"Verizon Wireless holds 48 percent of the cellular spectrum and 43 percent of the 700 MHz spectrum, measured on a MHz*Pops basis."[117] Moreover, the Commission found that post-AT&T/Qualcomm, "AT&T and Verizon Wireless combined would hold nationwide approximately 73 percent of below 1 GHz spectrum, measured on a MHz*Pops basis."[118] While these Transactions involve the assignment of AWS spectrum, which is above 1 GHz, they present an apt opportunity for the Commission to examine Verizon's holdings in light of the proper recent recognition that the aggregation of spectrum below 1 GHz should be carefully considered as part of the Commission's case-by-case analysis.

The Commission should assess spectrum based on different characteristics. For example, the Commission could establish a multiplier for spectrum under 1 GHz and above 2.5 GHz that would result in a higher value for spectrum under 1 GHz and lower value to spectrum above 2.5 GHz. Furthermore, the Commission should examine the effects of the transaction in light of the impact on spectrum available to the rest of the industry.

In addition, as noted above, not all spectrum is readily available for LTE, which is rapidly becoming the 4G standard in the United States. Post-Transactions, Verizon would be in an even more dominant position with respect to spectrum bands that are compatible with 4G LTE in the near term. If the Commission continues to utilize its spectrum screen, it should go a step further than it did in the *AT&T/Qualcomm Order*, and properly apply weighted values to different bands and blocks of spectrum based on the favorable, or unfavorable, characteristics that each band possesses for use in the provision of mobile broadband services.

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[117] *Id.* at ¶ 48.

[118] *Id.*

C. If The Commission Does Continue To Utilize The Spectrum Screen, It Must Be Revised To More Accurately Reflect The Current Availability Of Wireless Spectrum

If the Commission does not adopt a new measure to determine competitive harm, it must, at the very least, revise its spectrum screen downward.[119] The Commission previously considered spectrum to be included within the screen if it was available in the near term or within two years for broadband use. However, the 2010 *DOJ Horizontal Merger Guidelines* removed the two-year period for timeliness of availability. The Commission acknowledges this in the *AT&T/Qualcomm Order:* "Under these new guidelines, the relevant section states that 'in order to deter the competitive effects of concern entry must be rapid enough.' Accordingly, we consider the spectrum to be a relevant input if it will meet the criteria for suitable spectrum in the near term."[120] The Commission then proceeded to note that "[w]e anticipate that as we consider the input market for spectrum in future transactions, revisions to the screen may be necessary."[121] Further, the Commission promised that it "will continue to monitor any technological or market-driven developments, including those issues raised in the instant record, and will adjust the screen where appropriate to accommodate these changes."[122] Thus, the FCC now considers spectrum to be a relevant input if it is available for use in the near term – and has noted that revisions to the spectrum screen may be necessary for future transactions.

The current spectrum included by the FCC in the spectrum screen is 425.5 MHz – resulting in a spectrum screen of 145 MHz in most areas (slightly more than 1/3 of 425.5). The

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[119] Such a change is particularly necessary in rural areas, where carriers are hoarding spectrum, despite needing less usable spectrum to serve a less-populated subscriber base.

[120] *AT&T/Qualcomm Order* n.117.

[121] *Id.* at ¶ 42.

[122] *Id.*

Commission should consider a downward revision of the screen to as low as 135 MHz based on the removal of the certain spectrum blocks that are not useable in the near term for the provision of wireless broadband. For example, the Commission should remove two blocks of spectrum from the screen because it is not usable mobile wireless spectrum in the near-term: 12.5 MHz of SMR spectrum and 10 MHz of 700 MHz spectrum. This revision of the spectrum screen would more accurately reflect the useable spectrum available for mobile broadband. Viewed in this more precise manner, approximately 125 Verizon markets would trigger the Commission's spectrum screen, post-Transactions markets because the spectrum holdings would be 137 MHz or more.

Reducing the amount of Specialized Mobile Radio ("SMR") spectrum included in the screen from 26.5 megahertz to 14 megahertz would more accurately reflect the portion of SMR spectrum through which mobile broadband service can be provided efficiently in the near term. Indeed, the Commission noted in its *AT&T/Qualcomm Order* that, "[w]hen conducting competitive analysis in the future, the Commission may decide to include only the 14 megahertz of SMR spectrum suitable and available for mobile broadband services."[123] Since this 12.5 MHz of SMR spectrum does not meet the Commission's near-term availability criteria – and was specifically referenced as likely to be removed from the spectrum screen analysis in the *AT&T/Qualcomm Order* – the Commission should remove this SMR spectrum from the screen immediately.

In addition, the 10 MHz of D Block 700 MHz spectrum (758-763/788-793) does not meet the near-term availability criteria. As the Commission knows, Congress has reallocated the D Block from commercial to public safety use, thus removing such spectrum from the realm of use

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[123] *Id.* at n.126.

for the provision of commercial mobile wireless services. Thus, the D Block certainly will not be available for commercial broadband use in the near-term, and should be removed from the screen.[124]

In addition, if the Commission does utilize a spectrum screen, it must take into account both the different values of particular spectrum as well as the DOJ's recent proclamation that four national carriers are necessary in the wireless marketplace.[125] The Commission must also consider a spectrum screen that is different for the dominant carriers in the industry – the Twin Bells – than it utilizes for the rest of the industry. For instance, the Commission must, as noted above, apply different values for spectrum below 1 GHz – which is more valuable and better suitable for the provision of mobile broadband services, than for spectrum above 1 GHz. Moreover, in the context of spectrum transactions involving the two largest carriers, the Commission should consider changing its earlier determination to base the spectrum screen on being approximately 1/3 of the available, usable spectrum. As noted above, 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.[126] This finding supports a reasoned departure from the Commission's current spectrum screen analysis. Thus, when reviewing spectrum acquisitions

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[124] Other spectrum that has been referenced by the Applicants as being usable spectrum that should be added to the screen does not meet the test of being dedicated and available for mobile wireless usage in the near-term. Rather, such spectrum is only referenced by the Applicants in their efforts to increase the spectrum screen as high as possible in order to ensure that the Transactions do not receive the rigorous analysis they deserve.

[125] Under such an analysis, the Commission must also separate the spectrum holdings of Sprint Nextel from Clearwire. Sprint Nextel does not hold a controlling interest in Clearwire, and Clearwire is a wholesale provider of spectrum. Indeed, Clearwire has been very vocal in offering the use of its spectrum to anyone interested in using it. For these reasons, the Commission should not include Clearwire's spectrum in any spectrum screen analysis.

[126] *DOJ Amended Complaint* ¶ 36.

involving the two dominant carriers, the Commission should instead base any spectrum screen on being approximately 1/4 of the available, spectrum useable for the provision of retail mobile wireless services. This change would more closely align the spectrum screen with the current reality of the wireless marketplace, and prevent the two largest carriers from increasing their dominance even further. By adopting a screen that takes into account (1) the proper amount of usable spectrum; (2) a proper valuation of spectrum and (3) the current marketplace reality that four carriers are needed for competition in a market, the Commission would be able to more accurately determine the competitive harm caused by spectrum aggregation, particular in the context of additional spectrum aggregation by the two dominant carriers – AT&T and Verizon.

VIII. THE FCC SHOULD DENY THE PROPOSED TRANSACTION UNLESS STRINGENT AND SPECIFIC PROCOMPETITIVE CONDITIONS ARE IMPOSED

For all of the foregoing reasons, these Transactions cannot be approved as presented. The inescapable conclusion is that the applications cannot be granted unless the Commission fashions and imposes stringent transaction-specific conditions that limit the competitive harms that would result. Pursuant to Sections 214(a) and 310(d) of the Communications Act, in reviewing applications for the assignment of licenses, the Commission must determine "whether the Applicants have demonstrated that the proposed transfers of control of licenses and authorizations will serve the public interest, convenience, and necessity."[127] The burden of proof with respect to demonstrating that the Transactions are in the public interest rests with the

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[127] *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, ¶ 26 (2008) ("*Verizon/Alltel Order*").

Applicants.[128] In its determination, the Commission must consider whether the proposed Transaction "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."[129] The Commission also has stressed that its review will consider "whether a transaction will enhance, rather than merely preserve, existing competition, and takes a[n] . . . extensive view of potential and future competition and its impact on the relevant market."[130]

The Applicants have not met their public interest burden in this instance. The proposed Transactions will result in a more dominant duopoly, the assignment of spectrum from spectrum speculators to a spectrum warehouser, the removal of four significant potential competitors from the mobile wireless marketplace, anti-competitive cooperation between the major wired network operators and a further restriction of critical inputs necessary for competitors to the Twin Bells to compete. Indeed, the proposed Transactions, while certainly in *Verizon's* interest, are definitely not in the *public* interest. Thus, the proposed Transactions must be denied unless conditions are imposed that would prevent the potential harms to competition. As the Commission previously noted, "our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits."[131] RCA believes that the Commission can only find approval of

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[128] *Id.*

[129] *Id.*

[130] *Id.* at ¶ 28.

[131] *Id.* at ¶ 29.

the proposed Transactions to be in the public interest if the Commission adopts the stringent, transaction-specific conditions set forth below.

A. Substantial Divestitures Of Un- Or Under-Used Spectrum Is Appropriate

Approval of the Transactions should include robust divestitures of unencumbered useable spectrum that can be deployed by one or more competing carriers to provide wireless broadband services in areas where Verizon holds large amounts of warehoused spectrum. This includes rural areas, where Verizon appears not to be utilizing spectrum it already holds to its full capacity. RCA urges the Commission to conduct a full review of Verizon's spectrum use in each market across the nation, and require divestitures to existing operating carriers that are willing to enhance their current offerings or expand their current operations in markets where it is clear that Verizon's spectrum inventory unreasonably exceeds the capacity necessary to meet near-term demand.

B. Verizon Must Provide Voice And Data Roaming At Rates At Least As Favorable As Those Provided To The Cable Companies Under Their Reseller Arrangements

As discussed above, RCA's members still are unable to receive "commercially reasonable" data roaming rates from Verizon, despite the existence of the *Data Roaming Order*. Indeed, the Commission has found that the adoption of roaming rules "does not . . . obviate the need to consider whether there is any potential roaming-related harm that might arise" from a transaction.[132] This is because the voice and data roaming rules "do not enable a smaller or regional provider to replace the competitive position of a nationwide facilities-based provider,"[133] and "do not serve as a substitute for competition in the provision of these important

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[132] *AT&T/Qualcomm Order* ¶ 57.

[133] *Id.* at ¶ 67.

services."[134] Notably, the Commission was willing in the *AT&T/Qualcomm Order* to "carefully consider whether to impose a roaming condition" on that transaction, due to its nationwide competitive impact.[135] Such careful consideration here requires the Commission to adopt a robust voice and data roaming condition that allows smaller carriers the ability to provide services that are competitive to those services offered by Verizon. The Commission also must require that the Applicants fully disclose the redacted agreements that they have filed with the Commission, and in particular [begin highly confidential information] [redacted] [end highly confidential information] the Commission should consider adopting a stringent roaming condition with respect to Verizon that will allow new entrants and existing carriers to effectively compete in the market, such as applying the best available reseller rate Verizon is charging any of the Cable Companies to any requesting carrier.

It would be counterintuitive to allow the Cable Companies to benefit from a low reseller rate, despite their failure to develop the spectrum they purchased, their significant financial gain from the Transactions, and their own admitted inability to obtain reasonable roaming rates, while at the same time allowing Verizon to deny reasonable roaming rates to competitors. It is not in the public interest to allow the Non-Operators to benefit from a failure to compete while allowing Verizon to hold other competitors hostage in anti-competitive negotiations. Rather, Verizon must, at a minimum, [begin highly confidential information] [redacted] [end highly confidential information] offer this reseller rate to any facilities-based provider. It is likely that the reseller rates negotiated between the Cable Companies and Verizon should be considered

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[134] *Id.* at ¶ 104.

[135] *Id.* at ¶ 56.

"commercially reasonable," assuming that they were negotiated by sophisticated parties on both sides who each had bargaining leverage. If anything, roaming rates should be *lower* than reseller rates, as roaming carriers generally impose fewer costs on a serving carrier than do resellers. Moreover, the Commission must request [begin highly confidential information] [redacted] [end highly confidential information]

C. An Interoperability Requirement Should Be Adopted To Ensure The Availability Of Innovative Handsets

The Commission also must ensure that the equipment for all bands – particularly for 700 MHz and AWS – remains open and competitive, with all carriers having access to devices that are interoperable within a band. If granted, the Transactions will give Verizon a commanding position with respect to AWS spectrum, and the Commission must ensure that Verizon is prevented from restricting the best and most innovative handsets to its own spectrum bands and technologies. Although the Commission has indicated that an interoperability *NPRM* is forthcoming, the rulemaking and related appeal process on such a contested issue may be protracted. An interoperability condition on this transaction will mitigate competitive harms in the interim, and be subject to revision in accordance with the Commission's ultimate conclusions in the interoperability proceeding. In addition, Verizon must commit to deploying mobile

wireless services on its Lower 700 MHz A and B Block spectrum in the near term. In doing so, Verizon would create an equipment and infrastructure market that would both decrease its own warehousing of spectrum, as well as allow other providers to deploy on their own Lower 700 MHz A and B Block spectrum.

D. The Commission Must Ensure That The Market For Special Access Is Not Further Curtailed

In addition to being the two largest wireless providers, the Twin Bells are also the two largest wireline providers. This provides the Twin Bells with a significant competitive advantage, as they effectively control the backhaul networks that provide the pathway from wireless towers to the public switched telephone network. The Twin Bells have a history of discriminating against RCA members in the sale of backhaul capacity, tending to favor their own wireless affiliates. What already is a significant competitive disadvantage for smaller carriers will become seriously exacerbated by the proposed Transactions. This is because, in many markets, the Cable Companies also operate backhaul facilities that provide significant competition to the Verizon and AT&T landline networks. The availability of cable backhaul capacity acts as a constraint on Verizon's and AT&T's incentives to raise backhaul prices even further. Now, however, Verizon and the Cable Companies have entered into a series of joint marketing and resale agreements, which raises the serious question of whether the Cable Companies have an incentive to continue to provide other wireless carriers with competitive offerings in the backhaul and special access markets. The Commission must investigate such a possibility thoroughly, and ensure that any order approving the Transactions contains stringent conditions on access to Verizon's and the Cable Companies' backhaul capacity.

IX. CONCLUSION

The foregoing premises having been duly considered, RCA respectfully requests that the Commission condition the Transactions in accordance with this Petition, or otherwise deny them.

Respectfully submitted,

RCA – The Competitive Carriers Association

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February 21, 2012

CERTIFICATE OF SERVICE

I, Andrew Morentz, hereby certify that on the 21st day of February, 2012, I caused a true and correct copy of the foregoing Petition to Condition or Otherwise Deny Transactions to be sent by electronic mail to:

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* To receive one copy of the Highly Confidential Filing via hand delivery, pursuant to the Second Protective Order.