

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )	
Application of Cellco Partnership d/b/a )	WT Docket No. 12-4
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 )	
_____ )	

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

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RCA – The Competitive Carriers Association (“RCA”) hereby responds to the joint opposition (the “Joint Opposition”) of Cellco Partnership d/b/a Verizon Wireless (“Verizon”), SpectrumCo, LLC (“SpectrumCo”) and Cox TMI Wireless, LLC (“Cox”) (collectively, the “Applicants”) to RCA’s Petition to Condition or Otherwise Deny Transactions (the “RCA Petition”). Nothing that the Applicants have raised in the Joint Opposition to RCA’s Petition changes the need for stringent conditions on the Transactions. Accordingly, RCA once again urges the Federal Communications Commission (“FCC” or “Commission”) either to place stringent conditions on any approval of the subject applications or, in the alternative, to deny the applications. As set forth in detail below, the Applicants propose a series of transactions (the “Transactions”) that would assign substantial additional nationwide spectrum resources to one of the two largest wireless carriers under circumstances that will pose anti-competitive harms to the industry. The Transactions also would confer substantial value and unique rights to each of the

Applicants – pursuant to a number of reseller/agent and joint marketing agreements integrated with the Transactions (the “Joint Agreements”), and would further cement the wireless duopoly of Verizon and AT&T (the “Twin Bells”) to the detriment of the public interest. In reply, RCA respectfully shows the following:

**I. INTRODUCTION AND SUMMARY**

The Applicants originally presented the Transactions to the Commission as a series of simple, spectrum-only Transactions that raise no significant public interest issues and strenuously resisted opponents’ calls for more information. However, now that a diverse array of adverse parties have weighed in against the Transactions, and the Commission has made clear that it intends to conduct a searching review, the Applicants finally appear to be taking this proceeding seriously, suggesting that there may be more to the Transactions than the Applicants’ original public stance. RCA applauds the Commission for acknowledging this fact, and for taking the initial steps towards taking a hard look at the Transactions. Importantly, these initial steps recognize that the spectrum acquisitions and the Joint Agreements constitute, as a Comcast executive recently conceded, an “integrated transaction”<sup>1</sup> between Verizon and the Cable Companies, which must be subject to synchronized review. By requiring that the Applicants re-file the Joint Agreements<sup>2</sup> with fewer redactions, the Commission has allowed for greater public comment on the Transactions, which will no doubt lead to a more robust record and more reasoned decision-making based upon a more complete record.

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<sup>1</sup> Eliza Krigman, “Comcast executive defends Verizon-SpectrumCo deal,” POLITICO (Mar. 8, 2011) (“*Comcast Article*”).

<sup>2</sup> See, e.g., Letter dated Mar. 8, 2012 from Rick Kaplan, Chief, Wireless Telecommunications Bureau, to Michael Samscock, Cellco Partnership, WT Docket No. 12-4.

The Applicants’ reply filing consists of an 80-page Joint Opposition, along with nearly 200 pages of exhibits. Unfortunately, the Joint Opposition is long on words and short on substance. The Applicants fail to acknowledge the current concentration of market power in the wireless industry, and run for cover under Commission authority from a bygone, pre-duopoly and pre-spectrum crunch era.<sup>3</sup> The Applicants’ defense ignores the duopoly that has arisen in both the retail and wholesale wireless marketplaces. In the meantime, the Commission and the rest of the industry recognize that it is no longer 2004, or even 2007. For example, in the last *two* wireless competition reports, the Commission has been unable to find that there is effective competition in the broadband wireless industry. This is due to the fact that the Twin Bells have succeeded in effecting a rapid wave of consolidation, resulting in the duopoly that dominates the industry today. The Twin Bells dominate the industry by any meaningful measure, including total subscriber count, industry EBITDA, total revenues, quantity of prime spectrum and value of spectrum holdings.

Given the Twin Bells’ dominance in the wireless marketplace, the Commission can no longer simply stand by and allow the largest carriers to preempt all of the critical spectrum resources, and dominate and control all competitive inputs – such as roaming, handsets and backhaul – that are necessary to allow other carriers to provide competitive services to consumers. The Commission’s denial of the AT&T/T-Mobile transaction represented an important result under the “new wireless world order,” and the Commission has an equally important opportunity to ensure that the Twin Bells dominance is not extended *ad infinitum*. RCA urges the Commission to adopt the conditions recommended in RCA’s filings in this

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<sup>3</sup> See, e.g., Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, 32-33, 43-44 (filed Mar. 2, 2012) (“Joint Opposition”).

proceeding to mitigate some of the more harmful aspects of the Transactions to ensure that smaller carriers remain able to compete and provide competitive services to consumers. Given the nationwide nature of the Transactions, the Commission has ample authority to adopt these conditions, as the anti-competitive harms that would accrue on both a local and national levels were the Transactions to be granted unconditionally.<sup>4</sup>

The interrogatories sent by the Commission to the Applicants represent an important first step for the Commission to fulfill its obligation to take a hard look at whether SpectrumCo has engaged in license speculation. While SpectrumCo claims that certain recent statements made by Comcast have been misunderstood and taken out of context, RCA has amply demonstrated to the Commission that Comcast has made repeated statements – over a six year period – detailing its lack of interest in providing facilities-based competition.

In the final analysis, the Commission must decide whether Commission approval of the Transactions would serve the *public* interest – not whether it would serve *the Applicants'* interest. Absent substantial conditions designed to address the significant anticompetitive affects of the Proposed Transactions, these Transactions must be denied. As RCA has demonstrated, the end result of an unconditional grant of the Transactions would be the transfer of valuable public spectrum resources in large part from a speculator (SpectrumCo) to a warehouse (Verizon) and the removal of *four* potential competitors from the wireless marketplace. The transparent Verizon attempt to deflect the serious warehousing claims by now rewriting the story of its spectrum needs, and accelerating the timeframe from 2015 to 2013, must fail.<sup>5</sup>

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<sup>4</sup> *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*”).

<sup>5</sup> *See infra*, Section VII.B.

**REDACTED – FOR PUBLIC INSPECTION**

To remedy the anti-competitive harms that an unconditional grant of the Transactions would inflict on the wireless industry, the Commission must condition any grant of the Transactions in the following manner: (1) require substantial divestitures of un-or under-used useable spectrum within a Long Term Evolution (“LTE”) ecosystem from Verizon to competitive, operating entities that require additional spectrum immediately; (2) implement interoperability requirements to ensure the availability of innovative wireless devices to competitive carriers; (3) ensure that affordable backhaul and special access is available; and (4) require that Verizon offer to all facilities-based carriers voice and data roaming rates no less favorable than the reseller rates offered to the Cable Companies in the Reseller Agreements, which undoubtedly represent commercially reasonable rates negotiated by sophisticated parties at arms length:

Service	Rate
[begin highly confidential information]	
[REDACTED]	[REDACTED]
[end highly confidential information]	

Given the national scope of the Transactions, nationwide solutions to anti-competitive harms are required. If the Transactions are approved without adopting the conditions proposed by RCA and others, the Commission will have indirectly caused further consolidation of the wireless industry to the detriment of consumers, perhaps beyond repair. Make no mistake – the wireless industry may have reached the tipping point, beyond which the Twin Bell duopoly will simply bide its time waiting for competitive carriers to disappear for want of critical wireless inputs. RCA urges the Commission to heed its statutory duty to promote competition and to prevent

spectrum warehousing<sup>6</sup> and not allow the Transactions to proceed without the stringent conditions proposed by RCA.

## II. THE SPECTRUM TRANSFER IS INEXTRICABLY INTERTWINED WITH THE JOINT AGREEMENTS

The Transactions have never been about maximizing the dollar value obtained for the Cable Companies' spectrum. Instead, the Cable Companies have opted to sell a valuable public resource for a bounty that only Verizon could offer – what effectively amounts to an agreement not to compete with a former rival. Indeed, Comcast has now openly admitted that “[t]he transaction is an integrated transaction” and “[t]here was never any discussion about selling the spectrum without having the commercial agreements.”<sup>7</sup> By structuring the Transactions in a way that Verizon could be the only winning bidder, the Applicants foreclosed on one of the only near-term opportunities for competitive carriers to obtain desperately-needed spectrum on the secondary market. With these anti-competitive, integrated agreements as table stakes, it would have been impossible for *any* other carrier to match Verizon's offer – and not because they would have been unwilling to meet the purchase price.<sup>8</sup> In essence, the Cable Companies exchanged cash on the barrelhead for the opportunity to cement the market dominance of their competitor-turned-partner, Verizon, in hopes of reaping the rewards of stifled competition down the line.

The Commission must consider the anti-competitive impacts of the Joint Agreements when evaluating whether the integrated spectrum transfer is in the public interest – which, absent

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<sup>6</sup> 47 U.S.C. § 309(i)(4)(B).

<sup>7</sup> *Comcast Article*.

<sup>8</sup> While Comcast and others now claim they sought offers from other wireless providers, it is clear that the sale was rigged to ensure one particular outcome – the Transactions and the related Joint Agreements.

stringent conditions, it most certainly is not. To cure competitive carriers' foreclosed access to spectrum at the hands of Verizon, the Commission must order substantial spectrum divestitures to provide others in the industry the opportunity to obtain spectrum that they would not otherwise have and condition any transfer on meaningful conditions.

### **III. THE APPLICANTS' ANALYSIS IGNORES THE DUOPOLISTIC STATE OF THE WIRELESS MARKET**

As it has done throughout this proceeding, the Applicants continue to urge the Commission to treat this as a typical transaction involving “only the assignment of spectrum – nothing more.”<sup>9</sup> However, to do so would ignore the dominant market position that Verizon, as one of the Twin Bells of the wireless industry, enjoys. As RCA has demonstrated, the Twin Bells control the wireless market by nearly every metric. The Twin Bells account for a combined 90 percent of industry EBITDA,<sup>10</sup> dominate total subscriber numbers and average national spectrum holdings,<sup>11</sup> hold substantial leads in MHz\*POPs<sup>12</sup> and control by far the most spectrum in the top 100 markets.<sup>13</sup> In addition to occupying a dominant spectrum position, Verizon and its Twin Bell counterpart AT&T control the market for essential inputs for the provision of wireless service, such as voice and data roaming, special access and backhaul, and

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<sup>9</sup> Joint Opposition 41.

<sup>10</sup> 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).

<sup>11</sup> *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) (showing that Verizon has an average of 88 MHz while AT&T has an average of 94 MHz).

<sup>12</sup> *AT&T/Qualcomm Order* ¶ 45.

<sup>13</sup> 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](https://mm.jpmorgan.com/stp/t/c.do?i=62A4EB32&u=a_p*d_569842.pdf*h_ifi22f3) (“*J.P. Morgan Spectrum Study*”).

enjoy a commanding advantage in terms of access to the newest and most popular handsets. The fact that the Twin Bells exert control over every critical aspect of the wireless market makes the Transactions about far more than “only” spectrum. The Transactions, if granted without robust conditions, will cement the dominance of the Twin Bells in a potentially final manner. The loss of four potential competitors – who also at one time were important allies for competitive carriers – is potentially as significant as would have been the loss of T-Mobile from the marketplace into the clutches of AT&T. In short, the assignment of nationwide spectrum to one of the Twin Bells should not be taken lightly, and is ripe with potential anticompetitive harms.

Nevertheless, the Joint Opposition seeks to paint a picture of the wireless industry, both pre – and post – Transactions, that does not reflect reality. The lack of awareness – and inaccuracy – regarding the true competitive state of the wireless market pervades the Joint Opposition, as the Applicants repeatedly cite to stale precedent from pre-duopoly days.<sup>14</sup> The wireless marketplace, while once effectively competitive, is now on the precipice, if not already over the edge, of being completely dominated by two players. Significant changed circumstances have transformed the industry over the past few years, and recent Commission precedent acknowledges such changes. The Applicants, however, want the Commission to continue to exist in the past – for example, by asking the Commission to use a broken and outdated spectrum screen that was created in 2004 when the wireless marketplace was effectively competitive – to conduct a current competitive analysis on the Transactions.

RCA has demonstrated the substantial changes that have taken place in the wireless industry since the Commission first adopted its spectrum screen nearly eight years ago. In 2004,

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<sup>14</sup> See, e.g., Joint Opposition n.92 (citing transaction precedent from 2008), n.93 (citing transaction precedent from 2004), n.125 (citing transaction precedent from 2004 and 2008), n.130 (citing transaction precedent from 2007).

the Commission found that there was “generally effective competition in mobile telephony markets,”<sup>15</sup> a finding that it has declined to make in its last two reports on competition in the mobile wireless marketplace. Incredibly, this key fact is conveniently omitted in the Joint Opposition's discussion concerning the wireless industry. Consequently, the cornerstone of the spectrum screen analytical framework has crumbled in the ensuing time period. The Commission must conclude that the spectrum screen, as it currently exists, is no longer an effective tool for an examination of the potential anti-competitive harms posed by the Transactions.

An examination of the current wireless marketplace reveals that many key findings that led to the adoption of a spectrum screen are no longer valid:

- The Commission has declined to make a finding of effective competition in the mobile wireless marketplace in the past two wireless competition reports.
- The Commission initially found that a screen of roughly 1/3 of the total available spectrum 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.”<sup>16</sup> As the Applicants concede, this core assumption is no longer valid because of the “massive and accelerating growth in wireless data demand”<sup>17</sup> that all carriers face.

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<sup>15</sup> *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 107 (2004) (“*AT&T/Cingular Order*”).

<sup>16</sup> *Id.* at ¶ 109.

<sup>17</sup> Joint Opposition 13.

- The Department of Justice recently has found that there is a need to preserve at least four nationwide broadband carriers,<sup>18</sup> which is unlikely in a consolidating industry in which the Twin Bells can together preempt 2/3 of the useable spectrum under the spectrum screen.
- The screen was adopted when there was the prospect for significant additional spectrum on the horizon (i.e., AWS and 700 MHz spectrum). This is now unlikely.
- Because of the competitive nature of the marketplace in 2004, the spectrum screen’s stated intent was “simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of this transaction.”<sup>19</sup> However, as the Commission has already found in the *AT&T/Qualcomm Order*, the potential for competitive harm is not revealed only on a market-by-market basis, but indeed should be viewed on a nationwide basis.

Not surprisingly, the Applicants simply ignore these sea-changes in the structure of the wireless marketplace. Of course, it is in Verizon’s interest to live in the *status quo ante*, as that will enable it to protect and extend its Twin Bell dominance indefinitely.

The Applicants completely misrepresent the *AT&T/Qualcomm Order* when they argue that it favors the unconditional grant of the Transactions. In the context of that transaction, the Commission specifically indicated that it would consider even spectrum-“only” transactions

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<sup>18</sup> *United States of America v. AT&T Inc., et al.*, Case No. 1:11-01560, ¶ 36 (D.D.C. Sept. 16, 2011) (“*DOJ Amended Complaint*”).

<sup>19</sup> *AT&T/Cingular Order* ¶ 109.

according to a new, duopolistic market paradigm.<sup>20</sup> In circumstances where a major carrier seeks to acquire nationwide spectrum, the Commission indicated that the transaction should be reviewed for competitive harms on a national level.<sup>21</sup> The *AT&T/Qualcomm* transaction also involved assignment of spectrum from an entity that had put the spectrum to use (albeit unsuccessfully) to a carrier that claimed a spectrum need. Here, in contrast, only a small portion of the licenses are held by an entity that has ever offered service to the public (Cox), and the proposed assignments are going to Verizon, which has substantial unused spectrum holdings and no demonstrated need for additional spectrum.

Other transactions cited in the Joint Opposition are equally unhelpful to the Applicants. For example, the cited *Aloha/AT&T* transaction occurred prior to the recognition of the spectrum crunch and the release of the *National Broadband Plan*. Today, there is ample evidence that additional spectrum is badly needed by providers who lack the substantial spectrum reserves of Verizon. Also, the *Nextwave/Cingular* transaction involved substantially changed circumstances arising from multi-year litigation that went all the way to the Supreme Court. Absolutely no such changed circumstances exist here – SpectrumCo has known since 2006 what would be expected to provide beneficial, facilities-based service to the public.

#### **IV. THE JOINT OPPOSITION COMPLETELY IGNORES THE LOSS OF FOUR SIGNIFICANT POTENTIAL COMPETITORS**

The Applicants continue to reiterate their misguided belief that the Transactions should be granted promptly because they involve “only licenses for currently unused spectrum, and

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<sup>20</sup> *AT&T/Qualcomm Order* ¶ 2 (reviewing for anti-competitive harm on a national level notwithstanding the fact that the transaction involved “only the transfer of spectrum licenses and not the acquisition of wireless business units and customers”).

<sup>21</sup> *Id.* at ¶ 32 (noting 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”).

there will be no transfer or combination of any other assets, facilities, customers, or operating businesses.”<sup>22</sup> However, this entirely misses the important point regarding the loss of potential competitors – a point that RCA discussed extensively in its Petition, but was essentially ignored in the Joint Opposition.<sup>23</sup> As RCA noted, proper merger analysis “considers both incumbents and identifiable prospective competitors with the resources to compete effectively.”<sup>24</sup> Indeed, the Commission has explicitly recognized that it must “take[] a more extensive view of potential and future competition and the impact on the relevant market, including longer-term impacts.”<sup>25</sup> With these facts in mind, the loss of potential competition simply is too great to ignore.

The loss of potential competition is particularly important in this instance because of the duopolistic nature of the wireless market. With the Twin Bells wielding substantial market power, particularly with respect to inputs such as spectrum, roaming and wireless backhaul, the existence of the Cable Companies as potential competitors operated as one of the last competitive constraints on Verizon and AT&T. Indeed, [begin highly confidential information]

[REDACTED]

[end highly confidential information]

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<sup>22</sup> Joint Opposition 2.

<sup>23</sup> RCA Petition to Condition or Otherwise Deny Transactions, WT Docket No. 12-4, 25-30 (filed Feb. 21, 2012) (“RCA Petition”).

<sup>24</sup> *Id.* at 26 (citing DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, § 5.3 (Aug. 19, 2010), available at: <http://www.justice.gov/atr/public/guidelines/hmg-2010.html> (“DOJ Horizontal Merger Guidelines”).

<sup>25</sup> *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

Moreover, the DOJ has concluded that it important for a new entrant into the wireless marketplace to possess “nationwide spectrum, a national network, scale economies that arise from having tens of millions of customers, and a strong brand”<sup>26</sup> – qualities each of the Cable Companies, but few if any other businesses, possess. Thus, the removal of the Cable Companies from potentially entering the wireless marketplace removes a significant option for true facilities-based market entry and competition. Given the Commission’s mandate to protect competition in the wireless industry, it must promote competition and not stand by while potential competitors to be bought out to preserve and enhance a Twin Bell duopoly.

Not only are the Cable Companies losing the ability to individually enter the wireless market, they will enter the market as agents, as well as potentially resellers, for Verizon. This is worse than if they merely sold their spectrum, as Cable Companies’ continued relationship with Verizon will serve to reinforce its market dominance by increasing Verizon’s revenues and customers served. If the Cable Companies instead acted as agents or resellers for other carriers, those competitive carriers would benefit from broader distribution, which would help to cut against Verizon’s market dominance. Further, by entering the wireless market as agents for Verizon, the Cable Companies are precluded from offering roaming agreements with other competitive carriers.

**V. THE COMMISSION HAS THE ABILITY TO REVIEW THE TRANSACTIONS FOR COMPETITIVE HARM ON A NATIONAL LEVEL, AND RCA HAS DEMONSTRATED THAT SUCH HARM WOULD LIKELY OCCUR**

In a misguided attempt to limit the Commission’s review, the Applicants claim that RCA and others have concocted a “variety of novel theories”<sup>27</sup> of competitive analysis, including the

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<sup>26</sup> *DOJ Amended Complaint* ¶ 45.

<sup>27</sup> *Joint Opposition* 47.

contention that the Transitions must be reviewed for competitive harms on a national basis. And yet, the Commission made the same finding in the *AT&T/Qualcomm Order*. In that order, the Commission made clear that, where the transfer of nationwide spectrum is being considered, the Commission will consider the impact of the transaction on nationwide competition. Specifically, the *AT&T/Qualcomm Order* holds:

because 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.<sup>28</sup>

The same circumstances exist with respect to the subject Transactions – a nationwide spectrum acquisition engendering nationwide competitive harms. Indeed, RCA discussed at length the likely anti-competitive effects of the Transactions.<sup>29</sup>

In challenging RCA’s and others’ showing of competitive harm at a national level, the Applicants discuss at length the “robustly competitive” wireless marketplace,<sup>30</sup> cherry-picking favorable facts that belie the true competitive state of the current wireless market. It is difficult to imagine why the Applicants’ own finding of robust competition in the wireless marketplace should carry more weight than the Commission’s own wireless competition reports, the last two of which have failed to find “effective” – let alone “robust” – competition in the market for wireless services. The Commission must take the Applicants’ self-interested findings with a

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<sup>28</sup> *AT&T/Qualcomm Order* ¶ 35.

<sup>29</sup> RCA Petition 31-40.

<sup>30</sup> Joint Opposition 48.

grain of salt, and fully investigate the true state of the market, and the effect that the Transactions will have.

**A. Applicants Focus On Competition In The Retail Market, Ignoring The Anticompetitive Effects Of The Transactions On The Market For Critical Wholesale Inputs**

Perhaps not surprisingly, the Applicants focus on competition in the *retail* market for wireless services, completely ignoring the important effects that upstream inputs have on retail competition.<sup>31</sup> Notwithstanding the Commission’s recent failure to find effective competition in the retail marketplace, the situation is ever more dire with respect to wholesale inputs – which are critical to competition. While metrics like customer satisfaction<sup>32</sup> may be important considerations in the retail marketplace, it makes little sense to suggest that high customer satisfaction would counteract competitive harms in the wholesale market. As RCA detailed in its Petition, the Transactions give the already-dominant Verizon “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.”<sup>33</sup> Although the Applicants claim that the Transactions “will not result in any diminution in the number of service providers offering roaming, and therefore will have no competitive impact on the availability of any roaming services,”<sup>34</sup> the Commission’s competitive analysis clearly must account for the loss of the *four* potential roaming providers that are can no longer enter the market.

Verizon’s claim that to “the extent commenters are dissatisfied with the [roaming] negotiation process or the terms and conditions for roaming, they may file a complaint with the

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<sup>31</sup> *Id.* at 48-49.

<sup>32</sup> *Id.* at 49.

<sup>33</sup> RCA Petition 31.

<sup>34</sup> Joint Opposition 65.

Commission,” is similarly unavailing. The Commission previously has properly ruled that the adoption of its roaming rules “does not . . . obviate the need to consider whether there is any potential roaming-related harm that might arise” from a transaction.<sup>35</sup> This is particularly true in this instance, where the Transactions would result in the exit of not simply one, but *four* potential roaming partners from the marketplace. The Cable Companies, each with a regional wireless footprint and needing roaming agreements themselves, would have had an extremely strong incentive to be cooperative and equitable participants in the market for roaming services – incentives that the Twin Bells sorely lack. Indeed, SpectrumCo has effectively admitted that the difficulties of securing nationwide roaming agreements with the major carriers present a major obstacle, noting that “securing roaming agreements posed another complicating factor”<sup>36</sup> to becoming a facilities-based carrier. In addition, Comcast Executive Vice President David Cohen recently conceded that “access to roaming agreements is *next to impossible*.”<sup>37</sup> Perhaps most importantly, the unwillingness of the Twin Bells to enter into reasonable roaming agreements is entirely of the Twin Bells’ making. Against this backdrop it clearly is contrary to the public interest to permit SpectrumCo – which squatted on a valuable public resource for six years – [begin highly confidential information] [REDACTED] [end highly confidential information].<sup>38</sup> The Commission should not allow the Cable Companies to be rewarded for warehousing and then speculating spectrum – and allow Verizon to continue to hand pick who should be accorded access to the Verizon network to provide nationwide services.

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<sup>35</sup> *AT&T/Qualcomm Order* ¶ 57.

<sup>36</sup> Pick Declaration ¶ 14.

<sup>37</sup> *Comcast Article*.

<sup>38</sup> See discussion *infra* Section VIII.

Similar concerns arise regarding special access and backhaul, where Verizon and the Cable Companies have agreed to jointly market one another's services, meaning that "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)."<sup>39</sup> These obvious potential anticompetitive harms, which will occur at a national level, should give the Commission extreme pause when considering the Transactions, and can only be remedied by the imposition of strict, robust conditions regarding critical inputs, on any grant of the Applications.

**B. Verizon Dominates the Secondary Market for Spectrum**

By granting the transfer of 20 MHz of prime, nationwide spectrum to Verizon, the Commission essentially will be signing off on Verizon's secondary markets dominance. Back when Verizon was still expanding its network, it was incented to offer concessions to others, in the form of roaming or spectrum swaps, that operated in areas where its network did not operate. However, as Verizon's network has grown, its inclination to engage in spectrum swaps and roaming agreements has dwindled.<sup>40</sup> Although Verizon purports to present evidence that it has been an active seller of spectrum, its list of spectrum transfers fails to prove this point.<sup>41</sup> The 40 licenses that Verizon has transferred over the past five years represents an insignificant portion of its total spectrum holdings, and certain of these transfers were coupled with other transactions where the net effect was to increase Verizon's holdings. And, applications for eight of the 40

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<sup>39</sup> RCA Petition 31.

<sup>40</sup> Indeed, Verizon is so disinclined to participate in reasonable roaming negotiations that it has appealed the Commission's order requiring that data roaming be offered on commercially reasonable terms and conditions.

<sup>41</sup> See Joint Opposition, Exhibit 1.

licenses – fully 20 percent of the total transfers reported – were filed after the Transactions had been announced.<sup>42</sup>

A substantive review of Exhibit 1 to the Opposition indicates that Verizon is an active participant in the secondary markets only when it serves to expand the reach of its own network. For example, 75 percent of the listed transactions are spectrum swaps, as opposed to Verizon permitting other carriers to purchase excess spectrum from it at market rates in standalone sale transactions.<sup>43</sup> As Verizon continues to fill coverage gaps in its network, it has a diminishing incentive to participate even in spectrum swaps, and already has shown its disinterest in the outright sale of spectrum to other carriers. The same is true for Verizon’s much-touted LTE in Rural America Program, in which Verizon offers rural providers the “opportunity” to build out Verizon’s 4G LTE network over leased spectrum. This program operates under extremely strict conditions that ultimately tie the rural carrier to Verizon by forcing them to operate on leased spectrum they do not own, because Verizon refuses to sell such spectrum to these operating carriers, despite a desperate need for it and clear willingness to construct it. The fact that carriers would consider participating in this program at all shows the grave shortage of 4G LTE-capable spectrum available to rural and other competitive carriers, not to mention access to roaming and devices. Simply put, the Commission never intended for the secondary market to benefit only the Twin Bells. So long as Verizon and AT&T control the spectrum market,<sup>44</sup> they will have the

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<sup>42</sup> *See id.* (noting four assignments, covering eight licenses, filed in February 2012).

<sup>43</sup> 18 of the 24 spectrum assignments identified in Exhibit 1 to the Joint Opposition involve spectrum swaps or like-kind exchanges.

<sup>44</sup> Indeed, Verizon all but admits that it controls the secondary market, providing an exhibit stating that incumbent service providers, like Verizon, “are the very firms likely to value the licenses most highly and, thus, be willing to pay the most in secondary markets to obtain licenses.” Joint Opposition, Exhibit 4, ¶ 28.

ability and incentive to freeze out spectrum-starved competitors for anti-competitive purposes. Permitting the Transactions to move forward will simply exacerbate this problem by providing Verizon with 20 MHz of prime, nationwide spectrum that it can withhold from the secondary market, and add to its spectrum warehouse. Indeed, permitting this transaction to move forward signals to others in the secondary market that Verizon is willing to pay an anti-competitive premium for spectrum. This encourages holders of spectrum to wait for a Verizon “sweetheart deal” rather than sell at current market rates to spectrum-starved competitive carriers who would put the spectrum to beneficial use immediately.

**VI. THE COMMISSION HAS A PRIME OPPORTUNITY TO REFORM THE SPECTRUM SCREEN TO MAKE IT RELEVANT IN TODAY’S MARKETPLACE**

Based on the national characteristics of the Transactions – and the competitive harm that will accrue to the industry on a national level – the Commission has the plenary authority to apply stringent conditions in the public interest to any grant. As RCA has explained, “[t]he 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.”<sup>45</sup> For years, the Commission has relied on the spectrum screen to fuel its competitive analysis of transactions involving wireless spectrum. During that period, often at the Twin Bells’ behest, the Commission has revised the spectrum screen upward in the context of individual transactions.<sup>46</sup> Indeed, in its application to acquire ALLTEL, Verizon specifically argued that, due to changed circumstances, the spectrum screen “no longer

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<sup>45</sup> RCA Petition 40-41; *see also AT&T/Qualcomm Order* ¶ 32.

<sup>46</sup> *See* ULS File No. 0003463892, Exhibit 1 – Public Interest Statement (“Verizon-ALLTEL Application”).

provide[d] a meaningful trigger for engaging in competitive analyses” and should be revised.<sup>47</sup>

However, now that RCA and others have cited substantially changed circumstances in advocating for a revision to the spectrum screen, Verizon has changed its tune. In a sudden about-face, Verizon now claims that “requests that the Commission revisit the spectrum bands included in the screen in these transactions are unwarranted,”<sup>48</sup> calling efforts to refocus the spectrum screen “far outside the proper bounds of this proceeding.”<sup>49</sup> Yet, Verizon lodged no complaint as the Commission ratcheted the spectrum screen ever-upwards over the years in the context of individual transactions, and cannot now legitimately complain that the Commission may similarly rationalize its spectrum screen in the context of the Transactions before it.

Despite Verizon’s protestations, the Transactions offer the Commission an appropriate opportunity to revise the spectrum screen, should it conclude that a spectrum screen remains a necessary analytical tool for competitive analysis. As RCA previously noted, the Commission may review these Transactions on a national level to determine anticompetitive harm without the use of a spectrum screen because that tool no longer adequately allows the Commission to determine likely competitive impact. However, if the Commission does continue to utilize a spectrum screen, it must adopt revisions that take critical prior precedent and changed circumstances into account. First, it is time for the Commission to implement into its competitive harm analysis its determination that “the more favorable propagation characteristics of lower frequency spectrum (i.e., spectrum below 1 GHz) allow for better coverage across

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<sup>47</sup> *Id.* at iii; *see also id.* at 33-40.

<sup>48</sup> Joint Opposition 56.

<sup>49</sup> *Id.* at 58.

larger geographic areas and inside buildings.”<sup>50</sup> Without such integration, the Commission's prior findings will have no teeth.

The Applicants argue that higher frequency spectrum may sometimes be comparable to spectrum under 1 GHz.<sup>51</sup> However, the cited authority, taken in its proper context, merely alludes to the few narrow circumstances in which higher band spectrum may have desirable attributes as compared to spectrum below 1 GHz.<sup>52</sup> Indeed, as a lead-in to the paragraph referenced by the Applicants (again, conveniently omitted by the Applicants), the Commission plainly states that “[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.”<sup>53</sup> Given the unassailable fact that spectrum below 1 GHz has inherently greater utility for providing mobile wireless broadband services, the Commission must take spectrum holdings under 1 GHz into account when conducting a competitive analysis of the Transactions. This must involve greater weight being applied to spectrum under 1 GHz.<sup>54</sup>

In addition, even if the Commission takes no further action regarding the spectrum screen, the current usable amount of spectrum included by the Commission in the spectrum should be revised downward, at least to 135 MHz. This results from: (i) the removal of 12.5 MHz of SMR spectrum that the Commission has referenced may not be suitable for the provision

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<sup>50</sup> *AT&T/Qualcomm Order* ¶ 49.

<sup>51</sup> Joint Opposition 59.

<sup>52</sup> *Fifteenth Report* ¶¶ 292-96. The specific attribute was the ability to achieve higher capacity through greater cell splitting due to the lesser propagation in the higher bands.

<sup>53</sup> *Fifteenth Report* ¶ 292.

<sup>54</sup> For example, T-Mobile provided a potentially relevant analysis of various spectrum types, assigning them weighted values to be used when calculating a spectrum screen. *See* Petition to Deny of T-Mobile USA, Inc., WT Docket No. 12-4, 30-34 (filed Feb. 21, 2012).

of mobile broadband;<sup>55</sup> and (ii) the removal of 10 MHz of 700 MHz D Block spectrum that has been statutorily designated for use by public safety, as advocated by Verizon. The Applicants provide no meaningful arguments as to why this spectrum should not be removed from the screen, instead attempting to “balance out” the justified deletions by adding in more spectrum. However, none of the spectrum bands referenced by the Applicants will be deployed in a manner that meets the Commission’s stated guidelines for inclusion in the spectrum screen, which “consider the spectrum to be a relevant input if it will meet the criteria for suitable spectrum in the near term.”<sup>56</sup>

Indeed, the Applicants struggle to find any legitimate analysis for the spectrum screen not to be lowered. Given the Commission’s new guidelines, and repeated recognition of the differing values among bands of spectrum, it should take this opportunity to meaningfully revise the spectrum screen. A spectrum screen lowered to 135 MHz would result in approximately 125 markets triggering the screen. At the bare minimum, each of these markets must be analyzed for anti-competitive harm.

Moreover, a spectrum screen no greater than 1/4 of the total useable available spectrum in a particular market is now the more appropriate analytical metric, particularly when a transaction involves one of the two dominant carriers in the wireless industry. As RCA has explained, the DOJ took the position in its AT&T/T-Mobile Complaint that there is a need to

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<sup>55</sup> *AT&T/Qualcomm Order* n.126 (“When 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.”).

<sup>56</sup> *Id.* at ¶ 42. The Applicants seek to add in 104.5 MHz of BRS/EBS spectrum, 50 MHz of MSS ATC spectrum, 10 MHz of PCS G Block spectrum and 25 MHz of WCS spectrum, none of which have been found by the Commission to warrant inclusion as “near term” spectrum solutions.

preserve at least four nationwide broadband carriers,<sup>57</sup> meaning that the Commission should ensure that there is sufficient spectrum in each market nationwide to support four competitors. The rapid consolidation in the wireless broadband sector makes a screen based upon 1/3 of the spectrum inadequate to preserve the level of competition that is desirable. Further, the FCC’s prior observation that some carriers are able to compete with less spectrum was made at a time when carriers did not necessarily require greater spectrum resources to provide expanded services, such broadband data service. Indeed, the significant demand for wireless data has changed the paradigm substantially as the demand for bandwidth is outstripping supply – something that did not occur when the wireless industry was focused largely on the provision of voice services. If the Commission were to use this more appropriate 1/4 spectrum benchmark, the majority markets would trigger the spectrum screen and warrant closer analysis for anti-competitive harm. Indeed, in the *AT&T/T-Mobile Staff Analysis*, the staff determined that, because the spectrum screen was triggered in so many markets, anti-competitive harm could be inferred on an aggregate national basis without delving into the specifics in each market.<sup>58</sup> The Commission should adopt the same approach here.

The Applicants also claim in one breath that there is no “distinct ‘4G LTE’ spectrum market consisting only of 700 MHz and AWS spectrum,” while essentially admitting that there is such a submarket in their next breath. The Applicants cite certain sources that refer to medium or long term plans for additional LTE deployments in other spectrum bands, but the closest is

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<sup>57</sup> *DOJ Amended Complaint* ¶ 36.

<sup>58</sup> 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, ¶ 34 (rel. Nov. 29, 2011) (“*AT&T/T-Mobile Staff Analysis*”).

more than a year away.<sup>59</sup> Thus, the Applicants present no evidence that any spectrum other than 700 MHz or AWS *currently is* being used to provide LTE. And, the suggestion that Clearwire's WiMAX coverage somehow defeats the need for immediately LTE-ready spectrum is belied by the Applicants' statement that Clearwire is reconfiguring its network to operate over LTE, likely due to the widely-known issues with WiMAX deployments.<sup>60</sup> Simply put, Verizon's head start with respect to 4G LTE is commanding,<sup>61</sup> due in large part to the LTE-ready spectrum that it holds. While other bands may be suitable for LTE in the future, by the time they are actually deployed it may be too late for smaller carriers to adequately compete and bring consumers the benefit of robust competition in the 4G LTE marketplace. Thus, Verizon's dominance in the pre-4G world will be effectively transferred to the 4G world with little prospect of other competitors ever catching up to provide competitive services to consumers. Indeed, Verizon is accelerating this problem by announcing that it will only purchase 4G-LTE capable handsets on a going-forward basis. Other carriers who relied on Verizon's volume to bring down costs or drive development will once again be stranded without access to affordable devices. This will allow Verizon to further cement its dominance in the market.

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<sup>59</sup> The Applicants refer to deployments coming in the 2013 timeframe.

<sup>60</sup> This also coincides the recent news China Mobile has pushed back plans to use are TDD-LTE for several years, which will make it more difficult for the TDD-LTE ecosystem to develop for the spectrum Clearwire holds.

<sup>61</sup> Verizon has already deployed LTE in 203 markets. *See* Bryan Bishop, "Verizon LTE network crossing 200-market threshold tomorrow," *The Verge* (Mar. 14, 2012), *available at* <http://www.theverge.com/2012/3/14/2871897/verizon-lte-network-crossing-200-market-threshold-tomorrow>.

**VII. THE COMMISSION MUST INVESTIGATE THE EXTENT TO WHICH VERIZON IS WAREHOUSING CRITICAL SPECTRUM RESOURCES**

**A. Verizon’s Arguments That It is an Efficient User of Spectrum Miss the Mark**

The Applicants devote 10 full pages to claims that Verizon is an efficient user of spectrum, and a Verizon declarant spends a great deal of time talking about how efficiently Verizon uses the spectrum that it has built out. Verizon’s efficiency discussion relies on a misleading aggregate nationwide efficiency metric, when in reality a carrier may be extremely efficient in one market and incredibly inefficient in others. That Verizon may be an efficient user overall says little to rebut claims that it is warehousing spectrum in many markets across the country. Rather than focusing on how Verizon uses the spectrum it has deployed, the Commission should focus on the spectrum that Verizon does *not* use, which is left stranded in its warehouse. Verizon’s discussion conveniently ignores the fact that it *already holds* 20 MHz of unused AWS spectrum covering half the country,<sup>62</sup> as well as undeployed 700 MHz A and B Block licenses accounting for another 12 to 24 MHz in many markets. Verizon paid \$2.5 billion for 25 A Block licenses and \$2.1 billion for 77 B Block licenses in Auction 73 and \$2.8 billion for AWS licenses in Auction 66 – meaning that it already has more than \$7.4 billion in unused spectrum resources. Thus, notwithstanding its claims of “efficiency,” Verizon has as much as 44 MHz of prime spectrum, and perhaps more in certain markets, that is lying fallow. While Verizon has employed complicated average metrics to make the case for its efficient use of spectrum resources,<sup>63</sup> RCA would direct the Commission to a simpler metric: 44 MHz of unused spectrum means that Verizon is failing to provide service in numerous markets over

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<sup>62</sup> Indeed, Verizon admits that simply deploying this fallow AWS spectrum would “effectively double the ability of cell sites to handle data traffic.” Joint Opposition 22.

<sup>63</sup> *Id.* at 24-27.

approximately *half* of the 88 MHz of average spectrum that it holds nationally. This is even without considering the 20 MHz that Verizon is attempting to acquire in these Transactions. Certainly, Verizon cannot be arguing that a zero percent usage of half of its spectrum is efficient. Viewed in this light, Verizon’s efficiency arguments ring hollow.<sup>64</sup>

Further, Verizon’s currently-undeployed spectrum is not newly-acquired. Verizon’s AWS spectrum was acquired in 2006 and its 700 MHz spectrum was available for use as of the 2009 DTV transition. Indeed, many carriers are already providing broadband service – including 4G LTE service – over AWS spectrum, and AT&T already has deployed a 4G LTE network in selected markets using the 700 MHz B Block. To add an additional 20 MHz of nationwide spectrum on top of Verizon’s stockpile would fly in the face of the Commission’s affirmative obligation to “to prevent stockpiling or warehousing of spectrum by licensees or permittees.”<sup>65</sup> With little or no wireless broadband spectrum coming to the auction block in the near future, the Commission must take a stand and allow spectrum to be placed into the hands of hoarders that will not put it to beneficial public use immediately.

**B. Verizon’s Conveniently Changing Spectrum Story Must Be Fully Investigated By the Commission**

One of the Commission’s greatest concerns about these Transactions must be Verizon’s radically changed story regarding the extent and timing of its need for more spectrum. Indeed, this is a rare instance in which an Applicants’ own statements create an unresolved issue of

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<sup>64</sup> Verizon selectively provides information on 18 of its markets. Verizon has not explained how it selected these markets, but the Commission must assume that these represent markets favorable to Verizon’s argument and must carefully examine data relating to all relevant markets.

<sup>65</sup> 47 U.S.C. § 309(i)(4)(B). The Applicants mistakenly claim that “[n]o commenter . . . explains why the assignments would conflict with existing policy.” Joint Opposition 8. However, RCA clearly cited the Commission’s policy – and statutory obligation – to “prevent stockpiling or warehousing of spectrum by licensees or permittees.” RCA Petition 19-20 (citing 47 U.S.C. § 309(i)(4)(B)).

conflicting material facts that must be investigated thoroughly by the Commission. In the underlying Applications, Verizon offered vague suggestions that the spectrum it proposes to acquire might be needed for “projected future demand”<sup>66</sup> sometime around 2015 – and perhaps not until 2019.<sup>67</sup> After the Transactions came under serious fire by multiple petitioners, Verizon has suddenly “discovered” that its *real* spectrum needs will arise in 2013 – a full *two years* sooner than they had originally stipulated to the Commission.<sup>68</sup> If the real date on which additional spectrum would be required was 2013, why was this information not reported to the Commission earlier? Indeed, why did Verizon publicly state prior to the proposed Transactions that it did not need additional spectrum until at least 2015?<sup>69</sup> Surely the newly-tendered information was available to Verizon before. However, it was only when Verizon was faced with serious challenges from RCA and others regarding its actual near term need for additional spectrum that Verizon conveniently “revised the fourth quarter 2015 forecast upward by approximately 700 percent” in the time period between filing the original applications and submitting the Joint Opposition.

Verizon’s changing story raises another material question as well. If Verizon’s network is to become so severely spectrum constrained in the near term that the Transactions are necessary, how is Verizon able to offer the Cable Companies [begin highly confidential information] [redacted] [end highly confidential information] services? Verizon’s convenient change in tune must raise the

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<sup>66</sup> Verizon-SpectrumCo application, ULS File No. 0004993617 Exhibit 1, at 13 (“SpectrumCo PI Statement”).

<sup>67</sup> *Id.* at 14 (suggesting that its longer term spectrum needs might not arise for as long as “7 years”).

<sup>68</sup> *Id.* at 13. Interestingly, Verizon has not provided any real justification for this change.

<sup>69</sup> *Id.*

Commission’s suspicions about the validity of its claims. At the very least, the Commission must thoroughly investigate the spectrum need claims and the reasons behind Verizon’s drastic changes in tune in such a short period of time.

In addition, it is unclear the extent to which Verizon’s dramatic last-minute revision upward of its spectrum needs is based on relevant credible traffic data. As the Commission is aware, the Twin Bells until recently offered largely unlimited data plans, which naturally led to high data consumption rates. However, approximately eight months ago, Verizon ceased to provide this unlimited option, choosing instead to cap customers at 2 GB of data use at the old unlimited-plan price point.<sup>70</sup> And, as of September 2011, Verizon began to throttle data speeds of its 3G users to further reduce the amount of data flowing over its network.<sup>71</sup> To the extent that Verizon is basing its growth estimates on pre-July or pre-September 2011 numbers, such estimates would not accurately reflect the amount of data growth to be expected on its network.<sup>72</sup>

In sum, the Commission must request detailed information from Verizon regarding the basis for and the source of the numbers used in its projections to meaningfully assess Verizon’s changing story. At a very minimum, Verizon must be required to provide the same data forecast information for *all* of the markets in which there is overlap with SpectrumCo or Cox, rather than

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<sup>70</sup> Rachel Metz, “Verizon Data Cap: Wireless Carrier Kills Off Unlimited Plan,” Huffington Post (July 6, 2011), *available at* [http://www.huffingtonpost.com/2011/07/06/verizon-data-cap-unlimited\\_n\\_891755.html](http://www.huffingtonpost.com/2011/07/06/verizon-data-cap-unlimited_n_891755.html).

<sup>71</sup> Verizon “Network Optimization,” *available at* [http://support.verizonwireless.com/information/data\\_disclosure.html](http://support.verizonwireless.com/information/data_disclosure.html).

<sup>72</sup> Further, Verizon does not explain whether it will, and what plans it has to, reform its existing spectrum to 4G LTE. This is important, since a carrier can handle inefficient use by keeping legacy users on smaller slices of spectrum. This is equally true since Verizon has begun purchasing exclusively 4G LTE handsets, which should drive down usage on non-4G-LTE networks.

for its hand-picked selection of a small subset of markets.<sup>73</sup> While the Commission has posed some initial inquiries to Verizon about its spectrum usage, it must drill down to get complete details on a market-by-market, band-by-band basis for each technically distinct network Verizon is running (i.e., separate showings for EVDO versus LTE networks). Certainly, the Applicants must not be allowed to pick and choose the most favorable illustrations to present to the Commission. If Verizon is relying on market-specific forecast data – data which Verizon states it regularly collects – it must provide this data for each market at issue so that the Commission may ascertain the objective facts regarding Verizon’s alleged coming spectrum shortage.<sup>74</sup>

### **VIII. SPECTRUMCO DOES LITTLE TO DEMONSTRATE THAT IT WAS EVER SERIOUS ABOUT BUILDING A WIRELESS NETWORK**

The Applicants continue to avoid the very serious question of whether SpectrumCo purchased the AWS licenses with the true intent of providing beneficial service to the public, or rather purchased them as an investment for financial gain. Consequently, RCA applauds the Commission’s interrogatories that request additional information from the Applicants concerning statements that raise legitimate concerns regarding possible spectrum speculation.

The Joint Opposition incorrectly suggests that RCA’s trafficking concerns arose out of what the Applicants call “stray statements” and focus on “a single remark.”<sup>75</sup> To the contrary,

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<sup>73</sup> Because Verizon has indicated that it regularly “applies a demand forecast model based on traffic data collected,” Joint Opposition 9, it should easily be able to supply the Commission and other petitioners with this information.

<sup>74</sup> Even if the above-specified data forecast information is provided, it must be taken with a tablespoon of salt. Industry analysts have noted that “all carriers have their own projections for how fast data will grow,” and these internal metrics may not withstand independent scrutiny. Phil Goldstein, “Verizon: We’ll hit LTE capacity limit in some markets by 2013 without new spectrum,” FierceWireless (Mar. 5, 2012), *available at* [http://www.fiercewireless.com/story/verizon-hit-lte-capacity-limit-some-markets-2013-without-new-spectrum/2012-03-05?utm\\_medium=nl&utm\\_source=internal](http://www.fiercewireless.com/story/verizon-hit-lte-capacity-limit-some-markets-2013-without-new-spectrum/2012-03-05?utm_medium=nl&utm_source=internal).

<sup>75</sup> Joint Opposition 36 n.104.

RCA offered a series of *six statements*, made over a six-year period between 2006 and 2012, that each strike a consistent theme – SpectrumCo had no intent to construct and operate a wireless network. Although many of these statements have already been put into the record,<sup>76</sup> they bear repeating. When viewed as a series, from 2006 until 2012, these statements leave little doubt about SpectrumCo’s speculative intentions with regard to its spectrum licenses. From the very start, in the press announcement at the close of the 2006 AWS auction, SpectrumCo openly admitted that it “did not approach this *investment* with the intent of becoming the nation’s fifth wireless voice provider.”<sup>77</sup> Comcast repeatedly made similar statements over many years, including in 2006,<sup>78</sup> 2008,<sup>79</sup> 2009,<sup>80</sup> 2010,<sup>81</sup> and 2011.<sup>82</sup> And, earlier this year a Comcast executive plainly stated that “[Comcast] never really intended to build that spectrum.”<sup>83</sup>

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<sup>76</sup> RCA Petition 16-18.

<sup>77</sup> David L. Cohen, “Clarifying Comcast’s Spectrum Position,” ComcastVoices blog (Jan. 17, 2012), available at <http://blog.comcast.com/2012/01/clarifying-comcasts-spectrum-position.html> (emphasis added).

<sup>78</sup> 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/> (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.”) (“*SpectrumCo Article*”).

<sup>79</sup> 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> (Comcast’s plans for its AWS spectrum, that “has not changed and that we’re studying what’s the best way to utilize that, if at all.”)

<sup>80</sup> Statement of Michael J. Angelakis, Comcast Corporation, Goldman Sachs Communacopia Conference, 5 (Sept. 16, 2009) (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.”).

<sup>81</sup> Statement of Michael J. Angelakis, Comcast Corporation, Barclays Capital Investor Conference, 9 (May 26, 2010) (Comcast “[didn’t] need to own the [wireless] network” and “[didn’t] actually want to operate the [wireless] network.”).

Notably, Comcast has not been shy about discussing with the media the 75 percent return it is receiving on its spectrum “investment.”<sup>84</sup> Furthermore, given Comcast’s statement that “[t]here was never any discussion about selling the spectrum without having the commercial agreements,”<sup>85</sup> the real return to Comcast and other SpectrumCo participants may actually be far greater than the purchase price suggests.

It is simply disingenuous for the Applicants to attempt to dismiss these as “stray statements” when they so clearly form a pattern outlining SpectrumCo’s intentions and goals for its AWS licenses. Nor are the Applicants’ attempts – buried in a footnote – to explain away the most recent statements in any way convincing. The suggestion that Angelakis’ statement “was meant to convey the thought process following the years of evaluation and analysis, not SpectrumCo’s intentions at the time that the AWS licenses were acquired”<sup>86</sup> is untenable. First, the unambiguous statement that Comcast “never really intended to build that spectrum” has a plain meaning and cannot reasonably be construed to address the current plan after years of evolution. And, the current rationalization is not consistent with Comcast’s 2006 statements 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

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<sup>82</sup> Statement of Michael J. Angelakis, Comcast Corporation, Goldman Sachs Communacopia Conference, 5 (Sep. 20, 2011) (Comcast had “no desire to own a wireless network” and had “no desire to write large checks” to construct such a network.).

<sup>83</sup> Josh Wein, “Comcast Never Planned to Build Out AWS Spectrum,” Communications Daily, 8 (Jan 6, 2012).

<sup>84</sup> Chris Nolter, “Comcast remains plugged in to wireless,” The Deal Pipeline (Dec. 7, 2011), available at <http://www.thedeal.com/content/tmt/comcast-remains-plugged-in-to-wireless.php>.

<sup>85</sup> *Comcast Article*.

<sup>86</sup> Joint Opposition 36 n.104.

willing to let the asset lie fallow for some years to come.”<sup>87</sup> The latest statement merely reiterates the oft-stated view that the company had no serious intentions to construct or operate a wireless network.

Additionally, the evidence purporting to “demonstrate that SpectrumCo was fully engaged in exploring ways to use the AWS spectrum”<sup>88</sup> is plucked out of larger statements and stripped of its context. For example, while Angelakis may have said that SpectrumCo was looking to “add mobility” to existing data, voice and video products, in that same conference he made it clear that the company’s plans to do so did not include becoming “the seventh competitor in a market that we think is mature from the voice side.”<sup>89</sup> Further, the statement of Glenn Britt, TWC’s CEO, cited by the Applicants is even more devoid of context than the Angelakis statement. Immediately after Britt’s response, Robert Marcus, TWC’s President, COO and CFO clarified how TWC viewed its spectrum assets:

[O]n the AWS spectrum, we have no current plans to divest of the spectrum or otherwise monetize it. And at this moment in time, *we don't have specific plans to utilize it either*. What I will say is that notwithstanding all that, we're always keeping our eye on what the market for spectrum is, and I would note the recent AT&T acquisition of the media flow spectrum from QUALCOMM, and I think the price was somewhere in the mid-\$0.80 per megahertz pop, which is a pretty healthy number and certainly, more than what we paid for the AWS spectrum. And I would concede it's not exactly comparable spectrum, but I think *it certainly bodes well for the value of what we're holding*.<sup>90</sup>

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<sup>87</sup> *SpectrumCo Article*. SpectrumCo’s AWS licenses were acquired in 2006, the same year that this statement was made.

<sup>88</sup> Joint Opposition 36 n.104.

<sup>89</sup> Statement of Michael J. Angelakis, Comcast Corporation, Goldman Sachs Communacopia Conference, 5 (Sept. 16, 2009).

<sup>90</sup> Statement of Robert Marcus, President, COO and CFO of TWC, Q4 2010 Earnings Conference Call (Jan. 27, 2011), available at <http://seekingalpha.com/article/249137-time->

It is quite telling that the Applicants merely offer more conflicting statements to rebut RCA's well-founded concerns regarding spectrum speculation, as opposed to offering sworn declarations or record evidence. While the simplest rebuttal would have been to provide a clarifying declaration from Angelakis or an unambiguous statement of intent from another SpectrumCo principal, none has been provided. Instead, an independent consultant is commissioned to draft a report on SpectrumCo activities about which he has no firsthand knowledge.<sup>91</sup> Nor were any documents provided that would prove a serious effort to build the spectrum was undertaken.

Further discounting SpectrumCo's efforts is its suggestion that the AWS band was "in its infancy" and therefore difficult to deploy.<sup>92</sup> This ignores the fact that a number of carriers, including T-Mobile and MetroPCS, among others, were able to rapidly deploy their AWS spectrum. Perhaps most telling, while SpectrumCo was testing its "infant" spectrum, former SpectrumCo member Cox was entering into vendor contracts, building a facilities-based wireless network and launching service to consumers.<sup>93</sup> Given the fact that its former partner was able to design and deploy a wireless network, the Commission should not permit SpectrumCo to claim that the task of doing so was insurmountable.

These material conflicting statements must be investigated by the Commission. As noted above, RCA applauds the Commission's decision to request from each SpectrumCo member specific evidence relating to internal network planning deployment and discussions.

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[warner-cable-s-ceo-discusses-q4-2010-results-earnings-call-transcript?part=qanda](#) (emphasis added).

<sup>91</sup> See Exhibit 3 to Joint Opposition.

<sup>92</sup> Joint Opposition 34.

<sup>93</sup> *Id.* at 38.

Additionally, SpectrumCo must provide specific documentation regarding the nature and extent of the King of Prussia trials<sup>94</sup> to allow the Commission to determine how much time, effort and expense were invested, as well as the intention behind conducting these tests. SpectrumCo must also disclose how and why the \$20 million was spent “to clear or confirm the clearance” of incumbent microwave links,<sup>95</sup> and whether this was spent pursuant to actions initiated by SpectrumCo or in connection with third-party cost-sharing obligations imposed on SpectrumCo by rule. There simply are too many questions with respect to SpectrumCo’s intentions for the Commission to allow these serious concerns to go unaddressed.

#### **IX. THE COMMISSION MUST STRICTLY CONDITION ANY GRANT OF THE TRANSACTIONS**

Although the Joint Opposition claims that none of the conditions advocated by RCA “is specific to the transactions undergoing review,”<sup>96</sup> nothing could be further from the truth. The Applicants entirely miss the point that the Transactions will result in the continued consolidation of market power in the hands of Verizon, one of the Twin Bells, and exacerbate the market failures that currently exist with respect to: (1) useable available spectrum; (2) voice and data roaming; (3) interoperability and equipment availability; and (4) the market for special access and backhaul. The Applicants cannot successfully pretend that each of these input markets exists in a vacuum or that spectrum-only transactions do not raise competitive concerns.<sup>97</sup> Given the duopolistic state of the wireless industry the Commission would set a dangerous precedent if it

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<sup>94</sup> *Id.* at 34.

<sup>95</sup> *Id.* at 33.

<sup>96</sup> *Id.* at 64.

<sup>97</sup> *AT&T/Qualcomm Order* ¶ 2 (reviewing for anti-competitive harm on even though the transaction involved “only the transfer of spectrum licenses and not the acquisition of wireless business units and customers”).

failed to remedy the competitive harms raised by the pending Transactions. In order to address the market failures that will be exacerbated by an unconditional grant of the Transactions, RCA recommends that the Commission impose the following conditions on any grant of the proposed Transactions: (1) substantial divestitures of un- or under-used LTE-ready, currently usable spectrum to existing operating carriers; (2) Verizon must offer voice and data roaming rates at least as favorable to those provided to the Cable Companies under the reseller agreements; (3) an interoperability requirement for Verizon handsets operating in the 700 MHz and AWS bands; and (4) conditions to ensure that the market for special access is not further constrained.<sup>98</sup>

Spectrum has become a competitive weapon that Twin Bells can wield, and are wielding, to hamstring their smaller rivals. By amassing anti-competitive amounts of spectrum, in part through the Transactions, Verizon is able to limit access by competitors to critical inputs, thereby limiting their ability to compete and threatening their very existence. This harm is evidenced and enhanced by the plain fact that Verizon is not using the vast amounts of spectrum that it already has in its spectrum warehouse. To mitigate this harm, the Commission must require that significant divestitures of currently usable spectrum are made to currently operating, competitive facilities-based wireless providers. Allowing Verizon simply to divest spectrum to its fellow duopolist AT&T, or to divest it to a non-operator that may take many years to put the spectrum to beneficial use, will not mitigate the anti-competitive harms caused by these Transactions. Indeed, the public interest favors the divestiture of spectrum to competitive, operating carriers who will put this spectrum to use *now* – not in 2015 or later. Further, the spectrum must be spectrum that is currently useable for 4G-LTE.

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<sup>98</sup> See RCA Petition 53-58.

RCA’s members also remain unable to obtain “commercially reasonable” data roaming rates from Verizon, despite the existence of the *Data Roaming Order*. And, notwithstanding Verizon’s flippant suggestion that carriers who are denied reasonable roaming should “file a complaint,”<sup>99</sup> the Commission has specifically 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.<sup>100</sup> 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,”<sup>101</sup> and “do not serve as a substitute for competition in the provision of these important services.”<sup>102</sup> Moreover, Verizon has appealed the *Data Roaming Order*, which has injected substantial uncertainty into the data roaming complaint process.

Verizon – one of the Twin Bells who made it “nearly impossible”<sup>103</sup> for SpectrumCo to obtain roaming – now seeks to cement its dominance in the roaming market with the Transactions. Indeed, SpectrumCo members have admitted that “roaming availability and pricing . . . [were] one of the major obstacles to an effective entry into the wireless market.”<sup>104</sup> These potential entrants “attempted to negotiate roaming agreements” – likely with the Twin Bells – “but [were] unable to obtain commercially reasonable terms.”<sup>105</sup> As RCA argued, it is “counterintuitive to allow the Cable Companies to benefit from a low reseller rate, despite their

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<sup>99</sup> Joint Opposition 66.

<sup>100</sup> *AT&T/Qualcomm Order* ¶ 57.

<sup>101</sup> *Id.* at ¶ 67.

<sup>102</sup> *Id.* at ¶ 104.

<sup>103</sup> *Comcast Article*.

<sup>104</sup> Letter dated Mar. 22, 2012 from Robert G. Kidwell, counsel to BHN, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 12-4, at 3 (“*BHN Letter*”).

<sup>105</sup> *Id.*

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.”<sup>106</sup> Furthermore, members of SpectrumCo have expressly admitted that the Joint Agreements, including the Reseller Agreements, are part of “an integrated transaction,”<sup>107</sup> stating that they would “not have entered into the Spectrum License Purchase Agreement had the other parties not come to terms on the commercial agreements.”<sup>108</sup> [begin highly confidential information] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [end highly confidential information]

This proves without a doubt that the spectrum acquisition is fully intertwined with the Joint Agreements, and the two must be reviewed simultaneously as part of a single transaction. Any suggestion that the transfer of licenses is not directly related to the other commercial agreements is without merit.

Accordingly, any conditions relating to voice or data roaming arising from the Joint Agreements clearly are transaction-specific. [begin highly confidential information] [REDACTED]

[REDACTED]

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<sup>106</sup> RCA Petition 56.

<sup>107</sup> Comcast Article.

<sup>108</sup> BHN Letter 15.

[REDACTED]

[REDACTED] [end highly confidential information]

Indeed, as RCA suggested in its Petition, these rates provide the Commission with a prime example of “commercially reasonable” rates, negotiated between sophisticated parties at arms-length. [begin highly confidential information] [REDACTED]

[REDACTED]

[REDACTED] [end

highly confidential information] And, no distinction should be made between reseller traffic and roaming traffic, as both place an identical strain on the network. If anything, roaming rates should be lower given that roaming customers of another carrier spend less time on the host carriers’ network (thereby reducing network strain), do not require sales, marketing and customer service support, and home carriers in roaming agreements are also provided with the benefit of being able to roam on their partners’ networks, which has value.

Consequently, at an *absolute minimum*, Verizon must offer the following reseller rates, offered to the Cable Companies,<sup>109</sup> as roaming rates to any facilities-based provider:

Service	Rate
[begin highly confidential information]	
[REDACTED]	[REDACTED]
[end highly confidential information]	

<sup>109</sup> [begin highly confidential information] [REDACTED] [end highly confidential information]

The Commission obviously should view these as commercially reasonable roaming rates under any standard.

These rates represent the opportunity for the Commission to gauge what “commercially reasonable” rates look like in the context of roaming negotiations. If Verizon is able to offer such rates to the Cable Companies, it should not be heard to argue about capacity constraints, or concerns that such carriers are unwilling to construct facilities in such areas – arguments Verizon has made in the past as to its refusal to provide roaming. Indeed, if Verizon is able to allow carriers to resell service over its network at these rates, based on a commercially reasonable, arms-length agreement, it should be commercially reasonable to provide such rates to facilities based carriers. As a result, given that the Transactions eliminate four potential roaming partners and cement Verizon’s dominance in the spectrum market, roaming rates equal to or better than the reseller rates offered by Verizon to the Cable Companies must be offered to any interested facilities-based carrier as a way to mitigate the anti-competitive harm that the Transactions will cause in the market for voice and data roaming inputs. Otherwise, the Commission would be allowing carriers who have warehoused spectrum for years to potentially provide nationwide service, while leaving facilities based carriers – who have been constructing facilities and providing beneficial service – to continue to be disadvantaged and unable to provide nationwide voice and data services, to the detriment of consumers and the public interest. The Commission should not reward the Cable Companies in such a manner, by placing its stamp of approval on these Transactions – and by association on warehousing and spectrum speculation.

The Commission must ensure that competitive carriers are not denied interoperable access to the most innovative new devices and concomitant economies of scale. Any grant of the Transactions must include a condition requiring the interoperability of handsets across the bands in which they operate, in particular the AWS and 700 MHz bands. Similarly, the Commission must also make certain that competitive wireless carriers are able to obtain affordable special

access and backhaul. Due to the new Verizon-Cable Companies partnership, former wireline adversaries have essentially agreed not to compete. As a result, competitive wireless carriers may face new, and even greater, obstacles to obtaining affordable backhaul and special access. The Commission must adopt measures to ensure that the special access and backhaul market does not further devolve into an anti-competitive chokepoint.

**X. CONCLUSION**

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

Respectfully submitted,

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March 26, 2012

CERTIFICATE OF SERVICE

I, Andrew Morentz, hereby certify that on the 26th day of March, 2012, I caused a true and correct copy of the foregoing Reply to Opposition to Petition to Condition or Otherwise Deny Transactions to be sent by electronic mail to:

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