

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

In the Matter of)
)
Application of Cellco) WT Docket No. 12-4
Partnership d/b/a)
Verizon Wireless and SpectrumCo LLC)
For Consent To Assign Licenses)
)
Application of Cellco Partnership d/b/a)
Verizon Wireless and Cox TMI Wireless,)
LLC)
For Consent To Assign Licenses)

**PETITION TO DENY OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

Stefanie A. Brand
Director
Division of Rate Counsel
Christopher J. White
Deputy Rate Counsel
P.O. Box 46005
Newark, NJ 07101
Phone (973) 648-2690
Fax (973) 624-1047
www.rpa.state.nj.us
njratepayer@rpa.state.nj.us

Economic Consultants:
Susan M. Baldwin
Timothy E. Howington

February 17, 2012

TABLE OF CONTENTS

SUMMARY	iii
I. INTRODUCTION	1
II. SUMMARY OF TRANSACTIONS	3
A. Background	3
B. Proposed sale of spectrum from SpectrumCo to Verizon Wireless.....	6
C. Proposed sale of spectrum from Cox to Verizon Wireless	7
III. STANDARD OF REVIEW	8
A. Criteria for assessing applications for transfer of spectrum licenses	8
IV. SPECTRUM AND SECONDARY MARKETS	12
A. The spectrum licenses assigned to SpectrumCo and Cox have appreciated substantially, although these companies have done little more than warehouse them.	12
B. Spectrum is a public asset that should be assigned in a way that maximizes public benefits.....	13
V. COMPETITION	17
A. Background	17
B. The agreements between cable companies and Verizon Wireless could lead to collusion instead of competition, thus harming consumers.....	21
C. The proposed transaction would increase and entrench Verizon Wireless' market power.....	24
D. Recent data corroborate the trend of market concentration, a trend that the proposed transaction would accelerate.....	27
VI. NEED FOR FCC INVESTIGATIONS	32
A. Interstate Special Access.....	33
B. Net neutrality.....	34
C. Data Collection and Analysis.....	37
VII. CONDITIONS	38
A. The FCC should deny the proposed transactions; if it, nonetheless, decides to approve them, it should only do so conditioned upon specific commitments by Applicants to enhance the public interest.....	38
B. Verizon should commit to implement a program that parallels the Comcast "Essentials" program.....	38
C. Verizon Wireless should commit to the FCC's "third" net neutrality rule.....	39
VIII. CONCLUSION	40

- Attachment A Declaration of Susan M. Baldwin
- Attachment B “Top 10 Licenses by Provisionally Winning Bid (Net), Total FCC Advanced Wireless Services Auction No. 66, Final,” accessed 2/15/2012 at http://wireless.fcc.gov/auctions/66/charts/66press_1.pdf (via FCC Auctions page).
- Attachment C “Top 10 Bidders by Net Provisionally Winning Bids Total Total FCC Advanced Wireless Services Auction No. 66, Final,” accessed 2/15/2012 at http://wireless.fcc.gov/auctions/66/charts/66press_3.pdf (via FCC Auctions page).

SUMMARY

The Federal Communications Commission (“FCC” or “Commission”) should deny the Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses and should also deny the Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses because the Applicants have failed to demonstrate that the proposed transfers of licenses on balance would be in the public interest.

The Applicants portray the transactions as straightforward re-assignments of unused spectrum licenses, using the secondary market as a way to link various sellers (in this instance, a group that includes the nation’s largest cable companies) and a buyer (the nation’s largest wireless carrier). On its face, this would seem to be a reasonable shifting of spectrum resources from entities that have chosen not to use them to an entity that places value on and would plan to use these resources in order to serve customers, that is, simply a market transaction between two informed and willing parties. Indeed, Rate Counsel recognizes that the FCC has previously endorsed secondary markets as an efficient way to address carriers’ spectrum requirements, and Rate Counsel further acknowledges that the proposed transactions would not entail the transfer of any wireless customers. However, although no customers are being migrated from one carrier to another carrier, the potential anticompetitive consequences of the two applications could harm the nation’s consumers. Moreover, rather than rewarding the cable companies for stockpiling spectrum (with appreciation of more than one billion dollars relative to their original purchase prices for their licenses), and rather than approving a “sole source” market transaction, the FCC should instead require the companies to return the spectrum licenses to the FCC to be re-

auctioned to the highest bidder. The public, not cable companies, should benefit from the appreciation in the value of the spectrum, which is a public good. Furthermore, the spectrum should be offered through an auction to all possible wireless suppliers rather than being transferred in a bilateral transaction to Verizon Wireless.

The transactions are not as competitively benign as the Applicants would have the FCC believe, nor is it clear that the proposed transactions would maximize the public interest. The ways that spectrum are acquired and used have major implications that ripple throughout the nation's economy. Spectrum use has network externalities and is a critical and scarce input for other services in the economy. The spectrum licenses at issue here were acquired by large cable companies who never put them to productive use but now seek to profit – in a major way – from their resale. Rather than acquiesce in this windfall and thus reward the stockpiling of a scarce and valuable resource, the FCC should reassert its role as manager of the nation's spectrum and redistribute this valuable resource according to the original auction procedures. In this way, the public, rather than private interests, will derive the maximum market value for the spectrum, and it will give all potential wireless suppliers equal footing in obtaining access to a limited and essential resource.

Based on its review of the two proposed transactions and the status of today's wireless, telecommunications, and cable markets, Rate Counsel concludes the following:

- The unused spectrum should be returned to the FCC so that it can be auctioned to the highest bidder.
- The proposed transactions would further entrench Verizon Wireless' dominance in wireless markets, to the detriment of consumers.

- The transaction would eliminate potential competitors in a highly concentrated wireless market, to the detriment of the FCC's pursuit of competition and of consumers' access to a diverse supply of wireless companies.
- The fact that the nation's largest cable competitors have determined that the barriers to entry in wireless markets make it unprofitable to go into this line of business underscores the lack of supply elasticity in wireless markets, which accentuates the need for the FCC to take a hard look at the present and likely future status of competition in the nation's wireless markets.
- Wireless markets have become increasingly concentrated, with two companies controlling the vast majority of the market.
- The existence of commercial agreements between Verizon Wireless and their erstwhile cable competitors suggest that industry's "cooperation" could come at the expense of consumers – in the absence of effective competition, the now well-entrenched cable-telecommunications duopoly could exert unconstrained control over the rates, terms, and conditions of wireless and cable based offerings. Consumers would be harmed.
- Spectrum is a public asset: rather than allow cable companies to benefit from having hoarded spectrum since 2006, the FCC should require them to return the spectrum to the FCC (with compensation to the cable companies based on the price they originally paid through the auction, with interest, plus reasonable compensation for their investment in clearing microwave links and testing) to be re-auctioned on an expedited basis.
- The very trend upon which the Applicants rely in support of their Petitions, namely consumers' seemingly insatiable demand for wireless services, underscores the

importance of the FCC taking the competitive pulse of this increasingly concentrated industry that supplies what has become an indispensable service throughout the country.

- The FCC should deny the two Petitions.
- Regardless of the outcome of this proceeding, in order to protect consumers and to promote effective competition, the FCC should:
 - Open an investigation into the costs and rates of wireless services.
 - Require carriers to provide up-to-date information about the rates, terms, and conditions of their wireless services on a semiannual basis; the FCC should post this information for the general public. An informed public can make more economically efficient purchasing decisions than a public that is in the dark or confused by complex pricing plans. Furthermore, the FCC requires accurate and up-to-date pricing information to assist it in monitoring the level of competition that exists in relevant wireless markets.
 - Revisit its Net Neutrality Order, and apply all of its network neutrality policies and rules to wireless providers. Precisely because of the unprecedented and still-growing demand for wireless services, combined with the lack of effective wireless competition, net neutrality conditions are essential to protect consumers from otherwise unbridled practices of wireless carriers.
 - Monitor whether the voluntary “bill shock” measures that the wireless industry announced last year are protecting consumers adequately.
 - Complete its investigation of the supracompetitive rates of interstate special access services.

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

In the Matter of)	
)	
Application of Cellco Partnership d/b/a)	WT Docket No. 12-4
Verizon Wireless and SpectrumCo LLC)	
For Consent To Assign Licenses)	
)	
Application of Cellco Partnership d/b/a)	
Verizon Wireless and Cox TMI Wireless,)	
LLC)	
For Consent To Assign Licenses)	

**PETITION TO DENY OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

I. INTRODUCTION

Pursuant to the pleading cycle established by the Federal Communications Commission (“FCC” or “Commission”),¹ the New Jersey Division of Rate Counsel (“Rate Counsel”), an agency representing New Jersey consumers,² files this Petition to Deny (“Petition”) the above-referenced applications (“Applications”) for transfer of control of certain licenses and

¹/ Public Notice, DA 12-67, “Cellco Partnership d/b/a Verizon Wireless, Spectrum Co., LLC and Cox TMI Wireless, LLC Seek FCC Consent to the Assignment of AWS-1 Licenses, Pleading Cycle Established,” WT Docket No. 12-4, released January 19, 2012. Oppositions to petitions to deny are due March 2, 2012, and replies to the oppositions are due March 12, 2012. *Id.*

²/ Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel was formerly known as the New Jersey Ratepayer Advocate, as a Division within the Department of the Public Advocate. *N.J.S.A. §§ 52:27EE-1 et seq.*

authorizations.³ For the reasons set forth in this Petition to Deny, the FCC should find that the Applications are contrary to the public interest.

Rate Counsel's interest encompasses the use of spectrum licenses specifically in the Phil.-Atl. City PA-NJ-DE Basic Economic Area ("BEA") (license number AW-BEA012-B),⁴ but also, more broadly, to the national market for wireless services. New Jersey's wireline and wireless consumers communicate with other wireless consumers throughout the country, using spectrum which is a national public asset. Therefore, the way in which any (and all) of the spectrum at issue in this proceeding is assigned – or reassigned – directly affects New Jersey consumers.

Rate Counsel is heartened by the FCC's recent actions that demonstrate a concern for increasing concentration and lessening competition among wireless providers, as reflected in its recent deliberations regarding the proposed acquisition by AT&T Inc. ("AT&T") of T-Mobile USA, Inc. ("T-Mobile"). The FCC's comprehensive assessment of the potential impact of recent industry-proposed, sweeping changes to the composition of the wireless industry on consumers and the public interest was welcome. Specifically, the analytically thorough report issued by FCC Staff⁵ demonstrates sound fact-finding and conclusions. Rate Counsel is hopeful that the FCC, in its evaluation of the merits of the two pending applications in this proceeding, will

³ / Throughout this Petition, reference to "Applications" is intended to refer to all applications in the above-captioned proceeding.

⁴ / "Top Top 10 Licenses by Provisionally Winning Bid (Net), Total FCC Advanced Wireless Services Auction No. 66 Final," accessed 2/15/2012 at http://wireless.fcc.gov/auctions/66/charts/66press_1.pdf (via FCC Auctions page). This is included as Attachment B to this Petition to Deny. SpectrumCo's winning bid for its license for this BEA was \$78,838,000. *Id.*

⁵ / In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc., WT Docket No. 11-65, FCC Staff Analysis and Findings, released November 29, 2011.

continue to be wary of attempts by the wireless industry's dominant players to concentrate their market power, and to diminish public benefits.

Based upon the Applications as filed, the FCC should grant Rate Counsel's Petition and deny the Applications.

II. SUMMARY OF TRANSACTIONS

A. Background

The FCC is reviewing two separate applications pursuant to Section 310(d) of the Communications Act of 1934, as amended,⁶ for assignment of spectrum licenses, both of which involve Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"). In one application, Verizon Wireless and SpectrumCo, LLC ("SpectrumCo"),⁷ request consent to assign 122 Advanced Wireless Services (AWS-1)⁸ licenses to Verizon Wireless from SpectrumCo ("Verizon Wireless-SpectrumCo Application").⁹ In the second application, Verizon Wireless and Cox TMI Wireless, LLC¹⁰ ("Cox,") seek Commission consent to assign 30 AWS-1 licenses

^{6/} 47 U.S.C. § 310(d).

^{7/} SpectrumCo is a joint venture among subsidiaries of Comcast Corp. ("Comcast"), Time Warner Cable Inc. ("Time Warner Cable"), and Bright House Networks, LLC ("Bright House"). SpectrumCo is owned by Comcast (63.6 percent), Time Warner Cable (31.2 percent), and Bright House (5.3 percent). Verizon Wireless-SpectrumCo Application, File No. 0004993617, Public Interest Statement at 2.

^{8/} As explained in the Public Notice, the "AWS-1 band consists of multiple paired blocks within the 1710-1755 MHz and 2110-2155 MHz range." Public Notice, at footnote 5, citing 47 C.F.R. § 27.5(h). At some future time, the Commission contemplates awarding additional AWS licenses, in other spectrum blocks, that have been designated as AWS-2 and AWS-3. See, footnote 55, *infra*.

^{9/} See File No. 0004993617.

^{10/} Cox TMI Wireless, LLC is a subsidiary of Cox Communications, Inc., which Cox states is the third largest cable company in the country, and a long-time provider of high-speed Internet and local telephone services. See Verizon Wireless-Cox Application, File No. 0004996680, Public Interest Statement at 2. At the time SpectrumCo was granted the AWS-1 licenses that are the subject of the Verizon Wireless-SpectrumCo Application, an affiliate of Cox Communications, Inc. ("Cox Communications") held a 10.441% equity interest in SpectrumCo. See Application of SpectrumCo LLC, ULS File No. 0002774487, filed October 4, 2006, and Verizon Wireless-Cox Application, Public Interest Statement at 3. In 2009, the Cox Communications affiliate exited the SpectrumCo

to Verizon Wireless from Cox (“Verizon Wireless-Cox Application”).¹¹ Verizon Wireless, SpectrumCo, and Cox (“Applicants”) state that these transactions do not include the transfer of customers, facilities, or assets other than spectrum licenses.¹²

SpectrumCo holds 121 Basic Economic Area (“BEA”) licenses and one Regional Economic Area license (in Hawaii). In each market SpectrumCo has 20 MHz of spectrum, except in Houston where it has 30 MHz of spectrum.¹³

The areas that Cox’s AWS 30 licenses cover do not overlap with SpectrumCo’s licenses. Furthermore, the Cox AWS licenses that Verizon would acquire would include Verizon Wireless’ first spectrum in many markets.¹⁴ The 30 licenses are in 29 markets, and in each of the markets, Cox has 20 MHz of spectrum.¹⁵ The licenses generally correspond with Cox’s cable system footprint.¹⁶

In addition, the Applicants report that Verizon Wireless has entered into separate commercial arrangements with Comcast, Time Warner Cable, and Bright House, and with Cox, that include agreements under which the companies and Verizon Wireless will sell each other’s

venture, receiving as part of its redemption value the AWS-1 licenses that are the subject of the Verizon Wireless-Cox Application. *See* Verizon Wireless-Cox Application, File No. 0004996680, Public Interest Statement at 3.

¹¹/ *See* File No. 0004996680.

¹²/ Public Notice, citing Verizon Wireless-SpectrumCo Application, Public Interest Statement at 1; Verizon Wireless-Cox Application, Public Interest Statement at 1.

¹³ / Declaration of Robert Pick, Chief Executive Officer of SpectrumCo, LLC, attached as Exhibit 4 to Verizon Wireless/SpectrumCo Application (“Pick Declaration”), at para. 2.

¹⁴ / Declaration of William H. Stone, Executive Director of Network Strategy for Verizon, in support of Verizon Wireless/SpectrumCo Application, included as Exhibit 3 (“Stone Declaration”), at para. 3. Mr. Stone also sponsored a declaration on behalf of the Verizon Wireless/Cox Application (also designated as Exhibit 3) that is virtually identical to the declaration on behalf of the Verizon Wireless/SpectrumCo Application. For convenience, the page cites in this Petition to Deny to the Stone Declaration are keyed to his Declaration on behalf of the Verizon Wireless/SpectrumCo Application, but the discussion applies equally to Mr. Stone’s Declaration in support of the Verizon Wireless/Cox Application.

¹⁵ / Verizon Wireless-Cox Public Interest Statement, at 1.

¹⁶ / *Id.*

cable and wireless services.¹⁷ The Applicants state that these commercial agreements “have no bearing on whether the spectrum sale is in the public interest, do not require Commission approval, and, for several reasons, do not need to be part of the formal record in this proceeding,” but have submitted the agreements into the record under the Second Protective Order.¹⁸

Although the BEA licenses at issue cover 152 discrete markets, in the aggregate they provide broad coverage. The FCC’s “[p]reliminary review of the Verizon Wireless-SpectrumCo Application indicates that the proposed assignment of licenses to Verizon Wireless would result in Verizon Wireless acquiring either 20 or 30 megahertz of spectrum in 572 CMAs covering 259.7 million people (or approximately 84% of the U.S. population)” and that Cox’s “proposed assignment of licenses to Verizon Wireless would result in Verizon Wireless acquiring 20 megahertz of spectrum in 90 CMAs covering 30 million people (or approximately 10% of the U.S. population).”¹⁹ Since the licenses are non-overlapping, this adds up to coverage of some 94% of the U.S. population. Clearly, the disposition of this spectrum affects the vast majority of the population in the United States.

The nature of the entities seeking to transfer away their interests in this far-reaching and important spectrum is also quite material to the Commission’s public interest considerations. Major cable companies have been engaged in a head-to-head contest with large ILECs for multi-

^{17/} Public Notice, citing Verizon Wireless-SpectrumCo Application, Public Interest Statement at 23-24; Verizon Wireless-Cox Application, Public Interest Statement at 20.

^{18/} Public Notice, citing Ex Parte Notice and Submission of Highly Confidential Documents, to Marlene H. Dortch, Secretary, FCC, from J.G. Harrington, Counsel to Cox TMI Wireless, LLC dated January 18, 2012, p. 2 (Verizon Wireless-Cox commercial agreements); Ex Parte Notice and Submission of Confidential and Highly Confidential Documents Pursuant to First and Second Protective Orders, to Marlene H. Dortch, Secretary, FCC, from Michael H. Hammer, dated January 18, 2012, p. 2 (Verizon Wireless-SpectrumCo commercial agreements). The FCC also “note[s] that the Applicants omitted some highly sensitive information from the submitted documents.” Public Notice.

^{19/} Public Notice, at 2.

service offerings (so-called “triple-” and “quadruple-plays”). As multi-billion dollar companies with extensive customer bases, these large cable providers were strong contenders to compete head-on with the ILEC-affiliated wireless giants. **The fact that more than five years after acquiring this coveted spectrum, these multi-billion dollar companies²⁰ have decided that they cannot make a business case of entering wireless markets with their own facilities suggests enormous barriers to entry.**²¹ The inelasticity of supply also underscores the absence of effective competition.²² Under these circumstances, the FCC should establish a high bar for considering the merits of the two proposed transactions.

The FCC decided that “[f]or administrative convenience given the commonality of issues, particularly the aggregation of spectrum and the public interest arguments raised by the Applicants,” it would consolidate the Applications for the purposes of its review and consideration of those issues.²³ Rate Counsel’s Petition to Deny demonstrates the lack of merit in both applications.

B. Proposed sale of spectrum from SpectrumCo to Verizon Wireless

The proposed assignment of 122 Advanced Wireless Service (“AWS”) licenses from SpectrumCo to Verizon Wireless would involve the transfer of only spectrum, and no other

²⁰ / Comcast generated over \$9.3 billion in revenues from its communications business during the third quarter of 2011. Comcast press release “Comcast reports 3rd quarter 2011 results,” November 2, 2011. Time Warner Cable revenues totaled nearly \$5 billion in the fourth quarter of 2011, and \$19.7 billion for the full year 2011. Time Warner Cable press release “Time Warner Cable reports 2011 Fourth quarter and full-year results,” January 26, 2012. Cox Communications earned \$9.1 billion in 2010. Cox Enterprises 2010 Annual Review.

²¹ / See e.g., Verizon Wireless/SpectrumCo Public Interest Statement, at 21, stating that “the financial resources required to build a wireless network are enormous,” and *id.*, at 22, referring to “other costs and complexities” of entering as a facilities-based provider.”

²² / See, e.g., U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, issued August 19, 2010 (“Horizontal Merger Guidelines”), §9.

²³ / Public Notice, at 2.,

assets facilities, or customers.²⁴ According to the Applicants, the transaction would allow Verizon Wireless to add network capacity “so that customers will continue to enjoy the high-quality, high-speed services that state-of-the-art wireless broadband technology can provide.”²⁵

SpectrumCo was created in 2006, and was the successful bidder for 137 wireless spectrum licenses in the FCC’s AWS auction, which concluded in September 2006.²⁶ According to the Applicants, SpectrumCo has invested more than \$20 million to clear microwave links, thus enhancing the value of the spectrum;²⁷ it has also conducted tests of different 4G technologies and equipment.²⁸

C. Proposed sale of spectrum from Cox to Verizon Wireless

Cox was an original member of SpectrumCo, and, in 2008, in exchange for redeeming its interest in SpectrumCo, received the 30 AWS licenses that are under consideration in this proceeding.²⁹ Applicants explain that the transaction would involve the acquisition of any non-spectrum assets, facilities or customers.³⁰ While Cox initially acquired the licenses in question intending to provide wireless services over its own facilities, it has never put this spectrum into commercial operation.³¹ In recent years, Cox made a limited offering of wireless service to its customers on a non-facilities basis, as a MVNO, using Sprint’s 3G network. “By May 2011, Cox Wireless had concluded that it was uneconomic to provide mobile wireless

²⁴ / Wireless-SpectrumCo Application, Public Interest Statement, at 1.

²⁵ / *Id.*

²⁶ / *Id.*, at 2.

²⁷ / Pick Declaration, at para. 3.

²⁸ / *Id.*, at paras. 4-5, 7-8.

²⁹ / Verizon Wireless/Cox Public Interest Statement, at 3.

³⁰ / *Id.*, at 4.

³¹ / *Id.*

services over its own infrastructure.”³² Shortly thereafter, in November 2011, Cox announced its decision to also abandon its 3G MVNO services and will transition existing customers to other providers by March 30, 2012.³³ Notwithstanding Cox’s complete exit from the wireless market, the Applicants assert that the proposed transfer would not reduce choices of wireless service providers for consumers.

III. STANDARD OF REVIEW

A. Criteria for assessing applications for transfer of spectrum licenses

Pursuant to sections 214(a), 310(b)(4), and 310(d) of the Communications Act, the FCC must determine whether the proposed transactions would serve the public interest, convenience and necessity.³⁴ Among other things, in determining whether a proposed transaction will serve the public interest, the Commission considers whether the transaction will “substantially frustrat[e] or impair[] the objectives or implementation of the Communication Act or related statutes.”³⁵ In applying this standard, the Commission balances potential public interest harms of the proposed transaction against potential public interest benefits.³⁶

The FCC’s evaluation also includes a “deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced

³² *Id.* at 19.

³³ / *Id.*

³⁴ / In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manger and *De Facto* Transfer Leasing Arrangements, WT Docket No. 08-95, File Nos. 0003463892, *et al.*, ITC-T/C-20080613-00270, *et al.*, and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, File No. ISP-PDR-20080613-00012, *Memorandum Opinion and Order and Declaratory Ruling* (rel. November 10, 2008) (“Verizon/AllTel Order”).

³⁵ / *Id.*, at para. 26, cite omitted.

³⁶ / *Id.*

services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.”³⁷ As this Petition demonstrates, the proposed transaction would thwart competition and would not result in the management of the spectrum in the public interest, and therefore should be denied.

The FCC’s competitive analysis of the proposed transaction considers among other things “whether a transaction will enhance, rather than merely preserve, existing competition.”³⁸ The proposed transaction would neither preserve nor enhance existing competition, but instead would eliminate potential competitors in relevant markets.

Finally, the Applicants bear the burden of proof that the proposed transaction, on balance, will serve the public interest.³⁹ As this Petition demonstrates, the Applicants have failed to meet this burden. The FCC’s assessment of benefits considers whether they are “verifiable, transaction-specific public interest benefits.”⁴⁰ Applicants have failed to demonstrate that the purported benefits outweigh potential harms, which include potential competitive harms as well as the harm of the unused spectrum being re-assigned on a “sole source” basis rather than through a fully competitive bidding process. Therefore the FCC should deny the proposed transaction. Rate Counsel demonstrates throughout this Petition to Deny why the purported benefits do not make the proposed transaction in the public interest and Rate Counsel’s Petition to Deny should be granted.

B. Obligations associated with spectrum licenses

³⁷ / *Id.*, at para. 27, cite omitted.

³⁸ / *Id.*, at para. 28, cite omitted.

³⁹ / *Id.*

⁴⁰ / *Verizon/AllTel Order*, at para. 114. *See also, id.*, at para. 117, which states that “[b]ecause much of the information relating to the potential benefits of a merger is in the sole possession of the applicants involved in such a transaction, they are required to provide sufficient evidence supporting each claimed benefit.”

In September 2006, SpectrumCo was the successful bidder for 137 wireless spectrum licenses in the FCC’s AWS auction.⁴¹ At that time, SpectrumCo was a joint venture of Cox and subsidiaries of Comcast, Time Warner, Bright House, and Sprint Nextel Corporation (“Sprint”).⁴² When Sprint withdrew from SpectrumCo in 2007, the SpectrumCo members purchased Sprint’s interests for an amount that was equal to Sprint’s capital contribution to the joint venture.⁴³ In 2008, Cox redeemed its interest in SpectrumCo and received 30 AWS licenses in exchange.⁴⁴ Because many of the Cox Wireless licenses were partitioned when Cox Wireless left SpectrumCo, the total number of licenses subsequently increased from the original 137.⁴⁵ In the present transactions, the total number of licenses being assigned to Verizon Wireless will be 152 (122 from SpectrumCo and 30 from Cox Wireless).⁴⁶ Also, having been created by partitioning, the Cox Wireless AWS license holdings do not overlap the SpectrumCo licenses in any market area.⁴⁷

In devising its service rules for the initial AWS spectrum awards, the FCC was focused primarily on technical issues, such as ensuring the proper compensation of relocated licensees and designation of spectrum blocks.⁴⁸ Unfortunately, in the process, the Commission seems to have taken an exceptionally lax approach to ensuring that licensees acted promptly and

⁴¹ / Verizon Wireless/Cox Public Interest Statement, at 3.

⁴² / *Id.*

⁴³ / *Id.*

⁴⁴ / *Id.*

⁴⁵ / *Id.*

⁴⁶ / *Id.*

⁴⁷ / *Id.*

⁴⁸ / Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands (AWS-1 Service Rules Order), WT Docket No. 02-353, 18 FCC Rcd 25162 (2003) (AWS-1 Service Rules Order); modified by Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Order on Reconsideration, WT Docket No. 02-353, 20 FCC Rcd 14058 (2005). See also, 47 C.F.R. §27.14, Construction requirements; Criteria for renewal.

efficiently to utilize the spectrum licensed to them through the AWS-1 auction. Instead, the FCC granted these initial licenses for fifteen years, with performance requirements being enforced only at the time of renewal.⁴⁹ As such, questions that seem to have occurred to the Commission in rulemaking notices concerning the AWS-2 and AWS-3 blocks – including potential construction and service requirements occurring prior to the license expiration date⁵⁰ – are not mentioned in the FCC’s 2004 AWS Service Rules Order or the 2005 Reconsideration.

By contrast, even before the AWS-1 auctions had occurred, the FCC seems to contemplate some steps toward correcting this oversight – at least prospectively. Thus, in the 2004 NPRM on service rules for AWS-2 licenses, the Commission has already proposed a shorter license interval (10 years).⁵¹ It also specifically discusses the possibility of adopting “performance requirements in addition to a substantial service requirement at license renewal” (such as “minimum coverage requirements on licensees to ensure that spectrum is used effectively and service is implemented promptly; e.g., broadband PCS licensees were required to reach a minimum of one-third of the population in their licensed areas no later than the mid-point of the license term, and two-thirds of the population by the end of the license term.”).⁵² The

^{49/} *Id.*

^{50/} Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands; Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 04-356; WT Docket No. 02-353, Notice of Proposed Rulemaking, 19 FCC Rcd 19263 (2004) (AWS-2 Service Rules NPRM); Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band, WT Docket No. 07-195, Notice of Proposed Rulemaking, 22 FCC Rcd 17035 (2007) (AWS-3 Service Rules NPRM); In the Matter of Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band; Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, WT Docket No. 07-195; WT Docket No. 04-356, Further Notice of Proposed Rulemaking, 23 FCC Rcd 9859 (2008) (AWS 2/3 Service Rules FNRPM).

^{51/} AWS-2 Service Rules NPRM, para. 70.

^{52/} AWS-2 Service Rules NPRM, para. 74. Moreover, in the 2008 FNRPM, with respect to AWS-3 (nationwide licenses) the Commission proposed both interim and end-of-license performance requirements that would “[r]equire the licensee to provide signal coverage and offer service to: 1) at least 50 percent of the total population of the nation within four years of commencement of the license term and 2) at least 95 percent of the total population of the nation at the end of the 10-year license term. AWS 2/3 Service Rules, FNRPM, para. 3.

Commission specifically notes its obligations under Section 309(j)(4)(B) of the Communications Act “to include safeguards to protect the public interest in the use of the spectrum, and ‘performance requirements . . . to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.’”⁵³ This legal requirement presumably would apply equally to the AWS-1 licenses, but no affirmative safeguards to prevent stockpiling were applied. As a result, after five years, the public has received none of the anticipated benefits of Advanced Wireless Services and the licensees have the opportunity to exit, without fulfilling any obligations and making a more than tidy profit.

IV. SPECTRUM AND SECONDARY MARKETS

A. The spectrum licenses assigned to SpectrumCo and Cox have appreciated substantially, although these companies have done little more than warehouse them.

The market value of the spectrum licenses at stake in this proceeding have appreciated substantially. In 2006, SpectrumCo’s winning bid for the 137 licenses (subsequently increased by means of partitioning to the 152 now held by SpectrumCo and Cox) was \$2,377,609,000.⁵⁴ Five years later – and with a third of the original license term already expired –Verizon Wireless agreed to pay \$3.6 billion to SpectrumCo and \$315 million to Cox for these licenses, for a total

⁵³/ AWS-2 Service Rulemaking at para. 73.

⁵⁴ / “Top 10 Bidders by Net Provisionally Winning Bids Total Total FCC Advanced Wireless Services Auction No. 66, Final,” accessed 2/15/2012 at http://wireless.fcc.gov/auctions/66/charts/66press_3.pdf (via FCC Auctions page). See Attachment C to this Petition to Deny.

payment of \$3.915 billion.⁵⁵ Furthermore, \$3.915 billion may underestimate the actual market value because the transaction prices were not the result of an open, fully competitive auction process, but instead represent the outcome of a bilateral negotiation. The aggregate gain from the two proposed transactions that the cable companies would derive from having hoarded the spectrum is \$1,537,391,000, that is, a 65% appreciation over a five-year period (i.e., an annual appreciation of more than 10%) relative to the original purchase price. The Applicants have failed to demonstrate why it is in the public interest for SpectrumCo and Cox, rather than taxpayers as a whole, to benefit from the increase in spectrum value.

B. Spectrum is a public asset that should be assigned in a way that maximizes public benefits.

In assessing the merits of the proposed transactions, it is essential to recognize that spectrum is a public asset of substantial value and furthermore is a limited societal resource. Rate Counsel acknowledges that consumers' demand for wireless broadband is growing substantially, as is Verizon Wireless' own consumers' demand,⁵⁶ but meeting that demand through this reallocation of spectrum from cable providers to Verizon Wireless merits more than a passing glance by the FCC. Certainly, had SpectrumCo not been willing to allocate its licenses to Verizon Wireless, Verizon Wireless presumably would explore other ways to meet its consumers' growing demand.

According to the Applicants, the transaction "will move currently unused spectrum to a provider that will make efficient and effective use of it – the very type of transaction the

⁵⁵ / "Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for \$3.6 Billion," Verizon Press Release, December 2, 2011; "Cox Communications Announces Agreement to Sell Advanced Wireless Spectrum to Verizon Wireless," Verizon Press Release, December 16, 2011.

⁵⁶ Verizon Wireless/SpectrumCo Public Interest Statement, at 5-14; Stone Declaration, at paras. 4-6; Verizon Wireless/Cox Public Interest Statement, at 6-15.

Commission's secondary markets policies were designed to facilitate."⁵⁷ They quote a 2000 Policy Statement on secondary markets, and various other more FCC orders and statements, which show support for secondary markets as a way to move around spectrum.⁵⁸

Although Rate Counsel acknowledges the role that secondary markets can play in addressing an individual company's short-term or long-term spectrum shortage,⁵⁹ Rate Counsel is not persuaded in this instance that the FCC should condone this particular proposed transfer of valuable, public spectrum from cable goliaths to telco goliaths. SpectrumCo and Cox have been warehousing spectrum that other companies could instead have used to provide consumers with tangible benefits, and they should not be rewarded with the windfall resulting from its appreciation while lying fallow. Instead, the FCC should direct SpectrumCo and Cox to return the unused and underutilized spectrum to the FCC to be re-auctioned, thus commanding the highest and best value. The license holders should be compensated based on the levels of their winning bids (plus reasonable interest) and for any investment that has unambiguously enhanced the value of the spectrum (e.g., clearing microwave links).

However, the concerns raised by this proposed private redistribution of spectrum resources go beyond whether SpectrumCo and Cox should be allowed to benefit. In particular,

⁵⁷ / *Id.*, at 6. See *id.*, at 16-19.

⁵⁸ / *Id.*, at 16, quoting *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24178 (rel. December 1, 2000). See also *Id.*, at 17, citing *Fostering Innovation and Investment in the Wireless Communications Market: A National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd 11322, 11331 n.27 (rel. Aug. 27, 2009); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, 17505 ¶ 1 (rel. Sept. 2, 2004); Julius Genachowski, Chairman, Federal Communications Commission, Prepared Remarks: Unleashing America's Invisible Infrastructure, FCC Spectrum Summit at 3 (Oct. 21, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302331A1.pdf; Julius Genachowski, Chairman, Federal Communications Commission, Op-Ed., Building Better wireless networks, WASH. POST, Oct. 28, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/10/28/AR2010102806031.html?sub=AR>

⁵⁹ / Secondary spectrum market transactions are transactions that transfer use of the spectrum to an entity other than the original license holder.

the proposed transaction continues a disturbing trend of increased concentration of wireless spectrum resources – a trend that does not automatically get addressed when spectrum can simply be redistributed via secondary market transactions. As one paper states: “The ability of market mechanisms to ensure that resources remain in their most highly valued use requires not only that these initial allocations be properly conducted, but also that secondary markets be well functioning.”⁶⁰ Nothing in the Applicants’ submissions shows that, with respect to the specific transactions they propose, secondary markets are working in the public interest. It is even unclear whether the initial allocations, in 2006, were the product of an efficient market mechanism, given that they permitted SpectrumCo and Cox to hold onto the spectrum without delivering any service to the public for more than five years. Because the existing market mechanism appear to be permitting a troubling increase in the concentration of spectrum resources, whether or not the FCC approves these particular transactions, Rate Counsel urges it to embark immediately upon a thorough investigation of the actual levels of competition that exist in today’s wireless markets.

Rate Counsel opposes an outcome whereby cable companies can profit merely by having had the financial wherewithal to speculate in spectrum licenses, without having delivered on their obligation to use this spectrum to deliver benefits to the public. In now seeking to transfer those licenses, the cable companies apparently believe that they should be permitted to act in a manner that simply maximizes their own economic gain, without regard to any broader public consequences. One such potential consequence of the bilateral arrangement in which this

⁶⁰ / “Enabling Efficient Wireless Communications: The Role of Secondary Spectrum Markets,” Technology Policy Institute paper, John W. Mayo, Georgetown University, Scott Wallsten, Technology Policy Institute, June 2009, at 27.

spectrum ends up with the already spectrum-rich Verizon Wireless is that smaller wireless companies could find it more difficult to negotiate favorable roaming arrangements.

Opportunities for competition and innovation are compromised by letting Verizon Wireless stockpile an even greater percentage of the spectrum allocated to the provision of wireless services. Unlike tickets to a sporting event or a popular Broadway musical that a ticket “hoarder” may re-sell to willing buyers at a later date,⁶¹ a spectrum license is not simply a private commodity. Although, under present law, the Treasury receives compensation for licenses granted by the Commission, the grant is very different from an ownership interest; it comes with specific conditions as well as a general policy mandate that the spectrum be used in a publicly beneficial manner. The ways that spectrum are acquired and used have major implications that ripple throughout the nation’s economy. Unlike the consumption of a ticket, which affects the “utility” of the consumer alone, spectrum use has network externalities, being a critical and scarce input for other services in the economy.

The FCC’s choice should be clear. Rather than permitting this spectrum to be disposed of in a private, sole source sale of spectrum, thus ensuring that SpectrumCo and Cox receive an undeserved bonus for their failure to utilize their licenses for the intended purpose, the licensees should be required to return their licenses to the Commission for re-assignment of spectrum based on a fully competitive auction. SpectrumCo and Cox should be compensated for their original purchase of spectrum plus the book value of any investments related to that spectrum, provided that they can demonstrate that they are not under default of any obligations associated with the original assignment of licenses to them. At least as importantly, through an open

⁶¹ / See, e.g., article by noted economist Paul Krugman on the economics and policy of ticket scalping: “Thinking Outside the Box Office: Ticket scalping and the future of capitalism,” Slate, Paul Krugman, posted Thursday, May 13, 1999, http://www.slate.com/articles/business/the_dismal_science/1999/05/thinking_outside_the_box_office.html.

auction process, the unused licenses would potentially become available to smaller bidders who might be capable of using additional spectrum in particular BEA markets to bolster their competitive service offerings. This option would be foreclosed by approving the large package deals proposed by the Applicants.

V. COMPETITION

A. Background

The FCC has previously defined relevant product and geographic markets in its assessment of wireless mergers. Regarding the relevant product market, the FCC has used a combined mobile telephony/broadband services product market, which consists of mobile voice and data services including those provided over broadband wireless networks.⁶² Regarding the relevant geographic market, the FCC has concluded that the most appropriate geographic level for market analysis consists of cellular market areas (“CMA”) and component economic areas (“CEA”)⁶³ and “is the area within which a consumer is most likely to shop for mobile telephony/broadband services.”⁶⁴ The FCC conducts its “initial screen” to determine the Herfindahl-Hirschman Index (“HHI”) and the changes in the HHI as well as the Applicants’ share of spectrum.⁶⁵ The FCC’s initial screen for wireless mergers thus includes both an HHI

⁶² / *Verizon/AllTel Order*, at para. 45. *See also, id.*, at paras. 46-48.

⁶³ / *Id.*, at paras. 49, 52. CMAs are the areas for which the Commission initially granted licenses for cellular service. CEAs are defined by the Bureau of Economic Analysis and “are designed to represent consumers’ patterns of normal travel for personal and employment reasons and may therefore capture areas within which groups of consumers would be expected to shop for wireless service.” *Id.*, at fn 200.

⁶⁴ / *Id.*, at para. 52, cite omitted.

⁶⁵ / *Id.*, at para. 78. The FCC has previously analyzed wireless provider data (using the Number Resource Utilization and Forecast (“NRUF”) database, which tracks phone number usage by all telecommunications service providers), to estimate subscribership levels, market shares, and concentration for various geographic markets. *Id.*

analysis and a spectrum analysis.⁶⁶ Based on the results of the initial screen, the FCC then examines particular markets in more detail to assess whether unilateral effects could arise (where the merged firm could find it profitable to raise rates and suppress output).⁶⁷

Because the transactions that are the subject of this proceeding do not involve a transfer of customers, the Commission cannot calculate the HHI component of its competitive analysis in the typical manner. However, it is highly likely that the transfers will enable Verizon to increase market share over time, by giving it additional spectrum and by eliminating major cable companies as potential facilities-based competitors. Thus, as Rate Counsel discusses in more detail below, the FCC has an obligation to examine the competitive implications of the transfers with respect to market share, even if a typical application of the HHI screen is not possible.

Verizon Wireless and SpectrumCo have attempted to convince the Commission that the remaining test – the spectrum screen – should also be ignored with respect to their proposed transfer. According to Verizon Wireless and SpectrumCo, the proposed transaction will not diminish competition because “only spectrum is being transferred.”⁶⁸ They then assert, however, that the Commission’s spectrum screen is not triggered in 105 of the 120 markets affected by the proposed transaction,⁶⁹ and that in the few BEAs where it would apply, “the overage is generally small in amount” and/or “confined to only one or a handful of counties in the market.”⁷⁰ Effectively, Applicants argue that there is no harm to competition because the screens that the

⁶⁶ / *Id.*, at para. 81.

⁶⁷ / *Id.*, at para. 84.

⁶⁸ Verizon Wireless/SpectrumCo Public Interest Statement, at 5.

⁶⁹ / *Id.*, at 24. According to the Applicants the screen is 145 MHz in nearly all markets nationally and Verizon Wireless would remain below this level in 2,230 of the 2,276 counties that the SpectrumCo licenses cover.

⁷⁰ / *Id.*, at 26. *See also id.*, at 28-33. The Applicant refers to Exhibit 7 to their Application for additional information regarding the spectrum overages.

Commission routinely applies to examine competitive changes do not apply or cannot easily be applied to these particular transactions.

This should not deter the FCC from assessing the competitive consequences of the proposed transactions. Rate Counsel urges the FCC to consider these transactions within the larger context of the status of today's wireless markets. The proposed transactions would further entrench Verizon Wireless' dominance with AT&T of wireless markets as measured by demand (i.e., consumers and revenue) and by potential supply (e.g., Verizon's access to substantial spectrum). Entry barriers for suppliers are high, meaning that the elasticity of supply is low.⁷¹ The significance of a low elasticity of supply is that if wireless carriers were to raise prices, other companies could not easily enter relevant markets. Also, migrating among suppliers is not easy for consumers, and therefore the elasticity of demand is also low.⁷² Low elasticity of supply and low elasticity of demand are characteristics of a market that is not effectively competitive.

⁷¹ / SpectrumCo, a joint venture of three cable companies including the nation's two largest cable companies (Comcast and Time Warner) stated that "[n]otwithstanding the significant time, effort, and investment that SpectrumCo put into clearing the AWS spectrum and conducting technology tests, SpectrumCo has determined as a business matter, based on a variety of marketplace factors in combination, that constructing and operating a standalone facilities-based wireless network with that spectrum would not provide a return that would warrant incurring the substantial costs and risks involved." Verizon Wireless/SpectrumCo Public Interest Statement, at 20-21, citing Pick Declaration, at para. 10. See also Pick Declaration, at paras. 11-15 describing the various barriers to entry by the cable companies such as the risks associated with the necessary "enormous financial resources" (para. 11), the need, if its entry were successful, to incur further costs to acquire more spectrum placing it on a "spectrum 'treadmill'" (para. 12), the fact that having "less scale than established wireless carriers" they would have needed to pay higher prices "to acquire the newest, most desirable devices" (para. 13), the costs and complexity of securing roaming agreements (para. 14), and the risk and challenge of entering a wireless marketplace with "several mature providers" (para. 15). Although having "spent substantial resources in an effort to enter the wireless market as a facilities-based provider" (Declaration of Suzanne Fenwick, Executive Director for Corporate Development for Cox Communications, included as Exhibit 4 to the Verizon Wireless/Cox Application ("Fenwick Declaration"), at para. 3, having entered into contracts with vendors to build a third generation ("3G") wireless network (*id.*), and having entered into a mobile virtual network operator ("MVNO") agreement with Sprint Nextel to provide 3G services pending to speed market entry while it deployed its own infrastructure (*id.*, at para. 4), Cox, by May 2011, "concluded that it was uneconomic to provide 3G wireless services utilizing its own network infrastructure" (*id.*, at para. 5), and in November 2011, announced that it was discontinuing its 3G MVNO wireless service the next day (*id.*, at para. 6). Cox determined that it could not deploy a 3G mobile service on its AWS spectrum "without sustaining acceptably large losses." *Id.*, at para. 7.

⁷² / Among the high transaction costs that discourage consumers from migrating among wireless providers are early termination fees, customer inertia, and complex pricing plans.

Verizon Wireless fails to demonstrate that it is not now meeting demand, nor does it demonstrate adequately that, absent the proposed transaction, it would be unable to meet demand for the foreseeable future. The Applicants indicate that “there is no imminent spectrum auction that Verizon Wireless can look to as an alternative path to meet its growing spectrum needs.”⁷³ Although the Applicants assert that the approval of the transaction “will thus enable Verizon Wireless to continue fulfilling the Commission’s and the Administration’s goals of mobile broadband innovation, deployment and adoption,”⁷⁴ they fail to demonstrate that Verizon Wireless *could not* achieve these goals absent the transaction. Also, if the transaction, by amassing yet more spectrum for Verizon Wireless, enables Verizon Wireless to profitably sustain significant prices, then these supracompetitive price levels will suppress consumer demand and discourage broadband wireless adoption.

Furthermore, the wireless industry is not characterized by effective competition (see section *infra*). The proposed transaction would preclude Verizon Wireless’ competitors from obtaining access to spectrum, which they could use to provide service to consumers. Therefore, the proposed “sole source” nature of the transaction distorts markets, thwarting competitive entry and supply that might otherwise exist.

Even if Verizon Wireless had shown a current need for acquisition of additional spectrum, the pursuit of the objective of meeting consumers’ escalating demand for wireless services does not in and of itself justify the FCC’s hasty approval of the transaction. The transactions would have long-term implications of the way in which the wireless industry meets that indisputably growing consumer demand. Instead, the FCC should consider carefully the

⁷³ / Verizon Wireless/SpectrumCo Public Interest Statement, at 18.

⁷⁴ / *Id.*, at 19.

impact of the proposed transactions on the rates, terms, and conditions that Verizon Wireless does and could command for these services, as well as the impact on the rates, terms, and conditions of the services that cable companies will be able to sustain as a result of the cooperative agreements they would have with Verizon Wireless. Moreover, the FCC should deny the transactions because they would improperly preclude other wireless suppliers from bidding on the unused spectrum.

Although Rate Counsel of course does not oppose an increase in wireless supply, Rate Counsel does oppose a future where the vast majority of the nation's wireless supply is controlled by two companies. The pursuit of new spectrum and more efficient use of spectrum should not cloud judgment about the way in which that spectrum ultimately is controlled.

B. The agreements between cable companies and Verizon Wireless could lead to collusion instead of competition, thus harming consumers.

SpectrumCo's owners – Comcast, Time Warner, and Bright House – have entered into separate commercial agreements with Verizon Wireless under which the companies “will sell each other's services on a market-standard commission basis, with the new subscribers becoming customers of the other service provider (i.e., wireless customers signed up by the cable companies would become customers of Verizon Wireless, and cable companies signed up by Verizon Wireless would become customers of the cable companies).”⁷⁵ Cox and Verizon Wireless have entered into similar independent separate commercial agreements.⁷⁶ Although “[t]hese types of agency relationships” may be “nothing new,”⁷⁷ the scale and scope of the intended collaboration is something new and potentially harmful to the prospects for competition

⁷⁵ / *Id.*, at 23-24.

⁷⁶ / Verizon Wireless/Cox Public Interest Statement, at 20.

⁷⁷ / Verizon Wireless/SpectrumCo Public Interest Statement, at footnote 70.

in the overlapping wireless/broadband markets. The potential benefits to the companies are clear, but instead of competition, the industry would have collaboration, which could lead to collusion and higher prices for consumers.

Verizon Wireless and the cable companies have also indicated that they plan to create a new joint venture “to develop innovative technology and intellectual property that will integrate wired video, voice, and high-speed Internet with wireless technologies.”⁷⁸ According to the Applicants, this “joint venture will work to create a seamless environment in which consumers can enjoy multiple services across multiple communications platforms.”⁷⁹ The potential “collaboration” between the cable industry (Comcast, Time Warner, Bright House, Cox) and the telecommunications industry (Verizon Wireless) should set off some alarm bells for regulators because of the increased incentive and possibility for anticompetitive conduct. As Table 1 shows, these four companies are four of the six largest “traditional” cable companies.⁸⁰

⁷⁸ / *Id.*, at footnote 71.

⁷⁹ / *Id.*

⁸⁰ / Including the satellite providers, DirecTV and DISH networks, as well as Verizon and AT&T, Bright House is the nation’s tenth largest cable provider. www.ncta.com, accessed February 9, 2012; company quarterly and annual reports.

Table 1
Cable Companies (2011)⁸¹

Company	Video Subscribers	Revenue (millions)
Comcast ¹	22,360,000	\$57,356
Time Warner Cable	12,109,000	\$19,700
Cox ²	4,789,000	\$9,100
Charter Communications ¹	4,371,000	\$3,596
Cablevision ¹	3,264,000	\$5,960
Bright House Networks ³	2,109,000	NA
Cable Industry Total	104,500,000	\$97,598

Notes:

- 1) Subscribership is for Q3 2011. Annual video revenue is estimated based on annualized Q3 2011 quarterly video revenue.
- 2) Cox Communications revenues are for 2010.
- 3) Bright House Networks LLC is privately-held and does not release financial information.
- 4) Cable industry video subscribers is for year 2010. Revenues are for 2011.

Also, in aggregate, Verizon, Comcast, Time Warner, Bright House and Cox control a large percentage of the landline voice, wireless, and broadband links to the nation's households. Therefore, their joint conduct in the market place will have major repercussions for millions of consumers. At a minimum, Rate Counsel urges the Commission to examine thoroughly these agreements and the potential for anti-competitive conduct.⁸² Rate Counsel may comment further on the implications of these agreements for customers of wireless and cable services in a future filing with the FCC.⁸³

⁸¹ / www.ncta.com, accessed February 9, 2012; company quarterly and annual reports.

⁸² / Rate Counsel disagrees with the Applicants that the commercial agreements "are not subject to Commission review." Verizon Wireless/SpectrumCo Public Interest Statement, at 23.

⁸³ / The agreements will be made available pursuant to the FCC's two protective orders, released January 17, 2012, in the joint docket. WT No. 12-4, Protective Order, DA 12-50 and Second Protective Order, DA 12-51.

C. The proposed transaction would increase and entrench Verizon Wireless' market power.

Although the proposed transactions do not directly affect market concentration as measured by subscribers (because they involve a transfer solely of spectrum and not of customers), it is important to evaluate the transactions in the context of the level of market concentration that exists in today's wireless markets in order to assess whether the transactions would promote the Commission's goal of increasing competition. The proposed transaction would further concentrate valuable spectrum resources in an already substantially concentrated industry, thus elevating Verizon Wireless' market power and raising concerns about anticompetitive behavior, prices increases, and service quality degradation. The FCC has previously determined that "a transaction that creates or enhances significant market power or facilitates its use is unlikely to serve the public interest."⁸⁴

The trend of increasing wireless market concentration has been observed previously by the Commission. In his statement accompanying the FCC's 14th Mobile Wireless Competition Report, Commissioner Copps states that the report

confirms something I have been warning about for years— that competition has been dramatically eroded and is seriously endangered by continuing consolidation and concentration in our wireless markets. One number sticks out like a sore thumb: the Herfindahl- Hirschman Index—a widely-recognized and highly-credible measurement of industry concentration— shows that the concentration of mobile wireless service providers has skyrocketed to a weighted average of 2848. That's a jump of nearly 700 since we first calculated this metric a mere 7 years ago! So without denying those things that are right in the wireless world—and they are many—the facts also tell us that some things are not right.⁸⁵

⁸⁴ / *Verizon/AllTel Order*, at para. 40.

⁸⁵ / Statement of Commissioner Michael J. Copps, 14th Mobile Wireless Competition Report, *In the Matter of 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, Rel. May 20, 2010 ("14th MWCR"), at 276.

The 14th Mobile Wireless Competition Report explains that in the five years through 2009, the two largest wireless operators, AT&T and Verizon Wireless, continued to gain market share, acquiring 60 percent of both subscribers and industry revenue.⁸⁶ More recent data confirm this trend. As Table 2 below shows, relative to the top four wireless carriers, the niche market and regional carriers have significantly smaller shares, and therefore do not pose a significant competitive threat to the nation's four large wireless providers. For example, as Table 2 shows, in 2011, fifth-ranked Clearwire and sixth-ranked MetroPCS served approximately 9.6 and 9.1 million subscribers, respectively – less than 3% of the 333 million wireless subscribers served by the nation's eleven largest facilities-based carriers in 2011.

Table 2
Wireless Market Structure as of Year-End 2011⁸⁷

Carrier	Subscribers Year-end 2011 (Thousands)	Year over Year Net Change (Thousands)	Year over Year Change (Percent)
Verizon	108,667	6,421	6.3%
AT&T	103,247	7,711	8.1%
Sprint Nextel	55,021	5,111	10.2%
T-Mobile	33,711	-46	-0.1%
Clearwire	9,540	6,735	240.1%
Metro PCS	9,149	1,292	16.4%
US Cellular	5,932	362	6.3%
Leap	5,755	667	13.1%
C-Spire (formerly Cellular South)	approx. 900	NA	NA
Cincinnati Bell	472	-22	-4.5%
Ntelos	415	-19	-4.4%

⁸⁶ / *Id.*, at para. 4.

⁸⁷ / Company quarterly reports. C-Spire is privately held and does not release operational and performance data. Subscriber data for C-Spire is based on analysis by FierceWireless (www.fiercewireless.com, accessed February 9, 2012). All figures are as of the third quarter of 2011, except for Verizon, AT&T, and Sprint Nextel, which are as of the fourth quarter of 2011.

In describing the wireless structure, the FCC explains that “[a]s of year-end 2009, there were four facilities-based mobile wireless service providers in the United States that industry observers typically describe as ‘nationwide’”, which include AT&T, Sprint Nextel, T-Mobile, and Verizon Wireless (“Verizon”).⁸⁸ The FCC also explains that “[a]lthough these four providers do not have networks that cover the entire land area or population of the United States, they do cover a significant portion of both, and will be referred to as the nationwide providers throughout this Report,” and that the “four nationwide service providers all have mobile wireless networks that cover in excess of 87.5 percent of the U.S. population in large proportions of the western, mid-western, and eastern United States.”⁸⁹

The FCC describes the next tier of wireless providers as consisting of facilities-based companies that provide mobile wireless services on a regional, multi-metro, or local basis. The FCC states: “Leap Wireless International, Inc. (“Leap”) and MetroPCS Communications Inc. (“MetroPCS”) – provide service in multiple large and medium-sized metropolitan areas across the nation,” “United States Cellular Corporation (US Cellular) is a large regional provider that serves regions in the western, mid-western, and eastern United States” and “Clearwire, a recent entrant to the mobile wireless services market, provides mobile wireless broadband services in several metropolitan areas across the country.”⁹⁰

Facilities-based providers also include over ninety small providers that may serve only a single area, often in rural areas. Among these companies are Cincinnati Bell Wireless (serving the Cincinnati, Ohio area), and C-Spire, formerly Cellular South, (which serves the southeastern

⁸⁸ / *In the Matter of 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, Rel. June 27, 2011 (“15th MWCR”), at para. 27, cite omitted.

⁸⁹ / *Id.*

⁹⁰ / *Id.*, at para. 28, cites omitted.

part of the United States, primarily Mississippi). Non-nationwide service providers typically rely on roaming agreements with nationwide facilities-based providers so that they can extend their coverage.⁹¹ The proposed transfer of spectrum licenses is likely to exacerbate the recent trend toward higher market concentration in the wireless industry.⁹²

D. Recent data corroborate the trend of market concentration, a trend that the proposed transaction would accelerate.

Recent data confirm the trend of wireless industry consolidation. Using data for year-end 2011 for the four nationwide wireless service providers, and for the major regional providers, Table 3 shows the distribution of market shares among the wireless carriers. Presently, AT&T and Verizon Wireless control 64% of the wireless market.

⁹¹ / *Id.*, at para. 29, cites omitted.

⁹²/ The HHI is a well-known and well-respected measure of market share concentration, and is computed as the sum of the squares of each firm's market share. If a single firm serves a market, the HHI is 10,000 (that is, 100²), the highest possible HHI, and if two firms each equally serve a market the HHI of that market is 5000 (that is, 50² + 50²). The larger the HHI, the greater the concentration. Markets with HHI below 1500 are considered to be unconcentrated; those with an HHI between 1500 and 2500 are considered to be moderately concentrated, and those with an HHI above 2500 are considered to be highly concentrated. U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, issued August 19, 2010 ("Horizontal Merger Guidelines"), § 5.3; F.M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally & Company, Chicago, 1970, 50-52. The most recent guidelines released in August 2010 relaxed the definition of highly concentrated. The guidelines released in 1997 defined "highly concentrated" as HHI above 1800. U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, issued April 2, 1992, revised April 8, 1997, §1.5, 1.51.

Table 3
Subscriber Base Is Highly Concentrated:
Nationwide and Regional Wireless Providers⁹³

Carrier	2011 Subscribers (Millions)	Share of Subscriber Base
Verizon	108.7	32.7%
AT&T	103.2	31.0%
Sprint Nextel	55.0	16.5%
T-Mobile	33.7	10.1%
Clearwire	9.5	2.9%
Metro PCS	9.1	2.7%
US Cellular	5.9	1.8%
Leap	5.8	1.7%
C-Spire (formerly Cellular South)	0.9	0.3%
Cincinnati Bell	0.5	0.1%
Ntelos	0.4	0.1%
"Market" Total	333	

The four national carriers represent the vast majority (90.3%) of the nation's wireless subscribers. As Table 3 above shows, Clearwire, MetroPCS, US Cellular, and Leap served approximately 30.4 million customers, or, in aggregate, 9.1% of the total, at year-end 2011. Table 4 below summarizes Rate Counsel's HHI calculations, based on customer quantities.

⁹³ / Company quarterly reports. All figures are as of the third quarter of 2011, except for Verizon, AT&T, and Sprint Nextel, which are as of the fourth quarter of 2011.

Table 4
Wireless Markets Are Highly Concentrated⁹⁴

Carrier	2011 Subscribers (Millions)	Share of Subscriber Base	HHI Component
Verizon	108.7	33%	1065
AT&T	103.2	31%	961
Sprint Nextel	55.0	17%	273
T-Mobile	33.7	10%	102
Clearwire	9.5	3%	8
Metro PCS	9.1	3%	8
US Cellular	5.9	2%	3
Leap	5.8	2%	3
C-Spire (formerly Cellular South)	0.9	0.3%	0.1
Cincinnati Bell	0.5	0.1%	0.02
Ntelos	0.4	0.1%	0.02
HHI			2424

Regarding the HHI, in its 14th Wireless Competition Report, the Commission stated:

For context, the DOJ antitrust guidelines consider a market to be “highly concentrated” if the post-merger HHI exceeds 1800. DOJ antitrust scrutiny is typically applied to a merger if it would trigger an increase in the HHI of 100 or greater when the post-merger HHI is between 1000 and 1800, and an increase of 50 or greater when the post-merger HHI is above 1800... [T]he Commission has previously used a higher screen, 2800 for the HHI and 100 for the change in HHI, in reviewing mergers of mobile providers.⁹⁵

Revenues

As Table 5, below, shows, as measured by revenues (which reflect not only carriers’ supply of services but also the prices that they can sustain in the market), Verizon Wireless leads the nation. The ability to maintain prices at supracompetitive levels is another indication of

⁹⁴ / Company quarterly reports. All figures are as of the third quarter of 2011, except for Verizon, AT&T, and Sprint Nextel, which are as of the fourth quarter of 2011.

⁹⁵ / 14th MWCR, at 40-41 (cites omitted).

market power – another reason to question the proposed transactions, which further entrench Verizon Wireless’s dominance and preclude access to these licenses by regional competitors.

Table 5
Recent Quarterly Wireless Service Revenues⁹⁶

<u>Company</u>	<u>Period</u>	<u>Quarterly Wireless Service Revenues (billions)</u>
Verizon	Q4_2011	\$18.3
AT&T	Q4_2011	\$16.7
Sprint Nextel	Q4_2011	\$6.9
T-Mobile	Q3_2011	\$5.2

Verizon’s dominance in its other lines of business also bear on the proposed transaction. Verizon provides wireline, wireless, broadband and information services to consumer, business, wholesale and government customers. As of year-end 2011, Verizon served more than 24 million wireline access lines and approximately 8.7 million broadband connections nationwide.⁹⁷ Together, with AT&T, Verizon serves 42% of the nation’s wirelines, 30% of the fixed broadband subscribers, and 64% of the nation’s wireless subscribers.⁹⁸ This duopoly is an important backdrop to the proposed transactions. By acquiring substantial new spectrum, and

⁹⁶ / Company quarterly reports. T-Mobile's revenues are reported as 3.7 billion Euros. Euros are converted to dollars at the average 2011 exchange rate of \$1.39 per Euro. (www.economagic.com)

⁹⁷ / Verizon Investor Quarterly Q4 2011, January 24, 2012, at 14.

⁹⁸ / This analysis compares data from Verizon’s and AT&T’s quarterly reports for the fourth quarter of 2011 with the FCC’s latest publically available data, which is as of December 31, 2010. According to the FCC there were 84.5 million fixed broadband connections (over 200 kbps in at least one direction) in service as of December 31, 2010. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Internet Access Services: Status as of December 31, 2010*, rel. October 2011, at Table 1. There were 149 million wireline retail local telephone service connections (including switched access lines and interconnected VoIP) as of December 31, 2010. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2010*, rel. October 2011, at Figure 2.

also cross-marketing services with large cable companies, Verizon Wireless would be able to parlay its ubiquitous presence with multiple platforms yet further to dominate diverse markets.

The cost and rate structures of the wireless industry remain largely unexamined. Rate Counsel acknowledges that the Commission should not address broad matters in its review of this transaction that are better suited to a rulemaking or industry-wide proceeding, but such a review is long overdue. Furthermore, without cost data, one cannot assess whether, even with price decreases, wireless prices are set at supracompetitive levels. If, for example, the cost to supply a wireless minute is a penny, then a price reduction from 10 cents per minute to 8 cents per minute, although certainly better than no price decrease, does not demonstrate that the wireless industry is competitive. In seeking to maximize profits, suppliers may consider the elasticity of demand, and, as part of that consideration, may lower rates slightly to stimulate new demand such that the overall effect is to increase their net revenues. A simple review of rate changes is an insufficient basis for concluding that the wireless market is competitive. Rate Counsel urges the FCC to open a separate proceeding in which it would require the nation's top wireless providers to submit cost data for wireless access and (separately) for voice, text, data, and video usage.

The FCC's bill shock proceeding provided ample evidence of the ability of the wireless industry's dominant providers to charge excessive rates and, as stated by the FCC in October 2010: "The wireless industry will continue to profit from customer confusion about wireless plans."⁹⁹ Rate Counsel acknowledges that a year later, on October 17, 2011, the FCC and CTIA

⁹⁹ / Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure, CG Docket Nos. 10-207 and 09-158, *Notice of Proposed Rulemaking*, rel. October 14, 2010. FCC Public Notice, "Comment Sought on Measures Designed to Assist U.S. Wireless Consumers to Avoid 'Bill Shock,'" CG Docket No. 09-158, DA 10-803, rel. May 11, 2010; The bill shock proceeding is separate from the enforcement actions announced in October 2010 by the FCC. (The FCC's Enforcement Bureau announced on October 3, 2010 that it had opened an investigation into fees that Verizon Wireless customers had complained about appearing on their bills. FCC News Release, "FCC

(the wireless industry association) announced a voluntary agreement by CTIA and its members¹⁰⁰ to establish new industry guidelines addressing bill shock. According to Chairman Genachowski, CTIA's Code of Conduct will be modified to provide for:

- Free, automatic voice or text alerts notifying consumers when they approach and when they reach monthly plan limits for voice, data, and text messages that would result in overage charges;
- Free, automatic alerts when consumers will incur international roaming charges that are not covered by their monthly plans; and
- Disclosure of tools that mobile providers offer their customers to set their own usage limits and monitor their usage balances.¹⁰¹

Consumers will not be required to “opt in” to these alerts but, rather, they will automatically receive the alerts. Moreover, among other drawbacks, this plan does not go into effect right away.¹⁰² Rate Counsel certainly welcomes these measures, but is concerned that as a result of the agreement, the FCC is putting its Bill Shock proceeding (CG Docket No. 10-207) on hold and taking a “trust, but verify” approach.¹⁰³ More needs to be done, and further delay is not in consumers' interests.

VI. NEED FOR FCC INVESTIGATIONS

Confirms Investigation into Verizon Wireless' Mystery Fee,” October 3, 2010. On October 3, 2010, Verizon Wireless announced that it was refunding its customers a total of up to \$90 million for the charges, which it now acknowledges were erroneous charges for data usage. Verizon New Release, available at: <http://news.vzw.com/news/2010/10/pr2010-10-03.html>.

^{100/} According to CTIA, its members serve more than 97% of the wireless consumers in the United States. CTIA News Release, “CTIA-The Wireless Association®, Federal Communications Commission and Consumers Union Announce Free Alerts to Help Consumers Avoid Unexpected Overage Charges,” October 17, 2011.

^{101/} Statement of FCC Chairman Julius Genachowski, Bill Shock Event, The Brookings Institution, Washington, DC, October 17, 2011.

^{102/} According to the CTIA press release, by October 17, 2012, wireless carriers will “provide customers with at least two out of the four notifications for data, voice, text and international roaming and all of the alerts by April 17, 2013.” CTIA News Release, “CTIA-The Wireless Association®, Federal Communications Commission and Consumers Union Announce Free Alerts to Help Consumers Avoid Unexpected Overage Charges,” October 17, 2011.

^{103/} *Id. See, also*, Commissioner Michael J. Copps, Statement on the Bill Shock Industry Guidelines, October 17, 2011: “The Commission has a duty to remain vigilant here. So I am pleased that the underlying docket and proceeding will remain open. Should bill shock remain a problem despite industry efforts, a future Commission will be able to adopt and enforce anti-bill shock rules.”

The proposed transactions reveal several areas of policy that merit timely attention and/or correction by the FCC, *regardless of the outcome of this particular proceeding.*

A. Interstate Special Access

As Rate Counsel has previously stated, the development of efficient wireless markets depends on reasonable rates, terms, and conditions for interstate special access. Presently, supracompetitive interstate special access rates are thwarting the Commission's pursuit of diverse, affordable broadband wireless deployment. Structural changes in telecommunications markets, including horizontal and vertical integrations resulting from mergers among ILECs and from ILEC acquisitions of legacy AT&T and MCI, have exacerbated anticompetitive harms that legacy AT&T identified in its original 2002 petition seeking review of interstate special access rates.¹⁰⁴

Broadband deployment continues to be harmed as a result of high special access rates. NoChokePoints Coalition explained in 2010: "Special access services are critical inputs for broadband services provided by rural telecommunications carriers and wireless carriers, and therefore are essential for broadband deployment and competition. Special access is also the foundation of dedicated high-speed broadband for businesses, universities, hospitals, public safety organizations, and government agencies throughout the country."¹⁰⁵ By virtue of their

¹⁰⁴ / *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Petition for Rulemaking, filed Oct. 15, 2002. *See, also, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No. 05-25; RM-10593, *Order and Notice of Proposed Rulemaking*, released January 31, 2005.

¹⁰⁵ / *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Comments of the NoChokePoints Coalition, January 19, 2010, at 4-5. NoChokePoints Coalition, at the time comments were filed in January 2010, included: T-Mobile U.S.A., Inc., The New America Foundation, Public Knowledge, Media Access Project, Association for Information Communications Technology Professionals in Higher Education ("ACUTA"), Ad Hoc Telecommunications Users Group, Computer & Communications Industry Association ("CCIA"), U.S. PIRG, Deltacom, Inc., Cbeyond Inc., BT

extensive wireline distribution facilities, the two largest wireless providers, Verizon Wireless and AT&T – unlike their competitors – don’t need to purchase overpriced special access in a large portion of their respective wireless footprints. This in and of itself provide a huge competitive advantage. Therefore, regardless of the FCC’s deliberations in this proceeding, the FCC should stop delaying and promptly recalibrate the supracompetitive interstate special access rates that stymie wireless broadband deployment.

B. Net neutrality

Verizon Wireless’ proposed acquisition of substantial amounts of new spectrum combined with its commercial agreements with cable companies to cross-market services heightens potential threats to net neutrality.¹⁰⁶ On December 21, 2010, the FCC issued its “network neutrality” decision.¹⁰⁷ The order was a crucial first step for ensuring that consumers and innovators can make their own choices about applications, services, launching new technologies, and communicating. The FCC’s order acknowledges that most consumers have limited choices for broadband services and that, furthermore, broadband providers’ financial

Americas Inc., One Communications, Sprint Nextel Corporation, U.S. Cellular, Cellular South, Inc., Clearwire, Integra Telecom, XO Communications, and tw telecom inc. See, more recently, Ex parte letter from Maura Corbett Spokesperson for the NoChokePoints Coalition to Marlene H. Dortch, Secretary, Federal Communications Commission, March 14, 2011, Re: Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, Attachment: Stephen E. Siwak, Economics Incorporated, *Economic Benefits of Special Access Price Reductions*, March 2011.

¹⁰⁶ / See, e.g., *TR Daily*, December 19, 2011, “Verizon Wireless Open-Platform Prove Urged.” *TR Daily* reported: “The FCC should investigate both recent reports that Verizon Wireless’s new Android device does not support the Google Wallet mobile payment applications and reports from earlier this year that Verizon Wireless asked Google, Inc., to disable Verizon Wireless subscribers’ access to third-party tethering applications in the Android Market application store, Stanford Law School professor Barbara van Schewick, director of the school’s Center for Internet and Society, urged the FCC in a letter today. These practices appear to violate the open platform conditions on Verizon Wireless’s 700 megahertz C block license, she added, echoing concerns that Free Press raised last week in a letter also asking the FCC to investigate Verizon Wireless (*TR Daily*, Dec. 13). Ms. van Schewick had backed Free Press’s call for an investigation of the anti-tethering reports earlier this year (*TR Daily*, July 5).”

¹⁰⁷ / *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, *Report and Order*, released December 23, 2010 (“Net Neutrality Order”), 2010 FCC LEXIS 7455 at para. 1.

interests in their own telephony and pay television services create incentives for them to block or degrade other providers' services. The FCC's rules (1) require transparency by providers,¹⁰⁸ (2) prohibit the blocking of lawful content and applications,¹⁰⁹ and (3) prohibit unreasonable discrimination in the treatment of lawful Internet traffic.¹¹⁰ Regarding the third category of rules, the FCC explains that:

In evaluating unreasonable discrimination, the types of practices we would be concerned about include, but are not limited to, discrimination that harms an actual or potential competitor to the broadband provider (such as by degrading VoIP applications or services when the broadband provider offers telephone service), that harms end users (such as by inhibiting end users from accessing the content, applications, services, or devices of their choice), or that impairs free expression (such as by slowing traffic from a particular blog because the broadband provider disagrees with the blogger's message).¹¹¹

The third rule, however, unfortunately does not apply to wireless providers. This is particularly troubling in that many underserved and unserved areas appear to be targeted for mobile broadband deployment and many low-income and minority consumers rely solely upon mobile broadband for broadband Internet access.¹¹²

The FCC also discusses its decision to decline to apply the no unreasonable discrimination rule to mobile broadband, and its "measured steps" for protecting openness for mobile broadband at this time in the following manner:

We are taking measured steps to protect openness for mobile broadband at this time in part because we want to better understand how the mobile broadband market is developing before determining whether adjustments to this framework are necessary. To that end, we will closely monitor developments in the mobile

¹⁰⁸/ Transparency will be provided through broadband providers' disclosures regarding network practices, performance characteristics, and commercial terms. See *Net Neutrality Order*, paras. 53-61.

¹⁰⁹/ See *id.*, at paras. 62-67.

¹¹⁰/ See *id.*, at paras. 68-79.

¹¹¹/ *Id.*, at para. 75 (cites omitted).

¹¹²/ See *National Broadband Plan*, at 180.

broadband market, with a particular focus on the following issues: (1) the effects of these rules, the C Block conditions, and market developments related to the openness of the Internet as accessed through mobile broadband; (2) any conduct by mobile broadband providers that harms innovation, investment, competition, end users, free expression or the achievement of national broadband goals; (3) the extent to which differences between fixed and mobile rules affect fixed and mobile broadband markets, including competition among fixed and mobile broadband providers; and (4) the extent to which differences between fixed and mobile rules affect end users for whom mobile broadband is their only or primary Internet access platform. We will investigate and evaluate concerns as they arise. We also will adjust our rules as appropriate. To aid the Commission in these tasks, we will create an Open Internet Advisory Committee, as discussed below in paragraph 162, with a mandate that includes monitoring and regularly reporting on the state of Internet openness for mobile broadband.¹¹³

The FCC's exclusion of wireless service from a key component of its decision to ensure broadband openness was ill-advised. Moreover, in the *Verizon/AllTel Order*, the FCC declined to impose the Commission's *Internet Policy Statement*.¹¹⁴ Yet clearly an open Internet is essential. The FCC has also stated:

There is one Internet, which should remain open for consumers and innovators alike, although it may be accessed through different technologies and services. The record demonstrates the importance of freedom and openness for mobile broadband networks, and the rationales for adopting high-level open Internet rules, discussed above, are for the most part as applicable to mobile broadband as they are to fixed broadband. Consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission are as important when end users are accessing the Internet via mobile broadband as via fixed. And there have been instances of mobile providers blocking certain third-party applications, particularly applications that compete with the provider's own offerings; relatedly, concerns have been raised about inadequate transparency regarding network management practices. We also note that some mobile broadband providers affirmatively state they do not oppose the application of openness rules to mobile broadband.¹¹⁵

¹¹³ / *Net Neutrality Order*, at para. 105.

¹¹⁴ / *Verizon/AllTel Order*, at para. 191.

¹¹⁵ / *Net Neutrality Order*, at para. 93.

Commissioner Copps, in his concurring statement, clearly articulated various regrets about the Order, including, among others that the Order lacked “real parity between fixed and mobile.”¹¹⁶ Particularly in light of this lack of parity, the proposed merger poses serious harm to consumers and is not in the public interest.

If, contrary to Rate Counsel’s recommendation, the FCC approves the Petitions, it should do so only contingent upon Verizon Wireless agreeing to abide by the third rule in the FCC’s Net Neutrality Order. Furthermore, such a condition should not sunset.

C. Data Collection and Analysis

Consumers’ increasing demand for wireless services provides ample evidence of the growing significance of this sector of the nation’s economy to households, businesses, and social institutions throughout the country. At the same time that demand has increased substantially, the quantity of nationwide suppliers has shrunk substantially, leaving two companies with noticeable market dominance. If, contrary to Rate Counsel’s recommendation to the contrary, the FCC approves the two Petitions, Rate Counsel urges the FCC to establish regular, uniform, and comprehensive data reporting collections by the wireless industry regarding rates, terms, and conditions. Furthermore, the FCC should require the nation’s top wireless carriers to provide detailed cost studies for its voice, data, and broadband services to enable the FCC to monitor whether carriers are charging supracompetitive rates.

^{116/} *Id.*, at 141. Among Commissioner Copps’ other concerns were that that the FCC did not put broadband telecommunications back under Title II of the FCC’s enabling statute, did not establish a general ban on “pay for priority,” and did not do more to “strip loopholes from the definition of ‘broadband Internet access service’ to prevent companies falsely claiming they are not broadband companies.” *Id.*

VII. CONDITIONS

- A. The FCC should deny the proposed transactions; if it, nonetheless, decides to approve them, it should only do so conditioned upon specific commitments by Applicants to enhance the public interest.**

Rate Counsel urges the Commission to deny the proposed transactions because, as this Petition demonstrates, they would adversely affect the public interest. However, if, contrary to Rate Counsel's recommendation, the Commission decides to approve the transactions, Rate Counsel urges the Commission to condition such approval upon enforceable, measurable conditions that yield tangible public benefits. Rate Counsel provides a preliminary discussion of such conditions below.

- B. Verizon should commit to implement a program that parallels the Comcast "Essentials" program.**

Although the proposed transactions involve Verizon Wireless, as its corporate parent, Verizon could commit to implement a program that parallels Comcast's program whereby income-eligible families may obtain discounted broadband services and computers. On January 18, 2011, more than a year after Comcast, General Electric Company ("GE") – which owns an 80 percent interest in NBC Universal Inc. ("NBCU") – and Navy LLC (the Applicants' joint venture vehicle) entered into an agreement to create a joint venture, the FCC, with Commissioner Capps dissenting, approved the proposed merger subject to numerous conditions.¹¹⁷ Comcast committed to provide discounted broadband service to low-income consumers, which was codified in the merger order:

Broadband Adoption and Deployment. Comcast will make available to approximately 2.5 million low income households: (i) high-speed Internet access

¹¹⁷/ In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, *Memorandum Opinion and Order*, released January 20, 2011 ("Comcast-NBCU Order").

service for less than \$10 per month, (ii) personal computers, netbooks, or other computer equipment at a purchase price below \$150, and (iii) an array of digital-literacy education opportunities. Comcast will also expand its existing broadband networks to reach approximately 400,000 additional homes, provide broadband Internet access service in six additional rural communities, and provide free video and high-speed Internet service to 600 new anchor institutions, such as schools and libraries, in underserved, low income areas.¹¹⁸

The Internet service is available for \$9.95 per month plus tax with no activation or equipment rental fees. Consumers can also buy computers (netbook-style laptops) at service initiation for \$149.99 plus tax and receive free Internet training. To qualify, consumers must meet all of the following criteria: live in a Comcast service area; have a child in the home that participates in the National School Lunch Program; have not subscribed to Comcast Internet service in the past 90 days; and do not have an overdue Comcast bill or unreturned equipment.¹¹⁹ The program will be offered for three “school years” but once families subscribe they can continue service as long as their account is in good standing and their child remains in the free lunch program. Comcast states on its website that the Internet service will be provided at download speeds “up to” 1.5 mbps and upload speeds of “up to” 384 kbps.¹²⁰

C. Verizon Wireless should commit to the FCC’s “third” net neutrality rule.

If, contrary to Rate Counsel’s recommendation, the FCC approves the Petitions, it should do so only contingent upon Verizon Wireless agreeing to abide by the third rule in the FCC’s Net Neutrality Order. Furthermore, such a condition should not sunset.

^{118/} *Id.*, at para. 6. See paragraph 6 for a description of all of the Applicants’ voluntary commitments.

^{119/} <http://www.internetessentials.com/how/index.html>. More information can be found at Comcast’s website: www.internetessentials.com. Consumers can also be directed to Comcast at 1-855-8-INTERNET. There is also a “Partner Portal” on the website which provides information about resources and flyers that community groups can use to publicize the availability of Internet Essentials. <http://www.internetessentialspartner.com/Login.aspx>

^{120/} See <http://www.internetessentials.com/faq/index.html>.

VIII. CONCLUSION

Rate Counsel urges the Commission to deny the proposed transactions for the reasons set forth in this Petition. SpectrumCo and Cox should be required to return the spectrum to the FCC to be re-auctioned so that is deployed for the highest available use. As separate matters relating to the Commission's oversight of the rapidly growing and increasingly important wireless industry, Rate Counsel also urges the Commission to (1) initiate an in-depth investigation into the costs and rates of wireless voice, data, and broadband access; (2) initiate a rulemaking to require uniform and detailed pricing information to be submitted to the FCC on wireless "rack" rates and various pricing plans; (3) complete its long-pending investigation of interstate special access rates; and (4) revisit its net neutrality order and extend all of the provisions to broadband wireless. These matters bear directly on consumer welfare and the public interest.

Respectfully submitted,

Stefanie A. Brand
Director
Division of Rate Counsel
Christopher J. White
Deputy Rate Counsel
P.O. Box 46005
Newark, NJ 07101
Phone (973) 648-2690

Economic Consultants:
Susan M. Baldwin
Timothy E. Howington

February 17, 2012

DECLARATION UNDER PENALTY OF PERJURY

I, Susan M. Baldwin, hereby state the following:

1. I am an economic consultant retained by the New Jersey Division of Rate Counsel.
2. I have read the forgoing "Petition to Deny." With the exception of those facts of which official notice can be taken, all facts set forth herein are true and correct to the best of my knowledge, information, and belief.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of February, 2011



Susan M. Baldwin

FCC Advanced Wireless Services Auction No. 66 *** Final ***

Round: 161

Service AWS

	#of Lic.	PWBs* (Gross)	PWBs* (Net)	FCC Held	New PWBs*	Licenses w/PWBs*	Bids Placed
BEA	352	\$3,938,533,000	\$3,898,549,100	7	0	345	0
CMA	734	\$2,268,029,200	\$2,247,017,800	22	0	712	0
REA	36	\$7,672,548,000	\$7,554,700,250	6	0	30	0
Totals:	1,122	13,879,110,200	\$13,700,267,150	35	0	1,087	0

Top 10 Licenses by Provisionally Winning Bid (Net)

Service: AWS Geo. Desc. BEA Round: 161

Lic. Name	Market Name	PW Bidder	Round of PWB*	Pops	PWB* (Net)	PWB* (Gross)
AW-BEA010-B	NYC-Long Is. NY-NJ-CT	SpectrumCo LLC	20	25,712,577	\$468,178,000	\$468,178,000
AW-BEA010-C	NYC-Long Is. NY-NJ-CT	MetroPCS AWS, LLC	41	25,712,577	\$363,945,000	\$363,945,000
AW-BEA064-B	Chicago-Gary-Kenosha	SpectrumCo LLC	43	10,328,854	\$228,041,000	\$228,041,000
AW-BEA160-B	LA-Riverside-Orange Cn	SpectrumCo LLC	32	18,003,420	\$215,620,000	\$215,620,000
AW-BEA064-C	Chicago-Gary-Kenosha	Cingular AWS, LLC	53	10,328,854	\$162,082,000	\$162,082,000
AW-BEA013-B	Wash.-Balt. DC-MD-VA-	SpectrumCo LLC	47	8,403,130	\$148,708,000	\$148,708,000
AW-BEA160-C	LA-Riverside-Orange Cn	T-Mobile License LLC	34	18,003,420	\$114,816,000	\$114,816,000
AW-BEA163-B	San Fran.-Oakland-San	SpectrumCo LLC	46	9,111,806	\$80,834,000	\$80,834,000
AW-BEA057-B	Detroit-Ann Arbor-Flint	SpectrumCo LLC	50	6,963,637	\$78,988,000	\$78,988,000
AW-BEA012-B	Phil.-Atl. City PA-NJ-DE	SpectrumCo LLC	37	7,309,792	\$77,838,000	\$77,838,000

Service: AWS Geo. Desc. CMA Round: 161

Lic. Name	Market Name	PW Bidder	Round of PWB*	Pops	PWB* (Net)	PWB* (Gross)
AW-CMA001-A	New York-Newark, NY-	T-Mobile License LLC	23	16,134,166	\$396,232,000	\$396,232,000
AW-CMA003-A	Chicago, IL	T-Mobile License LLC	51	8,091,720	\$254,821,000	\$254,821,000
AW-CMA002-A	Los Angeles-Anaheim,	Cingular AWS, LLC	33	15,620,448	\$179,161,000	\$179,161,000
AW-CMA008-A	Washington, DC-MD-VA	Cricket Licensee (Reauctio	38	4,182,658	\$133,150,000	\$133,150,000
AW-CMA004-A	Philadelphia, PA	Cricket Licensee (Reauctio	48	5,036,646	\$82,565,000	\$82,565,000
AW-CMA005-A	Detroit-Ann Arbor, MI	T-Mobile License LLC	52	4,775,452	\$65,187,000	\$65,187,000
AW-CMA009-A	Dallas-Fort Worth, TX	Cingular AWS, LLC	36	5,120,721	\$50,682,000	\$50,682,000
AW-CMA014-A	Baltimore, MD	Cricket Licensee (Reauctio	52	2,512,431	\$43,657,000	\$43,657,000
AW-CMA006-A	Boston-Brockton-Lowell,	T-Mobile License LLC	32	4,279,111	\$36,787,000	\$36,787,000
AW-CMA012-A	Miami-Fort Lauderdale,	T-Mobile License LLC	32	3,876,380	\$35,633,000	\$35,633,000

Service: AWS Geo. Desc. REA Round: 161

Lic. Name	Market Name	PW Bidder	Round of PWB*	Pops	PWB* (Net)	PWB* (Gross)
AW-REA001-F	Northeast	Cellco Partnership d/b/a Ve	16	50,058,090	\$1,335,374,000	\$1,335,374,000
AW-REA006-F	West	T-Mobile License LLC	15	49,999,164	\$894,590,000	\$894,590,000
AW-REA003-F	Great Lakes	Cellco Partnership d/b/a Ve	14	58,178,304	\$615,923,000	\$615,923,000
AW-REA002-F	Southeast	Cellco Partnership d/b/a Ve	14	49,676,946	\$572,446,000	\$572,446,000
AW-REA001-D	Northeast	MetroPCS AWS, LLC	18	50,058,090	\$552,694,000	\$552,694,000
AW-REA001-E	Northeast	T-Mobile License LLC	17	50,058,090	\$472,553,000	\$472,553,000
AW-REA005-F	Central	T-Mobile License LLC	15	40,343,960	\$470,290,000	\$470,290,000
AW-REA006-E	West	Cingular AWS, LLC	15	49,999,164	\$362,757,000	\$362,757,000
AW-REA003-E	Great Lakes	T-Mobile License LLC	19	58,178,304	\$356,780,000	\$356,780,000
AW-REA006-D	West	MetroPCS AWS, LLC	14	49,999,164	\$355,726,000	\$355,726,000

* PWBs = Provisionally Winning Bids

FCC Advanced Wireless Services Auction No. 66 *** Final ***

Results for Round:	161	New Bids	0	PWBs* (Gross):	\$13,879,110,200
Stage:	2	New PWBs*	0	PWBs* (Net):	\$13,700,267,150
Change in PWBs* (Net):					0.00%

Top 10 Bidders by Net Provisionally Winning Bids Total

Bidder	PWBs*	Population	Net PWB* Total	PWB* Total
T-Mobile License LLC	120	474,718,308	\$4,182,312,000	\$4,182,312,000
Cellco Partnership d/b/a Verizon Wireless	13	192,047,611	\$2,808,599,000	\$2,808,599,000
SpectrumCo LLC	137	267,387,437	\$2,377,609,000	\$2,377,609,000
MetroPCS AWS, LLC	8	144,544,402	\$1,391,410,000	\$1,391,410,000
Cingular AWS, LLC	48	198,768,198	\$1,334,610,000	\$1,334,610,000
Cricket Licensee (Reaction), Inc.	99	117,802,839	\$710,214,000	\$710,214,000
Denali Spectrum License, LLC	1	58,178,304	\$274,083,750	\$365,445,000
Barat Wireless, L.P.	17	41,601,174	\$127,140,000	\$169,520,000
AWS Wireless Inc.	154	60,498,394	\$115,503,000	\$115,503,000
Atlantic Wireless, L.P.	15	35,803,110	\$75,294,000	\$100,392,000

Top 10 Bidders by Number of Provisionally Winning Bids

Bidder	PWBs*	Population	Net PWB* Total	PWB* Total
AWS Wireless Inc.	154	60,498,394	\$115,503,000	\$115,503,000
SpectrumCo LLC	137	267,387,437	\$2,377,609,000	\$2,377,609,000
T-Mobile License LLC	120	474,718,308	\$4,182,312,000	\$4,182,312,000
Cricket Licensee (Reaction), Inc.	99	117,802,839	\$710,214,000	\$710,214,000
American Cellular Corporation	85	23,266,510	\$65,880,000	\$65,880,000
Cingular AWS, LLC	48	198,768,198	\$1,334,610,000	\$1,334,610,000
Red Rock Spectrum Holdings, LLC	42	5,481,709	\$7,466,000	\$7,466,000
Cable One, Inc.	30	4,795,074	\$22,148,000	\$22,148,000
Cavalier Wireless, LLC	30	13,313,269	\$14,957,250	\$19,943,000
Barat Wireless, L.P.	17	41,601,174	\$127,140,000	\$169,520,000

Top 5 Bidders by Number of PWBs* In Each Geographic Licensing Group

BEA	Bidder	PWBs*	Population	Net PWB* Total	PWB* Total
	SpectrumCo LLC	136	266,175,900	\$2,376,176,000	\$2,376,176,000
	AWS Wireless Inc.	48	28,333,075	\$42,979,000	\$42,979,000
	Cricket Licensee (Reaction), Inc.	25	34,932,012	\$139,021,000	\$139,021,000
	Cingular AWS, LLC	24	65,557,424	\$450,314,000	\$450,314,000
	T-Mobile License LLC	17	45,436,013	\$229,503,000	\$229,503,000

CMA	Bidder	PWBs*	Population	Net PWB* Total	PWB* Total
	AWS Wireless Inc.	105	28,248,097	\$69,798,000	\$69,798,000
	T-Mobile License LLC	93	93,681,616	\$1,088,866,000	\$1,088,866,000
	Cricket Licensee (Reaction), Inc.	73	42,526,867	\$448,909,000	\$448,909,000
	American Cellular Corporation	73	16,703,526	\$53,133,000	\$53,133,000
	Red Rock Spectrum Holdings, LLC	37	4,416,425	\$6,264,000	\$6,264,000

REA	Bidder	PWBs*	Population	Net PWB* Total	PWB* Total
	T-Mobile License LLC	10	335,600,679	\$2,863,943,000	\$2,863,943,000
	Cellco Partnership d/b/a Verizon Wireless	4	189,240,313	\$2,798,738,000	\$2,798,738,000
	Cingular AWS, LLC	3	94,260,346	\$500,232,000	\$500,232,000
	MetroPCS AWS, LLC	2	100,057,254	\$908,420,000	\$908,420,000
	American Cellular Corporation	2	1,253,864	\$2,194,000	\$2,194,000

* PWB = Provisionally Winning Bid