

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

In the Matter of)	
)	
Rural Telecommunications Group)	RM-11498
)	
Petition for Rulemaking To Impose a Spectrum)	
Aggregation Limit on all Commercial)	
Terrestrial Wireless Spectrum Below 2.3 GHz)	

REPLY COMMENTS
of
THE PUBLIC INTEREST SPECTRUM COALITION

The Public Interest Spectrum Coalition (“PISC”) respectfully submits these reply comments in response to the *Petition for Rulemaking* filed by the Rural Telecommunications Group, Inc. (“RTG”).¹

SUMMARY

The *Petition* suggests that the Commission adopt a spectrum cap to alleviate problems with consolidation and abuse of market power in the wireless market. Specifically, the *Petition* requests that the Commission adopt a county-level aggregation limit of 110 MHz on control of wireless spectrum below 2.3 GHz.² Major wireless carriers and trade associations oppose the *Petition*, contending that spectrum caps are unnecessary as wireless markets remain competitive. Contrary to these arguments, the market for wireless services has changed substantially since the Commission’s 2001 revocation of spectrum caps. An endless series of corporate mergers and constant allegations of unfair dealings in negotiations over roaming arrangements have produced a downward spiral of consolidation and abuse of market power. The wireless market of 2008

¹ *Rural Telecommunications Group, Inc. Petition for Rulemaking To Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, RM-11498 (filed July 16, 2008) (“Petition”).

² Petition at 20-22.

demonstrates unequivocally that additional protections, such as the adoption of spectrum caps, are needed to promote competition. Consequently, PISC joins nondominant carriers in support of the *Petition*, and PISC further suggests the cap be set at 95 MHz, and supplemented by a screen for transactions involving spectrum above 2.3 GHz.

I. THE COMMISSION SHOULD REJECT ARGUMENTS THAT THE WIRELESS MARKET HAS NOT CHANGED SINCE 2001.

In the *CMRS Third Report and Order* of 1994, the Commission imposed a cap of 45 MHz on the amount of controlled spectrum in the combined PCS, cellular, and SMR bands.³ The Commission found that a spectrum cap was a “minimally intrusive means” to promote competition in the wireless market.⁴ In 2001, the Commission reversed this decision, finding that spectrum caps were no longer needed to promote competition in the wireless market.⁵

The Commission based its 2001 order on 3 key assumptions that are no longer valid. The Commission assumed: 1) CMRS competition could be effectively promoted without caps; 2) the Commission can monitor CMRS competition through an annual report; and 3) the Commission has additional statutory tools to police anti-competitive conduct.⁶ Verizon incorrectly asserts that these assumptions have not changed since 2001.⁷ In the wireless market of 2008, at least two of these three key assumptions are no longer valid. First, RTG demonstrates, and the Commission’s own CMRS reports show, CMRS competition is not being effectively promoted without spectrum caps.⁸ The Commission’s CMRS reports demonstrate less and less

³ *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, PR Docket Nos. 93-144, 89-553, Third Report and Order, 9 FCC Rcd 7988 (1994).

⁴ *Id.* at para. 239.

⁵ *In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, Report and Order, 16 FCC Rcd 22668, 22670-71, paras. 6-7 (2001).

⁶ Verizon Comments at 5.

⁷ Verizon Comments at 2-7.

⁸ *Petition* at 11-13, 15.

competition – to give one statistic, since 2006, the Commission’s annual report on CMRS competition has shown increasing HHI in all of the top 25 CMRS markets.⁹ Yet, mysteriously, recent CMRS reports have all concluded that the wireless market demonstrates “effective competition,” belying the second assumption – the annual CMRS reports, and their highly political conclusions in particular, are no longer effective in their role. Finally, although the statutory provisions referenced by the Commission in 2001 remain in place, and carriers may argue the third assumption remains true, these tools are ineffective to police anti-competitive conduct, as they have not been able to prevent further consolidation or abuse of power in roaming arrangements.

In fact, the wireless market of 2008 demonstrates the same problems that in 1994 led the Commission to impose the original spectrum cap. Abuse of market power has increased in recent years, particularly with regard to roaming agreements, which are the only way for small carriers to compete. As the *Petition* notes, many small competing carriers have folded (and sold themselves to larger carriers) as a result of their inability to negotiate fair roaming agreements with incumbents.¹⁰ As a result of increasing consolidation, two carriers dominate the nationwide wireless market today. Following a series of acquisitions,¹¹ AT&T and Verizon now have a combined mobile market share of 60 percent.¹² Similar to previous quarters, both telephone companies added 2 million retail customers last quarter, and saw significant increases in wireless

⁹ *Petition* at 11.

¹⁰ *Petition* at 10-11.

¹¹ Kevin Fitchard, “AT&T, VZW fuel growth through dueling acquisitions,” *TelephonyOnline*, Nov. 10, 2008, available at <http://telephonyonline.com/home/news/att-vzw-acquisitions-1110/>.

¹² AT&T: 74.9 million subscribers, Verizon: 84 million subscribers (numbers from Q3 2008 financials, plus Verizon/Alltel merger). 158.9 million subscribers/262.7 million subscribers = 60.5% (See CTIA, “Wireless Quick Facts,” <http://www.ctia.org/advocacy/research/index.cfm/AID/10323>).

data revenue,¹³ due in part to excessive text messaging fees.¹⁴ These gains come at the expense of their competitors.¹⁵

The American wireless market dynamic of handset exclusivity increases the harms of excessive market consolidation.¹⁶ As the Rural Cellular Association observes, small carriers face even greater hurdles in competing with nationwide carriers when they cannot provide their customers desirable new phones like the Apple iPhone (exclusive to AT&T), the Blackberry Storm (exclusive to Verizon), or the Samsung Instinct (exclusive to Sprint).¹⁷ The iPhone and other desirable new devices – all exclusively tied to major national carriers – will drive increased demand of wireless broadband services and, thus, of wireless services in general.¹⁸ And, by driving users towards the behemoths capable of negotiating exclusive deals for the next generation of smartphones, handset exclusivity will continue to increase consolidation in the wireless market.

In short, the wireless market has changed substantially since 2001, and is trending towards less competition, greater market power, and greater risk of abuse of market power – the

¹³ Michelle Donegan, “Wireless Boosts AT&T in Q3,” *Light Reading*, Oct. 22, 2008, available at http://www.lightreading.com/document.asp?doc_id=166432; Michelle Donegan, “Mobile Data Fuels Verizon in Q3,” *Light Reading*, October 27, 2008, available at http://www.lightreading.com/document.asp?doc_id=166747.

¹⁴ Karl Bode, “Text-Messaging Rates Come Under Scrutiny,” *DSLReports.com*, Sept. 10, 2008, available at <http://www.dslreports.com/shownews/TextMessaging-Rates-Come-Under-Scrutiny-97614>.

¹⁵ Kevin Fitchard, “T-Mobile falling behind in data race,” *Telephony Online*, Nov. 6, 2008, available at <http://telephonyonline.com/home/news/t-mobile-wireless-data-1106/index.html>; Kevin Fitchard, “For AT&T and Verizon Wireless, the subscriptions just keep on coming,” *Telephony Online*, July 24, 2008, available at <http://telephonyonline.com/wireless/news/att-verizon-increase-subscriptions-0724/index.html>.

¹⁶ This phenomenon is essentially unique to the American market. In Asia, wireless devices are sold “unlocked” far more often than locked. See, e.g., Marguerite Reardon, “Will “unlocked” cellphones free consumers?,” *USA Today*, Jan. 24, 2007, available at http://www.usatoday.com/tech/products/cnet/2007-01-24-unlocked-phones_x.htm.

¹⁷ See, e.g., *Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, at p. i-ii, 8 (filed May 20, 2008).

¹⁸ See, e.g., Ralph De La Vega, “AT&T Q3 2008 Earnings Call Transcript,” *Seeking Alpha*, Oct. 22, 2008, p. 2, available at <http://seekingalpha.com/article/101193-at-amp-t-q3-2008-earnings-call-transcript?page=2> (“iPhone 3G activations have exceeded our expectations and they have brought a significant halo effect which has driven store traffic and helped sales of other devices...”); Suzanne Choney, “Mobilizing the mobile Web,” *MSNBC*, April 10, 2008, available at <http://www.msnbc.msn.com/id/24017010/>.

same circumstances that led to the original spectrum caps. To protect against further consolidation and reduced competition, the Commission should reinstitute spectrum caps.

Making additional spectrum available is not sufficient to alleviate the competitive problems, despite what AT&T and others suggest.¹⁹ The Commission's recent wireless auction has demonstrated this – 78 percent of all winning bids were placed by the four national wireless service providers, and the lion's share of the winnings went to the top two carriers, AT&T and Verizon.²⁰ Furthermore, as the Wireless Communications Association has emphasized, the modern-day market for wireless services demands that providers deploy robust broadband services, which requires providers to control and operate larger portions of spectrum.²¹ Given recent auction history and increased spectrum needs, nondominant wireless carriers and new market entrants require additional protections to ensure that they can acquire enough spectrum to offer competing broadband services. With incumbent providers not yet sated in their desire to acquire any competitors or additional spectrum that may become available (despite substantial current holdings²²), standing ready and able to outbid smaller competitors and would-be new entrants, there is simply not enough available spectrum to enable adequate competition in the absence of a spectrum cap.

¹⁹ AT&T Comments at 9-11; CTIA Comments at 9.

²⁰ Petition at 14.

²¹ WCA Comments at 2.

²² See, e.g., Ralph De La Vega, "AT&T Q3 2008 Earnings Call Transcript," *Seeking Alpha*, Oct. 22, 2008, p. 3, available at <http://seekingalpha.com/article/101193-at-amp-t-q3-2008-earnings-call-transcript?page=3> ("At AT&T, we have assembled a truly outstanding spectrum position. . . . It covers 100% of the top 200 markets and across the top 100 U.S. markets, we have a total average spectrum depth of 90-megahertz."); Doreen Toben, "Verizon Communications Inc. Q3 2008 Earnings Call Transcript," *Seeking Alpha*, Oct. 27, 2008, p. 4, available at <http://seekingalpha.com/article/102166-verizon-communications-inc-q3-2008-earnings-call-transcript?page=4> ("As we said before future growth opportunities will be driven [by] our enhanced spectrum position.").

II. A HYBRID SPECTRUM CAP AND SCREEN WOULD GREATLY BENEFIT THE PUBLIC INTEREST.

The cap on spectrum below 2.3 GHz should be set at 95 MHz.

The *Petition* suggests the imposition of a spectrum aggregation limit of 110 MHz for spectrum below 2.3 GHz, and proposes using a county as the relevant geographic area. PISC agrees with the *Petition* that a cap on spectrum holdings will serve the public interest. PISC also agrees that the cap should not be set at the same level adopted by the Commission in the original 1994 caps.²³ However, PISC believes that the proper cap should be set at 95 MHz, the same threshold used as a spectrum screen by the Commission in 2007,²⁴ and retained by the Commission after the *Clearwire* and *Verizon* merger orders as a screen for markets in which neither BRS nor AWS-1 spectrum is available.²⁵ Although the Commission has determined that increased availability of BRS and AWS-1 in some markets justifies inclusion within a screen, BRS and AWS-1 spectrum remain encumbered in many markets, and therefore may not be able to support a nationwide competitor in the absence of other holdings or agreements. Consequently, even if BRS and AWS-1 spectrum bands are appropriately included within a spectrum screen, they should not be included within the “premium” category of highly efficient, unencumbered spectrum which should be subject to a spectrum cap. The cap should be set at one-third of total premium spectrum (the same formula used by the Commission in numerous past transactions) – or, in the current market, 95 MHz.

²³ *Petition* at 20.

²⁴ *Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 20295, 20308 at para. 17 (2007).

²⁵ *In re: Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC; For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto License Transfer Leasing Arrangements; Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, at para. 64, WT Docket No. 08-95, File Nos. 00033463892, et al., ITC-T/C-20080613-00270, et al., File No. ISP-PDR-20080613-00012, FCC 08-258 (rel. Nov. 10, 2008); *In re: Sprint Nextel Corporation and Clearwire Corporation Applications For Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, at para. 74, File Nos. 0003462540 et al, FCC 08-259 (rel. Nov. 7, 2008).

Spectrum above 2.3 GHz should be subject to a screen, rather than a cap.

As PISC has shown in other proceedings, historical Commission policy of differential treatment for spectrum above 2.3 GHz reflects technical differences in the spectrum, including reduced propagation characteristics and greater encumbrances.²⁶ Differential treatment also serves the public interest by permitting accumulation of less efficient spectrum by new entrants to allow them to compete effectively with incumbent holders of more efficient, less encumbered spectrum.²⁷ Furthermore, maintaining a flexible spectrum screen above 2.3 GHz (if properly applied and strictly scrutinized) will help to alleviate any problems that may arise. In fact, both the use of a cap on spectrum below 2.3 GHz and a screen on spectrum above 2.3 GHz have the same effect: to promote competition by limiting the acquisitions of market incumbents, while permitting new entrants to acquire additional spectrum, particularly in higher and less efficient bands, to compete with established holders of substantial spectrum in premium bands.

CONCLUSION

The wireless market grows more and more concentrated with every additional merger and spectrum auction, increasing opportunities for abuse of market power and failures of competing wireless carriers, thus producing even greater consolidation and even greater potential for abuse of market power. To stop this downward spiral, the Commission must act to reinstate a hard spectrum aggregation cap, preferably set at 95 MHz for control of spectrum below 2.3 GHz. The Commission should continue to apply a spectrum screen triggering increased scrutiny for transactions involving spectrum above 2.3 GHz, to enable new entrants to compete with incumbents while monitoring for potential harms.

²⁶ See, e.g., PISC Opposition to AT&T's Petition to Deny, WT Docket No. 08-94, at p. 3-4 (filed August 11, 2008).

²⁷ *Id.*

Respectfully submitted,

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