

REDACTED - FOR PUBLIC INSPECTION

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FILED/ACCEPTED

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Federal Communications Commission  
Office of the Secretary

February 21, 2012

VIA HAND DELIVERY AND ECFS

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20534

Ms. Sandra K. Danner  
Broadband Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street S.W., Room 3A-266  
Washington, DC 20554

**Re: Petition to Deny of T-Mobile, USA, Inc.  
WT Docket No. 12-4**

Dear Ms. Dortch and Ms. Danner:

Pursuant to the Protective Order issued in the above-referenced proceedings on January 17, 2012,<sup>1</sup> please find attached an unredacted version of the Petition to Deny ("Petition") the Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses and Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign License (collectively, "Applications"), filed in the above-referenced docket, which contains certain confidential and proprietary information related to T-Mobile, USA, Inc. ("T-Mobile").

T-Mobile seeks confidential treatment of certain information set forth Exhibit B to the Petition under the Protective Order. The information marked in Exhibit B is entitled to confidential, non-public treatment under the Freedom of Information Act (FOIA) and related provisions of the Commission's rules. See 47 C.F.R. §§ 0.457 and 0.459; 5 U.S.C.

<sup>1</sup> See Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses and Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign License, WT Docket No. 12-4, DA 12-50 (rel. Jan. 17, 2012) ("Protective Order").

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Ms. Sandra K. Danner  
February 21, 2012  
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§ 552, *et seq.* The marked information contains T-Mobile's network, business planning, and other confidential information.

T-Mobile treats the network information in Exhibit B as confidential and does not customarily release such information to the public. T-Mobile also limits the internal circulation of this information to only those persons with a legitimate need for such information. Moreover, information in the possession of a public entity is considered to be "confidential" if disclosure is likely to substantially harm the competitive position of the person from whom the information was obtained.<sup>2</sup>

T-Mobile is subject to actual and potential competition with respect to communications products and services. The information in Exhibit B provides certain information concerning the company's network design and business operations. As a result, the information in Exhibit B is sensitive and commercially valuable, and its disclosure would substantially harm T-Mobile's competitive position.

In support of its request for confidential treatment of Exhibit B, T-Mobile submits the following more specific information pursuant to FCC Rule 0.459:

(1) Identification of Confidential Materials: T-Mobile seeks confidential treatment for certain network information set forth in Exhibit B. Pursuant to the Protective Order, T-Mobile has marked each page of the non-redacted version of this filing with the legend: "**CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 12-4 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION.**" Each page of the redacted version of this filing is marked with the legend "**REDACTED - FOR PUBLIC INSPECTION.**"

(2) Circumstances Giving Rise to Submission of Information: See the above-referenced Commission docket. To provide relevant market information to the Commission in order to facilitate its review of the Applications, T-Mobile hereby voluntarily provides the confidential information provided in Exhibit B.

(3) Degree to Which Information is Commercial or Financial: The information in Exhibit B includes information on T-Mobile's network plans. This information is highly sensitive financial, trade and commercial information as it contains data and information concerning T-Mobile's business operations. T-Mobile treats this data as confidential and would not submit the data to the Commission without assurances that the information

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<sup>2</sup> See *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 873 (D.C. Cir. 1992).

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will be kept confidential. It would be highly inappropriate for the data to be disclosed to the public or third parties absent the protection of a non-disclosure agreement.

(4) Degree to Which the Information Concerns a Service Subject to Competition: Exhibit B contains information on T-Mobile's network plans. Such information is directly related to T-Mobile's service offerings which are subject to substantial competition from numerous other communications service providers, particularly wireless providers.

(5) How Disclosure Could Result in Substantial Harm: Disclosure of T-Mobile's network design information and related highly confidential information would enable T-Mobile's competitors to determine sensitive information concerning the Company's business plans. Public disclosure could give competitors a significant competitive advantage.

(6) Measures Taken to Prevent Disclosure: T-Mobile holds the information provided in this submission in strict confidentiality. T-Mobile has limited the number of persons with access to this information in order to lessen the chance of inadvertent or unauthorized disclosure.

(7) Public Access to Information, Third Party Disclosure: T-Mobile has not made this information publicly available through previous disclosures.

(8) Justification of the Period During Which the Material Should Not be Publicly Available: T-Mobile requests that the Commission hold this information out of public view for five years or until such earlier time as the information may otherwise be made public by T-Mobile. Release of this information before that time would cause substantial harm to T-Mobile as it would detail the Company's confidential business planning information.

Based on the foregoing, T-Mobile requests confidential treatment of designated portions of Exhibit B pursuant to FCC Rules 0.457 and 0.459 and the Protective Order.

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Ms. Sandra K. Danner  
February 21, 2012  
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Pursuant to the Protective Order, T-Mobile is delivering two copies of the confidential version of this filing, via courier, to Ms. Sandra K. Danner with the Broadband Division of the Commission's Wireless Telecommunications Bureau. One copy of the confidential version and two public, redacted versions of this filing are also being filed by courier with the Secretary's Office. One copy of the public version of this filing is being filed electronically through the Commission's Electronic Comment Filing System. Finally, one copy of the confidential version of this filing is being transmitted by courier to the Commission's Secretary's Office for time-stamp return by courier to the undersigned counsel.

Should you have any questions, please contact the undersigned.

Sincerely,

/s/ Jean L. Kiddoo

Andrew D. Lipman  
Jean L. Kiddoo

*Counsel for T-Mobile, USA, Inc.*

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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

**PETITION TO DENY OF T-MOBILE, USA, INC.**

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SUMMARY

The Commission should deny the Applications of Verizon Wireless to acquire the AWS spectrum currently held by SpectrumCo and Cox to prevent an excessive concentration of mobile service spectrum holdings that is contrary to the public interest.

The Transactions come before the Commission at a critical time for the future of competition in mobile services, and particularly in mobile broadband. Verizon Wireless, with its extensive holdings of valuable low-frequency spectrum, already has a significant advantage in the industry migration to LTE as the new wireless broadband standard. Its smaller competitors do not have excess spectrum in which to first warehouse bandwidth and later deploy LTE. With current spectrum holdings, their effort to deploy LTE is more complicated, costly and time consuming. Moreover, its smaller competitors are largely relegated to the higher frequency ranges, which are more difficult to deploy due to their propagation and building penetration characteristics, and their ability to keep up with demand as the industry evolves to the LTE standard will be significantly capacity constrained, to the detriment of competition.

Now, Verizon Wireless is seeking to acquire a substantial block of unused AWS spectrum that is unlikely to provide any near-term benefits to Verizon Wireless customers (indeed, the company already holds other AWS spectrum and has not even put it to use yet). Rather, the principal impact of the acquisition would be to foreclose the possibility that this spectrum could be acquired by smaller competitors – such as T-Mobile – who would use it more quickly, more intensively, and more efficiently than Verizon Wireless. The acquisitions will limit the deployment of LTE by competitors of Verizon Wireless and the bandwidth available for such deployments. If these transactions go forward, the end result will be less LTE capacity available overall and reduced competition in the provision of LTE, which would be contrary to the public interest.

Spectrum is a scarce resource that is an essential input to wireless services. The Commission's public interest analysis of spectrum transactions consistently has recognized that excessive

concentration of spectrum holdings is contrary to the public interest. These Transactions pose a clear threat to competition, both under the Commission's public interest analysis and the related antitrust standards applied by the Department of Justice and Federal Trade Commission. Further, the Transactions are accompanied by joint marketing and joint venture agreements between Verizon Wireless and the cable company parties that require further investigation to determine whether any illicit market divisions have been negotiated.

Contrary to Applicants' urging, the Commission should not rubber-stamp these questionable Transactions merely because they satisfy the current "spectrum screen" as calculated with respect to previous cases. The present screen is inadequate as applied to the current wireless market, particularly because it fails to recognize the vast difference in value between low (below 1GHz) and high (above 1 GHz) frequency bands. This is like assessing landholdings in acres only without considering the differences in land value based on location. Continuing to apply the current spectrum screen will only allow Verizon Wireless to accumulate even more spectrum on top of an already dominant position, while checkmating crucial avenues for growth of its smaller competitors. Accordingly, T-Mobile urges the Commission to adopt a value-weighted spectrum screen (in addition to updating the inventory of "available" and "suitable" spectrum to take account of the evolution of mobile broadband services and recent spectrum developments), which would provide a rational basis for a more balanced and economically sound analysis of Verizon Wireless' proposed spectrum acquisitions. Such an analysis would show that Verizon Wireless' proposed acquisition will cause substantial harm to competition.

For these reasons, the Commission should find that Applicants have not sustained their burden of demonstrating public interest benefits sufficient to outweigh the significant harms that would result from these Transactions. These applications should be denied.

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Before the  
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Washington, D.C. 20554

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

**PETITION TO DENY OF T-MOBILE, USA, INC.**

T-Mobile, USA, Inc. (“T-Mobile”), by its undersigned counsel, hereby petitions the Commission to deny the above-captioned applications for consent to assign certain wireless spectrum licenses, pursuant to 47 USC §§ 309(d) and 310(d), and the Commission’s rules.

**I. STATEMENT OF FACTS AND BACKGROUND**

**A. The Applications**

In the Applications, Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”) and SpectrumCo<sup>1</sup> request consent to assign 122 Advanced Wireless Services (AWS-1) licenses to Verizon Wireless from SpectrumCo; and Verizon Wireless and Cox<sup>2</sup> seek Commission consent

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<sup>1</sup> 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). *See* Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, File No. 0004993617, Description of Transaction and Public Interest Statement at 2 (“*SpectrumCo Public Interest Statement*”).

<sup>2</sup> 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* Application of Cellco Partnership d/b/a Verizon Wireless and

to assign 30 more AWS-1 licenses to Verizon Wireless from Cox (the “Transactions”). These licenses are not being used by SpectrumCo<sup>3</sup> or Cox (together, the “Assignors”) to provide any services, but have been lying fallow since they were granted in 2006.<sup>4</sup>

In its Public Notice on this transaction, the Commission noted:

Preliminary 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). Preliminary review of the Verizon Wireless-Cox Application indicates that the 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).<sup>5</sup>

In addition to the spectrum transfers, Verizon Wireless has entered into marketing arrangements with SpectrumCo principals Comcast, Time Warner Cable, and Bright House, and separately with Cox, that reportedly include agreements under which these companies and

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Cox TMI Wireless, LLC for Consent to Assign Licenses, File No. 0004996680, Public Interest Statement at 2 (“*Cox Public Interest Statement*”). 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 *Cox Public Interest Statement* at 3. In 2009, the Cox Communications affiliate exited the SpectrumCo venture, receiving as part of its redemption value the AWS-1 licenses that are the subject of the Verizon Wireless-Cox Application. *Id.*

<sup>3</sup> The CFO of Comcast, the largest investor in SpectrumCo, has been quoted in the trade press as telling a Citigroup conference: “We never really intended to build that spectrum, so therefore [selling it to Verizon Wireless] is a really good use of that spectrum.” *Communications Daily*, Jan. 19, 2001, at 1.

<sup>4</sup> *SpectrumCo Public Interest Statement* at 1-3; *Cox Public Interest Statement* at 1-3. Because the legal and policy arguments asserted by Applicants with respect to both Transactions are substantially similar, hereafter we will cite to only the *SpectrumCo Public Interest Statement*.

<sup>5</sup> *Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC And Cox TMI Wireless, LLC Seek FCC Consent To The Assignment Of AWS-1 Licenses*, Public Notice, WT Docket No. 12-4, DA 12-67 (rel. Jan. 19, 2012) (“*Public Notice*”).

Verizon Wireless will sell each other's cable and wireless services and engage in joint research and development (the "JMAs").<sup>6</sup> Applicants claim that the JMAs have no bearing on whether the spectrum sale is in the public interest and do not require Commission approval but, at the Commission's request, Applicants have submitted the agreements into the record as "Highly Confidential" materials. Even though these materials are subject to a restrictive Protective Order, the copies submitted into the record appear to be heavily redacted.<sup>7</sup>

Verizon Wireless enters the Transactions as the largest mobile service provider in the United States by any measure. As of the Commission's last Annual Report on Wireless Competition, Verizon Wireless covered some 285 million people with its voice network, and 270 million with its broadband data network.<sup>8</sup> As of the end of 2010, Verizon Wireless reportedly accounted for over 30 percent of wireless subscribers and revenues nationwide, and for some 45 percent of the entire industry's EBITDA. On a MHz-POP basis, Verizon Wireless holds approximately 43 percent of all 700 MHz spectrum in the nation, and 48 percent of cellular spectrum; these are the two most suitable (and valuable) bands for mobile broadband services.<sup>9</sup> AT&T is a distant second in these categories, while the third and fourth largest carriers by subscribers, Sprint and T-Mobile, are at a significant disadvantage, because they hold *no spectrum at all* in these highly desirable "beachfront" bands.<sup>10</sup> Additionally, Verizon Wireless already holds a considerable

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<sup>6</sup> Declaration of Judith Chevalier at para. 8 (attached hereto as Exhibit A) ("Chevalier Decl.").

<sup>7</sup> See Letter of Media Access Project *et al.* to Marlene H. Dortch, FCC, WT Docket No. 12-4 (filed Feb. 7, 2012).

<sup>8</sup> *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*, Fifteenth Annual Report, WT Docket No. 10-133, FCC 11-103, 26 FCC Rcd 9664, at para. 30, Tables 1 and 2 (2011) ("*Fifteenth Annual Report*").

<sup>9</sup> *Fifteenth Annual Report* at para. 288 (Tables 27 and 28), and paras. 289-295.

<sup>10</sup> *Id.* at para. 288 (Tables 27 and 28). We note, however, that Sprint holds 14 MHz in the 800 MHz SMR band. T-Mobile also holds one rural area license in the cellular band.

amount of AWS spectrum, though it does not use that spectrum today in providing services.<sup>11</sup> The AWS band is a critical one for T-Mobile, as it is where it has deployed 3G and 4G services, and for many of the other competitive smaller carriers.

Verizon Wireless, with its extensive holdings of valuable low-frequency spectrum, already has a significant advantage in the industry migration to LTE as the wireless broadband standard. Its smaller competitors do not have excess spectrum in which to deploy LTE, which makes their effort to do so more costly, time consuming, and complex. Moreover, the higher frequency ranges used by T-Mobile and most of Verizon Wireless' other competitors are more difficult to deploy due to their propagation and building penetration characteristics, and those companies' ability to keep up with demand as the industry evolves to the LTE standard could well face significant capacity constraints, which would negatively impact their ability to compete.<sup>12</sup>

For these reasons, T-Mobile and many other smaller carriers, as well as their customers, will be foreclosed – perhaps irrevocably – from critically important spectrum opportunities if the Transactions are permitted to proceed. By effectively cornering what remains of the available AWS spectrum, Verizon Wireless would be preventing T-Mobile and other smaller competitors from the opportunity of potentially obtaining the additional spectrum to meet their projected customers' needs, effectively keeping them from growing and, ultimately, from continuing to be a vibrant competitive force. The effects of this foreclosure would be most dramatic on competitors who seek to offer 4G broadband services, in particular using LTE. Allowing Verizon Wireless to continue to aggregate spectrum unchecked would necessarily preclude access to this spectrum by smaller competitors who will use it more quickly, intensively, and efficiently than

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<sup>11</sup> Chevalier Decl. at para. 35.

<sup>12</sup> See, e.g., Declaration of Neville R. Ray at paras. 4, 17, 19, 22-23 (attached hereto as Exhibit B) (“Ray Decl.”).

Verizon Wireless. The acquisition effectively will limit the bandwidth available for the deployment of LTE by competitors of Verizon Wireless. The end result will be less LTE capacity available overall in the wireless market and therefore less competition, contrary to the public interest.

**B. T-Mobile**

T-Mobile, a wholly owned subsidiary of Deutsche Telekom AG (DT), is headquartered in Bellevue, Washington, and offers nationwide wireless voice and data services to individual and business customers. T-Mobile is the fourth largest wireless carrier in the United States. Unlike Verizon Wireless, with the exception of a single cellular license, T-Mobile's spectrum holdings are entirely in the PCS and AWS bands, with no spectrum at all in the bands below 1 GHz.<sup>13</sup>

Notwithstanding this relative spectrum disadvantage, T-Mobile has been making very efficient use of its spectrum to provide high quality services to its approximately 34 million subscribers.<sup>14</sup> However, T-Mobile's spectrally efficient techniques can only take it so far. To deploy new technology while it is using all its spectrum bands for current services, T-Mobile will need to undertake resource-intensive techniques to repurpose spectrum from one technology to another, which will be challenging to execute. Even with the additional spectrum that T-Mobile is due to receive from AT&T (subject to Commission approval), it will face serious constraints in seeking to expand its delivery of the latest generation of broadband services. Thus, the availability of additional spectrum to meet the needs of its customers is of critical importance to the future growth and success of T-Mobile, as it is for most other competitive wireless carriers.

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<sup>13</sup> *Fifteenth Annual Report* at para. 288 (Tables 27 and 28).

<sup>14</sup> *U.S. v. AT&T, Inc.*, Second Amended Complaint, No. 1: 11-cv-01560, at paras. 28-29 (D.D.C., filed August 31, 2011), available at <http://www.justice.gov/atr/cases/f275700/275756.pdf> ("*DOJ Complaint*") ("T-Mobile has ... been an innovator in terms of network development and deployment. ... Such investments in new network technologies ... are valuable to consumers as they increase the efficiency of spectrum use and allow for more mobile wireless services output.").

## II. LEGAL STANDARD AND PUBLIC INTEREST FRAMEWORK

In deciding whether to grant the Applications, the Commission must determine, pursuant to Section 310(d) of the Communications Act, “whether the Applicants have demonstrated that the proposed transfers of control of licenses and authorizations will serve the public interest, convenience, and necessity.”<sup>15</sup> The Applicants “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.”<sup>16</sup> In making this determination, the Commission must “consider whether [the merger] could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes [and] then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.”<sup>17</sup>

As explained in the Commission’s recent decisions reviewing mergers in the mobile wireless industry, the Commission’s public interest evaluation also “necessarily encompasses the ‘broad aims of the Communications Act.’”<sup>18</sup> These broad aims, among other things, include:

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<sup>15</sup> *Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 11-18, FCC 11-118, at para. 23 (2011) (citing 47 U.S.C. § 310(d) (“*AT&T-Qualcomm Order*”)); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, at para. 26 (2008) (citations omitted) (“*Verizon Wireless-ALLTEL Order*”).

<sup>16</sup> *AT&T-Qualcomm Order* at para. 23 (citations omitted); *Verizon Wireless-ALLTEL Order* at para. 26 (citations omitted).

<sup>17</sup> *AT&T-Qualcomm Order* at para. 23 (citations omitted); see also *Verizon Wireless-ALLTEL Order* at para. 26 (citations omitted).

<sup>18</sup> *AT&T-Qualcomm Order* at para. 24 (citing *AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless Seek FCC Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, Memorandum Opinion and Order, 25 FCC Rcd 8704, at para. 23 (2010) (“*AT&T-Verizon Wireless Order*”)) (additional citations omitted).

a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest. Our public interest analysis also often entails assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.<sup>19</sup>

Under Commission precedent, a “competitive analysis” remains an important component of the public interest review.<sup>20</sup> This competitive analysis is broader than the DOJ’s review under antitrust laws in that, unlike the DOJ, the Commission “consider[s] whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant market.”<sup>21</sup>

The awareness that a transaction may have both “harmful and beneficial consequences,”<sup>22</sup> and that these must be weighed against each other, is central to the Commission’s review. “[C]ombining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.”<sup>23</sup> It is not unusual that license transfer applicants claim that their proposed transaction will enable them to achieve new efficiencies and roll out new products, as Applicants have done here. Indeed, it is virtually impossible to think of a significant license transfer in this industry in which the applicants did *not* make such claims. But it is vital that the Commission strictly scrutinize and test the validity

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<sup>19</sup> *AT&T-Qualcomm Order* at paras. 24, 27 (citations omitted).

<sup>20</sup> *Id.* at para. 25 (citations omitted).

<sup>21</sup> *AT&T-Qualcomm Order* at para. 25 (citations omitted), *see also id.* at para. 37; *AT&T-Verizon Wireless* at para. 28.

<sup>22</sup> *AT&T-Qualcomm Order* at para. 26 (citations omitted).

<sup>23</sup> *Verizon Wireless-ALLTEL Order* at para. 29.

of these claims, assess carefully the harms to the public interest that the Transactions threaten, and weigh the negative consequences of the Transactions against any positive effects.

Because, as shown in the following sections, the Applicants have not met their burden to show that the benefits of the Transactions to the public interest clearly outweigh the harms, the Applications should be denied.

### **III. THE COMMISSION SHOULD CONDUCT A FULL ANALYSIS OF THE TRANSACTIONS IN LIGHT OF SIGNIFICANT POTENTIAL HARMS TO COMPETITION**

The Applicants argue that the Commission’s review of the Transactions “should be limited” because, in their view, there are no potential anti-competitive effects.<sup>24</sup> They contend that the “screens” customarily applied by the Commission to review mobile services transactions are either not applicable here (the HHI-based screens) or not triggered except in a few markets (the spectrum screen).<sup>25</sup> Thus, they contend that under Commission precedent “there is ‘clearly no competitive harm[,]’” and therefore “no further review is appropriate[.]”<sup>26</sup> For the reasons stated below, this conclusion is incorrect; evidence of competitive harm is abundant, and competitive inquiry is essential.

Contrary to the Applicants’ urging, the Commission should conduct a full analysis of the potential public interest harms of the Transactions because the current spectrum screen is not necessarily probative of the likelihood of competitive harm in this case. “The Commission examines the effects of spectrum aggregation on the marketplace on a case-by-case basis.”<sup>27</sup> The

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<sup>24</sup> *SpectrumCo Public Interest Statement* at 4.

<sup>25</sup> *Id.* at 24-25.

<sup>26</sup> *Id.* at 25 (quoting *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Opinion and Order, 23 FCC Rcd 17570, at para. 76 (2008) (“*Sprint Nextel-Clearwire Order*”)) (additional citations omitted).

<sup>27</sup> *AT&T-Qualcomm Order* at para. 31.

HHI and spectrum screens are not substantive standards, but merely diagnostic tools used to help the Commission identify potential harms.<sup>28</sup> The spectrum screen as currently applied is no longer serving its intended role of identifying markets in which “no competitive harm” could result from the Transactions, and is in need of significant retooling.<sup>29</sup> T-Mobile presents its proposals for revising the screen in Section IV, below.

Independent of the spectrum screen, however, it is essential that the Commission address fully the evidence of potential competitive harms associated with the Transactions. The Commission’s public interest analysis of license assignments and transfers “is informed by but not limited to traditional antitrust principles.”<sup>30</sup> Evidence that the Transactions pose significant potential for competitive harm under antitrust principles, then, merits serious consideration and full investigation by the Commission, even if it does not in itself determine the outcome of that investigation.

**A. The Transactions Will Harm the Public Interest by Permitting Undue Concentration of Spectrum by Verizon Wireless**

The Transactions represent a major spectrum-grab by Verizon Wireless, the carrier that already enjoys the most valuable spectrum resources. In its Public Notice, the Commission stated that the proposed SpectrumCo Transaction “would result in Verizon Wireless acquiring either 20 or 30 megahertz of spectrum in 572 *CMA*s covering 259.7 million people (or approximately 84%

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<sup>28</sup> As Chairman Genachowski recently observed, the screen “has no actionable effect; it is merely a tool used to narrow the Commission’s focus on markets where there may be a higher level of concern.” Letter from FCC Chairman Julius Genachowski to Chairman Fred Upton, Committee on Energy and Commerce, at 2 (Dec. 20, 2011).

<sup>29</sup> Chevalier Decl. at para. 24-27, showing that measurement of spectrum holdings alone is not sufficient to detect all potential anti-competitive impacts of transactions.

<sup>30</sup> *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, at para. 24 (2011); see also *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 14032, at para. 23 (2000).

*of the U.S. population*”); and the Cox Transaction “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).”<sup>31</sup>

In these Transactions, Verizon Wireless seeks to extend its control of an essential and scarce resource – indeed, the *most* essential resource – necessary to compete in this market, and at the same time to undercut the potential that new rivals could enter this market, or that firms already in the market could use this spectrum to continue to compete vigorously as demand for bandwidth grows. Further, it is doing so at a critical time as LTE technology is just beginning to have an impact on the market. Broadband services are the future of the mobile industry, and Verizon Wireless seeks to occupy key spectrum before any of its rivals have a chance to use that resource to roll out their own LTE networks.

The FCC has already found that there are significant demands for additional spectrum to ensure continued growth and healthy competition in the mobile broadband market. For example, the Commission’s Fifteenth Annual Report on Wireless Competition stressed that:

As noted in the *National Broadband Plan*, making sufficient spectrum available to meet growing spectrum needs is integral to enabling network expansion and technology upgrades by providers.<sup>32</sup>

[C]urrent spectrum forecasts suggest that mobile broadband growth will likely outpace technology and network improvements by an estimated factor of three, leading to a spectrum deficit that is likely to approach 300 megahertz within the next five years.<sup>33</sup>

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<sup>31</sup> See note 5, above (emphasis added).

<sup>32</sup> *Fifteenth Annual Report* at para. 267.

<sup>33</sup> *Id.* at Executive Summary, Spectrum.

Chairman Genachowski has recognized an imminent need to free up spectrum for mobile broadband.<sup>34</sup>

In light of these constraints on the ability of those needing spectrum to obtain it, it is imperative that available spectrum be used efficiently and that transactions to redistribute this critical asset achieve results that are consistent with the Commission's pro-competitive goals for this industry. Consolidation of spectrum by large providers may reduce the motivation for efficient use of the spectrum that is already available. Economic analysis confirms that, in an industry in which production is constrained by access to a scarce input, a dominant firm may have an incentive to hoard that resource rather than allow its competitors to use it, resulting in less than socially-optimal levels of production.<sup>35</sup>

Even without the spectrum it proposes to acquire in the Transactions, Verizon Wireless already has a tremendous advantage over T-Mobile and other competitors in spectrum holdings. Verizon Wireless holds significantly greater allocations of spectrum than T-Mobile in nearly every major market today, even after accounting for spectrum that T-Mobile anticipates receiving from AT&T, and approval of these Transactions would increase the disparity. Moreover, and crucially, merely comparing gross spectrum holdings considerably understates the actual competitive disparity. As will be discussed below, different types of spectrum possess very different propagation characteristics, with the result that some types of spectrum can be built out to provide mobile broadband and other advanced services much more efficiently and cost-

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<sup>34</sup> Remarks of FCC Chairman Julius Genachowski, 2012 Consumer Electronics Show, Las Vegas, Jan. 11, 2012, *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0112/DOC-311974A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0112/DOC-311974A1.pdf) (stating that "we need to unleash spectrum so that mobile broadband can achieve its vast potential in driving economic growth and job creation"); *see e.g. Connecting America: National Broadband Plan, Goals for A High Performance America*, DA 09-1420, at Chapter 4 (rel. June 25, 2009), *available at* <http://www.broadband.gov/plan/> ("National Broadband Plan") (including recommendations for making more spectrum available).

<sup>35</sup> Chevalier Decl. at para. 39.

effectively than other types.<sup>36</sup> And Verizon Wireless already holds significantly more of this “beachfront” spectrum than any other carrier.

Indeed, to illustrate the disparity, Verizon Wireless has substantial holdings in the higher-quality bands below 1 GHz (cellular and 700 MHz), while T-Mobile’s are entirely in the bands above 1 GHz. If the Transactions are permitted to go forward as proposed, the relative spectrum holdings of Verizon Wireless and T-Mobile in the Top 25 CMAs would be as set forth in Table 1:

**Table 1: Post-Merger Spectrum Holdings**

	Cellular Market Area (“CMA”)	Verizon Wireless Spectrum			T-Mobile Spectrum <sup>37</sup>		
		Low Band	High Band	Total	Low Band	High Band	Total
1	Los Angeles-Long Beach/Anaheim-CA	71	40	111	0	60	60
2	New York, NY-NJ/Nassau-Suffolk, NY/Newark	59	80	139	0	50	50
3	Chicago, IL	59	50	109	0	60	60
4	Dallas-Fort Worth, TX	34	50	84	0	70	70
5	Houston, TX	59	50	109	0	80	80
6	Philadelphia, PA	59	60	119	0	50	50
7	Atlanta, GA	59	50	109	0	80	80
8	Washington, DC-MD-VA	59	70	129	0	50	50
9	Detroit/Ann Arbor, MI	59	60	119	0	60	60
10	Boston-Lowell-Brockton-Lawrence-MA-NH	47	70	117	0	60	60
11	San Francisco-Oakland, CA	59	30	89	0	80	80
12	Miami-Fort Lauderdale-Hollywood, FL	46	70	116	0	60	60
13	Phoenix, AZ	72	30	102	0	80	80
14	Minneapolis-St. Paul, MN-WI	59	80	139	0	60	60
15	San Diego, CA	47	40	87	0	75	75
16	Denver-Boulder, CO	59	40	99	0	70	70

<sup>36</sup> See Section V, below.

<sup>37</sup> These figures include spectrum that T-Mobile is due to receive from AT&T (subject to Commission approval).

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17	Baltimore, MD	59	70	129	0	60	60
18	Seattle-Everett, WA	47	70	117	0	70	70
19	St. Louis, MO-IL	47	30	77	0	40	40
20	Tampa-St. Petersburg, FL	59	70	129	0	65	65
21	San Juan-Caguas, PR	--	--	--	0	55	55
22	Portland, OR-WA	47	40	87	0	70	70
23	Sacramento, CA	59	30	89	0	75	75
24	Pittsburgh, PA	47	60	107	0	60	60
25	Las Vegas, NV	47	40	87	0	60	60

In a number of these markets, Verizon Wireless' spectrum holdings would be more than twice, and in some nearly three times, T-Mobile's. And these differences actually understate the real competitive disparities since in most of these markets more than half of Verizon Wireless' holdings are in the more valuable lower bands.

Accordingly, if the Commission approves the Transactions and allows Verizon Wireless to keep this spectrum from its competitors, the effect will be to give Verizon Wireless an advantage in spectrum that will make it significantly more difficult for other carriers to compete going forward. Assignors' spectrum is likely to be the only significant unused spectrum to become available for many months, if not years. Smaller carriers' efforts to carry out complex and expensive measures to wring the maximum efficiency out of their spectrum to provide broadband wireless services and deploy new technologies can only take them so far. At some point the extra costs, longer timeframes, customer impacts, and other inefficiencies inherent in such "heroic efforts" have impacts on their ability to compete aggressively in the market.

On the other hand, unlike T-Mobile and other carriers in a similar situation, Verizon Wireless has no pressing need for this spectrum. Verizon Wireless has said repeatedly before this transaction that it has sufficient spectrum for the near and medium term. Indeed, as recently as this past November, *one month before entering into this transaction*, Verizon Wireless was

confidently reiterating this point.<sup>38</sup> That is because Verizon Wireless today, even before these Transactions, is sitting on valuable spectrum which it has not deployed for any use as yet. These Transactions would permit Verizon Wireless to warehouse even more scarce spectrum for future growth, instead of putting it to immediate use for the benefit of consumers.<sup>39</sup>

Crucially, these Transactions would eliminate the only sizable allocated but unused block of spectrum that would be suitable for 4G deployment. Verizon Wireless' own Executive Director of Network Strategy acknowledged as much in his declaration in this proceeding:

[T]he Government has not made additional spectrum blocks available for mobile wireless services through spectrum auctions since the 700 MHz auction - an auction that concluded nearly four years ago. Although demand for wireless networks has been growing exponentially, the Government has not brought any "new" spectrum to market. Moreover, there is no imminent spectrum auction that [a carrier] can look to in order to meet its growing spectrum needs. But even were the Government to identify suitable spectrum in 2012, it would (based on past history) take several years to bring it to auction. Even more problematic, with many potential blocks of spectrum, significant issues would need to be resolved to clear in-

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<sup>38</sup> See, e.g., *How soon will wireless operators run out of capacity?* FierceWireless, Nov. 3, 2011, available at [www.fiercewireless.com/story/how-soon-will-wireless-operators-run-out-capacity/2011-11-03](http://www.fiercewireless.com/story/how-soon-will-wireless-operators-run-out-capacity/2011-11-03) (reporting on a presentation by Verizon Wireless Chief Technology Officer David Small at the Open Mobile Summit in November 2011). See also, e.g., *Verizon CEO talks up spectrum, downplays Sprint iPhone*, CNET News, Sept. 21, 2011, available at [http://news.cnet.com/8301-30686\\_3-20109452-266/verizon-ceo-talks-up-spectrum-downplays-sprint-iphone/](http://news.cnet.com/8301-30686_3-20109452-266/verizon-ceo-talks-up-spectrum-downplays-sprint-iphone/).

<sup>39</sup> It would be particularly ironic to allow Verizon Wireless to warehouse this additional spectrum, because it would affirmatively reward such behavior by other market participants. There is some indication that at least one of the Assignors was merely acquiring the spectrum to sell it. Comcast's CFO has been quoted in the trade press as telling a Citigroup conference: "We never really intended to build that spectrum, so therefore [selling it to Verizon Wireless] is a really good use of that spectrum." *Communications Daily*, Jan. 19, 2001, at 1.

cumbent users, further delaying potentially for years the full utility of that spectrum.<sup>40</sup>

It is likely no coincidence that Verizon Wireless signed this deal while the AT&T/T-Mobile transaction was still pending, so that T-Mobile was unable to compete to purchase this spectrum. This opportunistic accumulation of the last available spectrum is simply an attempt by Verizon Wireless to stockpile this essential resource to keep it out of its competitors' hands and to cement an overwhelming competitive advantage. The Commission's focus should be on the public interest – including the interest in more effective competition – inherent in a more appropriate balancing of spectrum in competitors' hands. With that, the Commission should not countenance these Transactions.

**B. The Proposed Transactions Will Injure Competition and Consumers in Violation of the Antitrust Laws**

Although Applicants have the burden of proving that the Transactions are in the public interest, their analysis of competitive impacts is superficial. They assert that there can be no injury to competition simply because Verizon Wireless is not acquiring a mobile service competitor. Applicants state that “[c]onsumers will continue to have all of the same choices among wireless providers that they do today.”<sup>41</sup> Yet this argument ignores the fact that merger analysis is forward-looking. The significance of the availability of scarce spectrum on competition among wireless competitors goes far beyond whether the current holder of such spectrum is using it. Any analysis of an acquisition of spectrum must take into account how that transaction may raise barriers to efficient and timely expansion, or inhibit innovation or the provision of new competitive services to consumers. A proper antitrust assessment of the proposed transaction reveals that

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<sup>40</sup> Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Assignment of Licenses, File No. 0004996680, Declaration of William H. Stone, Executive Director, Network Strategy, Verizon Wireless, at para. 15 (“*Stone Declaration*”).

<sup>41</sup> *SpectrumCo Public Interest Statement* at 5.

it would substantially lessen competition in violation of the Clayton Act, especially when viewed in the broader context of the simultaneous joint marketing agreements between the parties.

As Applicants concede, in this market, vigorous competition is “essential to ensuring continued innovation and maintaining low prices.”<sup>42</sup> Access to spectrum is a prerequisite to competition. While not eliminating an entity currently marketing wireless services, the Transactions pose serious harm to competition and to consumer welfare in the wireless market by permitting a dominant carrier to foreclose acquisition of spectrum by smaller rivals. The result of this will be lower quality of services, decreased product variety, increased prices, and stunted innovation by removing the incentives to invest in capacity and technological improvements. An evaluation of competitive harm from these Transactions must focus on a deeper analysis of the actual competitive effects, and not be limited by a rote calculation of spectrum holdings.

The limitation on spectrum capacity is one of the greatest impediments to robust competition among wireless providers in the United States. Indeed, Chairman Genachowski has recognized the imminent need to free up spectrum for mobile broadband.<sup>43</sup> Thus, to ensure the future of mobile activity, it is imperative that spectrum is available to providers who can deploy it innovatively and efficiently in the near term. Approving the Transactions is problematic not only due to the increase in Verizon Wireless’ own holdings, but because it would simultaneously deprive more efficient users of the spectrum they need to be and remain competitive. The acquisitions, thus, potentially foreclose a necessary input from competitors who could make immediate use of the spectrum.

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<sup>42</sup> *DOJ Complaint* at para. 1.

<sup>43</sup> Julius Genachowski, Chairman, FCC, Remarks on Broadband (Mar. 16, 2011), *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0316/DOC-305225A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0316/DOC-305225A1.pdf) (“Spectrum is our invisible infrastructure; it’s the oxygen that sustains our mobile communications.”).

There is ample precedent supporting a conclusion that an acquisition of an input can cause competitive harm in violation of the Clayton Act. The FTC and DOJ have found competitive harm with transactions that block access to necessary inputs, in some cases requiring divestitures to remedy this effect.<sup>44</sup>

In 1998, the DOJ challenged an acquisition of unused satellite television spectrum by a consortium of cable companies on the ground that the cable companies would use the spectrum in a less competitive manner than would other purchasers.<sup>45</sup> After filing suit, the cable consortium abandoned the acquisition. The spectrum was subsequently acquired by another satellite television provider, which was able to use it to expand its market position vis-a-vis the dominant cable providers.<sup>46</sup> Verizon Wireless' proposed acquisition of this spectrum threatens competition in exactly the same manner.

Particularly instructive to these Transactions, the DOJ recently issued comments supporting the Federal Aviation Administration's required slot divestiture in the LaGuardia/Washington-Reagan slot exchange (takeoff-and-landing rights) between Delta and US Airways.<sup>47</sup> The DOJ

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<sup>44</sup> Since the early 1990s, the DOJ has been challenging the competitive harm in denying access to necessary inputs, requiring merging parties to take some action to allow access to the input. See ABA Section of Antitrust Law, *Antitrust Law Developments*, p. 383 (6<sup>th</sup> ed. 2007) (listing various consent decrees requiring access to necessary inputs).

<sup>45</sup> *United States v. Primestar Inc. et al.*, Complaint, No. 1-98CV01193 (D.D.C. May 12, 1998).

<sup>46</sup> Courts have recognized similar theories in the context of private antitrust litigation. In *Virginia Vermiculite Ltd. v WR Grace & Co.*, 156 F.3d 535 (4th Cir. 1998), defendant WR Grace donated scarce vermiculite reserves to a non-profit dedicated to preventing vermiculite mining. Plaintiff competitor sued under a theory that the donation constituted an unlawful competitive act. The district court dismissed but on appeal, the Fourth Circuit reversed finding that keeping such "reserves" from a competitor could be regarded as a violation of the antitrust laws.

<sup>47</sup> Comments of the DOJ, Notice of Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport and Solicitation of Comments on Grant of Petition with Conditions, No. FAA-2010-0109, Mar. 24, 2010, available at <http://www.justice.gov/atr/public/comments/257463.pdf>.