

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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Federal Communications Commission  
Office of the Secretary

In the Matter of )

Application of Cellco Partnership d/b/a )  
Verizon Wireless and SpectrumCo LLC For )  
Consent To Assign Licenses )

WT Docket No. 12-4

Application of Cellco Partnership d/b/a )  
Verizon Wireless and Cox TMI Wireless, )  
LLC For Consent To Assign Licenses )

**RCA – THE COMPETITIVE CARRIERS ASSOCIATION**  
**REPLY TO OPPOSITION TO PETITION**  
**TO CONDITION OR OTHERWISE DENY TRANSACTIONS**

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**RCA – THE COMPETITIVE CARRIERS ASSOCIATION**  
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RCA – The Competitive Carriers Association (“RCA”) hereby responds to the joint opposition (the “Joint Opposition”) of Cellco Partnership d/b/a Verizon Wireless (“Verizon”), SpectrumCo, LLC (“SpectrumCo”) and Cox TMI Wireless, LLC (“Cox”) (collectively, the “Applicants”) to RCA’s Petition to Condition or Otherwise Deny Transactions (the “RCA Petition”). Nothing that the Applicants have raised in the Joint Opposition to RCA’s Petition changes the need for stringent conditions on the Transactions. Accordingly, RCA once again urges the Federal Communications Commission (“FCC” or “Commission”) either to place stringent conditions on any approval of the subject applications or, in the alternative, to deny the applications. As set forth in detail below, the Applicants propose a series of transactions (the “Transactions”) that would assign substantial additional nationwide spectrum resources to one of the two largest wireless carriers under circumstances that will pose anti-competitive harms to the industry. The Transactions also would confer substantial value and unique rights to each of the

Applicants – pursuant to a number of reseller/agent and joint marketing agreements integrated with the Transactions (the “Joint Agreements”), and would further cement the wireless duopoly of Verizon and AT&T (the “Twin Bells”) to the detriment of the public interest. In reply, RCA respectfully shows the following:

**I. INTRODUCTION AND SUMMARY**

The Applicants originally presented the Transactions to the Commission as a series of simple, spectrum-only Transactions that raise no significant public interest issues and strenuously resisted opponents’ calls for more information. However, now that a diverse array of adverse parties have weighed in against the Transactions, and the Commission has made clear that it intends to conduct a searching review, the Applicants finally appear to be taking this proceeding seriously, suggesting that there may be more to the Transactions than the Applicants’ original public stance. RCA applauds the Commission for acknowledging this fact, and for taking the initial steps towards taking a hard look at the Transactions. Importantly, these initial steps recognize that the spectrum acquisitions and the Joint Agreements constitute, as a Comcast executive recently conceded, an “integrated transaction”<sup>1</sup> between Verizon and the Cable Companies, which must be subject to synchronized review. By requiring that the Applicants re-file the Joint Agreements<sup>2</sup> with fewer redactions, the Commission has allowed for greater public comment on the Transactions, which will no doubt lead to a more robust record and more reasoned decision-making based upon a more complete record.

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<sup>1</sup> Eliza Krigman, “Comcast executive defends Verizon-SpectrumCo deal,” POLITICO (Mar. 8, 2011) (“*Comcast Article*”).

<sup>2</sup> See, e.g., Letter dated Mar. 8, 2012 from Rick Kaplan, Chief, Wireless Telecommunications Bureau, to Michael Samsoc, Cellco Partnership, WT Docket No. 12-4.

The Applicants' reply filing consists of an 80-page Joint Opposition, along with nearly 200 pages of exhibits. Unfortunately, the Joint Opposition is long on words and short on substance. The Applicants fail to acknowledge the current concentration of market power in the wireless industry, and run for cover under Commission authority from a bygone, pre-duopoly and pre-spectrum crunch era.<sup>3</sup> The Applicants' defense ignores the duopoly that has arisen in both the retail and wholesale wireless marketplaces. In the meantime, the Commission and the rest of the industry recognize that it is no longer 2004, or even 2007. For example, in the last *two* wireless competition reports, the Commission has been unable to find that there is effective competition in the broadband wireless industry. This is due to the fact that the Twin Bells have succeeded in effecting a rapid wave of consolidation, resulting in the duopoly that dominates the industry today. The Twin Bells dominate the industry by any meaningful measure, including total subscriber count, industry EBITDA, total revenues, quantity of prime spectrum and value of spectrum holdings.

Given the Twin Bells' dominance in the wireless marketplace, the Commission can no longer simply stand by and allow the largest carriers to preempt all of the critical spectrum resources, and dominate and control all competitive inputs – such as roaming, handsets and backhaul – that are necessary to allow other carriers to provide competitive services to consumers. The Commission's denial of the AT&T/T-Mobile transaction represented an important result under the "new wireless world order," and the Commission has an equally important opportunity to ensure that the Twin Bells dominance is not extended *ad infinitum*. RCA urges the Commission to adopt the conditions recommended in RCA's filings in this

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<sup>3</sup> See, e.g., Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, 32-33, 43-44 (filed Mar. 2, 2012) ("Joint Opposition").

proceeding to mitigate some of the more harmful aspects of the Transactions to ensure that smaller carriers remain able to compete and provide competitive services to consumers. Given the nationwide nature of the Transactions, the Commission has ample authority to adopt these conditions, as the anti-competitive harms that would accrue on both a local and national levels were the Transactions to be granted unconditionally.<sup>4</sup>

The interrogatories sent by the Commission to the Applicants represent an important first step for the Commission to fulfill its obligation to take a hard look at whether SpectrumCo has engaged in license speculation. While SpectrumCo claims that certain recent statements made by Comcast have been misunderstood and taken out of context, RCA has amply demonstrated to the Commission that Comcast has made repeated statements – over a six year period – detailing its lack of interest in providing facilities-based competition.

In the final analysis, the Commission must decide whether Commission approval of the Transactions would serve the *public* interest – not whether it would serve *the Applicants'* interest. Absent substantial conditions designed to address the significant anticompetitive affects of the Proposed Transactions, these Transactions must be denied. As RCA has demonstrated, the end result of an unconditional grant of the Transactions would be the transfer of valuable public spectrum resources in large part from a speculator (SpectrumCo) to a warehouse (Verizon) and the removal of *four* potential competitors from the wireless marketplace. The transparent Verizon attempt to deflect the serious warehousing claims by now rewriting the story of its spectrum needs, and accelerating the timeframe from 2015 to 2013, must fail.<sup>5</sup>

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<sup>4</sup> *Application of AT&T Inc. and Qualcomm Incorporated For Consent To Assign Licenses and Authorizations*, Order, WT Docket No. 11-18, FCC 11-188, ¶ 32 (rel. Dec. 22, 2011) (“*AT&T/Qualcomm Order*”).

<sup>5</sup> See *infra*, Section VII.B.

To remedy the anti-competitive harms that an unconditional grant of the Transactions would inflict on the wireless industry, the Commission must condition any grant of the Transactions in the following manner: (1) require substantial divestitures of un-or under-used useable spectrum within a Long Term Evolution (“LTE”) ecosystem from Verizon to competitive, operating entities that require additional spectrum immediately; (2) implement interoperability requirements to ensure the availability of innovative wireless devices to competitive carriers; (3) ensure that affordable backhaul and special access is available; and (4) require that Verizon offer to all facilities-based carriers voice and data roaming rates no less favorable than the reseller rates offered to the Cable Companies in the Reseller Agreements, which undoubtedly represent commercially reasonable rates negotiated by sophisticated parties at arms length:

Service	Rate
[begin highly confidential information]	
[REDACTED]	[REDACTED]
[end highly confidential information]	

Given the national scope of the Transactions, nationwide solutions to anti-competitive harms are required. If the Transactions are approved without adopting the conditions proposed by RCA and others, the Commission will have indirectly caused further consolidation of the wireless industry to the detriment of consumers, perhaps beyond repair. Make no mistake – the wireless industry may have reached the tipping point, beyond which the Twin Bell duopoly will simply bide its time waiting for competitive carriers to disappear for want of critical wireless inputs. RCA urges the Commission to heed its statutory duty to promote competition and to prevent

spectrum warehousing<sup>6</sup> and not allow the Transactions to proceed without the stringent conditions proposed by RCA.

## II. THE SPECTRUM TRANSFER IS INEXTRICABLY INTERTWINED WITH THE JOINT AGREEMENTS

The Transactions have never been about maximizing the dollar value obtained for the Cable Companies' spectrum. Instead, the Cable Companies have opted to sell a valuable public resource for a bounty that only Verizon could offer – what effectively amounts to an agreement not to compete with a former rival. Indeed, Comcast has now openly admitted that “[t]he transaction is an integrated transaction” and “[t]here was never any discussion about selling the spectrum without having the commercial agreements.”<sup>7</sup> By structuring the Transactions in a way that Verizon could be the only winning bidder, the Applicants foreclosed on one of the only near-term opportunities for competitive carriers to obtain desperately-needed spectrum on the secondary market. With these anti-competitive, integrated agreements as table stakes, it would have been impossible for *any* other carrier to match Verizon's offer – and not because they would have been unwilling to meet the purchase price.<sup>8</sup> In essence, the Cable Companies exchanged cash on the barrelhead for the opportunity to cement the market dominance of their competitor-turned-partner, Verizon, in hopes of reaping the rewards of stifled competition down the line.

The Commission must consider the anti-competitive impacts of the Joint Agreements when evaluating whether the integrated spectrum transfer is in the public interest – which, absent

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<sup>6</sup> 47 U.S.C. § 309(i)(4)(B).

<sup>7</sup> *Comcast Article*.

<sup>8</sup> While Comcast and others now claim they sought offers from other wireless providers, it is clear that the sale was rigged to ensure one particular outcome – the Transactions and the related Joint Agreements.

stringent conditions, it most certainly is not. To cure competitive carriers' foreclosed access to spectrum at the hands of Verizon, the Commission must order substantial spectrum divestitures to provide others in the industry the opportunity to obtain spectrum that they would not otherwise have and condition any transfer on meaningful conditions.

### III. THE APPLICANTS' ANALYSIS IGNORES THE DUOPOLISTIC STATE OF THE WIRELESS MARKET

As it has done throughout this proceeding, the Applicants continue to urge the Commission to treat this as a typical transaction involving “only the assignment of spectrum – nothing more.”<sup>9</sup> However, to do so would ignore the dominant market position that Verizon, as one of the Twin Bells of the wireless industry, enjoys. As RCA has demonstrated, the Twin Bells control the wireless market by nearly every metric. The Twin Bells account for a combined 90 percent of industry EBITDA,<sup>10</sup> dominate total subscriber numbers and average national spectrum holdings,<sup>11</sup> hold substantial leads in MHz\*POPs<sup>12</sup> and control by far the most spectrum in the top 100 markets.<sup>13</sup> In addition to occupying a dominant spectrum position, Verizon and its Twin Bell counterpart AT&T control the market for essential inputs for the provision of wireless service, such as voice and data roaming, special access and backhaul, and

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<sup>9</sup> Joint Opposition 41.

<sup>10</sup> Peter Cramton, *700 MHz Device Flexibility Promotes Competition*, (Aug. 9, 2010), attached to *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel for Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC, filed in RM-11592 (Aug. 10, 2010).

<sup>11</sup> See Sprint Nextel Corporation Petition to Deny, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer of Control Licenses and Authorizations*, WT Docket No. 11-65 (filed May 31, 2011) (showing that Verizon has an average of 88 MHz while AT&T has an average of 94 MHz).

<sup>12</sup> *AT&T/Qualcomm Order* ¶ 45.

<sup>13</sup> J.P. Morgan, *Wireless Services: Overview of Carrier Spectrum Holdings*, Mar. 30, 2011, at 3, available at [https://mm.jpmorgan.com/stp/t/c.do?i=62A4EB32&u=a\\_p\\*d\\_569842.pdf\\*h\\_ifi22f3](https://mm.jpmorgan.com/stp/t/c.do?i=62A4EB32&u=a_p*d_569842.pdf*h_ifi22f3) (“*J.P. Morgan Spectrum Study*”).

enjoy a commanding advantage in terms of access to the newest and most popular handsets. The fact that the Twin Bells exert control over every critical aspect of the wireless market makes the Transactions about far more than “only” spectrum. The Transactions, if granted without robust conditions, will cement the dominance of the Twin Bells in a potentially final manner. The loss of four potential competitors – who also at one time were important allies for competitive carriers – is potentially as significant as would have been the loss of T-Mobile from the marketplace into the clutches of AT&T. In short, the assignment of nationwide spectrum to one of the Twin Bells should not be taken lightly, and is ripe with potential anticompetitive harms.

Nevertheless, the Joint Opposition seeks to paint a picture of the wireless industry, both pre – and post – Transactions, that does not reflect reality. The lack of awareness – and inaccuracy – regarding the true competitive state of the wireless market pervades the Joint Opposition, as the Applicants repeatedly cite to stale precedent from pre-duopoly days.<sup>14</sup> The wireless marketplace, while once effectively competitive, is now on the precipice, if not already over the edge, of being completely dominated by two players. Significant changed circumstances have transformed the industry over the past few years, and recent Commission precedent acknowledges such changes. The Applicants, however, want the Commission to continue to exist in the past – for example, by asking the Commission to use a broken and outdated spectrum screen that was created in 2004 when the wireless marketplace was effectively competitive – to conduct a current competitive analysis on the Transactions.

RCA has demonstrated the substantial changes that have taken place in the wireless industry since the Commission first adopted its spectrum screen nearly eight years ago. In 2004,

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<sup>14</sup> See, e.g., Joint Opposition n.92 (citing transaction precedent from 2008), n.93 (citing transaction precedent from 2004), n.125 (citing transaction precedent from 2004 and 2008), n.130 (citing transaction precedent from 2007).

the Commission found that there was “generally effective competition in mobile telephony markets,”<sup>15</sup> a finding that it has declined to make in its last two reports on competition in the mobile wireless marketplace. Incredibly, this key fact is conveniently omitted in the Joint Opposition's discussion concerning the wireless industry. Consequently, the cornerstone of the spectrum screen analytical framework has crumbled in the ensuing time period. The Commission must conclude that the spectrum screen, as it currently exists, is no longer an effective tool for an examination of the potential anti-competitive harms posed by the Transactions.

An examination of the current wireless marketplace reveals that many key findings that led to the adoption of a spectrum screen are no longer valid:

- The Commission has declined to make a finding of effective competition in the mobile wireless marketplace in the past two wireless competition reports.
- The Commission initially found that a screen of roughly 1/3 of the total available spectrum was appropriate because “a market may contain more than three viable competitors even where one entity controls this amount of spectrum, because many carriers are competing successfully with far lower amounts of bandwidth today.”<sup>16</sup> As the Applicants concede, this core assumption is no longer valid because of the “massive and accelerating growth in wireless data demand”<sup>17</sup> that all carriers face.

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<sup>15</sup> *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 107 (2004) (“*AT&T/Cingular Order*”).

<sup>16</sup> *Id.* at ¶ 109.

<sup>17</sup> Joint Opposition 13.

- The Department of Justice recently has found that there is a need to preserve at least four nationwide broadband carriers,<sup>18</sup> which is unlikely in a consolidating industry in which the Twin Bells can together preempt 2/3 of the useable spectrum under the spectrum screen.
- The screen was adopted when there was the prospect for significant additional spectrum on the horizon (i.e., AWS and 700 MHz spectrum). This is now unlikely.
- Because of the competitive nature of the marketplace in 2004, the spectrum screen's stated intent was "simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of this transaction."<sup>19</sup> However, as the Commission has already found in the *AT&T/Qualcomm Order*, the potential for competitive harm is not revealed only on a market-by-market basis, but indeed should be viewed on a nationwide basis.

Not surprisingly, the Applicants simply ignore these sea-changes in the structure of the wireless marketplace. Of course, it is in Verizon's interest to live in the *status quo ante*, as that will enable it to protect and extend its Twin Bell dominance indefinitely.

The Applicants completely misrepresent the *AT&T/Qualcomm Order* when they argue that it favors the unconditional grant of the Transactions. In the context of that transaction, the Commission specifically indicated that it would consider even spectrum-"only" transactions

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<sup>18</sup> *United States of America v. AT&T Inc., et al.*, Case No. 1:11-01560, ¶ 36 (D.D.C. Sept. 16, 2011) ("*DOJ Amended Complaint*").

<sup>19</sup> *AT&T/Cingular Order* ¶ 109.

according to a new, duopolistic market paradigm.<sup>20</sup> In circumstances where a major carrier seeks to acquire nationwide spectrum, the Commission indicated that the transaction should be reviewed for competitive harms on a national level.<sup>21</sup> The *AT&T/Qualcomm* transaction also involved assignment of spectrum from an entity that had put the spectrum to use (albeit unsuccessfully) to a carrier that claimed a spectrum need. Here, in contrast, only a small portion of the licenses are held by an entity that has ever offered service to the public (Cox), and the proposed assignments are going to Verizon, which has substantial unused spectrum holdings and no demonstrated need for additional spectrum.

Other transactions cited in the Joint Opposition are equally unhelpful to the Applicants. For example, the cited *Aloha/AT&T* transaction occurred prior to the recognition of the spectrum crunch and the release of the *National Broadband Plan*. Today, there is ample evidence that additional spectrum is badly needed by providers who lack the substantial spectrum reserves of Verizon. Also, the *Nextwave/Cingular* transaction involved substantially changed circumstances arising from multi-year litigation that went all the way to the Supreme Court. Absolutely no such changed circumstances exist here – SpectrumCo has known since 2006 what would be expected to provide beneficial, facilities-based service to the public.

#### **IV. THE JOINT OPPOSITION COMPLETELY IGNORES THE LOSS OF FOUR SIGNIFICANT POTENTIAL COMPETITORS**

The Applicants continue to reiterate their misguided belief that the Transactions should be granted promptly because they involve “only licenses for currently unused spectrum, and

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<sup>20</sup> *AT&T/Qualcomm Order* ¶ 2 (reviewing for anti-competitive harm on a national level notwithstanding the fact that the transaction involved “only the transfer of spectrum licenses and not the acquisition of wireless business units and customers”).

<sup>21</sup> *Id.* at ¶ 32 (noting that “there are certain national characteristics to this transaction that warrant a competitive analysis on the national level. Accordingly, we will evaluate, as appropriate, competitive effects of the spectrum acquisition both locally and nationally”).

there will be no transfer or combination of any other assets, facilities, customers, or operating businesses.”<sup>22</sup> However, this entirely misses the important point regarding the loss of potential competitors – a point that RCA discussed extensively in its Petition, but was essentially ignored in the Joint Opposition.<sup>23</sup> As RCA noted, proper merger analysis “considers both incumbents and identifiable prospective competitors with the resources to compete effectively.”<sup>24</sup> Indeed, the Commission has explicitly recognized that it must “take[] a more extensive view of potential and future competition and the impact on the relevant market, including longer-term impacts.”<sup>25</sup> With these facts in mind, the loss of potential competition simply is too great to ignore.

The loss of potential competition is particularly important in this instance because of the duopolistic nature of the wireless market. With the Twin Bells wielding substantial market power, particularly with respect to inputs such as spectrum, roaming and wireless backhaul, the existence of the Cable Companies as potential competitors operated as one of the last competitive constraints on Verizon and AT&T. Indeed, [begin highly confidential information]

[REDACTED]

[REDACTED]

[end highly confidential information]

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<sup>22</sup> Joint Opposition 2.

<sup>23</sup> RCA Petition to Condition or Otherwise Deny Transactions, WT Docket No. 12-4, 25-30 (filed Feb. 21, 2012) (“RCA Petition”).

<sup>24</sup> *Id.* at 26 (citing DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, § 5.3 (Aug. 19, 2010), available at: <http://www.justice.gov/atr/public/guidelines/hmg-2010.html> (“DOJ Horizontal Merger Guidelines”).

<sup>25</sup> *AT&T/Qualcomm Order* ¶ 25. The Commission also recognizes that it has “unique statutory obligations, distinct from the DOJ, to consider the potential anticompetitive effects of proposed acquisitions of spectrum that is used in the provision of mobile services.” *Id.*, at ¶ 30, n.88

Moreover, the DOJ has concluded that it important for a new entrant into the wireless marketplace to possess “nationwide spectrum, a national network, scale economies that arise from having tens of millions of customers, and a strong brand”<sup>26</sup> – qualities each of the Cable Companies, but few if any other businesses, possess. Thus, the removal of the Cable Companies from potentially entering the wireless marketplace removes a significant option for true facilities-based market entry and competition. Given the Commission’s mandate to protect competition in the wireless industry, it must promote competition and not stand by while potential competitors to be bought out to preserve and enhance a Twin Bell duopoly.

Not only are the Cable Companies losing the ability to individually enter the wireless market, they will enter the market as agents, as well as potentially resellers, for Verizon. This is worse than if they merely sold their spectrum, as Cable Companies’ continued relationship with Verizon will serve to reinforce its market dominance by increasing Verizon’s revenues and customers served. If the Cable Companies instead acted as agents or resellers for other carriers, those competitive carriers would benefit from broader distribution, which would help to cut against Verizon’s market dominance. Further, by entering the wireless market as agents for Verizon, the Cable Companies are precluded from offering roaming agreements with other competitive carriers.

**V. THE COMMISSION HAS THE ABILITY TO REVIEW THE TRANSACTIONS FOR COMPETITIVE HARM ON A NATIONAL LEVEL, AND RCA HAS DEMONSTRATED THAT SUCH HARM WOULD LIKELY OCCUR**

In a misguided attempt to limit the Commission’s review, the Applicants claim that RCA and others have concocted a “variety of novel theories”<sup>27</sup> of competitive analysis, including the

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<sup>26</sup> *DOJ Amended Complaint* ¶ 45.

<sup>27</sup> *Joint Opposition* 47.

contention that the Transitions must be reviewed for competitive harms on a national basis. And yet, the Commission made the same finding in the *AT&T/Qualcomm Order*. In that order, the Commission made clear that, where the transfer of nationwide spectrum is being considered, the Commission will consider the impact of the transaction on nationwide competition. Specifically, the *AT&T/Qualcomm Order* holds:

because of the important national characteristics, competition that occurs at a local level is unlikely to affect, for example, the pricing and plans that the nationwide providers offer unless there is enough competition in enough local markets to make a nationwide pricing or plan change economically rational. Moreover, evaluating this proposed transaction not only on a local level but also on a national level is particularly appropriate in this instance because AT&T is seeking to acquire Qualcomm’s *nationwide* footprint of unpaired spectrum.<sup>28</sup>

The same circumstances exist with respect to the subject Transactions – a nationwide spectrum acquisition engendering nationwide competitive harms. Indeed, RCA discussed at length the likely anti-competitive effects of the Transactions.<sup>29</sup>

In challenging RCA’s and others’ showing of competitive harm at a national level, the Applicants discuss at length the “robustly competitive” wireless marketplace,<sup>30</sup> cherry-picking favorable facts that belie the true competitive state of the current wireless market. It is difficult to imagine why the Applicants’ own finding of robust competition in the wireless marketplace should carry more weight than the Commission’s own wireless competition reports, the last two of which have failed to find “effective” – let alone “robust” – competition in the market for wireless services. The Commission must take the Applicants’ self-interested findings with a

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<sup>28</sup> *AT&T/Qualcomm Order* ¶ 35.

<sup>29</sup> RCA Petition 31-40.

<sup>30</sup> Joint Opposition 48.

grain of salt, and fully investigate the true state of the market, and the effect that the Transactions will have.

**A. Applicants Focus On Competition In The Retail Market, Ignoring The Anticompetitive Effects Of The Transactions On The Market For Critical Wholesale Inputs**

Perhaps not surprisingly, the Applicants focus on competition in the *retail* market for wireless services, completely ignoring the important effects that upstream inputs have on retail competition.<sup>31</sup> Notwithstanding the Commission’s recent failure to find effective competition in the retail marketplace, the situation is ever more dire with respect to wholesale inputs – which are critical to competition. While metrics like customer satisfaction<sup>32</sup> may be important considerations in the retail marketplace, it makes little sense to suggest that high customer satisfaction would counteract competitive harms in the wholesale market. As RCA detailed in its Petition, the Transactions give the already-dominant Verizon “an even greater ability to foreclose access to other critical inputs for wireless services such as, voice and data roaming, equipment availability, special access and backhaul, WiFi offload, and media content.”<sup>33</sup> Although the Applicants claim that the Transactions “will not result in any diminution in the number of service providers offering roaming, and therefore will have no competitive impact on the availability of any roaming services,”<sup>34</sup> the Commission’s competitive analysis clearly must account for the loss of the *four* potential roaming providers that are can no longer enter the market.

Verizon’s claim that to “the extent commenters are dissatisfied with the [roaming] negotiation process or the terms and conditions for roaming, they may file a complaint with the

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<sup>31</sup> *Id.* at 48-49.

<sup>32</sup> *Id.* at 49.

<sup>33</sup> RCA Petition 31.

<sup>34</sup> Joint Opposition 65.

Commission,” is similarly unavailing. The Commission previously has properly ruled that the adoption of its roaming rules “does not . . . obviate the need to consider whether there is any potential roaming-related harm that might arise” from a transaction.<sup>35</sup> This is particularly true in this instance, where the Transactions would result in the exit of not simply one, but *four* potential roaming partners from the marketplace. The Cable Companies, each with a regional wireless footprint and needing roaming agreements themselves, would have had an extremely strong incentive to be cooperative and equitable participants in the market for roaming services – incentives that the Twin Bells sorely lack. Indeed, SpectrumCo has effectively admitted that the difficulties of securing nationwide roaming agreements with the major carriers present a major obstacle, noting that “securing roaming agreements posed another complicating factor”<sup>36</sup> to becoming a facilities-based carrier. In addition, Comcast Executive Vice President David Cohen recently conceded that “access to roaming agreements is *next to impossible*.”<sup>37</sup> Perhaps most importantly, the unwillingness of the Twin Bells to enter into reasonable roaming agreements is entirely of the Twin Bells’ making. Against this backdrop it clearly is contrary to the public interest to permit SpectrumCo – which squatted on a valuable public resource for six years – [begin highly confidential information] [REDACTED] [end highly confidential information].<sup>38</sup> The Commission should not allow the Cable Companies to be rewarded for warehousing and then speculating spectrum – and allow Verizon to continue to hand pick who should be accorded access to the Verizon network to provide nationwide services.

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<sup>35</sup> *AT&T/Qualcomm Order* ¶ 57.

<sup>36</sup> Pick Declaration ¶ 14.

<sup>37</sup> *Comcast Article*.

<sup>38</sup> See discussion *infra* Section VIII.

Similar concerns arise regarding special access and backhaul, where Verizon and the Cable Companies have agreed to jointly market one another's services, meaning that "in many areas the backhaul market may go from a duopoly (Verizon and the Cable Companies) to an effective monopoly (the cooperative Verizon/Cable Companies' joint effort)."<sup>39</sup> These obvious potential anticompetitive harms, which will occur at a national level, should give the Commission extreme pause when considering the Transactions, and can only be remedied by the imposition of strict, robust conditions regarding critical inputs, on any grant of the Applications.

**B. Verizon Dominates the Secondary Market for Spectrum**

By granting the transfer of 20 MHz of prime, nationwide spectrum to Verizon, the Commission essentially will be signing off on Verizon's secondary markets dominance. Back when Verizon was still expanding its network, it was incented to offer concessions to others, in the form of roaming or spectrum swaps, that operated in areas where its network did not operate. However, as Verizon's network has grown, its inclination to engage in spectrum swaps and roaming agreements has dwindled.<sup>40</sup> Although Verizon purports to present evidence that it has been an active seller of spectrum, its list of spectrum transfers fails to prove this point.<sup>41</sup> The 40 licenses that Verizon has transferred over the past five years represents an insignificant portion of its total spectrum holdings, and certain of these transfers were coupled with other transactions where the net effect was to increase Verizon's holdings. And, applications for eight of the 40

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<sup>39</sup> RCA Petition 31.

<sup>40</sup> Indeed, Verizon is so disinclined to participate in reasonable roaming negotiations that it has appealed the Commission's order requiring that data roaming be offered on commercially reasonable terms and conditions.

<sup>41</sup> See Joint Opposition, Exhibit 1.

licenses – fully 20 percent of the total transfers reported – were filed after the Transactions had been announced.<sup>42</sup>

A substantive review of Exhibit 1 to the Opposition indicates that Verizon is an active participant in the secondary markets only when it serves to expand the reach of its own network. For example, 75 percent of the listed transactions are spectrum swaps, as opposed to Verizon permitting other carriers to purchase excess spectrum from it at market rates in standalone sale transactions.<sup>43</sup> As Verizon continues to fill coverage gaps in its network, it has a diminishing incentive to participate even in spectrum swaps, and already has shown its disinterest in the outright sale of spectrum to other carriers. The same is true for Verizon’s much-touted LTE in Rural America Program, in which Verizon offers rural providers the “opportunity” to build out Verizon’s 4G LTE network over leased spectrum. This program operates under extremely strict conditions that ultimately tie the rural carrier to Verizon by forcing them to operate on leased spectrum they do not own, because Verizon refuses to sell such spectrum to these operating carriers, despite a desperate need for it and clear willingness to construct it. The fact that carriers would consider participating in this program at all shows the grave shortage of 4G LTE-capable spectrum available to rural and other competitive carriers, not to mention access to roaming and devices. Simply put, the Commission never intended for the secondary market to benefit only the Twin Bells. So long as Verizon and AT&T control the spectrum market,<sup>44</sup> they will have the

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<sup>42</sup> See *id.* (noting four assignments, covering eight licenses, filed in February 2012).

<sup>43</sup> 18 of the 24 spectrum assignments identified in Exhibit 1 to the Joint Opposition involve spectrum swaps or like-kind exchanges.

<sup>44</sup> Indeed, Verizon all but admits that it controls the secondary market, providing an exhibit stating that incumbent service providers, like Verizon, “are the very firms likely to value the licenses most highly and, thus, be willing to pay the most in secondary markets to obtain licenses.” Joint Opposition, Exhibit 4, ¶ 28.

ability and incentive to freeze out spectrum-starved competitors for anti-competitive purposes. Permitting the Transactions to move forward will simply exacerbate this problem by providing Verizon with 20 MHz of prime, nationwide spectrum that it can withhold from the secondary market, and add to its spectrum warehouse. Indeed, permitting this transaction to move forward signals to others in the secondary market that Verizon is willing to pay an anti-competitive premium for spectrum. This encourages holders of spectrum to wait for a Verizon “sweetheart deal” rather than sell at current market rates to spectrum-starved competitive carriers who would put the spectrum to beneficial use immediately.

**VI. THE COMMISSION HAS A PRIME OPPORTUNITY TO REFORM THE SPECTRUM SCREEN TO MAKE IT RELEVANT IN TODAY’S MARKETPLACE**

Based on the national characteristics of the Transactions – and the competitive harm that will accrue to the industry on a national level – the Commission has the plenary authority to apply stringent conditions in the public interest to any grant. As RCA has explained, “[t]he Commission clearly has the authority under its public interest mandate to conduct an exhaustive review of these Transactions, and to impose appropriate and necessary conditions to remedy the competitive harms that will result.”<sup>45</sup> For years, the Commission has relied on the spectrum screen to fuel its competitive analysis of transactions involving wireless spectrum. During that period, often at the Twin Bells’ behest, the Commission has revised the spectrum screen upward in the context of individual transactions.<sup>46</sup> Indeed, in its application to acquire ALLTEL, Verizon specifically argued that, due to changed circumstances, the spectrum screen “no longer

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<sup>45</sup> RCA Petition 40-41; *see also AT&T/Qualcomm Order* ¶ 32.

<sup>46</sup> *See* ULS File No. 0003463892, Exhibit 1 – Public Interest Statement (“Verizon-ALLTEL Application”).

provide[d] a meaningful trigger for engaging in competitive analyses” and should be revised.<sup>47</sup>

However, now that RCA and others have cited substantially changed circumstances in advocating for a revision to the spectrum screen, Verizon has changed its tune. In a sudden about-face, Verizon now claims that “requests that the Commission revisit the spectrum bands included in the screen in these transactions are unwarranted,”<sup>48</sup> calling efforts to refocus the spectrum screen “far outside the proper bounds of this proceeding.”<sup>49</sup> Yet, Verizon lodged no complaint as the Commission ratcheted the spectrum screen ever-upwards over the years in the context of individual transactions, and cannot now legitimately complain that the Commission may similarly rationalize its spectrum screen in the context of the Transactions before it.

Despite Verizon’s protestations, the Transactions offer the Commission an appropriate opportunity to revise the spectrum screen, should it conclude that a spectrum screen remains a necessary analytical tool for competitive analysis. As RCA previously noted, the Commission may review these Transactions on a national level to determine anticompetitive harm without the use of a spectrum screen because that tool no longer adequately allows the Commission to determine likely competitive impact. However, if the Commission does continue to utilize a spectrum screen, it must adopt revisions that take critical prior precedent and changed circumstances into account. First, it is time for the Commission to implement into its competitive harm analysis its determination that “the more favorable propagation characteristics of lower frequency spectrum (i.e., spectrum below 1 GHz) allow for better coverage across

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<sup>47</sup> *Id.* at iii; *see also id.* at 33-40.

<sup>48</sup> Joint Opposition 56.

<sup>49</sup> *Id.* at 58.

larger geographic areas and inside buildings.”<sup>50</sup> Without such integration, the Commission's prior findings will have no teeth.

The Applicants argue that higher frequency spectrum may sometimes be comparable to spectrum under 1 GHz.<sup>51</sup> However, the cited authority, taken in its proper context, merely alludes to the few narrow circumstances in which higher band spectrum may have desirable attributes as compared to spectrum below 1 GHz.<sup>52</sup> Indeed, as a lead-in to the paragraph referenced by the Applicants (again, conveniently omitted by the Applicants), the Commission plainly states that “[i]t is well established that lower frequency bands -- such as the 700 MHz and Cellular bands -- possess more favorable intrinsic spectrum propagation characteristics than spectrum in higher bands.”<sup>53</sup> Given the unassailable fact that spectrum below 1 GHz has inherently greater utility for providing mobile wireless broadband services, the Commission must take spectrum holdings under 1 GHz into account when conducting a competitive analysis of the Transactions. This must involve greater weight being applied to spectrum under 1 GHz.<sup>54</sup>

In addition, even if the Commission takes no further action regarding the spectrum screen, the current usable amount of spectrum included by the Commission in the spectrum should be revised downward, at least to 135 MHz. This results from: (i) the removal of 12.5 MHz of SMR spectrum that the Commission has referenced may not be suitable for the provision

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<sup>50</sup> *AT&T/Qualcomm Order* ¶ 49.

<sup>51</sup> Joint Opposition 59.

<sup>52</sup> *Fifteenth Report* ¶¶ 292-96. The specific attribute was the ability to achieve higher capacity through greater cell splitting due to the lesser propagation in the higher bands.

<sup>53</sup> *Fifteenth Report* ¶ 292.

<sup>54</sup> For example, T-Mobile provided a potentially relevant analysis of various spectrum types, assigning them weighted values to be used when calculating a spectrum screen. *See* Petition to Deny of T-Mobile USA, Inc., WT Docket No. 12-4, 30-34 (filed Feb. 21, 2012).

of mobile broadband;<sup>55</sup> and (ii) the removal of 10 MHz of 700 MHz D Block spectrum that has been statutorily designated for use by public safety, as advocated by Verizon. The Applicants provide no meaningful arguments as to why this spectrum should not be removed from the screen, instead attempting to “balance out” the justified deletions by adding in more spectrum. However, none of the spectrum bands referenced by the Applicants will be deployed in a manner that meets the Commission’s stated guidelines for inclusion in the spectrum screen, which “consider the spectrum to be a relevant input if it will meet the criteria for suitable spectrum in the near term.”<sup>56</sup>

Indeed, the Applicants struggle to find any legitimate analysis for the spectrum screen not to be lowered. Given the Commission’s new guidelines, and repeated recognition of the differing values among bands of spectrum, it should take this opportunity to meaningfully revise the spectrum screen. A spectrum screen lowered to 135 MHz would result in approximately 125 markets triggering the screen. At the bare minimum, each of these markets must be analyzed for anti-competitive harm.

Moreover, a spectrum screen no greater than 1/4 of the total useable available spectrum in a particular market is now the more appropriate analytical metric, particularly when a transaction involves one of the two dominant carriers in the wireless industry. As RCA has explained, the DOJ took the position in its AT&T/T-Mobile Complaint that there is a need to

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<sup>55</sup> *AT&T/Qualcomm Order* n.126 (“When conducting competitive analysis in the future, the Commission may decide to include only the 14 megahertz of SMR spectrum suitable and available for mobile broadband services.”).

<sup>56</sup> *Id.* at ¶ 42. The Applicants seek to add in 104.5 MHz of BRS/EBS spectrum, 50 MHz of MSS ATC spectrum, 10 MHz of PCS G Block spectrum and 25 MHz of WCS spectrum, none of which have been found by the Commission to warrant inclusion as “near term” spectrum solutions.

preserve at least four nationwide broadband carriers,<sup>57</sup> meaning that the Commission should ensure that there is sufficient spectrum in each market nationwide to support four competitors. The rapid consolidation in the wireless broadband sector makes a screen based upon 1/3 of the spectrum inadequate to preserve the level of competition that is desirable. Further, the FCC's prior observation that some carriers are able to compete with less spectrum was made at a time when carriers did not necessarily require greater spectrum resources to provide expanded services, such as broadband data service. Indeed, the significant demand for wireless data has changed the paradigm substantially as the demand for bandwidth is outstripping supply – something that did not occur when the wireless industry was focused largely on the provision of voice services. If the Commission were to use this more appropriate 1/4 spectrum benchmark, the majority markets would trigger the spectrum screen and warrant closer analysis for anti-competitive harm. Indeed, in the *AT&T/T-Mobile Staff Analysis*, the staff determined that, because the spectrum screen was triggered in so many markets, anti-competitive harm could be inferred on an aggregate national basis without delving into the specifics in each market.<sup>58</sup> The Commission should adopt the same approach here.

The Applicants also claim in one breath that there is no “distinct ‘4G LTE’ spectrum market consisting only of 700 MHz and AWS spectrum,” while essentially admitting that there is such a submarket in their next breath. The Applicants cite certain sources that refer to medium or long term plans for additional LTE deployments in other spectrum bands, but the closest is

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<sup>57</sup> *DOJ Amended Complaint* ¶ 36.

<sup>58</sup> Staff Analysis appended to *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer of Control Licenses and Authorizations*, Order, WT Docket No. 11-65, DA 11-1955, ¶ 34 (rel. Nov. 29, 2011) (“*AT&T/T-Mobile Staff Analysis*”).