licensee's existing holdings if it were to adopt a new allocation policy such as the framework described in these comments.[46] While grandfathering minimizes disruption to carriers' existing operations, a grandfathering policy works to undermine the pro-competitive purposes of the Commission's spectrum aggregation limits in the long run, as new spectrum becomes available (either at auction or on the secondary market). Therefore we suggest that the Commission could temporarily wave the rules for any particular licensee whose holdings exceed the caps described herein. If at a future date the licensee attempted to obtain spectrum in a market where it exceeds these caps, the Commission would then require the appropriate divestitures.

III. Conclusion

The wireless market would simply descend into monopoly in the absence of public policy protections limiting the amount of spectrum a single entity can control. But a broken spectrum allocation policy is almost as bad for consumers, competition and innovation as no policy at all. And there should be no doubt that the Commission's current spectrum screen is a failed, broken policy.

The predictions that the Commission made to justify its move away from a spectrum cap were spectacularly incorrect. If the Commission is serious about carrying out its statutory duties to promote wireless competition then it must reverse course and

[46] *Id.* at 11733 ¶ 49.

ground its spectrum allocation policies in antitrust practices designed to protect competition. The three-stage analytical approach we outline in these comments is based in tested antitrust theory and practice. We urge the Commission to adopt these recommendations.

Respectfully submitted,

_____/s/_____
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Appendix: Free Press Proposal for Reviewing Spectrum Allocations