

**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

**PETITION TO DENY OF PUBLIC KNOWLEDGE, MEDIA ACCESS PROJECT,
NEW AMERICA FOUNDATION OPEN TECHNOLOGY INITIATIVE,
BENTON FOUNDATION, ACCESS HUMBOLDT, CENTER FOR RURAL
STRATEGIES, FUTURE OF MUSIC COALITION, NATIONAL CONSUMER
LAW CENTER, ON BEHALF OF ITS LOW-INCOME CLIENTS, AND
WRITERS GUILD OF AMERICA, WEST**

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Public Knowledge, Media Access Project, the New America Foundation Open Technology Initiative, Benton Foundation,¹ Access Humboldt, Center for Rural Strategies, Future of Music Coalition, National Consumer Law Center, on behalf of its low-income clients, and Writers Guild of America, West (collectively, “Petitioners”) petition the Federal Communications Commission (“FCC” or “Commission”) to deny the above-captioned application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC as well as the application of Verizon Wireless and Cox TMI Wireless as contrary to the public interest. Petitioners also urge the Commission to block the Applicants’ related cross-sale and joint operating entity agreements.

SUMMARY

When the largest cable multisystem operators (MSOs) propose a series of joint transactions with the largest wireless company, the Commission has a responsibility to take notice. When the wireless company in question is controlled by Verizon, one of the remaining incumbent local exchange carriers (ILECs) and until now a fierce competitor with these MSOs for data, video, and voice services, the need for thorough scrutiny with a skeptical eye increases yet again. And where, as here, the Applicants have refused to make complete copies of pertinent documents available in the record—even under the strictest confidentiality—alarm bells should ring with deafening insistence.

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

It does not take the celebratory plaudits of Wall Street analysts² to recognize that these proposed transactions would fundamentally alter the nature of the telecommunications world in a manner utterly contrary to that intended by the 1996 Telecommunications Act. In the first place, Applicants have agreed to transfer more spectrum to the largest wireless operator, aggravating existing anticompetitive problems with spectrum aggregation. In addition, Applicants have agreed to three critical side agreements bearing on each other's businesses that give rise to serious concern that not only will these providers decline to compete further with one another, they will actively collude with one another. As explained in greater detail in the Confidential Appendix, if the companies genuinely intend to compete in good faith, the structure of these agreements make it practically impossible to do so.

What the parties characterize as "agency agreements" to become the exclusive resellers of each other's services would be bad enough. It is difficult to see how exclusive agreements between the MSOs to resell Verizon's mobile voice service, and Verizon Wireless to resell the incumbent MSOs' video services, can serve the interests of competition that lie at the heart of the Telecommunications Act of 1996. It is unclear, for example, whether Verizon Wireless could market its new joint venture with Redbox to provide streaming services as a competitor to Comcast or Comcast's Hulu. But such innovation in new video services is precisely the kind of vibrant competition the 1996 Act intended to encourage. Similarly, it would appear from the exclusivity clauses

² See Marguerite Reardon, *Verizon's \$3.6 billion spectrum deal: Who wins and who loses?*, CNET NEWS (Dec. 2, 2011), [http://news.cnet.com/8301-30686_3-57335808-266/verizons-\\$3.6-billion-spectrum-deal-who-wins-and-who-loses/#ixzz1myz3s4Xl](http://news.cnet.com/8301-30686_3-57335808-266/verizons-$3.6-billion-spectrum-deal-who-wins-and-who-loses/#ixzz1myz3s4Xl); Elizabeth Woyke, *Telecom Deals Ratchet Up Price Of Wireless Spectrum*, FORBES (Dec. 2, 2011), <http://www.forbes.com/sites/elizabethwoyke/2011/12/02/telecom-deals-ratchet-up-price-of-wireless-spectrum/>.

described by the Applicants in their public instatement that SpectrumCo providers Comcast, Time Warner Cable, and Bright House will terminate their potential partnerships with Sprint and Clearwire, and that Verizon will terminate its video resale agreement with DIRECTV. Thus, the side agreements entered into by the parties already appear to have a negative impact on competition. To “supersize” Verizon Wireless with additional spectrum from Comcast, Time Warner Cable, Bright House, and Cox so that the largest wireless operator can better promote the services of the largest incumbent cable operators directly undermines the pro-competitive policies of the 1996 Act and is thus contrary to the public interest.³

Even more troubling is the agreement by the parties to form a Joint Operating Entity (“JOE”) “to develop innovative technology and intellectual property that will integrate wired video, voice and high-speed Internet with wireless technologies.”⁴ In other words, the parties will come together to jointly develop foundational patents and standards across the very areas where they should compete with one another. Control of such an intellectual property portfolio—which would include not merely patents, but proprietary standards and other critical elements for the deployment of services—is particularly troubling here. The parties jointly control approximately 40% of the wireless market, 40% of the residential broadband markets, and 40% of the residential video market. In addition, Comcast controls substantial programming interests through its

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

⁴ Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004993617 at 24 n.71 (“Verizon/SpectrumCo Public Interest Statement”). *See also* Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004996680, at 20 n.62 (“Verizon/Cox Public Interest Statement”).

control of NBC/Universal. The technologies developed by the JOE will therefore almost immediately become industry standards, to the competitive disadvantage of competitors such as Sprint or DIRECTV.

As discussed in greater detail in the separately filed Confidential Appendix, from the material made available by Applicants, the JOE seems designed to facilitate precisely this kind of anticompetitive behavior. No amount of good faith effort to continue to compete can change the fact that the structure of these agreements, combined with the license transfers, force the parties to share vital business information, avoid expensive competition, and discriminate against rivals. It is Economics 101, known since the days of Adam Smith, that where firms have freedom to avoid competition and the ability to collude against rivals they have incentive to do so.

That these concerns are future-looking does not alter the Commission's responsibility to examine their potential and guard against them. The parties bear the burden showing that the transaction will serve the public interest. This includes a responsibility on the part of the Commission that the parties will not, at some later date, use the agreements to undermine the pro-competitive policies of the Act, either by declining to compete vigorously or by actively colluding against competitors.

Applicants have sought to characterize the agreements as independent of the transaction and outside the scope of the Commission's review. As an initial matter, the circumstantial evidence argues against this. Even if we accept that Comcast, Verizon, and the other parties negotiated the license transfer and three complex agreements concerning their core businesses independently, how did it come that Cox will join this "independently" negotiated agreement and that it will also, apparently, trade spectrum as

the price of admission to the JOE?⁵ It is difficult to see how the Commission can simply rely on the assurances of the Applicants, especially when they have taken considerable pains to avoid submitting complete agreements into the record.

Even if the Commission were to ignore the totality of the circumstances, it must consider whether the agreements give rise to sufficient “influence and control” concerns that, for purposes of review under Section 310(d), the Commission can no longer consider this purely a transfer from the MSOs to Verizon Wireless. Section 652 prohibits cable operators from acquiring any “management interest” in any LEC with an overlapping territory, and prohibits any LEC, such as Verizon, from acquiring any “management interest” in any incumbent cable operator.⁶ In addition, the statute prohibits certain joint ventures or partnerships with regard to provision of video or voice service.⁷ As an initial matter, as explained more fully in the separately filed Confidential Appendix, Applicants have failed to comply even with the relatively modest “insulation criteria” under the attribution rules.⁸ In such circumstances, it would certainly seem that the license transfer and agreements, taken together, act to frustrate the purposes of Section 652 and therefore grant of the transfer cannot serve the public interest.

In the same way, the transfer raises concerns under Section 628(b) and Section 629. Section 628(b) prohibits unfair methods of competition by incumbent cable

⁵ Verizon/Cox Public Interest Statement, 20 n.62.

⁶ See 47 U.S.C. § 572(a)–(b).

⁷ See 47 U.S.C. § 572(c).

⁸ 47 C.F.R. § 76.501 Notes 1–5. As explained in the Confidential Appendix, it does not appear that these interests can be insulated. Even if they could be insulated, they would not address the question of whether the agreements create a “management interest” under Sections 652(a) and (b) or a prohibited joint venture under Section 652(c).

operators and other “distributors of satellite cable programming,” such as Verizon.⁹ Section 629 requires the Commission to promote the competitive availability of services offered over “video programming systems.”¹⁰ The JOE, the exclusive resale agreements, and the license transfers act both individually and in combination with each other to undermine these statutory goals in violation of the public interest standard of Section 310(d).

Accordingly, even if one accepted the characterization by the Applicants that this merger simply involved the transfer of spectrum from companies not able to deploy competing services effectively to one that can make better use of it, the Commission would need to void these agreements. It is impossible to see how a license transfer that enhances the ability of Verizon Wireless to operate under these agreements to the detriment of its competitors could possibly serve the public interest. Nor does it appear possible to condition these agreements in ways that would address these concerns, especially as the parties may modify the agreements to be even more blatantly anti-competitive after the transaction is concluded.

Even voiding the agreements is insufficient to ensure that the transfers serve the public interest. Verizon Wireless is the largest wireless provider in the United States. The proposed transfers would further aggravate the imbalance between the two largest providers (Verizon Wireless and AT&T) and all other facilities based providers.¹¹ This

⁹ 47 U.S.C. § 628.

¹⁰ 47 U.S.C. § 629.

¹¹ Applicants’ reliance on the spectrum screen is misplaced. Verizon/SpectrumCo Public Interest Statement, 24–25; Verizon/Cox Public Interest Statement, 21–22. As discussed below, Verizon is well aware that the Petition for Reconsideration filed after the Commission adjusted the spectrum screen upward to permit Verizon to purchase Alltel’s licenses remains pending. Accordingly, the current screen must be considered unsettled and subject to adjustment at any time the

concern is further aggravated by recent Congressional action limiting the Commission’s ability to use auctions to address concerns with regard to spectrum aggregation through eligibility restrictions.¹² At a minimum, the Commission would need to impose data roaming conditions to safeguard against the possibility that Verizon’s challenge to the Commission’s current data roaming rules succeeds. The Commission should also impose significant rural buildout conditions. If the public interest benefit from this transaction is that it will ensure sufficient wireless capacity for future demand, then the Commission should take steps to ensure that future demand is met for *all* Americans, rural as well as urban. If Verizon is unwilling or unable to meet these new deadlines, the Commission should impose “use it or share it” conditions that would allow unlicensed use of the transferred spectrum until such time as Verizon meets its build out obligations.

STATEMENT OF INTEREST

Public Knowledge (“PK”) is an advocacy organization with members, including Verizon Wireless subscribers and subscribers of multichannel video programming cable service, who will be adversely affected if the Commission approves the proposed transactions. They will likely face fewer choices for wireline and wireless broadband and for cable service. Furthermore, if the agreements are permitted, Applicants may

Commission chooses to grant the Petition. *See* Petition for Reconsideration of the Public Interest Spectrum Coalition, *Sprint Nextel Corporation and Clearwire Corporation Application for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 08-94 (filed Dec. 8, 2008). More importantly, the spectrum screen is only a guide to situations where the Commission will, in the absence of any other criteria, elect to probe more deeply. Where, as here, other factors demand that the Commission conduct a searching review of the implications of further spectrum aggregation on competition, the spectrum screen does not provide an affirmative shield against the public interest review the Commission must conduct under Section 310(d).

¹² Temporary Payroll Tax Cut Continuation Act of 2011, H.R. 3630, 112th Cong. (2012).

subsequently modify the agreements in anticompetitive ways without Commission oversight, creating higher prices for these services for PK members.

The Media Access Project (“MAP”) is a non-profit, public interest law firm and advocacy organization working in communications policy. For over 38 years, MAP has promoted the public interest before the FCC and the U.S. Courts. Over that time, MAP has provided critical policy leadership and counsel to the public interest and media reform community and fought to ensure the public’s right to access and to diverse and competitive telecommunications services. MAP, its employees, and the persons it represents are users of wireless broadband services, and many are customers both of Verizon Wireless and of the owners of SpectrumCo and Cox. MAP’s employees and clients 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. They also receive multichannel video programming and wireline broadband access.

The Open Technology Initiative of the New America Foundation formulates policy and regulatory reforms to support open architectures and open source innovations and facilitates the development and implementation of open technologies and communications networks. This mission would be adversely affected by the transactions at issue in this proceeding.

The Benton Foundation works to ensure that media and telecommunications serve the public interest and enhance our democracy. It pursues this mission by seeking policy solutions that support the values of access, diversity and equity, and by demonstrating the

value of media and telecommunications for improving the quality of life for all. This mission would be adversely affected by the transactions at issue in this proceeding.

Access Humboldt is a non-profit, community based, public service media organization formed to manage local cable franchise benefits on behalf of the County of Humboldt, California and the Cities of Eureka, Arcata, Fortuna, Rio Dell, Ferndale and Blue Lake, and to advocate for policies in the interests of these communities. Its mission depends in part on a healthy communications landscape, which would be adversely affected by the transactions at issue in this proceeding.

The Center for Rural Strategies seeks to improve economic and social conditions for communities in the countryside and around the world through the creative and innovative use of media and communications. Its interests, and those of the people it represents, would be adversely affected by the transactions at issue in this proceeding.

The Future of Music Coalition is a national nonprofit organization that works to ensure a diverse musical culture where artists flourish, are compensated fairly for their work, and where fans can find the music they want. Its mission depends in part on a healthy communications landscape that allows artists to connect to their fans, and this would be adversely affected by the transactions at issue in this proceeding.

The National Consumer Law Center, on behalf of its low-income clients, is a nonprofit advocacy organization that seeks to build economic security and family wealth for low-income and other economically disadvantaged Americans. It joins this Petition to Deny on behalf of its low-income clients, who would be adversely affected if these transactions go forward.

The Writers Guild of America, West is a labor union composed of the thousands of writers who write the content for television shows, movies, news programs, documentaries, animation, and Internet and mobile phones (new media) that keep audiences constantly entertained and informed. Its members depend on a healthy communications landscape with that allows creators to connect to the public.

ARGUMENT

I. THE COMMISSION HAS AUTHORITY TO DENY THE PROPOSED TRANSACTIONS TO PROTECT COMPETITION AND FULFILL THE POLICIES OF THE COMMUNICATIONS ACT.

The Commission must block the proposed transactions by denying the license transfers and disallowing the joint marketing agreements and joint operating entity. The transfers of wireless licenses to Verizon would only further the increasing domination of just two carriers over the wireless market, and are in furtherance of an unlawful scheme to limit competition in the wireless and subscription video markets. The companies have announced that they intend to develop new technologies, to cross-market each other's products, and to otherwise collaborate exclusively. These stated ambitions alone provide grounds for the Commission to block the joint agreements. But even charitably interpreted, the joint agreements provide a mechanism for future collusion on pricing, building out, coverage, and other market control methods. In any event, the companies have failed to disclose the full text of their contracts, so it is impossible to know the precise nature of their plans. It is therefore necessary to assume the worst. As Adam Smith wrote, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some

contrivance to raise prices.”¹³ There is no way for the Commission or any other agency to prevent the companies, once they have begun talking, from continuing their conversation into other matters. If they have the means and to motive to limit competition to their own advantage they will likely do so.

To be sure, the Commission has independent authority to prohibit the anticompetitive joint agreements. If the companies had announced their anticompetitive enterprise without even mentioning spectrum license transfers the Commission would still have good reason to block them. But it has even better reason to block them and the license transfers now. First, it must not *abet* the agreements by enabling the spectrum transfers that are the price of entry into Verizon’s communications cartel. As Adam Smith also wrote, while the law may not be entirely able to prevent people of the same trade “from sometimes assembling together, it ought to do nothing to facilitate such assemblies.”¹⁴ In addition to being problematic in and of themselves, the license transfers would materially facilitate the unlawful joint agreements. Second, the anticompetitive agreements are all the worse in light of increasing spectrum concentration, lack of wireless competition, and other public interest harms that would result from the license transfers. This provides ample reason to block the entire transaction as a whole in this proceeding.

A. The Commission Has Broad Authority to Protect the Public Interest and Ensure the Effective Operation of the Communications Act.

The Commission has a broad interest in ensuring that the Communications Act (“the Act”) operates effectively and that the Act’s purposes are not undermined. Indeed,

¹³ ADAM SMITH, THE WEALTH OF NATIONS 129 (Oxford University Press 1998).

¹⁴ *Id.*

the Commission is required by Section 310(d) of the Act to only approve license transfers and assignments upon finding that the transfer will serve “the public interest, convenience, and necessity.”¹⁵ In conducting its public interest inquiry, the Commission examines: (1) whether the transaction would violate a provision of the Act or other law; (2) whether the transaction would violate the Commission’s rules; (3) whether the transaction would substantially frustrate or impair the Commission’s statutory implementation or enforcement, or would interfere with the objectives of the Communications Act or other related statutes; and (4) whether the transaction will create affirmative public interest benefits.¹⁶ As the Commission has consistently acknowledged, this review encompasses both an analysis of the transfer’s anticompetitive effects and “the potential impact of the proposed transaction on the rules, policies and objectives of the Communications Act.”¹⁷

Even if transactions do not violate the Act or the Commission’s rules, the Commission examines proposed transfers to determine whether they would substantially impair or frustrate the enforcement or objectives of the Act and whether the transaction would produce potential public interest benefits furthering the policies of the Act, such as

¹⁵ 47 U.S.C. § 310(d).

¹⁶ *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 and Order, ¶ 20 (2001) (*AOL/Time Warner Order*).

¹⁷ *Id.* ¶ 4. *See also* Communications Act of 1934, as amended § 1, 47 U.S.C. § 151 (2006) (stating that the Communications Act was created “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . and for the purpose of securing a more effective execution of this policy by centralizing authority . . . and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication” in the Commission to implement and enforce the Act.).

the preference for competitive telecommunications markets, preserving and enhancing competition in related markets, ensuring a diversity of voices in media and communications, ensuring the existence of diverse platforms and providers, and promoting the rapid development and deployment of Internet access service to all Americans.¹⁸ Additionally, the 1996 Act “reflects a clear preference that competitive markets, as opposed to regulated monopolies, be created and preserved as the mechanism for economic decision making,” necessitating that the Commission be alert for mergers that threaten competition by eliminating competitors or “creating opportunities to disadvantage rivals in anticompetitive ways.”¹⁹

1. The Commission May Only Approve the Proposed Transaction If It Finds the Transaction Will Affirmatively Enhance the Public Interest.

One well-established and vitally important aspect of the license transfer application process is that the Applicants bear the burden of proving that these agreements affirmatively serve the public interest.²⁰ Even if the proposed transaction would not overtly violate the Act or a Commission rule, the “Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.”²¹ The proposed transaction must “*enhance*, rather than merely preserve, existing

¹⁸ *AOL/Time Warner Order*, ¶¶ 4, 12.

¹⁹ *Id.* ¶ 15.

²⁰ *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, WC Docket No. 11-148, ¶ 7 (Jan. 31, 2012) (*Insight/Time Warner Order*); *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5673, ¶ 19 (2007) (*AT&T/BellSouth Order*).

²¹ *Insight/Time Warner Order*, ¶ 7 (citing *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket No. 08-238, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745-46, ¶ 9 (2009) (*Embarq/CenturyTel Order*)).

competition,”²² and in its application review the Commission “takes a more extensive view of potential and future competition and its impact on the relevant market.”²³

For the proposed transactions, Applicants fail to meet their burden of demonstrating that the agreements will affirmatively serve the public interest. Indeed, the proposed deals will negatively impact the public interest and will undermine the purposes and goals of the Communications Act.

2. *The Commission Has Broad Authority Over Spectrum Licensees.*

Consistent with the overall purposes of the Communications Act, the Commission has broad statutory authority over licensees. In granting this authority, Congress has given the Commission power to create novel solutions that address the unique dangers posed by the proposed transactions at issue here. The Act’s “terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system,”²⁴ within which the Commission was “expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.”²⁵

²² *Insight/Time Warner Order*, ¶ 9 (emphasis added) (citing *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17462, ¶ 28 (2008) (*Verizon/Atlantis Order*); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12366, ¶ 32 (2008) (*XM/Sirius Order*)).

²³ *Insight/Time Warner Order*, ¶ 9 (citing *Verizon/Atlantis Order*, 23 FCC Rcd 17444, 17462, ¶ 28; *XM/Sirius Order*, 23 FCC Rcd 12348, 12366, ¶ 32).

²⁴ *United States v. Sw. Cable Co.*, 392 U.S. 157, 168 (1968) (quotation marks and citation omitted).

²⁵ *Id.* (quotation marks and footnotes omitted).

Within that system, Congress granted the Commission the exclusive authority to grant licenses under the Act.²⁶ A number of concerns, such as physical scarcity of broadcast frequencies under existing technologies and interference between broadcast signals, “led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the ‘public interest.’”²⁷ When the Commission decides “which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity.”²⁸

Courts have long recognized the Commission’s “power to regulate broadcasting in the ‘public interest.’”²⁹ This authority includes both the authority to deny an application and to place conditions on a license’s use.³⁰ The Act requires that the Commission “must be satisfied that the public interest will be served by . . . the license.”³¹ The Commission’s public interest inquiry “necessarily encompasses the broad aims of the Communications Act,”³² which include a deeply rooted preference for preserving and enhancing competition; accelerating private-sector broadband deployment; ensuring a diversity of license holdings; ensuring the existence of a nationwide communications service, available to everyone; implementation of

²⁶ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 (1990), *overruled on other grounds*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

²⁷ *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978).

²⁸ *Nextwave Pers. Commc’ns, Inc. v. FCC*, 200 F.3d 43, 54 (2d Cir. 1999).

²⁹ *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. at 794.

³⁰ *P & R Temmer v. FCC*, 743 F.2d 918, 927 (D.C. Cir. 1984) (“An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission’s regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations.”).

³¹ *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946).

³² *Insight/Time Warner Order*, ¶ 8 (internal quotations omitted).

Congress’s policy framework designed to open all telecommunications markets to competition; the preservation and advancement of universal service; and generally managing spectrum in the public interest.”³³ The Commission’s public interest analysis will also inquire into how a proposed transaction “will affect the quality of communications services or will result in the provision of new or additional services to consumers,” taking into account technological and market changes and trends within the communications industry.³⁴ As discussed below, the proposed transactions would undermine the goals of the Communications Act, and should therefore be blocked under the Commission’s public interest review.³⁵

For example, the Commission has exercised its broad authority over licensees in the mass media context when issuing its rules regarding local marketing agreements (“LMAs”),³⁶ and in regulating designated entities to prevent parties from thwarting the purposes of the Act and to promote diversity in communications ownership.³⁷ In keeping with the Commission’s acknowledged comprehensive authority over licensees, the Commission must now consider all relevant ramifications of the Applicants’ entire

³³ *Id.* ¶ 8 (citing *AT&T/BellSouth Order*, ¶ 20; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18301, ¶ 17 (2005) (*SBC/AT&T Order*); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom Inc.*, WC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030–31, ¶ 9 (1998) (*WorldCom/MCI Order*)); *AOL/Time Warner Order*, ¶ 22. See 47 U.S.C. §§ 254, 332(c)(7), 1302; Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153, Preamble; cf. 47 U.S.C. §§ 301, 303, 309(j), 310(d), 521(4), 532(a).

³⁴ *Insight/Time Warner Order*, ¶ 8.

³⁵ See *infra* Section I.B.

³⁶ See 47 C.F.R. §§ 73.3555, 73.3613.

³⁷ See 47 C.F.R. § 1.2110 (citing as statutory authority 15 U.S.C. § 79 *et seq.*; 47 U.S.C. §§ 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309).

agreements. Section 310(d) of the Act requires the Commission to consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for the licenses under Section 308.³⁸ Thus, just as the Commission has a broad, encompassing authority over broadcast licensees generally, the Commission's authority under its public interest review of a proposed license transfer is equally expansive.

3. *The Commission Has Authority to Inquire Into Third Parties' Influence or Control Over Licensees.*

Even if the Commission determines that the agency and joint operating entity agreements are independent contracts, the agreements nevertheless pose issues of traditional concern for the Commission in reviewing license transactions. The question of another company's influence or control, financial or otherwise, over the programming decisions or core operating functions of a licensee is a traditional concern of the Commission. For example, the Commission's attribution rules "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."³⁹ In 1992, the Commission first adopted attribution rules for same-market radio LMAs to prevent increased common ownership that would undermine the Commission's competition and diversity goals

³⁸ See, e.g., *Verizon/Atlantis Order*, ¶ 26; *Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc.*, WT Docket No. 06-96, Memorandum Opinion and Order and Declaratory Ruling, 21 FCC Rcd 13580, 13588, ¶ 13 (2006) (*DoCoMo/Guam Cellular Order*); *SBC/AT&T Order*, 20 FCC Rcd 18290, 18300 n.60.

³⁹ *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (citing *1999 Attribution Order*, 14 FCC Rcd at 12560, ¶ 1).

under the Act.⁴⁰ More recently, the Commission extended attribution rules to television LMAs,⁴¹ and has inquired into expanding attribution rules further to local news service agreements and shared service agreements.⁴² The Commission's rules here acknowledge that even if an entity does not hold a majority interest in a licensee that entity may be able to exercise control over it. In examining the financial and other interests created by the cross-sales and joint venture components of the Applicants' agreements, the Commission is simply consistently addressing its recognition that unmonitored third party influence and control over licensees can thwart the purpose of the Commission's rules entirely.

The proposed agreement, taken as a whole, poses serious concerns about the ability of the SpectrumCo members or Cox to influence Verizon Wireless, and vice versa, with regard to decisions that affect their ability to compete with each other. Such influence could affect what should be the Applicants' independent decisions on questions of pricing, lines of business, and the rates they charge each other in intercarrier compensation. Once again, this concern also presents the possibility that the Applicants may be able to collude to the disadvantage of their competitors and ultimately to the detriment of consumers. The Commission must answer these questions and assure itself that the transactions, viewed in their entirety to include the cross-sale and joint venture

⁴⁰ See 47 C.F.R. § 73.3555; see also *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01-317, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19894, ¶ 82 (2001).

⁴¹ *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd 12559, 12612, ¶ 83 (1999) (*1999 Attribution Order*).

⁴² *2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Notice of Proposed Rulemaking, ¶ 204 (2011).

agreements, does not allow one entity to exert inappropriate and anticompetitive influence or control over another.

4. *The Totality of the Circumstances Gives Rise to Concerns of Collusion.*

Consistent with its broad authority to evaluate the proposed transactions with an eye to the agreements' effect on the public interest and the public policies of the Communications Act, the Commission should recognize that the totality of the circumstances in the proposed transactions gives rise to concerns of collusion. The Commission need not blindly accept the Applicants' assertion that the proposed license transfers are wholly unrelated to the Applicants' simultaneously negotiated agency and joint operating entity agreements. Quite the contrary: a thorough and responsible public interest analysis here requires examination of all parts of the Applicants' overall agreement and a finding of how those components will affect the provisions and policies of the Act.

The United States Supreme Court has recognized that the Commission "is permitted to take antitrust policies into account in making licensing decisions pursuant to the public-interest standard."⁴³ These policies include competition concerns that arise from agreements that increase an entity's anticompetitive power across different communications technologies.⁴⁴ Here, the Commission must look into the Applicants' entire agreement, including those parts concerning Applicants' intent to exclusively sell each other's services setting forth a plan to collectively develop—and collectively license—technologies that potentially have great import to other companies' ability to

⁴³ *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795–96 (1978) (citing *United States v. Radio Corp. of Am.*, 358 U.S. 334, 351 (1959); *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 222–24 (1943)).

⁴⁴ See *United States v. Radio Corp. of Am.*, 358 U.S. 334, 351–52 (1959).

compete.⁴⁵ For example, the agreements would increase Verizon's leverage over adjacent markets for devices through handset exclusivity arrangements. Verizon's increased dominance would also decrease competition for special access services; first, by increasing the areas in which Verizon has market dominance or an outright monopoly as a special access service provider, and second, by preventing the spectrum from being acquired by a potential competitor, to whom Verizon would need to provide special access services at a just and reasonable rate.

It is absurd to imagine that a license transfer, cross-sale agreements, and a joint venture are completely unrelated when those agreements were all negotiated at the same time, between the same parties, all relating to communications services. Tellingly, Verizon Wireless has negotiated the exact same deal with Cox Communications as it negotiated with the three SpectrumCo members, while not one cable company that lacked spectrum holdings was included in the pact. If the agency and joint venture agreements were indeed separate from the license transfer, one would expect that cable companies who could not offer a license transfer would have been welcome at the table for the agency and joint venture agreements.

5. The Proposed Joint Operating Entity Poses Serious Anticompetitive Harms.

Verizon and the cable companies also propose to create a joint operating entity “to develop innovative technology and intellectual property that will integrate wired video, voice and high-speed Internet with wireless technologies.”⁴⁶ This would create serious anticompetitive harms, allowing the parties to monopolize new technologies that

⁴⁵ For a more detailed analysis of the Joint Operating Entity, see Confidential Appendix.

⁴⁶ Verizon/SpectrumCo Public Interest Statement, 24 n.71. *See also* Verizon/Cox Public Interest Statement, 20 n.62.

are necessary for converging networks to interoperate. For example, the companies would have an incentive to develop handset technology that can easily hand off calls between their respective networks, but not between others, or proprietary signaling technologies that would thwart efforts to develop nationwide standards for communications. In particular, the companies would have the means and motivation to develop proprietary standards for the delivery of video over broadband, inhibiting the development of independent online video providers and putting their competitors at a disadvantage.

Generally, independent companies have an incentive to share their technologies with the industry as a whole, because they benefit from standardization and economies of scale. But that incentive is lost when some of the largest players in the communications market agree to work together on technology and marketing, to the exclusion of everyone else. The Applicants should not be able to use technology or their jointly-held patents to lock in their anticompetitive ambition to segment and control the communications marketplace. But the proposed joint venture allows them to do this, and it should be blocked.

B. The Commission Must Block the License Transactions Because They Would Undermine the Goals of the Communications Act.

The Commission must block any license transactions that are contrary to the public interest.⁴⁷ When the Commission evaluates whether a particular transaction should go forward, it “considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or

⁴⁷ See 47 U.S.C. § 310(d).

related statutes.”⁴⁸ In so doing, the Commission does not only consider the immediate, day-after effects of a transaction—it ensures that the transaction will not harm the market’s future development. In other words, the Commission must consider whether the transaction “will result in the provision of new or additional services to consumers . . . [and it] may consider technological and market changes, as well as trends within the communications industry, including the nature and rate of change.”⁴⁹

The transactions before the FCC in this docket are complex, consisting not only of the proposed transfers of wireless licenses, but of a series of contracts creating a joint operating entity and marketing arrangements.⁵⁰ Considered as a whole, these transactions would harm the public interest because they would frustrate many objectives of the Communications Act, today and in the future. As a result, the Commission should block the transactions.

1. Decreased Competition in the Wireless Market.

By proscribing the limits of competition between Verizon and cable companies, and by harming the overall competitive landscape, the proposed transactions would frustrate several goals of the Act that depend on competition between providers. After the transactions, there will be no possibility that the cable companies will enter the wireless market, and it is unlikely that Verizon will build out new landline or fiber infrastructure

⁴⁸ *Embarq/CenturyTel Order*, 24 FCC Rcd 8741, 8745–46, ¶ 9.

⁴⁹ *Insight/Time Warner Order*, ¶ 8.

⁵⁰ If the Commission considers the joint agreements to be separate from the license transfers, it must block the license transfers as contrary to the public interest. For the reasons described in Section I.C, even without the joint agreements the license transfers raise significant concerns that warrant denying the transfer. But assuming the joint agreements separately go forward (perhaps to be addressed in a parallel proceeding by the FCC, the Federal Trade Commission, or the Department of Justice), it would harm the public interest to allow companies engaged in separate questionable arrangements to further their anticompetitive goals by transferring spectrum licenses between themselves.

in the covered markets. Furthermore, the joint agreements between the companies will give them a formidable advantage that will make it difficult for any existing competitors to continue their service, much less for new competitors to enter the market.

One of the primary goals of the Act is to promote a communications service that is available at “reasonable charges”⁵¹ and “affordable rates.”⁵² But the lessened competition this transaction would bring about—itsself contrary to the “deeply rooted preference for preserving and enhancing competition in relevant markets,”⁵³—would lead to higher prices. The Commission is also charged with preventing unjust and unreasonable discrimination by carriers.⁵⁴ But a marketplace with reduced actual and potential competition would give carriers a freer hand to engage in anti-consumer behavior. Similarly, reduced competition would hinder the Commission’s ability to achieve the goals of promoting the competitive development of the Internet and maximizing user control,⁵⁵ goals that are best achieved in a competitive marketplace where the providers that serve customers’ needs best attract the most customers. Finally, a communications system with fewer, but more prominent, potential points of failure would impede the goal of achieving a rapid and efficient communications system that promotes public safety and the national defense.⁵⁶ “Redundancy *equals* insurance,”⁵⁷ and the fewer companies that are involved in the provision of communications services, the

⁵¹ 47 U.S.C. § 151.

⁵² 47 U.S.C. §§ 201(b); 254(b)(1).

⁵³ *Insight/Time Warner Order*, ¶ 8.

⁵⁴ 47 U.S.C. § 202(a).

⁵⁵ 47 U.S.C. § 230.

⁵⁶ 47 U.S.C. § 151.

⁵⁷ NASSIM NICHOLAS TALEB, *THE BLACK SWAN* 312 (Random House 2010).

more likely the system is to suffer dangerous failures and be unsuited to dealing with the shocks and increased call volume associated with emergencies.

Additionally, Section 706 of the Act directs the Commission to “take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market” if it finds that advanced telecommunications services, like wired and wireless broadband, are not being “deployed to all Americans in a reasonable and timely fashion.” This enacts a Congressional purpose to encourage deployment by increasing competition and removing barriers, such as anticompetitive agreements between different companies, which stand in its way. Unless the Commission blocks the proposed joint agreements, the purpose of Section 706 will be frustrated.

2. *Discouraging Facilities-Based Broadband Competition.*

These transactions are inconsistent with the Commission’s stated policy “to encourage facilities-based broadband competition.”⁵⁸ Popular among incumbent providers,⁵⁹ under this policy the Commission “promot[es] development and deployment of multiple platforms [to] promote competition in the provision of broadband capabilities.”⁶⁰ Viewed as an alternative to prescriptive regulation, this policy envisions that mobile wireless providers will provide a “third pipe” that competes with cable and DSL, with competitive pressure keeping prices low, keeping carrier practices fair, and

⁵⁸ *High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 6 (2002) (*Cable Modem Declaratory Ruling*).

⁵⁹ *See, e.g.*, Reply Comments of Verizon in WC Docket No. 09-223 (filed Feb. 22, 2010) at 12; Opposition to Petitions to Deny and Reply to Comments of Comcast in MB Docket No. 10-56 at 7.

⁶⁰ *Cable Modem Declaratory Ruling* ¶ 6.

driving innovation forward. But if the Commission allows providers to enter cross-marketing arrangements, where a wireless provider sells a wired provider's services and vice versa, there is little chance that the providers will compete. Unless and until it modifies its policies on facilities-based competition, the Commission has no choice but to block these transactions as flatly incompatible with that goal.

3. *Disadvantaging Low-Income Users.*

Pursuant to its statutory goals to promote affordable access and universal service, the Commission should prevent the proposed transactions from disproportionately harming low-income users. However, if allowed to proceed, these transactions would have a disproportionate effect on low-income users. Cable and wireless prices would rise due to reduced competition, the weakened position of smaller competitors left out of the deals, and a greatly reduced possibility of competitive entry into the relevant markets. As a baseline matter, bills for basic services make up a greater proportion of the paychecks of low-income users, so *any* price hikes would have a disproportionate impact on them. But the usage patterns of low-income households magnify these effects: low-income consumers are more likely to be wireless-only telephone subscribers,⁶¹ more likely to get Internet access through their wireless phones,⁶² and, for those low-income households

⁶¹ According to the National Center for Health Statistics, 42.8% of adults living in poverty are wireless-only subscribers, while the same is only true of 24.1% of higher-income adults. Stephen J. Blumberg, Ph.D. and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July–December 2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, 3 (June 8, 2011), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf>. See also Aaron Smith, *Mobile Access 2010*, Pew Internet & American Life Project (July 7, 2010), http://pewinternet.org/~media/Files/Reports/2010/PIP_Mobile_Access_2010.pdf (overview of usage statistics).

⁶² Gretchen Livingston, *Latinos and Digital Technology, 2010*, PEW RESEARCH CENTER: PEW HISPANIC CENTER, 19–20, 22–23 (Feb. 9, 2011), <http://www.pewhispanic.org/files/reports/134.pdf>.

that are cable or satellite video subscribers, less likely to have the wired broadband service that makes it possible to switch to streaming video services like Netflix.⁶³

The Commission has recently undertaken a modernization of its Lifeline program to make it better suited to the essential communications needs of today's low-income consumers.⁶⁴ However, the Commission's efforts—which rely heavily on a healthy, competitive communications marketplace⁶⁵—could be wasted if these transactions are allowed. The ability of low-income users to access communications services depends at least as much on a healthy marketplace as a well-functioning program like Lifeline, and the anti-competitive spectrum transfers, technology ventures, and marketing arrangements proposed by these transactions would widen the digital divide. It would be inconsistent both with the public interest and the interests of economically-vulnerable communities for the Commission to allow these transactions to proceed.

If higher prices in a range of services result from the proposed transactions, the deal will work against the goals the Commission adopted in the Lifeline order. As the Commission found:

If quality voice service is not affordable, low-income consumers may subscribe to voice service at the expense of other critical necessities, such as food and medicine, or may be unable to purchase sufficient voice service to obtain adequate access to critical employment, health care, or educational opportunities. And if low-income consumers initially subscribe to phone service, but intermittently lose access because they cannot consistently pay for the service,

⁶³ Only 40% of low-income Americans have adopted broadband. John B. Horrigan, *Broadband Adoption & Use in America*, 3 (OBI Working Paper No. 1, 2010).

⁶⁴ *Lifeline and Link Up Reform and Modernization*, WC Docket 11-41, Report & Order & Further Notice Of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012).

⁶⁵ Commenters note these many instances in the Lifeline order in which the Commission adopted rules in order to preserve competition or relies on competition in the implementation of the modernized Lifeline program. *See, e.g., id.* at ¶¶ 50, 173, 249, 317, 331, 357 n.959, 371, 378.

many of the benefits for individuals and the positive externalities for the economy and society will be lost.⁶⁶

For this reason, the Commission adopted the goals of ensuring the availability of voice service for low-income Americans⁶⁷ and the availability of broadband service for low-income Americans.⁶⁸ Moreover, the Commission found that voice service is only available to low-income consumers to the extent that it is affordable⁶⁹ and broadband to be “available” to a low-income consumer, a broadband network (or networks) must have been deployed to the consumer, and the broadband service offered over the network must be affordable and provide a sufficient level of robustness (e.g., bandwidth) to meet basic broadband needs.⁷⁰ Lifeline subscribers will be heavily impacted by hikes in wireless prices as the program supports “a uniform flat-rate reimbursement.”⁷¹

4. Reducing Competition for Video Devices.

Sections 629 and 624A of the Communications Act direct the Commission to create a competitive market for “video devices.”⁷² These provisions enact a Congressional policy that viewers should not be limited to renting cable and satellite set-top boxes from their providers, but should be able to benefit from the innovation provided by a competitive retail market for consumer electronics that can access and display subscription video content. By reducing video competition, the joint agreements would frustrate the Commission’s ability to implement these provisions. A cable industry

⁶⁶ *Id.* at ¶ 17.

⁶⁷ *Id.* at ¶ 27.

⁶⁸ *Id.* at ¶ 33.

⁶⁹ *Id.* at ¶ 28.

⁷⁰ *Id.* at ¶ 34.

⁷¹ *Id.* at ¶ 54.

⁷² 47 U.S.C. §§ 544a, 549.

characterized by increased incumbent market power not only would put CableCARD devices at a further competitive disadvantage that could result from unilateral cable actions, but could also provide a means for cable companies to further delay the implementation of AllVid by giving some incumbents the power to unilaterally delay industry-wide standard-setting through coordinated action. AllVid is an absolute necessity to improving competition in content and fulfilling the potential of Section 629. Too few companies presently control much of broadcast and cable, and AllVid would enable others to directly compete with these few present owners by integrating content into the same set-top box. Set-top boxes that integrate content from multiple sources will increase competition for and between content creators, with the benefit flowing to home viewers. Content availability, in turn, will lead to greater competition among distribution services for desired programming, which also will benefit consumers by way of better prices. Particularly if video competition is reduced via a Commission-sanctioned competition cease-fire between Verizon and cable conglomerates, further delay in AllVid's implementation will deny the public the benefits of a competitive market for video devices, undermining the intent of Congress in the Communications Act.

The joint operating entity proposed by the parties could block the Commission's efforts to *ever* implement Section 629. Just as CableLabs, a cable industry-controlled research organization, put onerous licensing and certification restrictions on CableCARD that prevented it from becoming a marketplace success,⁷³ the joint operating entity could

⁷³ See Letter from Consumer Federation of America et al. to Kevin J. Martin, Chairman, Federal Communication Commission, CS Docket No. 97-80 (June 11, 2007), *available at* <http://www.publicknowledge.org/pdf/fcc-ocap-letter-20070611.pdf>; John Bergmayer, *Zoom Shows How Comcast Abuses Its Market Power to Restrict Competition*, PUBLIC KNOWLEDGE (Nov. 29, 2010), <http://www.publicknowledge.org/blog/zoom-shows-how-comcast-abuses-its-market-powe>.

develop and deploy proprietary, incompatible technologies for set-top boxes and other “interactive communications equipment” that inhibit the development of nationwide standards. The joint operating entity could either refuse to license these technologies at all, or (following the model of CableLabs) license them only to companies that are able to comply with difficult, often irrelevant, testing criteria.

As discussed below, Section 628, the statute enacting these goals, also provides direct authority for the Commission to invalidate the joint agreements. But this notwithstanding, the various independent grounds for the Commission to block the transaction must factor into the public interest analysis, since its purpose will be frustrated unless the Commission blocks the joint agreements.

C. The Proposed Transactions Will Increase Spectrum Concentration, Thereby Harming Competition.

In evaluating transactions that involve spectrum acquisition by wireless service providers, the Commission examines whether the transaction would advance the “broad aims of the Communications Act” which include a “deeply rooted preference for preserving and enhancing competition” and “promoting a diversity of license holdings.”⁷⁴ The Commission has further explained that proposed transactions must not merely preserve competition but also enhance it.⁷⁵ By increasing the amount of spectrum allocated to Verizon Wireless, the current transaction would increase Verizon’s already

⁷⁴ *Applications of AT&T and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, Memorandum Opinion & Order, ¶ 12 (Nov. 19, 2007) (*AT&T/Dobson Order*); *Sprint Nextel Corporation and Clearwire Corporation, Application for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order, ¶ 20 (Nov. 7, 2008) (*Sprint/Clearwire Order*); *Verizon/Atlantis Order*, ¶ 27; *Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations*, WT Docket No. 11-18, Order, ¶ 24 (Dec. 22, 2011) (*AT&T/Qualcomm Order*).

⁷⁵ *AOL/Time Warner Order*, ¶ 21.

significant market power, thereby hurting competition and preventing a diversity of spectrum holders.

Verizon Wireless currently leads its competitors in terms of spectrum holdings.⁷⁶ The transactions would increase this lead by 20 MHz in most markets.⁷⁷ The Commission has held before that dominant spectrum holdings along with network coverage is indicative of a service provider's ability to behave in an anticompetitive manner.⁷⁸ Verizon's significant post-transfer spectrum holdings would provide it with the power to act anticompetitively. In particular, the proposed transactions would adversely impact entry of new wireless service providers and the ability of wireless services to emerge as a competitive alternative to wireline services.

Spectrum is a key input in the provision of wireless services; a potential competitor cannot enter the market if it lacks spectrum or the ability to acquire it.⁷⁹ As the National Broadband Plan notes, there is a shortage of this key input,⁸⁰ making it extremely difficult for the Commission to clear new spectrum bands for auction. While secondary markets may be a source of additional spectrum, new entrants will find it

⁷⁶ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, Table 128 (June 27, 2011) (*Fifteenth Wireless Competition Report*).

⁷⁷ See Spectrum Aggregation, attached to Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4; Spectrum Aggregation, attached to Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4.

⁷⁸ *Sprint/Clearwire Order*, ¶ 80.

⁷⁹ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, at 251 (May 20, 2010) (*Fourteenth Wireless Competition Report*).

⁸⁰ Federal Communications Commission, *Connecting America: The National Broadband Plan* at 81 (2010) (*National Broadband Plan*).

difficult to tap this source if the cost of acquisition is unreasonably high. Verizon's significant spectrum advantage would allow it to raise prices in the secondary market either by raising the price of leasing its own spectrum or by withdrawing available spectrum from the market.

In addition to harming competition among wireless service providers, by creating an arrangement in which wireline broadband service providers and the leading wireless service provider agree to cooperate in marketing each other's services, the proposed transactions would eliminate the Applicants' incentives to compete with each other. While such competition may not be a market reality today, the Commission has noted that meaningful competition may be a possibility in the future.⁸¹

1. The Supposed Benefits of the Transaction Are Not Sufficient to Overcome the Adverse Impact on Competition.

The Applicants claim that the transactions would benefit the public in two ways: first, the transactions would allow Verizon Wireless to better serve its customers;⁸² and second, the transactions would move spectrum to a "higher valued" use.⁸³ Both of these supposed benefits are minor at best and are outweighed by the public interest harms of the proposed transactions.

First, the Applicants' claim that the proposed transaction would "serve the public interest by enabling Verizon Wireless to obtain spectrum that will help the company meet

⁸¹ *Fifteenth Wireless Competition Report*, ¶ 367.

⁸² Verizon/SpectrumCo Public Interest Statement, 13–16; Verizon/Cox Public Interest Statement, 12–15.

⁸³ Verizon/SpectrumCo Public Interest Statement, 16–19; Verizon/Cox Public Interest Statement, 15–18.

the growing demands of its customers”⁸⁴ deserves further scrutiny. While meeting consumer demand is a legitimate goal, accomplishing it—particularly through spectrum acquisition—is foremost a benefit to Verizon and only indirectly a benefit to Verizon customers in the short term. However, facilitating Verizon’s ability to serve its customers better cannot be characterized as a public interest benefit because members of the public who are not Verizon’s customers would in no way see the benefits of the improved services. On the contrary, they would be harmed by Verizon’s incentive to behave in an anticompetitive manner.

Contrary to Applicants’ claims,⁸⁵ spectrum concentration is not a suitable response to challenges posed by increasing demands on spectrum. Just as Applicants claim that increased demands on spectrum will eventually defeat the benefits of cell splitting, increased demands on spectrum will eventually defeat the benefits of spectrum acquisition. As Public Knowledge and Future of Music Coalition have noted before,⁸⁶ spectrum shortage is an industry-wide problem. The entire wireless industry must strive to make more efficient use of its existing spectrum. The entire wireless industry must invest in upgrading outdated technologies to new, efficient standards. The entire wireless industry must innovate around limitations inherent to whatever spectrum it may control. In addition to cell splitting, software defined radios, mesh networking, channel bonding,

⁸⁴ Verizon/SpectrumCo Public Interest Statement, 13–16; Verizon/Cox Public Interest Statement, 12–15.

⁸⁵ See Verizon/SpectrumCo Public Interest Statement, 13–16; Verizon/Cox Public Interest Statement, 12–15.

⁸⁶ Petition to Deny of Public Knowledge and Future of Music Coalition, *Applications of AT&T and Deutsch Telecom for Consent to Transfer Control of Licenses and Authorizations Held by T-Mobile USA Inc., and Its Subsidiaries*, WT Docket No. 11-65 (May 31, 2011).

use of unlicensed frequencies, femtocells, and next generation standards are all potential solutions to spectrum limitations. Spectrum acquisitions that enhance the dominant position of a wireless provider may lead to that provider making small improvements in the near future. However, in the long term, competitive forces will be absent to discipline the dominant provider, thereby removing that provider's incentives to make any further improvements.

Second, Applicants' claim that the proposed transactions would move spectrum to a "higher valued" use and thereby represents "precisely the type of transaction that the Commission's secondary market policies are designed to facilitate"⁸⁷ merits further scrutiny. While the Commission's secondary market policies are generally designed to allow flexibility in spectrum transactions, including by license transfers, the Commission has noted that these transactions have to be consistent with the Commission's public interest objectives.⁸⁸ If a significant reduction in competitive pressure would eliminate the incentive for efficient use of spectrum, the Commission's public interest objectives would be undermined. As noted above, spectrum concentration would enable Verizon to raise prices for various other secondary market transactions, such as spectrum leasing.

Furthermore, the National Broadband Plan observed that the record on the functioning of current secondary markets is mixed.⁸⁹ It recommended that the Commission take a second look at the functioning of these markets and consider providing additional incentives for the development of secondary markets by, among

⁸⁷ Verizon/SpectrumCo Public Interest Statement, 16.

⁸⁸ Promoting efficient use of spectrum through elimination of barriers to the development of secondary markets, *Second Report and Order*, ¶ 1, WT Docket No. 00-230, (September 2, 2004), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-167A1.pdf.

⁸⁹ *National Broadband Plan* at 83.

other efforts, encouraging and facilitating dynamic spectrum sharing. Dynamic spectrum sharing focuses on the ability of devices to use portions of spectrum that are available at particular locations for short periods of time. This technology, with its focus on sharing, represents one of the most forward-thinking visions for spectrum secondary markets. Given these developments, the proposed transactions, with their model of exclusive control over a significant chunk of spectrum can hardly qualify as “precisely the type of transaction that the Commission’s secondary market policies are designed to facilitate.”

2. *The Commission Should Evaluate the Effects of Spectrum Concentration Even Where the Spectrum Screen Is Not Triggered.*

The Applicants claims that the proposed transactions will not exceed the spectrum screen in 105 of the 120 markets affected by the transactions. They further note that in the markets where the screen will be exceeded the overage will range from a minimum of 4 MHz to a maximum of less than 20 MHz. We trust the Commission to evaluate the veracity of these claims independently and note that an overage of 20 MHz is not insignificant.

While the Commission may be guided by the spectrum screen in evaluating the proposed transactions, the screen is not a dispositive test of whether the transactions would adversely impact competition. First, the legal status of the spectrum screen remains unsettled, as many parties have filed petitions before the Commission challenging the recent expansion of the screen.⁹⁰ Second, the assumptions underlying the

⁹⁰ Public interest groups filed a petition for reconsideration of the spectrum screen extension. *See* Petition for Reconsideration of the Public Interest Spectrum Coalition, *Sprint Nextel Corporation and Clearwire Corporation Application for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 08-94 (filed Dec. 8, 2008). Separately, the Rural Telecommunications Group filed a petition requesting the FCC reinstate a modified version of its spectrum cap, *see Rural Telecommunications Group, Inc. Petition for Rulemaking to Impose a Spectrum Aggregation Limit on All Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*,

method used to calculate the spectrum screen have proven to be unreliable. Spectrum is included within the screen based on a prediction that it will be available in the next two years for provision of broadband service.⁹¹ However, experience has shown that this prediction is not always accurate. For example, in approving AT&T's acquisition of spectrum licensed to Dobson Communications, the Commission revised the screen to include 80 MHz of spectrum from the 700 MHz band.⁹² In doing so, it relied on 62 MHz of this band being auctioned for commercial use in the future and 18 MHz already auctioned to Qualcomm for its MediaFLO service.⁹³ However, Qualcomm could not use this spectrum to offer its MediaFLO service and this same spectrum was later acquired by AT&T.⁹⁴ Spectrum involved in the current transaction is another example of how spectrum licensed for particular uses may not actually be built out for those uses.

For these reasons, the Commission must not rely on the spectrum screen as the sole basis to evaluate the impact of spectrum aggregation on competition. The Commission has, on previous occasions, altered the spectrum screen to permit pending transactions.⁹⁵ It can do the same to disallow license transfers where the broad aims of the Communications Act require such action.

Petition for Rulemaking, RM-11498 (filed July 16, 2008). Neither of these petitions has yet been resolved by the Commission, and consequently Applicants cannot simply rely on compliance with the screen as a proxy for a meaningful analysis of potential competitive harm.

⁹¹ *Verizon/Atlantis Order*, ¶¶ 60–62.

⁹² *AT&T/Dobson Order*, ¶ 30.

⁹³ *Id.* ¶ 31.

⁹⁴ *AT&T/Qualcomm Order*, ¶ 5.

⁹⁵ *AT&T/Dobson Order*, ¶ 26–30; *Sprint/Clearwire Order*, ¶ 53; *Verizon/Atlantis Order*, ¶ 53.

II. THE COMMISSION HAS DIRECT AUTHORITY TO BLOCK THE JOINT AGREEMENTS.

As discussed above, the Commission should block the entire transaction, including the license transfers and the joint agreements. While the Commission has independent authority to block the joint agreements even without their being part of a license transfer transaction, the public interest harms are greatly magnified when those license transfers are accompanied by the joint agreements, and the harms caused by the joint agreements themselves, with the anticompetitive license transfers as a backdrop, are likewise increased. However, in its analysis, the Commission should certainly not overlook its bases of authority apart from Section 301(d), and this section will describe the independent statutory grounds for the Commission to block the joint agreements that it should rely on when it acts to prevent the transaction as a whole.

A. The Commission Has Authority Under Section 628 To Block The Joint Agreements.

Pursuant to Section 628 of the Communications Act, the Commission must prohibit any arrangements that would reduce video distribution competition, such as the Verizon/SpectrumCo and the Verizon/Cox agreements.

Section 628 charges the Commission with promoting competition and diversity in video programming distribution.⁹⁶ It makes it unlawful “for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite

⁹⁶ 47 U.S.C. § 548.

broadcast programming to subscribers or consumers.”⁹⁷ This “broad and sweeping”⁹⁸ provision authorizes the Commission to take actions to ensure that competitive providers have continued access to programming through such measures as program access rules,⁹⁹ and that competitive providers have continued access to consumers through such measures as the prohibition of contracts that grant exclusive access for one provider to offer wiring inside multiple-dwelling units (“MDUs”).¹⁰⁰ Because the joint agreements would inhibit competitive video providers’ access to consumers, the Commission should disallow them.

Today, as cable systems consolidate, as small cable operators are squeezed by ever-higher programming costs, and as direct broadcast satellite (“DBS”) providers struggle to compete in markets where they cannot offer the same bundles (of telephone, broadband, and video) as other providers, video competition cannot be taken for granted. Numerous factors are conspiring to reduce consumer choice. New technologies allow for new forms of video distribution, but outdated business models and exclusionary business deals are preventing them from achieving their potential.

One bright spot in video competition is the emergence of telco video delivery—where AT&T or Verizon, for example, begin to offer subscription video services comparable to cable.¹⁰¹ But the joint agreements pose a threat to this emerging

⁹⁷ 47 U.S.C. § 548(b).

⁹⁸ *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 704 (D.C. Cir. 2011) (citing *Nat’l Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009)).

⁹⁹ 47 C.F.R. §§ 76.1000–1004.

¹⁰⁰ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007).

¹⁰¹ While online video is an important emerging video competitor, it generally offers complementary programming that does not match the line-up of traditional subscription services.

competition. In markets where Verizon has agreements with a cable system, it is unlikely to roll out video services over its copper plant, or continue the buildout of its fiber. The joint agreements therefore frustrate the effective performance of the Commission's duties in the future by limiting the potential for competitive entry into the video distribution market.

In 2011, telephone providers delivered programming to more than 8 million subscribers.¹⁰² In combination with the 34 million Americans who received video programming through a satellite provider, almost 40 percent of consumers took advantage of the choice to receive video programming through provides other than cable companies.¹⁰³ The growth of these alternative distribution channels has been positive for content providers, and for the viewing public. Competition in video delivery limited the buyer power of cable providers, which previously operated regional monopolies. This enabled sellers to negotiate for better affiliate fees, which they invested in original programming. Since 2001, for example, affiliate fees to basic cable networks grew almost 11% annually (from \$9.6 billion to \$26.8 billion).¹⁰⁴ Over the same period of time, basic cable networks invested an additional 10% annually in programming (from \$8.4 billion to \$22 billion).¹⁰⁵ In other words, nearly all of the benefit of competition flowed directly to the consumer, consistent with the predicate of the antitrust laws and the 1996 Act. The past year (2010–2011) featured 84 original comedies and dramas on basic cable networks,

¹⁰² SNL Kagan, *U.S. Multichannel Industry Benchmarks*, retrieved Feb. 13, 2012.

¹⁰³ *See id.*

¹⁰⁴ SNL Kagan, *TV Network Industry Benchmarks*, retrieved Feb. 13, 2012.

¹⁰⁵ *Id.*

compared to 24 in 2001–2002.¹⁰⁶ Altering the dynamics to remove that competition will have an adverse impact on original programming, affecting creators and the public at large. Consumers deserve access to more diverse content, not less. Content creators deserve a market where competition for their product allows them to capture an economic value commensurate with their product. The Commission must scrutinize and disallow the joint agreements, which by all appearances constitute agreements not to compete,¹⁰⁷ if it is to meet its public interest obligations to protect diversity and competition.

The joint agreements threaten existing video delivery competition. Cable overbuilders and DBS may find it increasingly difficult to match the prices and services of incumbent cable systems that now have the added advantage of bundling their services

¹⁰⁶ WGAW Analysis of Feb. 4, 2012.

¹⁰⁷ Though the Commission’s authority is not confined by the antitrust laws, as the Supreme Court observed long ago, “joint ventures have no immunity from the antitrust laws,” and “when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.” *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 110, 113 (1984) (internal quotations and citations omitted). *See also id.* at 114 (contrasting efficient blanket license music agreements covering broadcast rights to a large number of individual compositions from joint ventures at issue, which sold the rights on an individual basis, only in a non-competitive market), 115 (rejecting argument that the “plan [is] necessary to enable the NCAA to penetrate the market through an attractive package sale,” as “there is no need for collective action in order to enable the product to compete against its nonexistent competitors.”). Consistent with “the heart of our economic policy,” which “long has been faith in the value of competition,” the Sherman Act, like the Communications Act, reflects a legislative judgment that ultimately competition leads to lower prices and better goods. *See Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (internal quotations and citations omitted). Accordingly, the test for the enforceability of agreements in restraint of trade that are ancillary to an otherwise potentially legitimate transaction is “whether the challenged contracts or acts were unreasonably restrictive of competitive conditions. Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.” *Id.* at 690. In this instance, the surrounding circumstance give rise to the inference or presumption that the license transfers were intended to restrain trade and enhance prices. *See id.* at 693 (an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of a service provider, “[w]hile . . . not price fixing as such” requires “no elaborate industry analysis . . . to demonstrate the anticompetitive character” and “impedes the ordinary give and take of the market place”).

together with wireless, and a greatly increased retail presence. Together, these threats frustrate the Commission’s ability to carry out its responsibilities, and provide it reason to invalidate the joint agreements pursuant to Section 628. Like it has before, the Commission must “prohibit the continuation and proliferation of an anticompetitive cable practice that has erected a barrier to the provision of competitive video services.”¹⁰⁸ As the Commission has explained, actions to promote video distribution competition are consistent with the broader purposes of communications policy:

prohibiting exclusivity clauses for the provision of video services will further the purposes of the 1992 Cable Act and the 1934 Act . . . the 1992 Cable Act sought to promote competition and consumer choice in cable communications. In addition, the purpose of the Communications Act of 1934, as amended, is ‘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.’ Moreover, Section 706 of the Telecommunications Act of 1996 directs the Commission to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . .’¹⁰⁹

The joint operating entity intended to develop new technology represents a danger to video competition in itself. The companies have said they plan use the venture to develop technologies that “will integrate” video with other services.¹¹⁰ As discussed above, the joint venture’s motivation would be to keep these technologies proprietary to the Verizon, Cox, and SpectrumCo companies—perhaps licensing them only on oppressive terms, “take it or leave it.” In normal circumstances, such technologies rarely take off in the marketplace because competitors generally have more open alternatives and the standardization process ensures that essential patents can be licensed on reasonable and non-discriminatory terms. But against the backdrop of the unlawful joint

¹⁰⁸ 22 FCC Rcd. 20235, ¶ 46.

¹⁰⁹ Id. ¶ 47.

¹¹⁰ Verizon/SpectrumCo Public Interest Statement, 24 n.71.

marketing arrangements, any technologies developed by the joint venture would have a ready set of adopters, fragmenting the market for broadband-integrated video delivery. Under this scenario, for example, video services that are not party to the agreements would be unable to provide video that is compatible with Verizon devices, and in exchange the cable companies competing with these new services would make their video services Verizon-only. The Commission should not underestimate the creativity of the parties in devising ways to leverage technology to lock in control of the video delivery market.

For these reasons, consistent with its past actions, the Commission must protect the public interest and carry out Congressional policy to protect video distribution competition by disallowing the joint agreements.

B. Section 652 Prohibits the Joint Agreements.

Section 652 of the Communications Act places various restrictions on agreements between “local exchange carrier[s] or any affiliate of such carrier[s]” and cable systems.¹¹¹ Enacted “to maximize competition between local exchange carriers and cable operators within local markets,”¹¹² it prohibits the joint agreements between Verizon and the cable companies.

¹¹¹ 47 U.S.C. § 572. This provision allows the Commission to waive the prohibition if it finds doing so to be in the public interest. *Applications Filed by Comcast*, Memorandum Opinion & Order & Order on Reconsideration, 25 FCC Rcd. 3401, ¶ 2 (2010). But as argued throughout this Petition to Deny, the proposed joint agreements are not in the public interest. Consequently the FCC cannot waive Section 652.

¹¹² H.R. REP. NO. 104-458, at 174 (1996). To accomplish this goal, the final bill deliberately incorporates “the most restrictive provisions” of the House and Senate versions. *Id.*

1. Section 652 Applies to Verizon Wireless.

Verizon Wireless is an affiliate of Verizon Communications. Under the Communications Act, an “affiliate” is an entity “that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another [entity]. For purposes of this paragraph, the term ‘own’ means to own an equity interest (or the equivalent thereof) of more than 10 percent.”¹¹³

Verizon Communications, indisputably a local exchange carrier, owns and controls Verizon Wireless, holding 55% of the company. Its junior partner Vodafone has a “a non-controlling 45 percent interest”¹¹⁴ in the company. The Commission granted the license transfers that created Verizon Wireless after being given assurances that control of Verizon Wireless’s “business and affairs is vested in a seven-member Board of Representatives, four designated by Bell Atlantic [now Verizon Communications] and three by Vodafone. Therefore, according to the Applicants, Bell Atlantic will also hold majority control of the Board and, thus, will have affirmative control of [Verizon Wireless].”¹¹⁵

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,”¹¹⁶ and the two companies share interlocking

¹¹³ 47 U.S.C. § 153.

¹¹⁴ *Verizon/Atlantis Order*, ¶ 8.

¹¹⁵ *Applications of Vodafone Airtouch and Bell Atlantic Corporation for Consent to Transfer of Control or Assignment of Licenses and Authorizations*, Memorandum Opinion & Order, 15 FCC Rcd 16507, ¶ 8 (2000).

¹¹⁶ VERIZON LEADERSHIP TEAM, *Lowell C. McAdam*, http://www22.verizon.com/onecms/LeadershipTeam/Lowell_McAdam/?IsBio=Y (last visited Feb. 21, 2012).

directorates. Lowell McAdam, for example, is the Chairman and CEO of Verizon Communications, and Chairman of the Verizon Wireless Board of Representatives. Verizon Wireless and Verizon Communications even share one career track, with senior executives transferring from one company to the other. For example, Mr. McAdam and the now-retired Denny Strigl have held senior executive positions in each. Because Verizon Wireless is an affiliate of Verizon Communications, and because they operate as one company, any restrictions that apply to the one apply to the other.

Section 652(c) does not contain an “affiliation” provision, but applies to Verizon Wireless nonetheless. The DC Circuit has agreed with the FCC that statutory language that does not include the word “affiliate” can still apply to affiliates when such a reading is necessary to carry out the “regulatory purpose” of the provision.¹¹⁷ Other FCC practice confirms that the Commission looks past legal formalities to determine the facts of ownership and control—especially when, as here, companies may have an incentive to use business structures to evade the application of a rule or policy. For example, in its designated entity rules the Commission determines whether a company has material relationships with another that would undermine the purpose of its rules or Congressional policy. If a “designated entity” “leases or resells (including at wholesale) more than 25% of its spectrum capacity to any single lessee or purchaser, it must add that lessee’s or purchaser’s revenues to its own to determine its continued eligibility for DE credits.”¹¹⁸

The Commission adopted these and similar rules “to ensure that the recipients of designated entity benefits are limited to those entities and for those purposes Congress

¹¹⁷ *GTE Serv. v. FCC*, 224 F.3d 768, 773–74 (D.C. Cir. 2000). This applies even when related provisions *do* include the word “affiliate.” *Id.* at 772.

¹¹⁸ *Council Tree Commc’ns v. FCC*, 619 F.3d 235, 251 (3d Cir. 2010) (upholding the rules codified in 47 C.F.R. § 1.2110(b)(1)(i) and (b)(3)(iv)(B)).

intended.”¹¹⁹ Similarly, 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.

2. *Section 652(c) Prohibits Joint Undertakings Like Those Proposed By Verizon and the Cable Companies.*

Section 652(c) provides that “[a] local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market.”¹²⁰ The joint agreements between Verizon and the cable companies run afoul of this provision because they create a joint undertaking by the companies to directly provide video and telecommunications services to consumers. When Verizon sells a cable service directly from its stores and markets it as part of the same overall bundle or package as its voice and data services, this constitutes in all relevant respects a “joint venture or partnership” with a cable provider to provide video programming directly to its customers. Similarly, when a cable provider makes Verizon telecommunications services available in the same way as its video programming services, this constitutes a “joint venture or partnership” with Verizon to provide telecommunications services. Under 652(c) this is not allowed and the Commission must prohibit the arrangements.

¹¹⁹ *Modernization of the Commission’s Competitive Bidding Rules & Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Red. 4753, § 1 (2006).

¹²⁰ 47 U.S.C. § 572(c).

3. *Sections 652(a) and (b) Likewise Prohibit the Joint Agreements.*

Section 652(a) provides that “[n]o local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier’s telephone service area.”¹²¹ On their face the joint agreements create a “management interest” by Verizon in various cable companies: they create a mechanism whereby Verizon and the cable companies will sit down together to plan the future direction of competition in their jointly-controlled markets, and how they will jointly promote each other’s services. In the markets the undertakings will control, Verizon and the cable companies will behave as one unit, jointly managed. This is unlawful under 652(a).

The converse of 652(a), 652(b) provides that “[n]o cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator’s franchise area.”¹²² By the same reasoning as above, the agreements are unlawful under this provision as well.

III. NO REMEDIES CAN CURE THESE TRANSACTIONS.

The proposed transactions threaten serious and unfixable harms to the public interest and the Commission must therefore block the transactions and deny the instant

¹²¹ 47 U.S.C. § 572(a).

¹²² 47 U.S.C. § 572(b).

applications. The Commission, being well within its statutory authority, should prevent the proposed cross-sale and joint operating entity agreements in addition to denying Applicants' proposed license transfer. However, based on past practice, Petitioners are aware that the Commission often seeks to adopt remedies to address a few of the most egregious harms that a license transfer would cause, even if it is unable to completely make the public whole. Currently, such remedies cannot even be considered for the joint agreements, since Petitioners do not even have access to the full text of the contracts between the parties, and because, in any event, the gravest threat could come down the road, as the companies modify the scope of their cooperation. Such harms are irremediable. But after it blocks the joint agreements, if the Commission were to unwisely grant the license transfers, the remedies suggested in this section would be a minimum floor to begin remedying the harms caused by excessive spectrum concentrated in the hands on one carrier.

A. The Commission Must Block the Proposed Transfers and Joint Agreements.

As a general matter, Petitioners do not believe that the anticompetitive harms that these transactions would cause can be “remedied”—rather, the Commission must block them. Both the massive spectrum aggregation caused by the license transfers, and the blatantly anticompetitive joint agreements, are unfixable threats to the public interest. Each of these components alone threatens the competitive future of broadband services; together, they present an unacceptable attempt to lock cooperating incumbents into their respective spheres in the wireless, wireline, and video distribution worlds, reducing competition and frustrating multiple goals of the Communications Act.

The parties claim that the Commission should unconditionally approve the transfer because, for most markets, the current spectrum screen is not reached. To the extent that this is true, it does not account for the fact that the current spectrum screen provides a limited and inadequate tool for assessing the effects of spectrum consolidation. For example, frequencies below 1 GHz, as these are, can sustain mobile broadband use much more readily than those above 1 GHz, and consolidation in those lower frequencies therefore poses a much higher risk of reducing competition.¹²³ Verizon already has licenses to significant amounts of sub-1GHz spectrum, and adding these licenses to those consolidates a field considerably more rarefied than that of the full spectrum range. Even the current spectrum screen would far more accurately reflect the relative market value and competitive advantage of each firm's spectrum holdings by weighting each band based on the propagation characteristics, which in direct proportion to frequency range drives the capital cost of achieving a comparable quality of coverage over a similar geographic area. Many parties have repeatedly urged the Commission to take effects such as these into account. Indeed, a petition for the Commission to reconsider the spectrum screen extension has been pending before the Commission for over three years,¹²⁴ and others have urged the Commission to reinstate modified spectrum caps.¹²⁵ The lack of resolution on these issues should not mean that the Commission should proceed by ignoring the reality that different frequency ranges, by virtue of their differing physical

¹²³ *Fourteenth Wireless Competition Report*, ¶ 270.

¹²⁴ Petition for Reconsideration of the Public Interest Spectrum Coalition, *Sprint Nextel Corporation and Clearwire Corporation Application for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 08-94 (filed Dec. 8, 2008).

¹²⁵ *Rural Telecommunications Group, Inc. Petition for Rulemaking to Impose a Spectrum Aggregation Limit on All Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, Petition for Rulemaking, RM-11498 (filed July 16, 2008).

characteristics, represent different markets, and that this particularly valuable market becomes particularly more concentrated as a result of the proposed transfer.

B. Roaming Obligations.

Concentration of the spectrum market can easily harm the public interest. Verizon will face reduced competitive pressure to charge reasonable roaming terms and rates, or to build out rapidly to allow consumers to make use of this space. To ensure this, the Commission should condition the transfer upon Verizon meeting roaming obligations; building out service in the transferred spectrum blocks aggressively; and ensuring that, so long as the transferred spectrum is unused, it may be added to the white spaces database for use by unlicensed devices.

The further concentration resulting from the license transfers will necessarily increase Verizon's ability to restrict or unreasonably burden other carriers in terms of data roaming. As the Commission has recognized, data roaming requirements can increase competition among wireless providers, increase the number of consumers who have access to mobile broadband services, and promote investment in facilities-based broadband networks. The Commission should ensure that Verizon does not abuse its much-increased market power over wireless data roaming by conditioning the transfer on reasonable provisions paralleling those in its data roaming order,¹²⁶ including requirements to offer roaming arrangements to other providers on commercially reasonable terms and conditions, and accounting for technological compatibility and feasibility.

¹²⁶ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order (2011). The Commission should impose these obligation upon Verizon as a condition of this transfer regardless of the outcome in the pending judicial review of the Data Roaming Order.

C. Use It Or Share It: Buildout Obligations With Teeth.

The licenses at issue have mostly gone to waste for years. The bulk of the licenses come from SpectrumCo, which bought them at auction in 2006 only to warehouse them and fail to deliver services to the public. Whether this was a deliberate ploy to keep the licenses out of the hands of competitors, or a bona fide but failed attempt to bring new services to the wireless market, is immaterial. The fact is that the Commission's policies with regard to this spectrum have not been sufficient to ensure that it actually delivers benefits to consumers, and any conditions in these proposed transfers must reflect that.

In particular, the Commission should allow Verizon to control these licenses only subject to "use it or share it" provisions.¹²⁷ To begin with, the Commission should adopt a tight schedule for deployment, similar to that adopted for the upper A and B blocks of the 700 MHz auction. Under this schedule, Verizon must provide signal coverage and offer service over at least 35 percent of the geographic area of each of the transferred license authorizations within four years of the completion of the license transfer. By the end of the license terms, Verizon should provide signal coverage and offer service for 70 percent of each geographic area. As with the relevant 700 MHz blocks, failure to meet the buildout requirements should be subject to enforcement. But under "use it or share it" conditions, the consequence for Verizon, if it fails to develop its spectrum, need not be outright forfeiture. Instead, spectrum that is underdeveloped should be made available for opportunistic use or on secondary markets, at reasonable rates. If Verizon chooses not to fully make use of the public resource of spectrum it is entrusted with, it should not stand

¹²⁷ See Michael Calabrese, *Use it or Share it: Unlocking the Vast Wasteland of Fallow Spectrum* (2011), available at <http://ssrn.com/abstract=1992421>.

in the way of others who would, even—or especially—when those “others” are potential Verizon competitors.

“Use it or share it” conditions will allow the Commission to make spectrum useful for users, and keep it from being a chip in a high-stakes game between communications giants. At the same time, they would not interfere with Verizon’s legitimate investment expectations because Verizon can move forward on any investments it intends to make. The Commission should therefore allow the license transfers only subject to conditions that ensure that spectrum is put into the secondary market if Verizon fails to use it to benefit the public.

D. Unlicensed Uses Until Deployment.

However rapidly Verizon may plan on deploying service to the areas in these spectrum bands, there is no reason that this valuable spectrum should continue to lie fallow while waiting for this buildout to occur. Any buildout requirements should be augmented by a “use it or share it” license condition that would permit other parties to make use of the spectrum acquired in this transaction on a very localized basis until such time as Verizon actually deploys service in that area. Responding to the Commission’s Notice of Inquiry on Dynamic Spectrum Use Technologies, Petitioners (along with others in the Public Interest Spectrum Coalition) have previously proposed this as an alternative to more draconian and largely unenforceable “use it or lose it” buildout requirements.¹²⁸ While temporary local use of fallow spectrum may not have been practical as recently as

¹²⁸ See Comments of the Public Interest Spectrum Coalition, *Promoting More Efficient Use of Spectrum Through Dynamic Spectrum Use Technologies*, ET Docket No. 10-237 (Feb. 28, 2011). See also Michael Calabrese, “Use it or Share it: Unlocking the Vast Wasteland of Fallow Spectrum,” Working Paper, presented at 39th Research Conference on Communication, Information and Internet Policy, Sept. 25, 2011.

last year, the Commission's ongoing certification of geolocation databases to govern opportunistic and conditional access by frequency-hopping radios to vacant TV channels makes this entirely feasible. There appears to be no reason to limit use of the TV Bands Databases to the TV band frequencies only, since these databases are capable of being used to regulate contingent access to fallow portions of other bands, including fallow AWS bands at issue here.

Even if the Commission imposes the buildout obligations suggested above, this spectrum will remain fallow for many years, particularly in rural and remote areas, until such time as Verizon completes a nationwide buildout. Just as licensed wireless microphone operators can make reservations in the database to block unlicensed access to TV white space channels as they need it, as part of its buildout obligation Verizon should be required to notify one or more FCC-certified TV Bands Database managers in advance of the commercial operation of a base station or other transmitter in each discrete geographic area as it builds out, along with the protection contour that is needed to give the licensee its needed and expected protection from harmful interference. Any unlicensed or other FCC-approved access to unused spectrum in a local area would be subject to these conditions, including the presumption that use of fallow spectrum licensed to Verizon on a primary basis is secondary, contingent, and temporary.

As the Commission adds fallow or underutilized bands to the database, subject to band-by-band conditions designed to avoid interference with incumbent licensees, network operators and/or devices can check the database for a particular area and select the most useful frequency from among those to which they can be tuned. Although device costs might be higher, the low spectrum costs would be an offset, encouraging use

of this otherwise wasted capacity as cognitive radio devices become more cost-effective. That trade-off between the ability to use unlicensed spectrum with somewhat more expensive equipment and/or a potentially lower quality of service is what has allowed thousands of wireless Internet service providers and community wireless providers to serve rural and other underserved areas.

Another emerging development that supports both the usefulness of opening access to a variety of unused frequency bands and its benefit for consumers and competition is the possibility that multiple carriers—as well as other service providers needing wireless connectivity—can share a common network infrastructure. The applications that use fallow spectrum on an opportunistic basis and/or share common local infrastructure—like many of the applications that would use unlicensed access to TV white space—are likely to be very low power and use local area connections for peer-to-peer applications, or for connections to a wireline router for the purpose of achieving faster data rates and offload. This would also facilitate data offloading and avoid the need to send certain bandwidth intensive data applications (such as video) over a capacity-limited licensed network operating on exclusively licensed spectrum.

Unlicensed use of the spectrum also would reduce congestion in existing mobile broadband networks—a particular concern of the Applicants—and would continue to spur the development and adoption of unlicensed devices. The Commission has explicitly recognized the potential benefits of unlicensed use of unused spectrum, and this spectrum should likewise not remain dark any longer than is necessary.

E. Equipment Interoperability.

If the Commission allows the license transfers to go forward, Verizon—already dominant over other carriers with respect to its spectrum holdings—would have such control over the AWS spectrum that it could control the equipment market and deploy handsets that work on its network alone. Therefore, the Commission must act to protect consumer choice by adopting an interoperability condition. By doing so, it will help mitigate some of the harms to consumers that would result from a fragmented equipment market, ensuring that small and regional carriers’ subscribers have access to a full range of reasonably-priced and innovative handsets.

CONCLUSION

WHEREFORE, for the above stated reasons, the Commission should deny the Application, or refer the matter for a hearing pursuant to Section 310(d).

Respectfully submitted,

PUBLIC KNOWLEDGE
MEDIA ACCESS PROJECT
NEW AMERICA FOUNDATION OPEN
TECHNOLOGY INITIATIVE
BENTON FOUNDATION
ACCESS HUMBOLDT
CENTER FOR RURAL STRATEGIES
FUTURE OF MUSIC COALITION
NATIONAL CONSUMER LAW CENTER,
ON BEHALF OF ITS LOW-INCOME
CLIENTS
WRITERS GUILD OF AMERICA, WEST

/s Harold Feld
Legal Director
PUBLIC KNOWLEDGE

February 21, 2012

REDACTED—FOR PUBLIC INSPECTION

CONFIDENTIAL APPENDIX

[An appendix, consisting of 9 pages, containing highly confidential information subject to the Second Protective Order was submitted as part of this filing. Absent the explicit permission of the Parties with regard to what information can be made public, Petitioners have redacted the entire appendix.]

DECLARATION OF HAROLD FELD

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

1. I have read the foregoing Petition to Deny of Public Knowledge et al., including the Confidential Appendix.
2. This declaration is submitted in support of the Petition to Deny applications in FCC Docket Number WT 12-4.
3. 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.
4. 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.
5. 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.
6. 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

DECLARATION OF ANDREW JAY SCHWARTZMAN

1. I am Andrew Jay Schwartzman, Senior Vice President and Policy Director of Media Access Project (“MAP”), and declare under penalty of perjury that the foregoing is true and correct.
2. This declaration is submitted in support of the Petition to Deny applications in FCC Docket Number WT 12-4.
3. MAP is a non-profit, public interest law firm and advocacy organization working in communications policy. For over 38 years, MAP has promoted the public interest before the FCC and the U.S. Courts. Over that time, MAP has provided critical policy leadership and counsel to the public interest and media reform community and fought to ensure the public’s right to access and to diverse and competitive telecommunications services. MAP, its employees, and the persons it represents are users of wireless broadband services, and many are customers both of Verizon Wireless and of the owners of SpectrumCo and Cox. MAP’s employees and clients 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. They also receive multichannel video programming and wireline broadband access.
4. In my best knowledge and belief, the members of the public whose interests MAP represents, and MAP’s employees, 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 MAP’s employees and clients.
5. The allegations of fact contained in the petition are true to the best of my personal knowledge and belief.

/s Andrew Jay Schwartzman
Senior Vice President and Policy Director
MEDIA ACCESS PROJECT

CERTIFICATE OF SERVICE

I certify that on February 21, 2012, I sent the foregoing Petition to Deny by email to the following:

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s/ Jodie Griffin
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PUBLIC KNOWLEDGE