

either through empowering existing maverick facilities providers, or improving the ability of other MVNO's to enter the market (likely from somewhere other than just Sprint) on favorable terms, to compete with AT&T and the newly created Verizon-cable cartel. But this task would be exceedingly difficult given the lack of an entrant that could offer a non-Bell quad play offering.

As the Commission ponders its statutory duty to promote the public interest in the wireless market by encouraging and promoting competition,³⁶ it should consider the ramifications of the main justification Applicants offer for why these transactions are in the public interest. If Applicants are to be believed, Verizon's very market survival is dependent upon approval of these spectrum transfers because of predicted growth in demand for mobile broadband. Applicants spend many pages on this claim, one that is on the surface quite stunning given that Verizon currently holds the largest portfolio of valuable spectrum, has substantial unused beachfront spectrum that it apparently has no plans for, and is the most profitable carrier in the entire wireless industry. If Verizon's spectrum poverty claims are treated as legitimate (and they shouldn't be, as we discuss below), then it raises much deeper issues that the Commission must address: if Verizon can't flourish with its already dominant spectrum holdings, what hope can any of their smaller competitors possibly have? Is it therefore time for the Commission to regulate spectrum as a natural monopoly resource? We're sure that Verizon's answer to that question is a resounding no; it would prefer the Commission to let it have its duopoly cake and overcharge for it too. But the Commission's statutory responsibility lies with protecting the public interest, and carriers with substantial market power cannot simply

³⁶ 47 U.S.C. §§ 332(a)(3); 332(a)(1)(C).

be allowed to increase that power unchecked.

C. The Transactions Will Not Put Fallow Spectrum to its Most Immediate and Optimal Use

Applicants freely admit that “Verizon Wireless has sufficient spectrum to meet its immediate needs, and generally to meet increased demands in many areas until 2015...”³⁷ However, Verizon claims it needs these 20MHz of nationwide sub-2 GHz spectrum for future deployment. But Applicants fail to offer a detailed explanation of when and where Verizon expects to use this spectrum. Applicants need to make such showing of when and where this spectrum would be put to use, because it is reasonable to expect that other providers who do not possess the spectrum depth that Verizon currently enjoys would better serve the public interest by utilizing these resources well before Verizon plans to. Putting this spectrum in the hands of other carriers would promote more balanced use of all broadband spectrum across multiple carriers’ networks, which in turn would lessen any capacity constraints on any individual network (including Verizon’s) for the foreseeable future. That two carriers hold most of the spectrum (and in turn most of the customers) while pleading spectrum poverty is a strong signal that the Commission is not living up to its duty to “improve the efficiency of spectrum use.”³⁸

In addition to Applicants failing to offer detailed usage plans for these licenses, they also fail to offer any benefit-cost analysis as to why hoarding this valuable nationwide spectrum for multiple years is more beneficial to the public interest than Verizon simply investing in other methods for increasing capacity locally where it is needed. If Verizon can adequately manage capacity on its network in the future through

³⁷ See e.g. Cox Application, p. 12; SpectrumCo. Application, p. 13.

³⁸ 47 U.S.C. § 332(a)(2).

bringing online its fallow spectrum holdings, conducting cell splits, deploying distributed antenna systems (DAS), utilizing Wi-Fi offloading, or purchasing new spectrum in the localized areas where it is actually needed, all at a lower societal cost than these license transfers, then the public interest is clearly best served by rejecting these applications.

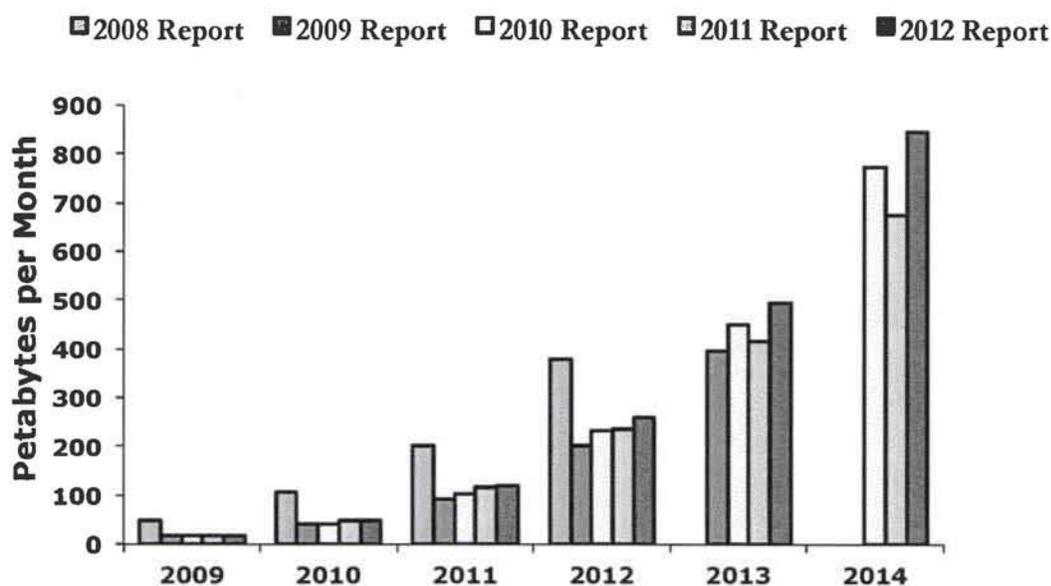
Indeed, to make a reasoned public interest determination the Commission *needs* to examine detailed engineering models, showing expected constraints and proposed utilization versus the costs of reliving those constraints with more conventional methods. Because as the Commission learned with AT&T in its quest to acquire T-Mobile, the claims of companies seeking regulatory favors from the FCC can be wildly overstated or flat out lies. Like AT&T in that proceeding, Verizon's case here is built on claims of an unmanageable pending data deluge. And just as AT&T's claims failed to live up to scrutiny, so too does Verizon's.

Applicants state "projections of future spectrum need must also take into account that previous projections have often understated actual growth in traffic... For example, Verizon Wireless' 4Q11 data traffic volume will be approximately double what its 2009 projection was; similarly, the company's most recent projections for data traffic in 4Q15 are now approximately seven times higher than the company's 2009 projection."³⁹ But contrary to Applicants assertion that prior projections understated actual growth in traffic, a review of the most utilized projections from Cisco show that such projections can vary substantially from year to year, and have in the past wildly *overstated* traffic growth. As Figure 5 shows, Cisco's predictions in 2008 overstated traffic growth, while its 2009, 2010 and 2011 predictions were in line with actual traffic growth.

³⁹ *Cox Application*, p. 15.

So despite Verizon’s assertion quoted above, it is certainly possible that its current 2015 projection may be overstated while its earlier projection for 2015 is more in line with reality.⁴⁰ Also, if Verizon’s 4Q11 data traffic was double what it was predicted to be 2 years prior, then that just illustrates that efficient investment can handle the very increases Verizon now claims to need to horde spectrum for.

**Figure 5:
Cisco Mobile Data Growth Estimates for North America (2008-2012)**



In its applications Verizon emphasizes how it has an ever-increasing amount of smartphone and data-using devices on its network, but never mentioned is the massive

⁴⁰ Indeed, while AT&T spent most of the past two years predicting exponential traffic growth, its CTO recently revealed that growth on its mobile (non-Wi-Fi) network only increased by 40 percent last year, an revelation AT&T quickly and clumsily tried to revise. See Tim Farrar, “Spinning Round in Circles,” TMF Associates MSS Blog, February 14, 2012. “AT&T’s blog post is apparently obfuscating the issue by changing its definition from ‘mobile data’ (in March 2011) to ‘wireless data’ (in the current blog post). In other words, AT&T’s WiFi offloading (at Starbucks, Times Square, the Superbowl, etc.), which is helping to drastically reduce the growth of (on-network) “mobile data” traffic, is presumably now included in their statistics.”

increase in revenues and profits that come from this trend,⁴¹ profits that can and should be partially put back into the network to increase capacity via cell-splits, DAS, Wi-Fi offload, spectrum re-farming, and other methods. Indeed Verizon's own wireless capital expenditure intensity *declined* even as it accelerated its LTE rollout, indicating that it has substantial resources to meet network demand without increasing prices, reducing service, or harming future competition by hoarding spectrum.⁴²

Verizon also neglects to mention that it is currently courting customers by offering them double the monthly data allotment than it usually does, suggesting that it expects to adequately handle future growth in data demand.⁴³

The bottom line is that there is a difference between want and need. Verizon certainly wants this spectrum and has plenty of cash (thanks to taxpayer largesse)⁴⁴ to acquire it, ensuring none of its maverick competitors ever have access to it. But Verizon

⁴¹ Verizon's wireless revenues for 2007-2011 were \$43.824B, \$49.298B, \$60.325B, \$63.407B, and \$70.154B. Verizon's net operating profits from its wireless division for 2007-2011 were \$11.737B, \$13.96B, \$16.638B, \$18.724B, and \$18.527B.

⁴² Capital intensity (the ratio of capital expenditures to revenues) is a normalized method for measuring how carriers are investing in their networks. Verizon's wireless capital intensity for 2007-2011 was 14.8%, 13.2%, 11.9%, 13.3%, and 12.8%. Capital intensity usually rises during periods of network expansion, unless revenues are rising at a substantially higher rate than capital expenditures, which appears to be the case for Verizon as it deploys LTE throughout its entire 3G network footprint.

⁴³ This promotion ran last November and was brought back this month. *See e.g.* Sarah Yin, "Verizon Promotion Doubles Data Allowance for 4G LTE Users," *PC Mag*, November 8, 2011. *See also e.g.* Nathan Olivarez-Giles, "Verizon brings back double-data promo for 4G phones," *Los Angeles Times*, February 7, 2012.

⁴⁴ In Q4 2011, Verizon reported a \$200 million net loss, largely due to how they incur and report pension liabilities. But Verizon's actual loss before taxes was \$1.8 billion. In other words, for the last 3 months of 2011, American taxpayers wrote Verizon a \$1.6 billion tax rebate check. This is an ongoing trend at Verizon, who is the third largest recipient of tax subsidies for the 2008-2010 period, just behind Wells Fargo and its twin Bell AT&T. *See* Robert S. McIntyre et.al., "Corporate Tax Payers & Corporate Tax Dodgers 2008-2010," Citizens for Tax Justice & the Institute on Taxation and Economic Policy, November (2011), p. 6.

has failed to demonstrate that it actually needs the spectrum, either now (by its own admission) or in the future. Verizon could do all of the routine things that carriers do to increase capacity to meet predictable increases in demand. And if Verizon fails to do these routine things, if it fails to invest in capacity enhancements like cell splits, then putting this spectrum in the hands of maverick competitors means customers will have alternatives. This is a reality that the duopoly carriers just do not seem to understand – their customers are not and should not be *theirs* forever, unless they do what is necessary to earn their loyalty.

D. Granting the Applications Would Encourage Inefficient Spectrum Use, Reward Spectrum Hoarding and Encourage Inefficient Network Investment

As discussed above, in order for the Commission to determine if these license transfers are in the public interest, it must first determine if the harms to competition are outweighed by the efficiencies of the transaction. That is, the Commission must determine if there are less costly, more efficient ways for Verizon to use its existing spectrum to meet future increases in demand. Such methods include cell splitting, deployment of Distributed Antenna Systems, increased use of Wi-Fi offloading, spectrum re-farming, or local spectrum swaps or acquisitions. The Commission's job is to consider all factors that determine the public interest impact of these transactions. If scarce spectrum goes to the spectrum starved maverick carriers and not the most spectrum rich carrier, competition will increase, market shares will become less tilted towards the top two carriers, capacity pressures on all carriers will decrease, and spectrum-rich carriers like Verizon will be more likely to make welfare-maximizing investments in cell-splitting, instead of hoarding spectrum.

Verizon is very dismissive of cell splitting in its application.⁴⁵ But as the Commission learned in its review of the AT&T-T-Mobile transaction, carriers are too quick to dismiss cell splitting in favor of spectrum consolidation. Indeed, in its application Verizon dismisses cell splitting as too time consuming and expensive, but later in the application when making the case for why it needs to acquire this spectrum now even though it won't use it for years to come, Verizon unintentionally reveals that cell splitting is in fact a more efficient method for meeting capacity increases than spectrum hoarding. In his declaration, Verizon's Executive Director for Network Strategy enumerates eight preparation activities that Verizon undertakes to deploy new spectrum.⁴⁶ Of these eight preparation activities, six or seven of them apply to cell splitting (new spectrum does require working with OEMs to produce new devices, while cell splitting uses existing bands and does not). In other words, Verizon *has* to do these things as a matter of routine, and *would* do most of these things *at a lower cost* whether or not it acquired this spectrum. For Verizon to claim that cell splitting is expensive when obtaining and deploying new spectrum entails more expense to meet the same capacity objectives suggests that Verizon finds additional value in the spectrum itself -- value from foreclosing their competitors from using that spectrum to compete with Verizon.

⁴⁵ See *SpectrumCo. Application*, at p. 15. "While Verizon Wireless can sometimes use cell splitting to meet increased demand, the benefits of that technology are limited. As more sites are placed close together, the benefits of additional sites decline, particularly relative to the zoning, equipment, construction, and other expenses necessary to deploy more sites. Moreover, the costs of deploying additional sites are substantial."

⁴⁶ See *e.g. Cox Application*, Declaration of William Stone, p. 8. These activities are complete the RF design; work with vendors to build base station equipment and antennas; work with OEMs to design and produce mobile devices; negotiate with landlords to acquire space on towers or acquire new site locations; complete the site permitting process; deploy the equipment at the sites; obtain and install backhaul; and test the network.

The simple fact is Verizon is doing what giants with market power do best – spending money to secure its market dominance because that is easier than competing fairly. Indeed, if the competitive pressures on Verizon were greater, it would first look to run its network in the most efficient manner possible by re-farming its legacy 2G and 3G spectrum. But Verizon Wireless CEO Dan Mead just told the media that re-farming “is not something that is in front of us in the immediate future because those networks are growing for us. Maybe down the road, but it's not something that's of great concern right now.”⁴⁷ Thus, like AT&T before it in its failed T-Mobile deal, Verizon seems happy to take the easy way out, even though it entails spectrum hoarding and continued inefficient use of supposedly scarce spectrum resources.

Indeed, the preference for inefficiency is seen all over Verizon's application. Verizon's Mr. Stone notes how the carrier cannot acquire spectrum on a “site-by-site basis,” so it has to acquire it on a market basis.⁴⁸ Well this is of course true, but there is certainly a difference between a county or CMA market geography (which is the typical geography for secondary market transactions) and the nationwide market (which is what Verizon seeks to acquire in this proceeding by acquiring all of SpectrumCo. and Cox's AWS spectrum). But the latter is *precisely* the kind of anti-competitive and inefficient use of spectrum that the FCC should discourage. If certain sites within a geographic market are capacity-constrained, then the best solution from a spectrum efficiency standpoint is to conduct cell splits or deploy DAS (or in the long-term, re-farming cellular and PCS spectrum). Barring that, spectrum swaps of local spectrum acquisitions are suitable for

⁴⁷ See “Dan Mead, CEO of Verizon Wireless, tells how world's biggest LTE operator strives to maintain quality,” *Global Telecoms Business*, February 16, 2012.

⁴⁸ See *e.g. Cox Application*, Declaration of William Stone, p. 12.

meeting the capacity needs in as targeted a fashion as possible. But a carrier acquiring an entire nationwide block of spectrum to meet hypothetical future capacity constraints that will certainly be confined to specific locations is highly inefficient. Giving spectrum to an already spectrum-bloated carrier as opposed to its more constrained maverick competitors is a bad use of this public resource, and harms the public interest.

Thus in contrast to Applicants claims about this transaction fitting the Commission's Secondary Markets policy,⁴⁹ it actually represents hoarding at a national level. The Commission's secondary market policy is designed to encourage the local-market specific transactions that are now a matter of routine, transactions that represent secondary market activity where spectrum is immediately put to its best use. The secondary market policy certainly was not meant to encourage spectrum hoarding at a national level by the most spectrum-rich carrier.

Spectrum hoarding is no small concern. As Figure 1 above shows, the holdings of minor carriers in the more mature cellular and PCS bands are quite low compared to the holdings of the non-dominant carriers in the 700MHz and AWS bands. This is not because there are numerous smaller established providers or new entrants gearing up to build new networks; it's because the Commission has turned a blind eye to spectrum speculation, even facilitated such behavior through its incredibly weak buildout requirements. Entities like Aloha Partners, Caviler, Nextwave and others will never serve a single customer, because that's not the business they are in.

And spectrum hoarding isn't only a problem with the speculators, large established carriers and telecom companies are guilty as well. Though SpectrumCo.

⁴⁹ See *e.g. Cox Application*, Declaration of William Stone, p. 17.

claims in its application that it really did intend to build a competitive network, Comcast Chief Financial Officer Michael Angelakis indicated that Comcast never planned to build a network using SpectrumCo.'s AWS holdings.⁵⁰ Such statements raise questions about what Comcast plans to do with its WCS holdings.⁵¹

Comcast is not alone in its hoarding. The likelihood that AT&T will deploy on its AWS or WCS spectrum is very low. Cox holds 700MHz licenses that will undoubtedly be sold for a substantial profit at a later date now that it is adamant it has no desire to build a network. And Verizon is sitting on a substantial amount of lower-band 700MHz A-block spectrum that it appears to admit in these applications that it has no intention of using at all (in addition to its B-block holdings, whose prospects remain a mystery). In his Declaration, Verizon's William Stone states that the carrier cannot use their lower-band 700MHz A-block spectrum "efficiently (or at all) in many markets" because of the presence of neighboring channel 51 broadcast operations.⁵² If this is true, what then are Verizon's plans for this incredibly valuable spectrum? Also, how can Verizon say here that it cannot use its 700MHz A-block spectrum while simultaneously trying to gain Commission approval for selling A-block spectrum to Leap, who has said they plan to use it for LTE?⁵³

⁵⁰ See Howard Buskirk, "Wireless Bureau to Probe Comcast CFO Statements on AWS Licenses," *Communications Daily*, January 19, 2012.

⁵¹ Comcast is clearly not going to buildout on any of its spectrum holdings. See e.g. remarks of Neil Smit, President & Chief Executive Officer, Comcast Cable Communications LLC, UBS Global Media & Communications Conference, December 5, 2011. "Yeah, with the MVNO, it's a perpetuity arrangement. So *it's great because we don't have to invest in building a wireless network*. We're not going to go out and acquire a wireless player, so it gives us access to what we feel is the best network out there for a long time." (emphasis added).

⁵² See e.g. *Cox Application*, Declaration of William Stone, p. 27.

⁵³ In Verizon's application for its A-block deal with leap it states that the spectrum

Approval of these transfers is simply not in the public interest. It would encourage inefficient use of spectrum, inefficient network investment, and reward spectrum hoarders with a large economic windfall.

E. The Commission Must Promote Meaningful Wireless Competition With Rational Policies that Recognize and Constrain Market Power

If the Commission accepts SpectrumCo.'s and Cox's tales of woe about not being able to use these substantial spectrum holding to enter the wireless market, then the right move for the Commission is to deny these applications for failing to meet the public interest standard of section 310(d).⁵⁴ The Commission should then take steps to reallocate these AWS licenses by initiating a separate proceeding either for license revocation or for license modification to strengthen the incredibly lax AWS buildout requirements, or perhaps even to repurpose SpectrumCo. and Cox's spectrum for unlicensed use, something that would benefit consumers and carriers alike.⁵⁵ The bottom line is if the U.S. wireless market is on the cusp of a real spectrum crunch, then the FCC should not tolerate speculation of any kind.

“will provide Cricket with additional spectrum it needs in the Chicago area to expand its service offerings and to deploy LTE network technology, which will allow it to offer improved broadband data services and to continue to compete with other carriers in that market.” *See* ULS Application # 0004952444, at Exhibit 1, p. 1.

⁵⁴ 47 U.S.C. § 310(d) (“No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner... [except] upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”).

⁵⁵ The Communications Act bars the Commission from considering “whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”⁵⁵ However, the language of Section 310(d) does not bar the Commission from considering whether denial of the application, followed by a separate proceeding to open the spectrum for unlicensed use either by revoking Qualcomm's license or modifying it to permit the use of unlicensed devices with equal rights, would serve the public interest, convenience, and necessity. *See* 47 U.S.C. §§ 310(d); 312; 316.

But the FCC has to develop a workable competition policy, both in wireless and wireline. “Winner take all” is not a policy that will fulfill the Commission’s duties to promote and encourage competition.⁵⁶ The Commission’s spectrum policy has to support new entrants and build up existing maverick carriers while also discouraging and punishing spectrum speculators. The Commission’s spectrum policy also has to account for the fact that 90 percent of the mobile market is controlled by carriers with a national footprint, and that the market is essentially a national product market that is currently dominated by the twin Bells. This means focusing on the prospects of the four national carriers, as well as exploring the likelihood (or unlikelihood) of new entrants into the national market, and what this all means for competition and the public interest. The lessons learned in the AT&T-T-Mobile review can serve the Commission well here.

Duopoly has never served the telecommunications markets well, certainly not unregulated duopoly. Wireless is a key example (but cable/satellite is certainly another). The Commission’s original duopoly policy for wireless resulted in a lost-decade of minimal investment, minimal innovation, and no competitive challenge to the wireline voice monopoly whatsoever. It wasn’t until the Commission allocated the PCS bands to new entrants that we saw robust investment, rapid consumer adoption and meaningful

⁵⁶ Indeed, the rest of the world is well aware of how well Verizon and AT&T have it here, and the FCC’s role in ensuring competition will never thrive here like it does in Europe. *See e.g.* “US vs. European mobile: Spectrum economics favoring the US - AT&T raising data prices,” JP Morgan Cazenove, January (2012). “AT&T today announced an increase in its data pricing by \$5/month (while adding more data to the package). We believe this development, positive for Vodafone and DT, confirms our long-held view that mobile data is easier to monetize in the US than in Europe, contributing to an up to 10pp US annual service revenue growth advantage. We believe the difference is mainly explained by differential approaches to spectrum regulation, *with the US pricing spectrum at market value, favoring a winner-takes-all outcome, while European regulators favor challengers.*” (emphasis added).

substitution of wireless for wireline voice services.⁵⁷ Now that the wireless market is once again reverting to a duopoly state, we should expect to see the associated harms to competition and innovation, unless the Commission acts. That begins by denying these license transfers, but it also begins by closely examining the unprecedented competition-killing Joint Marketing and Joint Operating Entity cartelization agreements that are tied to the spectrum sales. It's bad enough that the wireless market is now a rigid duopoly; but American consumers certainly cannot afford to see the broader high-speed Internet access market slip into monopoly.

IV. These Applications Are Premised on Anti-competitive Joint Operating Entity and Joint Marketing Agreements

A. Contrary to Applicants Claims, These Transactions Would Not Have Occurred if not for the Joint Operating and Joint Marketing Agreements

Applicants assert that the non-spectrum parts of these transactions -- the perpetual Joint Marketing Agreements (JMAs) and Joint Operating Entity (JOE) arrangements -- have no place in the Commission's review. These anti-competitive cartel agreements are only mentioned briefly in passing in the Applicant's public interest statements,⁵⁸ despite including a section deceptively labeled "Description of the Transaction." But ignoring

⁵⁷ See "Telecommunications Act: Competition, Innovation, and Reform," CRS Report for Congress, Congressional Research Service, January 13 (2006), note 94: "Some parties that have voiced concern about a duopoly market structure have pointed to the history of the wireless telephone industry. According to those commentators, for a decade, when there were only two cellular telephone providers in any geographic area (the incumbent local exchange carrier and a second carrier), there was little investment, innovation, or market success and no attempt to position wireless service as a direct competitor with wireline telephone service. Only when the FCC made additional spectrum available for wireless service (allocating spectrum in the 1900 MHz band for personal communications service), allowing several additional carriers to offer service in most geographic areas, did wireless begin to experience rapid technological and market advances that redounded to the benefit of consumers.

⁵⁸ *Cox Application* at 20; *SpectrumCo. Application* at 23.

these other provisions is incorrect as a matter of law. The Commission's statutory mandate is to ensure that a transfer serves the public interest, and the Commission is clearly directed by Congress to include "such other matters as the Commission may officially notice," in addition to the application, as part of its review.⁵⁹ These other provisions of the license transfer agreement have a substantial impact on whether Commission approval of the application would serve the public interest.

Verizon may claim that these arrangements have nothing to do with the Spectrum sale, but it is clear that offering the cable companies perpetual reciprocal marketing was the price of entry for Verizon. This is because the cable MSOs top priority was maintaining the ability to offer quad-play, which was their main objective all along in acquiring spectrum at auction. It is merely icing on the cake for the multichannel providers that Verizon will also undermine the competitiveness of its own wireline offerings by selling the cable MSO's services in Verizon Wireless stores located Verizon's LEC territories. Since the AWS-1 spectrum has a ridiculous 2025 buildout deadline, and since the spectrum will only continue to increase in value, why else would the cable operators selling now? The answer is simple, they want to be able to market a quad play bundle, and selling the spectrum alone wouldn't accomplish that. They need the Joint Marketing Agreements, and simply would not have entertained this deal without them.

Comcast's CFO recently made all of this plainly clear when speaking about the MSO's motivation for selling its spectrum now by describing its broader deal with

⁵⁹ 47 U.S.C. § 309(a).

Verizon as meeting its financial *and strategic* goals for the AWS holdings.⁶⁰ And this sentiment was confirmed by another Comcast executive.⁶¹ Lowell McAdam, Verizon's CEO put it even more bluntly, revealing that in a conversation between himself and Comcast's CEO Brian Roberts which occurred before the deal was finalized, where Roberts plainly told Verizon that in order to sell the spectrum Comcast needed a "fallback" so that it was "not blocked out of wireless."⁶²

Verizon and Comcast may think that they can say one thing to the Commission and something else completely contradictory to Wall Street analysts, but the truth is right

⁶⁰ See remarks of Michael J. Angelakis, Chief Financial Officer and Vice Chairman, Comcast Corp., UBS Global Media & Communications Conference, December 5, 2011. "I think we've always talked about the AWS spectrum as strategically important and also financially important, and it was really a goal that we set over the years of when we looked to monetize that asset. *It's got to be clear to us that we're having sort of the strategic benefits as well as the financial benefits.* You articulated the financial benefits; we're pleased the entire asset is selling for about \$3.6 billion. We will – our share of that is about \$2.3 billion, which is about \$1 billion gain. But really importantly and is that, we – it is really being used in a strategic way that we're excited about. You have a company like Verizon Wireless, who we view as an innovation leader, and I think Neil and his team running the cable business is – I would also say, is an innovation leader. And we have two great companies really looking to create some integration. So strategically terrific and financially terrific. We met the goals we tried to accomplish over the last few years." (emphasis added).

⁶¹ See remarks of Neil Smit, President & Chief Executive Officer, Comcast Cable Communications LLC, UBS Global Media & Communications Conference, December 5, 2011. "Yeah, and I think it gives the mobility play. I mean, we all know how the wireless side of the business is becoming ever more important, and people want an extension of their products outside of the home. And for our XFINITY products, that was a very important strategic aspect of this."

⁶² See remarks of Lowell C. McAdam, President, Chief Executive Officer, COO & Director, Verizon Communications, Inc., UBS Global Media & Communications Conference, December 7, 2011. "I think that's the reality of the situation we are in. As I talked with Brian Roberts, he said '*look, Lowell. If I sell you the spectrum, that puts me on a particular path. I need to have a fallback that if this doesn't work as well as we hope that I'm not blocked out of wireless,*' so I had to respect that as a partner. And an MVNO will have added burdens for them if they choose to go that path. They'll have to make that call, but it will be profitable for us if they do go that way. So it's a win-win I think for both of us." (emphasis added).

there on display. These spectrum sales would simply not be happening if it were not for the associated joint agreements. This truth, along with the harm these arrangements will cause to marketplace competition are why the Commission must consider them in the public interest analysis, and why the Commission must ultimately reject these applications.

B. The Joint Operating and Joint Marketing Agreements Create a Wireless-Wireline Cartel and Will Harm Competition

Congress was clearly concerned about protecting the potential for competition between phone and cable companies. The 1996 Act specifically bars most types of joint collaborations between LECs and incumbent cable operators.⁶³ This is because although Congress intended to facilitate multiple new entrants into the broader converged telecommunications marketplace, it recognized that the cable incumbents were best positioned to compete with incumbent LECs, and vice versa.

Largely due to a series of shortsighted regulatory decisions, this promised future of competition never really materialized in the broader telecommunications market. The twin Bell companies are offering TV services in portions of their footprint, but this form of competition isn't available to millions of Americans (and where it is available the

⁶³ 47 U.S.C. § 572. *See also* Conference Report, Telecommunications Act of 1996, House of Representatives, 104th Congress, 2d Session, H.Rept. 104-458, at p.174. “The conference agreement adopts the provisions of the Senate bill limiting acquisitions and prohibiting joint ventures between local exchange companies and cable operators that operate in the same market to provide video programming to subscribers or to provide telecommunications services in such market. Such carriers or cable operators may enter into a joint venture or partnership for other purposes, including the construction of facilities for the provision of such programming or services. With respect to exceptions to these general rules contained in new section 652 (a), (b), and (c), the conferees agreed, in general, to take the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets.”

competition looks more like coordination, with prices steadily rising in tandem). Both cable companies and LECs entered the Internet access service market, but the Commission's killing of open access turned the once vibrantly competitive ISP market into a stagnant duopoly. And now the cable companies are the only providers who are offering true next generation high-speed Internet services, with the smaller LECs seemingly content to plod along with slow DSL, while the twin Bells move to abandon wireline altogether in favor of wireless.⁶⁴ And of course, cable's promise to compete in the wireless markets turned out to be nothing more than cover for their spectrum speculation strategy.

But as bad as the competitive landscape is, it is about to get much worse. With these transactions we see the nation's largest wireless provider who is also the nation's largest provider of fiber wireline service is openly striking perpetual cartelization deals with its supposed cable competitors, deals that ensure these companies will not ever compete with each other. While it was clear for some time that the major LECs were unwilling to invest in wireline technologies that could challenge cable's dominance in the broadband market, there was some belief that the latest generation of wireless technologies would be robust enough, and cost-effective enough to offer some level of competition to cable. But with these joint arrangements this last hope for facilities-based competition is being nixed in corporate backrooms. We are poised to replace the Bell

⁶⁴ Indeed, last year AT&T CEO Randall Stephenson called DSL technology "obsolete," even as his own company consistently refuses to build fiber-to-the-home technology that would allow it to reverse its steady losses to its wireline cable competitors (and despite the fact that AT&T/SBC repeatedly promised the Commission it would deploy advance fiber services if granted regulatory favors that it later received). See Karl Bode, "AT&T CEO Calls DSL 'Obsolete' Which is Problematic Since That's His Primary Product," *DSL Reports*, July 19, 2011.

telecom monopoly with the cable telecom monopoly, and are already well on our way to replacing the promising wireless competition of the late 1990s with a Bell wireless duopoly. For the average American consumer this means higher cable and Internet bills every month; it means higher wireless bills; it means the cable-programming cartel will likely never be broken up; and ultimately it means the quality of U.S. communications networks will continue to trail many other developed nations, as the lack of real competition will mean less incentive to invest in R&D and network upgrades.

We have examined the heavily redacted highly confidential Joint Marketing and Joint Operating Entity contracts provided to the Commission under protective orders. And while it appears that the most damaging sections are blacked out, there are still many provisions shown that suggest these arrangements are best anti-competitive, if not outright violations of the DOJ's *Competitor Collaboration Guidelines*.

[BEGIN HIGHLY CONFIDENTIAL INFORMATION]

65

⁶⁵ **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]

⁶⁶ [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL
INFORMATION]

⁶⁷ [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION]

⁶⁸ See Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for the Licensing of Intellectual Property (1995) (*Intellectual Property Guidelines*). [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY
CONFIDENTIAL INFORMATION]
⁶⁹ [BEGIN HIGHLY CONFIDENTIAL INFORMATION]
[END HIGHLY CONFIDENTIAL
INFORMATION]
⁷⁰ [BEGIN HIGHLY CONFIDENTIAL INFORMATION]
[END HIGHLY CONFIDENTIAL INFORMATION]
⁷¹ [BEGIN HIGHLY CONFIDENTIAL INFORMATION]
[END HIGHLY CONFIDENTIAL
INFORMATION]

72

73

74

⁷² [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END
HIGHLY CONFIDENTIAL INFORMATION]
⁷³ [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END
HIGHLY CONFIDENTIAL INFORMATION]
⁷⁴ [BEGIN HIGHLY CONFIDENTIAL INFORMATION]
[END HIGHLY CONFIDENTIAL
INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION]

C. Whither Competition?

**i. These Transactions Confirm the Failure of the Commission’s
“Third-Pipe” Competition Policy**

“Next generation” wireless service has long been hailed as the coming competitive savior to free consumers from their duopoly cable-LEC broadband duopoly prison. Comcast has used wireless to downplay the harms of the wireline duopoly.⁷⁵ Both the current⁷⁶ and prior⁷⁷ FCC Chairmen have cited future wireless competition as the answer to concerns about the wireline duopoly. The Commission’s Wireless Broadband Access Task Force plainly suggested that “wireless networks can provide competition to existing broadband services delivered through the currently more prevalent wireline and cable technologies. Wireless broadband can create a competitive broadband marketplace and bring the benefits of lower prices, better quality, and greater

⁷⁵ See e.g. *Comments* of Comcast Corporation, GN Docket No. 09-51, June 8, 2009, p. 41; *Reply Comments* of Comcast Corporation, GN Docket No. 09-51, July 21, 2009, p. 7.

⁷⁶ See e.g. Steven Levy, “The Wired Interview: FCC Chair Julius Genachowski on Broadband, Google and His iPhone,” *Wired*, March 4, 2010.

⁷⁷ See e.g. *Written Testimony* of Chairman Kevin J. Martin, Federal Communication Commission, Before the Committee on Energy and Commerce, U.S. House of Representatives, P. 4, July 24, 2007.

innovation to consumers.”⁷⁸ But be it 3G or 4G, the wireless savior has yet to show up, and with these cartelization arrangements, its clear that salvation from the duopoly is not coming; consumers now must brace for the looming cable modem monopoly.

The woeful current and future state of broadband competition is no accident; its not the result of the invisible hand; it’s entirely due to a series of misguided FCC policy decisions, decisions that were always accompanied by wishful thinking and comically incorrect predictions about the results of the agency’s action. These decisions have completely undermined the ability of any viable third-platform broadband competitor to emerge to effectively challenge the phone and cable duopoly, including the 4G wireless platform.

In the *Wireline Broadband Order*, the FCC hedged its bets. It claimed wholesale competition would thrive absent regulations, and it promised consumers would have access to multiple intra-modal broadband ISPs. But even if that didn’t pan out, then “third-platform” inter-modal competition was sure to be the savior. The FCC uncritically accepted the stale argument that deregulation would unleash a wave of incumbent investment *and* investment by competitive providers, which having been foreclosed from wholesale access, would have no choice but to build their own facilities. In essence, the Commission declared that platform competition would develop because it was eliminating the regulatory structure that Congress created to develop platform competition.

The Commission appeared defensive in the Order, knowing its decision to replace

⁷⁸ See “Connected on the Go: Broadband Goes Wireless,” Report by the Wireless Broadband Access Task Force (“FCC Wireless Broadband Task Force Report”), Federal Communications Commission, GN Docket No. 04-163, February 2005, at pp. 13-14

a competitive structure that was working with nothing more than empty promises of future deployment would be criticized. The ruling noted the decision to end wholesale access “does not mean that we sacrifice competitive ISP choice for greater deployment of broadband facilities.”⁷⁹ But the Commission *did* sacrifice competitive ISP choice for the promise of greater deployment -- a promise that went unfulfilled. Simply put, there is no evidence that the very limited deployment that has occurred since 2006 would not have occurred otherwise. In fact, it is quite possible that greater ISP access and choice would have led to *more* deployment. Indeed, this is the exact purpose of Section 251 of the 1996 Act -- to use unbundling to give new competitors a path that begins with establishing a business and customer base and ends with robust facilities deployment.

In order after order that further entrenched the duopoly marketplace, the Commission continued to insist that alternative platform competition was just around the corner. The Commission pointed to the existence of platforms that might have a cumulative total of less than 1 percent of the national broadband market as proof that the duopoly would be short-lived. In the 2005 *Wireline Broadband Order*, the Commission stated, “Cable modem and DSL providers are currently the market leaders for broadband Internet access service. ... There are, however, other existing and developing platforms,

⁷⁹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review –Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), at para. 79 (Wireline Broadband Order).*

such as satellite and wireless, and even broadband over power line in certain locations, indicating that broadband Internet access services in the future will not be limited to cable modem and DSL service.” No one can accuse the FCC of being pessimistic about the future. But were they right? Have platforms such as satellite, wireless and broadband over powerline (BPL) emerged as legitimate competitive platforms to the cable-telco duopoly? In 2005, when the Commission made this statement, the combined fixed-residential broadband market share of phone and cable incumbents was 97 percent. *And here today, seven years later, that number stands unchanged.*

The FCC defended its 2005 dismantling of 30 years of successful competition policy by stating that the broadband market was already characterized by multiple “vigorously competing” platforms,⁸⁰ and that consumers in the future would “not be limited to cable modem and DSL service.”⁸¹ Looking back, it is hard to fathom how the Commission could have been so blind to reality and so indifferent to the plight of consumers. Predicting a future of competition and then regulating like it’s already in place is not good public policy. If the Commission was going to knowingly kill off the wholesale ISP market, and hope that emerging inter-modal platform competition would offset this, then it should have done something to turn that hope into reality. Optimism alone is not going to protect consumers and promote innovation.

ii. The Third-Pipe: Still the Sasquatch of The Broadband Market

The events recounted above are of course all viewed as ancient history. But unfortunately despite all the obvious market signals that the third-pipe savior is nothing

⁸⁰ See “Statement of Chairman Kevin J. Martin” accompanying the 2005 *Wireline Broadband Order*.

⁸¹ See *Wireline Broadband Order*, at para. 50.

more than a fairy tale, it appears policymakers have yet to grasp that in order for wireless-wireline competition to become a reality it will require much more than a policy of hope.

Take for example Comments of the Current Chairman made to the media during the National Broadband Plan's public relations tour. *Wired's* Stephen Levy asked how the Commission planned to address the market's competition problems. The Chairman responded "healthy competition places discipline on the market and should focus providers on providing the best service at a lower cost. Consumers are confused about their service and the price. They're confused about what speeds they're actually getting, they're confused about what they're paying for. As part of a competition strategy, increasing the transparency to consumers empowers consumers to make the market work." This response failed to sooth Mr. Levy's concerns, and he noted that while he considered himself to be an informed consumer that he did not "feel very empowered in terms of setting the prices." The Chairman then responded that "most people know what speeds are advertised, but don't know the actual speed they're getting, so they don't have the ability to compare and choose. They're confused about bundles, they're confused about a lot of things. And in the absence of consumers having accurate information, they're really not in a position to make the market work." Again, this response failed to address Mr. Levy's larger concerns about broadband competition, and he noted that "the competitive structure itself is such that no one is willing to deliver the kinds of speeds at the kinds of prices that we're seeing elsewhere there." The Chairman responded that "there are reasons, absolutely, to be concerned. The barriers to entry in this area are high. Building networks is very expensive; you can't do it as an entrepreneur in your garage. A

reason to be hopeful lies in the potential of global broadband to provide more competition throughout the ecosystem. *As the next generation of mobile broadband rolls out, if we can get it to roll out quickly, if it rolls out universally, and if it hits high enough speeds, it could become a legitimate substitute for people who have wired broadband*, in the way that wireless telephone service is becoming a substitute for wired, and that's providing some competition" (emphasis added).⁸² The Chairman of course deserves a little benefit of the doubt here, as these comments were made in 2009, when it wasn't abundantly clear that 4G was not going to become (or ever allowed by AT&T and Verizon to become) the great liberator of consumers from the broadband duopoly prison.

But today there is no room for doubt. With these transactions and associated cartelization agreements, we finally see industry admitting the myth of not only so-called "third-pipe competition," but of competition between cable broadband providers and ILEC broadband providers. Thus, it appears the wireline duopoly is in an accelerating slide towards monopoly, as the FCC itself considered a possibility in the National Broadband Plan. This is the danger of duopoly, and it why the FCC's top priority in wireless should be promoting effective competitors to Verizon and AT&T, not continuing to help cement their duopoly status by approving these applications.

V. Conclusion: The Commission Must Reject These Applications as a Step Towards Restoring Competition

The Commission has a long legacy of failing to adequately encourage and promote competition within and between the wireless and wireline markets. Whether or not this pattern of poor public service was the result of politics or simply misguided policy analysis, the result is still the same. Merger after merger and license transfer after license

⁸² Steven Levy, "The Wired Interview: FCC Chair Julius Genachowski on Broadband, Google and His iPhone," *Wired Magazine*, March 4 (2010).

transfer were approved, each with the rationale that it would best serve the public interest. Individually some of these transactions may have seemed innocuous, but collectively they have caused the death of competition by a thousand little paper cuts.

There is no reason this pattern of poorly protecting the public interest has to continue. The Commission showed immense analytical skill and political courage in rejecting the AT&T-T-Mobile merger, even if it did send AT&T home with the Qualcomm parting gift. Though the applications now before the Commission do not appear on the surface to be as harmful as AT&T's most recent horizontal empire plans, Verizon's consolidation of valuable spectrum raises as many long term competitive concerns. These concerns alone would be enough to reject these applications; but when viewed along with the unprecedented Verizon-cable cartelization agreements, the Commission has no choice but to tell Verizon no. The Commission is fond of evangelizing about the "spectrum crisis." Well, its long past time it gets serious about the competition crisis, and that begins with rejection of these anticompetitive license transfers.

Respectfully submitted,

_____/s/_____
Derek Turner
Free Press
501 Third Street N.W., Suite 875
Washington, D.C. 20001
202-265-1490