

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

In the Matter of)	
)	
Application of Cellco Partnership d/b/a Verizon Wireless and Nextlink Wireless, LLC)	ULS File No. 0007162285
)	
For Consent to Long-Term <i>De Facto</i> Transfer Spectrum Leasing Arrangement)	

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 2016

Released: July 25, 2016

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we consider the application of Verizon Wireless and Nextlink for Commission consent to a long-term *de facto* transfer spectrum leasing arrangement. As a result of this spectrum leasing arrangement, Verizon Wireless would lease from Nextlink spectrum associated with 93 LMDS licenses and nine 39 GHz licenses in all or parts of 289 CMAs, covering approximately 63 percent of the U.S. population. After carefully evaluating the likely competitive effects of this leasing arrangement, we find that the likelihood of any public interest harms at this point in time is low. We note that this is a proposed lease, and not a proposed acquisition, and that at the latest, the leasing arrangement would terminate by the end of 2018. In addition, Verizon Wireless’s post-transaction spectrum holdings across the LMDS (28 GHz) and 39 GHz bands do not raise any particular competitive concerns in light of the current state of the marketplace. Further, we find that some public interest benefits are likely to be realized, such as the expeditious use of this spectrum for the potential introduction of innovative 5G services to the benefit of American consumers. Based on the record before us and our competitive review, we find that the long-term *de facto* transfer spectrum leasing arrangement would serve the public interest, convenience, and necessity, and therefore we consent to the leasing arrangement.

II. BACKGROUND AND PUBLIC INTEREST FRAMEWORK

2. *Description of the Leasing Participants.* Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless, and together with Nextlink Wireless, LLC (Nextlink), the Leasing Participants) provides wireless communication services across one of the most extensive wireless networks in the United States,¹ Nextlink, a wholly-owned subsidiary of XO Holdings, has deployed over 750 microwave links providing wireless service between two points throughout its Local Multipoint Distribution Service

¹ Verizon Communications Inc., SEC Form 10-K, at 3 (filed Feb. 23, 2016), <https://www.sec.gov/Archives/edgar/data/732712/000119312516473367/d35513d10k.htm>. Verizon Wireless is a wholly-owned subsidiary of Verizon Communications Inc., a publicly-traded holding company incorporated in Delaware. *Id.*

(LMDS) and 39 GHz service areas.² Through Nextlink, XO Holdings provides its fixed wireless customers with last mile access, cell tower backhaul, and small cell backhaul services.³

3. *Description of the Leasing Arrangement.* On March 2, 2016, Verizon Wireless and Nextlink filed an application pursuant to Section 310(d) of the Communications Act of 1934, as amended (the Act),⁴ seeking Commission consent to a long-term *de facto* transfer spectrum leasing arrangement, whereby Verizon Wireless would lease from Nextlink spectrum associated with 93 LMDS licenses and nine 39 GHz licenses.⁵ The Leasing Participants state that the proposed arrangement would authorize Verizon Wireless to use all of Nextlink's LMDS and 39 GHz spectrum, except for certain discrete spectrum and geographic areas that are subject to existing leases to third parties or to contractual requirements to reserve spectrum for the use of third parties (Restricted Spectrum).⁶

4. On April 12, 2016, the Wireless Telecommunications Bureau released a Public Notice seeking comment on the proposed leasing arrangement.⁷ A number of parties filed petitions to deny and comments in response to the Leasing Public Notice.⁸ Verizon Wireless and Nextlink filed a joint opposition to the petitions to deny and comments.⁹

² Nextlink Application for Renewal of Call Sign WPOL286, ULS File No. 0007121090, Exhibit 1, at 1 (granted Apr. 20, 2016).

³ *Id.*

⁴ 47 U.S.C. § 310(d).

⁵ The Leasing Participants state that under a separate agreement, Verizon Wireless and XO Holdings are parties to an Equity Purchase Agreement, pursuant to which Verizon Wireless has an option to purchase from XO Holdings all of the issued and outstanding limited liability company interests in Nextlink (Purchase Option). *Application of Cellco Partnership d/b/a Verizon Wireless and Nextlink Wireless, LLC, a Subsidiary of XO Holdings, for Consent to a Long-Term De Facto Transfer Spectrum Leasing Arrangement Involving LMDS and 39 GHz Spectrum*, ULS File No. 0007162285 (filed Mar. 2, 2016, amended June 20, 2016) (Application), Exhibit 1–Description of Transaction and Public Interest Statement at 1, n.1 (Public Interest Statement). The Leasing Participants represent that Verizon Wireless is not exercising the Purchase Option at this time. Public Interest Statement at 1, n.1.

Verizon Communications Inc. (Verizon Communications) and XO Holdings, in a separate set of applications, have requested Commission consent to the transfer of control to Verizon Communications of various licenses and authorizations held by XO Holdings' subsidiary, XO Communications, LLC (Transfer of Control Application). *Applications Filed for the Transfer of Control of XO Communications, LLC to Verizon Communications Inc., WC Docket No. 16-70*, Public Notice, 31 FCC Rcd 3514 (WCB, WTB, IB 2016) (Transfer of Control Public Notice). The Wireline Competition Bureau, the Wireless Telecommunications Bureau, and the International Bureau released a public notice seeking comment on the Transfer of Control Application. *Id.* Several petitions and comments were filed in response to both the proposed leasing arrangement and the Transfer of Control Application. DISH Petition to Deny; DISH Reply; Public Knowledge Comments; Public Knowledge Reply.

⁶ Public Interest Statement at 1. Under the proposed leasing arrangement, Nextlink also would lease any Restricted Spectrum to Verizon Wireless at such time that it is no longer subject to a third-party commitment. The Leasing Participants assert that to ensure that any such lease to Verizon Wireless of newly available Restricted Spectrum would become effective immediately, they are seeking consent in the instant application with respect to all of Nextlink's LMDS and 39 GHz spectrum licenses. *Id.*

The Leasing Participants further state that the proposed leasing arrangement will begin upon the date of Commission consent to the leasing arrangement application and will terminate upon the later of: (1) December 31, 2018, or (2) the closing of the purchase by Verizon Wireless of the Nextlink interests if the Purchase Option is exercised. *Id.* at 1-2.

⁷ *Application of Cellco Partnership d/b/a Verizon Wireless and Nextlink Wireless, LLC, a Subsidiary of XO Holdings, for Consent to a Long-Term De Facto Transfer Spectrum Leasing Arrangement Involving LMDS and 39 GHz Spectrum*, ULS File No. 0007162285, Public Notice, 31 FCC Rcd 3521 (WTB 2016) (Leasing Public Notice).

⁸ Competitive Carriers Association Comments (filed May 3, 2016) (CCA Comments); ViaSat, Inc. Comments (filed May 3, 2016) (ViaSat Comments); DISH Network Corporation Petition to Deny (filed May 3, 2016) (DISH Petition to Deny).

(continued....)

5. *Standard of Review.* Pursuant to Section 310(d) of the Act,¹⁰ we must determine whether the Leasing Participants have demonstrated that the spectrum leasing arrangement would serve the public interest, convenience, and necessity.¹¹ In making this determination, we first assess whether the spectrum leasing arrangement complies with the specific provisions of the Act,¹² other applicable

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to Deny); INCOMPAS Petition to Deny (filed May 3, 2016) (INCOMPAS Petition to Deny); Public Knowledge Petition to Deny and Comments (filed May 12, 2016) (Public Knowledge Comments) (Public Knowledge filed its petition to deny in the Transfer of Control proceeding and filed its comments in the instant proceeding); ViaSat, Inc. Reply to Joint Opposition (filed May 20, 2016) (ViaSat Reply); INCOMPAS Reply to Joint Opposition (filed May 20, 2016) (INCOMPAS Reply); DISH Network Corporation Reply to Joint Opposition (filed May 27, 2016) (DISH May 27 Reply); Public Knowledge Reply (filed May 20, 2016) (Public Knowledge Reply); DISH Network Corporation Reply to Joint Opposition (filed June 6, 2016) (DISH June 6 Reply). DISH and Public Knowledge each filed combined pleadings in both the leasing arrangement application and Transfer of Control Application proceedings.

Additionally, several parties filed *ex parte* submissions. Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, ULS File No. 0007162285 (filed May 27, 2016) (DISH *Ex Parte*); Letter from Gregory M. Romano, Vice President & Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, ULS File No. 0007162285 (filed May 31, 2016) (Verizon Wireless *Ex Parte*); Letter from Thomas Cohen, Counsel, Nextlink Wireless, to Marlene H. Dortch, Secretary, FCC, ULS File No. 0007162285 (filed June 21, 2016) (Nextlink *Ex Parte*); Letter from Angie Kronenberg, Chief Advocate and General Counsel, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-70, ULS File No. 0007162285 (filed July 6, 2016) (INCOMPAS *Ex Parte*).

⁹ Verizon Wireless and Nextlink Wireless, LCC Joint Opposition to Petitions to Deny and Comments (filed May 13, 2016) (Joint Opposition). In the Joint Opposition, the Leasing Participants allege that neither DISH nor INCOMPAS has proved that they have standing to file petitions to deny. Joint Opposition at 7-8. We find it unnecessary to address the arguments concerning standing since we are denying the DISH and INCOMPAS petitions to the extent that they raise issues regarding the leasing arrangement application.

We further note that the Public Knowledge Reply was not timely filed with respect to this proceeding, although it was timely filed with respect to the Transfer of Control Application. The Leasing Public Notice stated that replies in this proceeding were due by May 20, 2016. Leasing Public Notice at 1. Public Knowledge filed its Reply on May 27, 2016. To the extent that the Public Knowledge Reply raises issues relevant to determining whether the grant of the leasing arrangement application is in the public interest, we will consider its arguments. We remind petitioners and commenters, however, that we expect them to comply with our procedural requirements, including those regarding standing and filing deadlines, and caution that pleadings that do not so comply may be subject to dismissal.

¹⁰ 47 U.S.C. § 310(d).

¹¹ 47 C.F.R. § 20.22; *see also Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, WT Docket No. 12-269, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6133, 6245, paras. 301-02 (2014) (*Mobile Spectrum Holdings Report and Order*); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20656, 20667, paras. 116, 147 (2003); *see also, e.g., Notification of Triangle Communication System, Inc. and Cellco Partnership d/b/a Verizon Wireless For a Long-Term Spectrum Manager Leasing Agreement*, Memorandum Opinion and Order, 31 FCC Rcd 301, 302-03, para. 4 (2016) (*Triangle-Verizon Wireless Order*); *Applications of AT&T Inc., E.N.M.R. Telephone Cooperative, Plateau Telecommunications, Inc., New Mexico RSA 4 East Limited Partnership, and Texas RSA 3 Limited Partnership for Consent To Assign Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 5107, 5111, para. 8 (2015) (*AT&T-Plateau Wireless Order*); *Applications of AT&T Inc., Leap Wireless International, Inc., Cricket License Co., LLC and Leap Licenseco, Inc. for Consent To Transfer Control and Assign Licenses and Authorizations*, Memorandum Opinion and Order, 29 FCC Rcd 2735, 2741-42, para. 13 (WTB, IB 2014) (*AT&T-Leap Order*).

¹² 47 C.F.R. § 20.22; *see also Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6245, paras. 301-02. *See also, e.g., Triangle-Verizon Wireless Order*, 31 FCC Rcd at 302-03, para. 4; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

statutes, and the Commission's rules.¹³ If the spectrum leasing arrangement does not violate a statute or rule, we next consider whether the arrangement could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.¹⁴ We then employ a balancing test weighing any potential public interest harms of the spectrum leasing arrangement against any potential public interest benefits.¹⁵ The Leasing Participants bear the burden of proving, by a preponderance of the evidence, that the spectrum leasing arrangement, on balance, would serve the public interest.¹⁶

6. The Commission has fully discussed the contours of the required public interest determination in several orders,¹⁷ which we follow here. In general, the competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.¹⁸ The Commission and the Department of Justice each have independent authority to examine the competitive effects of proposed mergers and transactions, but the Commission's competitive analysis under the public interest standard is somewhat broader.¹⁹ The Commission's public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.²⁰ If we are unable to find that the spectrum leasing arrangement serves the public interest for any reason or if the record presents a substantial and material question of fact, we must designate the application(s) for hearing.²¹

7. *Qualifications of the Leasing Participants.* As a threshold matter, the Commission must determine whether the parties to the spectrum leasing arrangement meet the requisite qualifications

¹³ See, e.g., *Triangle-Verizon Wireless Order*, 31 FCC Rcd at 302-03, para. 4; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

¹⁴ See, e.g., *Triangle-Verizon Wireless Order*, 31 FCC Rcd at 302-03, para. 4; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

¹⁵ See, e.g., *Triangle-Verizon Wireless Order*, 31 FCC Rcd at 302-03, para. 4; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

¹⁶ See, e.g., *Triangle-Verizon Wireless Order*, 31 FCC Rcd at 302-03, para. 4; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111, para. 8; *AT&T-Leap Order*, 29 FCC Rcd at 2741-42, para. 13.

¹⁷ See, e.g., *Applications of SprintCom, Inc., Shenandoah Personal Communications, LLC, and NTELOS Holdings Corp. for Consent To Assign Licenses and Spectrum Lease Authorizations and To Transfer Control of Spectrum Lease Authorizations and an International Section 214 Authorization*, Memorandum Opinion and Order, 31 FCC Rcd 3631, 3634-35, para. 7 (WTB, IB 2016) (*Sprint-Shentel-NTELOS Order*); *Applications of AT&T and DIRECTV for Consent To Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 29 FCC Rcd 9131, 9139-41, paras. 18-22 (2015) (*AT&T-DIRECTV Order*); *Applications of GCI Communication Corp., ACS Wireless License Sub, Inc., ACS of Anchorage License Sub, Inc., and Unicom, Inc. for Consent To Assign Licenses to The Alaska Wireless Network, LLC*, Memorandum Opinion and Order and Declaratory Ruling, 28 FCC Rcd 10433, 10442-44, paras. 23-27 (2013) (*Alaska Wireless Order*).

¹⁸ See, e.g., *Triangle-Verizon Wireless Order*, 31 FCC Rcd at 303-04, para. 5; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111-12, para. 9; *AT&T-Leap Order*, 29 FCC Rcd at 2742, para. 15.

¹⁹ See, e.g., *Triangle-Verizon Wireless Order*, 31 FCC Rcd at 303-04, para. 5; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111-12, para. 9; *AT&T-Leap Order*, 29 FCC Rcd at 2742, para. 15.

²⁰ See, e.g., *Triangle-Verizon Wireless Order*, 31 FCC Rcd at 303-04, para. 5; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111-12, para. 9; *AT&T-Leap Order*, 29 FCC Rcd at 2743-44, para. 16.

²¹ 47 U.S.C. § 309(e); see also, e.g., *Triangle-Verizon Wireless Order*, 31 FCC Rcd at 303-04, para. 5; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5111-12, para. 9; *AT&T-Leap Order*, 29 FCC Rcd at 2743, para. 15; *Application of EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., and EchoStar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002).

requirements to lease spectrum under Section 310(d) and the Commission's rules.²² We note that no issues were raised with respect to the basic qualifications of Verizon Wireless or Nextlink. In addition, Verizon Wireless has repeatedly been found qualified to hold Commission licenses.²³ We therefore find there is no reason to reevaluate the requisite citizenship, character, financial, technical, or other basic qualifications under the Act and our rules, regulations, and policies, of Verizon Wireless or Nextlink.²⁴

III. LEASING ARRANGEMENT AND TRANSFER OF CONTROL APPLICATIONS

8. A number of parties have argued that we should consolidate our review of the leasing arrangement application and the Transfer of Control Application.²⁵ We have broad discretion as to how we conduct our proceedings,²⁶ and for the reasons expressed below, including our review of the record in this proceeding, we decline to do so. First, the record shows that the leasing arrangement and the acquisition proposed in the Transfer of Control Application are separate transactions. The Leasing Participants assert that "this lease arrangement between Nextlink and Verizon is independent from Verizon's acquisition of XO Communications, LLC . . . Nor is the lease contingent on any other transaction."²⁷ The Leasing Participants further contend, in response to petitioners and commenters, that "[t]he transactions are not interdependent, and each will close (assuming FCC and other regulatory approvals) independent of the status of the other. The parties' respective rights and obligations under each agreement do not impact the rights and obligations in the other transaction."²⁸ Our independent review of the leasing arrangement and the Transfer of Control agreements confirms the Leasing Participants' assertions.

9. Another critical factor is our conclusion that the public interest will be served by granting the leasing arrangement application now. The Commission has held that the LMDS and 39 GHz spectrum that is included in this leasing arrangement is likely to be crucial to 5G deployment.²⁹ American consumers will benefit and the public interest will be served by facilitating in the near-term the development of innovative 5G services.³⁰ Verizon Wireless "has committed to an aggressive schedule in

²² 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; *see also, e.g., Triangle-Verizon Wireless Order*, 31 FCC Rcd at 304, para. 6; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5112, para. 10; *AT&T-Leap Order*, 29 FCC Rcd at 2744, para. 17.

²³ *See, e.g., Applications of Atlantic Tele-Network, Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 25 FCC Rcd 3763, 3777, para. 26 & nn.108-09 (2008); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent To Assign AWS-1 Licenses*, Memorandum Opinion and Order, 27 FCC Rcd 10698, 10714, para. 17 (2012).

²⁴ 47 U.S.C. § 310(d); 47 C.F.R. § 1.948.

²⁵ DISH Petition to Deny at 4-5; INCOMPAS Petition to Deny at 2; Public Knowledge Comments at 11; DISH Reply at 9-10. Additional parties filing in the Transfer of Control Application proceeding have made this same request. *See, e.g., New America's Open Technology Institute Comments*, WC Docket No. 16-70, at 3-4 (filed May 12, 2016); INCOMPAS Petition to Deny, WC Docket No. 16-70, at 4 (filed May 3, 2016). The Transfer of Control Application includes licenses and authorizations administered by the Commission's Wireline Competition Bureau, International Bureau, and Wireless Telecommunications Bureau, and it will be addressed in a separate order in due course. Transfer of Control Public Notice.

²⁶ *FCC v. Schreiber*, 381 U.S. 279 (1965); *Application of AT&T Inc. and Qualcomm Incorporated for Consent To Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589, 17622, para. 80 (2011).

²⁷ Joint Opposition at 1.

²⁸ Joint Opposition at 12.

²⁹ *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, GN Docket No. 14-177, et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 16-89, at 68-69, para. 184 (July 14, 2016) (*Spectrum Frontiers Order*).

³⁰ In addition, as discussed below, we conclude that the proposed leasing arrangement is unlikely to result in any significant public interest harms.

developing 5G technology—with technical trials taking place now,” but it does not currently hold any LMDS or 39 GHz spectrum and so is hampered in its ability to do so. Finally, under these circumstances, we find it in the public interest not to review the leasing arrangement application and the Transfer of Control Application together but to grant the leasing arrangement application at this time.

10. Our action on the instant leasing arrangement application does not preclude or limit any analysis, action, or remedy that may be found appropriate with respect to the Transfer of Control Application. Similarly, our action today does not prejudge our consideration of any possible future application associated with the exercise of the Purchase Option. Finally, we note that our decision to proceed separately with review and disposition of the instant leasing arrangement application does not preclude or limit our discretion to consolidate our review of other transaction applications in the future that we deem sufficiently related as to make such consolidated consideration appropriate.³¹

11. Public Knowledge has argued that the Commission should request a copy of the Purchase Option agreement prior to any action on the leasing arrangement application.³² We have done so, and nothing in that agreement alters our conclusions in this order. The Leasing Participants have represented that Verizon Wireless is not exercising the Purchase Option at this time.³³ The Purchase Option is not currently before the Commission. If and when Verizon Wireless decides to exercise the Purchase Option, the parties to the Purchase Option agreement will be required to file a transfer of control application for the LMDS and 39 GHz spectrum licenses, as the Leasing Participants acknowledge.³⁴ If such an application is filed in future, interested parties will have the opportunity to file petitions to deny and comments and the Commission will have the opportunity to fully consider that potential proposed transaction based on the facts and circumstances presented at that time.

IV. POTENTIAL PUBLIC INTEREST HARMS AND BENEFITS

12. After carefully evaluating the likely competitive effects of the leasing arrangement, we find, as discussed in more detail below, that the likelihood of competitive harm at this point in time is low. We note that this is a proposed lease, not a proposed acquisition, and, at the latest, the leasing arrangement would terminate by the end of 2018. In light of the limited term of the lease and the current state of the marketplace, Verizon Wireless’s post-transaction spectrum holdings across the LMDS (28 GHz) and 39 GHz bands do not raise any particular competitive concerns. Further, we find that the transaction is likely to lead to public interest benefits, such as the use of this spectrum for the potential deployment of innovative 5G products and services to the benefit of American consumers. Overall, we find that the leasing arrangement’s potential public interest benefits outweigh any potential public interest harms.

1. Potential Public Interest Harms

13. *Positions of the Parties.* The Leasing Participants claim that the proposed leasing arrangement does not raise any competitive or other public interest concerns.³⁵ They assert that because Verizon Wireless does not hold or lease any spectrum in the LMDS or 39 GHz bands, the proposed

³¹ *Wireless Bureau Consolidates Review of Verizon Wireless-SpectrumCo-Cox, Verizon Wireless-Leap Wireless, and T-Mobile-Verizon Wireless Transactions*, Public Notice, 27 FCC Rcd 9093 (WTB 2012) (discussing the “commonality of issues”).

³² Letter from John Gasparini, Policy Fellow, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-70 (filed Apr. 22, 2016) (Public Knowledge Letter). This letter was not filed in response to the leasing arrangement application, but was only filed in the Transfer of Control Application docket. However, we have determined that it is appropriate to respond to this argument in the instant proceeding.

³³ Public Interest Statement at 1, n.1. See *supra* note 5 (describing the Purchase Option).

³⁴ Joint Opposition at 9-10.

³⁵ Public Interest Statement at 2.

leasing arrangement would not result in any spectrum aggregation.³⁶ The Leasing Participants also argue that because the LMDS and 39 GHz spectrum bands are not included in the Commission's spectrum screen, that analysis is not implicated.³⁷

14. In its petition to deny, DISH contends that the LMDS and 39 GHz bands could be important for early 5G deployments by existing operators interested in augmenting their networks anchored by lower frequency spectrum,³⁸ and that if the proposed leasing arrangement were approved, it would allow licensed millimeter wave (mmW) spectrum in a critical frequency range to be controlled almost exclusively by Verizon Wireless.³⁹ CCA also contends that service providers will need access to diverse spectrum resources in order to meet future demand and make 5G a reality, and asserts that the proposed transaction represents a significant step in the direction of anti-competitive aggregation of mmW spectrum.⁴⁰ CCA and Public Knowledge maintain that the Commission should incorporate protections to ensure that mmW spectrum bands are not dominated by AT&T and Verizon Wireless.⁴¹ DISH, INCOMPAS, and Public Knowledge contend that the proposed leasing arrangement would eliminate the existing wireless broadband competition between Verizon Wireless and Nextlink (or its parent, XO Holdings) and eliminate potential future competition by Nextlink in 5G technologies and wireless broadband.⁴²

15. Several commenters argue that before considering the leasing arrangement application, we should adopt a competitive analysis framework regarding, specifically, the potential spectrum aggregation of mmW spectrum in the Spectrum Frontiers proceeding.⁴³ Public Knowledge argues that the Commission should make clear that if Verizon Wireless leases or leases and then purchases the Nextlink spectrum, that these proposed acquisitions will be evaluated under the rules established for these bands,⁴⁴ while CCA and ViaSat urge the Commission not to approve this proposed leasing arrangement until it adopts a framework governing the licensing and use of mmW spectrum.⁴⁵ Certain petitioners and commenters in this proceeding also raise concerns about the potential competitive effects of the leasing arrangement with respect to Business Data Services (BDS) and the backhaul market.⁴⁶

16. The Leasing Participants argue that the petitioners' objections are based on speculation regarding future events and potential Commission policies.⁴⁷ The Leasing Participants further contend

³⁶ Public Interest Statement at 2; Joint Opposition at 3.

³⁷ Public Interest Statement at 3.

³⁸ DISH Petition to Deny at 15 (anchored by "sub-3 GHz spectrum"); *see also* DISH *Ex Parte* at 2.

³⁹ DISH Petition to Deny at 2; *see also* DISH Reply at 7; Public Knowledge Reply at 7; DISH *Ex Parte* at 2.

⁴⁰ CCA Comments at 4-5; *see also* CCA *Ex Parte* at 3.

⁴¹ CCA Comments at 6-8; Public Knowledge Comments at 9; *see also* INCOMPAS Reply; Public Knowledge Reply at 7.

⁴² DISH Petition to Deny at 11, 15; INCOMPAS Petition to Deny at 6-7, 9-10; Public Knowledge Comments at 10-11; *see also* DISH Reply at 4; INCOMPAS Reply at 1-2; Public Knowledge Reply at 1-2, 4; DISH *Ex Parte* at 3.

⁴³ CCA Comments at 6-9; ViaSat Comments at 1-2; *see also* DISH Reply at 8-9. The Spectrum Frontiers proceeding was introduced in 2014 with a Notice of Inquiry. *See generally Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Notice of Inquiry, 29 FCC Rcd 13020 (2014).

⁴⁴ Public Knowledge Comments at 7, 14.

⁴⁵ CCA Comments at 6-9; ViaSat Comments at 1-2; *see also* DISH Reply at 8-9. We note that these concerns are now moot as the *Spectrum Frontiers Order* establishing the rules governing the licensing and use of the mmW spectrum has recently been released. *See generally Spectrum Frontiers Order* (rel. July 14, 2016). *See supra* at para. 9.

⁴⁶ *See, e.g.*, INCOMPAS Petition to Deny at 6; Public Knowledge Comments at 4; DISH Petition to Deny at 2-3.

⁴⁷ Joint Opposition at 3.

that the petitioners and commenters fail to identify any competition or potential public interest harms that would result under current policies or market circumstances, maintaining that they make generalized claims that do not point to any specific facts.⁴⁸ The Leasing Participants reiterate that the spectrum screen is not implicated because neither LMDS nor 39 GHz bands are included in the current spectrum screen, nor are they subject to band-specific aggregation limits.⁴⁹ The Leasing Participants conclude that the proposed leasing arrangement would not eliminate existing wireless broadband competition because neither XO Communications nor Nextlink offers competing services with Verizon Wireless's mobile broadband service.⁵⁰

17. *Discussion.* In its examination of any proposed transaction, the Commission evaluates the potential public interest harms and undertakes a case-by-case review of the competitive effects of any increase in market concentration or in spectrum holdings in the relevant markets.⁵¹ Spectrum is an essential input in the provision of mobile wireless services, and ensuring that sufficient spectrum is available for incumbent licensees as well as potential new entrants is critical to promoting effective competition and innovation in the marketplace.⁵² As the Commission noted in the *Mobile Spectrum Holdings Report and Order*, the mobile wireless marketplace is highly concentrated, and with continually increasing consumer demand for mobile broadband, "in order for there to be robust competition, multiple competing service providers must have access to or hold sufficient spectrum to be able to enter a marketplace or expand output rapidly in response to any price increase or reduction in quality, or other change that would harm consumer welfare."⁵³ As the Commission has also found, holding a mix of spectrum bands promotes competition between service providers, and consumers benefit when multiple service providers have access to such a mix.⁵⁴

18. We begin by noting that any potential competitive effects of the leasing arrangement with respect to BDS are more appropriately addressed in the Transfer of Control proceeding.⁵⁵ As stated above, our action on the leasing arrangement application does not preclude or limit any analysis, action, or remedy that may be found appropriate with respect to the Transfer of Control Application.

⁴⁸ Joint Opposition at 3-4.

⁴⁹ Public Interest Statement at 2-3; Joint Opposition at 5.

⁵⁰ Joint Opposition at 5-6. The Leasing Participants state that Nextlink uses its spectrum to provide fixed-wireless services directly to end users and leases its spectrum to third parties. *Id.* at 5.

⁵¹ See, e.g., *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5113, para. 12; *AT&T-Leap Order*, 29 FCC Rcd at 2745, para. 20.

⁵² See, e.g., *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6238-40, paras. 282-88; *AT&T-Leap Order*, 29 FCC Rcd at 2745-46, para. 21.

⁵³ *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6143-44, 6146-47, 6157, paras. 17-18, 23-25, 47; see also *Spectrum Frontiers Order*, at 68-69, para. 184.

⁵⁴ *Spectrum Frontiers Order*, at 68-69, para. 184; see also *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6163-64, para. 59.

⁵⁵ Once the leasing arrangement application is consummated pursuant to the consent granted in this Order, Verizon Wireless's control of the spectrum associated with the leasing arrangement, including any potential competitive effects on the BDS marketplace, may be considered in the Transfer of Control proceeding.

19. In our consideration of the spectrum leasing arrangement in front of us, we note that the Commission's spectrum screen, as historically applied to proposed secondary market transactions,⁵⁶ does not include the mmW bands. However, as the Commission found in the *Spectrum Frontiers Order*, the mmW bands are likely to be critical to the development of 5G services.⁵⁷ In that Order, the Commission evaluated the industry-wide issues, policies, and overarching goals concerning the use of mmW spectrum, and determined that proposed secondary market transactions, such as this one, should be analyzed on a case-by-case basis using a mmW spectrum threshold as an initial analytical tool to aid in identifying certain markets for further review.⁵⁸ As discussed in the *Spectrum Frontiers Order*, the three mmW bands are interchangeable, i.e., they have similar technical characteristics and potential uses.⁵⁹ Therefore, the *Spectrum Frontiers Order* declined to adopt a band-specific spectrum aggregation limit, but instead adopted a spectrum threshold for proposed secondary market transactions that would apply if an entity post-transaction would hold 1250 megahertz or more out of the total 3250 megahertz of spectrum⁶⁰ across the LMDS (28 GHz), 37 GHz, and 39 GHz bands.⁶¹ Although the regulations adopted by the *Spectrum Frontiers Order* have not yet become effective,⁶² our analysis of this leasing arrangement application is guided by those regulations.

20. Evaluating the various factors present in this case, we note first that this is a proposed *de facto* transfer leasing arrangement and not a transfer of control application. As stated above, the leasing arrangement would not extend past year-end 2018 and could terminate at an earlier point. The proposed leasing arrangement, as it stands, is relatively short-term, thereby limiting any potential competitive harms to the limited term of the lease. If Verizon Wireless were to exercise the Purchase Option, the Commission would evaluate the factors and characteristics of that proposed transaction in light of the state of the marketplace at that time. Further, post-transaction, we observe that Verizon Wireless would

⁵⁶ In its review of proposed transactions involving spectrum commonly used in the provision of mobile wireless services, the Commission historically has employed, among other tools, a spectrum screen applicable to specified bands to help identify those markets where aggregation of spectrum in those bands provide particular reason for further competitive analysis. However, the Commission has not limited its consideration of potential competitive harms solely to markets identified by its screen if it encounters other factors that may bear on the public interest inquiry. See, e.g., *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5113, para. 12; *AT&T-Leap Order*, 29 FCC Rcd at 2745, para. 20.

⁵⁷ *Spectrum Frontiers Order*, at 68-69, para. 184. Due to technological advances, the mmW bands could potentially be used for mobile broadband and are likely to serve as an important supplement to lower-band spectrum. Specifically, the mmW bands potentially will be used for supporting very high capacity networks in areas that require such capacity, as well as for machine-to-machine communications, and in the development of various Internet of Things applications including wearables, fitness and healthcare devices, autonomous driving cars, and home and office automation. *Id.* at 69, para. 185.

⁵⁸ *Spectrum Frontiers Order*, at 69, para. 185. We emphasize, however, that the threshold is not a "safe harbor:" our consideration of potential competitive harms is not limited to those markets identified by the threshold.

⁵⁹ *Spectrum Frontiers Order*, at 69, para. 185.

⁶⁰ In the *Spectrum Frontiers Order*, the Commission made available 850 megahertz of LMDS spectrum (27.5 GHz–28.35 GHz in the A1 Band), 1000 megahertz of 37 GHz spectrum (37.6 GHz–38.6 GHz), and 1400 megahertz of 39 GHz spectrum (38.6 GHz–40 GHz). *Id.* at 5-6, 30, 31, 32, 45, paras. 4, 72, 74, 76, 105, 111.

⁶¹ *Spectrum Frontiers Order*, at 68-69, 71, paras. 184-85, 189. Establishing this spectrum aggregation threshold in the secondary market context recognizes the specific characteristics of this spectrum while helping to ensure that multiple entities have an opportunity to obtain mmW spectrum for the deployment of innovative mobile technologies. *Id.* at 71, para. 189.

⁶² The *Spectrum Frontiers Order* was adopted and released on July 14, 2016. The regulations adopted in the *Spectrum Frontiers Order* will become effective 30 days after the date of publication in the Federal Register.

not hold 1250 megahertz or more of mmW spectrum in any county.⁶³ At this point in time, based on our careful review of the record, Verizon Wireless's post-transaction spectrum holdings across the LMDS (28 GHz) and 39 GHz bands associated with this limited term lease do not raise any particular competitive concerns in light of the current state of the marketplace. We find that the lease of this mmW spectrum by Verizon Wireless for, at maximum, the next two-and-a-half years is unlikely to foreclose rival service providers from obtaining access to sufficient mmW spectrum for their own development of innovative new products and services. For these reasons, we find that the likelihood of competitive harm from this particular spectrum leasing arrangement is low.

2. Potential Public Interest Benefits

21. We next consider whether the proposed leasing arrangement is likely to generate verifiable, transaction-specific public interest benefits.⁶⁴ Under Commission precedent, the Leasing Participants bear the burden of demonstrating the potential public interest benefits of a proposed transaction.⁶⁵ The Commission applies several criteria in deciding whether a claimed public interest benefit is cognizable. First, each claimed benefit must be transaction-specific.⁶⁶ That is, the claimed benefit must be likely to occur as a result of the proposed transaction and unlikely to be realized without the transaction or by a practical alternative that would raise fewer competitive concerns than the proposed transaction.⁶⁷ Second, each claimed public interest benefit must be verifiable.⁶⁸ Because much of the information relating to the potential benefits of a proposed transaction is in the sole possession of the Leasing Participants, they have the burden of providing sufficient evidence to support each claimed benefit to enable us to verify its likelihood and magnitude.⁶⁹ We will discount or dismiss speculative benefits that we cannot verify. Further, benefits expected to occur only in the distant future may be discounted or dismissed because, among other things, predictions concerning the distant future are inherently more speculative than predictions that are expected to occur closer to the present.⁷⁰ Third, "the magnitude of benefits must be calculated net of the cost of achieving them."⁷¹ Fourth, benefits must

⁶³ Verizon Wireless does not currently hold or lease any spectrum in the LMDS or 39 GHz bands, and it would lease from Nextlink spectrum associated with 93 LMDS licenses and nine 39 GHz licenses covering 920 counties, or approximately 63 percent of the U.S. population in all or parts of 289 CMAs. Application, Exhibit 2–Spectrum Data, Nextlink-Verizon Wireless Leases. Post-lease, Verizon Wireless would hold a maximum of 1050 megahertz of mmW spectrum, or under one-third, of the spectrum that the Commission made available in the *Spectrum Frontiers Order* for flexible use, including mobile services. *Spectrum Frontiers Order* at 5-6, para. 4.

⁶⁴ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Plateau Wireless Order*, 30 FCC Rcd at 5126, para. 43; *AT&T-Leap Order*, 29 FCC Rcd at 2792-93, para. 130.

⁶⁵ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 86; *AT&T-Leap Order*, 29 FCC Rcd at 2793, para. 131.

⁶⁶ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Leap Order*, 29 FCC Rcd at 2793, para. 132; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 87.

⁶⁷ U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, August 19, 2010, at § 10 at 30 & n.13 (stating that "the agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing"). Cf. *Alaska Wireless Order*, 28 FCC Rcd at 10467, para. 85.

⁶⁸ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Leap Order*, 29 FCC Rcd at 2793, para. 132; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 87.

⁶⁹ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Leap Order*, 29 FCC Rcd at 2793, para. 132; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 87.

⁷⁰ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Leap Order*, 29 FCC Rcd at 2793, para. 132; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 87.

⁷¹ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9237, para. 275.

flow through to consumers, and not inure solely to the benefit of the company.⁷² For example, we will more likely find marginal cost reductions to be cognizable than reductions in fixed costs because reductions in marginal costs are more likely to result in lower prices for consumers.⁷³

22. The Commission applies a “sliding scale approach” to evaluating benefit claims.⁷⁴ Under this sliding scale approach, where potential harms appear “both substantial and likely, a demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”⁷⁵ Conversely, where potential harms appear unlikely or less likely and less substantial, as is the case here, the Commission will accept a lesser showing of claimed benefits.⁷⁶

23. *Claims of the Leasing Participants.* According to the Leasing Participants, by using mmW frequencies pursuant to the lease, Verizon Wireless would be able to better its service to its customers.⁷⁷ The Leasing Participants assert that the proposed leasing arrangement would facilitate the industry-leading research and development of potential 5G products and services, as well as the early testing of 5G equipment and devices.⁷⁸ The Leasing Participants maintain that Verizon Wireless has committed to using this spectrum to develop 5G, and assert that “[h]igher frequency spectrum is an important part of possible 5G technologies and solutions that will deliver next-generation services to American consumers, game-changing new features, applications, wearables and sensors, and the benefits of the Internet of Things and a fully connected society. But substantial work and investment will be required to unlock the promise of 5G, an industry enterprise that is in its earliest stages.”⁷⁹ The Leasing Participants also maintain that the proposed leasing arrangement would further “enable [Verizon Wireless] to offer next-generation services to meet Americans’ ever growing demand for mobile broadband.”⁸⁰ Further, the Leasing Participants contend that Verizon Wireless “has committed to an aggressive schedule in developing 5G technology—with technical trials taking place now and an aggressive commercial rollout target.”⁸¹

24. The Leasing Participants assert that Verizon Wireless would also use the LMDS and 39 GHz spectrum included under the subject lease to meet its “substantial and evolving needs for wireless

⁷² See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9237, para. 275.

⁷³ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3647-48, para. 34; *AT&T-Leap Order*, 29 FCC Rcd at 2793-94, para. 132; *Alaska Wireless Order*, 28 FCC Rcd at 10468, para. 87.

⁷⁴ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3648, para. 35; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9238, para. 276.

⁷⁵ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3648, para. 35; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9238, para. 276.

⁷⁶ See, e.g., *AT&T/DIRECTV Order*, 30 FCC Rcd at 9238, para. 276; *Alaska Wireless Order*, 28 FCC Rcd at 10468-69, para. 88.

⁷⁷ Joint Opposition at 2.

⁷⁸ *Id.*

⁷⁹ Joint Opposition at 2-3.

⁸⁰ Public Interest Statement at 2; see also Edited Transcript, Verizon Communications at Morgan Stanley Technology, Media and Telecom Conference, Interview with Fran Shammo (Mar. 1, 2016) (“we made a strategic decision not to buy that spectrum”; “renting that spectrum with an option to buy. And the reason we wanted that was because with the FCC right now we’ve been granted some 28 gigahertz which we are trialing through five cities on what’s the capability of 5G. This rental agreement enables us to include in some of our R&D development with 28 gigahertz. So that just continues the path that we’re on in landing 5G as soon as the FCC clears spectrum.”).

⁸¹ Joint Opposition at 2.

backhaul to support existing mobile broadband services.”⁸² They further maintain that the leased spectrum would provide Verizon Wireless with additional options to supplement its existing backhaul operations.⁸³

25. *Discussion.* We have reviewed the Leasing Participants’ asserted public interest benefits, and find that, as a direct result of the leasing arrangement, Verizon Wireless would likely be better able to advance 5G development to the benefit of American consumers. As discussed in the *Spectrum Frontiers Order*, the LMDS (28 GHz) and 39 GHz spectrum that is included in the subject leasing arrangement is likely to be crucial to 5G deployment.⁸⁴ Verizon Wireless has publicly committed to an aggressive schedule in developing 5G technology, and is currently undertaking technical trials, and without access to the spectrum associated with this leasing arrangement, it would be severely hampered in its efforts. We believe therefore that consenting to the subject long-term *de facto* spectrum transfer leasing arrangement will allow Verizon Wireless, which does not currently hold any of this spectrum, to develop potentially important uses and new technology for these mmW spectrum bands. Further, the relatively short-term nature of the proposed leasing arrangement means that any such advancements in the development of innovative 5G products and services will likely be provided more expeditiously than in the absence of the proposed leasing arrangement.

V. BALANCING THE POTENTIAL BENEFITS AND THE POTENTIAL HARMS

26. The Leasing Participants bear the burden of demonstrating that the potential public interest benefits of the proposed transaction outweigh the potential public interest harms. Based on our careful evaluation of the likely competitive effects, we find that the leasing arrangement is unlikely to result in any significant public interest harms. We emphasize that the particular circumstances of this specific transaction guide our decision today. Each proposed transaction that comes before us that includes mmW spectrum will be carefully reviewed as to its particular facts. In addition, we find that the record provides general support for the Leasing Participants’ assertions that the leasing arrangement would likely result in certain public interest benefits. Therefore, under our sliding scale approach, we find that the likelihood of public interest harm is low and the potential public interest benefits outweigh any potential public interest harms. As a result, based on the record before us and our competitive review, we find that consent to the proposed leasing arrangement would serve the public interest, convenience, and necessity.

VI. ORDERING CLAUSES

27. Accordingly, having reviewed the application and the record in this matter, IT IS ORDERED that, pursuant to Sections 4(i)-(j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 303(r), 309, 310(d), the application for consent to the long-term *de facto* transfer spectrum leasing arrangement filed by Verizon Wireless and Nextlink IS GRANTED.

28. IT IS FURTHER ORDERED that, pursuant to Sections 63.10, 63.13, and 1.939 of the Commission’s Rules, 47 C.F.R. §§ 63.10, 63.13, 1.939, the petitions of DISH and INCOMPAS to deny the application ARE DENIED as discussed above.

29. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release. Petitions for Reconsideration under Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of release of this Memorandum Opinion and Order.

⁸² Public Interest Statement at 2; *see also* Joint Opposition at 2-3.

⁸³ Joint Opposition at 3.

⁸⁴ *Spectrum Frontiers Order*, at 68-69, para. 184.

30. 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, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Jon Wilkins
Chief
Wireless Telecommunications Bureau