REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses	)	WT Docket No. 12-4
Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses	)	

RCA – THE COMPETITIVE CARRIERS ASSOCIATION PETITION TO CONDITION OR OTHERWISE DENY TRANSACTIONS

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RCA – THE COMPETITIVE CARRIERS ASSOCIATION
PETITION TO CONDITION OR OTHERWISE DENY TRANSACTIONS

RCA – The Competitive Carriers Association ("RCA") hereby petitions the Federal Communications Commission ("FCC" or "Commission") either to place conditions on any approval of the subject applications or, in the alternative, to deny the applications. The applications arise out of a series of related transactions (the "Transactions") – one of which proposes to assign valuable wireless spectrum from a potential speculator and both of which propose to assign scarce spectrum to a potential warehouse. These Transactions must not be approved without a full examination of both the facts surrounding the intent of the assignors in acquiring the licenses at issue and the current spectrum utilization of the assignee, as well as the application of rigorous conditions, specific to the potential competitive harms that they would cause. Unconditional approval of the Transactions without appropriate conditions would significantly undermine the stated FCC goal of ensuring meaningful competition in the wireless industry. If Cellco Partnership d/b/a Verizon Wireless ("Verizon") is permitted to acquire the

spectrum currently held by SpectrumCo, LLC ("SpectrumCo") and Cox TMI Wireless, LLC ("Cox") (collectively, the "Applicants") without all of the conditions sought by RCA, the markets for mobile wireless services, wholesale inputs (such as voice and data roaming), special access and backhaul, spectrum on the secondary market, and content and wireless devices will be substantially and negatively impacted. In support of this Petition, the following is respectfully shown:

I. INTRODUCTION AND SUMMARY

RCA is an association representing more than 100 competitive wireless providers across the United States. Most of RCA's members individually serve fewer than 50,000 customers. RCA's role as the leading voice for competitive carriers on legal and policy issues gives it a unique perspective on the substantial harms that will accrue to competitive carriers if the Transactions are allowed to proceed without a searching factual inquiry and stringent conditions to mitigate their anti-competitive effects. As a result, RCA is a party in interest with standing to submit this Petition.[1]

The Commission once again finds itself at a crossroads for the wireless industry. As the Commission recognized in connection with the now-abandoned AT&T/T-Mobile transaction, the retail market for wireless services has become an imbalanced contest between the Twin Bells – the Verizon/AT&T duopoly – and the rest of the industry. While competitive carriers struggle to take on the Twin Bell duopoly with limited spectrum, financial resources, and scale and scope, Verizon is seeking to cement its position at the top by denying critical inputs to its competitors, such as by hoarding additional spectrum in its already well-stocked warehouse, leaving smaller spectrum-starved carriers to wither on the vine.

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[1] 47 C.F.R. § 1.939(a).

The Commission must not accept Verizon's untenable assertion that the Transactions do not merit close scrutiny because they involve "only" spectrum. Quite to the contrary, the Commission must conduct a robust review of the Transactions *precisely because* they involve spectrum – which is the lifeblood of the wireless industry. The Transactions come at a time when many carriers – Verizon being a notable exception – find themselves desperate for additional useable spectrum resources to meet surging consumer demand. Verizon already holds a commanding position with respect to usable spectrum under 1 GHz, and in spectrum that is currently best suited to deploy 4G LTE services in the near term. Verizon freely admits that its spectrum needs are met through at least 2015, but nonetheless seeks the Commission's blessing to hoard more valuable useable spectrum across the nation. These are not unassuming spectrum assignments as Verizon has claimed in its Applications; the Transactions instead raise significant competitive concerns, and must undergo a detailed review by the Commission.

The Commission also must investigate the substantial and material questions that are raised regarding whether SpectrumCo is a speculator intent upon trafficking in spectrum for profitable resale, rather than constructing and operating systems in the public interest. The Commission must take a close look at any spectrum transferred from a speculator to a warehouser. Comcast, for example, has been quite open about its true motives, which potentially violate the Commission's own rules, publicly stating that it "never really intended to build that spectrum."[2] This disregard for the scarce public tax-payer resource that has been entrusted to it is nothing new. Indeed, over the course of a nearly six-year period from license grant until today, leading members of SpectrumCo have made repeated statements indicating their lack of

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[2] Josh Wein, "Comcast Never Planned to Build Out AWS Spectrum," Communications Daily, 8 (Jan 6. 2012) ("*Comcast Article*").

interest in actually putting this valuable AWS spectrum to beneficial use serving consumers.[3] To ensure the integrity of the Commission's spectrum allocation processes, the Commission must thoroughly examine whether SpectrumCo acted as a speculator in violation of the Commission's rules against spectrum trafficking.[4]

Further, the Commission must investigate the extent to which Verizon is warehousing spectrum, which has serious anti-competitive effects. It is RCA's understanding that Verizon already has as much as 44 MHz of prime, unused spectrum in many markets. And, if the Transactions are permitted to proceed unaltered, Verizon will have up to 72 MHz of fallow spectrum in several of the top 100 markets. These vast swaths of unused spectrum, coupled with the lack of any definitive plans to use its existing or proposed new spectrum, prevent the Commission from finding that a grant of the Applications will serve the public interest.

In assessing the Transactions, the Commission must not limit its review to a market-by-market spectrum screen analysis, lest its granular approach mask the substantial potential anti-competitive harms that may result at the national level. The Commission previously has recognized that, where proposed transactions have national characteristics such as the nationwide spectrum acquisition at issue here, they "warrant a competitive analysis on the national level."[5] Consequently, the Commission can and should look outside of its traditional local spectrum screen analysis and view the Transactions on a national basis. When viewed in the aggregate, the anti-competitive harms become readily apparent. While the Verizon/AT&T duopoly already

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[3] *See infra*, Section III.A.

[4] 47 C.F.R. § 1.948(i)(1).

[5] *Application of AT&T Inc. and Qualcomm Incorporated For Consent To Assign Licenses and Authorizations*, Order, WT Docket No. 11-18, FCC 11-188, ¶ 32 (rel. Dec. 22, 2011) ("*AT&T/Qualcomm Order*").

dominates the most important input markets, a grant of the Transactions without significant conditions, which must include spectrum divestitures where Verizon would warehouse significant amounts of spectrum, will further fortify their supremacy with respect to spectrum availability, voice and data roaming, special access and backhaul, and equipment availability. Without reasonable access to these essential inputs, competitive carriers will be unable to provide meaningful competition in the national marketplace, and the Commission must attach conditions to remedy each of these potential harms. Importantly, the Transactions will also remove four separate potential competitors, which will further untether the limited competitive constraints on the Twin Bells in each of these input markets..

In addition to viewing the Transactions on a national level, the Commission should be actively considering alternatives to its current spectrum screen, which, in its current form, is broken. Any screen that the Commission uses must account for the substantial differences between types of useable spectrum – and in particular consider the significantly increased value of spectrum under 1 GHz and the lesser value of spectrum above 2.5 GHz. In the alternative, the Commission must revise the screen to more accurately reflect the current availability of wireless spectrum – particularly with respect to useable SMR spectrum and the 700 MHz D Block.

It is the Commission's duty to determine whether or not the Transactions are in the public interest. While the Applicants may suggest otherwise, the Transactions raise significant questions regarding speculation and warehouseing, the undue concentration of spectrum in Verizon, and the ability of Verizon to wield that spectrum as a weapon to the detriment of competition in the industry. In order to approve this nationwide transfer of spectrum, the Commission must conduct an exhaustive investigation and attach stringent conditions to the Transactions to counteract any potential anti-competitive harms that may result.

II. THE COMMISSION MUST CLOSELY SCRUTINIZE THESE TRANSACTIONS TO PREVENT SIGNIFICANT POTENTIAL COMPETITIVE HARMS

Verizon inexplicably suggests that the "Commission's review of [these] application[s]... should be limited"[6] because the "transaction[s] involve[] only assignments of spectrum."[7] In effect, the Applicants are asking the Commission to rubber stamp these significant, market-altering Transactions and the accompanying joint agreements between Verizon and the Cable Companies.[8] The proposition that these material spectrum transfers – which have a clear impact on the *nationwide wireless markets* – do not require a robust public interest analysis because they only involve the transfer of spectrum reveals a remarkable disconnect between Verizon's view of the world and reality. The aggregation of spectrum – the lifeblood of wireless services – is perhaps the *most* important consideration for the Commission when reviewing any proposed transaction. A searching inquiry is particularly important when the acquirer, Verizon, is one of the two nationwide carriers that enjoys a virtual duopoly in the wireless market. As the Commission has recognized, "[a]ccess to spectrum is a precondition to the provision of wireless service. In fact, Chairman Genachowski recently highlighted the importance of access to spectrum, calling it "invisible infrastructure."[9] Ensuring that sufficient spectrum is available for incumbent licensees, *as well as for entities that need spectrum to enter the market*, is critical to

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[6] Verizon-SpectrumCo application, ULS File No. 0004993617 Exhibit 1, at 4 ("SpectrumCo PI Statement").

[7] SpectrumCo PI Statement at 1.

[8] Consisting of Time Warner Cable ("TWC"), Comcast and Bright House Networks ("BHN") and Cox (collectively, the "Cable Companies").

[9] Statement of Julius Genachowski at the Silicon Flatirons Conference on Feb. 13, 2012, *available at* http://www.youtube.com/watch?v=Pyryxg12hAo.

promoting competition, investment and innovation."[10] As part of its competitive analysis, the Commission considers the important "input market for spectrum available for the provision of mobile telephony/broadband services."[11] This examination of spectrum is particularly important right now. Presently, that market is stagnant at best, with little or no opportunities for competitive providers or new entrants to gain access to spectrum suitable for the provision of wireless broadband. Indeed, the Commission must ignore the Applicants' cavalier attitude towards these significant and potentially harmful Transactions, and conduct a searching factual inquiry and a through and exhaustive review of the anti-competitive harms that would result.

As President Obama has written, and Verizon has acknowledged, America faces a potential spectrum problem that threatens to stifle wireless growth and innovation.[12] Sufficient spectrum capacity is necessary to support the explosion of consumer data use that is happening *right now*. Verizon properly recognizes this circumstance, noting that "data usage on networks more than doubled in 2010," and references a recent CTIA study that "again shows a doubling of consumers' data usage" for 2011.[13] Yet, in the face of these indisputable facts, Verizon somehow posits that the transfer of 20 MHz of prime usable spectrum, which it currently does

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[10] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fourteenth Report, 25 FCC Rcd 11407, ¶ 251 (2010) (emphasis added) ("*Fourteenth Report*").

[11] *Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, Memorandum Opinion and Order, 24 FCC Rcd 13915, ¶ 34 (2009) ("*AT&T-Centennial Order*").

[12] President Barack Obama, "Unleashing the Wireless Broadband Revolution," Presidential Memorandum (June 28, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution; SpectrumCo PI Statement at 6.

[13] SpectrumCo PI Statement at 7.

not have any plans to put to use in the near term,[14] is no big deal. To the contrary, these Transactions are a big deal to competitive carriers – and there are perhaps more to these Transactions than meets the eye, as the Applicants continue to hide the ball regarding the new cooperative relationships formed by the joint agreements among and between companies who otherwise would be staunch competitors.

A. The Transactions Will Exacerbate Verizon And AT&T's Spectrum Dominance And Cement A Wireless Duopoly

Over the last five-plus years, the wireless industry has consolidated at an alarmingly rapid rate. As a result, competitive carriers face ever-increasing obstacles to competing with the "Big Two" carriers – Verizon and AT&T (the "Twin Bells"). The dominance of the Twin Bells in the marketplace is visible by nearly any measure, including subscriber counts, industry EBITDA, total revenues, quantity of prime spectrum and value of spectrum. For example, these two mega-carriers enjoy a duopoly position in the wireless industry, sharing a combined *90 percent* of industry EBITDA, confirming that "the competitive landscape has continued to deteriorate in the last several years."[15] The wireless industry has passed the tipping point in terms of the national concentration of power, and the traditional market-by-market spectrum screen analysis fails to properly assess the actual competitive imbalance. The Commission must recognize that the dominant Verizon/AT&T duopoly – and their control of the lion's share of prime broadband spectrum – makes it increasingly difficult for new entrants or other smaller carriers to provide effective competition in the industry. Spectrum is the lifeblood of wireless competition, and

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[14] As discussed below, it is particularly troubling that Verizon seeks to stockpile spectrum for a theoretical rainy day more than three years away, while competitive carriers desperately need additional spectrum resources immediately.

[15] Peter Cramton, *700 MHz Device Flexibility Promotes Competition*, (Aug. 9, 2010), attached to *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel for Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC, filed in RM-11592 (Aug. 10, 2010).

each additional MHz that Verizon and AT&T acquire permits them to exert greater control over the market, making it increasingly difficult for competitive carriers to gain access to necessary spectrum resources, not to mention other critical inputs.

At present, Verizon is sitting atop its massive spectrum warehouse, effectively foreclosing the ability of competitive carriers to acquire access to spectrum on the secondary markets. Verizon also has a dreadful history of stonewalling and unreasonable behavior with respect to roaming agreements, effectively foreclosing this alternative access to spectrum in new markets.[16] The market power held by the Twin Bell duopoly enables them to foist roaming rates on others that are well above those that would prevail in a functioning competitive market. Creating further uncertainty for RCA members, Verizon has appealed the *Data Roaming Order* thus clearly signaling that it does not want to, and will not, offer data roaming on commercially reasonable terms.

The consolidated state of the industry is an important consideration for the Commission when analyzing the Transactions. The Commission must take a hard look at what a post-Transactions world looks like and ensure that it does not wind up overseeing an industry completely dominated by the Twin Bells, with competitive carriers left to wither on the vine. As discussed below,[17] competition is not only harmed by Verizon cementing its duopoly position, but also is harmed by the loss of potential new competitors. Indeed, the exit of the Cable

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[16] *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, Rural Cellular Association and Caressa D. Bennet, General Counsel, Rural Telecommunications Group to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-265 (filed Nov. 12, 2010) (recounting a history of stonewalling behavior experienced by RCA and RTG members at the hands of Verizon and AT&T).

[17] *See infra*, Section IV.

Companies from the wireless marketplace removes four separate potential competitors in both the retail and wholesale national wireless marketplaces.

B. The Transactions Would Result In The Twin Bells Having An Unprecedented Concentration Of Spectrum Resources

By any measure, the Transactions will result in an unprecedented concentration of spectrum resources in two carriers. While AT&T's commanding spectrum position has been well-documented by the Commission,[18] the Transactions would result in an even greater concentration of spectrum in the hands of Verizon. This dominance is evident from any number of viewpoints: (i) average spectrum holdings on a national basis; (ii) national MHz*POPs; (iii) spectrum holdings in top markets; (iv) spectrum under 1 GHz; (v) spectrum suitable for 4G LTE services; and (vi) book value of spectrum.

i. The Transactions Would Exacerbate Verizon's Dominant Spectrum Position, Further Cementing A Wireless Duopoly

It is no secret that, "[a]t the national level," Verizon and AT&T already "have the most substantial spectrum holdings."[19] With Verizon holding an average of 88 MHz nationally, and AT&T holding an average of 94 MHz nationally,[20] these two carriers dwarf the wireless broadband spectrum holdings of all other carriers *combined*. The Twin Bells hold dominant spectrum positions using the Commission's MHz*POPs metric – with Verizon holding licenses covering approximately 22 percent, and AT&T covering approximately 21 percent, of the total

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[18] *See generally*, Staff Analysis appended to *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer of Control Licenses and Authorizations*, Order, WT Docket No. 11-65, DA 11-1955 (rel. Nov. 29, 2011) ("*AT&T/T-Mobile Staff Analysis*").

[19] *AT&T-Qualcomm Order* ¶ 45.

[20] *See* Sprint Nextel Corporation Petition to Deny, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer of Control Licenses and Authorizations*, WT Docket No. 11-65 (filed May 31, 2011).

MHz*POPs available for use in the provision of wireless broadband.[21] Allowing these Transactions to proceed would result in a remarkable *23 percent* increase in Verizon's proportion of total national MHz*POPs, resulting in total coverage of approximately 27 percent of the national MHz*POPs (from 22 to 27 percent). This is a matter of serious concern in light of the Commission's guidelines for ensuring effective competition in the nationwide wireless broadband market, as discussed in the *AT&T/Qualcomm* transaction. In allowing AT&T to acquire Qualcomm's nationwide 700 MHz spectrum, the Commission concluded that the "implementation of [that] transaction would still leave available for competitors at the national level more than three quarters of the spectrum suitable for mobile voice or broadband."[22] However, the acquisition of SpectrumCo and Cox would allow Verizon to co-opt more than one fourth of the available national MHz*POPs (thus leaving less than three quarters available for competitors). And, even worse, when combined with AT&T's holdings, the two carriers would control nearly half of the national MHz*POPs.

The Twin Bells also dominate spectrum holdings in the top 100 markets, and the Transactions will only further entrench Verizon in these major markets. Verizon and AT&T tip the scales with 91 MHz and 100 MHz, respectively, in the top 100 markets, leaving their next closest competitor, T-Mobile with 53 MHz, a distant blur in the rear-view mirror.[23] In addition,

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[21] *AT&T-Qualcomm Order* ¶ 45. T-Mobile, the carrier holding the next largest amount of spectrum, has under 15 percent of the national MHz*POPs. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd 9664, ¶ 288, Chart 38 (2011) ("*Fifteenth Report*").

[22] *AT&T-Qualcomm Order* ¶ 45.

[23] J.P. Morgan, *Wireless Services: Overview of Carrier Spectrum Holdings*, Mar. 30, 2011, at 3, *available at* https://mm.jpmorgan.com/stp/t/c.do?i=62A4EB32&u=a_p*d_569842.pdf*h_-ifi22f3 ("*J.P. Morgan Spectrum Study*").

competitors like MetroPCS and Leap provide service in these markets over a mere *one-fifth* of the spectrum available to Verizon and AT&T, and the spectrum shortage is even more severe for many small rural carriers.[24] With no more usable spectrum on the horizon in the near term (even with the recent spectrum legislation), and with the Twin Bells' purchasing power chilling the secondary markets, this is simply an untenable situation. The Commission must not allow Verizon, which already commands a vast spectrum portfolio, to further fortify its spectrum dominance at the expense of competition.

ii. The Transactions Would Result In Verizon Dominating The Market For Prime Spectrum Resources

The alarming concentration of spectrum discussed above does not fully illustrate the overwhelming dominance Verizon would obtain if the Transactions are approved. The sheer magnitude of Verizon's warehouse of the aggregate available national spectrum is made all the more serious because Verizon's holdings largely consist of the most valuable types of spectrum. The Commission already has indicated that it is "prudent to inquire about the potential impact of [the] aggregation of spectrum below 1 GHz as part of the Commission's case-by-case analysis."[25] And, the Commission has properly recognized the potential need for distinguishing among the quality of various bands of spectrum for the purposes of competitive analysis.[26] When the amount of prime spectrum held by Verizon is taken into account, its spectrum dominance is even more glaring.

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[24] *Id*. Indeed, in a number of these metropolitan areas, one of the other carriers may be second or third to the Twin Bells with substantially less spectrum.

[25] *AT&T/Qualcomm Order* ¶ 49.

[26] *AT&T/T-Mobile Staff Analysis* ¶ 45, n.136.

The Commission has recently recognized – as it should – the "general consensus that the more favorable propagation characteristics of lower frequency spectrum allow for better coverage across larger geographic areas and inside buildings."[27] As a result, "[t]wo licensees may hold equal quantities of bandwidth but nevertheless hold very different spectrum assets."[28] For example, "[i]t is well established that lower frequency bands – such as the 700 MHz and Cellular bands – possess more favorable intrinsic spectrum propagation characteristics than spectrum in higher bands. As a result, 'low-band' spectrum can provide superior coverage over larger geographic areas, through adverse climates and terrain, and inside buildings and vehicles."[29] Notably, the FCC is not the only governmental body to have reached this conclusion. During "consideration of mobile wireless competition issues, the DOJ has noted the differences between the use of lower and higher frequency bands," and, "[a]s lower frequency spectrum is becoming available for mobile services in other countries, some regulators have adopted or are considering policies intended to help facilitate the wider distribution of this newly available spectrum."[30] With this as background, the Commission must take note of Verizon's already-dominant position in prime spectrum bands. In the top 100 Markets, Verizon holds 58 MHz of "beachfront" spectrum below 1 GHz, with AT&T a close second at 54 MHz.[31] Compared with the 12 MHz of SMR spectrum held by Sprint, the 12 MHz of 700 MHz Lower A

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[27] *Fifteenth Report* ¶ 289.

[28] *Id*. at ¶ 290.

[29] *Id*. at ¶ 292.

[30] *Id*.

[31] *J.P. Morgan Spectrum Study* 3.

Block spectrum held by MetroPCS in a single market,[32] and the 0 MHz held by Leap, the contrast could not be more stark between the spectrum "haves" and the "have-nots."

So, spectrum holdings below 1 GHz are an important consideration. An equally important consideration is the dominance by Verizon in spectrum that is best suited to provide 4G LTE services. Not all spectrum bands are available for LTE deployment at present. In fact, LTE so far has only been commercially deployed on the AWS band by MetroPCS and AT&T and on the 700 MHz band by Verizon. And, Verizon already has a commanding lead over other carriers (including AT&T) in these prime 4G LTE bands, holding an average of 62 MHz of spectrum currently available for 4G LTE deployment in the top 100 markets – which outpaces its closest competitor, AT&T, by 46 percent.[33] If the Transactions are permitted to proceed, Verizon would hold 56 percent more 4G LTE-ready spectrum in the top 10 markets than would AT&T,[34] to say nothing of its staggering advantage over the 4G LTE spectrum positions of small, rural and mid-tier carriers. What's worse, rural and regional carriers are prohibited from using their 700 MHz A Block spectrum as a result of the lack of interoperability caused by the large national carriers locking out their competitors from the 4G LTE market. Given the critical importance of 4G LTE services to consumers – and of carriers' ability to compete for consumers – the Commission must take a hard look at whether one carrier should be permitted to further cement its dominant position in these important spectrum bands, particularly when the acquiring

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[32] MetroPCS holds a single 700 MHz A Block license covering Boston and other surrounding ancillary markets.

[33] Elizabeth Woyke, "Verizon To Enter 2012 As King Of 'New Spectrum Landscape'" Forbes.com (Dec. 20, 2011), *available at* http://www.forbes.com/sites/elizabethwoyke/2011/12/20/verizon-to-enter-2012-as-king-of-new-spectrum-landscape/.

[34] *Id*.

carrier has demonstrated that its spectrum needs are met in the near term and would merely be putting this spectrum into its warehouse. Without the necessary spectrum in a 4G LTE world, carriers outside of the Twin Bells will be unable to compete for consumers on anything resembling a level playing field. As discussed in detail below, the Commission must condition the Transactions to prevent Verizon from extending its 3G dominance into an insurmountable position in the 4G LTE world.

III. ASSIGNMENT OF SIGNIFICANT NATIONWIDE SPECTRUM RESOURCES FROM A POTENTIAL SPECULATOR TO A WAREHOUSER IS CONTRARY TO THE PUBLIC INTEREST

In addition to the substantial and material anti-competitive concerns regarding the nationwide spectrum aggregation resulting from the Transactions, the Commission also must examine whether the Cable Companies, excluding Cox who briefly operated a facilities-based wireless network,[35] (the "Non-Operators") acted as mere spectrum speculators who sought only to turn a profit by exploiting a public resource. While the Non-Operators claim that they undertook actions to put the spectrum to use, they never undertook serious efforts to build and operate a facilities-based wireless network, instead choosing to treat valuable spectrum – desperately needed immediately by operating entities – as an investment vehicle. And, perhaps most disturbing, the Transactions propose to assign this prime resource from the speculating Non-Operators to Verizon, an admitted spectrum warehouser. With an immediate and critical demand for spectrum throughout the universe of competitive carriers, the Commission must not allow such an assignment to occur without stringent conditions.

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[35] Mike Robuck, "Cox to shut down wireless service," CED Magazine (Nov. 16, 2011), *available at* http://www.cedmagazine.com/news/2011/11/cox-to-shut-down-wireless-service.

A. The Commission Must Undertake A Robust Inquiry Into Whether The Non-Operators Acted As Spectrum Speculators

The Commission has long recognized the public interest harms of spectrum trafficking. Indeed, the Non-Operators' Licenses are specifically subject to a prohibition on trafficking, which the Commission defines as

> obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public or for the licensee's own private use.[36]

Based on public comments from Comcast in particular, it is quite clear that there was no true intent for any of the Non-Operators to become facilities-based competitors. Shortly after purchasing the Licenses in 2006, Comcast made its wireless intentions, or, more accurately, lack of intentions, quite apparent. A Merrill Lynch analyst reported that Comcast "[made] it clear at our annual media conference last week that the company has no intention of 'being the fifth cellular operator,'" and that "it did not anticipate embarking on any substantive buildout of the spectrum in the near term and that it was willing to let the asset lie fallow for some years to come."[37] In subsequent years Comcast repeatedly indicated that it had no real intention of ever using the Licenses to provide competition in the wireless market:

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[36] 47 C.F.R. § 1.948(i)(1).

[37] Heather Forsgren Weaver, "Leap, MetroPCS break into major markets with AWS spectrum," RCR Wireless (Sep. 25, 2006), *available at* http://www.rcrwireless.com/article/20060925/sub/leap-metropcs-break-into-major-markets-with-aws-spectrum/. This comment is telling because it demonstrates that the Non-Operators never intended to build out this spectrum. Rather, it was a purely financial play for them.

- In 2008, Comcast CEO Brian Roberts said, in response to a question about Comcast's plans for its AWS spectrum, that "the strategy has not changed and that we're studying what's the best way to utilize that, ***if at all***."[38]
- In 2009, Comcast CFO Michael Angelakis stated that Comcast "[didn't] want to be the seventh competitor in a market that we think is mature from the voice side. And it's a huge economic investment, which we're uncomfortable there's a real return for."[39]
- In 2010, Angelakis stated that Comcast "[didn't] need to own the [wireless] network" and "[didn't] actually want to operate the [wireless] network."[40]
- In 2011, Angelakis again reiterated Comcast's lack of interest in actually providing service over the Licenses, stating that Comcast had "no desire to own a wireless network" and had "no desire to write large checks" to construct such a network.[41]

Perhaps most disturbing, when asked what the Transactions meant for Comcast's wireless strategy, Angelakis plainly stated that "[Comcast] never really intended to build that spectrum."[42] Perhaps having let too much of the truth slip out, Comcast has attempted to back away from

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[38] Comcast Corporation Q4 2007 Earnings Conference Call Transcript (Feb. 14, 2008) (emphasis added), *available at* http://seekingalpha.com/article/64684-comcast-corporation-q4-2007-earnings-call-transcript.

[39] Statement of Michael J. Angelakis, Comcast Corporation, Goldman Sachs Communacopia Conference, 5 (Sept. 16, 2009).

[40] Statement of Michael J. Angelakis, Comcast Corporation, Barclays Capital Investor Conference, 9 (May 26. 2010).

[41] Statement of Michael J. Angelakis, Comcast Corporation, Goldman Sachs Communacopia Conference, 5 (Sep. 20, 2011).

[42] *Comcast Article* 8.

these comments. However, the record is clear that Comcast's attitude towards this valuable public tax-payer resource was the same in 2006 as it is in 2012: no interest or intent in actually putting the Licenses to beneficial use. The Non-Operators appear to view the SpectrumCo licenses as just another investment, entirely ignoring their obligation to serve the public interest.[43]

The Commission's Wireless Bureau was rightly troubled by Comcast's latest admission, with an official noting that "at the foundation of our rules, especially our auction rules, is the integrity of the bidders and the integrity of the process."[44] The Bureau official also noted that "carriers like T-Mobile and MetroPCS are actively building out the licenses they bought in the AWS auction while the SpectrumCo spectrum, which gave the consortium almost a national footprint, has been lying fallow."[45]

In the SpectrumCo Public Interest Statement ("SpectrumCo PI Statement"), SpectrumCo admits that the reason they have not been interested in putting the Licenses to use is that "they cannot justify undertaking the substantial costs and risks involved in building a standalone, facilities based wireless network."[46] However, the substantial cost of building a wireless network is nothing unexpected or new. SpectrumCo obviously knew at the time of purchase that

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[43] Statement of Commissioner Michael J. Copps *Re: Service Rules for the 698-746, 747-762 and 777-792 Bands; Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules*, Report and Order and FNPRM, 22 FCC Rcd 8064, 8172 (2007) ("A license to use the peoples airwaves is a public trust – and we must not countenance . . . unreasonable delay in putting this spectrum to work.").

[44] Howard Buskirk, "Wireless Bureau to Probe Comcast CFO Statements on AWS Licenses," Communications Daily, 1 (Jan. 19, 2012). The same observation can be made of Verizon, which holds 20 MHz of AWS spectrum east of the Mississippi. To RCA's knowledge, Verizon has not put any of this AWS spectrum to use.

[45] *Id*.

[46] SpectrumCo PI Statement at 17.

building and operating a network would be a substantial investment. The Non-Operators' public statements and inaction therefore create a substantial and material question regarding whether the Licenses were purchased for "the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public."[47] While Comcast has feebly attempted to backtrack from its comments – despite having sounded a consistent refrain for nearly six years – the FCC must at least investigate at a hearing these conflicting comments as material questions of fact. Approving the Transactions would reward SpectrumCo with a significant profit for simply sitting on a valuable public tax-payer resource. Indeed, SpectrumCo paid $2.4 billion for the Licenses that are now being sold for a combined $3.9 billion –*$1.5 billion in profit*, plus the value of the resale agreements, which have substantial value in and of themselves. With spectrum access challenges impacting carriers nationwide, SpectrumCo should not benefit from its gross inaction with a billion-dollar windfall, while the industry watches valuable spectrum be assigned from a speculator to a warehouser. Moreover, the $1.5 billion profit is money received for nothing more than allowing a *public tax-payer resource* to go to waste over a period of six years. It offends the public interest to allow this windfall to accrue to the Non-Operators.

B. The Commission Must Investigate The Extent To Which Verizon Has Been Warehousing Spectrum

The Communications Act of 1934, as amended (the "Act"),[48] places an affirmative obligation on the Commission "to prevent stockpiling or warehousing of spectrum by licensees or permitees."[49] A substantial question of fact is raised as to whether a grant of the subject

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[47] 47 C.F.R. § 1.948(i)(1).

[48] 47 U.S.C. § 151 *et. seq.*

[49] 47 U.S.C. § 309(i)(4)(B).

Transactions would violate this core public interest principle, particularly in light of the severe shortage of available broadband wireless spectrum that is plaguing many carriers in the industry.

Both the Commission and many carriers have referenced the spectrum challenges facing the wireless industry. Nonetheless, Verizon continues to trumpet its strong spectrum position, noting that it is not in need of spectrum in the immediate or near term, nor is it in danger of failing to meet foreseeable capacity demands on its network.[50] Indeed, in the SpectrumCo PI Statement, Verizon openly admits that it "has sufficient spectrum to meet its immediate needs, and generally to meet increased demands until 2015."[51] Allowing Verizon to add to the stockpile of spectrum in its warehouse would be contrary to the public interest. The Commission has a "unique responsibility to ensure that spectrum is allocated in a matter that promotes actual competition and that incentives are maintained for innovation and efficiency in the mobile services marketplace."[52] The Commission must be mindful of this critical goal and ensure that it does not permit Verizon to warehouse spectrum in anti-competitive amounts that result in damage to the industry. This is especially true when the industry is starved for spectrum and Verizon may be engaging in the Transactions for anti-competitive reasons.

Verizon has no near-term need for additional spectrum because it is not using large portions of the spectrum that it already has. For example, Verizon already possesses 20 MHz AWS licenses covering nearly half the country. Yet, it is RCA's understanding that Verizon

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[50] Verizon previously indicated that it currently has strong spectrum holdings and that any spectrum shortage it would face in the absence of new allocations "is five to ten years down the road." Rich Karpinski, *TIA 2011*: *Genachowski, Hutchison Push Hard on Spectrum*, TIA2011CONNECTED (May 20, 2011), *available at*: http://tia2011connected.com/stories/tia-2011-genachowski-hutchison-push-hard-on-spectrum-0520/.

[51] SpectrumCo PI Statement at 13.

[52] *AT&T/Qualcomm Order* ¶ 30.

currently does not serve customers over the AWS spectrum that it already owns. RCA also understands that Verizon is not providing public service over the numerous 700 MHz A and B block licenses that it possesses.[53] There also is additional spectrum in other bands, particularly in rural areas, that Verizon is not using. It is also not clear how much Cellular and PCS spectrum Verizon currently uses. Thus, even without considering the substantial additional spectrum Verizon seeks to acquire in the proposed Transactions, Verizon *already* possesses at least 12 MHz of fallow spectrum on a nearly-national basis, with over 32 MHz in the eastern half of the United States, and in many cases as much as 44 MHz of dormant spectrum. Compare this with many competitive carriers, who offer service in major metropolitan areas with as little as 10 MHz of spectrum *total*[54] and are in need of additional spectrum.[55]

Now, Verizon seeks to further stock its spectrum warehouse via the proposed Transactions. If the Transactions are permitted to proceed, Verizon will have stockpiled 40 MHz of completely unused AWS and 700 MHz spectrum in most top 100 markets – and up to as much as 72 MHz in several of them.[56] The public interest would not be served by permitting Verizon to hoard even more spectrum – that it has no intention of using in the near term – while competitive carriers are denied access to this important input. To confirm whether Verizon is indeed warehousing spectrum rather than using it to provide service to customers, the

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[53] Verizon holds 20 MHz AWS licenses effectively covering the eastern half of the United States, as well as 12-24 MHz of 700 MHz A and B Block spectrum nearly nationwide.

[54] For example, RCA member MetroPCS provides service in the Philadelphia, PA market using only 10 MHz of AWS spectrum.

[55] Indeed, at least one RCA member, MetroPCS, has publicly stated that it does not currently offer services over certain devices – such as laptops and tablets – as a result of this lack of spectrum.

[56] For the purposes of this aggregation analysis, RCA has included the pending Leap Wireless and Savary Island applications (ULS File Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598).

Commission must require Verizon to provide specific details on a market-by-market, band-by-band basis of what spectrum it is currently using. Only then can the Commission make an appropriate determination as to whether it is in the public interest to assign Verizon the SpectrumCo and Cox spectrum. As noted above, the Commission has a responsibility to ensure that spectrum, as a public tax-payer resource, is allocated and utilized in a fair manner. An exhaustive analysis of Verizon's spectrum use – or non-use – would allow the Commission the critical data that it needs to make this determination.[57]

Verizon also has offered no concrete plans for the use of the spectrum it proposes to acquire in this latest spectrum grab. In contrast, the Commission found AT&T to have offered an appropriately concrete buildout plan in the *AT&T/Qualcomm Order*. In that proceeding, RCA noted its concerns regarding possible spectrum warehousing. The Commission did not dismiss these concerns, but rather cited AT&T's concrete plan for using the Qualcomm spectrum to support and enhance its ability to provide mobile broadband services over its LTE network, with services over the band commencing as early as 2014.[58] Just as the Commission is charged by statute to deter warehousing of spectrum, the Act also obligates the FCC to "promote . . . rapid deployment of new technologies and services."[59] The Applications fall far short of enabling the Commission to meet this standard. Verizon has only offered vague suggestions that the

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[57] RCA reserves the right to file further comments when this important missing information is supplied.

[58] *AT&T/Qualcomm Order* ¶ 89.

[59] 47 U.S.C. § 309(j)(4)(B).

spectrum might be needed for "projected future demand"[60] sometime around 2015 – and perhaps not until 2019.[61]

Spectrum warehousing should be of the utmost concern to the Commission. In the meantime, as Verizon sits atop a massive spectrum stockpile, it will take far longer than anticipated in the National Broadband Plan for the Commission to identify and deliver new broadband spectrum resources to the wireless market for auction, even now that spectrum legislation has passed. Indeed, industry analysts have already recognized that "[w]ireless data growth has made spectrum a competitive weapon."[62] With Verizon already occupying a dominant position with respect to spectrum inputs, and in particular with respect to 4G LTE spectrum inputs, the Commission must not allow Verizon to turn a public tax-payer resource into a "competitive weapon" with which it can slay competitive carriers.

C. Allowing The Assignment Of Nationwide Spectrum For Medium-To-Long-Term Uses With a Looming Spectrum Crunch Is Contrary To The Public Interest

Carriers, the Commission and industry observers have all reached a similar and inexorable conclusion: wireless providers must have access to spectrum in order to satisfy consumer demand for wireless services. However, at present the unused reservoir of useable, available spectrum is effectively dry. Indeed, along with the 2 GHz MSS spectrum,[63] the Cable Companies' 20 MHz of nationwide AWS spectrum represents one of the last unconstructed,

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[60] SpectrumCo PI Statement at 13.

[61] *Id*. at 14 (suggesting that its longer term spectrum needs might not arise for as long as "7 years").

[62] John C. Hodulik, "The New Spectrum Landscape," 1, UBS Investment Research, Wireless Telecommunications (Dec. 19, 2011).

[63] The spectrum licenses held by bankrupt operators TerreStar and New DBSD currently are the subject of pending applications to transfer control to DISH.

available nationwide blocks of spectrum for the foreseeable future. RCA members have been advocating the release of additional useable spectrum since 2008 – but without success. Even with recent Congressional action to provide additional spectrum for commercial wireless broadband services, the legislation will not make more spectrum available for a number of years.[64] For example, it took approximately *10 years* from the time that Congress enacted the Balanced Budget Act of 1997, freeing up 700 MHz spectrum for commercial use, to the date on which the Commission actually auctioned the spectrum off. And, it was not until 2009 that the Digital Television Transition was completed, enabling the spectrum to be put to commercial use.

Moreover, due in large part to their dominant and market financial positions, the Twin Bells are able to pay staggering amounts for spectrum on the secondary markets, which encourages spectrum speculation for unfair financial gain. Instead, some speculators with no intention of constructing and operating wireless facilities are holding on to fallow spectrum in the hopes of a "big score" from one of the duopoly carriers. The long-term implications of the Transactions for developing and encouraging a robust secondary spectrum are bleak. If the Transactions are allowed to proceed, Verizon will be looking for new closet space in its spectrum warehouse while other carriers are left behind.

Notably, since Verizon freely admits that its spectrum needs are satisfied until 2015 at the earliest, this means that its future spectrum requirements – unlike the near term needs of RCA's members – may be met in future auctions. It simply makes no sense for the Commission to approve the Transactions that may cure theoretical shortfalls many years in the future while the carriers who promote a competitive marketplace are severely spectrum constrained right now.

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[64] With the notable exception of 12 MHz of 700 MHz A Block spectrum that could be deployed in as little as 12 to 18 months pursuant to an interoperability requirement.

Indeed, the Commission has found that it is obligated to "consider not only the near-term, but also the long term impacts of proposed transactions on the implementation of Congress's procompetitive, deregulatory policies aimed at developing and encouraging competitive markets."[65] The Commission must not allow Verizon to wield spectrum as a competitive weapon to the detriment of consumers and competition.

IV. COMPETITIVE HARM WILL RESULT FROM THE REMOVAL OF FOUR SIGNIFICANT POTENTIAL COMPETITORS FROM THE WIRELESS MARKETPLACE

In evaluating the proposed license assignments, the Commission should consider the antitrust guidelines established by the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in assessing the effect the Transactions will have on competition in the wireless marketplace. "[M]erger analysis does not consist of uniform application of a single methodology,"[66] and both the Commission and DOJ recognize the importance of evaluating merger transactions and other spectrum acquisition arrangements through a fact-specific process. For example, the DOJ and FTC have issued the *DOJ Horizontal Merger Guidelines*, which "outline the principal analytical techniques [and] practices . . . with respect to mergers and acquisitions involving actual or potential competitors under federal antitrust laws."[67] These guidelines highlight the significant competitive concerns that may result from a transaction involving an incumbent and potential entrant. The DOJ specifically recommends consideration

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[65] *AT&T/Qualcomm Order* ¶ 30.

[66] DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, § 1 (Aug. 19, 2010) *available at:* http://www.justice.gov/atr/public/guidelines/hmg-2010.html ("*DOJ Horizontal Merger Guidelines*"); *See also AT&T Qualcomm Order* ¶ 31 (stating that "[t]he Commission examines the effects of spectrum aggregation on the marketplace on a case-by-case basis").

[67] *DOJ Horizontal Merger Guidelines* § 1.

of the number of significant competitors in the market in measuring market concentration, an analysis that considers both incumbents and identifiable prospective competitors with the resources to compete effectively.[68] The Commission previously has acknowledged and applied these merger guidelines, but also may take a broader view in assessing the competitive effects of a transaction under the broad public interest standard.[69] Specifically, the Commission must "take[] a more extensive view of potential and future competition and the impact on the relevant market, including longer-term impacts."[70]

With respect to spectrum acquisitions, the Commission has paid close attention to anti-competitive results that may hinder "other competitors to meaningfully expand their provision of mobile broadband services."[71] The Commission has carefully considered actual spectrum aggregation and use in order to fulfill its "unique responsibility to ensure that spectrum is allocated in a manner that promotes actual and potential competition."[72] Accordingly, the Commission must consider the impact that these transactions will have as a result of the loss of *potential competitors* – SpectrumCo and Cox.

The need for a thorough competitive analysis is in no way reduced by the fact that the Transactions involve the sale of spectrum assets rather than a merger. The Commission has recognized that other non-merger market transactions, such as spectrum leasing arrangements,

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[68] *Id*. at § 5.3.

[69] *See e.g., AT&T/Qualcomm Order*, ¶ 25; *AT&T Staff Analysis*; *see also Fifteenth Report* (providing examples from the *Horizontal Merger Guidelines* that assist the FCC in evaluating the level of competition in the wireless market).

[70] *AT&T/Qualcomm Order* ¶ 25. The Commission also recognizes that it has "unique statutory obligations, distinct from the DOJ, to consider the potential anticompetitive effects of proposed acquisitions of spectrum that is used in the provision of mobile services." *Id*., at ¶ 30, n.88

[71] *Id*. at ¶ 51.

[72] *Id*. at ¶ 30.

and most recently, the *AT&T/Qualcomm* spectrum assignment transaction, potentially raise competitive concerns, and therefore should also be subject to the Commission's policies pertaining to competition analysis.[73] As a practical matter, the Transactions at issue in this proceeding raise the same level of competitive concern as would be the case if it was structured as a merger – especially with respect to the removal of potential competition and other entrants into the market.[74] Although the proposed transactions are not mergers, *per se*, the competitive concerns highlighted in the merger guidelines apply here with equal force because the licensees – The Cable Companies – will be assigning *all* of their AWS licenses in full to Verizon, thus eliminating any chance of these companies entering the wireless market and increasing competition in the future.[75] There is no practical difference from them being merged out of existence.

The *DOJ Horizontal Merger Guidelines* conclude that "[t]he lessening of competition resulting from [a merger between an incumbent and potential entrant] is more likely to be

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[73] *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, 19 FCC Rcd, 17503, ¶¶ 116-119, 147 (rel. Sept. 2, 2004); *see generally, AT&T/Qualcomm Order*.

[74] The FCC has evaluated effects of mergers with respect to the removal of "a current competitive threat and the significant potential for a future entrant." *See e.g., In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee; For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶¶ 350 – 352 (rel. June 16, 2000); *In re Applications of AmeriTech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, 14887, ¶¶ 420 – 422 (rel. Oct. 8, 1999).

[75] This would also prevent other wireless carriers that might have been interested in acquiring this spectrum, such as small, rural and mid-tier carriers, from acquiring any segment of the spectrum at issue that would provide them with greater standing to compete with the "Big 4" nationwide carriers.

substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others."[76] Using this analytical framework, Verizon, a carrier with a large and substantial market share, will be removing competitively significant potential entrants, which have both the spectrum necessary to enter the wireless market and compete effectively. By acquiring all of the Cable Companies' wireless spectrum, Verizon ensures that the threats to its market and its customers are eliminated.

Each of the Cable Companies has sufficient resources to qualify as a significant potential competitor in the wireless market. Each removed competitor could be a potential retail competitor as well as a provider of wholesale inputs, such as roaming services. It is no secret that competitive carriers continue to be unable to secure reasonable roaming arrangements with Verizon and AT&T.[77] Significantly, SpectrumCo specifically cites the difficulties of securing suitable nationwide roaming arrangements as a "complicating factor offered in support of its decision not to become a facility-based wireless competitor."[78] The addition of the four Cable Companies as wireless providers likely would have provided greater impetus for all carriers to cooperate in establishing commercially reasonable roaming arrangements, as well as the proper incentives to come to arms-length, commercially reasonable agreements. Their removal would

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[76] *DOJ Horizontal Merger Guidelines* § 5.3.

[77] *See generally, See* MetroPCS Communications, Inc., National Telecommunications Cooperative Association, NTELOS Holdings Corp., PRWireless, Inc., Revol Wireless, , Rural Cellular Association, Rural Telecommunications Group, United States Cellular Corporation, *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Comments in Support of the Blanca Telephone Company Petition for Reconsideration, WT Docket No. 05-265 (filed Dec. 16, 2011).

[78] Declaration of Robert Pick, Chief Executive Officer of SpectrumCo, LLC, ¶ 14, attached as Exhibit 4 to the SpectrumCo Application ("Pick Declaration").

leave four fewer providers in the market to purchase handsets, offer retail competition and innovation, and promote a competitive roaming market.

This loss of potential competition by cable operators is of particular concern because the Cable Companies are technically-sophisticated, have substantial existing customer bases, are well-financed, and have access to capital, thus making each of them well-situated to compete against the Twin Bells through "triple play" or "quadruple play" packages.[79] The DOJ has concluded that "entry by a new mobile wireless telecommunications services provider in the relevant geographic market would be difficult, time-consuming, and expensive" with the new entrant having to possess "nationwide spectrum, a national network, scale economies that arise from having tens of millions of customers, and a strong brand . . ."[80] The Cable Companies have nearly all of these desired characteristics, as they are often leading service providers in their core markets, are well-known in their respective communities, have strong familiar brands, and have access to all of the necessary inputs (technical expertise, financial resources, etc.) to create additional facilities-based wireless competition. Indeed, the Cable Companies represented one of the last true viable options for facilities-based competition.[81] The Commission need look no

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[79] For example, Cox already has previously offered wireless services to customers in bundled packages, and just recently, in November 2011, announced that it would discontinue offering wireless services to new customers, and allow existing customers to remain in service until March 30, 2012. "Cox Communications to Discontinue Cox Wireless Service, Effective March 30, 2012," Press Release, Cox Communications, (Nov. 15, 2011), *available at* http://cox.mediaroom.com/index.php?s=43&item=569.

[80] *United States of America v. AT&T Inc., et al.,* Case No. 1:11-01560, ¶ 45 (D.D.C. Sept. 16, 2011) ("*DOJ Amended Complaint*").

[81] As of September 2011, the National Cable & Telecommunications Association ("NCTA") listed all four potential competitors in the top ten multichannel video programming distributors as based on basic video subscribers, with a combined subscriber base of approximately 45,346,000. (Comcast Corporation is listed as number one; TWC is listed as number four; Cox

further than the SEC filings of Verizon to confirm that the cable companies are potentially significant and viable competitors in the wireless business. In discussing wireline competition, Verizon states:

> We expect competition to intensify further with traditional, non-traditional and emerging players seeking increased market share. Current and potential competitors include cable companies, wireless service providers, other domestic and foreign telecommunications providers, satellite television companies, Internet service providers and other companies that offer network services and managed enterprise solutions.
>
> In the Mass Markets business, cable operators are significant competitors. Cable operators have increased the size and digital capacity of their networks so that they can offer digital products and services. We continue to market competitive bundled offerings that include high-speed Internet access, digital television and voice services. Several major cable operators also offer bundles with wireless services through strategic relationships.[82]

The significant point here is that the same combination of attributes that enabled the Cable Companies to emerge as significant players in the wireline business also serve to explain why they represent significant potential entrants in the wireless space, particularly if they were to fulfill their promise of becoming facility-based competitors. Eliminating these companies from potentially entering the wireless market removes one of the most significant opportunities to increase competition in this market, and further solidifies the *de facto* Twin Bell duopoly in the wireless marketplace. The Commission must take these factors into account in its public interest analysis. The removal of those four potential competitors, combined with the strengthening of the current duopolists, will cause significant anti-competitive harm in the wireless industry.

Communications is listed as number five; and BHN is listed at number 10.) NCTA, Top 25 Multichannel Video Programming Distributors as of Sept. 2011, 1 – 25, *available at* http://www.ncta.com/Stats/TopMSOs.aspx.

[82] Verizon Communications, Inc., Annual Report (Form 10-K), at 13 (Feb. 28, 2011) *available at* http://eol.edgarexplorer.com/EFX_dll/EDGARpro.dll?FetchFilingHTML1?SessionID=XukkiWhUFX_cXzg&ID=7759054.

V. THE TRANSACTIONS WOULD FURTHER ENABLE VERIZON TO DENY ACCESS TO DATA ROAMING AND OTHER CRITICAL INPUTS

Grant of the Transactions would not only lock in Verizon's dominant spectrum position, but also would empower Verizon with an even greater ability to foreclose access to other critical inputs for wireless services such as, voice and data roaming, equipment availability, special access and backhaul, WiFi offload, and media content. As discussed in detail below, in many cases the Cable Companies provide the only alternative to Verizon and AT&T for critical special access and backhaul inputs. With Verizon and the Cable Companies now jointly marketing each others' services on a cooperative basis, in many areas the backhaul market may go from a duopoly (Verizon and the Cable Companies) to an effective monopoly (the cooperative Verizon/Cable Companies' joint effort). The Commission also has recognized the importance of wireless equipment, noting that "[m]obile handsets and devices directly affect the quality of a consumer's mobile wireless experience."[83] Wireless devices "are increasingly central to the dynamics of the overall wireless market, and play an increasingly important role for consumers as a basis for choosing providers."[84] The removal of four potential buyers of handsets will have a negative effect on the wireless equipment market. Verizon will have the ability and incentive to dictate not only the type of equipment available, but also the spectrum bands over which such equipment operates. The Transactions raise the possibility of Verizon further dominating the equipment market, and making it even more difficult for smaller carriers to compete for the latest cutting edge devices.

Voice and data roaming in particular has been a thorn in the side of competitive carriers for an extended period of time. The Commission has repeatedly recognized that roaming

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[83] *AT&T/T-Mobile Staff Analysis* ¶ 117.

[84] *Id.*

agreements "can be critical to providers remaining competitive in the mobile services marketplace."[85] Further, "the availability of roaming capability is and will continue to be a critical component to enable consumers to have a competitive choice" among wireless carriers, and is "particularly important for consumers in rural areas – where mobile data services may solely be available from small rural providers."[86] RCA's members are particularly sensitive to the need for nationwide data roaming, as it is the only tool that allows seamless nationwide data coverage.

The geographic service areas of all of RCA's members, taken together, do not replicate the massive national footprints of Verizon and AT&T, and so RCA's members are heavily reliant on data roaming arrangements to fill the substantial gaps. The DOJ recently confirmed the competitive disadvantage that roaming requirements place on smaller carriers:

> [L]ocal and regional providers must depend on one of the four nationwide carriers to provide them with wholesale services in the form of "roaming" in order to provide service in the vast majority of the United States (accounting for most of the U.S. population) that sits outside of their respective service areas. This places them at a significant cost disadvantage, particularly for the growing number of consumers who use smartphones and exhibit considerable demand for data services.[87]

In what now seems like the distant past, nationwide competitors like the Twin Bells once were willing to enter into roaming arrangements with smaller carriers in order to fill gaps in their own networks. On occasion in the past, Verizon has been willing to engage in spectrum "swaps" with smaller carriers, allowing each carrier to trade under-utilized spectrum for spectrum in

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[85] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411, ¶ 15 (2011) ("*Data Roaming Order*").

[86] *Data Roaming Order* ¶ 30.

[87] *DOJ Amended Complaint* ¶ 35.

markets where additional capacity was required.[88] However, due to a state of consolidation and aggressive spectrum acquisition, the Twin Bells have fashioned a roaming duopoly where they rarely, if ever, need smaller carriers' networks to fill coverage gaps. As a result, the Twin Bells have increasingly been able to hamstring the ability of other carriers to compete by refusing to offer voice and data roaming on reasonable terms and conditions. The Commission has recognized this imbalance of power, noting that "[r]oaming agreements between two providers can be difficult to negotiate when there is limited mutual interest – for instance when they have significantly different needs for their subscribers to roam on the others' network, or when they directly compete for the subscribers in a number of markets."[89]

By virtue of their substantial financial and spectrum resources, the mere presence of the Cable Companies as potential viable nationwide competitors has acted as one of the last constraints on the Twin Bells monopolistic behavior in the roaming market – and a bare constraint at that. RCA is pleased that the FCC has recognized the importance of voice and data roaming and, in doing so, has imposed voice and data roaming obligations on CMRS carriers.[90] Despite the FCC's data roaming order, RCA members continue to struggle to negotiate fair and reasonable data roaming agreements. This is true for two reasons. First, Verizon has appealed the FCC's data roaming order, leaving the impact of the order in limbo. And second, while the

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[88] Indeed, spectrum swaps have also been a catalyst for smaller carriers to receive more reasonable roaming agreements since the Twin Bells want something in return. With both of the Twin Bells having filled warehouses of spectrum, the last thing of value smaller carriers may have to trade is disappearing.

[89] *AT&T/T-Mobile Staff Analysis* ¶ 67.

[90] *See generally Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Order on Reconsideration, 25 FCC Rcd 4181 (2010); *Data Roaming Order*.

order is an important backstop in private negotiations, these negotiations remain very one-sided, with the larger carriers having significant bargaining advantages over the smaller carriers. As described above, the Twin Bells have the power and incentive to stall negotiations to foreclose competition.

If the Transactions are approved, the Twin Bells essentially will have unfettered control over the market for nationwide roaming services. This troubling situation is nearly identical to the one that arose in the context of the now-scuttled AT&T/T-Mobile merger. There, the staff found it significant that the transaction "would eliminate T-Mobile as a potential provider of LTE-based services in the AWS and/or PCS bands (when it was considering launching LTE-based service in the future), which could mean less competition in the provision of these services where consumers have LTE handsets that can roam on these frequency bands."[91] The same is true here – grant of the Transactions will eliminate the Cable Companies as potential AWS band LTE roaming partners, which will have a significant and negative impact on the market for roaming services.

Given the nationwide scope of the Transactions, and in particular the "spectrum concentration that raises the potential for competitive harm," the Commission "must carefully consider whether to impose a roaming condition in the context of this transaction."[92] Perhaps the most telling statement on the broken data roaming market comes from the Applicants themselves. In detailing the obstacles that SpectrumCo faced to constructing a facilities-based

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[91] *AT&T/T-Mobile Staff Analysis* ¶ 102.

[92] *AT&T/Qualcomm Order* ¶ 56.

network, the Applicants state that "SpectrumCo would need to secure nationwide roaming agreements."[93] SpectrumCo further explained that

> [S]ecuring roaming agreements posed another complicating factor. Wireless consumers expect service coverage wherever they travel. No carrier – and especially not a new entrant – can provide service in all areas, which necessitates that it obtain roaming arrangements with other carriers. SpectrumCo would have been especially dependent on roaming agreements in the early phases of deployment because wireless networks are built in stages. Securing these roaming agreements would impose further costs and business complexity.[94]

Incredibly, the applicants are arguing that the difficulty of obtaining nationwide roaming agreements – a difficulty that is almost exclusively born of the Twin Bells' refusal to reasonably deal with requesting carriers – somehow supports the conclusion that Verizon should be provided *more* power in the roaming market through the Transactions. This contention is simply outrageous. If anything, SpectrumCo's admission simply underscores why any approval of the Transactions must include strict voice and data roaming conditions to ensure that an already broken market does not fail entirely.

VI. TRANSACTION DOCUMENTS BETWEEN THE APPLICANTS MUST BE THOROUGHLY EXAMINED FOR POTENTIAL ANTI-COMPETITIVE EFFECTS

Verizon and each of the Cable Companies have entered into various other agreements (the "Related Agreements") with each other, which include "agreements with the ability to act as agents selling one another's services, and provide the members of SpectrumCo [and Cox] the option of acting as resellers in the future. They also establish a technology joint venture to develop innovative technology and intellectual property that will integrate wired video, voice,

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[93] SpectrumCo PI Statement at 23.

[94] Pick Declaration ¶ 14.

and high-speed Internet with wireless technologies."[95] The Applicants claim these Related Agreements were entered into separately from the license purchase agreement, and are not contingent upon each other. This claim does nothing to mitigate the significant anti-competitive effects of these Related Agreements. In a nutshell, rather than actively competing against each other for the gamut of telecommunications needs – wireless, wireline, video, etc. – the two major telecommunications companies in most areas of the country will now be working together through and effective non-compete agreement that almost certainly will result in a loss of competition in each separate product market. The potential for anti-competitive action between these companies is enormous – and potentially dangerous for consumers. The Commission should not blindly accept the Applicants' characterization that these significant Related Agreements do not raise any competitive issues. Rather, the Commission must conduct a complete and exhaustive review of these Related Agreements to ensure that competition is not stifled by their very existence.

As an initial matter, the Commission must request full and complete copies of each of the Related Agreements from the Applicants. [begin highly confidential information] [redacted]

[95] *See Ex Parte* from Michael H. Hammer, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (filed Jan. 18, 2012).

[redacted]

[redacted] [end highly confidential information].

A. The Commission Must Take A Hard Look At The Overall Relationship Between The Applicants

The Applicants, by entering into the license purchase agreement and the Related Agreements, are entering into arrangements that are extremely broad, reaching into many different areas of the telecommunications marketplace. Indeed, on their face, the Related Agreements raise serious concerns relating to control over broadband deployment, joint marketing and sales efforts. Rather than competing for customers, the Applicants will be coordinating and sharing products and services to sell on a cooperative basis to customers. Rather than competing in the development and delivery of distinct, innovative services, it appears that the Applicants, at a minimum, will be selling customers the same services under different names with the potential for rebranding in the future. Just as the spectrum acquisition is removing the Cable Companies as facility-based wireless competitors, the Related Agreements are replacing competition in other product lines with cooperation. Together, these agreements appear more like agreements to compete than marketing agreements. These Agreements also may disincent competition since each participant will be bale to offer the other party's services

without having to invest in network facilities. Given the Commission's preference for facilities-based competition, any agreement that might lead to incentives *not* to build facilities must be closely examined. In addition to a thorough and complete review of these Agreements in order to determine whether they are anti-competitive, the Commission must receive additional information from the Applicants in order to ensure that various inputs, such as content and special access, are not being foreclosed due to the newly formed "partnership" between the former competitors. Indeed, recent statements by Comcast's CEO Brian Roberts indicate that such concerns are very real. When discussing the nature of the joint marketing agreements, Roberts stated that Verizon and Comcast will "look for innovative ways to have all the video content available on your wireless devices and your tablets,"[96] which suggests that Verizon may have access to Comcast content that is unavailable to other wireless providers. Allowing discrimination in favor of Verizon with respect to such inputs would certainly be anti-competitive.

For instance, [begin highly confidential information]

[96] Kim Hart, "Comcast CEO expects approval for Verizon deal," POLITICO (Feb. 15, 2012).

[redacted]

[redacted]

[redacted]

[redacted] [end highly confidential information]

Lastly, the Commission must review the Agreements to ensure that they do not violate the letter, spirit or intent of Section 652(c) – which prohibits certain agreements between local exchange carriers and cable companies. Specifically, Section 652(c)(3) prohibits a local exchange carrier and a cable company "from enter[ing] into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market."[97] [begin highly confidential information] [redacted] [end highly confidential information].

[97] 47 U.S.C. § 652(c)(3).

VII. THE COMMISSION MUST UTILIZE AN UPDATED METHOD TO SCREEN FOR COMPETITIVE HARM

The proposed Transactions pose significant potential anti-competitive harms. The Commission clearly has the authority under its public interest mandate to conduct an exhaustive review of these Transactions, and to impose appropriate and necessary conditions to remedy the competitive harms that will result. These serious anti-competitive effects exist notwithstanding the Applicants' argument that the transactions do not trip the spectrum screen that the Commission previously has used as an important element of its competitive analysis. For the past eight years, the Commission has continued to use this now-outdated paradigm to determine whether or not to closely examine particular markets for competitive harm due to the consolidation of spectrum into the hands of too few entities. Because the operative facts in the dynamic broadband market were constantly changing, the Commission found it to be necessary to modify the screen constantly on a transaction-by-transaction basis, leading to recurring complaints of *ad hoc* decision making. While the spectrum screen may have been a useful transitional mechanism as the Commission moved away from spectrum caps in local markets, the time has come for the Commission to use a new approach to determine competitive harm. The spectrum screen approach is no longer an adequate tool to consider whether competitive harm may be occurring in a particular market.

For example, the traditional spectrum screen analysis does not properly account for the impact of the *de facto* duopoly structure – which has been allowed to arise by prior Commissions using the spectrum screen. Also the standard spectrum screen analysis does not adequately account for the fact that not all spectrum capable of being devoted to broadband use is comparable. Due to significant changes in the mobile wireless industry since 2004, the Commission should largely abandon the spectrum screen approach, as it partially did in the

AT&T/Qualcomm Order, in favor of a new paradigm in which the Commission reviews the potential anti-competitive effects of each proposed transaction on a national level, using a case-by-case analysis. This approach would more closely approximate the reality of the current mobile wireless industry.

A. The Commission's 2004 Findings That Led To The Adoption Of The Spectrum Screen Are No Longer Accurate

In 2004, in the context of its approval of the Cingular Wireless acquisition of AT&T Wireless, the Commission adopted a spectrum screen, "the function of which was simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of [the] transaction."[98] The Commission made a number of findings in that order in which it justified the usage of the spectrum screen, which it set at that time at 70 MHz – which was slightly more than 1/3 the total of available wireless spectrum. Analysis reveals that these core findings are no longer true today, and thus the Commission should abandon, or significantly alter, the use of the spectrum screen as a tool to determine potential competition harm.

For instance, in 2004, the Commission found that "effective competition" existed in the mobile wireless industry.[99] Significantly, through the Commission's last two wireless competition reports, it has <u>not</u> found "effective competition" in the mobile wireless industry. This is a critical change. Indeed, in the *AT&T/Cingular Order*, the Commission noted that its competitive harm analysis "follows the general structure of the DOJ/FTC Merger Guidelines,"

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[98] Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 109 (2004) ("*AT&T/Cingular Order*").

[99] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Ninth report, WT Docket No. 04-111 ¶ 2 (filed Sept. 28, 2004).

but that it "chose the concentration thresholds for this screen based on our observation of the current mobile telephony marketplace. To begin with, the Commission has found that there is generally effective competition in mobile telephony markets today. . ."[100] Thus, one of the bedrock findings underlying the Commission's adoption of its screen thresholds in 2004 is no longer accurate today. This in and of itself would be reason enough for the Commission to adopt an alternative approach to determine potential competitive harm due to spectrum aggregation.

In 2004, the Commission also found that an initial spectrum screen of 70 MHz was appropriate because "a market may contain more than three viable competitors even where one entity controls this amount of spectrum, because many carriers are competing successfully with far lower amounts of bandwidth today."[101] Indeed, when the Commission adopted the roughly 1/3 of available broadband spectrum as the basis for the screen in its *Cingular/AT&T Wireless Order*, it concluded that more than three carriers could compete successfully even if one carrier had spectrum holdings approaching the screen. This is no longer true. In 2004, mobile wireless data services were barely used by consumers. Today, mobile wireless data usage has exploded – resulting in a broadly-felt spectrum shortage and urgent needs for many carriers to obtain additional useable spectrum. It is no longer the case, when the Big Two carriers each are coopting large amounts of bandwidth that approach the spectrum screen, that more than 3 carriers can compete successfully when the smaller carriers must make due with far less bandwidth. Indeed, as the race for increased speeds continues, many carriers are being forced to limit their competitive offerings. For instance, some RCA members do not offer laptop cards, tablets or other data-intensive devices due to the spectrum shortage that they currently face. The

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[100] *AT&T/Cingular Order* ¶ 107.

[101] *Id*. at ¶ 109.

fact is, wireless carriers need an increased amount of spectrum to compete today, and it is not realistic to believe that competition will continue if two carriers control the vast majority of available spectrum. Continuing down this path will bring increased consolidation, not increased competition.

The DOJ took the position in the AT&T/T-Mobile Complaint that there is a need to preserve at least four nationwide broadband carriers.[102] This expert opinion further supports for a reasoned departure from the Commission's current spectrum screen analysis. The previously stated function of the screen was "simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of this transaction."[103] However, because of the national scope of the Transactions, whether there is a "potential for competitive harm as a result of this transaction" is not revealed only in a market-by-market analysis. The Commission must look to other methods to determine potential competitive harm.

B. The Commission Must Consider Alternatives To The Spectrum Screen As Currently Implemented

The Commission must take a fresh approach to its competitive analysis rather than allowing the past to cause it to recycle the outdated spectrum screen for these Transactions.

i. The Commission Should Examine This Transaction For Anti-Competitive Effects On A National Basis

In these Transactions, Verizon proposes to acquire a nearly nationwide block of 20 MHz of spectrum, which is increased in particular markets when viewed in conjunction with Verizon's proposed spectrum swap with Leap Wireless. A national acquisition of this scope by one of the Twin Bells is inherently worthy of a searching analysis by the Commission of the competitive

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[102] *DOJ Amended Complaint* ¶ 36.

[103] *AT&T/Cingular Order* ¶ 109.

effects. The Commission recently evaluated the AT&T/Qualcomm spectrum-only transaction on a national basis.[104] Perhaps equally important, the DOJ also has stated that wireless competition now occurs and must be accessed on a national basis. Commission should follow this precedent and take the same approach on these Transactions.

In AT&T/Qualcomm, the Commission properly recognized the need to look at the competitive impact of a transaction at the national level when a major carrier is seeking to acquire nationwide spectrum. Indeed, the Commission specifically noted that with respect to that transaction, "[w]e find that there are certain national characteristics to this transaction that warrant a competitive analysis on the national level. Accordingly, we will evaluate, as appropriate, competitive effects of the spectrum acquisition both locally and nationally."[105] In particular, the Commission noted that:

> [B]ecause of the important national characteristics, competition that occurs at a local level is unlikely to affect, for example, the pricing and plans that the nationwide providers offer unless there is enough competition in enough local markets to make a nationwide pricing or plan change economically rational. Moreover, evaluating this proposed transaction not only on a local level but also on a national level is particularly appropriate in this instance because AT&T is seeking to acquire Qualcomm's *nationwide* footprint of unpaired spectrum."[106]

Indeed, in AT&T/Qualcomm, even though few markets reached the spectrum screen for competitive analysis, the Commission still conducted an analysis at the local and national level to determine whether the transaction had the potential to harm competition. In addition, the *AT&T/T-Mobile Staff Analysis* noted that "we do not find it necessary to assess the competitive effects in retail wireless services individually in each local market to determine the likely

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[104] *DOJ Amended Compliant* ¶ 20.

[105] *AT&T/Qualcomm Order* ¶ 32.

[106] *AT&T/Qualcomm Order* ¶ 35.

consequences of the proposed transaction for competition."[107] This precedent allows the Commission the flexibility to determine competitive harms on a national level, outside the context of a spectrum screen, and to attach conditions that promote the public interest to these nationwide Transactions.

Moreover, even though much less spectrum was at issue in AT&T/Qualcomm – 6 MHz nationwide and 12 MHz in certain areas as compared to the 20+ MHz nationwide of spectrum that Verizon is proposing to acquire from the Cable Companies and Leap – the Commission nonetheless found competitive concerns in AT&T/Qualcomm. Moreover, the AT&T/Qualcomm spectrum-only transaction did not implicate the spectrum screen, and also did not result in the significant loss of potential competition that will occur if these Transactions are approved. These were overcome only because AT&T demonstrated an *immediate* need for additional spectrum, which the Commission recognized as being important. That is completely different than the instant situation where there will be a significant loss of multiple potentially viable competitors, where Verizon has clearly stated that it does not need this spectrum in the immediate or even near-term, and when Verizon currently has significant spectrum in its warehouse. As discussed in detail above, these Transactions have a series of adverse impacts on the national wireless markets. Verizon is exacerbating the spectrum shortage by co-opting spectrum not for near term use, but for distant future use. The market power of Verizon, and its ability to deny competitors essential inputs is enhanced. Potential competitors of Verizon, and potential allies of the other carriers are being eliminated.

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[107] *AT&T/T-Mobile Staff Analysis* ¶ 34.

ii. The Commission Should Consider The Different Values Of Spectrum When Evaluating This Transaction

The Commission properly held in AT&T/Qualcomm that not all spectrum is created equal. Indeed, the Commission recognized in AT&T/Qualcomm that "it is prudent to inquire about the potential impact of AT&T's aggregation of spectrum below 1 GHz as part of the Commission's case-by-case analysis."[108] Based on these findings, in addition to taking a national view of any anti-competitive harms, the Commission should consider a spectrum analysis that takes into account the propagation characteristics, efficiency and utility of different types of spectrum, which the current spectrum screen does not do.

The Commission has noted that "spectrum resources in different frequency bands can have widely disparate technical characteristics that affect how the bands can be used to deliver mobile services."[109] The Commission even noted that "[i]n addition to adding or subtracting bands – or portions thereof – from the [spectrum] screen, changes could also include distinguishing between different spectrum bands when determining the total bandwidth available."[110] Consequently, the Commission has determined that "the more favorable propagation characteristics of lower frequency spectrum (i.e., spectrum below 1 GHz) allow for better coverage across larger geographic areas and inside buildings."[111] Better propagation and penetration also translates into cost savings since fewer sites and less equipment is needed to reliably serve a geographic area. On the other hand, spectrum above 2.5 GHz is inherently less valuable than other spectrum because it requires considerably more sites to serve a geographic

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[108] *AT&T/Qualcomm Order* ¶ 49.

[109] *Id*.

[110] *AT&T/T-Mobile Staff Analysis* ¶ 45, n.136

[111] *AT&T/Qualcomm Order* ¶ 49.

area and may have less utility outside of metropolitan areas. Not surprisingly, the market has also recognized the inherent superiority of spectrum below 1 GHz by placing a substantial premium value on prime lower spectrum. For example, Verizon, whose current spectrum portfolio already consists of substantial swaths of prime 700 MHz, cellular and AWS spectrum, has reported a book value of $73.2 billion for its spectrum.[112] AT&T, a holder of large amounts of 700 MHz and cellular spectrum, reported a spectrum book value of $42.3 billion.[113] This compares to the $4.5 billion book value attributed to Clearwire's higher band BRS spectrum.[114] Clearly, market forces are signaling that not all spectrum is created equal.

The Commission has also recognized that "there is significantly less below 1 GHz spectrum available for mobile broadband service than above 1 GHz spectrum."[115] The Commission acted on these determinations in the course of applying conditions to the AT&T/Qualcomm transaction, noting that post-transaction, AT&T would hold "a significant portion of the available spectrum suitable for the provision of mobile voice or broadband services, particularly below 1 GHz," and that such holdings may "have a potentially significant impact on competition."[116]

A proper spectrum analysis which gives greater weight to holdings under 1 GHz, raises significant concern in light of the significant aggregation of prime spectrum in the hands of AT&T and Verizon. The Commission previously found that, prior to these Transactions,

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[112] Verizon Communications, Inc., Quarterly Report (Form 10-Q), 8 (Oct. 25, 2011).

[113] AT&T Inc., Quarterly Report (Form 10-Q), 3 (Nov. 3, 2011) (note that AT&T's book value has been upward adjusted to reflect the approved purchase of Qualcomm's 700 MHz licenses).

[114] Clearwire Corp., Quarterly Report (Form 10-Q), 7 (Nov. 3, 2011).

[115] *AT&T/Qualcomm Order* ¶ 49.

[116] *Id*. at ¶ 51.

"Verizon Wireless holds 48 percent of the cellular spectrum and 43 percent of the 700 MHz spectrum, measured on a MHz*Pops basis."[117] Moreover, the Commission found that post-AT&T/Qualcomm, "AT&T and Verizon Wireless combined would hold nationwide approximately 73 percent of below 1 GHz spectrum, measured on a MHz*Pops basis."[118] While these Transactions involve the assignment of AWS spectrum, which is above 1 GHz, they present an apt opportunity for the Commission to examine Verizon's holdings in light of the proper recent recognition that the aggregation of spectrum below 1 GHz should be carefully considered as part of the Commission's case-by-case analysis.

The Commission should assess spectrum based on different characteristics. For example, the Commission could establish a multiplier for spectrum under 1 GHz and above 2.5 GHz that would result in a higher value for spectrum under 1 GHz and lower value to spectrum above 2.5 GHz. Furthermore, the Commission should examine the effects of the transaction in light of the impact on spectrum available to the rest of the industry.

In addition, as noted above, not all spectrum is readily available for LTE, which is rapidly becoming the 4G standard in the United States. Post-Transactions, Verizon would be in an even more dominant position with respect to spectrum bands that are compatible with 4G LTE in the near term. If the Commission continues to utilize its spectrum screen, it should go a step further than it did in the *AT&T/Qualcomm Order*, and properly apply weighted values to different bands and blocks of spectrum based on the favorable, or unfavorable, characteristics that each band possesses for use in the provision of mobile broadband services.

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[117] *Id*. at ¶ 48.

[118] *Id*.

C. If The Commission Does Continue To Utilize The Spectrum Screen, It Must Be Revised To More Accurately Reflect The Current Availability Of Wireless Spectrum

If the Commission does not adopt a new measure to determine competitive harm, it must, at the very least, revise its spectrum screen downward.[119] The Commission previously considered spectrum to be included within the screen if it was available in the near term or within two years for broadband use. However, the 2010 *DOJ Horizontal Merger Guidelines* removed the two-year period for timeliness of availability. The Commission acknowledges this in the *AT&T/Qualcomm Order:* "Under these new guidelines, the relevant section states that 'in order to deter the competitive effects of concern entry must be rapid enough.' Accordingly, we consider the spectrum to be a relevant input if it will meet the criteria for suitable spectrum in the near term."[120] The Commission then proceeded to note that "[w]e anticipate that as we consider the input market for spectrum in future transactions, revisions to the screen may be necessary."[121] Further, the Commission promised that it "will continue to monitor any technological or market-driven developments, including those issues raised in the instant record, and will adjust the screen where appropriate to accommodate these changes."[122] Thus, the FCC now considers spectrum to be a relevant input if it is available for use in the near term – and has noted that revisions to the spectrum screen may be necessary for future transactions.

The current spectrum included by the FCC in the spectrum screen is 425.5 MHz – resulting in a spectrum screen of 145 MHz in most areas (slightly more than 1/3 of 425.5). The

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[119] Such a change is particularly necessary in rural areas, where carriers are hoarding spectrum, despite needing less usable spectrum to serve a less-populated subscriber base.

[120] *AT&T/Qualcomm Order* n.117.

[121] *Id*. at ¶ 42.

[122] *Id*.

Commission should consider a downward revision of the screen to as low as 135 MHz based on the removal of the certain spectrum blocks that are not useable in the near term for the provision of wireless broadband. For example, the Commission should remove two blocks of spectrum from the screen because it is not usable mobile wireless spectrum in the near-term: 12.5 MHz of SMR spectrum and 10 MHz of 700 MHz spectrum. This revision of the spectrum screen would more accurately reflect the useable spectrum available for mobile broadband. Viewed in this more precise manner, approximately 125 Verizon markets would trigger the Commission's spectrum screen, post-Transactions markets because the spectrum holdings would be 137 MHz or more.

Reducing the amount of Specialized Mobile Radio ("SMR") spectrum included in the screen from 26.5 megahertz to 14 megahertz would more accurately reflect the portion of SMR spectrum through which mobile broadband service can be provided efficiently in the near term. Indeed, the Commission noted in its *AT&T/Qualcomm Order* that, "[w]hen conducting competitive analysis in the future, the Commission may decide to include only the 14 megahertz of SMR spectrum suitable and available for mobile broadband services."[123] Since this 12.5 MHz of SMR spectrum does not meet the Commission's near-term availability criteria – and was specifically referenced as likely to be removed from the spectrum screen analysis in the *AT&T/Qualcomm Order* – the Commission should remove this SMR spectrum from the screen immediately.

In addition, the 10 MHz of D Block 700 MHz spectrum (758-763/788-793) does not meet the near-term availability criteria. As the Commission knows, Congress has reallocated the D Block from commercial to public safety use, thus removing such spectrum from the realm of use

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[123] *Id*. at n.126.

for the provision of commercial mobile wireless services. Thus, the D Block certainly will not be available for commercial broadband use in the near-term, and should be removed from the screen.[124]

In addition, if the Commission does utilize a spectrum screen, it must take into account both the different values of particular spectrum as well as the DOJ's recent proclamation that four national carriers are necessary in the wireless marketplace.[125] The Commission must also consider a spectrum screen that is different for the dominant carriers in the industry – the Twin Bells – than it utilizes for the rest of the industry. For instance, the Commission must, as noted above, apply different values for spectrum below 1 GHz – which is more valuable and better suitable for the provision of mobile broadband services, than for spectrum above 1 GHz. Moreover, in the context of spectrum transactions involving the two largest carriers, the Commission should consider changing its earlier determination to base the spectrum screen on being approximately 1/3 of the available, usable spectrum. As noted above, the DOJ took the position in the AT&T/T-Mobile Complaint that there is a need to preserve at least four nationwide broadband carriers.[126] This finding supports a reasoned departure from the Commission's current spectrum screen analysis. Thus, when reviewing spectrum acquisitions

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[124] Other spectrum that has been referenced by the Applicants as being usable spectrum that should be added to the screen does not meet the test of being dedicated and available for mobile wireless usage in the near-term. Rather, such spectrum is only referenced by the Applicants in their efforts to increase the spectrum screen as high as possible in order to ensure that the Transactions do not receive the rigorous analysis they deserve.

[125] Under such an analysis, the Commission must also separate the spectrum holdings of Sprint Nextel from Clearwire. Sprint Nextel does not hold a controlling interest in Clearwire, and Clearwire is a wholesale provider of spectrum. Indeed, Clearwire has been very vocal in offering the use of its spectrum to anyone interested in using it. For these reasons, the Commission should not include Clearwire's spectrum in any spectrum screen analysis.

[126] *DOJ Amended Complaint* ¶ 36.

involving the two dominant carriers, the Commission should instead base any spectrum screen on being approximately 1/4 of the available, spectrum useable for the provision of retail mobile wireless services. This change would more closely align the spectrum screen with the current reality of the wireless marketplace, and prevent the two largest carriers from increasing their dominance even further. By adopting a screen that takes into account (1) the proper amount of usable spectrum; (2) a proper valuation of spectrum and (3) the current marketplace reality that four carriers are needed for competition in a market, the Commission would be able to more accurately determine the competitive harm caused by spectrum aggregation, particular in the context of additional spectrum aggregation by the two dominant carriers – AT&T and Verizon.

VIII. THE FCC SHOULD DENY THE PROPOSED TRANSACTION UNLESS STRINGENT AND SPECIFIC PROCOMPETITIVE CONDITIONS ARE IMPOSED

For all of the foregoing reasons, these Transactions cannot be approved as presented. The inescapable conclusion is that the applications cannot be granted unless the Commission fashions and imposes stringent transaction-specific conditions that limit the competitive harms that would result. Pursuant to Sections 214(a) and 310(d) of the Communications Act, in reviewing applications for the assignment of licenses, the Commission must determine "whether the Applicants have demonstrated that the proposed transfers of control of licenses and authorizations will serve the public interest, convenience, and necessity."[127] The burden of proof with respect to demonstrating that the Transactions are in the public interest rests with the

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[127] *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶ 26 (2008) ("*Verizon/Alltel Order*").

Applicants.[128] In its determination, the Commission must consider whether the proposed Transaction "could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes" and "then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits."[129] The Commission also has stressed that its review will consider "whether a transaction will enhance, rather than merely preserve, existing competition, and takes a[n] . . . extensive view of potential and future competition and its impact on the relevant market."[130]

The Applicants have not met their public interest burden in this instance. The proposed Transactions will result in a more dominant duopoly, the assignment of spectrum from spectrum speculators to a spectrum warehouser, the removal of four significant potential competitors from the mobile wireless marketplace, anti-competitive cooperation between the major wired network operators and a further restriction of critical inputs necessary for competitors to the Twin Bells to compete. Indeed, the proposed Transactions, while certainly in *Verizon's* interest, are definitely not in the *public* interest. Thus, the proposed Transactions must be denied unless conditions are imposed that would prevent the potential harms to competition. As the Commission previously noted, "our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits."[131] RCA believes that the Commission can only find approval of

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[128] *Id*.

[129] *Id*.

[130] *Id*. at ¶ 28.

[131] *Id*. at ¶ 29.

the proposed Transactions to be in the public interest if the Commission adopts the stringent, transaction-specific conditions set forth below.

A. Substantial Divestitures Of Un- Or Under-Used Spectrum Is Appropriate

Approval of the Transactions should include robust divestitures of unencumbered useable spectrum that can be deployed by one or more competing carriers to provide wireless broadband services in areas where Verizon holds large amounts of warehoused spectrum. This includes rural areas, where Verizon appears not to be utilizing spectrum it already holds to its full capacity. RCA urges the Commission to conduct a full review of Verizon's spectrum use in each market across the nation, and require divestitures to existing operating carriers that are willing to enhance their current offerings or expand their current operations in markets where it is clear that Verizon's spectrum inventory unreasonably exceeds the capacity necessary to meet near-term demand.

B. Verizon Must Provide Voice And Data Roaming At Rates At Least As Favorable As Those Provided To The Cable Companies Under Their Reseller Arrangements

As discussed above, RCA's members still are unable to receive "commercially reasonable" data roaming rates from Verizon, despite the existence of the *Data Roaming Order*. Indeed, the Commission has found that the adoption of roaming rules "does not . . . obviate the need to consider whether there is any potential roaming-related harm that might arise" from a transaction.[132] This is because the voice and data roaming rules "do not enable a smaller or regional provider to replace the competitive position of a nationwide facilities-based provider,"[133] and "do not serve as a substitute for competition in the provision of these important

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[132] *AT&T/Qualcomm Order* ¶ 57.

[133] *Id*. at ¶ 67.

services."[134] Notably, the Commission was willing in the *AT&T/Qualcomm Order* to "carefully consider whether to impose a roaming condition" on that transaction, due to its nationwide competitive impact.[135] Such careful consideration here requires the Commission to adopt a robust voice and data roaming condition that allows smaller carriers the ability to provide services that are competitive to those services offered by Verizon. The Commission also must require that the Applicants fully disclose the redacted agreements that they have filed with the Commission, and in particular [begin highly confidential information] [redacted] [end highly confidential information] the Commission should consider adopting a stringent roaming condition with respect to Verizon that will allow new entrants and existing carriers to effectively compete in the market, such as applying the best available reseller rate Verizon is charging any of the Cable Companies to any requesting carrier.

It would be counterintuitive to allow the Cable Companies to benefit from a low reseller rate, despite their failure to develop the spectrum they purchased, their significant financial gain from the Transactions, and their own admitted inability to obtain reasonable roaming rates, while at the same time allowing Verizon to deny reasonable roaming rates to competitors. It is not in the public interest to allow the Non-Operators to benefit from a failure to compete while allowing Verizon to hold other competitors hostage in anti-competitive negotiations. Rather, Verizon must, at a minimum, [begin highly confidential information] [redacted] [end highly confidential information] offer this reseller rate to any facilities-based provider. It is likely that the reseller rates negotiated between the Cable Companies and Verizon should be considered

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[134] *Id*. at ¶ 104.

[135] *Id*. at ¶ 56.

"commercially reasonable," assuming that they were negotiated by sophisticated parties on both sides who each had bargaining leverage. If anything, roaming rates should be *lower* than reseller rates, as roaming carriers generally impose fewer costs on a serving carrier than do resellers. Moreover, the Commission must request [begin highly confidential information] [redacted] [end highly confidential information]

C. An Interoperability Requirement Should Be Adopted To Ensure The Availability Of Innovative Handsets

The Commission also must ensure that the equipment for all bands – particularly for 700 MHz and AWS – remains open and competitive, with all carriers having access to devices that are interoperable within a band. If granted, the Transactions will give Verizon a commanding position with respect to AWS spectrum, and the Commission must ensure that Verizon is prevented from restricting the best and most innovative handsets to its own spectrum bands and technologies. Although the Commission has indicated that an interoperability *NPRM* is forthcoming, the rulemaking and related appeal process on such a contested issue may be protracted. An interoperability condition on this transaction will mitigate competitive harms in the interim, and be subject to revision in accordance with the Commission's ultimate conclusions in the interoperability proceeding. In addition, Verizon must commit to deploying mobile

wireless services on its Lower 700 MHz A and B Block spectrum in the near term. In doing so, Verizon would create an equipment and infrastructure market that would both decrease its own warehousing of spectrum, as well as allow other providers to deploy on their own Lower 700 MHz A and B Block spectrum.

D. The Commission Must Ensure That The Market For Special Access Is Not Further Curtailed

In addition to being the two largest wireless providers, the Twin Bells are also the two largest wireline providers. This provides the Twin Bells with a significant competitive advantage, as they effectively control the backhaul networks that provide the pathway from wireless towers to the public switched telephone network. The Twin Bells have a history of discriminating against RCA members in the sale of backhaul capacity, tending to favor their own wireless affiliates. What already is a significant competitive disadvantage for smaller carriers will become seriously exacerbated by the proposed Transactions. This is because, in many markets, the Cable Companies also operate backhaul facilities that provide significant competition to the Verizon and AT&T landline networks. The availability of cable backhaul capacity acts as a constraint on Verizon's and AT&T's incentives to raise backhaul prices even further. Now, however, Verizon and the Cable Companies have entered into a series of joint marketing and resale agreements, which raises the serious question of whether the Cable Companies have an incentive to continue to provide other wireless carriers with competitive offerings in the backhaul and special access markets. The Commission must investigate such a possibility thoroughly, and ensure that any order approving the Transactions contains stringent conditions on access to Verizon's and the Cable Companies' backhaul capacity.

IX. CONCLUSION

The foregoing premises having been duly considered, RCA respectfully requests that the Commission condition the Transactions in accordance with this Petition, or otherwise deny them.

Respectfully submitted,

RCA – The Competitive Carriers Association

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February 21, 2012

CERTIFICATE OF SERVICE

I, Andrew Morentz, hereby certify that on the 21st day of February, 2012, I caused a true and correct copy of the foregoing Petition to Condition or Otherwise Deny Transactions to be sent by electronic mail to:

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