VERIZON AIRFONE HAS LEGAL AND EQUITABLE RIGHTS AS THE ONLY QUALIFIED LICENSEE PROVIDING IN-FLIGHT SERVICES TO THE PUBLIC

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SUMMARY

Verizon Airfone has legal and equitable rights as the only qualified licensee providing in-flight services to the public. The Commission should not – and lawfully cannot – take actions that undermine those rights or the existing services provided to Airfone's customers. When considering ATG spectrum allocation alternatives, the Commission must account for Verizon Airfone's rights as an incumbent operator in the band.

I. VERIZON AIRFONE IS THE ONLY ATG LICENSEE TO MEET ITS LICENSE COMMITMENTS.

Verizon Airfone is one of six licensees that at one time were authorized to share the 4 MHz of spectrum allocated for Air-to-Ground ("ATG") services. Verizon Airfone met its commitments as a licensee to build, operate, and provide ATG services to the airline traveling public. Its commercial service was initiated in 1984 and has continued uninterrupted to the present day. Verizon Airfone has invested many millions of dollars in making ATG a reality. There is no question that the company has fully met its licensee responsibilities.

In sharp contrast, the other five ATG licensees either never constructed systems or subsequently abandoned the business.[1] As a result, Verizon Airfone is the sole remaining licensee in the ATG service. Its license covers the full 4 MHz of spectrum allocated for ATG. However, existing rules constrain the potential service offerings to narrowband voice and low-speed data services. This precludes next generation broadband services that the traveling public wants and airlines would like to offer.

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[1] *See Amendment of Part 22 of the Commission's Rules To Benefit the Consumers and Air-Ground Telecommunications Services*, WT Docket No. 03-103, Notice of Proposed Rulemaking ("NPRM"), rel. Apr. 28, 2003 at ¶ 7 n.19 and ¶ 12. *See also* Claircom Licensee Corporation, License Cancellation Request, File No. 0001161399, Jan. 16, 2003.

Against this backdrop, Verizon Airfone has requested rule changes in the pending ATG proceeding to enable its transition from a narrowband provider to a broadband ATG provider in order to deliver the full range of Internet capabilities in-flight to the traveling public. Spectrum for broadband ATG services is an essential step forward.

The rule changes Verizon Airfone has requested are also necessary to promote competition. As previously documented, Boeing and other satellite-based systems are already ahead of Verizon Airfone in the race to provide broadband ATG services. Without a timely FCC spectrum decision, the terrestrial-based ATG provider will be severely, if not fatally, competitively disadvantaged.

II. SOME OF THE OPTIONS IDENTIFIED BY WTB & OET IGNORE VERIZON AIRFONE'S RIGHTS AS A LICENSEE.

Verizon Airfone and other participants in the ATG rulemaking have been asked to comment on various possible alternatives for new ATG spectrum allocation and licensing policies in the 4 MHz band, including: (1) a 2.5 MHz exclusive license and a 1.5 MHz exclusive license; (2) two overlapping 2.5 MHz licenses; and (3) one 4 MHz exclusive license. Some of these options seem to contemplate that Verizon Airfone's existing licensed operations would be either phased out or transitioned to specific segments of the ATG band. These options appear to assume that Verizon Airfone would have to cease its narrowband operations if it failed to win spectrum at a new broadband auction or that its existing spectrum rights would be cabined off at its expense.

The Act, FCC rules and long-standing policies provide assurances that incumbent licensees will be protected and treated equitably before licenses are modified or cancelled. Specifically, the Commission's actions must be informed by four relevant legal considerations: (1) the rights of a licensee to renewal expectancies; (2) the rights of a licensee to a hearing before

its license may be revoked or substantially modified; (3) the rights of a licensee being relocated to receive comparable alternative spectrum rights and relocation compensation from the new licensee; and, (4) the Constitutional issue of a regulatory taking resulting from an agency's actions that effectively terminate a licensee's business and render its investments valueless. Each of these considerations is discussed below. Just as fundamentally, it would be inequitable in the extreme if Verizon Airfone's incumbency rights were to be cast aside and ignored by Commission actions that reduce its rights or damage its business.

A. Licensee Renewal Expectancy

Under established Commission policies, all Commercial Mobile Radio Service ("CMRS") licensees are entitled to expect continuation of their licenses through renewal expectancies if they have provided substantial service during their past license term and have substantially complied with the Commission's rules and policies.[2] In the *CMRS Third Report and Order*, the Commission ordered that *all* CMRS licensees be extended the same treatment under the existing rules and case law regarding license renewal expectancy.[3] The FCC has defined ATG as a CMRS service in Section 20.9(a)(8).[4] As such, ATG licensees are afforded the full rights and protections of the renewal expectancy provisions.

Verizon Airfone has a legal right to a renewal expectancy. The company has met the requirements of the rules and the expectations of a licensee in providing substantial service to the

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[2] *See* 47 C.F.R. § 22.940(a).

[3] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, *Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, 9 FCC Rcd. 7988, 1994 FCC LEXIS 4728 ("*CMRS Third Report and Order*") at ¶¶ 385-386.

[4] *See* 47 C.F.R. § 20.9(a)(8).

public. Any action that would eliminate those renewal expectancy rights would run counter to the agency's rules and policies.[5]

B. Licensee Rights Under The Communications Act

Under the Communications Act, the FCC cannot summarily revoke or modify an existing license to accommodate new views of how spectrum should be used. Sections 312 and 316 of the Act set forth specific procedures and legal rights of a licensee where the FCC seeks to revoke and modify, respectively, a spectrum license.

Section 312, which would apply if the FCC sought to revoke Verizon Airfone's existing license rights, requires the agency to serve an order to show cause upon the licensee as to why an order of revocation should not be issued, and offers the licensee an opportunity to respond.[6] Similarly, under Section 316, if the FCC wanted to substantially modify Verizon Airfone's license rights to continue current operations, it would be required to notify the licensee in writing of any proposed changes and offer the licensee an opportunity to protest the modifications.[7]

Under both Sections 312 and 316, the Commission has burden of introducing evidence and the burden of proof in a hearing proceeding. These procedures must be carried out before the license is cancelled or modified. Thus, if Verizon Airfone's ATG license is cancelled or

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[5] Indeed, the Commission has previously held that licensees of shared services can achieve "earned exclusivity" based upon their commitment to meeting public needs and the failure of others to pursue spectrum opportunities. For example, in its *929 Paging Decision*, the FCC, recognizing that the existing regulatory framework was hampering the efficient use of spectrum and the delivery of customer-desired services, adopted an "earned exclusivity" approach, which afforded exclusivity based on the extent to which the incumbent licensee had built and was operating its systems. *Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz,* 8 FCC Rcd. 8318 (1993) ("*929 Paging Order*"), *recon. granted in part* 11 FCC Rcd. 3091 (1996) ("*929 Paging Reconsideration Order*"). The Commission decided to protect incumbents in the paging context, even though sharing might have been technically feasible. *See 929 Paging Reconsideration Order* ¶ 3. The case for an incumbent's earned exclusivity in the ATG band is stronger because sharing is *not* feasible. Verizon Airfone, through significant efforts to build and support ATG communications systems, similarly has earned exclusivity.

[6] *See* 47 U.S.C. § 312(c).

[7] *See* 47 U.S.C. § 316(a).

modified, the FCC must first provide clear notice and a full and fair hearing. Indeed, the ATG NPRM did not suggest that a possible outcome would force Verizon Airfone to cease operations.

C. Licensee Relocation Rights

Where the Commission decides to adopt new spectrum allocation policies or lawfully modify licenses to accommodate new services, there is a well established and judicially approved FCC process of providing incumbents with comparable alternative spectrum and compensation from the new entrant for the relocation costs incurred. In *Teledesic v. FCC*, the agency had required satellite providers who displaced fixed terrestrial licensees in the 18 GHz band to pay the latter's relocation costs, and the court upheld the policy, explaining that service providers who displace existing licensees in a given spectrum band can be "forced to pay those existing users to relocate to comparable facilities."[8] In addition, in 1992 the agency required PCS licensees to pay to relocate displaced fixed microwave users.[9] Likewise, in 1995, the Commission ordered certain SMR licensees to bear the costs of relocating displaced incumbent SMR licensees,[10] and reaffirmed the obligation two years later.[11]

If a scenario ultimately selected by the Commission imposes relocation obligations or costs on Verizon Airfone or its customers to accommodate new entrants, the agency must require

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[8] *Teledesic v. FCC,* 275 F.3d 75, 86 (D.C. Cir. 2001). Comparable facilities means that the replacement spectrum can be used to support the same systems previously operated, and thus maintain the status quo.

[9] *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6886 (1992).

[10] *See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order*, 11 FCC Rcd 1463 (1995).

[11] *See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report and Order*, 12 FCC Rcd 19,079 (1997). The D.C. Circuit routinely has given effect to orders containing these types of requirements. *See, e.g., Small Bus. in Telecomm. v. FCC*, 251 F.3d 1015, 1017, 1026 (D.C. Cir. 2001); *Ass'n of Pub.-Safety Communications Officials – Int'l, Inc. v. FCC*, 76 F.3d 395, 400 (D.C. Cir. 1996).

that the new entrants pay such costs. In addition, the agency must ensure that comparable alternative spectrum is provided for continuation of Verizon Airfone's existing services.

D. Constitutional "Takings" Considerations

Any FCC decision to revoke Airfone's ATG license or to allow it to expire would amount to an uncompensated taking of the company's property in violation of the Fifth Amendment. Federal courts, including the Supreme Court, long have recognized that the Takings Clause is implicated whenever the government takes action that destroys the value of private property in which the owner has a reasonable, investment-backed expectation.[12] As discussed above, Airfone is the *only* entity that has persevered in offering service in the ATG band.

Terminating Verizon Airfone's license would effectively destroy the business, thereby rendering worthless the company's multi-million dollar investments in equipment, personnel, and other capital expenditures. Airfone would not even be able to recoup some small portion of this lost value by reselling its equipment – *e.g.*, the handsets installed in aircraft, broadcast towers on the ground, etc. – because there are no prospective buyers for such items.

CONCLUSION

The Commission should not, and indeed cannot lawfully, take actions that undermine Verizon Airfone's incumbency rights and lead to the termination of current in-flight services provided to Airfone customers. When considering alternative ATG spectrum allocation and licensing policies, the Commission must account for Verizon Airfone's rights as an incumbent in the band.

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[12] *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019-21 (1992); *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979).