Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Verizon Communications Inc. and	)	ULS File No. 0007783428
Straight Path Communications, Inc.	)	DA 18-52
	)	
For Consent to Transfer Control of Local	)	
Multipoint Distribution Service, 39 GHz, Common	)	
Carrier Point-to-Point Microwave, and 3650-3700	)	
MHz Service Licenses	)	

OPPOSITION TO APPLICATION FOR REVIEW

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OPPOSITION TO APPLICATION FOR REVIEW

The Commission should deny the Competitive Carriers Association's ("CCA") Application for Review of the order approving the transfer of control of wireless licenses held by Straight Path Spectrum LLC ("Straight Path") to Verizon Communications Inc. ("Verizon").[1] In the *Verizon/Straight Path Order*, the Wireless Telecommunications Bureau ("Bureau") properly found that the license transfers will result in important public interest benefits for the future of 5G. CCA's challenge is nothing more than an effort to recycle speculative and generalized claims that are factually and legally incorrect. CCA has not met the standard set forth for applications for review in Section 1.115 of the Commission's rules, and accordingly, its Application for Review should be denied.

[1] Competitive Carriers Association Application for Review, ULS File No. 0007783428 (filed Feb. 20, 2018) ("Application for Review"); *Applications of Verizon Communications, Inc. and Straight Path Communications, Inc.*, Memorandum Opinion and Order, ULS File No. 0007783428, DA 18-52 (rel. Jan. 18, 2018) ("*Verizon/Straight Path Order*"). CCA styles its filing as an Application for Review "or, in the alternative," as a Petition for Reconsideration that CCA would then have the Bureau refer back to the Commission. Application for Review at 7-8. Either way, CCA's apparent goal is Commission-level review, and Verizon favors that outcome.

I. INTRODUCTION AND SUMMARY.

Verizon's acquisition of Straight Path's wireless licenses advances the public interest, and the Commission should affirm the Bureau's approval of the associated license transfers. Verizon is at the global vanguard of 5G. The Bureau properly found that the transaction would enable Verizon to speed the launch of innovative 5G services for the benefit of American consumers. As Chairman Pai recently put it, approval of the license transfers allows Verizon to "play[] [its] part by making aggressive plans to introduce 5G service using high-band spectrum."[2] Indeed, Verizon plans to use the Straight Path millimeter wave ("mmW") spectrum in its 5G commercial deployments later this year, following its successful 5G trials using other mmW spectrum. The *Verizon/Straight Path Order* helps Verizon to promptly deliver the benefits of 5G to consumers, businesses, and government users alike, even as other companies – including several CCA members – announce plans to compete in the 5G space using differing spectrum plans and business models.

CCA's allegations lack merit. In its Application for Review and associated Stay Petition,[3] CCA wrongly asserts that the Bureau "manipulate[d] applicable rules,"[4] "made blatantly incorrect findings of fact,"[5] engaged in "false assertion[s]"[6] and "fiction,"[7] "ignored the

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[2] *Remarks of FCC Chairman Ajit Pai at the Mobile World Congress, Barcelona, Spain*, Feb. 26, 2018, at 2, https://apps.fcc.gov/edocs_public/attachmatch/DOC-349432A1.pdf ("Pai Mobile World Congress Remarks").

[3] Competitive Carriers Association Petition for Stay, ULS File No. 0007783428 (filed Feb. 20, 2018) ("Stay Petition"). On February 28, Verizon and Straight Path closed the transaction. *See* FCC Form 603, ULS File No. 0008115758 (filed Feb. 28, 2018) (notice of consummation).

[4] Application for Review at 7.

[5] Stay Petition at 3.

[6] *Id.* at 9.

[7] Application for Review at 3.

record,"[8] "ignored Commission policy,"[9] "bur[ied] its head in the sand,"[10] "failed to conduct a meaningful review,"[11] and "rubber-stamp[ed] the Transaction"[12] while simultaneously engaging "in a rush to approve" it[13] and "stalling" action.[14] Notwithstanding this overheated rhetoric, CCA is wrong on the facts and the law.

CCA calls on the Commission to reject decisions in full force and effect today, making collateral attacks on those decisions (which CCA could have, but did not, challenge in a timely manner). For instance, CCA claims that the Bureau should consider only the 28 GHz and 39 GHz spectrum bands in evaluating the license transfers' competitive effects – even though the Commission has twice rejected CCA's call for band-specific mmW spectrum aggregation review and instead adopted the mmW spectrum "threshold" in the *Spectrum Frontiers* proceeding. CCA asserts that the Bureau should have used the now-discarded 1250 megahertz mmW threshold instead of the 1850 megahertz mmW threshold adopted in the *Spectrum Frontiers Second R&O* – a result that would supersede existing policy and undermine key tenets of administrative law. CCA even disputes the Bureau's finding that other spectrum is available for 5G services – even as its own members publicly tout aggressive 5G plans using many different spectrum bands. Finally, CCA's call to reverse the *Verizon/Straight Path Order* and auction Straight Path's spectrum attempts to rewrite the Straight Path *Consent Decree* – but the *Consent Decree* is final and CCA did not challenge it when it was issued.

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[8] Stay Petition at 3.

[9] *Id.* at 6.

[10] Application for Review at 10.

[11] *Id.* at 2.

[12] Stay Petition at 4.

[13] Application for Review at 12.

[14] *Id.* at 7.

Ultimately, CCA's Application for Review appears to be about disappointed members of CCA who failed to acquire Straight Path in the open market asking the Commission to undo this transfer of licenses. But the Commission's review process is not intended to be used against the legitimate results of secondary markets. The Commission should deny the Application for Review.

II. THE COMMISSION SHOULD AFFIRM THE BUREAU'S CONCLUSION THAT THE TRANSACTION WILL YIELD PUBLIC INTEREST BENEFITS IN ADVANCING 5G.

Verizon's acquisition of Straight Path's wireless licenses serves the public interest, and the Bureau properly approved the associated license transfers. The Bureau found that the transfer of Straight Path's licenses to Verizon would result in "the expeditious use" of the Straight Path spectrum "for the potential introduction of innovative 5G services to the benefit of American consumers."[15] The Bureau determined 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," and that consent to the transfer of these licenses "will allow Verizon to develop important uses and new technology for these mmW spectrum bands."[16]

The record confirms the Bureau's findings. As detailed in previous filings in this proceeding,[17] Verizon has been a leader on 5G, engaging in aggressive and market-leading innovation and investment. For example, over the past several years, Verizon:

[15] *Verizon/Straight Path Order* ¶ 1.

[16] *Id.* ¶ 29.

[17] *See generally* Joint Opposition to Petitions, ULS File No. 0007783428, at 3-6 (filed Aug. 18, 2017) ("Joint Opp."); Straight Path-Verizon Application, ULS File No. 0007783428, Exhibit 1, Description of Transaction and Public Interest Statement, at 1, 3-6 (filed June 1, 2017) ("Public Interest Statement"); *see also Verizon/Straight Path Order* ¶ 27.

- Tested 5G through ongoing trials of fixed 5G wireless services that started in 2017, and other real-world 5G testing dating back to 2016, in order to understand what works in 5G and what does not;

- Acquired inputs necessary to support 5G, including fiber (from Corning and Prysmian), fiber networks (from XO and WOW!), and spectrum (leased and then acquired from Nextlink);

- Conducted various demonstrations to highlight the capabilities of 5G – for example, showing the ability to maintain a consistent 1.6 Gbps fixed wireless connection to power advanced features in the home, and demonstrating 5G speed and low latency in mobile settings; and

- Launched the 5G Technology Forum ("5GTF") to develop technical specifications.[18]

All of these accomplishments are in the record of this proceeding and demonstrate Verizon's efforts to unleash the potential of 5G technology through its active, ongoing, and meaningful investment of significant resources. As such, this evidence supports the Bureau's predictive judgment about the public interest impact of this transaction, which Verizon has validated with its planned use of the Straight Path mmW spectrum to speed deployment of 5G.

Of course, the list of Verizon's 5G achievements thus far is just the start, as Verizon continues to double down on its commitment to lead on 5G. Just last month, Verizon, working with its commercial partners, became the first carrier to make an over-the-air call using the "5G New Radio (NR)" standard approved by the 5G 3rd Generation Partnership Project in December.[19] In the past two months, Verizon has conducted other ground-breaking tests, demonstrating for example how 5G technology – connecting a pair of goggles and helmet-

[18] *Id.*

[19] Verizon News Release, *Another step toward mobile 5G service: Verizon, Nokia and Qualcomm complete first call using 3GPP-compliant 5G New Radio technology*, Feb. 12, 2018, https://globenewswire.com/news-release/2018/02/12/1339484/0/en/Another-step-toward-mobile-5G-service-Verizon-Nokia-and-Qualcomm-complete-first-call-using-3GPP-compliant-5G-New-Radio-technology.html.

mounted cameras – could enable professional football and basketball players to run plays and shoot baskets in a virtual reality environment.[20]

The Application for Review does not question these public interest benefits. As a result of these efforts, Verizon will deploy 5G in a number of markets later this year.[21] And as noted above, it plans to use Straight Path spectrum to do so.

Commission precedent observes that the public interest is served by a robust secondary market that allows transactions like this one: "Our efforts to help promote more robust and effective secondary markets in spectrum usage rights are central to achieving additional improvement in these spectrum management policies."[22] And Chairman Pai has observed that recent mmW spectrum secondary market transactions including this one "aim to promote the highest-valued use of these bands."[23] All signs point to 5G coming soon, and Verizon seeks to

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[20] Verizon News Release, *5G takes center court*, Feb. 20, 2018, http://www.verizon.com/about/news/5g-takes-center-court; Verizon News Release, *5G technology: Changing the game*, Feb. 1, 2018, http://www.verizon.com/about/news/5g-technology-changing-game.

[21] *See* Verizon News Release, *Verizon to launch 5G residential broadband services in up to 5 markets in 2018*, Nov. 29, 2017, http://www.verizon.com/about/news/verizon-launch-5g-residential-broadband-services-5-markets-2018?_ga=2.57619945.255804042.1519401334-1259493464.1519401334 (announcing the launch of 5G in residential markets in 2018).

[22] *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 ¶ 59 (2003); *see also Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014 (2016) ("*Spectrum Frontiers R&O*") (finding that robust secondary market for mmW bands "could facilitate the efficient use of spectrum by enabling licenses to make offerings directly responsive to market demands for particular types of services, increasing competition by allowing new entrants to enter markets, and expediting provision of services that might not otherwise be provide in the near term"); *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 32 FCC Rcd 9581 ¶ 10 n.33 (2017) ("[T]he Commission has long recognized the clear public interest benefits in a license or authorization holder being able to assign or transfer control of its license or authorization freely.") (citations omitted).

[23] Pai Mobile World Congress Remarks at 2.

be the leader. The Commission should affirm the *Verizon/Straight Path Order* to effectuate these policies and allow Verizon to turn its 5G aspirations into reality.

III. THE BUREAU CORRECTLY HELD THAT THE TRANSACTION IS UNLIKELY TO CAUSE COMPETITIVE HARM, AND THE COMMISSION SHOULD REJECT COLLATERAL ATTACKS ON THE *SPECTRUM FRONTIERS* ORDERS.

The Bureau properly rejected petitioners' claims that the transaction would cause competitive harm, finding that "Verizon's post-transaction spectrum holdings do not raise concerns in light of the current state of the marketplace," and that its acquisition of the Straight Path licenses "is unlikely to foreclose rival service providers from obtaining access to sufficient spectrum for their own development of new products and services."[24] The Application for Review regurgitates those same claims. But none of these arguments have merit. CCA's real complaint is not with the *Verizon/Straight Path Order*; it is with the Commission's two decisions in the *Spectrum Frontiers* proceeding. But its attempt to leverage this license transfer proceeding to attack those would misuse Commission processes.[25]

A. CCA's Claims of Competitive Harm from Spectrum Aggregation Are Unsupported and Are No More than Attacks on Prior Commission Decisions.

The Bureau correctly held that CCA had not produced sufficient factual support for its argument that competitive harm would result from Verizon's acquisition of Straight Path's licenses. CCA's underlying petition to deny consisted of conclusory assertions, bereft of relevant facts or data. As the Bureau found, CCA's allegations were "speculative, generalized in

[24] *Verizon/Straight Path Order* ¶¶ 22-23.

[25] *See, e.g., Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69*, Memorandum Opinion and Order, 5 FCC Rcd 2573 ¶¶ 9-10 (1990) (rejecting an argument as a collateral attack on a final Commission order and noting that the already considered and rejected argument would not be considered again); *Rechannelization of the 17.7-19.7 GHz Frequency Band for Fixed Microwave Services under Part 101 of the Commission's Rules*, Report and Order, 21 FCC Rcd 10900 ¶ 17 n.40 (2006) (noting that "to the extent [the] claims indirectly challenge earlier Commission decisions . . . they are an impermissible collateral attack").

nature, and not specific to this transaction"[26] – all well-established bases to reject allegations of competitive harm.[27] The Application for Review recycles these same unsubstantiated claims.

CCA repeats its claim that Verizon's acquisition of the Straight Path licenses gives it a dominant position in the 28 GHz and 39 GHz bands, pointing to the percentage of spectrum in each band Verizon will hold. But CCA ignores the Commission's decisions in the *Spectrum Frontiers* proceedings, which *rejected* a competitive analysis based on individual bands.[28] In the *Spectrum Frontiers R&O*, the Commission held, "[w]e find that grouping the 28 GHz, 37 GHz, and 39 GHz bands together for purposes of applying these spectrum holdings policies, either at auction or in the secondary market, is appropriate in view of the interchangeability of the spectrum in these bands, i.e., similar technical characteristics and potential uses of this spectrum that are unique to the mmW bands."[29] The Commission followed this same approach in the *Spectrum Frontiers Second R&O*. It allocated two additional bands (24 GHz and 47 GHz) and determined that competitive analysis of secondary market transactions would consider aggregation across all five UMFUS bands together.[30] Verizon will hold barely more than 20

[26] *Verizon/Straight Path Order* ¶ 23.

[27] *See, e.g.*, *General Motors Corp. v. Hughes Electronics Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶¶ 244-45 (2004) (rejecting assertions of competitive harms that were "speculative at best"); *SkyTerra Communications Inc., Transferor, and Harbinger Capital Partners Funds, Transferee*, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd 3059 ¶ 54 (2010) (dismissing allegations that a transaction would harm next-generation services, explaining that "it would be speculative as to whether any competitive harm would occur and, if there were harm, the extent of its magnitude" given the services' early development).

[28] *Spectrum Frontiers R&O* ¶ 186; *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, 32 FCC Rcd 10988 ¶ 74 (2017) ("*Spectrum Frontiers Second R&O*").

[29] *Spectrum Frontiers R&O* ¶ 186.

[30] *Spectrum Frontiers Second R&O* ¶ 74.

percent of UMFUS spectrum – hardly a dominant level.[31] In any event, CCA offers no facts to support its claim that Verizon's spectrum holdings would likely harm competition.

CCA's band-specific analysis is an untimely collateral attack on the *Spectrum Frontiers* decisions. It is axiomatic that the Bureau must apply Commission rules, policies, and orders that are in effect. Longstanding precedent dictates that new policies or rules adopted during the pendency of a transaction apply to the resolution of that proceeding, and CCA cites no contrary authority. As the D.C. Circuit has recognized, when an agency decides "in an intervening proceeding" to change a policy, it "cannot be required to apply a policy it has rejected" in lieu of the new one it has adopted.[32] Expecting it to do so "would amount to a command to the agency to disregard its statutory mandate: it would have to employ a policy that, by its own determination, did not serve the public interest."[33]

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[31] Verizon's share of UMFUS spectrum was calculated on a national MHz/pops basis, based on a national population of 312,842,636 (U.S. Census), and the following amounts of UMFUS spectrum: 700 MHz (24 GHz), 850 MHz (28 GHz), 1000 MHz (37 GHz), and 1400 MHz (39 GHz), and 1000 MHz (47 GHz). It attributes to Verizon the Straight Path spectrum plus the spectrum it acquired from Nextlink through a separate transaction.

[32] *Washington Ass'n for Television & Children v. FCC*, 665 F.2d 1264, 1268-69 (D.C. Cir. 1981) ("*WATC*"); *see also, e.g., Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 686 (D.C. Cir. 2001) ("We have … recognized the Commission's authority to change license allocation procedures midstream.") (citations omitted); *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989) (upholding the denial of an application that was filed but not decided prior to a rule change, stating that "if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed"); *DIRECTV, Inc. v. FCC*, 110 F.2d 816, 826 (D.C. Cir. 1978) ("A change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The Commission is 'entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest.'") (quoting *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983)).

[33] *WATC*, 665 F.2d at 1268-69.

CCA also argues that the Bureau used "the wrong spectrum aggregation threshold" when it applied the 1850 megahertz mmW threshold the Commission had adopted last year.[34] There was no error. In the *Spectrum Frontiers R&O*, the Commission adopted a threshold of 1250 megahertz as an initial analytical tool to identify markets where spectrum aggregation could risk potential competitive harm. That figure was based on approximately one-third of UMFUS spectrum. When the Commission allocated an additional 1700 megahertz in the 24 GHz and 47 GHz bands as UMFUS spectrum in the *Spectrum Frontiers Second R&O*, it correspondingly revised the mmW threshold from 1250 megahertz to 1850 megahertz to keep it at approximately one-third of UMFUS spectrum.[35] This new threshold took effect on January 2, 2018, with the publication of the *Spectrum Frontiers Second R&O* in the Federal Register,[36] *before the Bureau decided the Verizon/Straight Path Order*.

CCA's claim that 1850 megahertz is too high challenges the Commission's *Spectrum Frontiers Second R&O* – not the Bureau's license transfer decision. Yet CCA failed to challenge the *Spectrum Frontiers Second R&O*. CCA's claims regarding the 1850 megahertz threshold should thus be dismissed. Had the Bureau applied the superseded 1250 megahertz threshold as CCA argues it should have done, the Bureau *would* have committed error. The Bureau instead did exactly what the Commission directed it to do: apply the in-effect 1850 megahertz threshold to "identif[y] those markets that may warrant further competitive analysis."[37]

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[34] Application for Review at 10. CCA repeatedly mislabels the mmW threshold as a "screen." *Id.* at 4, 5, 6, 13. But the Commission adopted the new threshold (and called it that) specifically because it declined to incorporate mmW spectrum into the existing spectrum screen.

[35] *Spectrum Frontiers Second R&O* ¶ 74.

[36] *Id.* ¶¶ 74 n.189, 268; 83 Fed Reg. 37 (Jan. 2, 2018).

[37] *Spectrum Frontiers Second R&O* ¶ 74.

Similarly, CCA argues that 24 GHz and 47 GHz bands should not have been included in the mmW threshold because that spectrum is not "available,"[38] but that argument also has no place in this transfer proceeding. CCA had ample opportunity to argue that when the Commission was considering whether to revise the mmW threshold. It did not. CCA could also have made it in a petition for reconsideration of the *Spectrum Frontiers Second R&O*. Again it did not.

But even on substance, CCA's "available" spectrum argument fails because of its misunderstanding of spectrum aggregation policy. The Commission expressly rejected extending the spectrum screen's "suitable and available" standard to the mmW threshold: "we do not find that the mmW bands are suitable and available for the provision of mobile telephony/broadband services[.]"[39] Instead it established the new mmW threshold, incorporating spectrum bands that do not meet the "suitable and available" standard; it then added the 24 GHz and 47 GHz bands because they "share similar technical characteristics and potential uses" as the mmW bands already included.[40] Chairman Pai's recent announcement that he intends for the Commission to move quickly to auction mmW spectrum in the 28 GHz and 24 GHz bands nine months from now obviates the mmW "availability" argument in any event.[41]

CCA's procedural challenge to the Bureau's use of the 1850 megahertz threshold also fails. CCA asserts that the Bureau erred by not giving parties notice of the Commission's action or reopening the pleading cycle to "solicit comment" on how that threshold should be applied,

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[38] Application for Review at 12.

[39] *Spectrum Frontiers R&O* ¶ 188.

[40] *Spectrum Frontiers Second R&O* ¶ 74.

[41] Pai Mobile World Congress Remarks at 2 (expressing intent to auction 28 GHz spectrum beginning in November 2018 to be followed immediately by an auction of 24 GHz, provided that Congress passes legislation by May 13 addressing the handling of upfront payments).

but cites as authority cases involving application of the Administrative Procedure Act to *rulemakings* and no case law involving application of Commission-adopted policies in an adjudicatory proceeding.[42] CCA even trips over itself in its criticisms of the Bureau's timing: it accuses the Bureau of "stalling" its decision "to manipulate the applicable rules" but also charges the Bureau with moving "in a rush to approve the transaction."[43] In any event, all stakeholders had notice of the updated threshold with the adoption of the *Spectrum Frontiers Second R&O* and its publication in the Federal Register.

Moreover, applying the mmW spectrum threshold is straightforward: the change from 1250 to 1850 megahertz is merely numeric, not methodological. CCA offers no evidence of ambiguity or interpretation requiring resolution in a new pleading cycle, nor does it explain how an exercise that the Bureau has already conducted with a different megahertz level requires additional Commission guidance. Further, in the spectrum screen context, the Commission routinely updates the bands included in the screen as part of the same transaction review in which it applies the new screen.[44] Here, the Bureau did exactly what it was supposed to: implement straightforward Commission policy.

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[42] Application for Review at 6-7. CCA similarly ignores the distinction between APA notice and comment in rulemakings and adjudications by criticizing the Bureau for "undermin[ing] the procedural transparency that serves as a key priority for the Commission," *id.* at 7 n.17, citing Chairman Pai's February 2017 announcement that he will provide advance notice of rulemaking actions before Commission meetings to consider them. The Chairman's announcement makes clear this policy applies only to rulemakings.

[43] *Id.* at 7, 12. CCA's criticism that the Bureau "rush[ed]" its decision is frivolous. In fact, the Bureau acted more than six months after it released the Public Notice accepting the transfer application and nearly eight months after that application was filed.

[44] *See, e.g.*, *Application of AT&T Inc. and Dobson Communications Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 20295 ¶ 231 (2007) (increasing screen from 70 to 90 megahertz and applying it therein); *Applications of Sprint Nextel Corp. and Clearwire Corp. for Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, 23 FCC Rcd 17570 ¶¶ 53, 62-70 (2008) (further increasing screen up to a maximum of 145 megahertz and applying it therein).

Ultimately, whether the mmW threshold is set at 1250 megahertz or 1850 megahertz or some other level, and whether it is exceeded or not, it is just an initial step of transaction review, not the last. As the Bureau observed, the mmW threshold is "an initial analytical tool to aid in identifying certain markets for further review."[45] The threshold does not operate as a cap that would trigger a denial or divesture for any transaction that exceeded it, and CCA misreads the mmW threshold policy in suggesting otherwise.[46] In addition, and again contrary to CCA's view, the Bureau did not reflexively approve Verizon's acquisition of Straight Path's licenses after finding it would hold less than 1850 MHz in each market. It instead conducted a careful public interest analysis of the transaction, finding "no significant potential public interest harms" and that clear public interest benefits result from the transaction for "innovative 5G services to the benefit of American consumers."[47]

B. CCA's Remaining Claims of Competitive Harm Are Also Incorrect and Ignore Marketplace Facts.

CCA brands as "patently false" the Bureau's finding that "'mmW is not the only spectrum available that may be useful for providing 5G.'"[48] CCA's claim is belied by its own recognition that there are multiple spectrum paths for 5G in other proceedings.[49] And CCA's

[45] *Verizon/Straight Path Order* ¶ 21.

[46] Application for Review at 4-5 (asserting that the Bureau "would have had no choice but to deny the Transaction as proposed" if the 1250 megahertz threshold had been in place, and urging the Commission in the alternative to "divest Straight Path's licenses" in markets where that threshold would have been exceeded).

[47] *Verizon/Straight Path Order* ¶¶ 26, 29.

[48] Application for Review at 14-15 (quoting *Verizon/Straight Path Order* ¶ 23).

[49] *See, e.g.*, Letter from Rebecca Murphy Thompson, CCA, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 17-79 *et al.*, at 3 (filed Feb. 5, 2018) (encouraging the Commission to "unlock valuable spectrum resources to pave the road to next-generation technologies and 5G," and in particular, supporting the 3.5 GHz rulemaking as part of that effort); CCA Reply Comments, WT Docket No. 17-183, at 2 (filed Nov. 15, 2017) ("[T]he 3.7-4.2 GHz band is particularly well-suited for 5G wireless services.").

own members have announced 5G plans that will deploy low- and mid-band spectrum: Sprint, T-Mobile, and DISH, for example, have each announced plans to develop 5G in the 2.5 GHz, 600 MHz, and AWS-4 and 700 MHz bands, respectively.[50] Just three days ago, T-Mobile announced plans to deploy 5G to thirty cities later this year.[51] Simply put, different companies have different visions and plans on what spectrum bands to use for 5G, and these plans are not limited to mmW. Indeed, there is growing 5G focus in multiple bands. As Commissioner O'Rielly has observed, "the international focus on 5G spectrum has now shifted to the mid bands that carry more data than low bands, but propagate farther than millimeter wave."[52] And Commissioner Clyburn has noted that "mid-band spectrum is not just important, but instrumental to unleashing the promise of 5G and beyond."[53]

CCA's bald claim that "Verizon would have the ability and incentive to depress 5G investment"[54] similarly defies logic and lacks any factual support.[55] Experts expect the wireless industry to invest $275 billion in 5G deployment in the next 6 years.[56] CCA's own members are plowing investment into 5G in multiple bands. For example, in addition to its 30-city 5G announcement noted above, T-Mobile recently acquired mmW licenses in the 28 GHz and 39

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[50] Joint Opp. at 7-9 (citing announcements about these companies).

[51] Jeff Baumgartner, *T-Mobile Going Big on Mobile 5G*, Broadcasting & Cable, Feb. 27, 2018, http://www.broadcastingcable.com/news/platforms/t-mobile-going-big-mobile-5g/172069.

[52] Michael O'Rielly, Commissioner, FCC, Remarks Before the CBRS Alliance, at 2 (Aug. 1, 2017), https://www.fcc.gov/document/commissioner-orielly-remarks-cbrs-alliance.

[53] *Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz*, Notice of Inquiry, 32 FCC Rcd 6373, 6390 (2017) (Statement of Commissioner Mignon L. Clyburn).

[54] Application for Review at 17-18.

[55] *See* Joint Opp. at 17-18.

[56] *How 5G Can Help Municipalities Become Vibrant Smart Cities*, ACCENTURE STRATEGY at 3 (Jan. 2017), https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf.

GHz Bands, adding to its mmW holdings.[57] Moreover, Chairman Pai's 28 GHz and 24 GHz auction announcement refutes any argument about access to additional mmW spectrum.

Finally, CCA makes the baseless claim that Verizon mischaracterized the amount of spectrum it would control, alleging that "the Vivint purchase option was a ruse."[58] On the contrary, at all times, the applicants were transparent and accurate in describing the relevance of Vivint's leases to the Commission's analysis. The *Verizon/Straight Path Order* sets forth the relevant facts. [59] The applicants initially argued that the Vivint-leased spectrum should not be incorporated into its post-transaction holdings in light of Vivint's bargain purchase options, which entitled Vivint to purchase the Nextlink spectrum under each lease for $1 per lease.[60] Nevertheless, the applicants provided calculations of Verizon's anticipated spectrum holdings both with and without the Vivint-leased spectrum subject to this option.[61] When Verizon entered into an agreement with Vivint five months later to terminate Vivint's bargain purchase options, Verizon immediately updated the record, consistent with Commission rules, and noted that its initial argument about the Vivint bargain purchase options no longer applied.[62] The *Verizon/Straight Path Order* acknowledges this update and attributes all of the Nextlink

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[57] *See* T-Mobile/First Communications, LLC, ULS File No. 0008037823 (consummated Feb. 2, 2018); T-Mobile/Smart City Information Services, LLC, ULS File No. 0008094289 (consented to Feb. 10, 2018). T-Mobile recently partnered with Nokia and Intel to conduct a 28 GHz 5G field test. *See* Nokia Press Release, *T-Mobile US and Intel collaborate to bring T-Mobile's first commercial hardware based 5G 28 GHz cell on air* (Jan. 3, 2018), https://www.nokia.com/en_int/news/releases/2018/01/03/nokia-t-mobile-us-and-intel-collaborate-to-bring-t-mobiles-first-commercial-hardware-based-5g-28-ghz-cell-on-air.

[58] Application for Review at 21.

[59] *Verizon/Straight Path Order* ¶ 22 n.66.

[60] Public Interest Statement at 9; Joint Opp. at 13-14.

[61] Joint Opp. at 15.

[62] Letter to Marlene H. Dortch, Secretary, FCC, from Adam D. Krinsky, Wilkinson Barker Knauer, LLP, Counsel to Verizon, ULS File No. 0007783438, at 1 (filed Dec. 26, 2017).

spectrum (including that which had been leased to Vivint) to Verizon[63] – the outcome that CCA had sought from the outset.[64] In short, there was nothing irregular – or even relevant – about the change in circumstances as to the Vivint leases.

IV. THE BUREAU DID NOT MISUSE THE STRAIGHT PATH *CONSENT DECREE*, AND THE COMMISSION SHOULD REJECT CCA'S COLLATERAL ATTACK ON IT.

CCA's complaint about harm arising from what it calls Straight Path's "unjust enrichment" and its proposed remedy of auctioning the Straight Path spectrum constitute an untimely collateral attack on the Enforcement Bureau's Straight Path *Consent Decree*[65] – a distraction the Bureau properly rejected.[66] The Commission should do likewise.

CCA correctly notes that "nothing in the *Consent Decree* requires" the Bureau to approve a proposed transfer of Straight Path's licenses,[67] but the Bureau *never* determined that the Straight Path *Consent Decree* obligated it to approve any particular transfer of licenses.[68] Instead, the Commission must assess whether the specific transaction before it serves the public interest. And the Commission may *not* consider whether an "alternative" assignment or transfer (like the auction proposal sought by CCA) would be preferable.[69] Here, the Bureau only

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[63] *Verizon/Straight Path Order* ¶ 22 n.66.

[64] *See, e.g.*, Competitive Carriers Association Petition to Deny, ULS File No. 0007783428, at 5-6 n.20 (filed Aug. 11, 2017) (arguing that the Vivint bargain purchase option is "irrelevant").

[65] Application for Review at 21; *Straight Path Communications Inc. Ultimate Parent Company of Straight Path Spectrum, LLC*, Order, 32 FCC Rcd 284 (EB 2017) ("*Consent Decree*").

[66] *Verizon/Straight Path Order* ¶¶ 16 (citing this argument as stated in CCA's petition to deny), 24 (rejecting this argument as an "inappropriate collateral attack").

[67] Application for Review at 19.

[68] The paragraph of the *Verizon/Straight Path Order* that CCA cites for this proposition merely recites the parties' arguments. *Id.* at 18 n.52 (citing *Verizon/Straight Path Order* ¶ 18).

[69] Joint Opp. at 20 (citing *Urban Radio I, LLC/YMF Media, New York Licensee LLC*, Memorandum Opinion and Order, 29 FCC Rcd 6389 ¶ 5 (2014) ("*Urban Radio*")); *see also Verizon/Straight Path Order* ¶ 5 (noting this duty).

considered the proposed transaction before it. That the outcome (approval of license transfers) was consistent with a final order issued by another bureau is not controversial.

CCA's other claims are transparent attacks on the *Consent Decree*. But as the Bureau correctly found, "[n]o party sought reconsideration or Commission review of the *Consent Decree*, so it is now a final action."[70] By directing that Straight Path sell its licenses, the Enforcement Bureau fulfilled the Commission's broader 5G goals while providing a significant payment to taxpayers through a penalty payment of over $600 million.[71]

CCA argues that the Bureau's "arbitrary rejection" of an auction of Straight Path's licenses "badly misinterprets the terms of the Consent Decree."[72] But it is CCA that not only misinterprets but misrepresents the *Consent Decree*. CCA quotes the *Consent Decree* to "expressly allow[ ] 'any subsequent Rule or Order adopted by the Commission' to supersede its terms,"[73] but CCA *omits key language from that quote*. The *Consent Decree* actually states: "The parties agree that if any provision of the Consent Decree conflicts with any subsequent Rule or Order adopted by the Commission *(except an Order specifically intended to revise the terms of this Consent Decree to which Straight Path does not expressly consent)* that provision will be superseded by such Rule or Order."[74] The language CCA omits directly undermines its assertion that the *Consent Decree* allows the Commission to recapture the licenses and auction them.

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[70] *Verizon/Straight Path Order* ¶ 12.

[71] *Consent Decree* ¶¶ 3-4 (seeking to "ensure that [Straight Path's] licenses are put into beneficial use as quickly as possible, promoting the rapid and widespread deployment of innovative wireless technologies to the public's benefit"); *see also infra* at 19.

[72] Application for Review at 18-19.

[73] *Id.* at 11.

[74] *Consent Decree* ¶ 28 (emphasis added).

While CCA's arguments against the *Consent Decree* fail on procedural grounds, CCA also does not identify a legitimate harm, let alone a transaction-specific one. The transaction proceeds to Straight Path do not constitute a harm. CCA's invitation that the Commission scrutinize the acquisition price would require it "to substitute [its] judgment for that of the parties with respect to the terms of the agreement" – something that the Commission may not do.[75]

Nor can any cognizable harm be derived from the imagined auction revenues that CCA claims have been "deprive[d]" to a "cash-strapped federal government."[76] CCA ignores that denying the transfer of Straight Path's licenses to Verizon would not, in and of itself, result in an auction of them. The terms of the *Consent Decree* would still govern. And any argument about proceeds from a hypothetical auction is beside the point – the Commission is legally prohibited from considering "whether the public interest, convenience, and necessity might be served by the assignment or transfer of [Straight Path's licenses] to any other than the proposed assignee or transferee."[77]

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[75] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 30 FCC Rcd 6668 ¶ 28 (2015) ("We emphasize again that the Commission does not involve itself in private contractual agreements, and we do not intend … to substitute our judgment for that of the parties with respect to the terms of the agreement."); *see also Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 15 FCC Rcd 20845 ¶ 58 (2000) ("[W]e believe that private parties generally are the best evaluators of their own economic circumstances and alternatives and we will not look to second guess their business decisions."); *Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, 31 FCC Rcd 6327 ¶ 312 (2016) ("In determining whether applicants are financially qualified to hold licenses, we do not substitute our business judgment for that of the applicants or the market."); *Edwin L. Edwards, Sr. (Transferor) and Carolyn C. Smith (Transferee) For Consent to the Transfer of Control of Glencairn, Ltd., parent entity of Baltimore (WNUV-TV) Licensee, Inc. Licensee of Television Station WNUV-TV, Baltimore, Maryland et al.*, 16 FCC Rcd 22236 ¶ 26 (2001) (noting that in the broadcast context, the Commission "traditionally do[es] not examine the purchase price in a station sale").

[76] Application for Review at 24.

[77] *Urban Radio* ¶ 5 (citation omitted).

Finally, CCA's characterization of the *Consent Decree* as a harm overlooks the affirmative benefits associated with preserving it – namely, to "ensure that [Straight Path's] licenses are put into beneficial use as quickly as possible, promoting the rapid and widespread deployment of innovative wireless technologies to the public's benefit."[78] By directing that Straight Path sell its licenses per the *Consent Decree*, the Bureau fulfilled the Commission's broader 5G goals while permitting Straight Path to satisfy its corporate obligations and providing a significant payment to taxpayers through a $614.3 million penalty payment that represents "the largest civil penalty ever paid to the U.S. Treasury to resolve a Commission investigation."[79]

V. CONCLUSION.

For the reasons set forth above, CCA fails to establish any grounds for reversal under Section 1.115 of the Commission's rules. Accordingly, the Commission should deny CCA's Application for Review.

Respectfully submitted,

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March 5, 2018

[78] *Consent Decree* ¶ 4.

[79] FCC News Release, *FCC Announces Payment of Over $600 Million by Straight Path & Verizon to Satisfy Settlement Terms*, Feb. 28, 2018.

CERTIFICATE OF SERVICE

I, Alexandra Carr, hereby certify under penalty of perjury that the foregoing Opposition to Application for Review was served this 5th day of March, 2018, by depositing a true copy thereof with the United States Postal Service, first class postage pre-paid, and via email (as indicated) addressed to:

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