in the covered markets. Furthermore, the joint agreements between the companies will give them a formidable advantage that will make it difficult for any existing competitors to continue their service, much less for new competitors to enter the market.

One of the primary goals of the Act is to promote a communications service that is available at "reasonable charges"[51] and "affordable rates."[52] But the lessened competition this transaction would bring about—itself contrary to the "deeply rooted preference for preserving and enhancing competition in relevant markets,"[53]—would lead to higher prices. The Commission is also charged with preventing unjust and unreasonable discrimination by carriers.[54] But a marketplace with reduced actual and potential competition would give carriers a freer hand to engage in anti-consumer behavior. Similarly, reduced competition would hinder the Commission's ability to achieve the goals of promoting the competitive development of the Internet and maximizing user control,[55] goals that are best achieved in a competitive marketplace where the providers that serve customers' needs best attract the most customers. Finally, a communications system with fewer, but more prominent, potential points of failure would impede the goal of achieving a rapid and efficient communications system that promotes public safety and the national defense.[56] "Redundancy *equals* insurance,"[57] and the fewer companies that are involved in the provision of communications services, the

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[51] 47 U.S.C. § 151.

[52] 47 U.S.C. §§ 201(b); 254(b)(1).

[53] *Insight/Time Warner Order*, ¶ 8.

[54] 47 U.S.C. § 202(a).

[55] 47 U.S.C. § 230.

[56] 47 U.S.C. § 151.

[57] NASSIM NICHOLAS TALEB, THE BLACK SWAN 312 (Random House 2010).

more likely the system is to suffer dangerous failures and be unsuited to dealing with the shocks and increased call volume associated with emergencies.

Additionally, Section 706 of the Act directs the Commission to "take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market" if it finds that advanced telecommunications services, like wired and wireless broadband, are not being "deployed to all Americans in a reasonable and timely fashion." This enacts a Congressional purpose to encourage deployment by increasing competition and removing barriers, such as anticompetitive agreements between different companies, which stand in its way. Unless the Commission blocks the proposed joint agreements, the purpose of Section 706 will be frustrated.

*2. Discouraging Facilities-Based Broadband Competition.*

These transactions are inconsistent with the Commission's stated policy "to encourage facilities-based broadband competition."[58] Popular among incumbent providers,[59] under this policy the Commission "promot[es] development and deployment of multiple platforms [to] promote competition in the provision of broadband capabilities."[60] Viewed as an alternative to prescriptive regulation, this policy envisions that mobile wireless providers will provide a "third pipe" that competes with cable and DSL, with competitive pressure keeping prices low, keeping carrier practices fair, and

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[58] *High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 6 (2002) (*Cable Modem Declaratory Ruling*).

[59] *See, e.g.*, Reply Comments of Verizon in WC Docket No. 09-223 (filed Feb. 22, 2010) at 12; Opposition to Petitions to Deny and Reply to Comments of Comcast in MB Docket No. 10-56 at 7.

[60] *Cable Modem Declaratory Ruling* ¶ 6.

driving innovation forward. But if the Commission allows providers to enter cross-marketing arrangements, where a wireless provider sells a wired provider's services and vice versa, there is little chance that the providers will compete. Unless and until it modifies its policies on facilities-based competition, the Commission has no choice but to block these transactions as flatly incompatible with that goal.

*3. Disadvantaging Low-Income Users.*

Pursuant to its statutory goals to promote affordable access and universal service, the Commission should prevent the proposed transactions from disproportionately harming low-income users. However, if allowed to proceed, these transactions would have a disproportionate effect on low-income users. Cable and wireless prices would rise due to reduced competition, the weakened position of smaller competitors left out of the deals, and a greatly reduced possibility of competitive entry into the relevant markets. As a baseline matter, bills for basic services make up a greater proportion of the paychecks of low-income users, so *any* price hikes would have a disproportionate impact on them. But the usage patterns of low-income households magnify these effects: low-income consumers are more likely to be wireless-only telephone subscribers,[61] more likely to get Internet access through their wireless phones,[62] and, for those low-income households

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[61] According to the National Center for Health Statistics, 42.8% of adults living in poverty are wireless-only subscribers, while the same is only true of 24.1% of higher-income adults. Stephen J. Blumberg, Ph.D. and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July–December 2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, 3 (June 8, 2011), http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf. *See also* Aaron Smith, *Mobile Access 2010*, Pew Internet & American Life Project (July 7, 2010), http://pewinternet.org/~/media//Files/Reports/2010/PIP_Mobile_Access_2010.pdf (overview of usage statistics).

[62] Gretchen Livingston, *Latinos and Digital Technology, 2010*, PEW RESEARCH CENTER: PEW HISPANIC CENTER, 19–20, 22–23 (Feb. 9, 2011), http://www.pewhispanic.org/files/reports/134.pdf.

that are cable or satellite video subscribers, less likely to have the wired broadband service that makes it possible to switch to streaming video services like Netflix.[63]

The Commission has recently undertaken a modernization of its Lifeline program to make it better suited to the essential communications needs of today's low-income consumers.[64] However, the Commission's efforts—which rely heavily on a healthy, competitive communications marketplace[65]—could be wasted if these transactions are allowed. The ability of low-income users to access communications services depends at least as much on a healthy marketplace as a well-functioning program like Lifeline, and the anti-competitive spectrum transfers, technology ventures, and marketing arrangements proposed by these transactions would widen the digital divide. It would be inconsistent both with the public interest and the interests of economically-vulnerable communities for the Commission to allow these transactions to proceed.

If higher prices in a range of services result from the proposed transactions, the deal will work against the goals the Commission adopted in the Lifeline order. As the Commission found:

> If quality voice service is not affordable, low-income consumers may subscribe to voice service at the expense of other critical necessities, such as food and medicine, or may be unable to purchase sufficient voice service to obtain adequate access to critical employment, health care, or educational opportunities. And if low-income consumers initially subscribe to phone service, but intermittently lose access because they cannot consistently pay for the service,

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[63] Only 40% of low-income Americans have adopted broadband. John B. Horrigan, *Broadband Adoption & Use in America*, 3 (OBI Working Paper No. 1, 2010).

[64] *Lifeline and Link Up Reform and Modernization*, WC Docket 11-41, Report & Order & Further Notice Of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012).

[65] Commenters note these many instances in the Lifeline order in which the Commission adopted rules in order to preserve competition or relies on competition in the implementation of the modernized Lifeline program. *See, e.g., id.* at ¶¶ 50, 173, 249, 317, 331, 357 n.959, 371, 378.

many of the benefits for individuals and the positive externalities for the economy and society will be lost.[66]

For this reason, the Commission adopted the goals of ensuring the availability of voice service for low-income Americans[67] and the availability of broadband service for low-income Americans.[68] Moreover, the Commission found that voice service is only available to low-income consumers to the extent that it is affordable[69] and broadband to be "available" to a low-income consumer, a broadband network (or networks) must have been deployed to the consumer, and the broadband service offered over the network must be affordable and provide a sufficient level of robustness (e.g., bandwidth) to meet basic broadband needs.[70] Lifeline subscribers will be heavily impacted by hikes in wireless prices as the program supports "a uniform flat-rate reimbursement."[71]

*4. Reducing Competition for Video Devices.*

Sections 629 and 624A of the Communications Act direct the Commission to create a competitive market for "video devices."[72] These provisions enact a Congressional policy that viewers should not be limited to renting cable and satellite set-top boxes from their providers, but should be able to benefit from the innovation provided by a competitive retail market for consumer electronics that can access and display subscription video content. By reducing video competition, the joint agreements would frustrate the Commission's ability to implement these provisions. A cable industry

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[66] *Id.* at ¶ 17.

[67] *Id.* at ¶ 27.

[68] *Id.* at ¶ 33.

[69] *Id.* at ¶ 28.

[70] *Id.* at ¶ 34.

[71] *Id.* at ¶ 54.

[72] 47 U.S.C. §§ 544a, 549.

characterized by increased incumbent market power not only would put CableCARD devices at a further competitive disadvantage that could result from unilateral cable actions, but could also provide a means for cable companies to further delay the implementation of AllVid by giving some incumbents the power to unilaterally delay industry-wide standard-setting through coordinated action. AllVid is an absolute necessity to improving competition in content and fulfilling the potential of Section 629. Too few companies presently control much of broadcast and cable, and AllVid would enable others to directly compete with these few present owners by integrating content into the same set-top box. Set-top boxes that integrate content from multiple sources will increase competition for and between content creators, with the benefit flowing to home viewers. Content availability, in turn, will lead to greater competition among distribution services for desired programming, which also will benefit consumers by way of better prices. Particularly if video competition is reduced via a Commission-sanctioned competition cease-fire between Verizon and cable conglomerates, further delay in AllVid's implementation will deny the public the benefits of a competitive market for video devices, undermining the intent of Congress in the Communications Act.

The joint operating entity proposed by the parties could block the Commission's efforts to *ever* implement Section 629. Just as CableLabs, a cable industry-controlled research organization, put onerous licensing and certification restrictions on CableCARD that prevented it from becoming a marketplace success,[73] the joint operating entity could

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[73] *See* Letter from Consumer Federation of America et al. to Kevin J. Martin, Chairman, Federal Communication Commission, CS Docket No. 97-80 (June 11, 2007), *available at* http://www.publicknowledge.org/pdf/fcc-ocap-letter-20070611.pdf; John Bergmayer, *Zoom Shows How Comcast Abuses Its Market Power to Restrict Competition*, PUBLIC KNOWLEDGE (Nov. 29, 2010), http://www.publicknowledge.org/blog/zoom-shows-how-comcast-abuses-its-market-powe.

develop and deploy proprietary, incompatible technologies for set-top boxes and other "interactive communications equipment" that inhibit the development of nationwide standards. The joint operating entity could either refuse to license these technologies at all, or (following the model of CableLabs) license them only to companies that are able to comply with difficult, often irrelevant, testing criteria.

As discussed below, Section 628, the statute enacting these goals, also provides direct authority for the Commission to invalidate the joint agreements. But this notwithstanding, the various independent grounds for the Commission to block the transaction must factor into the public interest analysis, since its purpose will be frustrated unless the Commission blocks the joint agreements.

### C. The Proposed Transactions Will Increase Spectrum Concentration, Thereby Harming Competition.

In evaluating transactions that involve spectrum acquisition by wireless service providers, the Commission examines whether the transaction would advance the "broad aims of the Communications Act" which include a "deeply rooted preference for preserving and enhancing competition" and "promoting a diversity of license holdings."[74] The Commission has further explained that proposed transactions must not merely preserve competition but also enhance it.[75] By increasing the amount of spectrum allocated to Verizon Wireless, the current transaction would increase Verizon's already

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[74] *Applications of AT&T and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, Memorandum Opinion & Order, ¶ 12 (Nov. 19, 2007) (*AT&T/Dobson Order*); *Sprint Nextel Corporation and Clearwire Corporation, Application for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order, ¶ 20 (Nov. 7, 2008) (*Sprint/Clearwire Order*); *Verizon/Atlantis Order*, ¶ 27; *Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations*, WT Docket No. 11-18, Order, ¶ 24 (Dec. 22, 2011) (*AT&T/Qualcomm Order*).

[75] *AOL/Time Warner Order*, ¶ 21.

significant market power, thereby hurting competition and preventing a diversity of spectrum holders.

Verizon Wireless currently leads its competitors in terms of spectrum holdings.[76] The transactions would increase this lead by 20 MHz in most markets.[77] The Commission has held before that dominant spectrum holdings along with network coverage is indicative of a service provider's ability to behave in an anticompetitive manner.[78] Verizon's significant post-transfer spectrum holdings would provide it with the power to act anticompetitively. In particular, the proposed transactions would adversely impact entry of new wireless service providers and the ability of wireless services to emerge as a competitive alternative to wireline services.

Spectrum is a key input in the provision of wireless services; a potential competitor cannot enter the market if it lacks spectrum or the ability to acquire it.[79] As the National Broadband Plan notes, there is a shortage of this key input,[80] making it extremely difficult for the Commission to clear new spectrum bands for auction. While secondary markets may be a source of additional spectrum, new entrants will find it

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[76] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, Table 128 (June 27, 2011) (*Fifteenth Wireless Competition Report*).

[77] *See* Spectrum Aggregation, attached to Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4; Spectrum Aggregation, attached to Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4.

[78] *Sprint/Clearwire Order*, ¶ 80.

[79] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, at 251 (May 20, 2010) (*Fourteenth Wireless Competition Report*).

[80] Federal Communications Commission, *Connecting America: The National Broadband Plan* at 81 (2010) (*National Broadband Plan*).

difficult to tap this source if the cost of acquisition is unreasonably high. Verizon's significant spectrum advantage would allow it to raise prices in the secondary market either by raising the price of leasing its own spectrum or by withdrawing available spectrum from the market.

In addition to harming competition among wireless service providers, by creating an arrangement in which wireline broadband service providers and the leading wireless service provider agree to cooperate in marketing each other's services, the proposed transactions would eliminate the Applicants' incentives to compete with each other. While such competition may not be a market reality today, the Commission has noted that meaningful competition may be a possibility in the future.[81]

*1. The Supposed Benefits of the Transaction Are Not Sufficient to Overcome the Adverse Impact on Competition.*

The Applicants claim that the transactions would benefit the public in two ways: first, the transactions would allow Verizon Wireless to better serve its customers;[82] and second, the transactions would move spectrum to a "higher valued" use.[83] Both of these supposed benefits are minor at best and are outweighed by the public interest harms of the proposed transactions.

First, the Applicants' claim that the proposed transaction would "serve the public interest by enabling Verizon Wireless to obtain spectrum that will help the company meet

[81] *Fifteenth Wireless Competition Report*, ¶ 367.

[82] Verizon/SpectrumCo Public Interest Statement, 13–16; Verizon/Cox Public Interest Statement, 12–15.

[83] Verizon/SpectrumCo Public Interest Statement, 16–19; Verizon/Cox Public Interest Statement, 15–18.

the growing demands of its customers"[84] deserves further scrutiny. While meeting consumer demand is a legitimate goal, accomplishing it—particularly through spectrum acquisition—is foremost a benefit to Verizon and only indirectly a benefit to Verizon customers in the short term. However, facilitating Verizon's ability to serve its customers better cannot be characterized as a public interest benefit because members of the public who are not Verizon's customers would in no way see the benefits of the improved services. On the contrary, they would be harmed by Verizon's incentive to behave in an anticompetitive manner.

Contrary to Applicants' claims,[85] spectrum concentration is not a suitable response to challenges posed by increasing demands on spectrum. Just as Applicants claim that increased demands on spectrum will eventually defeat the benefits of cell splitting, increased demands on spectrum will eventually defeat the benefits of spectrum acquisition. As Public Knowledge and Future of Music Coalition have noted before,[86] spectrum shortage is an industry-wide problem. The entire wireless industry must strive to make more efficient use of its existing spectrum. The entire wireless industry must invest in upgrading outdated technologies to new, efficient standards. The entire wireless industry must innovate around limitations inherent to whatever spectrum it may control. In addition to cell splitting, software defined radios, mesh networking, channel bonding,

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[84] Verizon/SpectrumCo Public Interest Statement, 13–16; Verizon/Cox Public Interest Statement, 12–15.

[85] *See* Verizon/SpectrumCo Public Interest Statement, 13–16; Verizon/Cox Public Interest Statement, 12–15.

[86] Petition to Deny of Public Knowledge and Future of Music Coalition, *Applications of AT&T and Deutsch Telecom for Consent to Transfer Control of Licenses and Authorizations Held by T-Mobile USA Inc., and Its Subsidiaries*, WT Docket No. 11-65 (May 31, 2011).

use of unlicensed frequencies, femtocells, and next generation standards are all potential solutions to spectrum limitations. Spectrum acquisitions that enhance the dominant position of a wireless provider may lead to that provider making small improvements in the near future. However, in the long term, competitive forces will be absent to discipline the dominant provider, thereby removing that provider's incentives to make any further improvements.

Second, Applicants' claim that the proposed transactions would move spectrum to a "higher valued" use and thereby represents "precisely the type of transaction that the Commission's secondary market policies are designed to facilitate"[87] merits further scrutiny. While the Commission's secondary market policies are generally designed to allow flexibility in spectrum transactions, including by license transfers, the Commission has noted that these transactions have to be consistent with the Commission's public interest objectives.[88] If a significant reduction in competitive pressure would eliminate the incentive for efficient use of spectrum, the Commission's public interest objectives would be undermined. As noted above, spectrum concentration would enable Verizon to raise prices for various other secondary market transactions, such as spectrum leasing.

Furthermore, the National Broadband Plan observed that the record on the functioning of current secondary markets is mixed.[89] It recommended that the Commission take a second look at the functioning of these markets and consider providing additional incentives for the development of secondary markets by, among

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[87] Verizon/SpectrumCo Public Interest Statement, 16.

[88] Promoting efficient use of spectrum through elimination of barriers to the development of secondary markets, *Second Report and Order*, ¶ 1, WT Docket No. 00-230, (September 2, 2004), *available at:* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-167A1.pdf.

[89] *National Broadband Plan* at 83.

other efforts, encouraging and facilitating dynamic spectrum sharing. Dynamic spectrum sharing focuses on the ability of devices to use portions of spectrum that are available at particular locations for short periods of time. This technology, with its focus on sharing, represents one of the most forward-thinking visions for spectrum secondary markets. Given these developments, the proposed transactions, with their model of exclusive control over a significant chunk of spectrum can hardly qualify as "precisely the type of transaction that the Commission's secondary market policies are designed to facilitate."

### 2. *The Commission Should Evaluate the Effects of Spectrum Concentration Even Where the Spectrum Screen Is Not Triggered.*

The Applicants claims that the proposed transactions will not exceed the spectrum screen in 105 of the 120 markets affected by the transactions. They further note that in the markets where the screen will be exceeded the overage will range from a minimum of 4 MHz to a maximum of less than 20 MHz. We trust the Commission to evaluate the veracity of these claims independently and note that an overage of 20 MHz is not insignificant.

While the Commission may be guided by the spectrum screen in evaluating the proposed transactions, the screen is not a dispositive test of whether the transactions would adversely impact competition. First, the legal status of the spectrum screen remains unsettled, as many parties have filed petitions before the Commission challenging the recent expansion of the screen.[90] Second, the assumptions underlying the

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[90] Public interest groups filed a petition for reconsideration of the spectrum screen extension. *See* Petition for Reconsideration of the Public Interest Spectrum Coalition, *Sprint Nextel Corporation and Clearwire Corporation Application for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 08-94 (filed Dec. 8, 2008). Separately, the Rural Telecommunications Group filed a petition requesting the FCC reinstate a modified version of its spectrum cap, *see Rural Telecommunications Group, Inc. Petition for Rulemaking to Impose a Spectrum Aggregation Limit on All Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*,

method used to calculate the spectrum screen have proven to be unreliable. Spectrum is included within the screen based on a prediction that it will be available in the next two years for provision of broadband service.[91] However, experience has shown that this prediction is not always accurate. For example, in approving AT&T's acquisition of spectrum licensed to Dobson Communications, the Commission revised the screen to include 80 MHz of spectrum from the 700 MHz band.[92] In doing so, it relied on 62 MHz of this band being auctioned for commercial use in the future and 18 MHz already auctioned to Qualcomm for its MediaFLO service.[93] However, Qualcomm could not use this spectrum to offer its MediaFLO service and this same spectrum was later acquired by AT&T.[94] Spectrum involved in the current transaction is another example of how spectrum licensed for particular uses may not actually be built out for those uses.

For these reasons, the Commission must not rely on the spectrum screen as the sole basis to evaluate the impact of spectrum aggregation on competition. The Commission has, on previous occasions, altered the spectrum screen to permit pending transactions.[95] It can do the same to disallow license transfers where the broad aims of the Communications Act require such action.

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Petition for Rulemaking, RM-11498 (filed July 16, 2008). Neither of these petitions has yet been resolved by the Commission, and consequently Applicants cannot simply rely on compliance with the screen as a proxy for a meaningful analysis of potential competitive harm.

[91] *Verizon/Atlantis Order*, ¶¶ 60–62.

[92] *AT&T/Dobson Order*, ¶ 30.

[93] *Id.* ¶ 31.

[94] *AT&T/Qualcomm Order*, ¶ 5.

[95] *AT&T/Dobson Order*, ¶ 26–30; *Sprint/Clearwire Order*, ¶ 53; *Verizon/Atlantis Order*, ¶ 53.

## II. THE COMMISSION HAS DIRECT AUTHORITY TO BLOCK THE JOINT AGREEMENTS.

As discussed above, the Commission should block the entire transaction, including the license transfers and the joint agreements. While the Commission has independent authority to block the joint agreements even without their being part of a license transfer transaction, the public interest harms are greatly magnified when those license transfers are accompanied by the joint agreements, and the harms caused by the joint agreements themselves, with the anticompetitive license transfers as a backdrop, are likewise increased. However, in its analysis, the Commission should certainly not overlook its bases of authority apart from Section 301(d), and this section will describe the independent statutory grounds for the Commission to block the joint agreements that it should rely on when it acts to prevent the transaction as a whole.

### A. The Commission Has Authority Under Section 628 To Block The Joint Agreements.

Pursuant to Section 628 of the Communications Act, the Commission must prohibit any arrangements that would reduce video distribution competition, such as the Verizon/SpectrumCo and the Verizon/Cox agreements.

Section 628 charges the Commission with promoting competition and diversity in video programming distribution.[96] It makes it unlawful "for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite

[96] 47 U.S.C. § 548.

broadcast programming to subscribers or consumers."[97] This "broad and sweeping"[98] provision authorizes the Commission to take actions to ensure that competitive providers have continued access to programming through such measures as program access rules,[99] and that competitive providers have continued access to consumers through such measures as the prohibition of contracts that grant exclusive access for one provider to offer wiring inside multiple-dwelling units ("MDUs").[100] Because the joint agreements would inhibit competitive video providers' access to consumers, the Commission should disallow them.

Today, as cable systems consolidate, as small cable operators are squeezed by ever-higher programming costs, and as direct broadcast satellite ("DBS") providers struggle to compete in markets where they cannot offer the same bundles (of telephone, broadband, and video) as other providers, video competition cannot be taken for granted. Numerous factors are conspiring to reduce consumer choice. New technologies allow for new forms of video distribution, but outdated business models and exclusionary business deals are preventing them from achieving their potential.

One bright spot in video competition is the emergence of telco video delivery—where AT&T or Verizon, for example, begin to offer subscription video services comparable to cable.[101] But the joint agreements pose a threat to this emerging

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[97] 47 U.S.C. § 548(b).

[98] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 704 (D.C. Cir. 2011) (citing *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009)).

[99] 47 C.F.R. §§ 76.1000–1004.

[100] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007).

[101] While online video is an important emerging video competitor, it generally offers complementary programming that does not match the line-up of traditional subscription services.

competition. In markets where Verizon has agreements with a cable system, it is unlikely to roll out video services over its copper plant, or continue the buildout of its fiber. The joint agreements therefore frustrate the effective performance of the Commission's duties in the future by limiting the potential for competitive entry into the video distribution market.

In 2011, telephone providers delivered programming to more than 8 million subscribers.[102] In combination with the 34 million Americans who received video programming through a satellite provider, almost 40 percent of consumers took advantage of the choice to receive video programming through provides other than cable companies.[103] The growth of these alternative distribution channels has been positive for content providers, and for the viewing public. Competition in video delivery limited the buyer power of cable providers, which previously operated regional monopolies. This enabled sellers to negotiate for better affiliate fees, which they invested in original programming. Since 2001, for example, affiliate fees to basic cable networks grew almost 11% annually (from $9.6 billion to $26.8 billion).[104] Over the same period of time, basic cable networks invested an additional 10% annually in programming (from $8.4 billion to $22 billion).[105] In other words, nearly all of the benefit of competition flowed directly to the consumer, consistent with the predicate of the antitrust laws and the 1996 Act. The past year (2010–2011) featured 84 original comedies and dramas on basic cable networks,

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[102] SNL Kagan, *U.S. Multichannel Industry Benchmarks*, retrieved Feb. 13, 2012.

[103] *See id.*

[104] SNL Kagan, *TV Network Industry Benchmarks*, retrieved Feb. 13, 2012.

[105] *Id.*

compared to 24 in 2001–2002.[106] Altering the dynamics to remove that competition will have an adverse impact on original programming, affecting creators and the public at large. Consumers deserve access to more diverse content, not less. Content creators deserve a market where competition for their product allows them to capture an economic value commensurate with their product. The Commission must scrutinize and disallow the joint agreements, which by all appearances constitute agreements not to compete,[107] if it is to meet its public interest obligations to protect diversity and competition.

The joint agreements threaten existing video delivery competition. Cable overbuilders and DBS may find it increasingly difficult to match the prices and services of incumbent cable systems that now have the added advantage of bundling their services

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[106] WGAW Analysis of Feb. 4, 2012.

[107] Though the Commission's authority is not confined by the antitrust laws, as the Supreme Court observed long ago, "joint ventures have no immunity from the antitrust laws," and "when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 110, 113 (1984) (internal quotations and citations omitted). *See also id.* at 114 (contrasting efficient blanket license music agreements covering broadcast rights to a large number of individual compositions from joint ventures at issue, which sold the rights on an individual basis, only in a non-competitive market), 115 (rejecting argument that the "plan [is] necessary to enable the NCAA to penetrate the market through an attractive package sale," as "there is no need for collective action in order to enable the product to compete against its nonexistent competitors."). Consistent with "the heart of our economic policy," which "long has been faith in the value of competition," the Sherman Act, like the Communications Act, reflects a legislative judgment that ultimately competition leads to lower prices and better goods. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (internal quotations and citations omitted). Accordingly, the test for the enforceability of agreements in restraint of trade that are ancillary to an otherwise potentially legitimate transaction is "whether the challenged contracts or acts were unreasonably restrictive of competitive conditions. Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices." *Id.* at 690. In this instance, the surrounding circumstance give rise to the inference or presumption that the license transfers were intended to restrain trade and enhance prices. *See id.* at 693 (an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of a service provider, "[w]hile . . . not price fixing as such" requires "no elaborate industry analysis . . . to demonstrate the anticompetitive character" and "impedes the ordinary give and take of the market place").

together with wireless, and a greatly increased retail presence. Together, these threats frustrate the Commission's ability to carry out its responsibilities, and provide it reason to invalidate the joint agreements pursuant to Section 628. Like it has before, the Commission must "prohibit the continuation and proliferation of an anticompetitive cable practice that has erected a barrier to the provision of competitive video services."[108] As the Commission has explained, actions to promote video distribution competition are consistent with the broader purposes of communications policy:

> prohibiting exclusivity clauses for the provision of video services will further the purposes of the 1992 Cable Act and the 1934 Act . . . the 1992 Cable Act sought to promote competition and consumer choice in cable communications. In addition, the purpose of the Communications Act of 1934, as amended, is 'to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.' Moreover, Section 706 of the Telecommunications Act of 1996 directs the Commission to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . .'[109]

The joint operating entity intended to develop new technology represents a danger to video competition in itself. The companies have said they plan use the venture to develop technologies that "will integrate" video with other services.[110] As discussed above, the joint venture's motivation would be to keep these technologies proprietary to the Verizon, Cox, and SpectrumCo companies—perhaps licensing them only on oppressive terms, "take it or leave it." In normal circumstances, such technologies rarely take off in the marketplace because competitors generally have more open alternatives and the standardization process ensures that essential patents can be licensed on reasonable and non-discriminatory terms. But against the backdrop of the unlawful joint

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[108] 22 FCC Rcd. 20235, ¶ 46.

[109] Id. ¶ 47.

[110] Verizon/SpectrumCo Public Interest Statement, 24 n.71.

marketing arrangements, any technologies developed by the joint venture would have a ready set of adopters, fragmenting the market for broadband-integrated video delivery. Under this scenario, for example, video services that are not party to the agreements would be unable to provide video that is compatible with Verizon devices, and in exchange the cable companies competing with these new services would make their video services Verizon-only. The Commission should not underestimate the creativity of the parties in devising ways to leverage technology to lock in control of the video delivery market.

For these reasons, consistent with its past actions, the Commission must protect the public interest and carry out Congressional policy to protect video distribution competition by disallowing the joint agreements.

### B. Section 652 Prohibits the Joint Agreements.

Section 652 of the Communications Act places various restrictions on agreements between "local exchange carrier[s] or any affiliate of such carrier[s]" and cable systems.[111] Enacted "to maximize competition between local exchange carriers and cable operators within local markets,"[112] it prohibits the joint agreements between Verizon and the cable companies.

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[111] 47 U.S.C. § 572. This provision allows the Commission to waive the prohibition if it finds doing so to be in the public interest. *Applications Filed by Comcast*, Memorandum Opinion & Order & Order on Reconsideration, 25 FCC Rcd. 3401, ¶ 2 (2010). But as argued throughout this Petition to Deny, the proposed joint agreements are not in the public interest. Consequently the FCC cannot waive Section 652.

[112] H.R. REP. NO. 104-458, at 174 (1996). To accomplish this goal, the final bill deliberately incorporates "the most restrictive provisions" of the House and Senate versions. *Id.*

*1. Section 652 Applies to Verizon Wireless.*

Verizon Wireless is an affiliate of Verizon Communications. Under the Communications Act, an "affiliate" is an entity "that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another [entity]. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent."[113]

Verizon Communications, indisputably a local exchange carrier, owns and controls Verizon Wireless, holding 55% of the company. Its junior partner Vodafone has a "a non-controlling 45 percent interest"[114] in the company. The Commission granted the license transfers that created Verizon Wireless after being given assurances that control of Verizon Wireless's "business and affairs is vested in a seven-member Board of Representatives, four designated by Bell Atlantic [now Verizon Communications] and three by Vodafone. Therefore, according to the Applicants, Bell Atlantic will also hold majority control of the Board and, thus, will have affirmative control of [Verizon Wireless]."[115]

Verizon's own actions demonstrate that Verizon Wireless and Verizon Communications operate as one enterprise. Verizon Communications describes Verizon Wireless as one of "its businesses,"[116] and the two companies share interlocking

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[113] 47 U.S.C. § 153.

[114] *Verizon/Atlantis Order*, ¶ 8.

[115] *Applications of Vodafone Airtouch and Bell Atlantic Corporation for Consent to Transfer of Control or Assignment of Licenses and Authorizations*, Memorandum Opinion & Order, 15 FCC Rcd 16507, ¶ 8 (2000).

[116] VERIZON LEADERSHIP TEAM, *Lowell C. McAdam*, http://www22.verizon.com/onecms/LeadershipTeam/Lowell_McAdam/?IsBio=Y (last visited Feb. 21, 2012).

directorates. Lowell McAdam, for example, is the Chairman and CEO of Verizon Communications, and Chairman of the Verizon Wireless Board of Representatives. Verizon Wireless and Verizon Communications even share one career track, with senior executives transferring from one company to the other. For example, Mr. McAdam and the now-retired Denny Strigl have held senior executive positions in each. Because Verizon Wireless is an affiliate of Verizon Communications, and because they operate as one company, any restrictions that apply to the one apply to the other.

Section 652(c) does not contain an "affiliation" provision, but applies to Verizon Wireless nonetheless. The DC Circuit has agreed with the FCC that statutory language that does not include the word "affiliate" can still apply to affiliates when such a reading is necessary to carry out the "regulatory purpose" of the provision.[117] Other FCC practice confirms that the Commission looks past legal formalities to determine the facts of ownership and control—especially when, as here, companies may have an incentive to use business structures to evade the application of a rule or policy. For example, in its designated entity rules the Commission determines whether a company has material relationships with another that would undermine the purpose of its rules or Congressional policy. If a "designated entity" "leases or resells (including at wholesale) more than 25% of its spectrum capacity to any single lessee or purchaser, it must add that lessee's or purchaser's revenues to its own to determine its continued eligibility for DE credits."[118] The Commission adopted these and similar rules "to ensure that the recipients of designated entity benefits are limited to those entities and for those purposes Congress

[117] *GTE Serv. v. FCC*, 224 F.3d 768, 773–74 (D.C. Cir. 2000). This applies even when related provisions *do* include the word "affiliate." *Id.* at 772.

[118] *Council Tree Commc'ns v. FCC*, 619 F.3d 235, 251 (3d Cir. 2010) (upholding the rules codified in 47 C.F.R. § 1.2110(b)(1)(i) and (b)(3)(iv)(B)).

intended."[119] Similarly, to carry out the Congressional purpose of maximizing competition between cable and telecommunications carriers, the Commission should find that Section 652 applies to the proposed agreements between Verizon and the cable companies.

### 2. *Section 652(c) Prohibits Joint Undertakings Like Those Proposed By Verizon and the Cable Companies.*

Section 652(c) provides that "[a] local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market."[120] The joint agreements between Verizon and the cable companies run afoul of this provision because they create a joint undertaking by the companies to directly provide video and telecommunications services to consumers. When Verizon sells a cable service directly from its stores and markets it as part of the same overall bundle or package as its voice and data services, this constitutes in all relevant respects a "joint venture or partnership" with a cable provider to provide video programming directly to its customers. Similarly, when a cable provider makes Verizon telecommunications services available in the same way as its video programming services, this constitutes a "joint venture or partnership" with Verizon to provide telecommunications services. Under 652(c) this is not allowed and the Commission must prohibit the arrangements.

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[119] *Modernization of the Commission's Competitive Bidding Rules & Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd. 4753, § 1 (2006).

[120] 47 U.S.C. § 572(c).

### 3. *Sections 652(a) and (b) Likewise Prohibit the Joint Agreements.*

Section 652(a) provides that "[n]o local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area."[121] On their face the joint agreements create a "management interest" by Verizon in various cable companies: they create a mechanism whereby Verizon and the cable companies will sit down together to plan the future direction of competition in their jointly-controlled markets, and how they will jointly promote each other's services. In the markets the undertakings will control, Verizon and the cable companies will behave as one unit, jointly managed. This is unlawful under 652(a).

The converse of 652(a), 652(b) provides that "[n]o cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area."[122] By the same reasoning as above, the agreements are unlawful under this provision as well.

## III. NO REMEDIES CAN CURE THESE TRANSACTIONS.

The proposed transactions threaten serious and unfixable harms to the public interest and the Commission must therefore block the transactions and deny the instant

[121] 47 U.S.C. § 572(a).

[122] 47 U.S.C. § 572(b).

applications. The Commission, being well within its statutory authority, should prevent the proposed cross-sale and joint operating entity agreements in addition to denying Applicants' proposed license transfer. However, based on past practice, Petitioners are aware that the Commission often seeks to adopt remedies to address a few of the most egregious harms that a license transfer would cause, even if it is unable to completely make the public whole. Currently, such remedies cannot even be considered for the joint agreements, since Petitioners do not even have access to the full text of the contracts between the parties, and because, in any event, the gravest threat could come down the road, as the companies modify the scope of their cooperation. Such harms are irremediable. But after it blocks the joint agreements, if the Commission were to unwisely grant the license transfers, the remedies suggested in this section would be a minimum floor to begin remedying the harms caused by excessive spectrum concentrated in the hands on one carrier.

### A. The Commission Must Block the Proposed Transfers and Joint Agreements.

As a general matter, Petitioners do not believe that the anticompetitive harms that these transactions would cause can be "remedied"—rather, the Commission must block them. Both the massive spectrum aggregation caused by the license transfers, and the blatantly anticompetitive joint agreements, are unfixable threats to the public interest. Each of these components alone threatens the competitive future of broadband services; together, they present an unacceptable attempt to lock cooperating incumbents into their respective spheres in the wireless, wireline, and video distribution worlds, reducing competition and frustrating multiple goals of the Communications Act.

The parties claim that the Commission should unconditionally approve the transfer because, for most markets, the current spectrum screen is not reached. To the extent that this is true, it does not account for the fact that the current spectrum screen provides a limited and inadequate tool for assessing the effects of spectrum consolidation. For example, frequencies below 1 GHz, as these are, can sustain mobile broadband use much more readily than those above 1 GHz, and consolidation in those lower frequencies therefore poses a much higher risk of reducing competition.[123] Verizon already has licenses to significant amounts of sub-1GHz spectrum, and adding these licenses to those consolidates a field considerably more rarefied than that of the full spectrum range. Even the current spectrum screen would far more accurately reflect the relative market value and competitive advantage of each firm's spectrum holdings by weighting each band based on the propagation characteristics, which in direct proportion to frequency range drives the capital cost of achieving a comparable quality of coverage over a similar geographic area. Many parties have repeatedly urged the Commission to take effects such as these into account. Indeed, a petition for the Commission to reconsider the spectrum screen extension has been pending before the Commission for over three years,[124] and others have urged the Commission to reinstate modified spectrum caps.[125] The lack of resolution on these issues should not mean that the Commission should proceed by ignoring the reality that different frequency ranges, by virtue of their differing physical

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[123] *Fourteenth Wireless Competition Report*, ¶ 270.

[124] Petition for Reconsideration of the Public Interest Spectrum Coalition, *Sprint Nextel Corporation and Clearwire Corporation Application for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 08-94 (filed Dec. 8, 2008).

[125] *Rural Telecommunications Group, Inc. Petition for Rulemaking to Impose a Spectrum Aggregation Limit on All Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, Petition for Rulemaking, RM-11498 (filed July 16, 2008).