

REDACTED—FOR PUBLIC INSPECTION

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

In the Matter of

Application of Cellco Partnership d/b/a
Verizon Wireless and SpectrumCo LLC
for Consent to Assign Licenses

WT Docket No. 12-4

Application of Cellco Partnership d/b/a
Verizon Wireless and Cox TMI Wireless,
LLC for Consent to Assign Licenses

**REPLY COMMENTS OF PUBLIC KNOWLEDGE, MEDIA ACCESS PROJECT,
NEW AMERICA FOUNDATION OPEN TECHNOLOGY INITIATIVE,
ACCESS HUMBOLDT, BENTON FOUNDATION, AND NATIONAL
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March 26, 2012

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

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SUMMARY

The proposed transactions in this proceeding threaten to deprive consumers of the benefits of competition through a scheme of convergence, spectrum aggregation, and patent portfolios. The full scope of the harms presented by the proposed transactions can only be understood when the Applicants' license transfers are put in context with their accompanying agency, resale, and Joint Operating Entity ("JOE") agreements. As the Federal Communications Commission ("Commission") has acknowledged in requiring the Applicants to remove redactions in certain parts of their side agreements, the Applicants' commercial agreements and license transfers are connected to and conditioned on each other. As a result, the Commission's review of the transactions' impact on the public interest will necessarily involve examining how the agency, resale, and JOE agreements will affect competition and consumers.

Petitioners have explained how the proposed transactions will violate the Communications Act ("the Act"), frustrate the ability of the Commission to effectuate the goals of the Act, and otherwise harm the public interest. Applicants have in large part failed to respond to Petitioners' arguments, particularly as to the harms threatened by the commercial agreements. Applicants' best attempt to counter the serious harms threatened by the JOE Agreement is to characterize the JOE as a mere "research agreement," which description the Commission should reject. The agreements demonstrably contemplate and require anticompetitive conduct that reaches far beyond simply joint research and development, and the Commission should not indulge Applicants' efforts to avoid addressing these issues. Accordingly, the Commission should recognize that Applicants have failed demonstrate that the proposed transactions will affirmatively serve the public interest, and block the proposed transactions.

Titles II and III of the Act vest the Commission with broad authority to fulfill its responsibilities under the Act—authority that encompasses review of the agreements at issue in

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this proceeding. The Commission has statutory authority to review these agreements and block the agreements entirely or implement restrictions and conditions, as it has in numerous past spectrum transfer applications. Past precedent also demonstrates that the Commission can act under its statutory authority even if its decisions or rules will render existing contracts void or illegal. Accordingly, the Commission has ample authority to act here to protect the public interest against the harms threatened by all of the components of the Applicants’ proposed transactions. The Commission should now exercise that authority to prevent the proposed transactions from stifling innovation and competition in voice, video, and data services by denying the Applications.

ARGUMENT

I. THE COMMERCIAL AGREEMENTS ARE INEXTRICABLY INTERTWINED WITH THE PROPOSED LICENSE TRANSFERS AND ARE STILL RELEVANT TO THE COMMISSION’S PUBLIC INTEREST REVIEW IN THIS PROCEEDING.

Petitioners² are aware that the Commission has recently established a new proceeding in which to examine the legality of the agency, resale, and Joint Operating Entity (“JOE”)³ agreements. Petitioners applaud this exercise of Commission authority to prevent agreements that outright violate the Communications Act in their own right. However, this does not alleviate the Commission’s responsibility to recognize and examine these side agreements as part of the proposed license transfer in this proceeding. As discussed in Petitioners’ Petition to Deny, the

² Petitioners New American Foundation Open Technology Initiative, Access Humboldt, Benton Foundation, and National Consumer Law Center, on behalf of its low-income clients, have only directly reviewed the redacted version of this filing.

³ In their Opposition to Petitions to Deny and Comments, Applicants rename the JOE as the “Innovation Technology Joint Venture.” *See, e.g.*, Joint Opposition to Petitions to Deny and Comments of Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless, LLC, WT Docket 12-4 (Mar. 2, 2012) at 71 (“Joint Opposition”). Petitioners will here continue to use the entity’s legal name, the Joint Operating Entity, or “JOE.”

public interest standard encompasses the entirety of the proposed agreements, and the Commission must consider how those agreements may impair the Commission's ability to effectuate the purposes of the Act, in addition to considering the other public interest harms the agreements may cause.⁴ In addition to likely violating the Act and being independently subject to the Commission's authority, these agreements are part of the same overall license transfer transaction between Verizon and the MSOs, and their impact on the public interest is thus properly considered in this proceeding as well.

Recent information that the Applicants only begrudgingly revealed after being ordered to do so by the Commission shows that terms of the agency, resale, and JOE agreements are undeniably connected to and contingent on the license transfer. In their Joint Opposition, Applicants protested that “[t]he license assignments and Commercial Agreements are separate from, and not contingent on, each other.”⁵ However, the Applicants' subsequent mandatory disclosures confirm that this is not true. Indeed, as Bright House Networks openly admits:

“Neither Comcast nor SpectrumCo would have entered into the Spectrum License Purchase Agreement had Comcast (and the other SpectrumCo owners) and Verizon Wireless not come to terms on the commercial agreements. In that sense, the transactions were integrated. . . . Comcast viewed the spectrum as a strategically important element of that plan, and it would not have relinquished the AWS licenses without having in hand alternative ways of achieving its wireless goals.”⁶

When asked whether the MSOs would have been willing to sell their spectrum to Verizon without the side agreements, Comcast Executive Vice President David Cohen confirmed as

⁴ See Petition to Deny of Public Knowledge *et al.*, WT Docket No. 12-4 (Feb. 21, 2012), at 10–36 (“Petition to Deny”).

⁵ Joint Opposition at 70.

⁶ Response to Information and Discovery Request by Comcast Corporation, WT Docket No. 12-4 (Mar. 22, 2012) at 26 (emphasis added). See also Response to Information and Discovery Request by Bright House Networks, WT Docket No. 12-4 (Mar. 22, 2012) at 15 (asserting the same, almost verbatim).

much, explaining: “The transaction is an integrated transaction. There was never any discussion about selling the spectrum without having the commercial agreements.”⁷

Verizon’s own description of the negotiations between Verizon and the cable companies bear this out.⁸ From the very first meetings between Verizon and [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL] In fact, the JOE and the spectrum purchase [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] The spectrum transfer and side agreements

were thereafter [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Bright House Network’s negotiation

⁷ Eliza Krigman, *Comcast Executive Defends Verizon-SpectrumCo Deal*, POLITICO (Mar. 8, 2012). Mr. Cohen went on to note that the parties actually do not object to the Commission reviewing the side agreements. *Id.*

⁸ Petitioners here largely rely upon Verizon’s descriptions of the parties’ negotiations. Counsel for Cox Communications, Comcast, and SpectrumCo stated they were unable to provide unredacted copies of their respective March 22nd filings until March 26th, and as of March 26th counsel for Bright House Networks had not responded to requests for unredacted copies of their respective filings.

⁹ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

¹⁰ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

¹¹ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

For example, [BEGIN HIGHLY CONFIDENTIAL]

timeline confirms that by the time it was brought into the discussions in late November 2011, the agreements were presented to Bright House as a single “transaction.”¹²

Moreover, Applicants’ protestations that the agency, resale, and JOE agreements are entirely unrelated to the Applicants’ proposed spectrum transfer is also directly contradicted by the language of their own agreements. For example, **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Additionally, **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Moreover, the Applicants have agreed that **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

¹² See Response to Information and Discovery Request by Bright House Networks, WT Docket No. 12-4 (Mar. 22, 2012) at 1–2.

¹³ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

¹⁴ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

¹⁵ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

¹⁶ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL] These provisions make crystal clear what Petitioners and other parties have long suspected: the agency, resale, and JOE agreements are intimately connected to and contingent on the license transfer.

In its response to the Commission’s Information and Document Request, Verizon even admits that [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Verizon, however, neglects to explain how [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] does not make the Applicants’ agreements contingent upon each other. Now that the Applicants have, at the order of the Commission, been required to reveal more provisions in their commercial agreements, those provisions make clear that Applicants’ previous promises that the commercial agreements and license purchase agreement are unrelated were flatly wrong.

II. APPLICANTS FAIL TO RESPOND TO PETITIONERS’ ARGUMENTS THAT THE COMMERCIAL AGREEMENTS ARE ANTICOMPETITIVE AND CONTRARY TO THE PUBLIC INTEREST.

Applicants have effectively failed to respond to the core issues raised by Petitioners opposing Applicants’ proposed agency, resale, and JOE agreements. Where Applicants do make

¹⁷ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

¹⁸ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

¹⁹ [BEGIN HIGHLY CONFIDENTIAL]
CONFIDENTIAL]

[END HIGHLY

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reference to Petitioners’ arguments regarding the side agreements, Applicants’ purported rebuttals are irrelevant to Petitioners’ points. No amount of misdirection can hide the fact that under § 310(d) of the Act, the Commission should evaluate the proposed agreements as a whole and consider the future state of the communications landscape if the Commission were to permit these agreements to stand.²⁰ As the Commission has most recently explained:

“If the proposed transaction would not violate a statute or rule, we next consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest harms.”²¹

If the Commission finds that the agreements will stifle competition between the Applicants, their affiliates, and third parties, or otherwise fail to affirmatively serve the public interest, then the Commission must deny the transfer applications. If the Commission determines that the spectrum transfer alone will serve the public interest when subject to certain conditions, the law requires that it void the side agreements as part of its approval of the transfer application.

In contrast to Applicants’ attempts to shoehorn the Commission’s public interest analysis into only the question of spectrum efficiency,²² the Commission’s examination under § 310(d) encompasses much more than simply whether the proposed transferee will use the spectrum in question efficiently. Encouraging the efficient use of spectrum is certainly one part of the

²⁰ As one of the Applicants openly admits, even today new competitors face tremendous barriers to entering the wireless market, stifling competition. Eliza Krigman, *Comcast Executive Defends Verizon-SpectrumCo Deal*, POLITICO (Mar. 8, 2012) (quoting Comcast executive David Cohen: “Believe me, if there was any way for us to get into the wireless space, that’s what we would have done. It’s too expensive; the barriers to entry are too consequential; the access to devices is too difficult; access to roaming agreements is next to impossible.”).

²¹ *Applications for Consent to Assign/Transfer Control of Licenses and Authorizations of New DBSD Satellite Services GP, Debtor-in-Possession and TerreStar License Inc., Debtor-in-Possession*, IB Docket No. 11-150, *Requests for Rule Waivers and Modified Ancillary Terrestrial Component Authority*, IB Docket No. 11-149, Order, ¶ 12 (2012) (citations omitted).

²² Joint Opposition at 8.

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Commission’s public interest analysis, but it is by no means the only part. Looking at the agreements as a whole, the Commission should also consider how the proposed transactions will affect competition, quality of services, build-out of new services, barriers to market entry, retail and enterprise prices, special access, backhaul, video programming offerings, and the development and use of new technologies, among other considerations.

The JOE Agreement in particular will prevent competition and promote collusion, particularly given that statements by the Applicants demonstrate that the transfer would not occur absent the side agreements. Applicants argue that their agreement does not harm competition because it merely offers customers a “one-stop-shop” for bundled services,²³ but this argument misses the nature of Petitioners’ concerns. Is it not necessarily the ability to bundle services that is anticompetitive, but the agreement to do so to the exclusion of other competitors or partners that makes these agreements anticompetitive.²⁴ As Petitioners have explained, the JOE’s very structure encourages coordination between Verizon Communications and the MSOs.²⁵ The JOE also **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL] and gives Applicants the ability and incentive to discriminate against competitors when licensing the JOE’s intellectual property.

²³ Joint Opposition, Exhibit 6, at 3.

²⁴ Petitioners also note that the agreements at issue decrease Verizon’s incentive to compete against the cable companies in the video market, which ultimately creates higher per channel cable prices for consumers. As the Commission recently found in its Report on Cable Industry Prices, cable companies charge consumers approximately 31% less per channel for expanded basic networks where they face competition from another cable provider. *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 Prices, Table 1 (2012).

²⁵ Petition to Deny, Confidential App. at A-3–A-5.

A. Applicants’ Portrayal of the Joint Operating Entity as a Mere “Research Agreement” Is Contrary to Evidence Placed in the Record in this Proceeding.

Applicants refer to the JOE as a mere “research agreement,”²⁶ but the JOE Agreement itself—which is still only incompletely submitted into the record by Applicants—demonstrates that the JOE is much more than a simple agreement to research together. Indeed, it is precisely the provisions of the JOE that extend well beyond research that cause the most concern for future competition in the wireless and wireline services market.

The JOE Agreement, particularly when combined with the Applicants’ agency and reseller agreements, blatantly contemplates and requires conduct that extends far beyond a typical research agreement. Here, it is useful to look to the 1984 National Cooperative Research Act (NCRA),²⁷ which defined a “joint research and development venture,” including both activities that are and are not included within the scope of a joint research and development venture.²⁸ The statutory provision defining joint ventures (which includes research agreements) specifically excludes “entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing, distribution, or provision by any person who is a

²⁶ Joint Opposition, Exhibit 6, at 18 n.52.

²⁷ Pub L. No. 98-462 (codified as amended at 15 U.S.C. § 4301–05). In 1993, Congress amended the NCRA to extend protections to joint ventures that were involved in production activities, in part because of scholarly commentary, because it was unclear whether joint ventures could engage in activities going beyond research and development while still retaining the protections of the NCRA. National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301–06.

²⁸ HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 36.3b1 (Aspen 2004 Supp.). Although the NCRA may not be directly applicable to this proceeding, it established a national standard under which certain cooperative ventures could avoid treble damages under antitrust law. The NCRA thus provides an objective background against which the Applicants’ use of the label “research agreement” can be measured. By contrast, Applicants offer no examples or standards that would justify referring to the JOE as a “research agreement.”

party to such venture of any product, process, or service”²⁹ Joint research ventures also do not include agreements “to restrict or require the sale, licensing, or sharing of inventions, developments, products, processes, or services not developed through, or produced by, [the] venture.”³⁰ Nor can any agreement “to restrict or require participation by any person who is a party to such venture in other research and development activities” qualify as a joint research venture.³¹

The JOE Agreement, particularly when combined with the agency and reseller agreements, explicitly requires conduct that goes well beyond the scope of a typical research agreement. The JOE Agreement [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL] It also [BEGIN HIGHLY CONFIDENTIAL]

[END

HIGHLY CONFIDENTIAL] thus controlling and limiting the newcomers’ marketing and promotion efforts. It is ridiculous to claim that a series of agreements that operate collectively to exert so much control over the parties’ independent marketing, promotion, research, development, deployment, and licensing of technology is no more than a research agreement, and the Commission should recognize these contracts for what they are: agreements to [BEGIN HIGHLY CONFIDENTIAL]

²⁹ 15 U.S.C. § 4301(b)(2). In contrast, activities like theoretical analysis or experimentation, developing and testing basic engineering techniques, and producing and testing a new product or service are included within the definition of a joint venture or research agreement. 15 U.S.C. § 4301(a)(6).

³⁰ 15 U.S.C. § 4301(b)(3)(A).

³¹ 15 U.S.C. § 4301(b)(3)(B).

[END HIGHLY CONFIDENTIAL]

As Petitioners explained in their Petition to Deny (and as Applicants fail to counter in their Opposition), the structure of the JOE itself encourages coordination between Verizon Communications and the MSOs.³² [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Moreover, the JOE does not simply contemplate joint research, but [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] This demonstrates that the JOE is not intended merely to facilitate joint research and development, but to [BEGIN HIGHLY CONFIDENTIAL]

³² See Petition to Deny, Confidential App. at A-3–A-5.

³³ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

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³⁴ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

³⁵ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

³⁶ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] and to create a critical mass of market power to disadvantage competitors that are not members of the JOE. As a result, the JOE's technologies are effectively [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] The JOE thus stifles innovation not only by outside companies but also by the members of the JOE themselves.

The JOE contemplates a scheme of coordinated control, joint management, and exclusive development of technologies key to the future of wireline and wireless Internet access technologies. This reaches much further than a simple agreement to research together,³⁷ and poses much more serious harms to the competition and the public interest than a simple research agreement would.

B. The Joint Operating Entity Requires Anticompetitive Conduct Unrelated to Research.

Applicants attempt to counter arguments that their agreements form a cartel by asserting that “[n]othing in the Agency Agreements, the Reseller Agreements, or the Innovation Technology Joint Venture . . . will allow the MSOs or Verizon Wireless to control the production or price of the other’s products.”³⁸ However, Applicants’ Joint Operating Entity is designed to achieve exactly this purpose: to control the parties’ and others’ use of the technology developed by the JOE, and thus to control the entrance of new competitors, products, and services in the marketplace of integrated wireline and wireless services.

³⁷ See *supra* Section II.A.

³⁸ Joint Opposition, Exhibit 6, at 5.

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The JOE Agreement requires the Applicants to engage in anticompetitive conduct that is neither necessary nor conducive to the creation of an innovative research entity. The JOE

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Applicants insist that the JOE is not a cartel because the JOE will not sell any currently existing services or license or distribute content.³⁹ Petitioners note that, even under *the Applicants' own definition* of a cartel,⁴⁰ the JOE qualifies as a cartel. The JOE **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] The JOE

therefore embodies a decision by its members to forego independent decision-making and instead jointly set the prices and terms for its technology.

Moreover, Applicants' protestations that the JOE does not sell any existing services are beside the point and fail to address the real danger of the JOE: that the Applicants will use the

³⁹ *Id.* at 7.

⁴⁰ See Joint Opposition, Exhibit 6, at 5 (“A cartel . . . is ‘[a] combination of producers or sellers that join together to control a product’s production or price.’”) (citing *Freedom Holdings, Inc. v. Spitzer*, 447 F. Supp. 2d 230, 251 (S.D.N.Y. 2004) (quoting BLACK’S LAW DICTIONARY 206 (7th ed. 1999)); IIA PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 405a, at 26 (2d ed. 2002) (“Competing firms form a cartel when they replace independent decisions with an agreement on price, output, or related matters.”)).

JOE to leverage intellectual property rights over *new* technologies anticompetitively. Even though the Applicants explicitly acknowledge that licensing the JOE’s technology to others would benefit consumers, the Applicants still cannot bring themselves to affirmatively promise that the JOE will be willing to even offer licenses on any terms to competitors.⁴¹ What’s worse,

[BEGIN HIGHLY CONFIDENTIAL]

[END

HIGHLY CONFIDENTIAL] The Applicants cannot possibly claim that this agreement is really just about research and development when it includes [BEGIN HIGHLY

CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

entirely unrelated to developing new technology.

Perhaps more tellingly, Applicants utterly fail to respond to Petitioners’ arguments on this front. Applicants ignore Petitioners’ arguments that [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL] They do not respond to [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] In response to

Petitioners’ concerns over the opportunities the agreements present for Verizon and the MSOs to

⁴¹ *Id.* (“The Innovation Technology Joint Venture *may* license these technologies to others”) (emphasis added).

⁴² [BEGIN HIGHLY CONFIDENTIAL]
HIGHLY CONFIDENTIAL]

[END

act anticompetitively against third parties,⁴³ Applicants point to [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY

CONFIDENTIAL] as if [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] is in any way responsive to the serious problems created by [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL] Applicants also fail to address the Commissioner’s authority under Sections 624A, 628, 629, and 706 in any meaningful way.⁴⁵

To justify the JOE Agreement, Applicants cite the Federal Trade Commission and Department of Justice guidelines to note that research and development collaborations “*may* enable participants more quickly or more efficiently to research and develop”⁴⁶ new technologies. However, the very next sentence in those same guidelines warns:

“Joint R&D agreements . . . can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants’ individual competitive R&D efforts.”⁴⁷

⁴³ Petition to Deny at 19–20; [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL].

⁴⁴ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

⁴⁵ See Petition to Deny at 5–6, 24, 27–29, 36–41; Joint Opposition at 78.

⁴⁶ Dep’t of Justice & Fed. Trade Comm’n, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000), *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (emphasis added); see Joint Opposition, Exhibit 6, at 18–19.

⁴⁷ Dep’t of Justice & Fed. Trade Comm’n, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000), *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

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The guidelines also caution that joint operations like the JOE “may facilitate tacit collusion on R&D efforts.”⁴⁸ As the agencies warn, joint ventures, like the one proposed here, “may provide an opportunity for participants to discuss and agree on anticompetitive terms, or otherwise to collude anticompetitively, as well as a greater ability to detect and punish deviations that would undermine the collusion.”⁴⁹ Thus the JOE allows Applicants to use their market power anticompetitively to protect their own respective market positions while slowing the pace of competitors’ research and development efforts.⁵⁰ This reduces the number of competitors and leads to fewer, lower quality, and/or delayed products and services.⁵¹

The FTC and DOJ guidelines also explicitly caution that these joint ventures “are more likely to raise competitive concerns when the collaboration or its participants already possess a secure source of market power over an existing product and the new R&D efforts might cannibalize their supracompetitive earnings,” especially if the R&D competition is confined to entities with specialized assets like intellectual property, or when regulatory approval processes limit new competitors’ ability to catch up with incumbent companies.⁵² And here, not only is Verizon Wireless already one of the largest spectrum licensees in the country, but the JOE Agreement is itself part of a larger deal *to transfer even more spectrum to Verizon*.

Seemingly in response to Petitioners’ concerns that the JOE Agreement **[BEGIN
HIGHLY CONFIDENTIAL]**

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *Id.*

[END

HIGHLY CONFIDENTIAL] Applicants argue that they are still permitted to purchase unrelated technology outside of the JOE.⁵⁴ This is utterly nonresponsive and beside the point. Even if the Applicants retain the right to **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL] they nevertheless are not permitted to **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] What's worse, the JOE Agreement requires the Applicants to **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Going forward, if any of the Applicants **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] This makes the ability to purchase outside technology illusory. If any third-party entities wish to license any of the JOE's technology, **[BEGIN HIGHLY CONFIDENTIAL]**

⁵³ **[BEGIN HIGHLY CONFIDENTIAL]**
[END HIGHLY CONFIDENTIAL]

⁵⁴ Joint Opposition, Exhibit 6, at 17.

⁵⁵ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

⁵⁶ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

⁵⁷ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL] Moreover, Applicants' assertions that they may [BEGIN HIGHLY

CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

is irrelevant in light of the fact that [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Notably, the JOE will also exacerbate recurring patent disputes between technology companies. [BEGIN HIGHLY CONFIDENTIAL]

⁵⁸ [BEGIN HIGHLY CONFIDENTIAL]

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members of the JOE may see this as a useful trump card in recurring patent disputes, but the result is that it will only enhance the anticompetitive effects of the JOE and increase the Applicants' control over nascent technologies integrating wireless and wireline service.

The importance of seamless interoperability between complex operating systems in wireless and wireline communications throws this problem into stark relief.⁶² [BEGIN

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[END HIGHLY CONFIDENTIAL] Even if the Commission were to allow the JOE Agreement to stand on condition that the JOE license its patents on reasonable and non-discriminatory terms, the JOE may nonetheless use those patents anticompetitively. For example, patent holders have in the past caused concern through the use of exclusionary orders before the ITC to block competing products from entering the country rather than dispute the terms of a license.⁶³ Importantly, exclusionary orders also affect all downstream products, so any device or

⁶² *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd.*, DEPARTMENT OF JUSTICE (Feb. 13, 2012).

⁶³ *See, e.g.*, Letter from Senator Patrick Leahy, Chairman, and Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Rights, United States Senate, to Eric H. Holder Jr., Attorney General, United States Dep't of Justice (Mar. 15, 2012) ("The misuse of ITC exclusion orders to prevent rival technologies poses a significant threat to competition and innovation . . ."). *See also* 19 U.S.C. § 1337 (establishing the ITC and authorizing it to investigate—on complaint or upon its own initiative—and remedy certain

good that contains the infringing technology would also be prohibited. Thus, even requiring the JOE to engage in reasonable and non-discriminatory licensing may not be enough to prevent the JOE from opting to threaten competition instead of engaging in licensing negotiations.

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CONFIDENTIAL] Applicants' promise that they "are committed to maintaining open networks"⁶⁴ falls short of making enforceable commitments to network openness or to licensing the JOE's intellectual property on fair, reasonable, and non-discriminatory terms.

C. Applicants Make No Response to Petitioners' Attribution Arguments.

Applicants fail to alleviate concerns raised by Petitioners that the proposed agreements create an attributable interest under Title III and Section 652 of the Act.⁶⁵ Applicants respond to Petitioners' concerns that the agreements will enable Verizon and the cable companies to exert improper influence or control over each other by pointing out that [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] but [BEGIN HIGHLY

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[END HIGHLY

CONFIDENTIAL] is entirely separate from the ability to exert influence or control over another entity. Additionally, neither in their initial Application nor in their Opposition do

intellectual property violations by excluding the infringing articles from entry into the United States).

⁶⁴ Joint Opposition, Exhibit 6, at 17.

⁶⁵ See Petition to Deny, Confidential App., at A-8.

⁶⁶ Joint Opposition, Exhibit 6, at 2.

Applicants make the proffer required under the Commission’s cable ownership rules to avoid any discussion of programming services.⁶⁷ Finally, Applicants ignore Petitioners’ argument that the agreements give rise to an attributable interest under Section 652 because participation in an LLC is fully attributable to the members of the LLC absent a single majority shareholder.⁶⁸ As Petitioners have explained, it is ridiculous to pretend that Verizon Communications is not directly involved in this transaction when the JOE Agreement [BEGIN HIGHLY

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[END

HIGHLY CONFIDENTIAL] And as Applicants revealed just last week, their discussions of the license transfer and commercial agreements have from the very beginning [BEGIN

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Applicants are apparently either unable or unwilling to counter the substance of Petitioners’ arguments.⁷¹ Petitioners have thoroughly established how Verizon Wireless is an affiliate of Verizon Communications under Section 652,⁷² as well as how the JOE Agreement

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⁶⁷ See 47 C.F.R. § 76.503 Note (b)(2).

⁶⁸ See Petition to Deny, Confidential App. at A-8-A-9.

⁶⁹ See, e.g., [BEGIN HIGHLY CONFIDENTIAL]
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⁷⁰ [BEGIN HIGHLY CONFIDENTIAL]

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⁷¹ See Petition to Deny at 5, 17–19, 42–44; Petition to Deny, Confidential App. at A-8-A-9.

⁷² See Petition to Deny at 42–44.

⁷³ [BEGIN HIGHLY CONFIDENTIAL]

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CONFIDENTIAL] By virtue of its 55% ownership interest in Verizon Wireless, Verizon Communications has a **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

The Commission’s rules explicitly state that “[a]ctual working control, in whatever manner exercised, shall be deemed a cognizable interest,”⁷⁵ and Petitioners have specifically explained how the JOE Agreement **[BEGIN HIGHLY CONFIDENTIAL]**

[END

HIGHLY CONFIDENTIAL] Applicants make no reference, much less rebuttal, to this argument in their Opposition.

III. THE COMMISSION SHOULD CONSIDER WHETHER THE AGENCY, RESALE, AND JOINT OPERATING ENTITY AGREEMENTS WILL VIOLATE THE ACT OR FRUSTRATE THE PURPOSES OF THE ACT.

The marketing, resale, and JOE agreements made between the Applicants as part of their agreements to transfer spectrum are an important part of the Commission’s review in this proceeding. The Applicants admit that the Commission must consider all harms that would “arise from the transaction,”⁷⁷ but mistakenly fail to conclude that the Commission must consider all

⁷⁴ See 47 C.F.R. § 76.501 Note (f)(c). **[BEGIN HIGHLY CONFIDENTIAL]**

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⁷⁵ *Id.* Note 1.

⁷⁶ **[BEGIN HIGHLY CONFIDENTIAL]**
[END HIGHLY CONFIDENTIAL]

⁷⁷ Joint Opposition at 64 (citing *Verizon Commc’ns Inc. and MCI, Inc.*, Memorandum Opinion & Order, 20 FCC Rcd 18433, 18446 ¶ 19 (2005); *IT&E Overseas, Inc. and PTI Pacifica Inc.*, Memorandum Opinion & Order & Declaratory Ruling, 24 FCC Rcd 5466, 5474 ¶ 14 (2009);

harms that would arise from the transaction, even if those harms are also relevant to other Commission proceedings. Applicants imply that if a particular issue raised by the proposed transactions has also been raised in another proceeding, then the Commission should simply ignore the issue and pretend that it has no relevance to the agreements.⁷⁸ The Commission need not, and indeed should not, ignore the harms that arise from a license transaction simply because those harms are also under discussion in another proceeding. Here, the commercial agreements are properly considered as part of the Applicants' overall license transfer agreement, and the Commission must block those agreements because they would violate the Communications Act and otherwise frustrate the Commission's ability to carry out the goals of the Act.

The Commission is responsible for effectuating the purposes of the Act and has the authority to review transactions to determine whether they frustrate those purposes. Even if a license transaction does not violate the Act, the Commission examines the proposed transfer to determine whether it would substantially impair or frustrate the enforcement or objectives of the Act and whether the transaction would produce potential public interest benefits to promote the goals of the Act.⁷⁹ Applicants argue that their proposed transactions do not violate Section 652(c) because they claim the section only applies to LECs and not to affiliates.⁸⁰ But the Commission has held that the statutory language can still apply to affiliates when such a reading is necessary to carry out the "regulatory purpose" of the provision, and the D.C. Circuit has agreed with this

Time Warner Inc. and Time Warner Cable Inc., Memorandum Opinion & Order, 24 FCC Rcd 879, 887 ¶ 13 (MB/WCB/IB 2009); *SBC Commc'ns Inc. and AT&T Corp.*, Memorandum Opinion & Order, 20 FCC Rcd 18290, 18303 ¶ 20 (2005)).

⁷⁸ Joint Opposition at 64–65.

⁷⁹ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion & Order, ¶¶ 4, 12 (2001) ("AOL/Time Warner Order").

⁸⁰ Joint Opposition at 77.

interpretation.⁸¹ Moreover, Section 652(c) certainly applies here, where, as Petitioners have argued, Verizon completely controls Verizon Wireless.⁸² In fact, Verizon’s own actions demonstrate that Verizon Wireless and Verizon Communications operate as one enterprise: Verizon Communications describes Verizon Wireless as one of its businesses, and the two companies share interlocking directorates.⁸³ To carry out the Congressional purpose of maximizing competition between cable and telecommunications carriers, the Commission should find that Section 652 applies to the proposed agreements between Verizon and the cable companies.

In addition to violating Section 652, the agreements run afoul of Section 310’s public interest test.⁸⁴ Under the public interest standard, if a party attempts to evade the purpose or frustrate the application of the Communications Act—as Verizon and the cable companies are attempting to do—the Commission has authority to deny the proposed transaction or condition approval upon actions that would make the deal serve the public interest. The agreements here provide incentive for the Applicants to use business structures to evade the application of a rule or policy in contravention of the Commission’s mandate to promote competition and the public interest. As a result, the Commission has authority to review the agreements.

Additionally, the mere fact that the Department of Justice (“DOJ”) is also reviewing these agreements does not eliminate the Commission’s authority. The Commission should review the commercial agreements to determine whether they comply with the goals of the Act and promote the public interest, regardless of whether the DOJ reviews the agreements for antitrust violations.

⁸¹ *GTE Serv. v. FCC*, 224 F.3d 768, 773–74 (D.C. Cir. 2000).

⁸² *See* Petition to Deny at 42–44.

⁸³ Petition to Deny at 42.

⁸⁴ Joint Opposition at 76–79.

Applicants say that to the extent elements of the agreements require government review to ensure the ongoing competitiveness of the marketplace, the DOJ is performing that review and is the only agency with the authority to do so.⁸⁵ But the Applicants are incorrect.

Not only is the Commission's authority to review the agreements independent from whether the DOJ reviews the agreements, but the Commission's standard of review is substantially broader than the DOJ's standard.⁸⁶ While the DOJ reviews the agreements to ensure competitive behavior, the Commission looks to ensure competitive behavior *plus* many other public interest factors. Furthermore, the fact that the DOJ is reviewing the agreements makes the case for the Commission's review that much stronger. The DOJ is reviewing the agreements because of serious anticompetitive concerns. Because these serious concerns could also inhibit the goals of the Act, the Commission must review the agency, resale, and JOE agreements, regardless of the DOJ's independent review.

IV. THE COMMISSION HAS BROAD AUTHORITY UNDER TITLES II AND III OF THE COMMUNICATIONS ACT TO REVIEW THE AGREEMENTS.

Contrary to Applicants' claims, the Commission has broad authority to review and block the commercial agreements, both in this license transfer proceeding and independently. The Commission has historically used this authority to impose restrictions on licenses granted to licensees and to review the contract agreements accompanying license transfers to protect and promote the public interest. Applicants' arguments to the contrary misunderstand the Commission's reasons for declining to review particular contracts in past proceedings. As discussed above, the commercial agreements at issue in this proceeding threaten serious harms to

⁸⁵ Joint Opposition at 75.

⁸⁶ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion & Order, 26 FCC Rcd 4238, ¶ 24 (2011).

the public interest and the goals of the Communications Act, and are thoroughly intertwined with the license transfer agreement. As a result, the Commission can and should review the side agreements and block them outright or condition the license transfer upon their termination.

A. The Commission has Broad Authority Under Titles II and III to Review the Agreements and Implement Restrictions.

The Commission has broad, sweeping authority under Titles II and III of the Act to review the Verizon/SpectrumCo and Verizon/Cox license transfers and accompanying agreements and to determine whether they affirmatively serve the public interest. As the Commission itself has recognized, “Congress charged the Commission with ‘regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding’ and therefore intended to give the Commission sufficiently ‘broad’ authority to address new issues that arise with respect to ‘fluid and dynamic’ communications technologies.”⁸⁷ The Commission has leeway to determine the jurisdictional basis and regulatory tools that will most effectively promote Congress’s objectives and the public interest under the Communications Act.⁸⁸

The Commission has consistently recognized its authority to allow or deny spectrum license transfers in the public interest under Section 310(d) and Section 214(a), and SpectrumCo and Cox will not be able to transfer its spectrum licenses to Verizon without Commission approval.⁸⁹ First, the Commission determines if a license transfer will comply with the

⁸⁷ *Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report & Order, 25 FCC Rcd 17905, ¶ 15 (2010) (*Open Internet Order*) (citing *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190, 219–20 (1943)).

⁸⁸ *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

⁸⁹ *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, WC Docket No. 11-148, 2012 FCC Lexis 410, ¶ 7 (*Insight Communications Transfer*); *Rio Tinto America Inc. and Alcan Corp; Parent Companies of Various Subsidiary, Companies Holding Various Authorizations in the Wireless Radio Services*, File No. EB-09-IH-1665; 2011 FCC Lexis 5073, ¶ 3.

Communications Act, other statutes, and the Commission’s rules. Even if the transfer complies with all of the statutes and rules the Commission must then look to how the transfer will affect the public interest and whether the transfer will frustrate the Commission’s ability to effectuate the purposes of the Act.⁹⁰ The Commission has imposed many conditions to remedy likely harms that would arise from transactions under this broad authority.⁹¹ The Commission is thus well within its authority to condition the proposed license transfers on the termination of the Applicants’ side agreements, at which point the Applicants may choose to void their side agreements in order to accomplish their proposed license transfer.

B. Under Its Sweeping Authority, the Commission Has Reviewed Many Proposed Spectrum Transactions and Denied or Restricted the Proposals.

It is well established that the Commission has “authority to manage spectrum and establish and modify license and spectrum usage conditions in the public interest,”⁹² including when the rule is based upon characteristics particular to an industry.⁹³ Time and again, the Commission has imposed requirements on existing licenses based on its broad authority over spectrum license grants and transfers under Titles II and III.⁹⁴ Congress mandated that the Commission “determine . . . whether the public interest, convenience, and necessity will be served by the granting of such [a license] application.”⁹⁵ When the Commission implemented rules through the Open Internet Report and Order, it did so pursuant to Section 309(a), which

⁹⁰ *Insight Communications Transfer* at ¶ 7.

⁹¹ *Id.* at ¶ 10.

⁹² *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report & Order, 26 FCC Rcd 5411, ¶ 2 (2011) (*Roaming Obligations Order*).

⁹³ *Id.* at ¶ 62.

⁹⁴ *See, e.g., Open Internet Order* at ¶ 133.

⁹⁵ *Id.*; 47 U.S.C. §§ 307, 309(a).

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gives it the authority to regulate services in the public interest,⁹⁶ and Section 303(g), which directs it to encourage efficient uses in the public interest.⁹⁷ The Commission explained that companies “ha[d] the incentive and ability to block, degrade, or otherwise disadvantage the services of their online voice competitors.”⁹⁸ Since competitors are not allowed to harm the network (by entering into agreements that may degrade service or otherwise),⁹⁹ the Commission implemented rules to prevent self-interested practices that would “jeopardize broadcasters’ ability to offer . . . programming over the internet, and, in turn, threaten to impair their ability to offer high-quality broadcast content.”¹⁰⁰ The Commission also looked to its “express and expansive authority” under Section 201 to ensure the practices of companies that provide both voice communications and broadband internet access services were “just” and “reasonable” and found that the practices that could block competitors’ services were not reasonable before implementing Open Internet Rules.¹⁰¹ The Open Internet Order is just one example of the Commission recognizing its statutory authority to impose new requirements on existing licenses, and then imposing requirements in accord with the public interest.¹⁰²

The Commission has broad general authority “to establish license conditions and operational obligations, if the condition or obligation will further the goals of the Communications Act without contradicting any basic parameters of the agency’s authority,”¹⁰³

⁹⁶ *Open Internet Order* at ¶ 122.

⁹⁷ *Id.* at ¶ 128.

⁹⁸ *Id.* at ¶ 125.

⁹⁹ *Id.* at ¶ 134.

¹⁰⁰ *Id.* at ¶¶ 135, 128.

¹⁰¹ *Id.* at ¶ 125.

¹⁰² *Id.* at ¶ 135.

¹⁰³ *Id.* at ¶ 207.

and the Commission has used its authority to implement other restrictions on spectrum under Title III. For example, the Commission does not allow licensees of the Upper 700 MHz Band C Block, which was designated for public safety and commercial services,¹⁰⁴ to “block, degrade, or interfere with the ability of end users to download and utilize applications of their choosing on the licensee’s C Block network, subject to reasonable management.”¹⁰⁵

With industry practices potentially impeding new devices and applications for consumer use, the Commission required C Block licensees to allow consumers to use any devices or applications (with some limitations).¹⁰⁶ The prohibition promoted the development of new devices and applications to the benefit of consumers, and it fell well within the Commission’s statutory authority.¹⁰⁷ Section 303(r) requires the Commission to create rules and regulations to carry out the provisions of the Act, Section 309(j)(3) requires the Commission to “include safeguards to protect the public interest,” and Section 303(b) encourages new uses, experimental uses, and effective uses of radio. When Verizon Wireless and other opponents objected to the rule, the Commission disagreed and held to its initial decision to implement the restrictions. Under Section 309(j)(3), the Commission articulated that the public interest of having available devices and applications well outweighed a possible loss in the monetary value of the spectrum to Verizon, when balancing the statutory objectives.¹⁰⁸ The rule was consistent with the

¹⁰⁴ *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, PS Docket No. 06-229, WT Docket No. 96-86, Second Report & Order, 22 FCC Rcd 15289, ¶ 15 (2007) (*700 MHz Band Order*).

¹⁰⁵ *Id.* at ¶ 206.

¹⁰⁶ *Id.* at ¶ 207.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at ¶ 208, 214, 215.

Commission’s goals of “promoting commercial access to 700 MHz Band spectrum and the development of a nationwide interoperable broadband network for public safety users.”¹⁰⁹

The Commission also used its authority under several sections of Titles II and III to manage spectrum and modify license conditions when it imposed data roaming obligations on CMRS providers because the industry’s general practices conflicted with the public interest and entrants’ ability to compete in the market.¹¹⁰ The rule required certain providers of commercial mobile data services to offer data roaming to other providers.¹¹¹ The Commission explained that when it grants a license, it does not convey ownership in the spectrum and the licensee cannot override its regulatory power over the spectrum.¹¹²

A number of provisions of the Act give the Commission authority to impose data roaming obligations. Section 301 requires the Commission to maintain the control over radio transmission channels.¹¹³ Section 316 specifically allows the Commission to adopt new conditions on existing licenses. Section 303 allows the Commission to establish operational obligations and prescribe the nature of the services rendered for licenses to promote the public interest and Congressional goals.¹¹⁴ Sections 201 and 202 require carriers to provide roaming services to other carriers on a just, reasonable, and non-discriminatory basis.¹¹⁵ The Commission used its authority to create a rule that affected current agreements and developed new agreements between service providers, by obliging them to offer individually negotiated data roaming

¹⁰⁹ *Id.* at ¶3.

¹¹⁰ *Roaming Obligations Order* at ¶ 62.

¹¹¹ *Id.* at ¶ 1.

¹¹² *Id.* at ¶ 62.

¹¹³ 47 U.S.C. § 301. *Roaming Obligations Order* at ¶ 62.

¹¹⁴ *Id.* at ¶ 62; 47 U.S.C. § 316.

¹¹⁵ *Id.* at ¶ 4.

arrangements on reasonable terms.¹¹⁶ The rule promoted the Communication Act’s goal of fully realizing competitive mobile broadband services by allowing consumers greater use of their data plans, encouraging nationwide connectivity to data services, and enabling competitive development of data technology.¹¹⁷

The authority to promote the public interest by preventing spectrum licensees from acting in an anticompetitive manner is longstanding. In 1970, the Commission imposed prime time access rules on broadcasters, citing its authority under Section 303 to generally encourage the larger and more effective use of radio in the public interest.¹¹⁸ Reviewing common network practices, the Commission found that “only three organizations control[led] access to the crucial prime time evening television schedule”—an “unhealthy situation.”¹¹⁹ Because the television industry monopolized control and eliminated sources of programming, it was in the public interest to limit network control, give independent programmers more access to the airwaves, and give the public more programming options.¹²⁰ The Commission concurrently adopted the financial interest and syndication rules “to encourage the development of diverse and antagonistic sources of program service.”¹²¹

On appeal of the prime time access rules order, the Second Circuit upheld the Commission’s authority under Section 303 to order licensees to give other competitors and

¹¹⁶ *Id.* at ¶¶ 66, 68.

¹¹⁷ *Id.* at ¶¶ 1, 28.

¹¹⁸ *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 478 (2d Cir. 1971) (*Mansfield Television*). *See also* 47 U.S.C. § 303.

¹¹⁹ *Amendment of Part 72 of the Commission’s Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, Docket No. 12782, Report & Order, 23 FCC 2d 382, ¶ 21 (1970).

¹²⁰ *Mansfield Television*, 442 F.2d at 476.

¹²¹ *Id.*

entrants the opportunity to broadcast.¹²² The Court also upheld the financial interest and syndication rules on the basis that it was “reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting” and therefore within the Commission’s authority because it would encourage independent competing programmers in the market.¹²³

Based on Commission precedent, the Commission has ample authority to review the license transfers at issue under Section 310(d). Verizon and the MSOs cannot use their spectrum licenses to “block, degrade, or interfere with” consumers’ rights to competitive commercial services or competitors’ rights to participate in the market.¹²⁴ The industry practices that could have prevented competition and harmed consumer choice, leading the Commission to place restrictions on spectrum licenses in the Orders discussed above, will likely happen if the Commission does not use its authority to review SpectrumCo’s spectrum license transfer to Verizon in its entirety. Such practices would violate the “just” and “reasonable” requirements in Section 201. The Commission must use its authority to ensure the license transfer is in the public interest and promotes the effective, competitive use of spectrum.

C. The Commission May Act Pursuant to Its Statutory Authority Even If Its Rules or Reviews Effectively Render Existing Contracts Void or Illegal.

Not only must the Commission review the spectrum license transfer under Section 310(d), is also has the authority to review the accompanying agency, resale, and JOE agreements. Once the Commission has authority over a spectrum license transfer, Applicants cannot try to deny that authority by claiming to distinguish half of the contract as a separate agreement that the

¹²² *Id.* at 480.

¹²³ *Id.* at 483, 486.

¹²⁴ *Open Internet Order* at ¶ 134; *700 MHz Band Order* at ¶ 207.

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Commission does not have the right to review. In any event, the Commission has authority to regulate spectrum license transfers regardless of their accompanying contracts, and its rules can affect both preexisting and future agreements so long as the rules are constitutional.

The Commission has in the past taken action that effectively rendered existing contracts void. For example, the Commission prohibited housing associations' restrictive covenants because they impaired consumers' ability to receive video programming services through over-the-air reception devices.¹²⁵ In that instance, Section 207 of the Telecommunications Act of 1996 gave the Commission authority to create rules to promote consumer access to a broad range of video programming services and competition among service providers.¹²⁶ Specifically, "[t]he 1996 Act's direction to the Commission to prohibit restrictions that impair reception of over-the-air video programming services promotes the primary objective of the Communications Act, to 'make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.'"¹²⁷

The Commission also looked to its mandate to consider the public interest under Section 303. Thus, the Commission has authority to prohibit restrictive covenants that impair, delay, or block viewers' ability to access programming, even if the rules result in voided contracts. The Commission found it in the public interest to prohibit the covenants that impaired consumers'

¹²⁵ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service & Multichannel Multipoint Distribution Service*, CS Docket No. 96-83, Report & Order, Memorandum Opinion & Order, & Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, ¶¶ 5, 41–42 (1996) (*OTARD Order*). Restrictions included permits and shrubbery to conceal the devices. *Id.* at ¶ 16.

¹²⁶ *Id.* at ¶ 6.

¹²⁷ *Id.* at ¶ 1. *See* 47 U.S.C. § 151.

ability to access programming, but exempted nongovernmental covenants that promoted safety goals or did not impair program reception.¹²⁸ In adopting the rule, the Commission consolidated two previous rulemakings where it relied on its broad authority to implement regulations relating to wireless service,¹²⁹ specifically referring to Sections 1 and 705 and to Title III of the Communications Act.¹³⁰

The Commission has also voided preexisting contracts between television programming service providers and owners of multiple dwelling units (MDUs) because it was in the public interest to have more than one programming option in their homes.¹³¹ The Commission reasoned that since it had authority to implement rules that promote competitive satellite cable and satellite broadcast programming in the public interest under Section 628,¹³² it could reach the exclusivity agreements that program providers made.¹³³ Providers who wanted to recoup investments from the exclusivity agreements argued that the Commission's authority was limited to anticompetitive practices that limited programming, but not customers.¹³⁴ The Commission responded that it had broad authority over both programming and customers—Congress knew how to narrowly draft provisions, but intentionally made Section 628 broad.¹³⁵ Looking past the

¹²⁸ *Id.* at ¶¶ 6, 24, 51.

¹²⁹ *Id.* at ¶ 2.

¹³⁰ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 5809, ¶ 11 (1996).

¹³¹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) (*MDU Report & Order*).

¹³² *Id.* at ¶¶ 50, 55, 40.

¹³³ *Id.* at ¶¶ 4, 27.

¹³⁴ *Id.* at ¶¶ 39, 44.

¹³⁵ *Id.* at ¶ 44.

form of the agreements to the resulting anticompetitive practices, the Commission prohibited exclusivity agreements for harming competition and denying services to residents of MDUs.¹³⁶

D. The Commission Has Authority to Review Applicants' Proposed Spectrum Transfers and Therefore Has Authority to Review Accompanying Agreements.

The Commission has authority to review Applicants' proposed license transfers under Section 310(d), and therefore must also review the agency, resale, and JOE agreements under its sweeping authority under Section 303 to protect the public interest. It does not matter whether the side agreements themselves specifically involve spectrum license transfers—they are tied to the spectrum transfers, and the Commission can only collect all of the information it needs to determine what the communications landscape will look like post-transaction if the Commission considers *the entirety* of the agreements. The agency agreement may allow Applicants to cross-market each other's products in an attempt to dominate the market in an anticompetitive manner while effectively agreeing not to compete with each other.¹³⁷ Additionally, through the JOE the Applicants may develop new patents and use those patents to keep potential new entrants out of the market for broadband and wireless services. The Commission has the authority to review the agency, resale, and JOE agreements and must use that authority to determine whether the agreements will serve the public interest.

¹³⁶ *Id.* at ¶¶ 1, 15, 17. The D.C. Circuit later affirmed the Commission's authority to enact rules prohibiting exclusivity agreements. *Nat'l Cable & Telecom. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

¹³⁷ The Applicants have admitted that they entered into the commercial agreements, in part, in case the spectrum transfer did not work as planned. For example, Verizon Communications CEO Lowell McAdam has quoted Comcast CEO Brian Roberts as saying, "look, if I sell you this spectrum that puts me on a particular path. I need to have a fallback that if this doesn't work as well as we had hoped that I am not blocked out of wireless." Lowell C. McAdam, President, Chief Executive Officer, COO & Director, Verizon Communications, Inc., UBS Global Media & Communications Conference, December 7, 2011.

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Applicants argue that the Commission declines to review agreements that do not include license transfers.¹³⁸ But the Commission declined to review the agreements cited by Applicants for reasons other than being ancillary to the spectrum transfers at issue: in the AT&T-Centennial transaction, the Commission found the arguments regarding the settlement contract moot.¹³⁹ The Commission declined to review the GM-Hughes agreement because the alleged claim regarded specific classes of derivative shareholders and more properly belonged in state court.¹⁴⁰ Finally, the Commission did not decline to review any agreements in the Sprint Nextel-Clearwire transfer, but instead *declined to impose* reviews on all potential financially-backed contracts.¹⁴¹ Furthermore, precedent exists for the Commission reviewing side agreements in spectrum transfer proceedings. For example, the Commission reviewed several agreements addressing business matters other than the proposed spectrum transfer (e.g., joint ventures and over-the-air broadcasting) during the Comcast/NBCU merger.¹⁴²

In mandating that the Commission review license transfers, Congress granted the Commission broad authority and responsibility to determine whether proposed license transfer agreements—viewed in their entirety—affirmatively enhance the public interest. If the agreements fail to serve the public interest, frustrate the purposes of the Communications, or

¹³⁸ Joint Opposition at 70–71.

¹³⁹ *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17490-17491 ¶ 98; *see also AT&T Inc. and Centennial Communications Corp.*, Memorandum Opinion & Order, 24 FCC Rcd 13915, ¶ 152 (2009) (“AT&T-Centennial Order”).

¹⁴⁰ *General Motors Corp. and Hughes Electronics Corp.*, Memorandum Opinion & Order, 19 FCC Rcd 473 ¶ 314 (2004).

¹⁴¹ *Sprint Nextel Corp. and Clearwire Corp.*, Memorandum Opinion & Order, 23 FCC Rcd 17570 ¶ 101 (2008).

¹⁴² *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion & Order, 26 FCC Rcd 4238, ¶ 38, 159–62 (2011).

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frustrate the ability of the Commission to achieve the goals of the Act, the Commission must block the license transfer and accompanying agreements, or permit the transfer of spectrum only if the anticompetitive side agreements are voided.

CONCLUSION

WHEREFORE, the Commission should deny the Applications and block the Applicants' commercial agreements or refer the matter for a hearing pursuant to Section 310(d).

Respectfully submitted,

/s Harold Feld
Legal Director

/s Jodie Griffin
/s John Bergmayer
Staff Attorneys

/s Kara Novak
Law Clerk

PUBLIC KNOWLEDGE

MEDIA ACCESS PROJECT
NEW AMERICA FOUNDATION OPEN
TECHNOLOGY INITIATIVE
ACCESS HUMBOLDT
BENTON FOUNDATION
NATIONAL CONSUMER LAW CENTER, ON
BEHALF OF ITS LOW-INCOME CLIENTS

March 26, 2012

DECLARATION OF HAROLD FELD

I, Harold Feld, declare under penalty of perjury that:

1. I have read the foregoing Reply Comments of Public Knowledge et al.
2. I am the Legal Director for Public Knowledge (“PK”), an advocacy organization with members, including Verizon Wireless subscribers and subscribers of multichannel video programming cable service, who, in my best knowledge and belief, will be adversely affected if the Commission approves the proposed transactions.
3. PK members use the wireless devices associated with their accounts to make and receive voice calls, send and receive text messages, and use data services when they travel to various locations throughout the United States. PK members also receive multichannel video programming and wireline broadband access.
4. In my best knowledge and belief, PK members will be directly and adversely affected if the Commission allows the proposed transactions between Verizon Wireless and SpectrumCo and between Verizon Wireless and Cox TMI Wireless to proceed. They will likely face fewer choices for wireline and wireless broadband and for cable service. Furthermore, if the agreements are permitted, Applicants may subsequently modify the agreements in anticompetitive ways without FCC oversight, creating higher prices for these services for PK members.
5. The allegations of fact contained in the petition are true to the best of my personal knowledge and belief.

/s Harold Feld
Legal Director
PUBLIC KNOWLEDGE

CERTIFICATE OF SERVICE

I certify that on March 26, 2012, I sent a redacted copy of the foregoing Reply Comments by email to the following:

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/s Jodie Griffin
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PUBLIC KNOWLEDGE