available nationwide blocks of spectrum for the foreseeable future. RCA members have been advocating the release of additional useable spectrum since 2008 – but without success. Even with recent Congressional action to provide additional spectrum for commercial wireless broadband services, the legislation will not make more spectrum available for a number of years.[64] For example, it took approximately *10 years* from the time that Congress enacted the Balanced Budget Act of 1997, freeing up 700 MHz spectrum for commercial use, to the date on which the Commission actually auctioned the spectrum off. And, it was not until 2009 that the Digital Television Transition was completed, enabling the spectrum to be put to commercial use.

Moreover, due in large part to their dominant and market financial positions, the Twin Bells are able to pay staggering amounts for spectrum on the secondary markets, which encourages spectrum speculation for unfair financial gain. Instead, some speculators with no intention of constructing and operating wireless facilities are holding on to fallow spectrum in the hopes of a "big score" from one of the duopoly carriers. The long-term implications of the Transactions for developing and encouraging a robust secondary spectrum are bleak. If the Transactions are allowed to proceed, Verizon will be looking for new closet space in its spectrum warehouse while other carriers are left behind.

Notably, since Verizon freely admits that its spectrum needs are satisfied until 2015 at the earliest, this means that its future spectrum requirements – unlike the near term needs of RCA's members – may be met in future auctions. It simply makes no sense for the Commission to approve the Transactions that may cure theoretical shortfalls many years in the future while the carriers who promote a competitive marketplace are severely spectrum constrained right now.

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[64] With the notable exception of 12 MHz of 700 MHz A Block spectrum that could be deployed in as little as 12 to 18 months pursuant to an interoperability requirement.

Indeed, the Commission has found that it is obligated to "consider not only the near-term, but also the long term impacts of proposed transactions on the implementation of Congress's procompetitive, deregulatory policies aimed at developing and encouraging competitive markets."[65] The Commission must not allow Verizon to wield spectrum as a competitive weapon to the detriment of consumers and competition.

IV. COMPETITIVE HARM WILL RESULT FROM THE REMOVAL OF FOUR SIGNIFICANT POTENTIAL COMPETITORS FROM THE WIRELESS MARKETPLACE

In evaluating the proposed license assignments, the Commission should consider the antitrust guidelines established by the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in assessing the effect the Transactions will have on competition in the wireless marketplace. "[M]erger analysis does not consist of uniform application of a single methodology,"[66] and both the Commission and DOJ recognize the importance of evaluating merger transactions and other spectrum acquisition arrangements through a fact-specific process. For example, the DOJ and FTC have issued the *DOJ Horizontal Merger Guidelines*, which "outline the principal analytical techniques [and] practices . . . with respect to mergers and acquisitions involving actual or potential competitors under federal antitrust laws."[67] These guidelines highlight the significant competitive concerns that may result from a transaction involving an incumbent and potential entrant. The DOJ specifically recommends consideration

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[65] *AT&T/Qualcomm Order* ¶ 30.

[66] DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, § 1 (Aug. 19, 2010) *available at:* http://www.justice.gov/atr/public/guidelines/hmg-2010.html ("*DOJ Horizontal Merger Guidelines*"); *See also AT&T Qualcomm Order* ¶ 31 (stating that "[t]he Commission examines the effects of spectrum aggregation on the marketplace on a case-by-case basis").

[67] *DOJ Horizontal Merger Guidelines* § 1.

of the number of significant competitors in the market in measuring market concentration, an analysis that considers both incumbents and identifiable prospective competitors with the resources to compete effectively.[68] The Commission previously has acknowledged and applied these merger guidelines, but also may take a broader view in assessing the competitive effects of a transaction under the broad public interest standard.[69] Specifically, the Commission must "take[] a more extensive view of potential and future competition and the impact on the relevant market, including longer-term impacts."[70]

With respect to spectrum acquisitions, the Commission has paid close attention to anti-competitive results that may hinder "other competitors to meaningfully expand their provision of mobile broadband services."[71] The Commission has carefully considered actual spectrum aggregation and use in order to fulfill its "unique responsibility to ensure that spectrum is allocated in a manner that promotes actual and potential competition."[72] Accordingly, the Commission must consider the impact that these transactions will have as a result of the loss of *potential competitors* – SpectrumCo and Cox.

The need for a thorough competitive analysis is in no way reduced by the fact that the Transactions involve the sale of spectrum assets rather than a merger. The Commission has recognized that other non-merger market transactions, such as spectrum leasing arrangements,

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[68] *Id.* at § 5.3.

[69] *See e.g., AT&T/Qualcomm Order,* ¶ 25; *AT&T Staff Analysis*; *see also Fifteenth Report* (providing examples from the *Horizontal Merger Guidelines* that assist the FCC in evaluating the level of competition in the wireless market).

[70] *AT&T/Qualcomm Order* ¶ 25. The Commission also recognizes that it has "unique statutory obligations, distinct from the DOJ, to consider the potential anticompetitive effects of proposed acquisitions of spectrum that is used in the provision of mobile services." *Id.*, at ¶ 30, n.88

[71] *Id.* at ¶ 51.

[72] *Id.* at ¶ 30.

and most recently, the *AT&T/Qualcomm* spectrum assignment transaction, potentially raise competitive concerns, and therefore should also be subject to the Commission's policies pertaining to competition analysis.[73] As a practical matter, the Transactions at issue in this proceeding raise the same level of competitive concern as would be the case if it was structured as a merger – especially with respect to the removal of potential competition and other entrants into the market.[74] Although the proposed transactions are not mergers, *per se*, the competitive concerns highlighted in the merger guidelines apply here with equal force because the licensees – The Cable Companies – will be assigning *all* of their AWS licenses in full to Verizon, thus eliminating any chance of these companies entering the wireless market and increasing competition in the future.[75] There is no practical difference from them being merged out of existence.

The *DOJ Horizontal Merger Guidelines* conclude that "[t]he lessening of competition resulting from [a merger between an incumbent and potential entrant] is more likely to be

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[73] *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets,* Second Report and Order, 19 FCC Rcd, 17503, ¶¶ 116-119, 147 (rel. Sept. 2, 2004); *see generally, AT&T/Qualcomm Order.*

[74] The FCC has evaluated effects of mergers with respect to the removal of "a current competitive threat and the significant potential for a future entrant." *See e.g., In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee; For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶¶ 350 – 352 (rel. June 16, 2000); *In re Applications of AmeriTech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules,* Memorandum Opinion and Order, 14 FCC Rcd. 14712, 14887, ¶¶ 420 – 422 (rel. Oct. 8, 1999).

[75] This would also prevent other wireless carriers that might have been interested in acquiring this spectrum, such as small, rural and mid-tier carriers, from acquiring any segment of the spectrum at issue that would provide them with greater standing to compete with the "Big 4" nationwide carriers.

substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others."[76] Using this analytical framework, Verizon, a carrier with a large and substantial market share, will be removing competitively significant potential entrants, which have both the spectrum necessary to enter the wireless market and compete effectively. By acquiring all of the Cable Companies' wireless spectrum, Verizon ensures that the threats to its market and its customers are eliminated.

Each of the Cable Companies has sufficient resources to qualify as a significant potential competitor in the wireless market. Each removed competitor could be a potential retail competitor as well as a provider of wholesale inputs, such as roaming services. It is no secret that competitive carriers continue to be unable to secure reasonable roaming arrangements with Verizon and AT&T.[77] Significantly, SpectrumCo specifically cites the difficulties of securing suitable nationwide roaming arrangements as a "complicating factor offered in support of its decision not to become a facility-based wireless competitor."[78] The addition of the four Cable Companies as wireless providers likely would have provided greater impetus for all carriers to cooperate in establishing commercially reasonable roaming arrangements, as well as the proper incentives to come to arms-length, commercially reasonable agreements. Their removal would

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[76] *DOJ Horizontal Merger Guidelines* § 5.3.

[77] *See generally, See* MetroPCS Communications, Inc., National Telecommunications Cooperative Association, NTELOS Holdings Corp., PRWireless, Inc., Revol Wireless, , Rural Cellular Association, Rural Telecommunications Group, United States Cellular Corporation, *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Comments in Support of the Blanca Telephone Company Petition for Reconsideration, WT Docket No. 05-265 (filed Dec. 16, 2011).

[78] Declaration of Robert Pick, Chief Executive Officer of SpectrumCo, LLC, ¶ 14, attached as Exhibit 4 to the SpectrumCo Application ("Pick Declaration").

leave four fewer providers in the market to purchase handsets, offer retail competition and innovation, and promote a competitive roaming market.

This loss of potential competition by cable operators is of particular concern because the Cable Companies are technically-sophisticated, have substantial existing customer bases, are well-financed, and have access to capital, thus making each of them well-situated to compete against the Twin Bells through "triple play" or "quadruple play" packages.[79] The DOJ has concluded that "entry by a new mobile wireless telecommunications services provider in the relevant geographic market would be difficult, time-consuming, and expensive" with the new entrant having to possess "nationwide spectrum, a national network, scale economies that arise from having tens of millions of customers, and a strong brand . . ."[80] The Cable Companies have nearly all of these desired characteristics, as they are often leading service providers in their core markets, are well-known in their respective communities, have strong familiar brands, and have access to all of the necessary inputs (technical expertise, financial resources, etc.) to create additional facilities-based wireless competition. Indeed, the Cable Companies represented one of the last true viable options for facilities-based competition.[81] The Commission need look no

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[79] For example, Cox already has previously offered wireless services to customers in bundled packages, and just recently, in November 2011, announced that it would discontinue offering wireless services to new customers, and allow existing customers to remain in service until March 30, 2012. "Cox Communications to Discontinue Cox Wireless Service, Effective March 30, 2012," Press Release, Cox Communications, (Nov. 15, 2011), *available at* http://cox.mediaroom.com/index.php?s=43&item=569.

[80] *United States of America v. AT&T Inc., et al.,* Case No. 1:11-01560, ¶ 45 (D.D.C. Sept. 16, 2011) ("*DOJ Amended Complaint*").

[81] As of September 2011, the National Cable & Telecommunications Association ("NCTA") listed all four potential competitors in the top ten multichannel video programming distributors as based on basic video subscribers, with a combined subscriber base of approximately 45,346,000. (Comcast Corporation is listed as number one; TWC is listed as number four; Cox

further than the SEC filings of Verizon to confirm that the cable companies are potentially significant and viable competitors in the wireless business. In discussing wireline competition, Verizon states:

> We expect competition to intensify further with traditional, non-traditional and emerging players seeking increased market share. Current and potential competitors include cable companies, wireless service providers, other domestic and foreign telecommunications providers, satellite television companies, Internet service providers and other companies that offer network services and managed enterprise solutions.
>
> In the Mass Markets business, cable operators are significant competitors. Cable operators have increased the size and digital capacity of their networks so that they can offer digital products and services. We continue to market competitive bundled offerings that include high-speed Internet access, digital television and voice services. Several major cable operators also offer bundles with wireless services through strategic relationships.[82]

The significant point here is that the same combination of attributes that enabled the Cable Companies to emerge as significant players in the wireline business also serve to explain why they represent significant potential entrants in the wireless space, particularly if they were to fulfill their promise of becoming facility-based competitors. Eliminating these companies from potentially entering the wireless market removes one of the most significant opportunities to increase competition in this market, and further solidifies the *de facto* Twin Bell duopoly in the wireless marketplace. The Commission must take these factors into account in its public interest analysis. The removal of those four potential competitors, combined with the strengthening of the current duopolists, will cause significant anti-competitive harm in the wireless industry.

Communications is listed as number five; and BHN is listed at number 10.) NCTA, Top 25 Multichannel Video Programming Distributors as of Sept. 2011, 1 – 25, *available at* http://www.ncta.com/Stats/TopMSOs.aspx.

[82] Verizon Communications, Inc., Annual Report (Form 10-K), at 13 (Feb. 28, 2011) *available at* http://eol.edgarexplorer.com/EFX_dll/EDGARpro.dll?FetchFilingHTML1?SessionID=XukkiWhUFX_cXzg&ID=7759054.

V. THE TRANSACTIONS WOULD FURTHER ENABLE VERIZON TO DENY ACCESS TO DATA ROAMING AND OTHER CRITICAL INPUTS

Grant of the Transactions would not only lock in Verizon's dominant spectrum position, but also would empower Verizon with an even greater ability to foreclose access to other critical inputs for wireless services such as, voice and data roaming, equipment availability, special access and backhaul, WiFi offload, and media content. As discussed in detail below, in many cases the Cable Companies provide the only alternative to Verizon and AT&T for critical special access and backhaul inputs. With Verizon and the Cable Companies now jointly marketing each others' services on a cooperative basis, in many areas the backhaul market may go from a duopoly (Verizon and the Cable Companies) to an effective monopoly (the cooperative Verizon/Cable Companies' joint effort). The Commission also has recognized the importance of wireless equipment, noting that "[m]obile handsets and devices directly affect the quality of a consumer's mobile wireless experience."[83] Wireless devices "are increasingly central to the dynamics of the overall wireless market, and play an increasingly important role for consumers as a basis for choosing providers."[84] The removal of four potential buyers of handsets will have a negative effect on the wireless equipment market. Verizon will have the ability and incentive to dictate not only the type of equipment available, but also the spectrum bands over which such equipment operates. The Transactions raise the possibility of Verizon further dominating the equipment market, and making it even more difficult for smaller carriers to compete for the latest cutting edge devices.

Voice and data roaming in particular has been a thorn in the side of competitive carriers for an extended period of time. The Commission has repeatedly recognized that roaming

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[83] *AT&T/T-Mobile Staff Analysis* ¶ 117.

[84] *Id.*

agreements "can be critical to providers remaining competitive in the mobile services marketplace."[85] Further, "the availability of roaming capability is and will continue to be a critical component to enable consumers to have a competitive choice" among wireless carriers, and is "particularly important for consumers in rural areas – where mobile data services may solely be available from small rural providers."[86] RCA's members are particularly sensitive to the need for nationwide data roaming, as it is the only tool that allows seamless nationwide data coverage.

The geographic service areas of all of RCA's members, taken together, do not replicate the massive national footprints of Verizon and AT&T, and so RCA's members are heavily reliant on data roaming arrangements to fill the substantial gaps. The DOJ recently confirmed the competitive disadvantage that roaming requirements place on smaller carriers:

> [L]ocal and regional providers must depend on one of the four nationwide carriers to provide them with wholesale services in the form of "roaming" in order to provide service in the vast majority of the United States (accounting for most of the U.S. population) that sits outside of their respective service areas. This places them at a significant cost disadvantage, particularly for the growing number of consumers who use smartphones and exhibit considerable demand for data services.[87]

In what now seems like the distant past, nationwide competitors like the Twin Bells once were willing to enter into roaming arrangements with smaller carriers in order to fill gaps in their own networks. On occasion in the past, Verizon has been willing to engage in spectrum "swaps" with smaller carriers, allowing each carrier to trade under-utilized spectrum for spectrum in

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[85] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411, ¶ 15 (2011) ("*Data Roaming Order*").

[86] *Data Roaming Order* ¶ 30.

[87] *DOJ Amended Complaint* ¶ 35.

markets where additional capacity was required.[88] However, due to a state of consolidation and aggressive spectrum acquisition, the Twin Bells have fashioned a roaming duopoly where they rarely, if ever, need smaller carriers' networks to fill coverage gaps. As a result, the Twin Bells have increasingly been able to hamstring the ability of other carriers to compete by refusing to offer voice and data roaming on reasonable terms and conditions. The Commission has recognized this imbalance of power, noting that "[r]oaming agreements between two providers can be difficult to negotiate when there is limited mutual interest – for instance when they have significantly different needs for their subscribers to roam on the others' network, or when they directly compete for the subscribers in a number of markets."[89]

By virtue of their substantial financial and spectrum resources, the mere presence of the Cable Companies as potential viable nationwide competitors has acted as one of the last constraints on the Twin Bells monopolistic behavior in the roaming market – and a bare constraint at that. RCA is pleased that the FCC has recognized the importance of voice and data roaming and, in doing so, has imposed voice and data roaming obligations on CMRS carriers.[90] Despite the FCC's data roaming order, RCA members continue to struggle to negotiate fair and reasonable data roaming agreements. This is true for two reasons. First, Verizon has appealed the FCC's data roaming order, leaving the impact of the order in limbo. And second, while the

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[88] Indeed, spectrum swaps have also been a catalyst for smaller carriers to receive more reasonable roaming agreements since the Twin Bells want something in return. With both of the Twin Bells having filled warehouses of spectrum, the last thing of value smaller carriers may have to trade is disappearing.

[89] *AT&T/T-Mobile Staff Analysis* ¶ 67.

[90] *See generally Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Order on Reconsideration, 25 FCC Rcd 4181 (2010); *Data Roaming Order*.

order is an important backstop in private negotiations, these negotiations remain very one-sided, with the larger carriers having significant bargaining advantages over the smaller carriers. As described above, the Twin Bells have the power and incentive to stall negotiations to foreclose competition.

If the Transactions are approved, the Twin Bells essentially will have unfettered control over the market for nationwide roaming services. This troubling situation is nearly identical to the one that arose in the context of the now-scuttled AT&T/T-Mobile merger. There, the staff found it significant that the transaction "would eliminate T-Mobile as a potential provider of LTE-based services in the AWS and/or PCS bands (when it was considering launching LTE-based service in the future), which could mean less competition in the provision of these services where consumers have LTE handsets that can roam on these frequency bands."[91] The same is true here – grant of the Transactions will eliminate the Cable Companies as potential AWS band LTE roaming partners, which will have a significant and negative impact on the market for roaming services.

Given the nationwide scope of the Transactions, and in particular the "spectrum concentration that raises the potential for competitive harm," the Commission "must carefully consider whether to impose a roaming condition in the context of this transaction."[92] Perhaps the most telling statement on the broken data roaming market comes from the Applicants themselves. In detailing the obstacles that SpectrumCo faced to constructing a facilities-based

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[91] *AT&T/T-Mobile Staff Analysis* ¶ 102.

[92] *AT&T/Qualcomm Order* ¶ 56.

network, the Applicants state that "SpectrumCo would need to secure nationwide roaming agreements."[93] SpectrumCo further explained that

> [S]ecuring roaming agreements posed another complicating factor. Wireless consumers expect service coverage wherever they travel. No carrier – and especially not a new entrant – can provide service in all areas, which necessitates that it obtain roaming arrangements with other carriers. SpectrumCo would have been especially dependent on roaming agreements in the early phases of deployment because wireless networks are built in stages. Securing these roaming agreements would impose further costs and business complexity.[94]

Incredibly, the applicants are arguing that the difficulty of obtaining nationwide roaming agreements – a difficulty that is almost exclusively born of the Twin Bells' refusal to reasonably deal with requesting carriers – somehow supports the conclusion that Verizon should be provided *more* power in the roaming market through the Transactions. This contention is simply outrageous. If anything, SpectrumCo's admission simply underscores why any approval of the Transactions must include strict voice and data roaming conditions to ensure that an already broken market does not fail entirely.

VI. TRANSACTION DOCUMENTS BETWEEN THE APPLICANTS MUST BE THOROUGHLY EXAMINED FOR POTENTIAL ANTI-COMPETITIVE EFFECTS

Verizon and each of the Cable Companies have entered into various other agreements (the "Related Agreements") with each other, which include "agreements with the ability to act as agents selling one another's services, and provide the members of SpectrumCo [and Cox] the option of acting as resellers in the future. They also establish a technology joint venture to develop innovative technology and intellectual property that will integrate wired video, voice,

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[93] SpectrumCo PI Statement at 23.

[94] Pick Declaration ¶ 14.

and high-speed Internet with wireless technologies."[95] The Applicants claim these Related Agreements were entered into separately from the license purchase agreement, and are not contingent upon each other. This claim does nothing to mitigate the significant anti-competitive effects of these Related Agreements. In a nutshell, rather than actively competing against each other for the gamut of telecommunications needs – wireless, wireline, video, etc. – the two major telecommunications companies in most areas of the country will now be working together through and effective non-compete agreement that almost certainly will result in a loss of competition in each separate product market. The potential for anti-competitive action between these companies is enormous – and potentially dangerous for consumers. The Commission should not blindly accept the Applicants' characterization that these significant Related Agreements do not raise any competitive issues. Rather, the Commission must conduct a complete and exhaustive review of these Related Agreements to ensure that competition is not stifled by their very existence.

As an initial matter, the Commission must request full and complete copies of each of the Related Agreements from the Applicants. [begin highly confidential information] [redacted]

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[95] *See Ex Parte* from Michael H. Hammer, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (filed Jan. 18, 2012).

[redacted] [end highly confidential information].

A. The Commission Must Take A Hard Look At The Overall Relationship Between The Applicants

The Applicants, by entering into the license purchase agreement and the Related Agreements, are entering into arrangements that are extremely broad, reaching into many different areas of the telecommunications marketplace. Indeed, on their face, the Related Agreements raise serious concerns relating to control over broadband deployment, joint marketing and sales efforts. Rather than competing for customers, the Applicants will be coordinating and sharing products and services to sell on a cooperative basis to customers. Rather than competing in the development and delivery of distinct, innovative services, it appears that the Applicants, at a minimum, will be selling customers the same services under different names with the potential for rebranding in the future. Just as the spectrum acquisition is removing the Cable Companies as facility-based wireless competitors, the Related Agreements are replacing competition in other product lines with cooperation. Together, these agreements appear more like agreements to compete than marketing agreements. These Agreements also may disincent competition since each participant will be bale to offer the other party's services without having to invest in network facilities. Given the Commission's preference for facilities-based competition, any agreement that might lead to incentives *not* to build facilities must be closely examined. In addition to a thorough and complete review of these Agreements in order to determine whether they are anti-competitive, the Commission must receive additional information from the Applicants in order to ensure that various inputs, such as content and special access, are not being foreclosed due to the newly formed "partnership" between the former competitors. Indeed, recent statements by Comcast's CEO Brian Roberts indicate that such concerns are very real. When discussing the nature of the joint marketing agreements, Roberts stated that Verizon and Comcast will "look for innovative ways to have all the video content available on your wireless devices and your tablets,"[96] which suggests that Verizon may have access to Comcast content that is unavailable to other wireless providers. Allowing discrimination in favor of Verizon with respect to such inputs would certainly be anti-competitive.

For instance, [begin highly confidential information] [redacted]

[96] Kim Hart, "Comcast CEO expects approval for Verizon deal," POLITICO (Feb. 15, 2012).

[redacted]

[redacted] [end highly confidential information]

Lastly, the Commission must review the Agreements to ensure that they do not violate the letter, spirit or intent of Section 652(c) – which prohibits certain agreements between local exchange carriers and cable companies. Specifically, Section 652(c)(3) prohibits a local exchange carrier and a cable company "from enter[ing] into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market."[97] [begin highly confidential information] [redacted] [end highly confidential information].

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[97] 47 U.S.C. § 652(c)(3).

VII. THE COMMISSION MUST UTILIZE AN UPDATED METHOD TO SCREEN FOR COMPETITIVE HARM

The proposed Transactions pose significant potential anti-competitive harms. The Commission clearly has the authority under its public interest mandate to conduct an exhaustive review of these Transactions, and to impose appropriate and necessary conditions to remedy the competitive harms that will result. These serious anti-competitive effects exist notwithstanding the Applicants' argument that the transactions do not trip the spectrum screen that the Commission previously has used as an important element of its competitive analysis. For the past eight years, the Commission has continued to use this now-outdated paradigm to determine whether or not to closely examine particular markets for competitive harm due to the consolidation of spectrum into the hands of too few entities. Because the operative facts in the dynamic broadband market were constantly changing, the Commission found it to be necessary to modify the screen constantly on a transaction-by-transaction basis, leading to recurring complaints of *ad hoc* decision making. While the spectrum screen may have been a useful transitional mechanism as the Commission moved away from spectrum caps in local markets, the time has come for the Commission to use a new approach to determine competitive harm. The spectrum screen approach is no longer an adequate tool to consider whether competitive harm may be occurring in a particular market.

For example, the traditional spectrum screen analysis does not properly account for the impact of the *de facto* duopoly structure – which has been allowed to arise by prior Commissions using the spectrum screen. Also the standard spectrum screen analysis does not adequately account for the fact that not all spectrum capable of being devoted to broadband use is comparable. Due to significant changes in the mobile wireless industry since 2004, the Commission should largely abandon the spectrum screen approach, as it partially did in the

AT&T/Qualcomm Order, in favor of a new paradigm in which the Commission reviews the potential anti-competitive effects of each proposed transaction on a national level, using a case-by-case analysis. This approach would more closely approximate the reality of the current mobile wireless industry.

A. The Commission's 2004 Findings That Led To The Adoption Of The Spectrum Screen Are No Longer Accurate

In 2004, in the context of its approval of the Cingular Wireless acquisition of AT&T Wireless, the Commission adopted a spectrum screen, "the function of which was simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of [the] transaction."[98] The Commission made a number of findings in that order in which it justified the usage of the spectrum screen, which it set at that time at 70 MHz – which was slightly more than 1/3 the total of available wireless spectrum. Analysis reveals that these core findings are no longer true today, and thus the Commission should abandon, or significantly alter, the use of the spectrum screen as a tool to determine potential competition harm.

For instance, in 2004, the Commission found that "effective competition" existed in the mobile wireless industry.[99] Significantly, through the Commission's last two wireless competition reports, it has <u>not</u> found "effective competition" in the mobile wireless industry. This is a critical change. Indeed, in the *AT&T/Cingular Order,* the Commission noted that its competitive harm analysis "follows the general structure of the DOJ/FTC Merger Guidelines,"

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[98] Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 109 (2004) ("*AT&T/Cingular Order*").

[99] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Ninth report, WT Docket No. 04-111 ¶ 2 (filed Sept. 28, 2004).

but that it "chose the concentration thresholds for this screen based on our observation of the current mobile telephony marketplace. To begin with, the Commission has found that there is generally effective competition in mobile telephony markets today. . ."[100] Thus, one of the bedrock findings underlying the Commission's adoption of its screen thresholds in 2004 is no longer accurate today. This in and of itself would be reason enough for the Commission to adopt an alternative approach to determine potential competitive harm due to spectrum aggregation.

In 2004, the Commission also found that an initial spectrum screen of 70 MHz was appropriate because "a market may contain more than three viable competitors even where one entity controls this amount of spectrum, because many carriers are competing successfully with far lower amounts of bandwidth today."[101] Indeed, when the Commission adopted the roughly 1/3 of available broadband spectrum as the basis for the screen in its *Cingular/AT&T Wireless Order,* it concluded that more than three carriers could compete successfully even if one carrier had spectrum holdings approaching the screen. This is no longer true. In 2004, mobile wireless data services were barely used by consumers. Today, mobile wireless data usage has exploded – resulting in a broadly-felt spectrum shortage and urgent needs for many carriers to obtain additional useable spectrum. It is no longer the case, when the Big Two carriers each are coopting large amounts of bandwidth that approach the spectrum screen, that more than 3 carriers can compete successfully when the smaller carriers must make due with far less bandwidth. Indeed, as the race for increased speeds continues, many carriers are being forced to limit their competitive offerings. For instance, some RCA members do not offer laptop cards, tablets or other data-intensive devices due to the spectrum shortage that they currently face. The

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[100] *AT&T/Cingular Order* ¶ 107.

[101] *Id.* at ¶ 109.

fact is, wireless carriers need an increased amount of spectrum to compete today, and it is not realistic to believe that competition will continue if two carriers control the vast majority of available spectrum. Continuing down this path will bring increased consolidation, not increased competition.

The DOJ took the position in the AT&T/T-Mobile Complaint that there is a need to preserve at least four nationwide broadband carriers.[102] This expert opinion further supports for a reasoned departure from the Commission's current spectrum screen analysis. The previously stated function of the screen was "simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of this transaction."[103] However, because of the national scope of the Transactions, whether there is a "potential for competitive harm as a result of this transaction" is not revealed only in a market-by-market analysis. The Commission must look to other methods to determine potential competitive harm.

B. The Commission Must Consider Alternatives To The Spectrum Screen As Currently Implemented

The Commission must take a fresh approach to its competitive analysis rather than allowing the past to cause it to recycle the outdated spectrum screen for these Transactions.

i. The Commission Should Examine This Transaction For Anti-Competitive Effects On A National Basis

In these Transactions, Verizon proposes to acquire a nearly nationwide block of 20 MHz of spectrum, which is increased in particular markets when viewed in conjunction with Verizon's proposed spectrum swap with Leap Wireless. A national acquisition of this scope by one of the Twin Bells is inherently worthy of a searching analysis by the Commission of the competitive

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[102] *DOJ Amended Complaint* ¶ 36.

[103] *AT&T/Cingular Order* ¶ 109.

effects. The Commission recently evaluated the AT&T/Qualcomm spectrum-only transaction on a national basis.[104] Perhaps equally important, the DOJ also has stated that wireless competition now occurs and must be accessed on a national basis. Commission should follow this precedent and take the same approach on these Transactions.

In AT&T/Qualcomm, the Commission properly recognized the need to look at the competitive impact of a transaction at the national level when a major carrier is seeking to acquire nationwide spectrum. Indeed, the Commission specifically noted that with respect to that transaction, "[w]e find that there are certain national characteristics to this transaction that warrant a competitive analysis on the national level. Accordingly, we will evaluate, as appropriate, competitive effects of the spectrum acquisition both locally and nationally."[105] In particular, the Commission noted that:

> [B]ecause of the important national characteristics, competition that occurs at a local level is unlikely to affect, for example, the pricing and plans that the nationwide providers offer unless there is enough competition in enough local markets to make a nationwide pricing or plan change economically rational. Moreover, evaluating this proposed transaction not only on a local level but also on a national level is particularly appropriate in this instance because AT&T is seeking to acquire Qualcomm's *nationwide* footprint of unpaired spectrum."[106]

Indeed, in AT&T/Qualcomm, even though few markets reached the spectrum screen for competitive analysis, the Commission still conducted an analysis at the local and national level to determine whether the transaction had the potential to harm competition. In addition, the *AT&T/T-Mobile Staff Analysis* noted that "we do not find it necessary to assess the competitive effects in retail wireless services individually in each local market to determine the likely

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[104] *DOJ Amended Compliant* ¶ 20.

[105] *AT&T/Qualcomm Order* ¶ 32.

[106] *AT&T/Qualcomm Order* ¶ 35.

consequences of the proposed transaction for competition."[107] This precedent allows the Commission the flexibility to determine competitive harms on a national level, outside the context of a spectrum screen, and to attach conditions that promote the public interest to these nationwide Transactions.

Moreover, even though much less spectrum was at issue in AT&T/Qualcomm – 6 MHz nationwide and 12 MHz in certain areas as compared to the 20+ MHz nationwide of spectrum that Verizon is proposing to acquire from the Cable Companies and Leap – the Commission nonetheless found competitive concerns in AT&T/Qualcomm. Moreover, the AT&T/Qualcomm spectrum-only transaction did not implicate the spectrum screen, and also did not result in the significant loss of potential competition that will occur if these Transactions are approved. These were overcome only because AT&T demonstrated an *immediate* need for additional spectrum, which the Commission recognized as being important. That is completely different than the instant situation where there will be a significant loss of multiple potentially viable competitors, where Verizon has clearly stated that it does not need this spectrum in the immediate or even near-term, and when Verizon currently has significant spectrum in its warehouse. As discussed in detail above, these Transactions have a series of adverse impacts on the national wireless markets. Verizon is exacerbating the spectrum shortage by co-opting spectrum not for near term use, but for distant future use. The market power of Verizon, and its ability to deny competitors essential inputs is enhanced. Potential competitors of Verizon, and potential allies of the other carriers are being eliminated.

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[107] *AT&T/T-Mobile Staff Analysis* ¶ 34.

ii. The Commission Should Consider The Different Values Of Spectrum When Evaluating This Transaction

The Commission properly held in AT&T/Qualcomm that not all spectrum is created equal. Indeed, the Commission recognized in AT&T/Qualcomm that "it is prudent to inquire about the potential impact of AT&T's aggregation of spectrum below 1 GHz as part of the Commission's case-by-case analysis."[108] Based on these findings, in addition to taking a national view of any anti-competitive harms, the Commission should consider a spectrum analysis that takes into account the propagation characteristics, efficiency and utility of different types of spectrum, which the current spectrum screen does not do.

The Commission has noted that "spectrum resources in different frequency bands can have widely disparate technical characteristics that affect how the bands can be used to deliver mobile services."[109] The Commission even noted that "[i]n addition to adding or subtracting bands – or portions thereof – from the [spectrum] screen, changes could also include distinguishing between different spectrum bands when determining the total bandwidth available."[110] Consequently, the Commission has determined that "the more favorable propagation characteristics of lower frequency spectrum (i.e., spectrum below 1 GHz) allow for better coverage across larger geographic areas and inside buildings."[111] Better propagation and penetration also translates into cost savings since fewer sites and less equipment is needed to reliably serve a geographic area. On the other hand, spectrum above 2.5 GHz is inherently less valuable than other spectrum because it requires considerably more sites to serve a geographic

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[108] *AT&T/Qualcomm Order* ¶ 49.

[109] *Id.*

[110] *AT&T/T-Mobile Staff Analysis* ¶ 45, n.136

[111] *AT&T/Qualcomm Order* ¶ 49.

area and may have less utility outside of metropolitan areas. Not surprisingly, the market has also recognized the inherent superiority of spectrum below 1 GHz by placing a substantial premium value on prime lower spectrum. For example, Verizon, whose current spectrum portfolio already consists of substantial swaths of prime 700 MHz, cellular and AWS spectrum, has reported a book value of $73.2 billion for its spectrum.[112] AT&T, a holder of large amounts of 700 MHz and cellular spectrum, reported a spectrum book value of $42.3 billion.[113] This compares to the $4.5 billion book value attributed to Clearwire's higher band BRS spectrum.[114] Clearly, market forces are signaling that not all spectrum is created equal.

The Commission has also recognized that "there is significantly less below 1 GHz spectrum available for mobile broadband service than above 1 GHz spectrum."[115] The Commission acted on these determinations in the course of applying conditions to the AT&T/Qualcomm transaction, noting that post-transaction, AT&T would hold "a significant portion of the available spectrum suitable for the provision of mobile voice or broadband services, particularly below 1 GHz," and that such holdings may "have a potentially significant impact on competition."[116]

A proper spectrum analysis which gives greater weight to holdings under 1 GHz, raises significant concern in light of the significant aggregation of prime spectrum in the hands of AT&T and Verizon. The Commission previously found that, prior to these Transactions,

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[112] Verizon Communications, Inc., Quarterly Report (Form 10-Q), 8 (Oct. 25, 2011).

[113] AT&T Inc., Quarterly Report (Form 10-Q), 3 (Nov. 3, 2011) (note that AT&T's book value has been upward adjusted to reflect the approved purchase of Qualcomm's 700 MHz licenses).

[114] Clearwire Corp., Quarterly Report (Form 10-Q), 7 (Nov. 3, 2011).

[115] *AT&T/Qualcomm Order* ¶ 49.

[116] *Id.* at ¶ 51.