

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

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

**THE NEW JERSEY DIVISION OF RATE COUNSEL
REPLY TO OPPOSITION**

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March 26, 2012

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Attachment A Declaration of Susan M. Baldwin

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I. INTRODUCTION

The New Jersey Division of Rate Counsel (“Rate Counsel”) submits this reply to the opposition submitted by Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC and Cox TMI Wireless, LLC (“Applicants”).¹ The Applicants fail to address adequately the concerns Rate Counsel described in its Petition to Deny (“Rate Counsel Petition”). The Federal

¹/ Joint Opposition of Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC and Cox TMI Wireless, LLC to Petitions to Deny and Comments, March 2, 2012 (“Joint Opposition”).

Communications Commission (“FCC” or “Commission”) should grant Rate Counsel’s Petition and deny the Application.²

The spectrum license holders – SpectrumCo (which is a joint venture among subsidiaries of Comcast Corp. (“Comcast”), Time Warner Cable Inc. (“Time Warner Cable”), and Bright House Networks, LLC (“Bright House”)) and Cox TMI Wireless, LLC (“Cox”), which is a subsidiary of Cox Communications, Inc. – should not be rewarded for hoarding a valuable public resource. Instead the FCC should re-auction the spectrum so that it is assigned to the optimum societal use. Furthermore, the transaction is clearly adverse to the public interest because, among other things, it would create substantial new incentives and ability for one of the nation’s two “twin Bells” (as well as the nation’s largest wireless carrier) to thwart competition in wireline and wireless markets as well as in voice, data, and video markets. The cross-platform marketing agreements among the Applicants would allow the nation’s cable and telecommunications giants to collude, discourage head-to-head competition and prevent potential competition between incumbent telecommunications and incumbent cable companies.

Furthermore, contrary to the Applicants’ view,³ the cross-marketing agreements fall squarely within the purview of the FCC. The agreements would directly and significantly affect the structure of telecommunications and cable markets, diminish competition, create incentives for collusion, and therefore jeopardize the public interest. Rate Counsel, therefore, commends the FCC for requesting the Applicants to submit for the record, on an expedited basis, certain

² / On March 8, 2012, the FCC issued detailed and numerous discovery and document requests separately to each of the five Applicants (Bright House Networks, Comcast, Cox, Time Warner, and Verizon Wireless) and set a deadline of March 22, 2012 for their responses. Rate Counsel may address the Applicants’ responses in a separate submission to the FCC.

³ / Joint Opposition, at 70-79.

material previously redacted from their commercial agreements that the FCC determined to be “essential to the Commission's review of the proposed license transfer.”⁴

II. REPLY TO OPPOSITION

A. Marketing Agreements.

The Applicants’ Joint Opposition fails to address concerns that the transaction would fail to enhance potential and future competition. Among other things, the agreements between the nation’s largest cable companies and the nation’s largest wireless carrier (as well as one of the “twin Bells”) creates substantial and new incentives and opportunities for the companies to discriminate against rivals in handset, roaming, and other arrangements, and to exert dominance in “quadruple play” markets (wireline voice, wireline data, video, and wireless). If the agreements between the largest cable operators and the nation’s largest wireless company are as benign as the Applicants seemingly seek to portray them to be, the Applicants then should not have expressed concern when the FCC sought to examine the complete, unredacted versions of these documents. Instead, the Applicants sought to prevent the complete disclosure of the terms and conditions of these critically important agreements, an effort that the FCC has properly forestalled. The agreements essentially eliminate cable companies as actual and potential competitors to Verizon and its affiliates, including Verizon Wireless. If the FCC intends to give up on the prospects for such competition or if the FCC is to determine that the efficiencies of such cross-marketing justify the agreements, then the FCC should explicitly throw in the towel on its goal of pursuing the pro-competition vision of the 1996 Telecommunications Act, and

⁴ / In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses and Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses, WT Docket No. 12-4, *Order*, March 8, 2012, at para. 4.

regulate the *de facto* merged cable-telecommunications industry as the monopoly it would become. Otherwise consumers would be harmed by the “worst of both worlds” scenario where, under the pretense of competition, colluding cable and telecommunications companies could charge supracompetitive rates, discourage innovation, and impose unreasonable terms and conditions on services offered to rivals and to consumers, with minimal and insufficient regulatory safeguards.

There is already ample evidence that the cable-telecommunications duopoly is failing to protect consumers from supracompetitive prices. For example, in the absence of effective competition, cable companies have been able to profitably sustain rate increases. Recently, the FCC determined that “[t]he average monthly price of expanded basic service (the combined price of basic service and the most subscribed cable programming service tier excluding taxes, fees and equipment charges) for all communities surveyed increased by 3.7 percent over the 12 months ending January 1, 2010, to \$54.44, compared to an increase of 2.5 percent in the Consumer Price Index (CPI).”⁵ Furthermore, in those markets which purportedly have “effective competition,” rates increased by a *higher* amount than in those communities for which no effective competition had been found.⁶

The Applicants fail to address well-founded concerns that the agreements would unambiguously jeopardize the achievement of the pro-competition goals of the 1996 Act, and,

⁵/ In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, MM Docket No. 92-266, Report on Cable Industry Reports, DA 12-377, released March 9, 2012, at para. 2.

⁶/ *Id.*, at para. 3.

therefore are the legitimate and proper focus of the FCC's review.⁷ Moreover, the fact that the Department of Justice is examining the agreements does not in any way preclude the FCC from separately examining the agreements.⁸ The FCC's purview encompasses broad public interest concerns as well as its responsibility to ensure that the agreements do not thwart the goals set forth in the 1996 Communications Act.

Rate Counsel reviewed the agreements (which are still partially redacted), and based on its review of those documents, does not alter its position that the agreements jeopardize the prospects for competition and are adverse to the public interest.⁹

B. Spectrum

Spectrum is a limited resource that is an essential input for wireless providers. The Applicants protest the claim that the cable companies, which would transfer the spectrum licenses to Verizon Wireless, are being rewarded for hoarding spectrum.¹⁰ However, they fail to rebut the fact that the cable companies that are selling the licenses through these proposed bilateral transactions would reap substantial profit and would also benefit from the cross-marketing agreement with Verizon Wireless. Rather than needing to compete with Verizon, the cable companies would be able to coordinate marketing, price-setting, and strategic planning. Also the Applicants fail to address the merits of Rate Counsel's recommendation that the FCC should regain control of the spectrum and re-auction it to ensure that it is put to the best use, including, among other things, the possibility that the use of the spectrum would be more

⁷ / Joint Opposition, at 70-74; 76-79.

⁸ / See, e.g., *id.*, at 75-76.

⁹ / See, highly confidential documents produced pursuant to the Letter from Rick Kaplan, Chief of the Wireless Telecommunications Bureau to Michael Samscock of Verizon Wireless.

¹⁰ / *Id.*, at 63-64.

balanced (rather than further entrenching Verizon Wireless' use of spectrum), and that smaller companies might gain access to this limited public resource.

The nation's indisputable devotion to smart phones, I-Pads, Googling, YouTubes, and other applications and devices does not in any way justify the adoption of unsound public policy. The Applicants' repeated reference to consumer demand for wireless services amounts to no more than a form of telecommunications blackmail where the Applicants raise the specter of traffic congestion and frustrated data-demanding consumers,¹¹ but fail to address legitimate concerns about the anticompetitive consequences of the proposed transaction. The Applicants fail to rebut Rate Counsel's concern about the mounting evidence of Verizon's and AT&T's increasingly entrenched market dominance, and the transaction's further exacerbation of this trend of market concentration. Of course Rate Counsel welcomes spectrum policy that anticipates and accommodates continuing growth in consumer demand, but opposes policy that is based on veiled industry threats to harm consumers if the transaction does not occur pursuant to the Applicants' specific designs and plans.

C. Conditions

Rate Counsel urges the Commission to deny the Applications outright because the Applicants have failed to meet their burden of demonstrating that the transactions would be in the public interest. If the Commission nonetheless decides to approve the transaction, it should not do so unless and until the Applicants commit to specific, measurable, enforceable conditions. The Applicants' view that various measures are not "specific to the transactions under review,"¹²

¹¹ / See, e.g., *id.*, at 5, 12-23, Supplemental Declaration of Bill Stone.

¹² / Joint Opposition, at 64. See also, *id.*, at 65-69.

does not preclude the FCC from examining the role of measures to ameliorate the proposed transaction. Certainly past FCC approvals of transactions have been conditioned on applicants' various commitments to certain specific measures such as broadband deployment, subsidized broadband availability and network neutrality measures that were tangential to the specific transactions under consideration.¹³ Such conditions could include subsidized broadband for income-eligible households and broadband deployment in unserved and underserved areas of the country as well as other conditions that Rate Counsel described in its Petition.

III. CONCLUSION

On balance, the Applicants have failed to demonstrate that the proposed transaction is in the public interest, and they have not provided the information necessary to show that the purported benefits outweigh the harms. Rate Counsel urges the Commission to deny the proposed transaction for the reasons set forth in its Petition and in this reply to the Applicants' Opposition. If, contrary to this recommendation, the Commission intends to approve the transaction, it should condition such approval on measurable, enforceable commitments. The FCC should consider carefully the potentially sweeping and substantial impact of the cross-marketing agreements on the future of competition in telecommunications and cable markets, and the consequences of such impacts for consumers.

¹³ / See, e.g., In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, *Memorandum Opinion and Order*, released January 20, 2011; SBC Communications Inc. and AT&T Corp., *Memorandum Opinion and Order*, 20 FCC Rcd 18290 (2005); In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, *Memorandum Opinion and Order*, 22 FCC Rcd 5662 (2007), Attachment F.

Respectfully submitted,

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March 26, 2012

DECLARATION UNDER PENALTY OF PERJURY

I, Susan M. Baldwin, hereby state the following:

1. I am an economic consultant retained by the New Jersey Division of Rate Counsel.
2. I have read the forgoing "Reply to Opposition." With the exception of those facts of which official notice can be taken, all facts set forth herein are true and correct to the best of my knowledge, information, and belief.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 23rd day of March, 2011


Susan M. Baldwin