

**STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND CONCURRING IN PART**

Re: Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses, WT Docket No. 12-4; Applications of Verizon Wireless and Leap for Consent To Exchange Lower 700 MHz, AWS-1, and PCS Licenses, ULS File Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598; and Applications of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses, WT Docket 12-175

As Americans' reliance on data-intensive wireless devices and services is increasing, so too is the need for more spectrum on which to run them. Auctioning additional spectrum for commercial use is, of course, the Commission's best-known tool for dealing with the spectrum crunch. But that's not enough. We also must ensure that the spectrum already available is put to its highest and best use. Approving the transactions before us brings fallow spectrum into mobile broadband service; lets wireless providers better harmonize their spectrum holdings to improve efficiency; and signals to the private sector that facilitating a secondary market for spectrum will be an agency priority. Swift, yet thorough, review and approval of transactions will enable this market to function well, which is why I am pleased to support this order.

The order capably lays out the many benefits of these particular transactions, but let me add one more. We cannot understate the societal benefit of private, voluntary agreements to transfer spectrum for lawful consideration. We should welcome such contracts between and among private parties; after all, mutual consent implies mutual benefit, and it is accordingly in the public interest for freely-negotiated contracts to be allowed and enforced so long as no third parties are harmed (or any such harms can be mitigated with narrowly tailored, legally permissible conditions).

In addition, I wish to highlight a significant achievement of this order: the remedying of concerns about spectrum concentration within the Advanced Wireless Service (AWS-1) band through the voluntary transfer of licenses between T-Mobile and Verizon Wireless. Government-managed divestitures can let valuable spectrum languish for years, whereas the timely approval of this private-sector solution will resolve the Commission's competitive concerns and immediately put the spectrum to good use. I hope this portends a future norm in spectrum transactions.

I would be remiss if I did not mention the aspects of the order with which I only concur. *First*, the order should not and need not assert authority over the Commercial Agreements, which the Antitrust Division of the Department of Justice (DOJ) ably analyzed. It is a shibboleth that the Commission's authority to review mergers or transactions is broad, but we must be mindful that broad is not boundless. For example, Section 310(d) of the Communications Act—the primary authority for today's order—directs the Commission to examine spectrum license transfers.¹ If the parties to such a transfer incorporate other provisions into the same agreement—a land sale, a conveyance of patents, a commercial marketing agreement, and so on—the Commission's authority does not automatically expand to encompass those extraneous provisions. Congress limited the scope of our review to the proposed transfer of spectrum licenses, not to other business agreements that may involve the same parties. And in any case, the assertion is unnecessary. If DOJ “conducted its own independent and comprehensive investigation of these agreements,” and if the Consent Decree it negotiated “address[es] the key potential harms to consumers and competition,”² then any pronouncement about our authority is just dicta.

¹ 47 U.S.C. § 310(d). Similarly, section 214 directs the Commission to assess a transfer of lines between two wireline operators. 47 U.S.C. § 214.

² Memorandum Opinion and Order, para. 144.

Second, I respectfully disagree with the imposition of a “voluntary” data roaming commitment upon Verizon. First, such a condition is not voluntary in any meaningful sense of the word, insofar as the parties would not agree to it independently but know that its acceptance is a predicate for regulatory approval of these transactions. Moreover, the Commission’s authority to impose such a condition generally is doubtful. Although the Communications Act affords us broad jurisdiction over telecommunications services, we have extremely limited authority over information services like mobile broadband. This discrepancy will come into even sharper relief should the U.S. Court of Appeals for the D.C. Circuit strike down the Commission’s *Data Roaming Order*³ as exceeding the Commission’s jurisdiction. For then, Verizon Wireless will have been compelled to abide by an otherwise unlawful mandate for *five years*—an eternity in this dynamic industry. Just as we should not impose transactional conditions that are more appropriately considered in the context of an industry-wide rulemaking process, so too should we refrain from extracting commitments that we could not legally enforce otherwise.

Notwithstanding my disagreements, my review of the record suggests that on balance, this item will increase consumer welfare, will mitigate any potential harms to competition, and will signal the speedier resolution of secondary market transactions. For these reasons, I vote to approve in part and concur in part.

In conclusion, I would like to thank the Commission staff whose hard work (including close collaboration with the Department of Justice) yielded such thoughtful consideration of these complex transactions. Led by Rick Kaplan, whom we were fortunate to retain during this process, the superb staff of the Wireless Telecommunications Bureau, International Bureau, Media Bureau, Wireline Competition Bureau, Office of Strategic Planning & Policy Analysis, and Office of General Counsel materially aided our deliberations. This intra-agency collaboration, culminating in the fine product we adopt today, exhibits the Commission at its best. I appreciate all of your efforts and applaud your public service.

³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411 (2011).