

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WIRELESS TELECOMMUNICATIONS, INC.)	File No. 0003130320
)	
Application for Assignment of Broadband Radio)	
Service Licenses WLK341, WNTI856, WMH868,)	
WMI343, and WMH308 to Vermont Telephone)	
Company, Inc.)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 2009

Released: March 16, 2009

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau (Bureau) has before it an application filed by Wireless Telecommunications Inc. (WTCI) seeking to assign the licenses for Broadband Radio Service (BRS) Stations WLK341, WNTI856, WMH868, and WMI343 (collectively Rutland BRS licenses) and BRS Station WMH308 to the Vermont Telephone Company, Inc. (VTEL).¹ We also have before us a petition filed by Utopian Wireless Corporation (Utopian) asking the Bureau to deny the assignment application,² and a Request for an Order to Show Cause filed by Utopian seeking revocation of the Rutland BRS licenses.³ For the reasons discussed below, we find that grant of the assignment application will serve the public interest because it could result in the rapid deployment of services for the benefit of the public and facilitate the resolution of a complicated bankruptcy proceeding. We also dismiss Utopian's Petition to Deny and Request for Order to Show Cause as untimely; and, treating Utopian's pleadings as informal objections, we reject the arguments raised therein and deny the objections.

II. BACKGROUND

2. The licenses subject to the assignment application were originally issued to Satellite Signals of New England Inc. or Sanguinetti Investment Corporation, companies under common control (collectively, SSNE).⁴ SSNE used the Rutland BRS licenses in connection with "Grandpa's Wireless," a wireless cable company operating in Rutland, Vermont and serving 690 customers in 1997.⁵ On August

¹ File No. 0003130320 (filed Aug. 8, 2007) (Assignment Application). Stations WLK341, WNTI856, WMH868, and WMI343 are all located in Rutland, Vermont and Station WMH308 is located in Cornwall, Vermont.

² Petition to Deny or Informal Objection of Application for Assignment (filed Mar. 6, 2008) (Petition to Deny).

³ Request for Order to Show Cause and Consolidated Reply to Oppositions to Petition to Deny or Informal Objection (filed Mar. 27, 2008) (Request for Order to Show Cause). Utopian argues that the Bureau should issue an Order to Show Cause as to why the Rutland BRS licenses should not be revoked.

⁴ See File Nos. BPMD-8313110 (granted Feb. 8, 1988); BPMD-768917 (granted Mar. 22, 1991); BPMD-9250975 (granted May 21, 1992); BPMD-92510123 (granted May 7, 1992); BPMD-8311305 (granted Dec. 12, 1991).

⁵ Opposition to Petition to Deny or Informal Objection of Application for Assignment (filed Mar. 16, 2008) (SSNE Opposition) at 2-3.

19, 1997, SSNE executed an Asset Purchase Agreement to sell the non-license assets of Grandpa's Wireless to WTCI.⁶ The Asset Purchase Agreement included an option that, if exercised, would have permitted WTCI to purchase the licenses for the BRS stations, subject to specific terms and conditions.⁷ In addition to the Asset Purchase Agreement, SSNE and WTCI entered into a lease agreement, which permitted WTCI to lease the channels from SSNE.⁸ After the Asset Purchase Agreement was executed, WTCI began operating Grandpa's Wireless.⁹ On June 9, 2000, WTCI was placed into involuntary bankruptcy.¹⁰ The licenses at issue in this *Memorandum Opinion and Order* are part of WTCI's bankruptcy estate.

3. On March 1, 2004, SSNE and WTCI entered into another Asset Purchase Agreement in which SSNE agreed, in relevant part, to assign the Rutland BRS licenses and the license for BRS Station WMH308 to WTCI, subject to the approval of the Bankruptcy Court and the Commission.¹¹ On June 22, 2004, SSNE filed an application with the Commission to assign the Rutland BRS licenses and the license for BRS Station WMH308 to WTCI.¹² This assignment application was granted by the Wireless Telecommunications Bureau on August 24, 2004.¹³

4. On August 8, 2007, the United States Bankruptcy Court for the Middle District of Pennsylvania entered an order that, *inter alia*, approved the sale of the Rutland BRS licenses and the license for Station WMH308 from WTCI to VTEL.¹⁴ On the same date, WTCI filed an application with the Commission to assign the Rutland BRS licenses and the license for BRS Station WMH308 to VTEL.¹⁵ VTEL, a Vermont corporation, and its wholly-owned wireless subsidiary, VTEL Wireless, Inc., ("VTW"), currently hold licenses in the broadband Personal Communications Services ("PCS"), Advanced Wireless Services ("AWS-1"), and the 700 MHz Band.¹⁶ According to the Assignment Application, VTEL's primary business is telecommunications, serving 14 towns and villages in southern Vermont, and upon grant and consummation of the proposed license assignment, VTEL plans to use the subject spectrum to "provide competitive broadband wireless services primarily to residential and small business customers in rural portions of Vermont and New Hampshire."¹⁷ Public notice of the filing of the

⁶ Petition to Deny, Exhibit I at 19 and Exhibit II at 1; Supplement to Opposition to Petition to Deny or Informal Objection of Application for Assignment at attachment.

⁷ Supplement to Response to Informal Objection at 1 (filed Mar. 25, 2008).

⁸ Response to Informal Objection, Exhibit No. 3 at 6 and Exhibit No. 9 at 1 (filed Mar. 21, 2008).

⁹ WTCI Supplement, Exhibit No. 7 at 2.

¹⁰ WTCI Supplement, Exhibit No. 7 at 2.

¹¹ Petition to Deny at Exhibit III.

¹² File No. 20040622AAA (2004 Assignment Application).

¹³ See Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control Licensee Applications, *De Facto* Transfer Lease Applications and Spectrum Manager Lease Notifications Action, Report No. 1939, *Public Notice* (Sep. 15, 2004) at 23.

¹⁴ See Wireless Telecommunications, Inc., *et al.*, Order, Case No. 5-02-03994 JJT (Bank. Ct. M.D. PA Aug. 8, 2007) ("*Bankruptcy Court Order*").

¹⁵ Assignment Application.

¹⁶ Assignment Application, Public Interest Statement (filed Aug. 8, 2007) at 4.

¹⁷ *Id.*

assignment application was given on August 15, 2007.¹⁸ Petitions to deny the application were due by August 29, 2007.¹⁹ No petitions to deny were filed during this period.

5. On March 6, 2008, Utopian filed a petition to deny the Assignment Application.²⁰ Utopian leases three Educational Broadband Service (EBS) licenses in Rutland, Vermont.²¹ Utopian requests a waiver of Section 1.939(a) of the Commission's Rules²² to permit it to file a petition to deny more than thirty days after WTCI's Assignment Application was placed on public notice indicating that the assignment application was accepted for filing.²³ Utopian asks the Bureau to consider its late-filed petition because, Utopian asserts, the Bureau removed WTCI's Assignment Application from the Commission's general application processing twice.²⁴ In its Request for Order to Show Cause, Utopian claims that its petition is not late-filed because on March 25, 2008, the Assignment Application once again appeared on public notice as removed from general application processing.²⁵ Moreover, Utopian asserts, the Bureau has not yet made a decision on the application.²⁶

6. Utopian asks that the Bureau deny the Assignment Application because, Utopian asserts, the Rutland BRS stations have not been operational since 1997, and therefore, under Section 21.44(a)(3) of the Commission's Rules, the stations were automatically cancelled and accordingly cannot be assigned.²⁷ In the alternative, Utopian asks the Bureau to revoke the licenses for the BRS stations because of willful misrepresentations allegedly made by SSNE and WTCI to the Commission in connection with the 2004 Assignment Application.²⁸ Utopian also argues that the Assignment Application should be denied because it would create a concentration of spectrum in the control of VTEL, the incumbent local exchange carrier and incumbent Digital Subscriber Line (DSL) provider.²⁹ SSNE,³⁰ WTCI,³¹ and VTEL³² filed oppositions to the Petition to Deny. SSNE³³ and WTCI³⁴ also filed supplements to their respective oppositions.

¹⁸ Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and De Facto Transfer Lease Applications, and Designated Entity Reportable Eligibility Event Applications Accepted for Filing, *Public Notice*, Report No. 3377 (rel. Aug. 15, 2007) at 1.

¹⁹ *Id.*, see also 47 C.F.R. § 1.948(j)(1)(iii).

²⁰ Petition to Deny.

²¹ Petition to Deny at 1 n.1.

²² 47 C.F.R. § 1.939(a).

²³ Motion to Accept Petition to Deny of Application for Assignment and Request for Waiver of Section 1.939 of the Commission Rules (filed Mar. 6, 2008) at 1 n.1 (Motion to Accept Petition to Deny).

²⁴ Motion to Accept Petition to Deny at 1-2 n.3.

²⁵ Request for Order to Show Cause at 27 n.95.

²⁶ *Id.* at 1.

²⁷ Petition to Deny at 3-4, i.

²⁸ *Id.* at 5-9.

²⁹ *Id.* at 9-10.

³⁰ SSNE Opposition.

³¹ Response to Informal Objection (filed Mar. 21, 2008) (WTCI Response).

³² Opposition to Petition to Deny or Informal Objection of Application for Assignment (filed Mar. 19, 2008) (VTEL Opposition).

³³ Supplement to Opposition to Petition to Deny or Informal Objection of Application for Assignment (filed Mar. 27, 2008) (SSNE Supplement).

7. After WTCI opposed Utopian's Petition to Deny, Utopian filed the Request for Order to Show Cause.³⁵ In addition to replying to the oppositions filed against the Petition to Deny, Utopian makes the new argument that the Bureau should revoke the license for BRS Station WMH308 (Cornwall, VT), in addition to the Rutland BRS licenses, because WMH308 was never constructed.³⁶ Utopian also elaborates on its argument that grant of the Assignment Application would be anticompetitive because it would create a concentration of spectrum in the control of VTEL.³⁷ Specifically, Utopian contends that the Assignment Application should be subject to the spectrum screen the Commission uses to evaluate certain transactions.³⁸ SSNE filed an opposition to Utopian's Request for Order to Show Cause.³⁹ The parties have also filed numerous motions.⁴⁰

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

8. Pursuant to Section 310(d) of the Communications Act⁴¹ and the Commission's license assignment and transfer of control proceedings, we must determine whether the Applicants have demonstrated that the proposed assignment would serve the public interest, convenience, and necessity. In applying our public interest test, we must assess whether the proposed assignment complies with the specific provisions of the Communications Act,⁴² other applicable statutes, and the Commission's

(...continued from previous page)

³⁴ Supplement to Response to Informal Objection (filed Mar. 25, 2008) (WTCI Supplement).

³⁵ Request for Order to Show Cause.

³⁶ *Id.* at 17-18.

³⁷ *Id.* at 20-26.

³⁸ *Id.* at 23-25.

³⁹ Response to Request for Order to Show Cause and Consolidated Reply to Oppositions to Petition to Deny or Informal Objection (filed May 9, 2008) (SSNE Response to Order to Show Cause).

⁴⁰ Motions for Extension of Time, Wireless Telecommunications, Inc. (filed Mar. 19, Mar. 29, Apr. 9, Apr. 14, and Apr. 21, 2008). Motion to Deny Unauthorized Responsive Pleading and Related Motion for Extension of Time, Utopian Wireless Corporation (filed Apr. 10, 2008). SSNE requested leave to file under Section 1.939(f) of the Commission's Rules. SSNE Opposition at 1. SSNE moved to dismiss Utopian's petition because it failed to serve SSNE as an interested party. SSNE Response to Order to Show Cause at 2-3. Utopian subsequently sought to waive the service rule. Motion to Dismiss or, Alternately, Reply to SSNE's Response (filed May 21, 2008) at n.1.

⁴¹ 47 U.S.C. § 310(d).

⁴² Section 310(d), 47 U.S.C. § 310(d), requires that we consider applications for transfer of control as if the proposed transferee were applying for the licenses directly under Section 308 of the Act, 47 U.S.C. § 308. *See, e.g.*, Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order & Declaratory Ruling*, 23 FCC Rcd 17444, 17464 ¶ 26 & n.136 (2008) ("*Verizon-ALLTEL Order*"); Applications of Sprint Nextel Corporation and Clearwire Corporation For Consent to Transfer Control of Licenses, Leases and Authorizations, WT Docket No. 08-94, *Memorandum Opinion and Order*, 23 FCC Rcd 17570, 17579 (2008) at ¶ 19 & n.69 ("*Sprint Nextel-Clearwire Order*"); Application of AKD Holdings, LLC, Alaska DigiTel, LLC, and GCI, Inc. For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 08-10, *Memorandum Opinion and Order*, DA 08-1882, at ¶ 12 (WTB rel. Aug. 8, 2008) ("*GCI-Alaska DigiTel II Order*"); Applications of Celco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation For Consent To Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases, WT Docket No. 07-208, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 12463, 12476-77 ¶ 26 (2008) ("*Verizon-RCC Order*"); Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, *Memorandum Opinion and Order*, 22 FCC Rcd 20295, 20301 ¶ 10 (2007) ("*AT&T-Dobson Order*").

applicable rules and policies.⁴³ If a proposed assignment does not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.⁴⁴ The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.⁴⁵ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.⁴⁶ If the record presents a substantial and material question of fact whether the application would serve the public interest, convenience and necessity, then we must designate the application for hearing under Section 309(e) of the Communications Act.⁴⁷

IV. DISCUSSION

A. Procedural Issues

9. As an initial matter, we find that Utopian has not justified a waiver of Section 1.948(j) of the Commission's Rules⁴⁸ to permit it to file a petition to deny substantially more than fourteen days after WTCI's Assignment Application was placed on public notice accepting it for filing.⁴⁹ Specifically, Utopian has not demonstrated that: (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁵⁰

10. First, none of Utopian's arguments persuade us that the underlying purpose of the deadline established by Section 1.948(j) – efficiency and regulatory certainty in the application review process – would not be served by applying the rule to the instant case. While Utopian asserts that the Bureau's actions to remove the assignment application from general processing undermine the filing deadline in

⁴³ See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17464 ¶ 26 & n.136; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 & n.69; *GCI-Alaska DigiTel II Order*, DA 08-1882, at ¶ 12; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10.

⁴⁴ See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17464 ¶ 26 & n.136; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 & n.69; *GCI-Alaska DigiTel II Order*, DA 08-1882, at ¶ 12; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10.

⁴⁵ See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17464 ¶ 26 & n.136; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 & n.69; *GCI-Alaska DigiTel II Order*, DA 08-1882, at ¶ 12; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10.

⁴⁶ See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17464 ¶ 26 & n.136; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 & n.69; *GCI-Alaska DigiTel II Order*, DA 08-1882, at ¶ 12; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10.

⁴⁷ 47 U.S.C. § 309(e). See also *Verizon-ALLTEL Order*, 23 FCC Rcd at 17464 ¶ 26 & n.136; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 & n.69; *GCI-Alaska DigiTel II Order*, DA 08-1882, at ¶ 14; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10.

⁴⁸ We note that, while Utopian has requested a waiver of Section 1.939(a) of the Commission's rules, 47 C.F.R. § 1.939(a), the procedural rule applicable to the instant case is Section 1.948(j)(1)(iii), 47 C.F.R. § 1.948(j)(1)(iii), which provides a 14-day period for filing petitions to deny against assignment applications. We therefore evaluate whether Utopian has justified a waiver of Section 1.948(j)(1)(iii).

⁴⁹ Motion to Accept Petition to Deny at 1 n.1. Utopian filed its petition more than six months after the public notice accepting the assignment application for filing.

⁵⁰ 47 C.F.R. § 1.925(b)(3).

Section 1.948(j), the relevant rules do not support that interpretation. Under the Commission's general approval procedures, within 21 days after an assignment application is accepted for filing, the Bureau must consent to the application, deny the application, or decide to subject the application to further review.⁵¹ Every 90 days after the Bureau decides to subject an application to further review, it must either consent to the application or issue another public notice extending the review period by an additional 90 days.⁵² The same rule section establishes the deadline for filing petitions to deny, but does not open a new window for petitions to deny if an application is subject to further review.⁵³ Second, we find that Utopian does not present any unique or unusual factual circumstances that warrant grant of a waiver. While Utopian claims that it has discovered new material evidence regarding discontinuance of operation that was unavailable by the filing deadline,⁵⁴ Utopian fails to demonstrate that it could not have obtained the information earlier through other means.

11. While we decline to grant Utopian's request for waiver of Section 1.948(j) to permit late filing of its Petition to Deny, we will instead treat the pleading as an informal objection under Section 1.41 of the Commission's Rules, and we consider below the substantive arguments raised therein.⁵⁵ Similarly, while we recognize that Utopian's Request for Order to Show Cause is procedurally defective because the Commission does not recognize motions to revoke,⁵⁶ we will treat the pleading as an informal objection and address below the substantive arguments raised therein.⁵⁷

B. Qualifications of Applicants

12. In evaluating whether the parties meet the requisite qualifications to hold and assign licenses under Section 310(d) of the Communications Act and the Commission's rules,⁵⁸ the Commission does not, as a general rule, re-evaluate the qualifications of assignors unless issues related to basic

⁵¹ See 47 C.F.R. § 1.948(j)(1)(iv).

⁵² See 47 C.F.R. § 1.948(j)(1)(v).

⁵³ See 47 C.F.R. § 1.948(j)(1)(iii).

⁵⁴ Motion to Accept Petition to Deny at 2. Utopian asserts that this new information was discovered in a deposition taken of Ms. Lee Bonamico, an officer in Sanguinetti Investment Corporation in a matter unrelated to the assignment of the BRS stations and Station WMH308. *Id.* at 3.

⁵⁵ Under Section 1.41 of the Commission's rules, we have discretion to consider Utopian's Petition to Deny as an informal objection. 47 C.F.R. § 1.41.

⁵⁶ See Danbury Cellular Telephone Company, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 4186 ¶ 3 (1991) (citations omitted) (Commission does not recognize motions to revoke because commencing revocation proceedings is a matter wholly within the Commission's discretion).

⁵⁷ *Id.* at n.2, see also 47 C.F.R. § 1.41. Because we are treating Utopian's pleadings as informal objections, the procedural deadlines contained in Section 1.45 of the Commission's Rules do not apply. See R&R Radio Corp., *Letter*, DA 08-2467 (MB rel. Nov. 7, 2008) at n.2. We therefore consider all pleadings filed in this proceeding in order to ensure a complete record.

⁵⁸ See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see also *Verizon-RCC Order*, 23 FCC Rcd at 12477-78 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 11; Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., WT Docket No. 05-339, *Memorandum Opinion and Order*, 21 FCC Rcd 11526, 11536 ¶ 17 (2006) ("*ALLTEL-Midwest Wireless Order*"); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13979 ¶ 24 (2005) ("*Sprint-Nextel Order*"); Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13063 ¶ 18 (2005) ("*ALLTEL-Western Wireless Order*"); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21546 ¶ 44 (2004) ("*Cingular-AT&T Wireless Order*").

qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant designation for hearing.⁵⁹

13. We are unconvinced by Utopian's claims that SSNE and WTCI engaged in misrepresentation or lack of candor when SSNE assigned the BRS stations and Station WMH308 to WTCI in March 2004.⁶⁰ With respect to the character qualifications of SSNE, we observe that the licenses in question were assigned from SSNE to WTCI five years ago, and no question was raised about SSNE's character qualifications during the pendency of that application.⁶¹ As for WTCI, Utopian claims that SSNE and WTCI misled the Commission in response to questions 13(a) and 16(b) on the Form 305 filed to request the Commission's consent to the assignment.⁶² In response to question 13(a), which asks whether the assignee (WTCI) or any other party to the application had any FCC station license revoked or had any license or renewal denied by the Commission, WTCI answered that there was no such revocation of which it was aware.⁶³ Utopian alleges that the answer was false because certain BRS licenses originally issued to SSNE automatically cancelled for failure to make installment payments.⁶⁴ Assuming, *arguendo*, that the response was incorrect, the *sine qua non* of misrepresentation or lack of candor is intent to deceive the Commission.⁶⁵ The Commission has declined to infer intent to deceive the Commission when information is elsewhere disclosed or available in its records.⁶⁶ Here, because the automatic cancellation of SSNE's licenses was an event known to the Bureau, we cannot conclude, absent other evidence, that WTCI was attempting to conceal this action from the Bureau. Utopian has not provided other evidence of WTCI's intent. We therefore find that Utopian has failed to make a *prima facie* case of intent.

14. In responding to question 16(b), which asks whether the transferee has "examined the subject facilities and determined that construction and operation are in compliance with the current authorization and the Commission's Rules," Utopian asserts that WTCI failed to disclose the BRS stations' noncompliance with the Commission's operational rules and was "purposely evasive" as to the status of the facilities.⁶⁷ With respect to question 16(b), since SSNE had received a waiver of the

⁵⁹ See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17465 ¶ 33; *Verizon Wireless-RCC Order*, 23 FCC Rcd at 12477-78 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063-64 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44. See also Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. See *id.*

⁶⁰ Petition to Deny at 5-9, Request for Order to Show Cause at 18-20.

⁶¹ See 2004 Assignment Application.

⁶² Request for Order to Show Cause at 18-20.

⁶³ Petition to Deny at 8.

⁶⁴ *Id.* The licenses in question were for BTA 063, Burlington, Vermont, and BTA 388, Rutland Vermont. The Burlington license automatically cancelled on September 29, 1998, and the Rutland license automatically cancelled on November 28, 1998. See *Satellite Signals of New England, Inc., Order*, 22 FCC Rcd 1937, 1940-1941 ¶ 7 (WTB 2007).

⁶⁵ See *Fox River Broadcasting, Inc., Memorandum Opinion and Order*, 93 FCC 2d 127, 129 ¶ 6 (1983).

⁶⁶ See Joseph W. Bollinger and Donna M. Bollinger, *Memorandum Opinion and Order*, 16 FCC Rcd 18107, 18109 ¶ 5 (2001).

⁶⁷ Petition to Deny at 6-7; Request for Order to Show Cause at 18-19.

discontinuance of service rule, the facilities were in compliance with the Commission's rules. Utopian has therefore failed to show that the answer was inaccurate.

15. Utopian also asserts that the Rutland BRS stations have not been operational since 1997, and therefore, under Section 21.44(a)(3) of the Commission's Rules, the stations were automatically cancelled and accordingly cannot be assigned.⁶⁸ Utopian fails to note, however, that SSNE had twice asked for and received a waiver of the discontinuance of service rules⁶⁹ that permitted SSNE to discontinue service until the Commission eliminated the discontinuance of service rules on January 10, 2005.⁷⁰ Specifically, on January 29, 2002, the former Mass Media Bureau granted SSNE's November 2, 2001 request for waiver of the discontinuance of service rules in Section 21.303(d) of the Commission's Rules.⁷¹ Then, on September 24, 2004, the Wireless Telecommunications Bureau granted SSNE's February 5, 2004 request for a waiver of the discontinuance of service rules in former Section 21.303(c) of the Commission's Rules.⁷² Utopian also alleges that Station WMH308 was never properly constructed.⁷³ Utopian's allegations are based on vague statements contained in Ms. Bonamico's deposition.⁷⁴ We have previously declined to reach a conclusion that a license cancelled based on vague statements.⁷⁵ Similarly, in this case, the record is insufficient for us to conclude that SSNE did not comply with the terms of the authorization for Station WMH308.

16. In addition, Utopian alleges that the Rutland BRS licenses should be revoked because there was an unauthorized transfer of control between SSNE and WTCI.⁷⁶ Even assuming, *arguendo*, that an unauthorized transfer of control took place, the Commission has held that an unauthorized transfer of

⁶⁸ Petition to Deny at 3-4, i. Section 21.44(a)(3) of the Commission's Rules, states that "[a] license shall be automatically forfeited in whole or in part without further notice to the licensee upon [t]he voluntary removal or alteration of the facilities, so as to render the stations not operational for a period of 30 days or more." 47 C.F.R. §21.44(a)(3) (2004).

⁶⁹ 47 C.F.R. § 21.303(d) (2004).

⁷⁰ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14254 ¶ 231 (2004) (*BRS/EBS R&O and FNPRM*, as appropriate).

⁷¹ Letters from Stephen Svab, Attorney, MDS Section, Video Services Division, Mass Media Bureau to E. Nicholas Sanguinetti, Sanguinetti Investment Corporation (dated Jan. 29, 2002). We note that under that under the old MDS rules, there were two rules addressing discontinuance of service – Section 21.44, as noted above, and Section 21.303 of the Commission's Rules. Section 21.303(d) of the Commission's Rules requires the licensee to take one of three actions "if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed. . . ." The three potential actions are (1) submitting its station license for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver and an extension in the time permitted for resuming operation, pursuant to Section 21.303(d)(3). We believe that the waiver granted by the former Mass Media Bureau necessarily covered SSNE's period of non-operation, whether viewed by the 30-day period of 21.44 or the 12-month period of 21.303.

⁷² Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, 19 FCC Rcd 18752 (WTB BD 2004) (*2004 Public Notice*). In granting waivers of the discontinuance of service rules, the Broadband Division waived both Sections 21.44 and 21.303, as needed. *Id.*

⁷³ Request for Order to Show Cause at 17-18.

⁷⁴ *Id.*

⁷⁵ See Rohel Pascual, *Memorandum Opinion and Order*, 22 FCC Rcd 867 (WTB BD 2007) (Division rejects argument that license cancelled based on vague statement by engineer).

⁷⁶ Request for Order to Show Cause at 16-17.

control does not provide a basis for instituting a revocation proceeding in the absence of misrepresentation or other intent to deceive the Commission.⁷⁷ Utopian has failed to make the requisite showing of intent to deceive.

C. Competitive Analysis

17. Consistent with the Commission's practice when reviewing proposed wireless transactions affecting the mobile telephony/broadband market, we consider the potential competitive harms associated with this assignment application.⁷⁸ First, we define the relevant product and geographic markets.

18. *Product Market.* In reviewing this proposed spectrum transfer application, we apply the same product market definition for mobile telephony/broadband services as applied by the Commission in recent transactions.⁷⁹ Although the Commission has determined that there are separate relevant product markets for interconnected mobile voice services and mobile data services, and also for residential services and enterprise services,⁸⁰ it nevertheless analyzes all of these product markets under the combined market for mobile telephony/broadband services.⁸¹ Based on consideration of various factors, including the nature of these services and their relationship with each other, the Commission has determined that this approach provides a reasonable assessment of any potential competitive harm resulting from transactions.⁸²

19. *Geographic Market.* The Commission applies the "hypothetical monopolist test" to relevant geographic markets and found that they are local, larger than counties, may encompass multiple counties, and, depending on the consumer's location, may even include parts of more than one state.⁸³ The Commission uses two sets of geographic areas that effectively may be used to define local markets – Component Economic Areas ("CEAs") and Cellular Market Areas ("CMAs").⁸⁴ Because these two sets of geographic areas come separately from the demand and supply sides – demand in the case of CEAs, supply in the case of CMAs – the Commission finds them to be useful cross-checks on each other and,

⁷⁷ See Alliance for Higher Education, *Memorandum Opinion and Order*, 19 FCC Rcd 4569, 4573-4574 (WTB BD 2004), citing, e.g., Roy M. Speer, et al., *Memorandum Opinion and Order and Notice of Apparent Liability*, 11 FCC Rcd 18393, 18428 ¶ 88 (1996).

⁷⁸ See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12481-83 ¶¶ 31-35.

⁷⁹ *Verizon-ALLTEL Order*, 23 FCC Rcd at 17469-70 ¶¶ 45-47; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17586-89 ¶¶ 38-45.

⁸⁰ See *Verizon-ALLTEL Order*, 23 FCC Rcd at 17470 ¶ 45 n.198; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17586 ¶ 38 n.106; *Verizon-RCC Order*, 23 FCC Rcd at 12483-84 ¶ 37; *AT&T-Dobson Order*, 22 FCC Rcd at 20308 ¶ 21.

⁸¹ See *Verizon-ALLTEL Order*, 23 FCC Rcd at 17469-70 ¶¶ 45-47; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 n.69; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 37; *AT&T-Dobson Order*, 22 FCC Rcd at 20308 ¶ 21.

⁸² See *Verizon-ALLTEL Order*, 23 FCC Rcd at 17469-70 ¶¶ 45-47; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 n.69; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 37; *AT&T-Dobson Order*, 22 FCC Rcd at 20308 ¶ 21.

⁸³ See *Verizon-ALLTEL Order*, 23 FCC Rcd at 17470-71 ¶ 49; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 n.69; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 38; *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23.

⁸⁴ See *Verizon-ALLTEL Order*, 23 FCC Rcd at 17471 n.200; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17591 n.136; *Verizon-RCC Order*, 23 FCC Rcd at 12484 n.151; *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23; *GCI-Alaska DigiTel I Order*, 21 FCC Rcd at 14876-77 ¶ 27.

together, they help ensure that the Commission's analysis does not overlook local areas that require more detailed analysis.⁸⁵

20. *Input Market for Spectrum.* Consistent with the Commission's recent wireless transaction orders, we also examine this transaction in light of the input market for spectrum associated with the provision of mobile telephony/broadband services in the affected markets. In the *Verizon-ALLTEL* and *Sprint Nextel-Clearwire* orders, adopted in November 2008, the Commission determined that the input market would vary depending on the "suitable" spectrum available in the particular market affected by the transaction. Specifically, the Commission found that spectrum suitable for the provision of mobile telephony/broadband services includes approximately 280 megahertz of cellular, broadband PCS, Specialized Mobile Radio ("SMR"), and 700 MHz band spectrum that is available for the provision of mobile telephony/broadband services on a nationwide basis,⁸⁶ as well as the 90 megahertz of Advanced Wireless Service spectrum in the 1.7/2.1 GHz band ("AWS-1") and the 55.5 megahertz of contiguous Broadband Radio Service ("BRS") spectrum in the 2.5 GHz band to the extent such spectrum also is available for the provision of mobile telephony/broadband services.⁸⁷

21. *Market Participants.* Consistent with the recent wireless transaction orders, when computing initial measures of market concentration, we limit our analysis of this transaction involving mobile telephony/broadband services to cellular, PCS, and SMR facilities-based service providers, and excluded satellite service providers, nomadic wireless Voice over Internet Protocol ("VoIP") providers, mobile virtual network operators ("MVNOs"), and resellers from consideration.⁸⁸ In addition, to the extent that entities provide facilities-based mobile telephony/broadband services using 700 MHz, AWS-1, and BRS spectrum, we also consider them to be market participants.⁸⁹

22. *Initial Screen.* When examining the effect of proposed transactions, the Commission applies a two-part initial "screen," followed by a further case-by-case review of the markets identified by that screen. As discussed in previous wireless transaction orders, the purpose of this initial screen is to eliminate from further review those markets in which there is clearly no competitive harm in today's generally competitive marketplace.⁹⁰ For those markets that are identified by the initial screen, we then conduct, on a market-by-market basis, an analysis of other market factors that pertain to competitive effects, including the incentive and ability of other existing firms to react and of new firms to enter the market, in response to attempted exercises of market power by the merged entity. Ultimately, we must assess whether the combined firm, or as in this case, the assignee, could likely exercise market power in

⁸⁵ See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17470-71 ¶ 49; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17579 ¶ 19 n.69; *Verizon-RCC Order*, 23 FCC Rcd at 12476-77 ¶ 39; *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23.

⁸⁶ *Verizon-ALLTEL Order*, 23 FCC Rcd at 17473 ¶ 53; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17591-92 ¶ 53.

⁸⁷ *Verizon-ALLTEL Order*, 23 FCC Rcd at 17473-74 ¶¶ 53-55; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17591-92 ¶¶ 53-55.

⁸⁸ See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17480-81 ¶ 71; *Sprint-Clearwire Order*, 22 FCC Rcd at 17600 ¶ 75; *AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 32; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 91.

⁸⁹ See *Verizon-ALLTEL Order*, 23 FCC Rcd at 17481 ¶ 71; *Sprint-Clearwire Order*, 22 FCC Rcd at 17600-01 ¶ 75; *AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36.

⁹⁰ See, e.g., *Verizon ALLTEL Order*, 23 FCC Rcd at 17481-82 ¶ 75; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17601 ¶ 76; *Verizon Wireless-RCC Order*, 22 FCC Rcd at 12489 ¶ 51; *AT&T-Dobson Order*, 22 FCC Rcd at 20317 ¶ 39; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11547 n.151; *Sprint-Nextel Order*, 20 FCC Rcd at 13993 ¶ 62; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073-74 ¶ 48; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106-109.

any particular market.⁹¹

23. The first part of this screen examines changes in the measures of the Herfindahl-Hirschman Index (“HHI”) of market concentration in each affected market, which is calculated based on providers’ subscriber market shares.⁹² Our initial HHI screen identifies, for further case-by-case analysis, those markets in which, post-transaction: (1) the HHI would be greater than 2800 and the change in HHI would be 100 or greater or (2) the change in HHI would be 250 or greater, regardless of the level of the HHI.⁹³ In this assignment application, the record indicates that there is no transfer of mobile telephony/broadband service customers from WTCI to VTEL. Although Utopian contends that this proposed assignment will give VTEL, an incumbent local exchange provider, too much market power in broadband services, it does not claim that this assignment application triggers the Commission’s HHI screen.⁹⁴ Therefore, we find that this assignment application does not trigger the first part of the Commission’s competitive analysis screen for the mobile telephony/broadband services market.

24. The second part of this screen examines the input market for spectrum available for the provision of mobile telephony/broadband services in each of the affected markets.⁹⁵ This spectrum aggregation screen varies depending on whether, in addition to the 280 megahertz of cellular, broadband PCS, SMR, and 700 MHz spectrum, there also is AWS-1 and/or BRS spectrum available *locally* in the affected market.⁹⁶ In markets in which neither AWS-1 nor BRS spectrum is available, the spectrum screen identifies for further competitive review each market in which the proposed spectrum aggregation would amount to 95 megahertz or more of spectrum.⁹⁷ In other markets where AWS-1 and/or BRS spectrum is in fact available, the Commission applies a higher spectrum screen.⁹⁸

25. Utopian argues that assignment of the licenses for the BRS Stations to VTEL would create a concentration of spectrum sufficient to trigger the Commission’s initial spectrum screen because VTEL holds 68 MHz of combined PCS and 700 MHz spectrum and the assignment of the licenses for the BRS stations would give VTEL another 51 MHz of spectrum.⁹⁹ As a consequence, Utopian asks the Bureau to

⁹¹ *Verizon-ALLTEL Order*, 23 FCC Rcd at 17468-69 ¶ 41; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17583 ¶24; *Verizon Wireless-RCC Order*, 23 FCC Rcd at 12482 ¶ 32; *AT&T-Dobson Order*, 22 FCC Rcd at 20307 ¶ 16.

⁹² *Verizon-ALLTEL Order*, 23 FCC Rcd at 17468-69 ¶ 41; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17601 ¶ 76; *Verizon-RCC Order*, 23 FCC Rcd at 12482, ¶ 32; *AT&T-Dobson Order*, 22 FCC Rcd at 20306 ¶ 15.

⁹³ *Verizon-ALLTEL Order*, 23 FCC Rcd at 17482-83 ¶ 78; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17601 ¶ 76; *Verizon-RCC Order*, 23 FCC Rcd at 12489-90 ¶ 52; and *AT&T-Dobson Order*, 22 FCC Rcd 20317-18 ¶ 40.

⁹⁴ Petition to Deny at 2. 10; Order to Show Cause at 26.

⁹⁵ *Verizon-ALLTEL Order*, 23 FCC Rcd at 17468-69 ¶ 41; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17591-92, 17607 ¶¶ 53-55, 77.

⁹⁶ See *Verizon-ALLTEL Order*, 23 FCC Rcd at 17468-69 ¶ 41; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17591-92 ¶ 53. For markets in which only cellular, PCS, SMR, and 700 MHz spectrum is available, and neither AWS-1 nor BRS spectrum is available, the Commission applies a 95 megahertz spectrum screen. For markets in which AWS-1 and BRS spectrum is available, the applicable screen is 145 megahertz. For markets in which AWS-1 is available but BRS is not available, the Commission applies a spectrum screen of 125 megahertz. Finally, for markets in which BRS is available but AWS-1 is not available, the Commission applies a spectrum screen of 115 megahertz. *Verizon-ALLTEL Order*, 23 FCC Rcd at 17477-78 ¶ 64; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17600 ¶ 74.

⁹⁷ *Verizon-ALLTEL Order*, 23 FCC Rcd at 17477-78 ¶ 64; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17600 ¶ 74.

⁹⁸ *Supra* note 96.

⁹⁹ Request for Order to Show Cause at 24-25.

undertake a case-by-case analysis of the assignment of the BRS Stations to VTEL.¹⁰⁰

26. After a review of the record, we find that the assignment application does not meet the threshold of the Commission's spectrum screen to warrant further competitive analysis. All of the stations subject to the assignment application are BRS stations, so the only additional spectrum being obtained by VTEL here is BRS spectrum. Within the Rutland Vermont BTA (BTA388), BRS stations WLK341, WNTI856, WMH868, and WMI343 are being assigned. Because the BRS transition is not complete in the Rutland Vermont BTA,¹⁰¹ these four BRS stations do not qualify as additional spectrum for purposes of the spectrum aggregation screen.

27. The remaining assignment, Station WMH308, is located in the Burlington, Vermont BTA (BTA063). The transition of BRS spectrum is complete in the Burlington, VT BTA; therefore 55.5 megahertz of BRS spectrum is included in the screen. In addition, AWS-1 spectrum is also available in the nine counties that comprise the geographic service area (GSA) for Station WMH308;¹⁰² therefore the trigger for the counties in the GSA for Station WMH308 is 145 megahertz.

28. VTEL holds 12 to 54 megahertz of spectrum suitable for the provision of mobile telephony/broadband services on a county-by-county basis in the Station WMH308 GSA,¹⁰³ and as a result of the proposed assignment VTEL would acquire an additional 22.5 megahertz of BRS spectrum within this GSA. Therefore post-transaction VTEL's spectrum aggregation on a county-by-county basis for this GSA would be 34.5 to 76.5 megahertz, which falls well below the 145 megahertz of spectrum threshold that would warrant further competitive analysis.¹⁰⁴

29. Utopian asks the Bureau to consider other effects of this assignment application that it considers to be anti-competitive.¹⁰⁵ Specifically, Utopian alleges that grant of the Application "would provide [VTEL], a monopoly incumbent local exchange carrier in the areas surrounding Rutland, VT, which are covered by the BRS Stations, with a near monopoly in the broadband services market in the areas served by [VTW]."¹⁰⁶ Utopian further claims that VTEL "is incentivized to protect its monopoly DSL service by limiting Vermont consumer choices in broadband services."¹⁰⁷ According to Utopian, VTEL is providing DSL to customers in southern Vermont and claims to have the highest DSL penetration rate in the country.¹⁰⁸ Therefore, in this case, the Commission should consider the

¹⁰⁰ *Id.* at 24.

¹⁰¹ WT Docket No. 06-136.

¹⁰² The GSA of Station WMH308 covers portions of seven counties in Vermont and two counties in New York. The seven Vermont counties are Addison, Chittenden, Essex, Orange, Rutland, Washington, and Windsor. The two New York counties are Warren and Washington.

¹⁰³ We note that VTEL stated in a March 2008 pleading that it held "a combined 68 MHz of broadband PCS and 700 MHz spectrum," but not "throughout its entire wireless footprint including in the Rutland, VT area." Opposition at 3 & n.4. According to the Commission's Universal Licensing System database, VTEL's current holdings of spectrum suitable for the delivery of mobile telephony/broadband services in the counties included in the Station WMH308 GSA are as follows: 22 megahertz in Addison (VT); 54 megahertz in Chittenden (VT); 12 megahertz in Essex (VT); 12 megahertz in Orange (VT); 37 megahertz in Rutland (VT); 22 megahertz in Washington (VT); 22 megahertz in Windsor (VT); 12 megahertz in Warren (NY); and 12 megahertz in Washington (NY). See <http://wireless.fcc.gov/uls>.

¹⁰⁴ Even assuming, for the sake of argument, that Utopian were correct that VTEL should be attributed with 119 megahertz of spectrum, post-assignment, that would not be sufficient to meet the 145 megahertz threshold for further analysis.

¹⁰⁵ *Id.*; Petition to Deny at 2.

¹⁰⁶ Petition to Deny at 2.

¹⁰⁷ *Id.* at 10.

¹⁰⁸ Order to Show Cause at 26.

competitive effects of “VTEL’s dominance of the local wireline market,” together with Utopian’s assertion that “[i]f the assignment is approved, VTEL would be the only BRS licensee in the area.”¹⁰⁹ Utopian also argues that VTEL “is engaging in protectionist behavior” because its wholly owned subsidiary, VTW, is warehousing spectrum that it “holds in the PCS, AWS, and 700 MHz spectrum bands.”¹¹⁰ In support of its spectrum warehousing allegation, Utopian asserts that “[b]ased on publicly available information, it appears [VTW] has never provided services over any of this spectrum to date.”¹¹¹

30. In response to these arguments, VTEL claims that, in 2001, the Commission eliminated its spectrum cap rules in favor of a spectrum screen.¹¹² Since, the proposed assignment does not trigger that screen, VTEL argues that Utopian’s claims that the assignment would be anti-competitive are meritless.¹¹³ VTEL adds that the Commission has previously determined that the existing eligibility of DSL providers to hold licenses for [BRS] spectrum “has caused no apparent [competitive] problems.” In response to Utopian’s spectrum warehousing arguments, VTEL counters that they amount to “rank speculation.”¹¹⁴ According to VTEL, it “only controls a small percentage of all available spectrum in these markets, and will compete with national and regional carriers that already provide service within VTEL’s service areas.”¹¹⁵ Therefore, according to VTEL, it would make no economic or competitive sense for VTEL to warehouse its spectrum.¹¹⁶

31. Utopian’s arguments do not present any novel or extraordinary circumstances that persuade us to depart from the Commission’s current policies for reviewing the competitive implications of transactions in the mobile telephony/broadband services market. As VTEL points out, the Commission previously determined, in 2004, that permitting DSL providers to hold licenses for BRS spectrum “has caused no apparent problems.”¹¹⁷ In the *BRS/EBS R&O*, the Commission explained that under its precedent, eligibility restrictions are imposed only when (1) there is a significant likelihood of substantial competitive harm in specific markets, and (2) eligibility restrictions will be effective in addressing such harm.¹¹⁸ The record does not demonstrate that there is a significant likelihood of competitive harm by permitting DSL providers to also hold BRS licenses in Vermont. Since VTEL would hold 34.5 to 76.5 megahertz of spectrum, post-transaction, there would still remain 391 to 349 megahertz of spectrum suitable for mobile telephony/broadband services for any competitor that wanted to offer wireless broadband services in the relevant geographic markets implicated by this application. As VTEL points out, Verizon Wireless, Rural Cellular (Unicell), U.S Cellular, Sprint and T-Mobile already provide wireless broadband services in the Vermont area.¹¹⁹ In fact, Verizon Wireless announced upgrades to its

¹⁰⁹ *Id.*

¹¹⁰ Petition to Deny at 2.

¹¹¹ *Id.*

¹¹² VTEL Opposition at 2.

¹¹³ VTEL Opposition at 3.

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *BRS/EBS R&O*, 19 FCC Rcd at 14231 ¶ 175.

¹¹⁸ *Id.* at 14232 ¶ 175.

¹¹⁹ VTEL Opposition at 4. In 2008, Verizon Wireless acquired Rural Cellular Corporation (RCC) and as a condition of this transaction, the Commission required the applicants to divest either Verizon Wireless’s or RCC’s Vermont business units, including all spectrum, network assets, and customers. See *Verizon-RCC Order*, 23 FCC Rcd at 12512-13 ¶ 113. In compliance with the *Verizon-RCC Order*, the applicants divested RCC’s business units in Vermont to AT&T Inc. (“AT&T”). See AT&T Inc. and Verizon Wireless Seek FCC Consent to Assign and Transfer Control of Licenses, Spectrum Leasing Arrangements, and Related Authorizations-Amended and New

(continued....)

wireless broadband services network in many of the geographic service areas implicated by this assignment application.¹²⁰ AT&T also recently announced plans to upgrade its wireless broadband services in the near future.¹²¹

D. Public Interest Benefits

32. In addition to assessing the potential competitive harms associated with the application, we also consider whether the proposed assignment is likely to generate verifiable, transaction-specific public interest benefits.¹²² In doing so, we ask whether the proposed assignment application would result in demonstrable and verifiable benefits to consumers that would not be pursued but for the proposed arrangement.¹²³

33. The Applicants contend that the proposed assignment to VTEL will “provide competitive broadband wireless services primarily to residential and small business customers in rural portions of Vermont and New Hampshire.”¹²⁴ The Applicants also implicitly argue that the assignment to VTEL will have the added public interest benefit of furthering “the Court-approved [Master Settlement Agreement] in the bankruptcy proceedings.”¹²⁵ The Commission entered into this Master Settlement Agreement with WTCI.¹²⁶

34. We find that the proposed transaction could result in some of the transaction-specific public interest benefits that the Applicants claim. In particular, the proposed assignment could result in VTEL being an effective broadband wireless service provider and should also promote the efficient use of spectrum and the rapid deployment of services for the benefit of the public. Furthermore, while the licenses subject to the Assignment Application are not included in the Master Settlement Agreement, we find that action on the Assignment Application could facilitate resolution of the WTCI bankruptcy estate, and we find that it is in the public interest to facilitate the Bankruptcy Court’s decision approving the sale.¹²⁷

(...continued from previous page)

Applications, WT Docket 07-208, DA 08-2468, Public Notice (rel. Nov. 7, 2008). AT&T consummated the applications on January 17, 2009. See Consumation Notification File No. 0003707533.

¹²⁰ <http://www.reuters.com/article/pressRelease/idUS181307+24-Jan-2008+PRN20080124> (announcing upgrades to Verizon’s wireless broadband services networks in Addison, Orange, Rutland, Washington, and Windsor counties).

¹²¹ See http://www.vpr.net/news_detail/84200/ (announcing AT&T’s plan to upgrade its wireless broadband network in Vermont).

¹²² See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17495 ¶ 114; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17614 ¶ 113; *Verizon-RCC Order*, 23 FCC Rcd at 12504 ¶ 91; *AT&T-Dobson Order*, 22 FCC Rcd at 20330 ¶ 73.

¹²³ See, e.g., *Verizon-ALLTEL Order*, 23 FCC Rcd at 17495 ¶ 114; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17614 ¶ 113; *Verizon-RCC Order*, 23 FCC Rcd at 12504 ¶ 91; *AT&T-Dobson Order*, 22 FCC Rcd at 20330 ¶ 73.

¹²⁴ Application, Exhibit A at 3.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1.

¹²⁷ See *Summit Wireless WOW, LLC, Debtor-in-Possession, Summit Wireless Billings, LLC, Debtor-in-Possession, Summit Wireless, LLC, Debtor-in-Possession, and Summit Wireless Liquidating Trust, Memorandum Opinion and Order*, 19 FCC Rcd 23759, 23768-69 (WTB 2004); citing *LaRose v. FCC*, 494 F.2d 1145, 1150 (D.C. Cir. 1974).

IV. CONCLUSION AND ORDERING CLAUSES

35. For the reasons discussed above, we dismiss Utopian's Petition to Deny as untimely and deny it as an informal objection. Furthermore, we treat Utopian's request that the Commission initiate revocation proceedings against WTCI as an informal objection and deny that pleading. We find WTCI qualified to be a licensee. In addition, we find that it is in the public interest to grant the assignment application to VTEL.

36. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 and Section 1.948 of the Commission's Rules, 47 C.F.R. § 1.948, that the Motion to Accept Petition to Deny of Application for Assignment and Request for Waiver of Section 1.939 of the Commission Rules filed by Utopian Wireless Corporation on March 6, 2008 IS DENIED, and the Petition to Deny or Informal Objection of Application for Assignment filed by Utopian Wireless Corporation on March 6, 2008 IS TREATED AS AN INFORMAL OBJECTION, and as an informal objection IS DENIED.

37. IT IS FURTHER ORDERED, pursuant to Section 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, that the Request for Order to Show Cause and Consolidated Reply to Oppositions to Petition to Deny or Informal Objection filed by Utopian Wireless Corporation on March 27, 2008 IS DENIED.

38. IT IS FURTHER ORDERED, that the Broadband Division of the Wireless Telecommunications Bureau SHALL PROCESS the application filed by Wireless Telecommunications Inc. on August 8, 2007 seeking consent to assign its licenses for BRS stations WLK341, WNTI856, WMH868, WMI343, and WMH308 to Vermont Telephone Company, Inc. (File No. 0003130320) in accordance with this *Memorandum Opinion and Order* and the Commission's Rules and policies.

39. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Acting Chief, Wireless Telecommunications Bureau