June 19, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: WT Docket No. 12-4, Proposed Assignment of Licenses to Verizon Wireless from SpectrumCo and Cox TMI Wireless
Notice of *Ex Parte* Meeting

Dear Ms. Dortch:

On June 15, 2012, Harold Feld, Senior Vice President; Jodie Griffin, Staff Attorney; and Carrie Ellen Sager, Legal Intern; of Public Knowledge (PK) met with Commissioner Clyburn, Dave Grimaldi, Louis Peraertz, and Seth Atkisson from Commissioner Clyburn's office.

As the Commission considers whether to approve the proposed spectrum transfers, PK believes it is important to consider the impact of the "spectrum gap" in addition to the spectrum crunch. As the gap between the amount of spectrum controlled by the top two providers and the amount controlled by others increases, meaningful competition becomes more difficult, limiting consumer choice and preventing new competitors from entering the market. PK concludes that the transactions should be blocked, and strongly maintains that if they are not, conditions must be put in place to protect consumers and competition within the industries.

If the Commission approves the spectrum transfers, the Commission should require a "use it or share it" condition, which would require any spectrum left unused by Verizon by 2016 to be included in the white spaces database for use by white spaces devices. Such a condition would be a boon to technology by encouraging developers to invest in white spaces technology. The spectrum would continue to be available for use on an unlicensed basis until Verizon builds out. Implementing this as a purely mechanical system would be easy because the condition would work with the existing white spaces databases, and would have the additional benefit of preventing the need for enforcement: Verizon would send notification when they turn on the new system, and if they fail to do so, the spectrum would automatically be put into the database and made available for use.

PK also supported the recommendation of Free Press and others that the Commission require divestiture of AWS-1 spectrum to enhance competition. PK also urged the Commission to resolve its Petition for Reconsideration of the spectrum screen, pending since the Verizon/AllTel transaction in 2008.[1] The spectrum screen is not a safe harbor, but here Verizon attempts to hold it up as a shield. Before using the spectrum screen as a tool in its analysis in this proceeding, the Commission should resolve PK's petition. Verizon also cannot claim that it had no notice of the petition since it was a party to the 2008 proceeding in which the petition was filed.

Grant of the pending Petition for Reconsideration would return the spectrum to 95 MHz by eliminating BRS and EBRS spectrum from consideration in the screen. As PK observed in the now four-year old Petition, inclusion of BRS and EBRS spectrum is unjustified because of its physical characteristics, because the band faces numerous encumbrances, and because the effect of the increase is to benefit the two largest providers to the detriment of competition as a whole. These reasons remain relevant today. However, if the Commission feels it should refresh the record, it should hold this transaction in abeyance pending resolution of the pending Petition.

Additionally, on the subject of spectrum aggregation, if the Commission requires divestitures of the parties, the Commission should ensure that the spectrum divested by Verizon Wireless is not simply bought by AT&T. The Commission can achieve this result by requiring Verizon Wireless to put the divested spectrum in a divestiture trust, which can then sell the spectrum only to carriers that meet certain criteria crafted to preserve competition in wireless service.

PK also urged the Commission to grant its challenge to the confidentiality claims of the Applicants for the governance structure of the JOE.[2] In particular, PK challenges the Applicants' classification of **[BEGIN HIGHLY CONFIDENTIAL**

[END HIGHLY CONFIDENTIAL] as confidential. This information is not commercially sensitive, but its disclosure is pivotal to the public review and discourse in this proceeding.

Companies with an interest in the proposed agreements are unable to speak out against the deals if they are denied access to this information through improper confidentiality claims. For example, a company like Netflix may have a substantial interest in the resolution of this proceeding, but the secrecy surrounding the governance of the JOE can hide its importance for companies that will be impacted by the JOE. This is particularly true for information—like the

[1] See Petition for Reconsideration of the Public Interest Spectrum Coalition, WT Docket 08-95 (filed Dec. 10, 2008).
[2] *See* Challenge to Confidentiality Designation of Public Knowledge, WT Docket No. 12-4 (May 9, 2012).

JOE—that is designated as Highly Confidential instead of Confidential, because then only outside counsel may view the information. Even if outside counsel spot provisions that could seriously harm their client, the confidentiality surrounding the information can prevent the counsel from being able to explain the full impact of the agreements on their client.

At their core, the proposed agreements represent the creation of the communications cartel of the next ten to fifteen years. **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] The fact that these companies maintain significant levels of control—40% of the wireless market, 40% of the residential broadband market, and 40% of the residential video market—means it will be a cartel with clout. Using the intellectual property they develop, the Applicants will be able to impose their own proprietary standards on the market—something Comcast has already shown itself to be particularly adept at.

The Applicants themselves have effectively admitted that these agreements mark the end of their attempts to directly compete with each other. For example, on one conference call Time Warner Cable stated that instead of competing with Verizon, they will offer enriched offerings available only to those who have dual subscriptions to both Verizon and Time Warner Cable.[3] The proposed agreements are the vessel for the Applicants' promises to work together instead of competing, therefore doing a great disservice to the public interest.

PK also pointed out that competition from companies like Apple are no competitive counterweight to the Applicants' collusion, since this type of competitor would be no match for the increased market power that Verizon and Comcast will gain through these transactions. Companies that control only content or only transmission paths will still in some way be dependent upon the Applicants, who will jointly control both conduit and content, and who **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Comcast in particular, which owns NBCUniversal, several cable networks, and a vast wireline Internet access service infrastructure, would face no meaningful competition from companies like Apple.

PK explained how the Applicants' related joint marketing, reseller, and JOE agreements will

[3] *See* Steve Donohue, *How will Time Warner Cable and Verizon Wireless innovate?* FIERCECABLE (Apr. 26, 2012), http://www.fiercecable.com/story/how-will-time-warner-cable-and-verizon-wireless-innovate/2012-04-26.

prevent or discourage competitors to Verizon Wireless from **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** The agreements would negatively affect the development of Wi-Fi networks by restricting [**BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** For example, a carrier like Pioneer might enter into a Wi-Fi backhaul agreement with Comcast, in order to offer a desirable coverage area to consumers without needing to build extensive infrastructure or use expensive data roaming agreements unless absolutely necessary. But under the agreements in this proceeding, **[BEGIN HIGHLY CONFIDENTIAL]** [4] **[END HIGHLY CONFIDENTIAL]**

The harms of this restriction are magnified when combined with **[BEGIN HIGHLY CONFIDENTIAL]**
[5] **[END HIGHLY CONFIDENTIAL]** These requirements would prevent the cable operator Applicants from launching competing wireless offerings, or discourage them from doing so. For example, Time Warner Cable's recent patent on "virtual ownership" of video programming and patent application for seamless "Wi-Fi roaming" could be used to launch a competing mobile service, but under the commercial agreements **[BEGIN HIGHLY CONFIDENTIAL]**

[6] **[END HIGHLY CONFIDENTIAL]**

Reference to the Applicants' document production simply confirms the conclusions of a textual analysis of the agreements. For example, **[BEGIN HIGHLY CONFIDENTIAL]**

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[4] **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[5] **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[6] *See* Letter from Harold Feld, Legal Director, and Jodie Griffin, Staff Attorney, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (Apr. 30, 2012).

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[END HIGHLY CONFIDENTIAL] In order to protect Wi-Fi offloading against the anticompetitive threats of the agreements, the Commission should impose a condition preventing Verizon from using any means to interfere with agreements between its competitors and the cable operators for Wi-Fi offload.

PK expressed support for DirectTV's analysis of the anticompetitive effects these agreements have already had on the video programming marketplace.[9] Similarly, the members of SpectrumCo terminated their partnership with ClearWire in favor of their new agreements with Verizon Wireless.[10]

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[7] **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**
[8] **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]
[9] *See* Comments of DirecTV, LLC, WT Docket No. 12-4 (filed Feb. 21, 2012) (describing how DirecTV was working with Verizon on bundling satellite video and wireless broadband services, but its partnership was terminated when the transactions at issue were announced.).
[10] *See* Samuel Weigley, *SpectrumCo to Wind Down Service with Clearwire Under $3.6 Billion Deal With Verizon*, INT'L BUSINESS TIMES (Dec. 2, 2011), http://www.ibtimes.com/articles/260388/20111202/verizon-wireless-spectrum-clearwire-agreement.htm.

Finally, PK noted that the proposed agreements create an attributable interest under a straight reading of Section 652 and the Commission's traditional tests.[11] The JOE and the resale agreements create a management interest by **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Such a management interest is prohibited under Section 652(a) and (b). Additionally, Section 652(c) prohibits joint ventures to provide video programming or telecommunications services; the JOE's requirement that **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] creates such a prohibited joint venture.

Respectfully submitted,

/s/
Harold Feld
Senior Vice President
Public Knowledge

[11] *See* Petition to Deny of Public Knowledge et al., WT Docket No. 12-4, Conf. App. A-8-A-9 (Feb. 21, 2012).