

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

In the Matter of)
)
Verizon Communications and Straight Path)
Communications Seek FCC Consent to the) ULS File No. 0007783428
Transfer of Control of Local Multipoint)
Distribution Service, 39 GHz, 3650-3700 MHz,)
and Fixed Point to Point Microwave Licenses)
)

**REPLY OF PUBLIC KNOWLEDGE &
NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE**

I. INTRODUCTION AND SUMMARY

Public Knowledge and New America’s Open Technology Institute file this Reply in the above-captioned proceeding in response to the Joint Opposition to Petitions to Deny (“Joint Opposition”) submitted by Verizon Communications Inc. (“Verizon”) and Straight Path Spectrum, LLC (“Straight Path”) (collectively, “Applicants”).¹ At present, the Federal Communications Commission (“Commission” or “FCC”) should not approve the transfer of control of wireless licenses held by Straight Path to Verizon because the Applicants have failed to demonstrate that the proposed transaction is in the public interest.

The Applicants have not met their burden of proof to demonstrate that the transaction would serve the “public interest, convenience, and necessity.” Neither the Applicants’ Public

¹ See Verizon and Straight Path Spectrum, LLC Joint Opposition to Petitions, ULS File No. 0007783428 (filed Aug. 18, 2017) (“Joint Opposition”).

Interest Statement² nor Joint Opposition provide any commitments or specific public interest benefits that would occur if the application were to be granted. The only benefit the Applicants claim is some future deployment of 5G wireless services, without specifying how this would be a public interest benefit as opposed to a profitable business venture. The Applicants are the *only* voice in the record in support of their position.

While the alleged public interest benefits are underwhelming, if not entirely absent, there are many public interest harms that would result from granting the transaction. The record overwhelmingly supports denial of the Verizon/Straight Path application. The proposed transaction would limit 5G competition and innovation in the millimeter wave (“mmW”) bands by allowing Verizon to exceed the mmW spectrum threshold. Further, granting the application would unjustly enrich Straight Path, undermining the FCC’s credibility with regards to future enforcement of its build-out requirements.

Extensive evidence exists in the record to support the denial of the application. To the contrary, the Applicants have not demonstrated with any detail how this acquisition would benefit the public and advance the Commission’s goals of promoting universal service and competition. Lastly, the parties do not sufficiently address the substantive concerns raised by commenters and petitioners. Therefore, the Verizon/Straight Path application should be denied.

II. THE RECORD DEMONSTRATES THAT THE PROPOSED TRANSACTION DOES NOT SERVE THE PUBLIC INTEREST

The Verizon/Straight Path Public Interest Statement, along with the Joint Opposition, fail to demonstrate that the transaction will serve the public interest and do not adequately address the public interest and competitive harms raised in the record. Under the Communications Act,

² See Application of Verizon Communications Inc. and Straight Path Communications Inc. for Transfer of Control of Licenses, ULS File No. 0007783428, Ex. 1 – Description of Transaction and Public Interest Statement (filed June 1, 2017) (“Public Interest Statement”).

the Commission cannot grant the application unless Verizon and Straight Path demonstrate “the proposed transaction, on balance, serves the public interest.”³ The standard of evaluation requires the “Commission consider[] whether a transaction would enhance, rather than merely preserve existing competition.”⁴ In this case, the harms that would result from granting the application substantially outweigh any speculative public interest benefits alleged by the Applicants. In particular, the transfer would significantly harm consumers by curtailing potential 5G competition, investment, and innovation by concentrating mmW spectrum holdings into the hands of the two dominant wireless carriers. The record extensively details these harms,⁵ whereas the applicants have not specified the public interest benefits of the transaction, other than generally asserting they plan to use the spectrum for 5G services at some point in the future. Granting the transaction would also undermine future enforcement of the FCC’s build-out requirements, and unjustly reward Straight Path’s misconduct. As such, the applicants have not met their burden of proof and the Commission cannot approve the transfer.

³ See Applications of AT&T Inc. and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, *Memorandum Opinion and Order*, 30 FCC Rcd 9131, 9140 ¶ 18 (2015); Applications of Cricket License Company, LLC, *et al.*, Leap Wireless International, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations, Application of Cricket License Company, LLC and Leap Licenseco Inc. for Consent to Assignment of Authorization; WT Docket No. 13-193; *Memorandum Opinion and Order*, 29 FCC Rcd 2735, 2742 ¶ 13 (2014); 47 U.S.C. § 310(d).

⁴ Joint Application of Consolidated Communications Holdings, Inc., and FairPoint Communications, Inc., to Transfer Indirect Control of Authorization Holders to Consolidated Communications Holdings, Inc., WC Docket No. 16-417, *Memorandum Opinion and Order*, 32 FCC Rcd 3820, 3823 ¶ 9 (2017).

⁵ See Competitive Carriers Association Petition to Deny, ULS File No. 0007783428, at 3-7, 10-11, 15-18 (filed Aug. 11, 2017) (“CCA Petition”); INCOMPAS Comments, ULS File No. 0007783428, at 1-3 (filed Aug. 11, 2017) (“INCOMPAS Comments”); U.S. Telepacific Corporation Petition to Deny, ULS File No. 0007783428, at 7 (filed Aug. 11, 2017) (“TPx Petition”).

A. Approval of the Transaction will Excessively Concentrate mmW Spectrum Holdings and Harm the Public Interest

1. Allowing the transfer would allow Verizon to exceed the Spectrum Market Stream threshold set by the Spectrum Frontier Order

Verizon already has access to substantial mmW spectrum, and approval of this transaction would increase Verizon's holdings to approximately 312 billion MHz/POPs.⁶ This transaction, combined with Verizon's acquisition of the Nextlink spectrum, would result in Verizon meeting or exceeding the *Spectrum Frontiers Order* mmW spectrum threshold of 1250 MHz of in 761 of the 3,234 counties in the U.S.⁷

The Competitive Carriers Association ("CCA") explains that "[t]here is substantial overlap between the Straight Path and Nextlink mmW spectrum, all of which Verizon has announced plans to acquire."⁸ And if the transfer is approved, "Verizon will exceed the secondary market spectrum screen of 1250 MHz established by the Spectrum Frontiers Order in a vast number of markets across the United States."⁹ On a nationwide MHz-POP basis, the proposed transaction, in combination with the Nextlink transaction, would give Verizon 45% of all combined 28 and 39 GHz spectrum, leaving less than 20% of the MHz-POPs available in the 28GHz and 39 GHz bands for competitive bidding by other carriers.¹⁰

The Applicants argue that the mmW spectrum threshold is not a cap and that exceeding it does not necessarily indicate that competitive harm will occur. While they have accurately cited the a portion of the relevant language from the FCC's *Spectrum Frontiers Order*, their analysis

⁶ See Motion to Consolidate of Competitive Carriers Association, ULS File No. 0007783428, at 5 (filed June 13, 2017) ("CCA Motion to Consolidate").

⁷ See *Id.* at 9 (citing Use of Spectrum Bands Above 24 GHz For Mobile Radio Services, *et al*, GN Docket No. 14-177, *et al*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014, 8083-84 ¶ 189 (2016) ("*Spectrum Frontiers Order*").).

⁸ CCA Motion to Consolidate at 3.

⁹ *Id.*

¹⁰ CCA Petition at 6.

ignores the Commission’s rationale for adopting the mmW threshold in the first place – to ensure that valuable mmW spectrum is available to multiple providers, and “guard against consolidation of this spectrum by one or two providers and [] encourage the development of innovative services to benefit the American consumer.”¹¹

The Applicants’ Public Interest Statement attempts to relitigate Verizon’s failed arguments against the mmW spectrum threshold from the Spectrum Frontiers proceeding.¹² The Public Interest Statement and Joint Opposition also try to downplay the importance of the mmW spectrum threshold and the harm that excessive spectrum aggregation that will result from the Verizon/Straight Path and Verizon/Nextlink transactions by pointing to some unknown date, potentially years into the future, when 37 GHz band spectrum is to be made available for auction and flexible service rules are extended to additional bands.¹³

These claims are ill conceived and invalid. First, the appropriate time and place for the Applicants to contest the imposition of the mmW spectrum threshold is in a Petition for Reconsideration of the *Spectrum Frontiers Order*, not in a pending transaction. Second, the Applicants refer to the 37 GHz band as if the mmW spectrum threshold does not contemplate those frequencies. It does.¹⁴ Last, the additional mmW spectrum the Applicants claim that flexible service rules could be extended to in the future are entirely hypothetical. As the *Spectrum Frontiers Proceeding* explained, when considering whether to include spectrum for inclusion in the spectrum screen, the Commission considers whether the spectrum is available (or likely to be available in the near term) and suitable for mobile telephone/broadband.¹⁵ It would

¹¹ *Spectrum Frontiers Order* at 8084 ¶ 190.

¹² *See* Public Interest Statement at 9.

¹³ *See id.* at 9, Joint Opposition at 9-10.

¹⁴ *See Spectrum Frontiers Order* at 8082-8083 ¶¶ 186, 189.

¹⁵ *See id.* at 8083 ¶ 188.

be inappropriate and adverse to Commission policy to conclude that bands that have not yet been made available for flexible use, and are potentially years away from being made available, mitigate the potential for competitive harm from Verizon exceeding the mmW spectrum threshold in hundreds of markets across the U.S. The Applicants' attempt to inappropriately shift the focus of the matter at hand towards a discussion of other spectrum bands only serves as a distraction from Verizon's methodical attempts to stockpile mmW spectrum, and illustrates the weakness of their public interest claims.

2. Granting the transaction would likely result in a duopoly control of the mmW bands, harming Consumers, Competition, and Innovation

Granting the Verizon/Straight Path application, in combination with AT&T's proposed acquisition of FiberTower's mmW licenses, would result in duopoly control of the mmW frequencies. CCA explains that in addition to Verizon's application to acquire Straight Path, "the Commission is currently considering two other high-band 5G spectrum transactions—Verizon's purchase of Nextlink's spectrum portfolio that includes millimeter wave spectrum and AT&T's purchase of FiberTower's 24 GHz and 39 GHz spectrum band licenses."¹⁶ If these transactions are approved, it would result in Verizon and AT&T holding more than half of the available 28 GHz spectrum and about two-thirds of the 39 GHz spectrum.¹⁷

It is the Commission's policy to prevent consolidation of the mmW spectrum into the hands of only one or two providers. Concentration of spectrum holdings precludes multiple carriers from using the licenses to provide next generation services to consumers, and prevents parties that value the spectrum the most from having a chance to obtain it, which stifles potential

¹⁶ *Id.* at 2.

¹⁷ *See* CCA Petition at 6-7.

innovative uses of the spectrum. Granting the Verizon/Straight Path application would contradict the FCC’s goal of “promot[ing] the provision of innovative services.”¹⁸

As INCOMPAS points out, “[The duopoly created by the applicants’ transfer] would effectively repeat the history of low-band spectrum—in which Verizon and AT&T controlled more than 90 percent of the spectrum below 1 GHz until this concentration was remediated by the incentive auction’s reallocation of the 600 MHz band.”¹⁹ This outcome would drastically inhibit competition, stifle innovation, and inefficiently allocate the mmW spectrum,²⁰ contrary to the FCC’s stated goals for the mmW bands.²¹

CCA agrees, explaining that permitting excessive aggregation of the mmW spectrum “would depress investment and innovation in next-generation wireless services exactly when it is needed most.”²² As a result, U.S. leadership in the global race to 5G will be undermined²³ – undercutting the sole public interest benefit the Applicants claim. Additionally, the combined spectrum positions of Verizon and AT&T would ultimately harm consumers. If the two largest wireless companies amass controlling positions in the mmW bands, they will be in a position to deter competitive and innovative providers from investing in 5G deployments, depriving consumers of the aggressive pricing that has recently become a hallmark of 4G services.²⁴

Similarly, TPx explains that permitting the transaction would give Verizon excessive control of the 28 GHz band, which could result in wide ranging economic harm. Verizon’s control of the 28 GHz band could potentially strand enterprise customer infrastructure

¹⁸ *Spectrum Frontiers Order* at 8085 ¶ 191.

¹⁹ INCOMPAS Comments at 3.

²⁰ *Id.*

²¹ *See Spectrum Frontiers Order* at 8078 ¶ 178.

²² CCA Petition at 8-9.

²³ *See id.* at 10-12.

²⁴ *See id.* at 17-18.

investments and dislocate customers, resulting in economic inefficiency and diminution of broadband service.²⁵

Further, Commission has identified the 28 and 39 GHz bands as “likely to be critically important in the development of 5G services moving forward,”²⁶ and recognized that the 28 and 39 GHz bands are valuable for the development of a myriad of applications.²⁷ However, “the transformative nature of this spectrum will be lost if it is only concentrated in the hands of the nation’s two largest wireless providers, without any opportunity for competitive providers to acquire it.”²⁸

B. Granting the Application Would Unjustly Enrich Straight Path and Undermine The Credibility of the Commission’s Build-Out Requirements

The record clearly demonstrates that granting the Verizon/Straight Path application would harm the public interest by undermining the Commission’s credibility to enforce its deployment obligations, and unjustly enriching Straight Path. As INCOMPAS explains, the Commission found strong evidence that Straight Path engaged in serious misconduct by misrepresenting its compliance with the Commission’s build-out requirements. Regular order requires the Commission to cancel the Straight Path licenses and auction them to benefit U.S. taxpayers.²⁹ If the Commission grants the Applicants’ proposed transaction, Straight Path will reap a windfall as a reward for its violation’s of the FCC’s rules – creating perverse incentives for other licensees. Approval of the proposed transaction will harm the public interest because it undermines the Commission’s credibility that it will strictly enforce its construction and discontinuance rules, even when licensees mislead the agency.

²⁵ See TPx Petition at 2-3, 8-9.

²⁶ *Spectrum Frontiers Order* at 8082 ¶ 186.

²⁷ See *id.* at 8020 ¶ 7.

²⁸ INCOMPAS Comments at 2.

²⁹ *Id.* at 4-5.

III. THE COMMISSION SHOULD DENY THE PROPOSED TRANSACTION AND AUCTION THE STRAIGHT PATH SPECTRUM

The Applicants argue that opponents are, “misus[ing] this proceeding to launch a collateral challenge to the Straight Path *Consent Decree*.”³⁰ This analysis misses the mark. As discussed above, allowing the merger is harmful *in and of itself*. The record clearly demonstrates that the public interest harms overwhelmingly outweigh any benefits alleged by the Applicants. Granting the Applicants’ proposal would create significant public interest harms and minimal, if any, public interest benefits. Chairman Pai has trumpeted his belief that economic analysis must play a larger role in FCC policy making.³¹ Here, the Applicants fail to offer any meaningful economic evidence in support of their assertion that the transaction will generate public interest benefits, such as closing the digital divide, promoting competition, or making broadband more accessible and affordable. Instead, the Applicants rely on vague, unsupported claims of potential benefits.

Upon denying the proposed transaction, the Commission should auction the Straight Path licenses. Selling the licenses via public auction would maximize public interest benefits by putting the licenses in the hands of stakeholders that value them the most. In addition, utilizing the public auction process will help the Commission further its goal of closing the digital divide by giving small, competitive carriers that prioritize serving rural and lower income areas the opportunity to obtain mmW spectrum.

³⁰ Joint Opposition at 20.

³¹ *See, e.g.*, Ajit Pai, Chairman, Federal Communications Commission, Remarks at the Hudson Institute (April 5, 2017), *available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0405/DOC-344248A1.pdf.

IV. CONCLUSION

For the reasons stated above, the Commission should deny Verizon's proposed purchase of the Straight Path licenses and sell the licenses at public auction.

Respectfully submitted,

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August 25, 2017

DECLARATION

Public Knowledge and New America's Open Technology Institute's Reply was prepared using facts of which I have personal knowledge or upon information provided to me. I declare, under penalty of perjury, that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed August 25, 2017

/s/ Phillip Berenbroick

Phillip Berenbroick
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CERTIFICATE OF SERVICE

I, Phillip Berenbroick, hereby certify that on August 25, 2017 I caused true and correct copies of the foregoing Petition to Deny to be served on the following via electronic mail.

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