

December 16, 2008

**MAP WHITE PAPER PROPOSAL ON
FCC SPECTRUM POLICY REFORM**



The change in administration presents an ideal opportunity to rethink several aspects of the Commission's spectrum policy. The new Commission must, of course, address open dockets and existing issues in the current mobile market. But for these changes to have meaning, the Commission must reconsider its overall approach. The Commission has not seriously reexamined its approach to spectrum since the Spectrum Task Force issued its report in 2002. Further, this exercise relied heavily on the approach adopted by the Commission since Congress authorized auctions in 1993. This approach created four underlying structural problems the FCC must correct.

- Perpetuation of the now discredited position of the "Chicago School" that deregulated markets are competitive markets, combined with reliance on the extremist "Property School" approach that spectrum efficiency is best achieved by converting spectrum use into a species of property right in violation of the Communications Act.
- A refusal to recognize that wireless markets have features that make them different from the simple market for goods and services to which they are frequently analogized.
- The insistence on considering wireless as a separate mobile market, except where useful to show potential competition in related markets such as broadband, without any underlying justification beyond the effort to reach a pre-determined result.
- Refusal to consider data or approaches that contradict these principles, resulting in poor data collection and the issuance of reports designed as "feel good" exercises justifying the wisdom of the Chicago School and pushing the agenda of the "Property School."

As a matter of market structure, the existing wireless market has broken down into two dominant vertically integrated players – AT&T and Verizon – and everyone else. Furthermore, the mobile market now intersects all aspects of telecom and media policy, from broadband access to mobile television. The ideological blinders driving the Commission's spectrum policy have caused it to overlook critical inputs into the wireless industry – such as the need for backhaul and the impact of vertical integration – and to fail to consider how to integrate wireless into the Commission's

overall plan for deployment of competitive broadband services.

From the consumer perspective, Americans pay more money for fewer equipment options and fewer services than in most other industrialized countries. The cost of instant messaging on most plans is now approximately 1 cent per 7 bytes of data transferred, or approximately \$1000 per MB of transport – a price with absolutely no basis in cost. Early termination fees persist, despite continued consumer complaints. And, while the price of voice on a per-minute basis has fallen, the actual price paid by consumers for contracts has increased steadily with the rate of concentration in the industry.

In short, rigid ideological adherence to the Chicago School and endless pursuit of the property model has utterly failed to lead either the industry or consumers into the Promised Land flowing with milk and honey.

Failure of the Auction Model As Implemented

Coase's oft quoted prophecy that distribution of licenses by auction followed by unrestricted sale of licenses would produce the optimum result has utterly failed to materialize. Despite 15 years of devout deregulation and enhanced reliance on market mechanisms by Chicago School acolytes, Coase's free market prophecy has failed to produce either robust competition or the promised consumer benefits. Worse, it has produced precisely the opposite result of what Congress mandated when it passed the auction statute in 1993. Section 309(j) requires that the Commission structure auctions to maximize innovation, prevent concentration of licenses, and enhance participation in the wireless market by traditionally marginalized stakeholders such as minority and women run business and rural areas. The statute expressly prohibits consideration of revenues as part of the public interest analysis. It stresses that distribution at auction does not create a property interest in the license, relieve licensees of the obligation to serve the public interest, or limit the Commission's overall regulatory power over spectrum. Despite this clear statutory mandate, the FCC has managed

spectrum in a way that increases concentration, continues to exclude women and minority owned businesses, under-serves rural communities, and encourages licensees to regard licenses as a species of property right immune to federal regulation and exempt from the “old media” concept of public interest obligations.

A Comprehensive Proposal To Address Then Systemic Problems

MAP proposes a set of recommendations designed to address the policy failures of the last 15 years in a systemic fashion. As a general matter, MAP recommends that the FCC abandon the approach based on Chicago School ideology and reject the explicit goal of the Property School to privatize spectrum as an end in itself. Instead, the FCC should focus on the use of spectrum to achieve the broader goals of the Communications Act as set forth in Section 1:

To make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.

This should be combined with the policy described in Section 257(b):

The Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

It should also encompass the specific public interest goals described in Section 309(j) of encouraging competition, innovation, and inclusion of traditionally marginalized stakeholders.

Achieving these ends requires that the Commission formulate policies based on real world data. It should also examine how actors actually behave in the real world (a study called “behavioral economics”) rather than simply postulate that rational actors in an ideal universe will behave in positive ways. Where evidence shows that providers of wireless services possess market power due to vertical integration, predictable real-world consumer behavior, or other factors, the Commission should act to ensure that the practices of wireless providers are just and reasonable no matter what

traditional metrics such as HHI may say. Similarly, to effectuate the Congressional goals of broadband deployment, as well as the critical First Amendment interest in ensuring the widest diversity of participating views in the electronic media, the Commission must be prepared to take proactive steps rather than wait for a clear sign from Heaven that the market has failed beyond all hope of redemption.

Perhaps most important, the Commission must abandon the false ideological dichotomies of “old media” v. “new media” or “property” v. “commons.” The real question is and always should be “what is the best way to achieve the goals mandated by Congress?”

Specific Recommendations.

MAP suggests four categories of specific recommendations: (1) Address existing market structure and consumer injuries (“staunch the bleeding”), primarily through existing dockets; (2) Enhance overall spectrum efficiency; (3) Employ proactive means to encourage participation by marginalized stakeholders; and (4) Take steps for overall culture change. A complete list of proposed initiatives, including those already found in existing open dockets, is attached as Appendix A.

Address existing market structure issues and consumer harms. The FCC should address the immediate problems in the mobile market by resolving several open dockets so as to enhance competition and protect consumers where even a competitive market may not provide sufficient protection. These include restoration of spectrum caps, roaming reform, grant of the *Skype Petition* and the *PK Text Messaging* petition, USF/ICC reform, and elimination of early termination fees.

These dockets address the problems of vertical integration and market power that have arisen in the wireless market by either enhancing existing competition (*e.g.* USF/ICC, roaming reform), creating competition in related markets for equipment and applications (*Skype Petition* and “Wireless *Carterfone*” generally), eliminating barriers to switching (eliminating ETFs).

USF/ICC reform in particular should be viewed as ways to enhance competition and

encourage deployment. In doing so, the Commission should carefully consider the problem of vertical integration and how it impacts competition. When competing wireless carriers pay access charges to the wireline component of a vertically integrated company, it has an anticompetitive effect. Similarly, when USF funds go only to subsidy programs and do not pay for purchase of equipment or wholesale services that would allow local communities to construct their own networks to service themselves, it impedes competition. USF/ICC reform therefore provides a perfect opportunity to begin the cultural transformation that address the root problem.

Measures to enhance spectrum efficiency. The Commission can take several steps to enhance the overall efficient use of commercial spectrum and federal spectrum. These include increased opportunities for opportunistic sharing (such as used in the broadcast white spaces), receiver standards to enhance efficient use in licensed services, and instituting a general preference for non-exclusive use over exclusive use where feasible, closer cooperation between the FCC, NTIA, and other branches of the federal government to share spectrum use with the private sector using models other than clearing federal users and auctioning licenses, and exploring ways in which state and local governments can use non-public safety spectrum to enhance spectrum access for all.

It is important to note that the typical objection that the Commission should not look at non-exclusive models such as opportunistic sharing and “licensing lite” because the Commission has “done enough” for unlicensed spectrum is a false dichotomy, as is the effort by broadcasters and other incumbents to frame the issue as “new” v. “old.” The question at all times is “does this make spectrum use more efficient.” Clearly allowing users of unlicensed spectrum to use frequency bands where licensees have not deployed service in a way that does not hinder deployment by the licensee enhances efficient use of spectrum. To suggest that the Commission should not facilitate such use solely because the Commission has done “enough” for unlicensed makes no sense.

Other suggestions, such as the use of receiver standards, do represent a departure from

Commission precedent that would potentially impose new expenses on manufacturers and others. The ever increasing demand for access to spectrum, however, suggests that this may confer enormous public interest benefits. It is time for the Commission to reevaluate its previous policies of requiring new entrants to fully protect all existing uses and instead consider whether a modest sharing of possible costs would pay huge dividends for everyone.

Proactive means to encourage traditionally marginalized stakeholder communities. MAP recommends the Commission examine ways to proactively ensure that traditionally marginalized stakeholder communities will have greater opportunity to hold spectrum licenses in accordance with Section 309(j)(3)(B) and have greater ability to participate in the distribution and use of spectrum-based services, in accordance with Section 309(j)(4)(D). This should include general education and outreach by the Commission, as well as consideration that certain policies may have disproportionate impact on these communities.

In addition, the Commission must consider how the use of public interest obligations – such as build out obligations or capacity set asides – impact deployment of service and the opportunity for traditionally marginalized stakeholders to participate in the distribution and use of spectrum services. Finally, the Commission should consider whether licensing additional capacity, such as the “S License” proposed by Media Access Project President Andrew Jay Schwartzman at the Commission’s hearing on diversity in Brooklyn, NY, would increase opportunities for traditionally marginalized stakeholders to become licensees.

Overall Culture Change. The Commission must integrate consideration of spectrum policy as part of an overall strategy to accomplish the goals set forth in Section 1 of the Communications Act, rather than as an independent market with no bearing on the evolution of “old media.” In doing so, the Commission should abandon the now discredited Chicago School fallacy that all regulation is inherently evil and employ appropriate tools of economic analysis, such as behavioral economics

that examines how actors actually behave in the market.

While “culture change” presents obvious challenges, MAP offers several concrete proposals to effectuate this change. First, MAP recommends revitalizing the Office of Strategic Plans and Policies (OSP). Under Robert Pepper, OSP provided several valuable functions within the FCC – from acting as an internal “think tank” to holding forums on new technology to providing advice on technological and economic matters across the agency. This ability to provide “big picture” perspective and to keep the Commission informed of new developments outside the considerations of any specific proceeding or specific Bureau proved a valuable tool in combating insularity and encouraging broader strategic thinking.

Second, the Commission should abandon the policy of expanding spectrum use rights without exacting some corresponding benefit to the public in return. Section 309(j)(3)(C) requires the Commission to recoup some compensation for the exclusive use of the public asset. This need not be solely a monetary return. To the contrary, serious consideration of what constitutes reasonable public interest obligations for the 21st Century, such as provision of lifeline wireless service, would provide a better overall return to the public than a one time payment to the public. But the Commission has generally made no effort to require that licensees make any return for expanded use of the public spectrum.

Third, the Commission should use merger adjudications to vigorously address the problem of vertical integration and market power. The Commission has too often evaded its responsibilities in this regard by finding that such issues are “industry-wide issues” supposedly “better suited” for rulemaking. But an adjudication involving the largest market participants is, in essence, an industry-wide proceeding. More to the point, the evidence provided in a merger review makes it possible for the Commission to address specific issues with precision, while simultaneously sending important signals to the industry as a whole. An integrated approach to spectrum management that addresses

real world issues such as vertical integration should not scorn the useful tool of merger review.

Finally, and perhaps most significantly, the Commission should embrace the idea of an industrial policy that encourages competition. This includes a renewed emphasis on accurate data collection and identifying emerging problems with industry structure as part of the CMRS report. Too often, the Commission announces its intent to promote competition but then refrains from taking necessary action on the grounds that it does not want to “pick winners.” But the entire point of promoting competition is to “pick winners” – at least in the sense that consumers will continue to have choices and competitive options. A policy of promoting competition combined with a refusal to take any action to actually ensure that competition emerges in the face of existing incumbents amounts to little more than a pious wish for a better world. This may be adequate for an FCC where the Chairman states that “the market is my religion” and waits for visitations by Angels to recognize the public interest, but it should have little place in an FCC that effectively carries out the directives of Congress.

APPENDIX A

Specific Recommendations By Category

Enhancing Competition And Addressing Consumer Harms

Existing Dockets:

RTG Spectrum Cap Petition
Roaming Reform
Skype Petition
Public Knowledge Text Messaging Petition
USF Reform
ICC Reform

Potential New Proceedings:

Early Termination Fee reform
Lifeline wireless service
Self-provisioning/Local Ownership Inquiry

Enhance Efficient Use of Spectrum

Existing Dockets:

Resolve broadcast white spaces docket, particularly promised NOI on use of higher power in rural areas.

Potential New Proceedings:

Further opportunities for opportunistic sharing
Receiver standards
Facilitating use of secondary markets by Federal or State licensees for non-public safety spectrum
Closer cooperation with NTIA and other federal agencies for shared use of spectrum with the private sector
Encouraging reliance on private dispute resolution among licensees.

Proactive Means To Encourage Marginalized Stakeholders

Closer cooperation with Native American Sovereign Tribes
Outreach and education
S-license for digital broadcast media
Recommend Congress reinstitute Tax Certificate Program
Use of public interest obligations in specific wireless proceedings

Overall Culture Change

Rebuild OSP with an emphasis on empirical data and behavioral economics
Incorporate the concept of return on the public asset in expanding spectrum rights
Use mergers to address issues of vertical integration

Improve data collection and rigor of CMRS Report
Embrace industrial policy of deployment and competition