

**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)
)

**PETITION TO DENY OF PUBLIC KNOWLEDGE &
NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE**

I. INTRODUCTION AND SUMMARY

Public Knowledge and New America’s Open Technology Institute file this Petition to Deny in response to the Federal Communications Commission’s (“Commission” or “FCC”) Public Notice¹ regarding the application of Verizon Communications Inc. (“Verizon”) and Straight Path Communications Inc. (collectively, “Applicants”) seeking approval to transfer control of various licenses held by Straight Path subsidiary, Straight Path Spectrum, LLC (together, “Straight Path”).

The Applicants have not met their burden of showing that the proposed transaction would serve the “public interest, convenience, and necessity,” and that the potential public interest

¹ See Verizon Communications and Straight Path Communications Seek FCC Consent to the Transfer of Control of Local Multipoint Distribution Service, 39 GHz, 3650-3700 MHz, and Fixed Point to Point Microwave Licenses, ULS File No. 0007783428, *Public Notice*, DA 17-705 (rel. July 21, 2017).

benefits outweigh the potential harms. The potential benefits of Verizon’s intention to use the Straight Path spectrum for 5G mobile broadband pale in comparison to the potential harms. These harms include precluding multiple carriers from using the licenses to provide next-generation services to consumers; permitting Verizon to exceed the secondary market spectrum screen established by the *Spectrum Frontiers Order*; impeding the Commission from auctioning the Straight Path spectrum so that users that value it most highly can acquire it, which would generate revenues for the Treasury, benefitting taxpayers; and undermining the Commission’s credibility regarding its commitment to enforcing its construction and discontinuance rules and preventing licensees from ripping off the public. Therefore, the Commission should deny the proposed transaction and auction the Straight Path licenses as soon as feasible.

II. VERIZON AND STRAIGHT PATH BEAR THE BURDEN OF DEMONSTRATING THE TRANSACTION SERVES THE PUBLIC INTEREST

The Applicants’ Public Interest Statement fails to demonstrate that the transaction will serve the public interest and does not adequately address the public interest and competitive harms the transaction poses.² This is a threshold matter, and the Commission cannot approve the transaction unless Verizon and Straight Path are able to demonstrate that the proposed combination serves the public interest.

Under the Communications Act, Verizon and Straight Path must demonstrate that the transaction will serve the “public interest, convenience, and necessity” to gain the Commission’s approval.³ The Applicants “bear the burden of proving, by a preponderance of the evidence, that

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”).

³ See 47 U.S.C. § 310(d); 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, 9139 ¶ 18 (explaining that applicants bear the burden of

the proposed transaction, on balance, serves the public interest.”⁴ If the Commission cannot find that the proposed combination serves the public interest, or if the record presents a substantial and material question of fact, the application must be designated for hearing.⁵

The Commission’s evaluation includes “a deeply rooted preference for preserving and enhancing competition . . . promoting a diversity of information services and services to the public, and generally managing the spectrum in the public interest.”⁶ The FCC’s competition analysis “considers how the transaction would affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition, and the efficiencies, if any, that may result from the transaction.”⁷

Importantly, the Commission’s competition analysis is broader than the Department of Justice’s review because it includes the public interest standard. “[T]he Commission considers whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.”⁸

As the Competitive Carriers Association has already explained, the Commission’s public interest

demonstrating “that the proposed transfer of control of licenses and authorizations will serve the public interest, convenience, and necessity”) (“*AT&T/DirectTV Order*”).

⁴ *AT&T/DirectTV Order* at 9140 ¶ 18; 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).

⁵ See 47 U.S.C. § 309(e); *AT&T/DIRECTV Order* at 9140 ¶ 18; Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10-56, *Memorandum Opinion and Order*, 26 FCC Rcd 4238, 4247-48 ¶ 22 (2011) (“*Comcast/NBCU Order*”).

⁶ *AT&T/DIRECTV Order* at 9140 ¶ 19; *Comcast/NBCU Order* at 4248 ¶ 23.

⁷ *AT&T/DIRECTV Order* at 9140-41 ¶ 20; Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee; MB Docket No. 07-57; *Memorandum Opinion and Order and Report and Order*; 23 FCC Rcd 12348, 12365 ¶ 32 (2008) (“*Sirius/XM Order*”).

⁸ *AT&T/DIRECTV Order* at 9141 ¶ 21; *Comcast/NBCU Order* at 4248 ¶ 24; *Sirius/XM Order* at 12365-66 ¶ 32.

review also extends far beyond competition issues, and includes whether the transaction comports with the Communications Act, other laws, and the FCC's rules, as well as whether the transaction may harm the public interest by frustrating or impairing the objectives of the Communications Act. Verizon and Straight Path bear the burden of proof and must establish that they have satisfied their burden, before the Commission may approve the application.⁹

III. VERIZON AND STRAIGHT PATH CLAIM THE TRANSACTION WILL CREATE MINIMAL PUBLIC INTEREST BENEFITS

The Applicants' public interest showing is underwhelming. The only public interest benefit Verizon and Straight Path claim that may result from the transaction is that Verizon hopes to use the Straight Path spectrum as part of its planned 5G mobile broadband deployment.¹⁰

Verizon commits to no timetable for the launch of its planned 5G network, other than citing to a nearly six month old press release promising 5G trials in multiple markets by mid 2017.¹¹ It appears Verizon has already failed to meet this target. Additionally, Verizon makes no commitment to deploy the Straight Path spectrum in unserved low income or rural communities that lack access to any high-speed broadband, where 5G deployments could truly serve the public interest by helping to close the digital divide. Nor does Verizon commit to ensuring that the services it offers using the Straight Path spectrum will be made affordable to the millions of

⁹ Reply to Joint Opposition to Motion to Consolidate of the Competitive Carriers Association, ULS File Nos. 0007765708, 0007783428, at 4-5 (filed June 20, 2017) (citing SprintCom. Inc., and Shenandoah Personal Communications, LLC, and NTELOS Holdings Corp., WT Docket No. 15-262, *Memorandum Opinion and Order*, 31 FCC Rcd 3631, 3634-35 ¶ 7 (2016).).

¹⁰ See Public Interest Statement at 3-6.

¹¹ *Id.* at 5, n.17.

low-income Americans who lack basic connectivity because broadband access is too expensive.¹²

Further, it is unclear whether Verizon even needs to acquire the Straight Path spectrum to deploy its planned 5G network. As the Applicants concede, the transaction triggers the *Spectrum Frontiers Order*'s spectrum threshold for secondary market transactions.¹³ Combined with Verizon's acquisition of Nextlink spectrum, Verizon will hold 1250 megahertz or more millimeter wave ("mmW") spectrum in 761 of the 3,234 counties in the U.S., and over 1250 megahertz in 594 counties.¹⁴ The Applicants have not made any case, let alone a compelling one, why it would serve the public interest to allow Verizon to acquire licenses in counties where it will reach and exceed the mmW spectrum threshold. The Applicants' failure to produce even *de minimis* public interest benefits makes clear that the Commission must deny the proposed transaction if it poses any potential harms.

IV. THE POTENTIAL PUBLIC INTEREST HARMS FAR OUTWEIGH THE MINIMAL PUBLIC INTEREST BENEFITS

The proposed transaction has the potential to harm competition and consumers in the market for 5G mobile broadband services, harm taxpayers, and undermine the Commission's credibility regarding enforcement of its buildout and discontinuance rules. These harms far outweigh the minimal potential public interest benefits that the Applicants claim.

¹² In September 2016, NTIA reported that 33 million U.S. households do not use the internet at home, and quarter of those households cited the high cost of internet access as the reason they are offline. See National Telecommunications & Information Administration, *Digitally Unconnected in the U.S.: Who's Not Online and Why?*, NTIA Blog (Sept. 28, 2016), <https://www.ntia.doc.gov/blog/2016/digitally-unconnected-us-who-s-not-online-and-why> (last visited Aug. 10, 2017).

¹³ Public Interest Statement at 7 (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*").).

¹⁴ Public Interest Statement at 9.

A. Granting the Application Could Foreclose Competition in 5G Mobile Broadband, Harming Consumers

Verizon's planned acquisition of Straight Path mmW spectrum has the potential to harm consumers and competition by excessively concentrating holdings of mmW spectrum, foreclosing future competition in these bands. This transaction would give Verizon one-third or more of the existing mmW spectrum in hundreds of counties across the U.S., exceeding the Commission's mmW spectrum holdings threshold. Together with Verizon's acquisition of Nextlink's mmW licenses and AT&T's proposed acquisition of FiberTower's mmW spectrum, these transactions will concentrate mmW spectrum holdings into the hands of the two dominant wireless carriers, raising significant competitive concerns.¹⁵ The Commission has previously recognized the risk of harm to consumers and competition if the two dominant carriers control an overwhelming amount of spectrum in a particular band.¹⁶ The Department of Justice has also recognized these risks, and explained that access to spectrum is a critical factor the Commission should consider to ensure competition in the future.¹⁷

Verizon already has access to 180 billion MHz/POPs in the mmW bands, and approval of the present transaction would increase Verizon's mmW holdings to approximately 312 billion MHz/POPs. AT&T's planned acquisition of FiberTower's mmW licenses would result in AT&T holding approximately 122 billion MHz/POPs. As a result, Verizon and AT&T would collectively hold more than half of the available 28 GHz spectrum and about two-thirds of the 39

¹⁵ See Applications of AT&T Mobility Spectrum LLC and FiberTower Corporation Seek FCC Consent to the Transfer of Control of 24 GHz and 39 GHz Licenses, ULS File Nos. 0007652635, 0007652637, *Public Notice*, 32 FCC Rcd 1932 (2017).

¹⁶ See Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, WT Docket No. 12-269, Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6133, 6161 ¶ 57 (2014).

¹⁷ See *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12, 269 (filed Apr. 11, 2013).

GHz spectrum before a mmW spectrum auction has even taken place, creating substantial potential harm by foreclosing opportunities for smaller providers and new entrants to offer competitive, affordable, and innovative alternatives to consumers.

B. Granting the Application Would Undermine the Commission’s Credibility on Enforcing its Construction and Discontinuance Rules

Earlier this year, the Commission’s Enforcement Bureau entered into a *Consent Decree* with Straight Path to resolve Straight Path’s violations of the Commission’s buildout and discontinuance rules in connection with Straight Path’s 28 GHz and 39 GHz licenses. As a penalty, Straight Path agreed to pay a \$100M civil penalty, surrender some 39 GHz licenses, and sell the remainder of its spectrum portfolio, remitting twenty percent of the proceeds to the Treasury.¹⁸ However, as a result of the proposed transaction with Verizon, Straight Path stands to receive a post-civil penalty windfall of \$2.38B.¹⁹

As the *Spectrum Frontiers Order* explained, the Commission’s construction and discontinuance requirements are intended “to promote the productive use of spectrum, to encourage licensees to provide service to customers in a timely manner, and to promote the provision of innovative services.”²⁰ In the *Consent Decree*, the Enforcement Bureau explained, in

¹⁸ See Straight Path Communications Inc., Ultimate Parent Company of Straight Path Spectrum, LLC, Straight Path Spectrum, LLC, File No. EB-SED-16-00022575, Acct No. 201732100003, FRN: 0022779334, *Order*, 32 FCC Rcd 284 ¶¶ 1-3 (2017); Straight Path Communications Inc., Ultimate Parent Company of Straight Path Spectrum, LLC, Straight Path Spectrum, LLC, File No. EB-SED-16-00022575, Acct No. 201732100003, FRN: 0022779334, *Consent Decree*, 32 FCC Rcd 286, 288-89 ¶¶ 4-5 (2017) (“*Consent Decree*”).

¹⁹ Verizon has agreed to pay \$3.1B for Straight Path’s licenses. Anjali Athavaley and Rishika Sadam, *Verizon beats AT&T to buy spectrum holder Straight Path*, Reuters, May 11, 2017, <http://www.reuters.com/article/us-straight-path-m-a-verizon-idUSKBN1871HT> (last visited Aug. 10, 2017).

²⁰ *Spectrum Frontiers Order* at 8085 ¶ 191.

the context of Straight Path's violations of the FCC's rules, that several of its construction requirements and discontinuance rules carry a penalty of license termination.²¹

Chairman Pai has emphasized the need for licensees to meet their deployment obligations, and explained that the Commission's lax buildout requirements are particularly detrimental to the rural communities that carriers often choose not to serve.²² Further, Chairman Pai has previously criticized Commission actions and loopholes that "sen[t] the message to big businesses that 'anything goes,'" and "allow big businesses to rip off the American people to the tune of billions of dollars."²³

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. Granting the proposed application also undercuts the Chairman's claims that he will not permit companies that flout the FCC's rules to reap financial rewards for defrauding the public. This is doubly true when considered alongside the Commission's current review of AT&T's proposed acquisition of FiberTower's mmW licenses.²⁴ Approving this transaction will weaken the Commission's efforts to promote rapid deployment of next-generation wireless services by enforcing its rules, and in preventing speculators, who acquire licenses with no intent to meet construction deadlines or serve consumers, from reaping ill-gotten gains by flipping licenses on the secondary market after failing to meet their buildout requirements. It does not serve the public interest to permit Straight

²¹ See *Consent Decree* at 287-88 ¶ 3.

²² See Ajit Pai, Commissioner, Federal Communications Commission, Remarks at the Brandy, Cincinnati OH, A Digital Empowerment Agenda (Sept. 13, 2016) (emphasizing that lax buildout obligations are particularly detrimental to rural communities).

²³ Statement of Commissioner Ajit Pai On Abuse of the Designated Entity Program (Feb. 2, 2015).

²⁴ FiberTower's mmW licenses, which AT&T seeks to acquire, terminated as a matter of law in 2012.

Path to derive financial reward as a result of its failure to meet its obligations under the Commission's rules. Denying the transaction would prevent unjustified windfall profits accruing to Straight Path, and demonstrate that the Commission is serious about enforcing its construction and discontinuance rules and will not allow licensees to defraud the public. In this sense, denying the transaction will have significant public interest benefits.

C. Granting the Application Would Prevent the Commission from Auctioning the Straight Path Spectrum, Harming Taxpayers

Instead of permitting Straight Path to reap a windfall for its failure to adhere to the Commission's construction and discontinuance rules, the Commission should terminate Straight Path's licenses and auction them as soon as possible. Allowing Verizon to acquire licenses that should have been terminated instead of auctioning the licenses will harm taxpayers because it deprives taxpayers of billions of dollars and prevents these licenses from being put to their highest and most valuable use. Auctioning the Straight Path licenses has clear and substantial public interest benefits.

If the Commission approves the Verizon-Straight Path transaction rather than auctioning the licenses, there is potential for public interest harm because the spectrum may not be put to the greatest use. Denying the Applicants' proposed transaction and auctioning the licenses would allow the Straight Path spectrum to be put toward its highest and most valuable use. Further, an auction would give all carriers, including small, competitive carriers that prioritize serving rural and lower income areas, the opportunity to obtain mmW spectrum and provide 5G services to consumers, helping to advance the Commission's goal of closing the digital divide.

As the Commission has recognized, an auction of mmW spectrum would result in the acquisition of a license by the party that values it the most. Interested parties will bid competitively against one another, generating numerous public interest benefits and resulting in a

winner most likely to maximize the use of the licenses, and maximizing the auction proceeds for the Treasury.²⁵ Auctioning the Straight Path spectrum would serve the public interest by providing benefits to taxpayers. This outcome would serve the public interest far better than allowing Straight Path to benefit from its failure to comply with the FCC's construction and discontinuance rules. To the contrary, approving the transaction would permit Straight Path to benefit at the expense of the public interest.

V. CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's proposed acquisition of the Straight Path licenses. The Commission should also auction the Straight Path licenses as soon as possible.

Respectfully submitted,

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²⁵ See *Spectrum Frontiers Order* at 8047 ¶ 84.

DECLARATION

Public Knowledge and New America's Open Technology Institute's Petition to Deny 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 11, 2017

/s/ Phillip Berenbroick

Phillip Berenbroick
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CERTIFICATE OF SERVICE

I, Phillip Berenbroick, hereby certify that on August 11, 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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