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Setting aside the anti-competitive and antitrust issues that plague the Commercial Agreements entered into by the Applicants, which will be discussed at length below, a thorough review of the proposed transactions on their face will confirm that the likely public interest harms vastly outweigh whatever public interest benefits might exist. Verizon Wireless has failed to do anything with the AWS spectrum it previously won in Auction 66. The risk of spectrum warehousing is severe at a time when all market players attest to the fact that no new spectrum will be released via FCC auction in the next three to four years. Furthermore, the loss of spectrum from SpectrumCo and Cox, bolstered by statements from those licensees, confirms that four well-financed telecommunications companies (Comcast, Time Warner, Bright House Networks, and Cox) will never compete as facilities-based competitors to Verizon. Finally, as if these events alone weren't detrimental enough to healthy competition in the industry for telecommunications services - - the Cable Companies and Verizon Wireless (along with Verizon) have announced the existence of Commercial Agreements that trumpet the dawn of a new era in America - - the oligopolistic cartel of Big Cable + the Twin Bells.

VII. THE COMMERCIAL AGREEMENTS BETWEEN THE CABLE COMPANIES AND VERIZON WIRELESS VIOLATE SECTION 572(c) OF THE COMMUNICATIONS ACT AND CONSTITUTE AN ANTICOMPETITIVE CARTEL ACTING TO RESTRAIN TRADE AND COMMERCE IN VIOLATION OF SECTION 1 OF THE SHERMAN ANTITRUST ACT.

The proposed sale of AWS licenses from the Cable Companies to Verizon Wireless should be denied for the reasons stated above. However, in addition to those reasons, the Commission needs to be aware of additional public interest reasons dictating denial of the applications. As discussed below, the existence of an ominous collection of ill-conceived Commercial Agreements that have been entered into between the Cable Companies and Verizon

REDACTED – FOR PUBLIC INSPECTION

Wireless, highlights the adverse impact on the public that would result from approval of the proposed transactions.

When the Telecommunications Act of 1996 was enacted, there was great hope that cable companies would compete against wireline local exchange carriers by offering voice services and fledgling Internet services, and in turn, wireline local exchange carriers would compete against the cable companies by offering video services and Internet services. Consumers today want the ability to use voice services, Internet services and video services, and they want to access these various services from their primary fixed locations (typically homes and businesses) and now increasingly, while mobile. If the Cable Companies are allowed to sell their spectrum holdings to Verizon Wireless and implement the Commercial Agreements they have entered into with one another, this would kill the competition between telecommunications carriers and cable companies intended by the 1996 Act.

The issue here is not that voice, Internet and video services are not being delivered to the consumers, but rather that the Cable Companies and Verizon Wireless are complicit in deciding to rely *solely* on cable connections for fixed connectivity to voice, Internet and video while at the same time concentrating spectrum *solely* in the hands of Verizon Wireless to support those same three services over wireless for mobile connectivity. This arrangement has the net result of not just excluding other wireless players at a national level, but it minimizes the likelihood that competition of any type will emerge from any wireline player given the enormous costs and time commitment it would take to even contemplate such a venture.

The emergence of mobile as an overarching means of connectivity for voice, Internet and video has the potential to be a boon for competition, but only to the extent that the operators of those mobile wireless services have a financial incentive to actually compete for customers who

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currently buy voice, Internet and video services from other carriers. Verizon has the ability to maintain or even expand its FiOS fiber-to-the-premise network and actively compete with the Cable Companies, but it has decided to abandon any future build out of its FiOS network and instead rely on the Cable Companies for fixed connections.⁵⁰ As discussed below, this arrangement, along with the other arrangements set forth in the Commercial Agreements, creates a cartel where the parties are acting in concert to hinder competition by restraining trade and commerce in the provisioning of video, landline and wireless services to consumers.

Section 572(c) of the Act, entitled “Joint ventures,” states quite plainly that “[a] local exchange carrier and a cable operator whose telephone service area and cable franchise areas, 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.”⁵¹ As discussed below, Verizon Wireless, while a legal partnership, is for all intents and purposes an affiliate of Verizon, itself a bona fide “local exchange carrier.” As discussed earlier, Verizon, through Verizon Wireless, has readily admitted to the Commission that at least one of the Commercial Agreements is designed to “establish a technology joint venture to develop innovative technology and intellectual property that will integrate wired video, voice, and high-speed Internet with wireless technologies.”⁵² The Commercial Agreements also “provide the parties to those agreements with the ability to act as agents selling

⁵⁰ See e.g., Kang, Cecilia, “Verizon Ends Satellite Deal, FiOS Expansion as it Partners with Cable,” *The Washington Post*, (December 8, 2011), http://www.washingtonpost.com/blogs/post-tech/post/verizon-ends-satellite-deal-fios-expansion-as-it-partners-with-cable/2011/12/08/gIQAGANrfO_blog.html (last visited February 21, 2012); Cheredar, Tom, “Lame: Verizon is Abandoning its FiOS TV & Internet Service to Pursue Wireless Partnerships,” *Venturebeat.com* (December 9, 2011), <http://venturebeat.com/2011/12/09/verizon-stops-fios-build-out/> (last visited February 21, 2012).

⁵¹ 47 U.S.C. § 572(c).

⁵² *Ex Parte of SpectrumCo.*

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one another's services, and provide the members of SpectrumCo the option of acting as resellers in the future."⁵³ Verizon is in the business of selling voice, Internet and video services to its customers, and its subsidiary Verizon Wireless is in the business of selling mobile wireless voice services, (which is often a one-for-one replacement for landline voice service) as well as mobile Internet service. Any type of commercial arrangement, and especially a joint venture, that helps facilitate the melding of these various services to be sold as a unified product by either of the companies in the markets where they currently compete is a violation of the Act.

While Verizon Wireless or the Cable Companies might argue that the joint venture entity itself does not actually *sell* the various services, it should be noted that when Section 572(c) of the Act was finalized by Congress, its drafters intended for it to be applied broadly. According to the Senate's Conference Report which accompanied S.652, the final version of the enrolled bill eventually voted on by Congress and signed by President Clinton:

"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 service in such market. Such carriers and 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." (emphasis added)

Congressional intent here is obvious; the purpose of the legislation was to maximize competition between cable companies and local exchange carriers. Any type of commercial or legal arrangement whereby the Cable Companies and Verizon (or Verizon Wireless) seek to work together to sell each other's services in lieu of providing

⁵³ *Id.*

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competing services is grossly anticompetitive. The one exception that Congress did include concerning the “construction of facilities” is more akin to mobile wireless operators reducing capital or operational costs through tower colocation agreements or even network-sharing agreements. But in any instance, there would still be competition between the market players, and that is clearly not the case here because Verizon, as Verizon Wireless’ parent company, is using Verizon Wireless’ voice and Internet services as a *de facto* “replacement” for its own voice and Internet services.

Verizon Wireless and Comcast have already announced a trial program of this new sales and marketing arrangement in the cities of Portland, Oregon and Seattle, Washington where Verizon Wireless stores are selling Comcast Xfinity® cable and Internet services.⁵⁴ These same markets also happen to be where Verizon has recently sold off its wireline network to Frontier Communications. Were Verizon to exit its presence in FiOS or other wireline markets and remove a viable market player for voice, Internet and video services, and instead concentrate (through Verizon Wireless) on teaming up with the Cable Companies and possibly other cable companies nationwide to provide those same three services through just cable and wireless systems, it will have all the hallmarks of a true cartel, where a limited number of providers control the means of production and the delivery mechanisms and ultimately set the prices for consumers who have no alternatives.⁵⁵

⁵⁴ Verizon Wireless and Comcast Team Up in Seattle to Deliver to Consumers the Best Video Entertainment, Communications and Internet Experiences at Home and Away,” Comcast Press Release (released January 19, 2012) <http://www.comcast.com/about/pressrelease/pressreleasedetail.aspx?SCRedirect=true&PRID=1144> (last visited February 21, 2012).

⁵⁵ While the provision of communications services is not typically considered a product, as discussed further below, the arrangement between the parties goes beyond the mere transmission of voice, data and video.

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As discussed above, Section 572(c) of the Act prohibits joint ventures between cable companies and local exchange carriers. This outright prohibition reflects Congress's conviction that it is imperative to have healthy competition between the traditional providers of voice service (local exchange carriers) and the traditional providers of wired video services (cable companies). Since the enactment of Section 572(c), mobile wireless operators have rapidly displaced (or at the very least equaled) local exchange carriers as the most convenient means of consumers obtaining voice communications.⁵⁶ Verizon, as the majority owner of Verizon Wireless, is uniquely positioned because it controls the means of delivery for mobile voice services across the entire country. Verizon, by itself, is the incumbent voice carrier through wireline means in those markets where it is the local exchange carrier, including those markets where it provides additional Internet and video services through its FiOS network. Verizon Wireless seemingly believes that it has not violated Section 572(c) because it is Verizon Wireless and not Verizon that is entering into a joint venture with the Cable Companies.⁵⁷ However, that

⁵⁶ Snider, Mike "More People Ditching Home Phone for Mobile", *USA Today*, (April 21, 2011) <http://www.usatoday.com/tech/news/2011-04-20-cellphone-study.htm> (last viewed February 21, 2012).

⁵⁷ While Section 572(c) prohibits joint ventures of this type between the local exchange carrier and the local cable company, affiliates of each are also implicated. As Section 572(a) and (b) make plain, a buyout of a cable company or local exchange company by the other is prohibited outright even if it were structured to take place through an affiliated company.

Sec. 572. Prohibition on buy outs

(a) Acquisitions by carriers

No 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.

(b) Acquisitions by cable operators

No 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.

Simply put, Verizon cannot use its affiliate, Verizon Wireless to structure a joint venture that Verizon is prohibited from entering into under Section 572(c).

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is not the case. Verizon and Verizon Wireless must be treated as one-in-the-same not just because the former owns a majority stake in the latter,⁵⁸ but also because wireless voice services have by and large replaced landline voice services.⁵⁹ At the very least, the existence of a joint venture between the Cable Companies and Verizon Wireless leads to the development of integrated services (between voice, Internet and video) that limits proper competition in those markets in the United States where Verizon is the incumbent local exchange carrier.⁶⁰ In sum, Verizon cannot escape the confines of Section 572(c) simply by having its affiliate, Verizon Wireless, do what Verizon is prohibited by statute from doing.

Verizon Wireless is likely to contend that Section 572(c) does not apply under any circumstances because Verizon Wireless is not a local exchange carrier. As discussed above, with the replacement of local exchange services with voice wireless services and the cutting of the cord by consumers, this proposition can no longer be maintained. [START HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

⁵⁸ Verizon Wireless is a general partnership under the laws of the State of Delaware. Verizon is the majority owner of the interests within the general partnership. See Ownership of Cellco Partnership, <http://wireless2.fcc.gov/ownerQryDetail/ownership-search-results-detail.htm?applid=6553741&edittype=R/O&OwnershipSearch=Y&reqPage=4#> (last viewed February 21, 2012). The ultimate control Verizon has in the general partnership is exemplified by the “dividend vs. debt pay-down” issue that has been simmering between Verizon and Vodafone Group Plc (“Vodafone”), the minority partner in Verizon Wireless, since at least 2005. See Harrington, Ben, “Vodafone Shares Rise After Special Dividend Boost”, *The Telegraph* (July 29, 2011) <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/telecoms/8671322/Vodafone-shares-rise-after-special-dividend-boost.html>, (last viewed February 21, 2012). For years, Vodafone tried to pass through a dividend from the operating profits of Verizon Wireless to Vodafone. However, because Verizon believed that paying off Verizon Wireless was a more important concern, it overruled Vodafone and routinely declined to allow Verizon Wireless to pay out a dividend to its majority-controlling and minority-controlling owners. In 2011, Verizon finally relented to the dividend payout, but it also reiterated that a guaranteed annual dividend payout was not possible. See “Verizon Dividend Setback for Vodafone, Report”, *Reuters*, (September 12, 2011) <http://www.reuters.com/article/2011/09/12/us-verizon-communications-vodafone-idUSTRE78B03320110912> (last viewed February 21, 2012). The fact that Verizon can dictate how the profits of Verizon Wireless are administered is convincing evidence that while Verizon Wireless is not wholly-owned by Verizon, Verizon is its controlling entity and Verizon makes the ultimate decisions on how Verizon Wireless is run.

⁵⁹ See discussion, *infra*.

⁶⁰ *SpectrumCo Public Interest Statement* at p. 24, FN 71; *Cox Public Interest Statement* at p.20, FN 62.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY

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In the study of economics and market competition, collusion takes place within an industry when rival companies secretly and deceitfully cooperate for their mutual benefit.⁶³ Collusion most often takes place within the market structure of an oligopoly, where the decision of a few firms to collude can significantly impact the market as a whole. Similarly, a cartel is a formal, often explicit, association of *competing* firms.⁶⁴ Cartels usually occur in an oligopolistic industry, where there are a small number of sellers, and usually involve homogeneous products. Cartel members may agree on such matters as price fixing, total industry output, market shares, allocation of customers, allocation of territories, bid rigging, establishment of common sales agencies, and the division of profits or some combination thereof. The aim of such collusion

⁶³ Collusion is defined as “A secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose.” *Black’s Law Dictionary* (6th West, 1999).

⁶⁴ Cartel is defined as “A combination of producers of any product joined together to control its production, sale, and price, so as to obtain a monopoly and restrict competition in any particular industry or commodity” as well as “an association by agreement of companies or sections of companies, having common interests designed...to promote the interchange of knowledge resulting from scientific and technical research, exchange of patent rights, and standardization of products.” *Black’s Law Dictionary* (6th West, 1999).

REDACTED – FOR PUBLIC INSPECTION

(also called a cartel agreement) is to increase individual members' profits by reducing competition.

[START HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED] ⁶⁵ [REDACTED]

[REDACTED]

⁶⁶ [REDACTED]

⁶⁵ Verizon is implicated in the cartel not only because it owns 55% of Verizon Wireless, but also because according to **[START HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL INFORMATION]**

⁶⁶ 15 U.S.C. §1 (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”). While the FCC is not the primary forum for adjudication of Sherman Act violations, violation of the Sherman Act is clearly relevant to the public interest determination required to be made by the Commission in this proceeding. Clearly, violating the Sherman Act is not in the public interest.

[REDACTED]

[REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL INFORMATION]**

Unfortunately because key provisions have been redacted out of **[START HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL INFORMATION]** it is impossible for an interested party to review the compensation and pricing terms⁶⁷ to address the restraint of trade and commerce, a key component to proving a violation of antitrust law under the Sherman Act.⁶⁸ Because the FCC has not demanded the applicants to provide the redacted information under the highly confidential protective orders, interested parties are not able to fully address the antitrust issues that are implicated.

VIII. APPLICANTS' FAILURE TO MEET THEIR BURDEN OF DEMONSTRATING THAT THE PROPOSED TRANSACTIONS ON BALANCE SERVE THE PUBLIC INTEREST, AND THE EXISTENCE OF MATERIAL QUESTIONS OF FACT, REQUIRE THAT THE FCC HOLD AN EVIDENTIARY HEARING UNDER SECTION 309(e).

As discussed above, the Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transactions, on balance, will serve the public interest.⁶⁹ If the Commission is unable to find that the proposed transactions serve the public interest, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that

⁶⁷ *Ex Parte of SpectrumCo.*

⁶⁸ 15 U.S.C. §§ 1-7.

⁶⁹ *Applications of Echostar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations); (Transferors) and Echostar Communications Corporation (a Delaware Corporation); (Transferee)*, Hearing Designation Order, CS Docket No. 01-348, 17 FCC Rcd 20559, 20574 at ¶ 25 (2002) (“Echostar”).

REDACTED – FOR PUBLIC INSPECTION

the applications be designated for hearing.⁷⁰ RTG respectfully requests the Commission to require the Applicants to provide the redacted information contained in [START HIGHLY CONFIDENTIAL INFORMATION] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION] so that interested parties may assess the information and fully participate in the public interest debate before the Commission. RTG also requests that the Commission require the parties to submit specific information, including but not limited to: all documentation related to the formation of [START HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION] The Commission has found the need for such an evidentiary hearing under Section 309(e) where applicants have failed to demonstrate that their proposed transactions are necessary to achieve their claimed public interest benefits and where substantial and material issues of fact exist with respect to whether the proposed transactions are likely to cause anticompetitive harm and yield any public interest benefits.⁷¹ The sheer amount of information missing from the Commercial Agreements

⁷⁰ *Id.*

⁷¹ *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, WT Docket No. 11-65, DA 1955 (released November 29, 2011) (“*AT&T-DT Order*”) at ¶¶ 2-3.

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and the anticompetitive concerns raised by the existence of the Commercial Agreements compel the Commission to designate the present applications for such a hearing.

IX. CONCLUSION

The Applicants have failed to meet their burden of proving that the proposed transactions, on balance, serve the public interest. The dubious public interest “benefits” claimed by Verizon Wireless benefit only Verizon Wireless, and such benefits are substantially outweighed by the many public interest harms that would result from approval of the proposed transaction, including the likely warehousing of the acquired spectrum by Verizon Wireless and the removal of the Cable Companies as potential facilities-based competitors to Verizon Wireless, in addition to [START HIGHLY CONFIDENTIAL INFORMATION], [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION] Applicants’ failure to meet their burden of proving the grant of the applications would, on balance, serve the public interest, and [START HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION], requires that the Commission hold an evidentiary hearing under Section 309(e) of the Act. If, after the conclusion of such hearing, the Commission determines that grant of the applications is warranted, it should do so only on the condition that Verizon Wireless be prohibited from holding more than 110 megahertz of spectrum below the 2.3 GHz band in any one county.

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Absent the relief requested herein, the anticompetitive injuries to wireless and wireline communications subscribers throughout the nation are likely to linger for decades to come.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Colleen von Hollen, of Bennet & Bennet, PLLC, 4350 East West Highway, Suite 201, Bethesda, MD 20814, hereby certify that a copy of the foregoing Petition to Deny of the Rural Telecommunications Group, Inc. was served on this 21st day of February, 2012, via electronic mail, on those listed below:

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