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**BY ELECTRONIC COMMENT FILING SYSTEM**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Notice – WT Docket No. 12-4 (Verizon-SpectrumCo/Cox)

Dear Ms. Dortch:

On August 2, 2012, SpectrumCo (on behalf of its members, Comcast, Time Warner Cable, and Bright House) and Cox (collectively, the "Cable Companies") submitted an ex parte (the "Cable Ex Parte") in this proceeding. The Cable Ex Parte responds to various concerns raised by MetroPCS, RCA-The Competitive Carriers Association, Sprint and others (collectively, the "Competitive Carriers") with respect to the pending applications. Among other issues, the Competitive Carriers' ex partes express their concern that the Cable Companies would provide exclusive or preferential access to Verizon Wireless ("Verizon") to the Cable Companies' joint network of Wi-Fi hotspots, called CableWiFi, which covers more than 50,000 Wi-Fi access points,[1] and would also refuse to provide comparable access to other wireless carriers on reasonable terms and conditions. The Cable Ex Parte resoundingly confirms the Competitive Carriers' fears in this regard.

In the Cable Ex Parte, the Cable Companies argue that the Data Roaming Order[2] does not apply to the CableWiFi network because it uses unlicensed spectrum. This assertion exacerbates the concern that the Cable Companies consider themselves to be free to discriminate in favor of Verizon as an outgrowth of the controversial cooperative Commercial Agreements under which a Joint Operating Entity ("JOE") is being created by Verizon and the Cable Companies to develop integrated wireless and wireline products. This response also expressly ratifies MetroPCS' concern that the Cable Companies do not plan to provide other wireless companies with access to the Cable Companies' CableWiFi network on "commercially reasonable terms."[3] This raises the specter that, in addition to having hoarded valuable Advanced Wireless Services spectrum to the detriment of the Competitive Carriers, the Cable Companies

[1] CableWiFi is a sizeable and serious wireless data network, with approximately four times the number of access nodes that MetroPCS has in cell sites across its entire network.
[2] See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order, 26 FCC Rcd 5411 ("Data Roaming Order").
[3] See MetroPCS July 13 Ex Parte at 2.

now are intent upon disposing of it in a manner that further hinders competition in the mobile wireless industry.

As is set forth in detail below, the Cable Companies are wrong as a matter of law to assert that their CableWiFi network is not subject to the Commission's data roaming rules. However, even if that were not the case, the circumstances presented here justify a special condition. Accordingly, the Commission should (1) clarify that the Cable Companies' provision of Wi-Fi services for a fee is covered by the Data Roaming Order; and (2) impose a condition in connection with any Commission approval of the above-referenced transactions that the Cable Companies must provide access to the CableWiFi network to wireless providers on commercially reasonable terms.[4]

## The *Data Roaming Order* Applies to the CableWiFi Network

In the Cable Ex Parte, the Cable Companies argue that the "Data Roaming Order does not apply to unlicensed uses of spectrum, such as Wi-Fi, that rely on Part 15 devices, because the Act defines 'mobile service' to include services 'for which a license is required,' and the Commission has determined expressly that this language excludes Part 15 unlicensed radio frequency devices from the definition of 'mobile services."[5] The Cable Companies are wrong for two reasons.

First, the rules adopted in the Data Roaming Order apply to all providers of "commercial mobile data services." The Data Roaming Order defines "commercial mobile data service" as "[a]ny mobile data service that is not interconnected with the public switched network and is: (i) provided for profit; and (ii) available to the public or to such classes of eligible users as to be effectively available to the public."[6] Notably absent from this definition is any reference to or use of the separately defined term of art "mobile service." Nor is there any indication that "commercial mobile data services" require a license.[7]

Section 20.12(e) of the Commission's Rules provides that a "facilities-based provider of mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions … ."[8] The Wi-Fi roaming that the Cable Companies are providing each other certainly meets the definition of commercial mobile data service. The Cable Companies are providing the Wi-Fi service to their own customers (and to each other) for a profit and the Wi-Fi service is available to the public or such classes of eligible users as to be effectively available to the public. Nothing more is required.

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[4] MetroPCS has demonstrated separately that the transactions should not be approved unless and until Verizon divests additional spectrum. See MetroPCS Comments on the Impact of the Verizon Wireless/T-Mobile Spectrum Assignments on the pending Verizon Wireless/SpectrumCo and Verizon Wireless Transactions, WT Docket No. 12-4, at Section II (filed July 10, 2012).

[5] Cable Ex Parte at 12.

[6] 47 C.F.R. § 20.3; see also Data Roaming Order.

[7] The Cable Companies also suggest that MetroPCS is requesting that the Commission regulate Wi-Fi as a common carrier service. See Cable Ex Parte at 12. This is patently false. The Commission's Data Roaming Order explicitly declined to regulate data roaming services as common carrier services, and MetroPCS is not asking the Commission to go further than the Data Roaming Order.

[8] 47 C.F.R. § 20.3(e).

Since the definition of "commercial mobile data service" does not limit the category to licensed services and does not reference or incorporate in any way the definition of "mobile service," the argument made by the Cable Companies that the CableWiFi network services are not "mobile services" is completely irrelevant. Because the Cable Companies offering of Wi-Fi services falls under the definition of "commercial mobile data services," such services must be offered by the Cable Companies on commercially reasonable terms and conditions pursuant to the Data Roaming Order.

Second, the Cable Companies are wrong that the term "mobile service" does not include any services provided using unlicensed spectrum. The Communications Act of 1934, as amended, (the "Act"), defines "mobile service" as:

> a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.[9]

The Cable Companies argue that Wi-Fi services are excluded from the definition of "mobile service" because such services are "unlicensed uses of spectrum . . . that rely on Part 15 devices."[10] They base this argument on subsection (C) of the above definition which refers to "any service for which a license is required" which they claim means that the entire definition must be read to exclude "unlicensed spectrum." This argument is nonsensical. The term "mobile service" *includes* those services encompassed by subsections (A), (B), and (C). The use of the word "includes" means that these subsections provide a partial list of the types of services that are included within the definition. Under traditional principles of statutory construction, a list of included items following the word "including" does not restrict the definition to those listed items.[11]

It certainly is not the case that a service needs to meet all three subsections of the definition to qualify as a "mobile service." For instance, the Cable Companies would have to concede that the term

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[9] 47 U.S.C. § 153(33).

[10] Cable Ex Parte at 12.

[11] *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2170 (U.S. 2012) (explaining that in an instance where "the definition is introduced with the verb 'includes' instead of 'means[,]' [t]his word choice is significant because it makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive."); *see also* Burgess v. United States, 553 U.S. 124, 131 n.3 (U.S. 2008) (recognizing that a definition with the word "includes" typically is a "term of enlargement, and not of limitation.").

"mobile service" is broad enough to include both private and common carrier services. Yet a common carrier mobile service would never meet the test of subsection (B) because that is limited only to "private one-way or two-way land mobile radio communications."[12] This simple illustration demonstrates that a "mobile service" need not meet all subsections of the definition to qualify.

This conclusion is further demonstrated by the fact that subsection (C) of the definition only refers to a licensed personal communications service ("PCS") established in the Personal Communications Services proceeding as being included in the definition of "mobile service." PCS in this instance does not include, for example, Public Mobile Services (including cellular) licensed under Part 22, Private Land Mobile Services licensed under Part 90, or Advanced Wireless Services and 700 MHz Services licensed under Part 27. Yet, all of these would be considered "mobile services" despite the fact that they are not specifically listed in Section 153(33).

The Cable Companies also can take no comfort in the Commission Order they cite "clarifying that the definition of 'mobile services' does not include Part 15 devices and unlicensed PCS."[13] As the Cable Companies concede, that clarification was made "to foster new technologies by permitting manufacturers to introduce new products without the delays associated with licensing."[14] Treating Wi-Fi services as commercial mobile data services that are subject to the Data Roaming Order would not give rise to any licensing requirement or give rise to any licensing delays.[15]

The bottom line is it is irrelevant that Wi-Fi is an unlicensed service within the terms of subsection (C) of the definition of "mobile service." The key is that the CableWiFi service meets the core definition of being "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves."[16]

## The Commission Should Obligate the Cable Companies to Make Their CableWiFi Network Available to Facility-Based Wireless Service Providers on Nondiscriminatory Terms

As is set forth above, the Cable Companies already are required to provide access to their CableWiFi network on commercially reasonable terms and conditions under the Data Roaming Order. However, given the circumstances presented in this transaction, that is not enough. As the Commission is aware, the cooperative Commercial Agreements between Verizon and the Cable Companies creating the JOE have generated considerable controversy. Interested parties have expressed understandable concerns

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[12] 47 U.S.C. § 153(33)(B).
[13] Cable Ex Parte at 12 citing Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd. 1411, ¶ 37 (1994).
[14] Cable Ex Parte at 12, n. 44.
[15] Furthermore, the Cable Companies can find no respite in 47 CFR §20.7(h) which excludes unlicensed radio frequency devices under Part 15 and unlicensed PCS devices from its definition of "mobile services within the meaning of Section 3(n) and 332 of the Act." Defining certain unlicensed services as mobile services under Section 332 could give rise to unintended regulatory consequences. No such consequences arise from making commercial Wi-Fi services subject to the data roaming rules.
[16] 47 U.S.C. § 153(33).

that the cozy relationship between Verizon and the Cable Companies – who in the absence of the Commercial Agreements would be vigorously competing in the provision of both wireless and video services – will harm competition. The harm will be increased if the Cable Companies accord preferential treatment to Verizon in terms of access to the CableWiFi network while denying access to other wireless carriers. The substantive position taken by the Cable Companies that the data roaming rule does not apply, if accepted, would grant them *carte blanche* to discriminate unfairly. And, notably absent from the Cable Ex Parte is any firm assurance that they will not do so.

But, even if the Commission were to confirm that the data roaming rules apply, substantial competitive harm could still ensue. The data roaming rule does not contain a strict non-discrimination requirement. This raises the risk that the Cable Companies would be able to cite the benefits accruing to them under the Commercial Agreements as a commercially reasonable basis to accord Verizon more favorable CableWiFi access. The Commission should not allow that to occur.

In the final analysis, the public interest requires both confirmation that commercial services offered over the CableWiFi network are subject to the rules adopted in the Data Roaming Order, and a special condition on the proposed transactions requiring the Cable Companies to provide facilities based wireless carriers with access to the CableWiFi network on reasonable non-discriminatory terms and conditions. This is justified because the Cable Companies have equivocated in their statements to the Commission in a manner that calls into question their willingness to abide by the data roaming rule – and now publicly have argued that the Data Roaming Order does not apply to their provision of such services. This approach is especially justified given that one of the pernicious effects of approving a Verizon-SpectrumCo transaction is that the Competitive Carriers will lose four potential roaming partners that could have provided an alternative to the Twin Bells.

Please direct any questions in connection with this notification to the undersigned.

Sincerely,

Carl W. Northrop
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