



Public Knowledge

March 26, 2012

FILED/ACCEPTED

MAR 26 2012

Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WT Docket No. 12-4, Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses

Dear Ms. Dortch:

Pursuant to the Protective Orders in this proceeding, please find enclosed two copies of Public Knowledge et al.'s Reply Comments in redacted form.

Respectfully submitted,

/s Harold Feld
Legal Director
PUBLIC KNOWLEDGE

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of Cellco Partnership d/b/a
Verizon Wireless and SpectrumCo LLC
for Consent to Assign Licenses

Application of Cellco Partnership d/b/a
Verizon Wireless and Cox TMI Wireless,
LLC for Consent to Assign Licenses

WT Docket No. 12-4

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Federal Communications Commission
Office of the Secretary

**REPLY COMMENTS OF PUBLIC KNOWLEDGE, MEDIA ACCESS PROJECT,
NEW AMERICA FOUNDATION OPEN TECHNOLOGY INITIATIVE,
ACCESS HUMBOLDT, BENTON FOUNDATION, AND NATIONAL
CONSUMER LAW CENTER, ON BEHALF OF ITS LOW-INCOME CLIENTS**

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March 26, 2012

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

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SUMMARY

The proposed transactions in this proceeding threaten to deprive consumers of the benefits of competition through a scheme of convergence, spectrum aggregation, and patent portfolios. The full scope of the harms presented by the proposed transactions can only be understood when the Applicants' license transfers are put in context with their accompanying agency, resale, and Joint Operating Entity ("JOE") agreements. As the Federal Communications Commission ("Commission") has acknowledged in requiring the Applicants to remove redactions in certain parts of their side agreements, the Applicants' commercial agreements and license transfers are connected to and conditioned on each other. As a result, the Commission's review of the transactions' impact on the public interest will necessarily involve examining how the agency, resale, and JOE agreements will affect competition and consumers.

Petitioners have explained how the proposed transactions will violate the Communications Act ("the Act"), frustrate the ability of the Commission to effectuate the goals of the Act, and otherwise harm the public interest. Applicants have in large part failed to respond to Petitioners' arguments, particularly as to the harms threatened by the commercial agreements. Applicants' best attempt to counter the serious harms threatened by the JOE Agreement is to characterize the JOE as a mere "research agreement," which description the Commission should reject. The agreements demonstrably contemplate and require anticompetitive conduct that reaches far beyond simply joint research and development, and the Commission should not indulge Applicants' efforts to avoid addressing these issues. Accordingly, the Commission should recognize that Applicants have failed demonstrate that the proposed transactions will affirmatively serve the public interest, and block the proposed transactions.

Titles II and III of the Act vest the Commission with broad authority to fulfill its responsibilities under the Act—authority that encompasses review of the agreements at issue in

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this proceeding. The Commission has statutory authority to review these agreements and block the agreements entirely or implement restrictions and conditions, as it has in numerous past spectrum transfer applications. Past precedent also demonstrates that the Commission can act under its statutory authority even if its decisions or rules will render existing contracts void or illegal. Accordingly, the Commission has ample authority to act here to protect the public interest against the harms threatened by all of the components of the Applicants' proposed transactions. The Commission should now exercise that authority to prevent the proposed transactions from stifling innovation and competition in voice, video, and data services by denying the Applications.

ARGUMENT

I. THE COMMERCIAL AGREEMENTS ARE INEXTRICABLY INTERTWINED WITH THE PROPOSED LICENSE TRANSFERS AND ARE STILL RELEVANT TO THE COMMISSION'S PUBLIC INTEREST REVIEW IN THIS PROCEEDING.

Petitioners² are aware that the Commission has recently established a new proceeding in which to examine the legality of the agency, resale, and Joint Operating Entity ("JOE")³ agreements. Petitioners applaud this exercise of Commission authority to prevent agreements that outright violate the Communications Act in their own right. However, this does not alleviate the Commission's responsibility to recognize and examine these side agreements as part of the proposed license transfer in this proceeding. As discussed in Petitioners' Petition to Deny, the

² Petitioners New American Foundation Open Technology Initiative, Access Humboldt, Benton Foundation, and National Consumer Law Center, on behalf of its low-income clients, have only directly reviewed the redacted version of this filing.

³ In their Opposition to Petitions to Deny and Comments, Applicants rename the JOE as the "Innovation Technology Joint Venture." *See, e.g.*, Joint Opposition to Petitions to Deny and Comments of Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless, LLC, WT Docket 12-4 (Mar. 2, 2012) at 71 ("Joint Opposition"). Petitioners will here continue to use the entity's legal name, the Joint Operating Entity, or "JOE."

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public interest standard encompasses the entirety of the proposed agreements, and the Commission must consider how those agreements may impair the Commission's ability to effectuate the purposes of the Act, in addition to considering the other public interest harms the agreements may cause.⁴ In addition to likely violating the Act and being independently subject to the Commission's authority, these agreements are part of the same overall license transfer transaction between Verizon and the MSOs, and their impact on the public interest is thus properly considered in this proceeding as well.

Recent information that the Applicants only begrudgingly revealed after being ordered to do so by the Commission shows that terms of the agency, resale, and JOE agreements are undeniably connected to and contingent on the license transfer. In their Joint Opposition, Applicants protested that "[t]he license assignments and Commercial Agreements are separate from, and not contingent on, each other."⁵ However, the Applicants' subsequent mandatory disclosures confirm that this is not true. Indeed, as Bright House Networks openly admits:

“Neither Comcast nor SpectrumCo would have entered into the Spectrum License Purchase Agreement had Comcast (and the other SpectrumCo owners) and Verizon Wireless not come to terms on the commercial agreements. In that sense, the transactions were integrated. . . . Comcast viewed the spectrum as a strategically important element of that plan, and it would not have relinquished the AWS licenses without having in hand alternative ways of achieving its wireless goals.”⁶

When asked whether the MSOs would have been willing to sell their spectrum to Verizon without the side agreements, Comcast Executive Vice President David Cohen confirmed as

⁴ See Petition to Deny of Public Knowledge *et al.*, WT Docket No. 12-4 (Feb. 21, 2012), at 10-36 (“Petition to Deny”).

⁵ Joint Opposition at 70.

⁶ Response to Information and Discovery Request by Comcast Corporation, WT Docket No. 12-4 (Mar. 22, 2012) at 26 (emphasis added). See also Response to Information and Discovery Request by Bright House Networks, WT Docket No. 12-4 (Mar. 22, 2012) at 15 (asserting the same, almost verbatim).

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much, explaining: “The transaction is an integrated transaction. There was never any discussion about selling the spectrum without having the commercial agreements.”⁷

Verizon’s own description of the negotiations between Verizon and the cable companies bear this out.⁸ From the very first meetings between Verizon and [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL] In fact, the JOE and the spectrum purchase [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] The spectrum transfer and side agreements were thereafter [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Bright House Network’s negotiation

⁷ Eliza Krigman, *Comcast Executive Defends Verizon-SpectrumCo Deal*, POLITICO (Mar. 8, 2012). Mr. Cohen went on to note that the parties actually do not object to the Commission reviewing the side agreements. *Id.*

⁸ Petitioners here largely rely upon Verizon’s descriptions of the parties’ negotiations. Counsel for Cox Communications, Comcast, and SpectrumCo stated they were unable to provide unredacted copies of their respective March 22nd filings until March 26th, and as of March 26th counsel for Bright House Networks had not responded to requests for unredacted copies of their respective filings.

⁹ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

¹⁰ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

¹¹ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

For example, [BEGIN HIGHLY CONFIDENTIAL]

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timeline confirms that by the time it was brought into the discussions in late November 2011, the agreements were presented to Bright House as a single “transaction.”¹²

Moreover, Applicants’ protestations that the agency, resale, and JOE agreements are entirely unrelated to the Applicants’ proposed spectrum transfer is also directly contradicted by the language of their own agreements. For example, **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Additionally, **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Moreover, the Applicants have agreed that **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

¹² See Response to Information and Discovery Request by Bright House Networks, WT Docket No. 12-4 (Mar. 22, 2012) at 1–2.

¹³ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

¹⁴ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

¹⁵ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

¹⁶ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] These provisions make crystal clear what Petitioners and other parties have long suspected: the agency, resale, and JOE agreements are intimately connected to and contingent on the license transfer.

In its response to the Commission's Information and Document Request, Verizon even admits that [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Verizon, however, neglects to explain how [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] does not make the Applicants' agreements contingent upon each other. Now that the Applicants have, at the order of the Commission, been required to reveal more provisions in their commercial agreements, those provisions make clear that Applicants' previous promises that the commercial agreements and license purchase agreement are unrelated were flatly wrong.

II. APPLICANTS FAIL TO RESPOND TO PETITIONERS' ARGUMENTS THAT THE COMMERCIAL AGREEMENTS ARE ANTICOMPETITIVE AND CONTRARY TO THE PUBLIC INTEREST.

Applicants have effectively failed to respond to the core issues raised by Petitioners opposing Applicants' proposed agency, resale, and JOE agreements. Where Applicants do make

¹⁷ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

¹⁸ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

¹⁹ [BEGIN HIGHLY CONFIDENTIAL]
CONFIDENTIAL]

[END HIGHLY

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reference to Petitioners' arguments regarding the side agreements, Applicants' purported rebuttals are irrelevant to Petitioners' points. No amount of misdirection can hide the fact that under § 310(d) of the Act, the Commission should evaluate the proposed agreements as a whole and consider the future state of the communications landscape if the Commission were to permit these agreements to stand.²⁰ As the Commission has most recently explained:

“If the proposed transaction would not violate a statute or rule, we next consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest harms.”²¹

If the Commission finds that the agreements will stifle competition between the Applicants, their affiliates, and third parties, or otherwise fail to affirmatively serve the public interest, then the Commission must deny the transfer applications. If the Commission determines that the spectrum transfer alone will serve the public interest when subject to certain conditions, the law requires that it void the side agreements as part of its approval of the transfer application.

In contrast to Applicants' attempts to shoehorn the Commission's public interest analysis into only the question of spectrum efficiency,²² the Commission's examination under § 310(d) encompasses much more than simply whether the proposed transferee will use the spectrum in question efficiently. Encouraging the efficient use of spectrum is certainly one part of the

²⁰ As one of the Applicants openly admits, even today new competitors face tremendous barriers to entering the wireless market, stifling competition. Eliza Krigman, *Comcast Executive Defends Verizon-SpectrumCo Deal*, POLITICO (Mar. 8, 2012) (quoting Comcast executive David Cohen: “Believe me, if there was any way for us to get into the wireless space, that’s what we would have done. It’s too expensive; the barriers to entry are too consequential; the access to devices is too difficult; access to roaming agreements is next to impossible.”).

²¹ *Applications for Consent to Assign/Transfer Control of Licenses and Authorizations of New DBSD Satellite Services GP, Debtor-in-Possession and TerreStar License Inc., Debtor-in-Possession*, IB Docket No. 11-150, *Requests for Rule Waivers and Modified Ancillary Terrestrial Component Authority*, IB Docket No. 11-149, Order, ¶ 12 (2012) (citations omitted).

²² Joint Opposition at 8.

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Commission’s public interest analysis, but it is by no means the only part. Looking at the agreements as a whole, the Commission should also consider how the proposed transactions will affect competition, quality of services, build-out of new services, barriers to market entry, retail and enterprise prices, special access, backhaul, video programming offerings, and the development and use of new technologies, among other considerations.

The JOE Agreement in particular will prevent competition and promote collusion, particularly given that statements by the Applicants demonstrate that the transfer would not occur absent the side agreements. Applicants argue that their agreement does not harm competition because it merely offers customers a “one-stop-shop” for bundled services,²³ but this argument misses the nature of Petitioners’ concerns. Is it not necessarily the ability to bundle services that is anticompetitive, but the agreement to do so to the exclusion of other competitors or partners that makes these agreements anticompetitive.²⁴ As Petitioners have explained, the JOE’s very structure encourages coordination between Verizon Communications and the MSOs.²⁵ The JOE also **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL] and gives Applicants the ability and incentive to discriminate against competitors when licensing the JOE’s intellectual property.

²³ Joint Opposition, Exhibit 6, at 3.

²⁴ Petitioners also note that the agreements at issue decrease Verizon’s incentive to compete against the cable companies in the video market, which ultimately creates higher per channel cable prices for consumers. As the Commission recently found in its Report on Cable Industry Prices, cable companies charge consumers approximately 31% less per channel for expanded basic networks where they face competition from another cable provider. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, Table 1 (2012).

²⁵ Petition to Deny, Confidential App. at A-3–A-5.

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A. Applicants' Portrayal of the Joint Operating Entity as a Mere "Research Agreement" Is Contrary to Evidence Placed in the Record in this Proceeding.

Applicants refer to the JOE as a mere "research agreement,"²⁶ but the JOE Agreement itself—which is still only incompletely submitted into the record by Applicants—demonstrates that the JOE is much more than a simple agreement to research together. Indeed, it is precisely the provisions of the JOE that extend well beyond research that cause the most concern for future competition in the wireless and wireline services market.

The JOE Agreement, particularly when combined with the Applicants' agency and reseller agreements, blatantly contemplates and requires conduct that extends far beyond a typical research agreement. Here, it is useful to look to the 1984 National Cooperative Research Act (NCRA),²⁷ which defined a "joint research and development venture," including both activities that are and are not included within the scope of a joint research and development venture.²⁸ The statutory provision defining joint ventures (which includes research agreements) specifically excludes "entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing, distribution, or provision by any person who is a

²⁶ Joint Opposition, Exhibit 6, at 18 n.52.

²⁷ Pub L. No. 98-462 (codified as amended at 15 U.S.C. § 4301-05). In 1993, Congress amended the NCRA to extend protections to joint ventures that were involved in production activities, in part because of scholarly commentary, because it was unclear whether joint ventures could engage in activities going beyond research and development while still retaining the protections of the NCRA. National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301-06.

²⁸ HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 36.3b1 (Aspen 2004 Supp.). Although the NCRA may not be directly applicable to this proceeding, it established a national standard under which certain cooperative ventures could avoid treble damages under antitrust law. The NCRA thus provides an objective background against which the Applicants' use of the label "research agreement" can be measured. By contrast, Applicants offer no examples or standards that would justify referring to the JOE as a "research agreement."

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party to such venture of any product, process, or service”²⁹ Joint research ventures also do not include agreements “to restrict or require the sale, licensing, or sharing of inventions, developments, products, processes, or services not developed through, or produced by, [the] venture.”³⁰ Nor can any agreement “to restrict or require participation by any person who is a party to such venture in other research and development activities” qualify as a joint research venture.³¹

The JOE Agreement, particularly when combined with the agency and reseller agreements, explicitly requires conduct that goes well beyond the scope of a typical research agreement. The JOE Agreement **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL] It also **[BEGIN HIGHLY CONFIDENTIAL]**

[END

HIGHLY CONFIDENTIAL] thus controlling and limiting the newcomers’ marketing and promotion efforts. It is ridiculous to claim that a series of agreements that operate collectively to exert so much control over the parties’ independent marketing, promotion, research, development, deployment, and licensing of technology is no more than a research agreement, and the Commission should recognize these contracts for what they are: agreements to **[BEGIN HIGHLY CONFIDENTIAL]**

²⁹ 15 U.S.C. § 4301(b)(2). In contrast, activities like theoretical analysis or experimentation, developing and testing basic engineering techniques, and producing and testing a new product or service are included within the definition of a joint venture or research agreement. 15 U.S.C. § 4301(a)(6).

³⁰ 15 U.S.C. § 4301(b)(3)(A).

³¹ 15 U.S.C. § 4301(b)(3)(B).

[END HIGHLY CONFIDENTIAL]

As Petitioners explained in their Petition to Deny (and as Applicants fail to counter in their Opposition), the structure of the JOE itself encourages coordination between Verizon Communications and the MSOs.³² [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Moreover, the JOE does not simply contemplate joint research, but [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] This demonstrates that the JOE is not intended merely to facilitate joint research and development, but to [BEGIN HIGHLY CONFIDENTIAL]

³² See Petition to Deny, Confidential App. at A-3–A-5.

³³ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL]

³⁴ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

³⁵ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

³⁶ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] and to create a critical mass of market power to disadvantage competitors that are not members of the JOE. As a result, the JOE's technologies are effectively [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] The JOE thus stifles innovation not only by outside companies but also by the members of the JOE themselves.

The JOE contemplates a scheme of coordinated control, joint management, and exclusive development of technologies key to the future of wireline and wireless Internet access technologies. This reaches much further than a simple agreement to research together,³⁷ and poses much more serious harms to the competition and the public interest than a simple research agreement would.

B. The Joint Operating Entity Requires Anticompetitive Conduct Unrelated to Research.

Applicants attempt to counter arguments that their agreements form a cartel by asserting that “[n]othing in the Agency Agreements, the Reseller Agreements, or the Innovation Technology Joint Venture . . . will allow the MSOs or Verizon Wireless to control the production or price of the other’s products.”³⁸ However, Applicants’ Joint Operating Entity is designed to achieve exactly this purpose: to control the parties’ and others’ use of the technology developed by the JOE, and thus to control the entrance of new competitors, products, and services in the marketplace of integrated wireline and wireless services.

³⁷ See *supra* Section II.A.

³⁸ Joint Opposition, Exhibit 6, at 5.

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The JOE Agreement requires the Applicants to engage in anticompetitive conduct that is neither necessary nor conducive to the creation of an innovative research entity. The JOE

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Applicants insist that the JOE is not a cartel because the JOE will not sell any currently existing services or license or distribute content.³⁹ Petitioners note that, even under *the Applicants' own definition* of a cartel,⁴⁰ the JOE qualifies as a cartel. The JOE **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] The JOE

therefore embodies a decision by its members to forego independent decision-making and instead jointly set the prices and terms for its technology.

Moreover, Applicants' protestations that the JOE does not sell any existing services are beside the point and fail to address the real danger of the JOE: that the Applicants will use the

³⁹ *Id.* at 7.

⁴⁰ See Joint Opposition, Exhibit 6, at 5 (“A cartel . . . is ‘[a] combination of producers or sellers that join together to control a product’s production or price.’”) (citing *Freedom Holdings, Inc. v. Spitzer*, 447 F. Supp. 2d 230, 251 (S.D.N.Y. 2004) (quoting BLACK’S LAW DICTIONARY 206 (7th ed. 1999)); IIA PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 405a, at 26 (2d ed. 2002) (“Competing firms form a cartel when they replace independent decisions with an agreement on price, output, or related matters.”)).

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JOE to leverage intellectual property rights over *new* technologies anticompetitively. Even though the Applicants explicitly acknowledge that licensing the JOE’s technology to others would benefit consumers, the Applicants still cannot bring themselves to affirmatively promise that the JOE will be willing to even offer licenses on any terms to competitors.⁴¹ What’s worse, [BEGIN HIGHLY CONFIDENTIAL]

[END

HIGHLY CONFIDENTIAL] The Applicants cannot possibly claim that this agreement is really just about research and development when it includes [BEGIN HIGHLY

CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

entirely unrelated to developing new technology.

Perhaps more tellingly, Applicants utterly fail to respond to Petitioners’ arguments on this front. Applicants ignore Petitioners’ arguments that [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL] They do not respond to [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] In response to

Petitioners’ concerns over the opportunities the agreements present for Verizon and the MSOs to

⁴¹ *Id.* (“The Innovation Technology Joint Venture *may* license these technologies to others”) (emphasis added).

⁴² [BEGIN HIGHLY CONFIDENTIAL]
HIGHLY CONFIDENTIAL]

[END

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act anticompetitively against third parties,⁴³ Applicants point to [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] as if [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] is in any way responsive to the serious problems created by [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Applicants also fail to address the Commissioner’s authority under Sections 624A, 628, 629, and 706 in any meaningful way.⁴⁵

To justify the JOE Agreement, Applicants cite the Federal Trade Commission and Department of Justice guidelines to note that research and development collaborations “*may* enable participants more quickly or more efficiently to research and develop”⁴⁶ new technologies. However, the very next sentence in those same guidelines warns:

“Joint R&D agreements . . . can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants’ individual competitive R&D efforts.”⁴⁷

⁴³ Petition to Deny at 19–20; [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL].

⁴⁴ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

⁴⁵ See Petition to Deny at 5–6, 24, 27–29, 36–41; Joint Opposition at 78.

⁴⁶ Dep’t of Justice & Fed. Trade Comm’n, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000), *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (emphasis added); see Joint Opposition, Exhibit 6, at 18–19.

⁴⁷ Dep’t of Justice & Fed. Trade Comm’n, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000), *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

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The guidelines also caution that joint operations like the JOE “may facilitate tacit collusion on R&D efforts.”⁴⁸ As the agencies warn, joint ventures, like the one proposed here, “may provide an opportunity for participants to discuss and agree on anticompetitive terms, or otherwise to collude anticompetitively, as well as a greater ability to detect and punish deviations that would undermine the collusion.”⁴⁹ Thus the JOE allows Applicants to use their market power anticompetitively to protect their own respective market positions while slowing the pace of competitors’ research and development efforts.⁵⁰ This reduces the number of competitors and leads to fewer, lower quality, and/or delayed products and services.⁵¹

The FTC and DOJ guidelines also explicitly caution that these joint ventures “are more likely to raise competitive concerns when the collaboration or its participants already possess a secure source of market power over an existing product and the new R&D efforts might cannibalize their supracompetitive earnings,” especially if the R&D competition is confined to entities with specialized assets like intellectual property, or when regulatory approval processes limit new competitors’ ability to catch up with incumbent companies.⁵² And here, not only is Verizon Wireless already one of the largest spectrum licensees in the country, but the JOE Agreement is itself part of a larger deal *to transfer even more spectrum to Verizon*.

Seemingly in response to Petitioners’ concerns that the JOE Agreement [BEGIN

HIGHLY CONFIDENTIAL]

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *Id.*

[END

HIGHLY CONFIDENTIAL] Applicants argue that they are still permitted to purchase unrelated technology outside of the JOE.⁵⁴ This is utterly nonresponsive and beside the point. Even if the Applicants retain the right to **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL] they nevertheless are not permitted to **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] What's worse, the JOE Agreement requires the Applicants to **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Going forward, if any of the Applicants **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] This makes the ability to purchase outside technology illusory. If any third-party entities wish to license any of the JOE's technology, **[BEGIN HIGHLY CONFIDENTIAL]**

⁵³ **[BEGIN HIGHLY CONFIDENTIAL]**
[END HIGHLY CONFIDENTIAL]

⁵⁴ Joint Opposition, Exhibit 6, at 17.

⁵⁵ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

⁵⁶ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

⁵⁷ **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL] Moreover, Applicants' assertions that they may [BEGIN HIGHLY

CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

is irrelevant in light of the fact that [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Notably, the JOE will also exacerbate recurring patent disputes between technology companies. [BEGIN HIGHLY CONFIDENTIAL]

⁵⁸ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

⁵⁹ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

⁶⁰ [BEGIN HIGHLY CONFIDENTIAL]
CONFIDENTIAL]

[END HIGHLY

⁶¹ [BEGIN HIGHLY CONFIDENTIAL]
CONFIDENTIAL]

[END HIGHLY

[END HIGHLY CONFIDENTIAL] The

members of the JOE may see this as a useful trump card in recurring patent disputes, but the result is that it will only enhance the anticompetitive effects of the JOE and increase the Applicants' control over nascent technologies integrating wireless and wireline service.

The importance of seamless interoperability between complex operating systems in wireless and wireline communications throws this problem into stark relief.⁶² [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Even if the Commission were to allow the JOE Agreement to stand on condition that the JOE license its patents on reasonable and non-discriminatory terms, the JOE may nonetheless use those patents anticompetitively. For example, patent holders have in the past caused concern through the use of exclusionary orders before the ITC to block competing products from entering the country rather than dispute the terms of a license.⁶³ Importantly, exclusionary orders also affect all downstream products, so any device or

⁶² *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd.*, DEPARTMENT OF JUSTICE (Feb. 13, 2012).

⁶³ *See, e.g.*, Letter from Senator Patrick Leahy, Chairman, and Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Rights, United States Senate, to Eric H. Holder Jr., Attorney General, United States Dep't of Justice (Mar. 15, 2012) ("The misuse of ITC exclusion orders to prevent rival technologies poses a significant threat to competition and innovation . . ."). *See also* 19 U.S.C. § 1337 (establishing the ITC and authorizing it to investigate—on complaint or upon its own initiative—and remedy certain

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good that contains the infringing technology would also be prohibited. Thus, even requiring the JOE to engage in reasonable and non-discriminatory licensing may not be enough to prevent the JOE from opting to threaten competition instead of engaging in licensing negotiations.

[BEGIN HIGHLY CONFIDENTIAL]

[END

HIGHLY CONFIDENTIAL] Applicants' promise that they "are committed to maintaining open networks"⁶⁴ falls short of making enforceable commitments to network openness or to licensing the JOE's intellectual property on fair, reasonable, and non-discriminatory terms.

C. Applicants Make No Response to Petitioners' Attribution Arguments.

Applicants fail to alleviate concerns raised by Petitioners that the proposed agreements create an attributable interest under Title III and Section 652 of the Act.⁶⁵ Applicants respond to Petitioners' concerns that the agreements will enable Verizon and the cable companies to exert improper influence or control over each other by pointing out that **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] but **[BEGIN HIGHLY**

CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL] is entirely separate from the ability to exert influence or control over another entity. Additionally, neither in their initial Application nor in their Opposition do

intellectual property violations by excluding the infringing articles from entry into the United States).

⁶⁴ Joint Opposition, Exhibit 6, at 17.

⁶⁵ See Petition to Deny, Confidential App., at A-8.

⁶⁶ Joint Opposition, Exhibit 6, at 2.

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Applicants make the proffer required under the Commission’s cable ownership rules to avoid any discussion of programming services.⁶⁷ Finally, Applicants ignore Petitioners’ argument that the agreements give rise to an attributable interest under Section 652 because participation in an LLC is fully attributable to the members of the LLC absent a single majority shareholder.⁶⁸ As Petitioners have explained, it is ridiculous to pretend that Verizon Communications is not directly involved in this transaction when the JOE Agreement **[BEGIN HIGHLY CONFIDENTIAL]** **[END**

HIGHLY CONFIDENTIAL] And as Applicants revealed just last week, their discussions of the license transfer and commercial agreements have from the very beginning **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

Applicants are apparently either unable or unwilling to counter the substance of Petitioners’ arguments.⁷¹ Petitioners have thoroughly established how Verizon Wireless is an affiliate of Verizon Communications under Section 652,⁷² as well as how the JOE Agreement **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY

⁶⁷ See 47 C.F.R. § 76.503 Note (b)(2).

⁶⁸ See Petition to Deny, Confidential App. at A-8-A-9.

⁶⁹ See, e.g., **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

⁷⁰ **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

⁷¹ See Petition to Deny at 5, 17–19, 42–44; Petition to Deny, Confidential App. at A-8-A-9.

⁷² See Petition to Deny at 42–44.

⁷³ **[BEGIN HIGHLY CONFIDENTIAL]**
[END HIGHLY CONFIDENTIAL]