

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

In re Applications of)
)
SPECTRUMCO, LLC, Transferor)
COX TMI WIRELESS, LLC, Transferor)
)
and)
)
CELLCO PARTNERSHIP D/B/A)
VERIZON WIRELESS, Transferee)
)
for Consent to the Assignment of AWS-1)
Licenses)

WT Docket No. 12-4

To: The Commission

REPLY TO JOINT OPPOSITION TO PETITION TO DENY

**RURAL TELECOMMUNICATIONS
GROUP, INC.**

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SUMMARY

The transactions proposed by Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless, LLC (collectively, “Applicants”) would cause significant harm to RTG, its members, and Americans who live, work and travel through rural America. Just as it has failed to make any efforts to put its existing AWS spectrum to use, Verizon Wireless is likely to warehouse any AWS spectrum acquired in these transactions, denying the benefits derived from use of such spectrum throughout its vast service area. Letting valuable spectrum lie fallow disservices the public interest in many ways, and SpectrumCo’s sale of its spectrum with no intent to actually buildout its AWS licenses magnifies the harm resulting from this transaction. SpectrumCo has conceded that it never intended to buildout its licenses, and post-hoc justifications for such admissions do nothing to refute justified concerns of license trafficking. At a minimum, an evidentiary hearing is warranted under Section 309(e) of the Communications Act to resolve such issues.

Perhaps the greatest harm that will result from approval of the proposed transactions is the loss of two potential nationwide competitors. That the license sale would occur prior to SpectrumCo and Cox initiating service does nothing to diminish the competitive impact of the loss of such well positioned competitors.

Not only are the proposed transactions, combined with related agreements between the Applicants, contrary to the public interest, they appear to violate both the Sherman Antitrust Act and Section 262(c) of the Communications Act. Contrary to Applicants’ assertions, these agreements are directly relevant to the license transfers, as both Comcast and the FCC appear to have recognized. Applicants’ exceedingly narrow reading of Section 262(c) does not support its

ability to enter into a joint venture that would substantially reduce competition in the markets for both telecommunications service and video programming.

In reviewing the proposed transactions, the Commission should apply a lowered spectrum screen as proposed in RTG's petition to deny. The proposed transactions also highlight the need for a spectrum cap, and RTG urges the Commission to commence a rulemaking proceeding based on RTG's pending petition for rulemaking to consider adoption of such a cap.

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REPLY TO JOINT OPPOSITION TO PETITION TO DENY

The Rural Telecommunications Group, Inc. (“RTG”) ¹, by its attorneys and pursuant to Section 1.939 of the Federal Communications Commission’s (“FCC” or “Commission”) Rules and Regulations, hereby responds to the Joint Opposition to Petitions to Deny and Comments (“Opposition”) filed by Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”), SpectrumCo, LLC (“SpectrumCo”) and Cox TMI Wireless, LLC (“Cox”) (collectively, “Applicants”).

I. RTG HAS STANDING TO FILE A PETITION TO DENY IN THIS PROCEEDING.

In a footnote buried 54 pages into their Opposition, and 27 pages after first mentioning RTG, the Applicants argue that RTG lacks the standing to petition to deny the above-referenced

¹ RTG is a 501(c)(6) trade association whose members consist of rural and small wireless carriers and licensees who serve less than 100,000 subscribers. In addition to the numerous anticompetitive public interest harms that will impact all Americans should the two deals proceed, the proposed sale of spectrum will specifically harm RTG’s members and its members’ subscribers; accordingly, RTG, through its members, is a real party in interest in the above-captioned proceeding and has standing to file the instant petition.

Applications.² The Applicants argue that RTG failed to state “how grant of the instant transactions will result in a direct injury to RTG.”³ RTG’s members hold wireless licenses in many of the markets that are the subject of the Applications and would be competing against a post-transaction Verizon Wireless and the Petition makes clear that they would be harmed by grant of the Applications. As noted therein, the concentration of additional AWS licenses in the hands of Verizon Wireless will make it harder for rural wireless carriers to compete and the removal of SpectrumCo and Cox from ever becoming viable, facilities-based nationwide competitors to Verizon Wireless will leave RTG members dependent upon a dwindling number of options for nationwide roaming coverage. Similar meritless claims of lack of standing have been made against RTG in similar large scale license transfer proceedings and the FCC has never rejected RTG’s standing in any of these proceedings.

II. APPLICANTS FAIL TO DEMONSTRATE THAT APPROVAL OF THE PROPOSED TRANSACTION WILL SERVE THE PUBLIC INTEREST.

A. Verizon Wireless has a Demonstrated History of Warehousing Spectrum and is Likely to Warehouse any Spectrum Acquired from SpectrumCo and Cox.

While Verizon Wireless claims that it needs the spectrum it seeks to acquire from SpectrumCo and Cox to improve its service to its subscribers, Verizon Wireless is more likely to warehouse this spectrum, as it has done with similar AWS spectrum, than put it to use for the benefit of the public. Verizon Wireless has held thirteen 20 MHz AWS licenses since 2006, but has yet to use such valuable spectrum to provide any type of communications service. Verizon Wireless has presented no evidence that it has done *anything* to prepare its licensed AWS spectrum for use. Although Verizon Wireless cites the number of incumbent operators that have been relocated to date and the fact that it has incurred expenses in connection with such

² Opposition at p. 54, n. 173.

³ *Id.* at p. 55, n. 173.

relocation, Verizon Wireless fails to mention what specific steps, if any, it took to clear its licenses in the AWS band of incumbent users. In addition, Verizon Wireless does not seek to incorporate the AWS band into its consumer devices in anticipation of future use of the spectrum. For example, two of Verizon Wireless's most popular mobile devices today,⁴ the Apple iPhone 4S⁵ and the Motorola Droid RAZR⁶ are designed to work only on the Cellular, 700 MHz and PCS bands, but not on AWS frequencies. Clearly, Verizon Wireless is not even attempting to seed the marketplace with devices that will work on AWS spectrum it has held since 2006. While Verizon Wireless has not yet failed to meet its buildout deadlines for its existing AWS licenses, its failure to take any actions toward meeting such deadlines is strongly suggestive of warehousing. Moreover, the FCC has recognized the need for accelerating these deadlines to expedite the use of AWS spectrum.⁷

Applicants tout Verizon Wireless's spectrum efficiency and argue that because Verizon Wireless is using its spectrum (on a per megahertz basis) to serve significantly more customers than T-Mobile, this "belies any claim that Verizon Wireless is warehousing spectrum."⁸ Regardless of how efficiently Verizon Wireless may or may not be using its licensed *and*

⁴ Ginny Mies, "Top 5 Verizon Phones," PC World (January 30, 2012), http://www.pcworld.com/reviews/collection/3768/top_5_verizon_phones.html (last viewed March 26, 2012).

⁵ See http://store.apple.com/us/browse/home/shop_iphone/family/iphone/iphone4, (last viewed March 26, 2012).

⁶ See <http://www.motorola.com/Consumers/US-EN/Consumer-Product-and-Services/Mobile-Phones/ci.DROID-RAZR-BY-MOTOROLA-US-EN.alt#anchor>, (last viewed March 26, 2012).

⁷ *In the Matter of Amendment of Parts 1, 22, 24, 74, 80, 90, 95, and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services and Imposition of a Freeze on the Filing of Competing Renewal Applications for Certain Wireless Radio Services and the Processing of Already-Filed Competing Renewal Applications*, Notice of Proposed Rulemaking and Order, WT Docket No 10-112, FCC 10-86 (released May 25, 2010).

⁸ Opposition at p. 27.

operational spectrum, any such efficiency does not and can not transform the public harms of spectrum warehousing frequently identified by the Commission⁹ to public benefits.

B. SpectrumCo Never Fully Attempted to Build Out its Network.

In its petition to deny, RCA – The Competitive Carriers Association (“RCA”) correctly pointed out that the members of SpectrumCo appear to have engaged in trafficking by acquiring and then selling their wireless licenses with no intent to actually build out those licenses in contravention of the FCC’s rules and the public interest.¹⁰ While Applicants argue that the members of SpectrumCo “tried to develop their spectrum but the business case ultimately did not materialize,”¹¹ such argument is belied by the fact that at least one member (Comcast) publicly stated shortly after acquiring its spectrum that it had no intention of building out its licenses. In referencing the statement of Comcast CFO Michael Angelakis earlier this year that Comcast “never really intended to build that spectrum”, Applicants creatively explain that “[t]his remark was meant to convey the thought process following the years of evaluation and analysis, not SpectrumCo’s intentions at the time the AWS licenses were acquired.”¹² While this is a valiant attempt to explain away a bald admission of trafficking, it also completely ignores the similar statements made by Comcast executives back in 2006 well before the so-called “years of

⁹ *In the Matter of Joint Statement on Broadband*, GN Docket No. 10-66, Connecting America: The National Broadband Plan (released March 16, 2010) (“*National Broadband Plan*”) (“The FCC has expressed concern that existing licensees may not fully utilize or plan to utilize the entire spectrum assigned to them; as a result, a substantial amount of spectrum may be underused, especially in rural areas.”).

¹⁰ RCA Petition to Deny at pp. 16-19. *See also* MetroPCS Communications, Inc. Petition to Deny Applications, p. 3, n. 9 (“The sellers need to provide documents sufficient for the Commission to ascertain whether they acquired the spectrum at issue with a *bona fide* intent to construct facilities and provide beneficial services to the public”).

¹¹ Opposition at p. 31.

¹² Opposition at p. 36, n. 104.

evaluation and analysis.”¹³ These admissions clearly raise serious public interest issues in connection with the proposed transaction, and at a minimum mandate exploration at an evidentiary hearing pursuant to Section 309(e) of the Communications Act.

C. The Loss of Potential Competitors is Contrary to the Public Interest.

In its Petition to Deny, RTG demonstrated how the transfer of spectrum from SpectrumCo and Cox to Verizon, and the consequent loss of two of the largest potential competitors to Verizon Wireless for the provision of nationwide voice and data service, will irreparably harm the competitive market for these services nationwide to the detriment of all American consumers of wireless telecommunications services.¹⁴ Applicants argue that the Commission should ignore this competitive earthquake because SpectrumCo and Cox have not yet commenced the provision of service. However, Applicants themselves recognize the relevance of potential competitors to an assessment of marketplace competition.¹⁵

Applicants also analogize this proceeding to an unrelated proceeding where the Commission, according to Applicants, disposed of “generalized claims similar to those raised by the same parties here” based on a failure to present facts or evidence that specific competitive harm would result in the markets at issue.¹⁶ However, unlike the informal comments at issue in *D&E Investments*, RTG’s Petition to Deny in this proceeding raised specific public interest harms that will result in all markets subject to the proposed transaction if the transaction is

¹³ Heather Forsgren Weaver, “Leap, MetroPCS break into major markets with AWS spectrum,” RCR Wireless (September 25, 2006), <http://www.rcrwireless.com/article/20060925/sub/leap-metropcs-break-into-major-markets-with-aws-spectrum/> (last viewed March 26, 2012).

¹⁴ See *RTG Petition to Deny* at pp. 2-3, 10-12. These public interest harms are further exacerbated by the Commercial Agreements between the applicants, discussed both in the petition and further below.

¹⁵ See *Opposition* at p. 46 (arguing that certain markets are competitive where “licensees are either competing today, could enter the market and compete, or could assign their spectrum to others seeking to compete.” (emphasis added)).

¹⁶ *Opposition* at p. 42 (citing *New Cingular Wireless PCS, LLC and D&E Investments, Inc.*, Order, DA 12-232, (WTB rel. Feb. 16, 2002) (“*D&E Investments*”).

approved. Among other issues raised by RTG specifically in its Petition in this proceeding are Verizon Wireless's warehousing of spectrum, the removal of the Cable Companies as potential competitors to Verizon Wireless, and the unlawful cartel established by the Commercial Agreements.

III. THERE IS A PRESSING NEED TO REVIEW THE PROPOSED TRANSACTIONS WITH A LOWERED SPECTRUM SCREEN AND AN OVERALL NEED FOR THE COMMISSION TO ADOPT A SPECTRUM CAP.

Applicants argue that because Verizon Wireless will not exceed the FCC's *current* spectrum screen, the proposed transaction will not diminish competition in any area. However, the current spectrum screen does not adequately protect against the harms posed by the country's largest spectrum holders from warehousing and further consolidating additional spectrum and reducing competition in the process. Applicants fail to dispute the fact that the Commission has stated a need to revisit the current spectrum screen. American consumers are relying upon the Commission to prophylactically maintain a minimum level of facilities-based competition in each market across the country by acting to prevent an overconcentration of spectrum in the hands of a few carriers. RTG has proposed in a *Petition for Rulemaking* that the Commission impose a spectrum cap of 110 megahertz in each county for all bands below 2.3 GHz¹⁷ and an additional spectrum cap of 50 megahertz in each county for all bands below 1 GHz.¹⁸ RTG strongly urges the Commission to issue a Notice of Proposed Rulemaking separate and apart

¹⁷ See *In the Matter of Rural Telecommunications Group, Inc. Petition for Rulemaking to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, Rural Telecommunications Group, Inc. Petition for Rulemaking (filed July 16, 2008) ("*Petition for Rulemaking*"). The FCC put RTG's *Petition for Rulemaking* out for comment on October 10, 2008 (Public Notice, RM No. 11498, DA 08-2279).

¹⁸ See *In the Matter of Application of AT&T Inc. and QUALCOMM Incorporated for Consent to Assign Licenses and Authorizations*, Reply to Joint Opposition to Petition to Deny of the Rural Telecommunications Group, Inc., WT Docket No. 11-18, FCC 11-88 (filed March 28, 2011) at p. 5.

from this proceeding to determine whether a spectrum cap should be imposed in the current environment.

A lowered spectrum screen and a CMRS spectrum cap can co-exist harmoniously and Commission utilization of both of these tools will solidify competition from facilities-based competitors who yearn for additional spectrum in order to launch competitive 4G/LTE networks to compete against Verizon Wireless. However, regardless of whether and when the Commission may act to adopt a spectrum cap in response to the Petition for Rulemaking, the Commission must adjust its existing spectrum screen in connection with its consideration of this transaction. Specifically, RTG urges the Commission to lower the applicable spectrum screen to approximately 106 megahertz in each county for all CMRS bands, a value which corresponds to one-quarter of all spectrum available to CMRS providers. RTG is not alone in its support for use of a spectrum screen approximating 106 megahertz. Several parties in this proceeding have filed petitions urging for a similarly revised spectrum screen.¹⁹

In the absence of a spectrum cap, spectrum screens were implemented by the Commission to ensure that the right markets are examined as the Commission considers whether a competitive environment will be adversely affected by a proposed transaction. Specifically, the Commission determined that “under the statutory regime set out by Congress, the Commission has an obligation, distinct from that of the Department of Justice (“DOJ”), to consider as part of the Commission’s public interest review the anticompetitive effects of acquisitions of CMRS spectrum, including those that occur in the secondary market.”²⁰ The

¹⁹ See, e.g., Petition to Deny of T-Mobile USA, Inc., WT Docket No. 12-4 (filed February 21, 2012) at p. 30; Petition to Condition or Otherwise Deny Transactions of RCA – The Competitive Carrier Association, WT Docket No. 12-4 (filed February 21, 2012) at p. 48.

²⁰ *In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, WT Docket No. 01-14, FCC 01-328 (released December 18, 2001) (“*2000 Biennial Review*”) at ¶ 62.

spectrum screen is a tool that reinforces the Commission’s stated objective of discouraging anticompetitive behavior.²¹ The Commission has a long-standing position of reviewing proposed transactions on a case-by-case basis and in the decade-plus time the spectrum screen has been utilized, the Commission has always had the discretion to adjust the megahertz value of the screen in order to accommodate the CMRS market at specific points in time.²² Accordingly, the Commission has unquestionable authority to reduce the applicable spectrum screen on a case-by-case basis in order to promote competition and remove competitive harms.

In determining what spectrum screen to apply to the CMRS industry today, the Commission should examine FCC and DOJ precedent. Significant consumer benefits stem from the presence of a fourth market competitor, and the Commission has recognized this fact for over a decade.²³ More recently, in its review of AT&T Inc.’s attempted takeover of T-Mobile USA, Inc., DOJ determined that “[t]he substantial increase in concentration that would result from this merger, and the reduction in the number of nationwide providers from four to three, likely will

²¹ *2000 Biennial Review* at ¶ 54.

²² *Id.*

²³ *In the Matter of 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, Report and Order, WT Docket No. 98-205, FCC 99-244 (released September 22, 1999) at ¶ 44 (“We believe that significant benefits of competition are unlikely to be exhausted with the entry of a third carrier.”) (“[W]e draw upon our experience in other telecommunications markets, where consumers generally have benefited from their ability to choose from among more than three firms to obtain the services they desire.”). Other countries have determined that four competitors at a bare minimum are needed to maintain effective competition. After a very lengthy review period, the government of the much smaller United Kingdom has recently determined as much. House of Commons, Culture, Media and Sport Committee, *Spectrum: Government Response to the Committee’s Eight Report of Session, 2010-2012* (released January 24, 2012) (“*UK Parliament Report*”) at ¶ 47 (“From the evidence we have heard, we believe that Ofcom’s proposal to secure at least four mobile network operators after the next spectrum auction is an adequate measure to safeguard plurality of mobile network operation. We are reassured that four is a minimum rather than a limit, as imposing such an artificial constraint on the number of operators in the market would inhibit competition.”) and ¶ 48 (“In its consultation Ofcom proposes that, after the auction, there should be at least four holders of a minimum spectrum portfolio that are “credibly capable of offering high quality data services in the future.”), <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmcomeds/1771/1771.pdf> (last viewed March 26, 2012).

lead to lessened competition due to an enhanced risk of anticompetitive coordination.”²⁴ Given that the Commission has “an obligation to ensure that acquisitions of CMRS spectrum do not have anticompetitive effects that render them contrary to the public interest”²⁵ and that a healthy CMRS industry should have at a minimum four competitors in each market, it is mathematically impossible to sustain a spectrum screen that passively endorses the aggregation of up to one-third of the spectrum in a given market, and in some cases, beyond that amount. Under the current spectrum screen, each of the country’s largest mobile operators could, piece-by-piece, aggregate up to one-third of the spectrum in each market without raising any red flags. This type of incremental consolidation will crowd-out a fourth, fifth or sixth competitor in these very same markets. Instead, the only possible way to maintain a functional spectrum screen and support at least four competitors in each market is to reduce the spectrum screen to approximately 106 megahertz, or one-quarter of the available CMRS spectrum in a given market. Under RTG’s proposed spectrum screen, operators such as Verizon Wireless could consolidate up to one-quarter of the available spectrum in a given market. This way, even if all four of the country’s nationwide operators pushed to aggregate as much spectrum as they could in any given market, when the dust settles, consumers will have at least four competitors to choose from.

The Commission’s migration from a hard spectrum cap of 45 megahertz, which at the time represented approximately one-quarter of all available CMRS spectrum in the marketplace, to a spectrum screen that was approximately one-third of all available spectrum in the

²⁴ *U.S. v. AT&T, Inc., T-Mobile USA, Inc. and Deutsche Telekom AG*, Case 1:11-cv-01560, Complaint (Dist. D.C. Aug. 31, 2011) at ¶ 36.

²⁵ *2000 Biennial Review* at ¶ 55.

marketplace, came about during its review of the AT&T Wireless-Cingular Wireless merger.²⁶

When explaining how it derived the newly applicable spectrum screen of 70 megahertz, the

Commission noted:

By selecting 70 MHz as the threshold, we ensured that we subjected to further review any market in which the level of spectrum aggregation will exceed what is present in the marketplace today. As an initial matter, although 70 MHz represents a little more than one-third of the total bandwidth available for mobile telephony today, we emphasize that a market may contain more than three viable competitors where one entity controls this amount of spectrum, because many carriers are competing successfully with far lower amounts of bandwidth today.²⁷

In other words, the Commission determined that because no market player exceeded the one-third threshold at the time, it was a reasonable line in the sand. However, the commercial mobile wireless industry that existed in 2004 (and that the Commission was basing its analysis on) was dramatically different than today's industry in two very important respects. First, no mobile operator in 2004 had a genuine, facilities-based, nationwide network and corresponding coverage to offer its subscribers. Accordingly, even the country's largest mobile wireless operators (whether in terms of market share, spectrum-depth, or size of network) depended on roaming agreements at the regional or national level, especially from regional, small and rural operators scattered across the country. Therefore, the existence of potentially only three operators in any given market, whether urban or rural, was significantly less critical to competition within the market because *all* of those market players would be dependent upon other operators not in that same market for nationwide roaming. Quite simply, there was little chance those three players in a given market would be the *same* three players in each and every market across the country.

²⁶ *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 04-70, FCC 04-255 (released October 26, 2004) (“*AT&T-Cingular Merger Order*”).

²⁷ *AT&T-Cingular Merger Order* ¶ 109.

That clearly is not the case today. Both Verizon Wireless and AT&T are omnipresent having successfully gobbled up larger regional players such as Dobson Cellular, Edge Wireless, Rural Cellular, Centennial Wireless and ALLTEL Communications, as well as dozens of small and rural operators over the years, and as a result have very little dependence on other carriers for roaming coverage.

A second important difference between the mobile wireless marketplace “then” and the same marketplace today is the fact that consumer mobile data consumption has increased significantly as has the need for more spectrum. For example, the Commission notes that mobile operators in 2004, including Verizon Wireless, were able to offer simple voice and data services using thirty-five megahertz or less of spectrum.²⁸ The problem today is that these other regional players that offered roaming - like Dobson, Rural Cellular, and especially ALLTEL - are not only absent from the marketplace today, but the beneficiaries of their demise, such as Verizon Wireless, have increased their spectrum holdings incrementally through auction and secondary market purchases while the remaining few competitors have not had an opportunity to access new spectrum so that they can offer the latest new 3G and 4G services in order to compete against Verizon.

If the Commission ultimately approves the proposed transactions, then the Commission should adopt a lowered spectrum screen of approximately 106 megahertz so that it may also perpetuate the prospects for long-term competition of no fewer than four national market players. For example, in no fewer than 23 of the Top 50 CMAs in the country, Verizon Wireless will

²⁸ *Id.* (“For example, Verizon Wireless has recently launched EV-DO service in five markets in which it hold 30 MHz of bandwidth – Austin, Texas; Milwaukee, Wisconsin; and Miami, Tampa and West Palm Beach, Florida – and in most other locations where it has begun to offer EV-DO, it is doing so with 35 MHz of spectrum. Similarly, Dobson has recently announced launch of EDGE service throughout its 16-state territory, where it holds no more than 30 MHz of bandwidth in over 90 percent of the applicable counties.”)

exceed the 106 megahertz screen in the combined Verizon-Cox and Verizon-SpectrumCo transactions. This is in addition to 9 of the Top 50 CMAs today where Verizon already holds in excess of 106 megahertz of spectrum before either of the proposed transactions are taken into consideration. The same pattern holds true for smaller markets (including rural CMAs) under consideration in these deals. Verizon is attempting to position itself to control one-third, or more, of the available spectrum in hundreds of markets across the country, but it is doing so at the expense of American consumers who are denied a marketplace where at least four providers can exist independently with sufficient spectrum to offer *competitive* 4G services.

As discussed below, the Commission should also move forward on the *Petition for Rulemaking*. A hard cap of 50 megahertz per county below 1 GHz and 110 megahertz per county below 2.3 GHz will establish a clearly identifiable standard for all parties engaging in spectrum assignment transactions on a forward-moving basis. Until such time as new CMRS spectrum is allocated and released at auction, the hard caps of 50 megahertz and 110 megahertz will provide market players with clear guidelines when negotiating future secondary market transactions, which in turn will streamline the review process of the Commission and leave less uncertainty for existing and prospective licensees. Other countries, including Canada just this month, have identified the use of spectrum caps as highly appropriate for maintaining effective competition and promoting the public interest.²⁹

²⁹ *UK Parliament Report* ¶ 55, Response to 5 & 6 (“The Committee’s assessment clearly articulates the difficulties faced by Ofcom. We also believe that Ofcom’s approach of a mix of spectrum floors and caps represents the most appropriate way forward to help address existing competitive tensions.”); *See also* Industry Canada, Spectrum Management and Telecommunications Department, “Policy and Technical Framework: Mobile Broadband Services (MBS) – 700 MHz Band” (released March 15, 2011) at ¶ 35 (“These spectrum caps will give four or more service providers in most regions, including AWS entrants, the opportunity to access prime spectrum in both the 700 MHz and 2500 MHz bands. The caps will also support competition by preventing a further concentration of holdings...allowing many service providers to improve their networks and the experiences of their customers.”), [http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/700MHz-e.pdf/\\$file/700MHz-e.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/700MHz-e.pdf/$file/700MHz-e.pdf) (last viewed March 26, 2012).

In arguing against a spectrum cap, Applicants are either confused about the location of certain spectrum or misunderstand what is being proposed. Applicants argue that “the limit RTG proposes – 110 MHz of spectrum below 2.3 GHz ignores the fact that more spectrum resources are coming into use every day via a variety of mechanisms. These additional resources, including the PCS G Block, BRS/EBS, MSS and WCS, and unlicensed alternatives like Wi-Fi, make such a limit both unnecessary and irrational.”³⁰ Of all the “additional resources” identified by Applicants, only the PCS G Block and MSS spectrum would fall within the proposed spectrum cap. BRS/EBS, unlicensed spectrum and WCS are all located above 2.3 GHz and would not be subject to the cap.

As previously noted, the adoption of a new spectrum cap through a notice and comment cycle does not preclude the Commission from adjusting the spectrum screen in its case-by-case review of a specific transaction, and it should clearly do so as set forth above. The public interest harms resulting from Verizon Wireless’s proposed purchase of spectrum from SpectrumCo and Cox vastly outweigh any conceivable public interest benefits, and RTG urges the Commission to use a lowered 106 megahertz spectrum screen specifically for these transactions and to issue a Notice of Proposed Rulemaking to consider adoption of a new spectrum cap.

IV. VIOLATION OF THE SHERMAN ACT IS RELEVANT TO THE FCC’S PUBLIC INTEREST ANALYSIS

In its Petition to Deny, RTG argued that various agreements between and among the Applicants and other cable companies³¹ (“Commercial Agreements”) create a cartel among Verizon Wireless, its parent Verizon, Comcast, Time Warner, Bright House Networks and Cox

³⁰ *Opposition* at p. 55.

³¹ The cable companies that are signatories to these agreements are Comcast, Time Warner, Bright House Networks and Cox (collectively, “Cable Companies”).

in violation of the Sherman Antitrust Act. Rather than fully addressing the merits of this argument, Applicants simply argue that the Commission should not pay attention to it since the Commercial Agreements are already the subject of review by the Department of Justice (“DOJ”) Antitrust Division.³² The fact that DOJ may engage in an *antitrust* analysis of the Commercial Agreements does not permit the Commission to evade its responsibility to determine whether grant of the subject applications is in the public interest. A coordinated effort by the Applicants to establish an unlawful cartel that will result in untold damage to the competitive marketplace for voice, video and data services is undoubtedly contrary to the public interest and indisputably relevant to the Commission’s consideration of the same. Comcast even admits as much.³³ More importantly, the Commission appears to have reached this same conclusion as to the relevancy of the Commercial Agreements. In connection with an announcement that the FCC has requested the Applicants to provide additional information on the Commercial Agreements³⁴, an FCC spokesman was quoted as follows:

After an initial review of the proposed spectrum license transfers as well as the commercial agreements between Verizon Wireless and several cable companies, the Commission staff has concluded that portions of the commercial agreements are inseparable from the proposed license transfer and related wireless competition issues. Consequently, those portions of the commercial agreements will be examined within the license transfer proceeding.³⁵

³² Although Applicants state that the Commercial Agreements are already the subject of DOJ review, a Comcast executive has argued that DOJ has no ability to approve or reject the subject transactions. See Eliza Krigman, “Comcast Executive Defends Verizon-SpectrumCo Deal,” POLITICO PRO (March 8, 2012), <http://www.politico.com/morningtech/0312/morningtech421.html> (last viewed March 26, 2012).

³³ *Id.* (quoting Comcast executive David Cohen: “The transaction is an integrated transaction. There was never any discussion about selling the spectrum without having the commercial agreements.”).

³⁴ Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau to Michael Samscock, Counsel, Verizon Wireless, *et.al.*, WT Docket No. 12-4 (March 8, 2012), <http://transition.fcc.gov/transaction/VerizonRFL.pdf> (last viewed March 26, 2012).

³⁵ Brendan Sasso, “FCC Will Probe Verizon-Cable Commercial Deals,” The Hill (March 12, 2012), <http://thehill.com/blogs/hillicon-valley/technology/215109-overnight-tech-fcc-will-probe-verizon-cable-commercial-deals> (last viewed March 26, 2012).

While RTG understands why the Applicants would prefer that the Commission not look behind the curtain, the Commission cannot properly evaluate the public interest ramifications of the proposed transactions without doing so.

V. THE JOINT VENTURE ESTABLISHED BY THE COMMERCIAL AGREEMENTS VIOLATES SECTION 652(c) OF THE COMMUNICATIONS ACT.

Section 652(c) of the Communications Act of 1934, as amended (“Act”), prohibits a “local exchange carrier and a cable operator whose telephone service area and cable franchise areas, respectively, are in the same market” from entering “into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market.”³⁶ Applicants unsurprisingly argue that Section 652(c) is inapplicable because Verizon Wireless is not a “local exchange carrier.” However, as discussed in RTG’s Petition to Deny, Verizon Wireless is owned *and* controlled by a local exchange carrier, Verizon. The fact that Section 652(c) does not specifically reference affiliates does not preclude its application to an affiliate. *See GTE Service Corp. v. FCC*, 224 F. 3d 768 (D.C. Cir. 2000).³⁷ Applicants argue that *GTE Service Corp.* is not relevant because that case involved a provision “whose legislative history made clear that it was intended to be interpreted broadly.”³⁸ However, the legislative history of Section 652(c) makes clear that *it is* intended to be interpreted broadly.³⁹ That history characterizes the relevant provision as “prohibiting joint ventures

³⁶ 47 U.S.C. § 652(c).

³⁷ *See also* Public Knowledge Petition to Deny at pp. 43-44.

³⁸ Opposition at p. 77, n. 274.

³⁹ H.R. REP. NO. 104-458, at 174 (1996). (referencing Congressional intent “in general, to take the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets.”).

between local exchange *companies* and cable operators that operate in the same market.”⁴⁰ By referring to local exchange *companies*, Congress made clear that it intended its joint venture prohibition to apply more broadly. As discussed extensively in the Petition to Deny, as a result of the effective replacement of landline voice services by wireless voice services over the last decade, the wireless service provided by Verizon Wireless serves as an effective substitute for local exchange service, and Congress’s intent was clearly to prohibit a scenario, like the one that would exist should the FCC grant the subject applications, where three potential competitors in the delivery of voice, Internet and video services (the Cable Companies, Verizon and Verizon Wireless) are acting in concert to reduce the field of competitors contrary to the purpose and intent of the Telecommunications Act of 1996 which sought to have cable companies and telephone companies compete head to head.

VI. CONCLUSION

RTG’s Petition to Deny demonstrated that the public interest harms that would result from grant of the subject applications greatly outweigh any public interest benefits that would result from such grant. In their Opposition, Applicants fail to meet their burden of demonstrating that the proposed transactions on balance serve the public interest. These transactions must be analyzed in the context of an updated spectrum screen that takes proper account of changes in spectrum usage. The Commission has recognized that the Commercial Agreements are intrinsically linked to the Applications, and the antitrust and competitive issues they raise must

⁴⁰ *Id.* (emphasis added)

be examined by the Commission in an evidentiary hearing pursuant to Section 309(e) of the Communications Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linda Braboy, of Bennet & Bennet, PLLC, 4350 East West Highway, Suite 201, Bethesda, MD 20814, hereby certify that a copy of the foregoing Reply to Joint Opposition to Petition to Deny of the Rural Telecommunications Group, Inc. was served on this 26th day of March, 2012, via electronic mail, on those listed below:

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