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

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| In the Matter of | ) | |
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| Application of Verizon Communications Inc. and Straight Path Communications, Inc. | ) | ULS File No. 0007783428 |
| | ) | |
| For Consent to Transfer Control of Local Multipoint Distribution Service, 39 GHz, Common Carrier Point-to-Point Microwave, and 3650-3700 MHz Service Licenses | ) | |

# ORDER DENYING PETITION FOR STAY

**Adopted: April 2, 2018** **Released: April 2, 2018**

By the Chief, Wireless Telecommunications Bureau:

## I. INTRODUCTION

1. In this Order Denying Petition for Stay, we deny a request from the Competitive Carriers Association (CCA) to stay[1] the January 18, 2018, *Memorandum Opinion and Order* (*MO&O*)[2] approving the transfer of various spectrum licenses by Straight Path Spectrum LLC, a wholly-owned subsidiary of Straight Path Communications, Inc. (Straight Path) to Verizon Communications Inc. (Verizon). CCA seeks a stay pending the Commission's review of its concurrently filed Application for Review, or in the alternative, Petition for Reconsideration.[3] We find that CCA has failed to meet its burden for a grant of an extraordinary remedy of a stay.

## II. BACKGROUND

2. On June 1, 2017, Verizon and Straight Path filed an application pursuant to Section 310(d) of the Communications Act of 1934, as amended (the Act),[4] seeking Commission consent to the transfer of control from Straight Path Spectrum, LLC, a wholly-owned subsidiary of Straight Path, to Verizon of 735 licenses in the 39 GHz band, 133 licenses in the 28 GHz, 29 GHz and 31 GHz bands, nine common carrier point-to-point microwave licenses, and one non-exclusive nationwide license in the 3650-3700 MHz band. The agreement between Verizon and Straight Path provided that the latter will

[1] Petition for Stay, Competitive Carriers Association (filed Feb. 20, 2018) (Petition for Stay).

[2] *Application of Verizon Communications, Inc. and Straight Path Communications, Inc. for Transfer of Control of Licenses*, Memorandum Opinion and Order, 33 FCC Rcd 188 (WTB 2018) (*MO&O*).

[3] Application for Review or, In the Alternative, Petition for Reconsideration of Competitive Carriers Association, (filed Feb. 20, 2018) (Application for Review).

[4] 47 U.S.C. § 310(d).

become a wholly-owned direct subsidiary of Verizon, while Straight Path Spectrum, LLC, the holder of the licenses, will become a wholly-owned indirect subsidiary.[5]

3. CCA, among other parties, filed a petition to deny.[6] On January 18, 2018, the Wireless Telecommunications Bureau (Bureau) released the *MO&O* denying the petitions to deny and consenting to the transaction. The Bureau found "no evidence in the record to support a finding that the proposed transaction will result in potential public interest harms, and [it] reject[ed] petitioners' arguments that it will."[7] The Bureau noted that the Commission had previously adopted a mmW spectrum threshold of 1250 megahertz for proposed secondary market transactions,[8] and that in the *Spectrum Frontiers Second Report and Order*, the Commission had increased this threshold to 1850 megahertz,[9] a decision which, for the Commission's part, was preceded by notice-and-comment rulemaking. The Bureau applied the Commission's newly adopted 1850 megahertz mmW spectrum threshold to the Verizon-Straight Path transaction, and observed that post-transaction, Verizon's maximum spectrum holdings in any given county would be 1650 megahertz.[10] The Bureau found that, given the proposed transaction did not trigger the mmW spectrum threshold, and based on its careful review of the record, as well as its examination of the various relevant factors, Verizon's post-transaction spectrum holdings did not raise competitive concerns.[11] The Bureau also analyzed and rejected Petitioners' arguments that Verizon's post-transaction spectrum holdings would lead to competitive harms through foreclosure and anticompetitive spectrum aggregation.[12] After finding that "as a direct result of the transaction, Verizon likely will be better able to develop and deploy innovative 5G services to the benefit of American consumers,"[13] the Bureau consented to the transaction as serving the public interest, convenience, and necessity.[14]

4. On February 20, 2018, CCA filed the Application for Review and Petition for Stay. Verizon and Straight Path jointly opposed the Petition for Stay on February 27, 2018.[15] CCA did not file a reply to the Joint Opposition.

## III. DISCUSSION

5. *Standard for Stay.* The Commission evaluates motions for stays under well settled principles. To qualify for the extraordinary remedy of a stay, the moving party must demonstrate that: (1)

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[5] *Application of Verizon Communications, Inc. and Straight Path Communications, Inc. for Transfer of Control of Licenses*, ULS File No. 0007783428 (filed June 1, 2017) - Ex. 1 – Description of Transaction and Public Interest Statement at 2.

[6] Competitive Carriers Association Petition to Deny the Verizon/Straight Path Application (filed Aug. 11, 2017).

[7] *MO&O*, 33 FCC Rcd at 193, para. 14.

[8] *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, Report and Order and Further Notice of Proposed Rulemaking*, 31 FCC Rcd 8014, 8083-84, paras. 188-189 (2016) (*Spectrum Frontiers Report and Order or FNPRM*, as appropriate).

[9] *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Second Report and Order, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, and Memorandum Opinion and Order, FCC 17-152, 32 FCC Rcd 10988, 11011, para. 74 (2017) (*Spectrum Frontiers Second Report and Order*). This change in the threshold became effective on January 2, 2018. *See Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, 83 Fed. Reg. 37 (Jan. 2, 2018).

[10] *MO&O*, 33 FCC Rcd at 196, para. 22.

[11] *MO&O*, 33 FCC Rcd at 196, para. 22.

[12] *MO&O*, 33 FCC Rcd at 196, para. 23.

[13] *MO&O*, 33 FCC Rcd at 198, para. 29.

[14] *MO&O*, 33 FCC Rcd at 198, para. 31.

[15] Joint Opposition to Petition to Stay, Straight Path Spectrum, LLC and Verizon Communications, Inc. (filed Feb. 27, 2018) (Joint Opposition).

it is likely to prevail on the merits of its pending Application for Review; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if a stay is granted; and, (4) the public interest favors granting a stay.[16] The Commission's consideration of each factor is weighed against the others, with no single factor dispositive.[17] After fully reviewing the record, we conclude that CCA has failed to make an adequate showing under any of the stay criteria.

6. Based on our review, CCA has not demonstrated that it is likely to prevail on the merits. CCA argues that the Bureau improperly applied the 1850 megahertz mmW spectrum threshold to the transaction in the *MO&O* instead of the prior 1250 megahertz threshold because there was allegedly no notice that the 1850 megahertz threshold would apply, and because the spectrum made available in the *Spectrum Frontiers Second Report and Order* which formed the basis for raising the threshold would allegedly not be accessible for years.[18] CCA's notice argument is without merit. The Commission adopted the spectrum threshold for secondary market transactions involving mmW spectrum,[19] and proposed to revise the mmW spectrum threshold well before the filing of the Verizon-Straight Path transaction.[20] Following notice and comment, the Commission then updated that threshold.[21] During its rulemaking, the Commission determined that the threshold warranted inclusion of mmW spectrum planned for auction but not yet auctioned, because it found that "this frontier spectrum is likely to become increasingly valuable to the advent of 5G services," "the spectrum screen applicable to lower-band spectrum has been one tool used to help identify particular markets for further competitive analysis," and use of the mmW spectrum threshold (updated to reflect that more bands are "available") "identifies those markets that may warrant further competitive analysis."[22] And it expressly noted that this increase in the mmW spectrum threshold would become effective upon publication in the Federal Register,[23] which occurred on January 2, 2018,[24] Therefore, CCA and others were provided with sufficient notice that the revised secondary market threshold of 1850 megahertz would apply and, preceding that, opportunity to comment on the change. Moreover, the Bureau's application of the revised threshold is consistent with past practice of applying law in existence at the time it takes action. Indeed, the Commission has revised an analogous tool -- its general spectrum screen that it applies to secondary market transactions -- in

[16] *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C Cir. 1956) In *re Subsidiaries of Cablevision Systems Corporation*, 23 FCC Rcd. 17012, 17013 (2008).

[17] *In re Protecting the Privacy of Customers of Broadband and Other Telecomm. Servs.,* Order Granting Stay Petition in Part, 32 FCC Rcd 1793, 1796 (2017).

[18] Petition for Stay at 2-3.

[19] Based on the unique characteristics of the mmW bands, the Commission decided not to include the mmW bands in the "spectrum screen" that includes those bands that the Commission has determined are "suitable and available for the provision of mobile telephony/broadband services," but instead it adopted a separate mmW spectrum threshold recognizing that this frontier spectrum is likely to become increasingly valuable to the advent of 5G services. *Spectrum Frontiers Report and Order* 31 FCC Rcd at 8083, para. 188.

[20] *Spectrum Frontiers FNPRM*, 31 FCC Rcd at 8180, para. 491 ("to the extent these bands to be made available have similar technical characteristics and potential uses as the 28 GHz, 37 GHz, and 39 GHz bands, we propose to use the approximately one-third threshold of the total amount of spectrum as our starting point").

[21] *Spectrum Frontiers Second Report and Order*, 32 FCC Rcd at 11011, para.74.

[22] *Spectrum Frontiers Report and Order*, 31 FCC Rcd at 8083, para. 189; *Spectrum Frontiers Second Report and Order*, 32 FCC Rcd at 11011, para. 74.

[23] *Spectrum Frontiers Second Report and Order*, 32 FCC Rcd at 11011, 11074, paras. 74, 268, n.189. While CCA disagrees about inclusion of the bands not yet auctioned because it asserts that the 24 GHz and 47 GHz spectrum are not "available," (*see* Petition for Stay at 8), that is not the pertinent standard for purposes of application of the mmW spectrum threshold for secondary market transactions at issue here.

[24] *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, 83 Fed. Reg. 37 (Jan. 2, 2018).

various orders and has applied it to pending transactions.[25] Here, the mmW spectrum threshold was changed in a rulemaking proceeding, and to the extent that CCA is arguing that some of the spectrum included in the mmW spectrum threshold will not be available for years, its remedy was to file a petition for reconsideration of the *Spectrum Frontiers Report and Order* and/or the *Second Report and Order*. It did not do so. In fact, the Commission has under consideration before it a draft Public Notice that would take steps to initiate the auction process for certain of this spectrum.[26] Accordingly, there was no basis for the Bureau to apply any threshold other than the 1850 megahertz screen adopted by the Commission and effective as of the date the *MO&O* was adopted.

7. CCA also asserts that even if 1850 megahertz were in fact the applicable threshold, the Bureau ignored parties' concerns about mmW spectrum aggregation and resultant competitive harms, and falsely claimed in the *MO&O* that "mmW spectrum is not the only spectrum available that may be useful for providing 5G services."[27] CCA further argues that this contradicts recent Commission statements, including those in the *Spectrum Frontiers* proceedings, that a mix of low-, mid-, and high-band spectrum were all necessary inputs for 5G, and that the propagation characteristics and available bandwidth associated with these mmW frequencies made them uniquely suitable for 5G services.[28] Neither of CCA's claims is accurate. As CCA recognizes, the spectrum screen "is only one 'analytical tool' for assessing competition,"[29] and while the Commission established the mmW spectrum threshold because it recognized that mmW spectrum is likely to become one critical component in the development of 5G services,[30] other bands remain available. There is nothing "false" therefore about the claim that other bands may be useful for 5G services: Indeed, various service providers, including CCA member T-Mobile, intend to use a variety of bands to provide 5G service.[31] Further there is nothing contradictory. As the Commission did indeed note in the *Spectrum Frontiers Report and Order*, holding a mix of spectrum bands benefits competition and consumers, and mmW spectrum is likely to serve as an important supplement to lower-band spectrum.[32] In the *MO&O*, after noting that Verizon would not trigger the 1850 megahertz mmW spectrum threshold in any market, we went on to find that Verizon's acquisition of this mmW spectrum is unlikely to foreclose rival service providers from obtaining access to sufficient spectrum.[33] CCA's remaining arguments largely repeat its speculative and generalized claims from its Petition to Deny, including its various reasons for why we underestimated the competitive importance of the 28 GHz and 39 GHz mmW bands *vis-à-vis* other bands and why we failed to adequately handle Straight Path's unjust enrichment through the transaction. These were issues that CCA raised in its Petition to Deny which the Bureau denied. CCA has not demonstrated that the Bureau erred in its analysis or that the Bureau's statements about 5G use in other bands was inconsistent with any

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[25] *See, e.g., Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company*, Memorandum Opinion and Order, 27 FCC Rcd 16459, 16470, para. 31 (2012) (adding WCS A and B blocks to the spectrum screen); *Applications of AT&T Corporation and Dobson Communications Corporation*, Memorandum Opinion and Order, 22 FCC Rcd 20295, 20312-13, paras. 30-31 (2007) (adding 700 MHz spectrum to the spectrum screen).

[26] *See Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Licenses*, Public Draft (posted Mar. 27, 2018), *available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0327/DOC-349938A1.pdf.

[27] Petition for Stay at 9, *quoting MO&O*, 33 FCC Rcd at 196, para. 23.

[28] Petition for Stay at 9-10.

[29] Petition for Stay at 9 & n.20 (quoting *Spectrum Frontiers Report and Order*, 31 FCC Rcd at 8084, para. 190).

[30] *Spectrum Frontiers Report and Order*, 31 FCC Rcd at 8081, para. 184.

[31] *MO&O*, 33 FCC Rcd at 194, para. 18.

[32] *Spectrum Frontiers Report and Order*, 31 FCC Rcd at 8081, para. 184.

[33] *MO&O*, 33 FCC Rcd at 196, para. 23.

Commission statements and the marketplace. Accordingly, CCA has failed to demonstrate that it is likely to prevail on the merits.

8. In order to satisfy the second element that must be met for issuance of a stay, a petitioner must show that it will be irreparably injured absent a stay during the pendency of its Application for Review. An injury qualifies as "irreparable harm" only if it is both certain and great; it must be actual and not theoretical. Furthermore, to demonstrate irreparable harm, CCA must provide "proof indicating that the harm it alleges is certain to occur in the near future."[34] As Commission precedent in a separate context also indicates, "[i]rreparable harm must be more than economic loss. Competitive harm is merely a type of economic loss, and revenues and customers lost to competition which can be regained through competition are not irreparable."[35]

9. We find that CCA has not met this burden. CCA argues that awarding Verizon such large holdings of mmW spectrum will give it a first-mover advantage that will irreparably harm CCA's members by "effectively shut[ting] competitive carriers out from the emerging 5G markets."[36] As noted above, the competitive injury it alleges is speculative and as an economic loss would not form the basis for a stay. Furthermore, CCA has not substantiated its claim with any factual showing that its members will be irreparably injured absent a stay during the pendency of its Application for Review or that harm is certain to occur in the near future.[37] Indeed, we note that CCA did not even seek a stay until over a month after the Bureau's order approving this transaction. In addition, as CCA acknowledges, 5G is an emerging service, and as the Bureau found in its order, Verizon does not trigger the mmW spectrum threshold of 1850 megahertz, and many spectrum bands, including mmW bands, can be used for 5G deployment and innovative next generation offerings to help bolster the competitiveness of other market participants.

10. Finally, we consider the two remaining factors in the stay test – namely the third factor, that granting the stay will not harm other interested parties and the fourth factor, that the public interest favors a stay. CCA argues other parties will not be harmed by a stay denying or briefly pausing Verizon's "anticompetitive first-mover advantage" because such a stay would be a benefit to the public and because in any event, "the first 5G deployments are not expected until 2020."[38] Verizon responds that it has announced plans to deploy 5G in a number of markets in 2018, and that by unraveling its complex multi-million dollar business transaction and disrupting these operations, sufficient harm would occur to warrant denying the stay.[39] Verizon also argues that a stay would inflict specific financial injury on the transacting parties by undoing the bargain they stuck and disrupting their operations.[40] While the plans are, indeed, first steps toward 5G deployments, they appear to be geared toward expediting this critical service being available to the public, an effort that this stay would halt. CCA's pleading does not

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[34] *Wisconsin Gas Company v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[35] *In re Telmex/Sprint Comms., LLC*, Order, 13 FCC Rcd 15678 (IB 1998).

[36] *See* Petition for Stay at 12-13.

[37] *See Wisconsin Gas Co.*, 758 F.2d. at 674.

[38] Petition for Stay at 14.

[39] Joint Opposition at 14-15 & n.62 (stating that forcing the parties to "unravel" a transaction via stay "would, absent a compelling reason, unnecessarily unsettle a complex multi-million dollar business transaction and the professional lives of the [parties'] employees," and that requiring the seller to return funds to the buyer presents a "financial issue having a potential spill-over effect" on employees and the public.) (*citing Applications of Cumulus Licensing Corp.*, Order, 16 FCC Rcd 1052, 1055 para. 9 (2001)). The parties closed on this transaction on February 28, 2018. *See Straight Path Communications Announces Completion of Merger with Verizon*, Press Release (Mar. 1, 2018), *available at* https://www.businesswire.com/news/home/20180228005817/en/Straight-Path-Communications-Announces-Completion-Merger-Verizon.

[40] Joint Opposition at 14.

adequately acknowledge this impact or address why the speculative interests that it advances outweigh those of the general public or on the parties to this transaction.

11. With respect to the public interest, CCA argues that allowing the transaction to move forward will result in excessive aggregation of mmW spectrum that will cripple price competition and depress innovation in next-generation wireless services, resulting in permanent long-term harm to consumers, and that staying these effects favors the public interest.[41] CCA asserts permitting consummation of the transaction will also deprive the U.S. treasury of billions of dollars in potential spectrum auction revenue, reward Straight Path with a windfall for filing allegedly fraudulent renewal applications, and incentivize the gamesmanship and misconduct of other licenses – all factors against the public interest.[42] Verizon argues CCA cannot show that a stay is in the public interest because its impact would be the opposite: Verizon's ability to deliver 5G service to the public would be impacted as would the functioning of a robust secondary market – a stated Commission objective.[43] Furthermore, Verizon argues that denying Straight Path licenses will not immediately result in their reauction since the terms of the Consent Decree would still govern.[44] These arguments, in effect, amount to an impermissible collateral attack on the Enforcement Bureau's exercise of its enforcement discretion in entering into the Consent Decree.[45] Since CCA's arguments are premised on the argument that the Commission should auction spectrum held by an existing licensee, they are also difficult to square with the statutory endorsement of secondary market transactions in Section 310(d) of the Act. Whether or not the Commission is permitted to accord any weight to the prospect of enhanced auction revenues for the U.S. treasury,[46] we agree that staying the approval of the transaction would not be in the public interest, particularly given our observations above about CCA's assertions regarding the impact on others and on 5G deployment if we were to grant its stay request.

12. In the *MO&O*, after a thorough review of the record, the Bureau found that "the transaction is unlikely to result in any significant public interest harms" and that there was "general support" for the applicants' claims of public interest benefits.[47] CCA's arguments in favor of a stay mostly repeat arguments considered and rejected in the *MO&O*. Based on our review of the Petition for Stay, we find that CCA has not met its burden to demonstrate that other interested parties will not be harmed if a stay is granted and the public interest favors granting a stay. We find that CCA's failure to raise a serious question on the merits as well as its failure to substantiate a claim of irreparable injury resulting from the transaction, combined with credible claims by Verizon that the transacting parties would be harmed through stopping the transaction without any benefit to the public, all argue in favor of denying CCA's Petition for Stay.

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[41] Petition for Stay at 14.

[42] Petition for Stay at 15.

[43] Joint Opposition at 15.

[44] Joint Opposition at 16.

[45] *See, e.g., NTCH, Inc. v. FCC,* 841 F.3d 497, 502-03 (D.C. Cir. 2016).

[46] *See* 47 U.S.C. § 309(j)(7)(A) (Commission may not premise public interest finding, in determining whether to assign a band of frequencies to a use for which licenses will be issued through auction, on "the expectation of Federal revenues from the use of" auctions).

[47] *MO&O*, 33 FCC Rcd at 198, para. 30.

## IV. CONCLUSION

13. For the foregoing reasons we deny CCA's Petition for Stay. CCA's Application for Review remains pending before the Commission. Our action herein is without prejudice to the Commission's consideration of the Application for Review.

## V. ORDERING CLAUSES

14. Accordingly, having reviewed the application and the record in this matter, **IT IS ORDERED** that, pursuant to the authority of sections 1, 4(i), 4(j), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 405, and sections 1.43 and 1.102 of the Commission's rules, 47 C.F.R. §§ 1.43, 1.102, the Petition for Stay filed by the Competitive Carriers Association **IS DENIED.**

15. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 CFR §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Donald Stockdale
Chief
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