Before the

Federal Communications Commission

Washington, DC 20554

In re Licenses of Cellco Partnership D/B/A Verizon Wireless T-Mobile License LLC For Consent to the Assignment of Advanced Wireless Service Licenses	)	WT Docket No. 12-175

To: The Secretary

PETITION TO DENY

The Diogenes Telecommunications Project (DTP) files this Petition to Deny the above captioned applications.[1] As demonstrated herein, Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") has abused its trust as a Commission licensee; it knowingly defrauded millions of its customers for years, and knowingly misrepresented its conduct to the Commission.

Background

Verizon Wireless deliberately and systematically cheated it customers by imposing $1.99 data charges on customers who did not use Verizon Wireless's data services. The FCC's Enforcement Bureau ("Bureau") investigated these charges, but terminated the investigation before it was concluded and before the matter was fully investigated and adjudicated.

The phony $1.99 data charges that Verizon Wireless defended as valid for years in the face of public outcry, large numbers of complaints, and extensive media coverage apparently

[1] Antonio Kovar is a member of DTP and is a customer of Verizon Wireless. Mr. Kovar's Declaration is attached hereto as Exhibit 1.

were first addressed by the Federal Communications Commission ("Commission" or "FCC") on December 4, 2009, when the Wireless Telecommunications Bureau and the Consumer and Governmental Affairs Bureau included several questions pertaining to the matter in a letter dealing primarily with early termination charges. Both this letter and Verizon Wireless's December 18, 2009 response, denying that customers were wrongly charged, are publicly available.

Verizon Wireless's December 18, 2009, response contained material misrepresentations and obviously was calculated to mislead the Commission and the public. In its response to the Commission, Verizon Wireless certified that it only charges customers data usage fees when they launch their Internet browsers on their phones and navigate away from the Verizon Wireless home page. This is not true; Verizon Wireless has admitted that this was not the case. More troubling, officers of the company appear to have been well aware of the phony data charges *before* responding to the Commission on December 18, 2009.

After it dissembled to the Commission, nothing more was publicly heard from Verizon Wireless until it made a public announcement on October 3, 2010 that it planned to issue refunds and credits to fifteen million customers "due to mistaken past data charges." The Verizon Wireless statement did not address why it took the company years to even acknowledge that there was a problem.

On October 28, 2010 the Commission released an order and a consent decree ("Consent Decree")[2] terminating the Enforcement Bureau investigation that had been underway since at least January 2010. Verizon Wireless agreed to pay 25 million dollars to end the investigation. Aside from describing remedial measures for customers that were wrongly charged and

[2] 25 FCC Rcd 15105 (2010).

protective measures to prevent such occurrences in the future, neither the Enforcement Bureau nor Verizon Wireless gave any insight into how Verizon Wireless had managed the issue over several years or any explanation whatsoever for its failure to take corrective action earlier. Despite the previous pleas for answers to these key questions, the public still is completely in the dark about how this travesty could have been prolonged and eventually harm at least fifteen million customers.

The Consent Decree referenced two letters of inquiry sent by the Enforcement Bureau to Verizon Wireless to which the company filed a number of responses and supplementary responses. On November 9, 2010, Smithwick and Belendiuk, P.C. ("S&B") filed a Freedom of Information Act Request ("FOIA") requesting the Enforcement Bureau's Letters of Inquiry ("LOI") and Verizon Wireless's responses. By letter, the Enforcement Bureau gave Verizon Wireless an opportunity to respond to S&B's FOIA request. In its December 20, 2010, response to the Enforcement Bureau, Verizon Wireless objected to disclosure of most of the material sought in the FOIA Request. Verizon Wireless submitted a heavily redacted version of the materials. In a letter dated January 14, 2011, ("Bureau Decision") the Enforcement Bureau withheld from disclosure in their entirety the Enforcement Bureau's First and Second LOIs. According to the Bureau Decision, the material disclosed to Plaintiff was nothing more than the redacted version that Verizon Wireless submitted with its objection letter. Of the one hundred and eleven pages disclosed, most of the text has been redacted. What text remains is largely routine technical description or legal argument. Information pertaining to the questions surrounding Verizon Wireless' conduct with respect to the data charges had been excised.

S&B filed an Application for Review of the Enforcement Bureau's decision on February 4, 2011, FOIA Request No. 2011-060. On August 22, 2011, S&B wrote the FCC requesting

expeditious resolution of the pending Application for Review. On September 30, 2011, the Chief of the Enforcement Bureau sent a letter stating that the Bureau had reprocessed the FOIA request and provided the two requested letters of inquiry with redactions. The Bureau redacted all substantive information leaving only boilerplate procedural instructions. The supplemental response did not "reprocess" Verizon Wireless's responses and supplements, which, as pointed out, was prepared by Verizon Wireless and simply passed on by the Bureau without subjecting the heavily redacted document to its own critical review under FOIA exemptions. The Bureau has taken no further action on the Application for Review and pending FOIA request. The butchered and generally incomprehensible documents released to S&B shed little light on what Verizon Wireless knew, when it knew it, and what it did about it.

On June 4, 2012, S&B filed a Complaint for Injunctive Relief with the United States District Court, seeking review by the Court of S&B's FOIA request. Case No.1:12-cv-00891. The Complaint is currently pending before the court.

Petitioner Has Standing To Object To Verizon Wireless's Qualifications

Antonio Kovar's standing as a Verizon Wireless customer is grounded in the substantial likelihood that Verizon Wireless will defraud him and many others in its 100 million plus customer base in the future unless the Commission designates the licensee's character qualifications for hearing and imposes administrative sanctions as warranted. The knowingly unlawful and deceptive actions of Verizon Wireless over several years, wrongfully imposing phony $1.99 data charges on millions of customers and brushing off or lying to those who complained, amount to a highly organized internal program to pad the bottom line at the expense of unwitting customers.

That the Commission's Enforcement Bureau eventually investigated the matter and negotiated a consent decree with the company is alone inadequate to safeguard Verizon Wireless

customers against repeated fraudulent activities going forward. This was not an isolated instance of misconduct; Verizon Wireless deflected inquiries for years, confusing customers with technical jargon and denials, frequently pointing the finger at the customers' children. Unless the Commission upholds its high standards of conduct for licensees in this case, Verizon Wireless is likely to continue to subject its customers to such shoddy business, factoring in the economic risk that it may be held accountable for some of its schemes and may have to disgorge a portion of its ill-gotten gains, while avoiding any threat to its good standing as a Commission licensee. Enforcement of the Commission's qualification rules here would materially reduce the potential for Verizon Wireless to wrong its customers in the future on so large a scale, for so long, and in such an organized way.

DTP similarly has standing to raise qualifications issues in the context of these applications, which are best described as a "spectrum swap." That the transactions, if approved, would effect a net transfer of licenses from Verizon Wireless to T-Mobile License LLC is inconsequential, since Verizon Wireless would still be acquiring new licenses and must therefore demonstrate its qualifications as a Commission licensee. Furthermore, if after a hearing the Commission determines that Verizon Wireless violated the standards expected of its licensees, the Commission has a range of administrative sanctions it may order, up to and including revocation of licenses. These sanctions may be structured to afford future customers greater protection against similar unlawful actions by Verizon Wireless.

Petitioner Has Raised Substantial Character Issues That Require A Hearing

DTP's February 15, 2012 Petition to Deny the Verizon Wireless cable transactions in WT Docket No. 12-4, sets out the tawdry history of the phony $1.99 data charges affair and the legal obligations the Commission places on its licensees. That petition is attached hereto as Exhibit 2, and is incorporated in this petition. Although there is enough evidence already in the public

record from which to conclude that substantial character issues have been raised, the Enforcement Bureau has withheld its two letters of inquiry and the narrative responses of Verizon Wireless, which make up the substance of its investigation. DTP believes that these materials show unequivocally that Verizon Wireless knew it was cheating millions of its customers for years and nevertheless continued the practice until its back was to the wall and it could no longer pursue its greedy strategy.

Lest there be any question whether DTP has raised substantial qualification issues warranting a hearing, it is incumbent upon the Commission to make the Enforcement Bureau's two letters of inquiry and the Verizon Wireless responses available to parties in this proceeding under protective order during the pendency of the Application for Review and the United States District Court Complaint. These documents will illuminate the company's conduct and degree of culpability for its wrongful acts. Parties deserve an opportunity to review these documents and comment on their import herein. Alternatively, the FCC should take no action in this docket or in Docket 12-4 until the Court has had an opportunity to rule on S&B's FOIA request.

Conclusion

Although Verizon Wireless was able to negotiate a settlement with the Enforcement Bureau for its sustained egregious conduct in respect to the phony $1.99 data charges it knowingly added on to the monthly billing statements of at least 15 million of its customers, it has not been held accountable as a Commission licensee for its wholesale violations of the Communications Act and Commission rules.[3] To overlook the company's breach of its

[3] *See, Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) ("It is the recognized policy of the Commission that assignment of a broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited the authorization."). The FCC describes the "*Jefferson Radio*" policy as a "long-held Commission policy" under which "a transfer or assignment application cannot be granted when there are 'unresolved issues' concerning the seller's basic qualifications." The policy "applies to issues that, if proved,

obligation as a licensee is to send the company a signal that it may continue its fraudulent ways subject only to having to buy itself out of any sticky situation that may arise. Inaction by the Commission on these character issues vastly increases the probability that Verizon Wireless will wrong its customers in the future.

Respectfully Submitted,

By: _____
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July 10, 2012

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could result in the loss of operating authority or denial of a pending application." *In re Application of Mark R. Nalbone, Receiver (Assigner) for Assignment of License of Television Station KFNB (Channel 20), Casper, Wyoming, Memorandum Opinion and Order*, 6 F.C.C.R. 7529 ¶ 7 (Dec. 12, 1991).

Exhibit 1

DECLARATION

I, Antonio Kovar, declare under penalty of perjury, as follows:

I reside in Ocean Pines, Maryland. I am a member of The Diogenes Telecommunications Project. I am a wireless telephone customer of Verizon Wireless.

7-7-12
Date

Antonio Kovar
The Diogenes Telecommunications Project

Exhibit 2

Before the

Federal Communications Commission

Washington, DC 20554

In Re Licenses of:	)	
	)	
	)	
Cellco Partnership D/B/A	)	
Verizon Wireless	)	WT Docket No. 12-4
	)	ULS File Nos.
SpectrumCo, LLC	)	0004996680
	)	0004993617
Cox TMI Wireless, LLC	)	
	)	
For Consent to Assign or Transfer	)	
Control of Licenses and Authorizations	)	
	)	

To: The Secretary

PETITION TO DENY

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February 15, 2012

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SUMMARY

Verizon Wireless, America's largest wireless provider serves more than 92 million customers nationwide. Verizon Wireless and its affiliates hold over 8,000 active FCC licensees, through which it carries on wireless operations that in 2010 generated $62 billion. Despite a highly successful business model and huge profits, Verizon Wireless has been deliberately and systematically cheating it customers by imposing $1.99 data charges when no service was used. The exact amount of the overcharges cannot be calculated at this time, but it may well be far in excess of the announced refunds and credits of $50 million.

That Verizon Wireless continued its pattern and practice of charging for phantom data sessions long after being put on notice by legions of complaints, is strong evidence of a calculated scheme by the company to defraud its customers. It strains credulity for Verizon Wireless to maintain as it did in its statement of October 3, 2010 that it "mistakenly" overcharged at least fifteen million customers over a several year period. This type of false billing is inconsistent with the standard of conduct expected of an FCC licensee, especially an industry leader. Verizon's conduct amounts to willful and repeated violations of the Communications Act, a serious breach of its public trust as an FCC licensee, and either gross incompetence, purposeful neglect, or intentional criminal fraud.

When the Wireless Bureau asked the company to explain itself, Verizon Wireless did the one thing no licensee is permitted to do, it responded with mistruths and half-truths. The Enforcement Bureau conducted its own secret investigation, which ultimately resulted in Verizon Wireless agreeing to a partial refund of the funds it had misappropriated from its customers. Unfortunately, the Enforcement Bureau has refused to make public both its letters of inquiry and Verizon Wireless's responses thereto. Smithwick and Belendiuk's FOIA requests has gone

unanswered. The Bureau produced only what Verizon Wireless approved for release and meaningless sections of boilerplate. Verizon Wireless's customers have an absolute right to know exactly what Verizon Wireless did, what it knew about the phony charges and when it knew it.

The Commission should designate these applications for hearing (1) to determine whether Verizon Wireless made material misrepresentations to the Commission and its customers and (2) to determine whether Verizon Wireless's authorizations to continue as a common carrier should be revoked.

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Cellco Partnership D/B/A	)	
Verizon Wireless	)	WT Docket No. 12-4
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SpectrumCo, LLC	)	0004996680
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	)	
For Consent to Assign or Transfer	)	
Control of Licenses and Authorizations	)	
	)	

To: The Secretary

PETITION TO DENY

The Diogenes Telecommunications Project (DTP) files this Petition to Deny the above captioned applications, because Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless) has abused its trust as a licensee and made knowingly false statements to the Commission.

STANDING

Antonio Kovar is a member of DTP and a customer of Verizon Wireless. Mr. Kovar's Declaration is attached hereto as Exhibit 1.

INTRODUCTION

Verizon Wireless, America's largest wireless provider serves more than 107 million customers nationwide. Verizon Wireless and its affiliates hold more than 8,000 active FCC licenses, through which it carried on wireless operations that in 2010 generated revenues of $62

billion.[1] Despite a highly successful business model and huge profits, Verizon Wireless deliberately and systematically cheated it customers by imposing $1.99 data charges on customers who did not use Verizon Wireless's data services. The FCC's Enforcement Bureau ("Bureau") investigated these charges, but terminated the investigation before it was concluded and before the matter was fully investigated and adjudicated.[2] The *Consent Decree* states:

> Verizon Wireless and the Bureau agree that this Consent Decree constitutes a settlement of the Investigation. This Consent Decree does not constitute either an adjudication on the merits, or a factual or legal finding or determination regarding any compliance or noncompliance with, or applicability of, the Act or the Rules.

The *Consent Decree* between Verizon Wireless and the Bureau, in addition to the payment of 25 million dollars to the US Treasury, required Verizon Wireless to refund approximately $52.8 million to 15 million wrongly charged customers.

Paying a fine and returning (some of) the money it took does not address the central issue of Verizon Wireless's character qualifications. The Commission has not had a chance to review Verizon Wireless's conduct concerning the phantom data charges. More importantly, the public, especially Verizon Wireless's customers, has not had a chance to conduct its own investigation or review the documentation Verizon Wireless provided to the Bureau. This evidence, as well as any other evidence Verizon Wireless has in its possession is vital to a fair and full review of its conduct concerning the phantom data charges.

That Verizon Wireless continued its pattern and practice of charging for phantom data sessions long after being put on notice by legions of complaints is strong evidence of a calculated scheme by the company to defraud its customers. It strains credulity for Verizon Wireless to

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[1] Verizon Wireless Investor Relations, http://investor.verizon.com/business/wireless.aspx.

[2] *In the Matter of Verizon Wireless, Data Usage Charges(Consent Decree)*, 25 FCC Rcd 15107 (Enf. Bur. 2010)

maintain, as it did in its terse statement of Sunday October 3, 2010, that it "mistakenly" charged at least fifteen million customers over a several year period. This type of false billing is inconsistent with the standard of conduct expected of an FCC licensee, especially an industry leader. Verizon Wireless's conduct here amounts to willful and repeated violations of the Communications Act, a serious breach of its public trust as an FCC licensee, and either gross incompetence, purposeful neglect, or intentional criminal fraud. When the FCC asked the company to explain itself, Verizon Wireless did the one thing no licensee is permitted to do, it responded with half-truths and misrepresentations. As shown herein, information already in the public record confirms that Verizon Wireless made material misrepresentations to the FCC and must now pay the penalty: the denial of consent to the assignment of AWS-1 licenses on the grounds that Verizon Wireless is not qualified to hold Commission licenses.

THE PUBLICLY AVAILABLE EVIDENCE SHOWS THAT VERIZON WIRELESS KNOWINGLY OVERCHARGED ITS CUSTOMERS

For several years, customers had been complaining about mysterious data usage charges on their Verizon Wireless phone bills. Verizon Wireless's questionable practices reached the attention of the nation when on August 14, 2009, Teresa Dixon Murray, a reporter for the *Cleveland Plain Dealer*, in her Money Matters column wrote about the problems she was having straightening out her Verizon Wireless bill:

> I have cell phone service through Verizon. My two children's phone lines are tied to the same plan (saves lots of money).
>
> Every month for the past seven months, Verizon has billed two of our three lines -- but never the same two -- for a $1.99 "data usage" charge. They say we must be "accidentally" accessing the Internet -- even though doing that requires hitting several buttons in sequence.

> I've been fighting with Verizon about this all year. The customer service folks insist they can't identify the day and time I accidentally accessed the Internet. (I found out later they can.)
>
> They also insist Verizon can't block the ability to accidentally access the Internet unless it also blocks all picture-sending capability and other services. (I later found out this also is incorrect.)
>
> My patience with this issue ran out last month. I went to a local Verizon store and told the nice salesman, Jason, that I wasn't leaving until the mysterious, recurring $1.99 "data usage" charge was resolved. Lo and behold, he was able to look up what day and time my son most recently "accidentally" accessed the Internet for one minute and one minute only.
>
> It turns out this $1.99 charge showed up on my son's line on a day when he was grounded from his phone. His phone was in my dresser drawer. And we were out of town that afternoon. Oops. No accidental Internet access going on that day.
>
> Verizon's next explanation was that it has a "backup assistance" service that automatically backs up your contacts list without your knowledge in case you lose or break your phone. Some people get charged $1.99 a month for this, even though it's free.
>
> During the past few weeks, I informally surveyed some friends and relatives: Nearly every one of them has been dealing with this same $1.99 data usage charge every month.[3]

This story generated more than 400 reader responses with similar complaints. Ms. Murray followed up on August 24, 2009, with a second column about Verizon Wireless's widespread billing problems, reproduced below, in pertinent part:

> At a minimum, thousands of customers apparently have been charged $1.99 per month for Internet "data usage" even though they had not tried to go online. In some cases, customers were charged when their phones were off, the batteries were dead, the phone's Internet access was blocked or even when the phones didn't have the software to go online.

[3] Verizon's $1.99 'data usage' charge ended, but it wasn't easy: Money Matters, August 14, 2009. http://www.cleveland.com/moneymatters/index.ssf/2009/08/verizons_199_data_usage_charge.html.

Hundreds of Verizon customers told *The Plain Dealer* that they got the same incorrect information both in stores and from customer service workers in call centers.

Some readers say they've been battling the charges for more than a year. Most said they're tired of calling Verizon month after month. Some were irate because they'd punished their children because they wrongly believed the kids had gone on the Internet. One reader said his mom's phone was charged for Internet access - weeks after the mother had died and her phone sat idle in her empty home.

Karen Fullerman of Twinsburg is typical of customers who complained to *The Plain Dealer* last week.

Fullerman has three phone lines; two are for her 23-year-old twin daughters. Fullerman has been charged $1.99 on one or two phones every month. And sometimes there's an extra $9.99 download fee. Fullerman, who recently lost her job, said every dollar counts these days.

She insists that none of the three has gone on the Internet. And she said Verizon has told her repeatedly that the company has blocked the phones' ability to go on the Internet - yet the Internet charges continue.

The same is true for James Grega of Brunswick, whose four phone lines with Verizon have been getting charged sporadically for about four months.

"The phones are still being charged after I had them blocked," Grega said. "Their assurance that the $1.99 charges would stop has been a joke."

Also frustrating to customers are several incorrect statements from Verizon workers:

Verizon can't determine the dates or times of supposed Internet access. The company can, said Joseph Hall, an associate director of customer service for Verizon.

You can't block a phone's ability to access the Internet without blocking the phone's ability to send pictures. You can.

> A $1.99 data usage charge could be caused by the company's "backup assistant" service. It can't; the service doesn't involve data usage and is a different line item for subscribers.
>
> The company can't refund charges beyond the current month. "We do it all of the time," Hall said.
>
> Brian Forneris of Amherst has made a mission of complaining every month he's hit with $1.99 data usage charges or $9.99 premium text message charges.
>
> "I had success for a few months with getting Verizon to remove/credit the charges," he said. "However, they have refused to do so some months. I suspect that they hope that people will not dedicate the time and effort to wait on hold and argue for a few dollars."
>
> Ferneris is standing on principle and talked to them as recently as last week.
>
> "They continue to claim that they cannot block the ability to access megabyte usage without also blocking text messaging capabilities."[4]

The New York Times was next to pick up on the phantom data charge scheme. In his November 12, 2009 column, *The New York Times'* David Pogue reported on a "bit of greedy nastiness" from Verizon Wireless:

> Here's one example, from a Verizon customer:
> "David, I read your posts about how the cell carriers are eating up our airtime with those 15-second 'To page this person, press 5' instructions, but I think Verizon has a bigger scam going on: charging for bogus data downloads.
>
> "Virtually every bill I get has a couple of erroneous data charges at $1.99 each—yet we download no data.
>
> "Here's how it works. They configure the phones to have multiple easily hit keystrokes to launch 'Get it now' or 'Mobile Web'—usually a single key like an arrow key. Often we have no idea what

[4] Verizon offering refunds because of mystery 'data usage' charges, Money Matters, August 24, 2009. http://www.cleveland.com/business/index.ssf/2009/08/verizon.html

key we hit, but up pops one of these screens. The instant you call the function, they charge you the data fee. We cancel these unintended requests as fast as we can hit the End key, but it doesn't matter; they've told me that ANY data–even one kilobyte–is billed as 1MB. The damage is done.

"Imagine: if my one account has 1 to 3 bogus $1.99 charges per month for data that I don't download, how much are they making from their 87 million other customers? Not a bad scheme. All by simply writing your billing algorithm to bill a full MB when even a few bits have moved."

As it turns out, my correspondent is quite correct. My last couple of Verizon phones did indeed have non-reprogrammable, dedicated keys for those ridiculously overpriced "Get it now"-type services that I would never use in a million years.

At about the same time, I got a note from a reader who says he actually works at Verizon, and he's annoyed enough about the practice to blow the whistle:

"The phone is designed in such a way that you can almost never avoid getting $1.99 charge on the bill. Around the OK button on a typical flip phone are the up, down, left, right arrows. If you open the flip and accidentally press the up arrow key, you see that the phone starts to connect to the web. So you hit END right away. Well, too late. You will be charged $1.99 for that 0.02 kilobytes of data. NOT COOL. I've had phones for years, and I sometimes do that mistake to this day, as I'm sure you have. Legal, yes; ethical, NO.

"Every month, the 87 million customers will accidentally hit that key a few times a month! That's over $300 million per month in data revenue off a simple mistake!

"Our marketing, billing, and technical departments are all aware of this. But they have failed to do anything about it—and why? Because if you get 87 million customers to pay $1.99, why stop this revenue? Customer Service might credit you if you call and complain, but this practice is just not right.

"Now, you can ask to have this feature blocked. But even then, if you one of those buttons by accident, your phone transmits data; you get a message that you cannot use the service because it's

> blocked–BUT you just used 0.06 kilobytes of data to get that message, so you are now charged $1.99 again!
>
> "They have started training us reps that too many data blocks are being put on accounts now; they're actually making us take classes called Alternatives to Data Blocks. They do not want all the blocks, because 40% of Verizon's revenue now comes from data use. I just know there are millions of people out there that don't even notice this $1.99 on the bill."[5]

Based on these newspaper reports and complaints it received from consumers, the Wireless Bureau in a December 4, 2009 letter, asked Verizon Wireless to explain exactly how its customers can incur data usage charges.[6] As established by its October 3, 2010 admission, Verizon Wireless's December 18, 2009, response contained material misrepresentations and obviously was calculated to deceive both the Commission and the public:

> Usage fees for Verizon Wireless' mobile Internet service, Mobile Web, apply when a customer launches the Internet browser and then navigates away from the default Mobile Web homepage to sites other than a Verizon Wireless customer care site (*e.g.*, My Verizon, the online customer account portal). Usage fees are not charged when a customer simply launches the Internet browser and lands on the Verizon Wireless Mobile Web homepage, which is the default setting.
>
> ...
>
> If the browsing session ends [on the Mobile Web homepage] without the customer navigating to another webpage, the customer will not incur charges for Mobile Web browsing.

In response to the Commission's letter inquiry, therefore, Verizon Wireless certified that it only charges customers data usage fees when they launch their Internet browsers on their phones <u>and</u> navigate away from the Verizon Wireless homepage. This response contradicts

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[5] Verizon: How Much Do You Charge Now?, November 12, 2009. http://pogue.blogs.nytimes.com/2009/11/12/verizon-how-much-do-you-charge-now/

[6] DA-09-2535A1 Letter of Wireless Telecommunications Bureau and Consumer & Governmental Affairs Bureau to Verizon Wireless December 4, 2009

Teresa Dixon Murray, who wrote about how her son's phone was charged for data usage on a day it was turned off. According to Verizon's initial response to the Commission, she is mistaken, as are the Verizon Wireless employees she interviewed, who acknowledged that the company had a problem. What about the customers being charged data usage fees even when their phones were turned off, the batteries were dead, Internet access was blocked or when the phones did not have the software to go online? According to Verizon Wireless, these customers are all mistaken. What about the relatives of people who died, yet still were billed for data usage charges? What about Verizon Wireless's previous admission that its "backup assistance" will automatically backup a customer's contacts list without the customer's knowledge? If Verizon Wireless's December 18, 2009 response is to be credited, its own employees are mistaken. Verizon Wireless unequivocally stated to the FCC that the writers of the articles in *The Cleveland Plain Dealer,* and *The New York Times* are mistaken, that the many thousands of people who reported incidents of abuse and overcharging to the company and government are all mistaken. Then, over nine months after it denied improper data billing practices in its response to the FCC, Verizon admits that, *it* is "mistaken."

On October 3, 2010, a Verizon Wireless Deputy General Counsel issued a terse statement announcing the company's plan to make refunds and credits to the accounts of 15 million of its customers, "due to mistaken past data charges." Verizon did not offer any explanation of how such a "mistake" could have happened and been prolonged over several years without acknowledgment and correction by the company.

The "mistake" that Verizon Wireless claims it made; what kind of a mistake was it? Was it an innocent mistake? Most certainly it was not. Verizon Wireless's customers have been complaining for years about unwarranted data charges; its employees were well aware of the

problem and the FCC inquired into the practice ten months before Verizon's revelation on October 3, 2010. The "mistake" unquestionably was not innocent, but rather insidious.

The Consent Decree between the Bureau and Verizon Wireless is telling on this point insofar as it identifies the sources of the "mistaken" charges:

> the Company has concluded that the majority of the erroneous charges involved data exchanges caused by third-party software built into certain customers' phones, while other charges resulted from, *inter alia*, customers accessing certain web links that should not have incurred charges, devices that incurred charges for attempts to access data when there was insufficient network coverage to complete the transfer, and unwanted third-party data transfers affecting customers with content filters.[7]

These are hardly the kinds of occurrences that could have eluded Verizon Wireless for years after having been put on notice by its customers, the media and the FCC. There is simply no other explanation for its conduct than that it was milking its customers for the additional revenue for as long as it could get away with the scam.

In the wake of Verizon Wireless's stunning admission on October 3, 2010, two articles capture what many customers who have been burned by the company were undoubtedly feeling. These pieces by Bob Dyer in the *Akron Beacon Journal* on October 12 and 19, respectively, are reproduced in full:

> Oct 12, 2010 (The Akron Beacon Journal - McClatchy-Tribune Information Services) -- How can a company this incompetent rake in $62 billion a year? Oh, wait. Silly me. These guys aren't inept; they're dishonest.
>
> How else to explain the saga of the bogus $1.99 "data usage" fee that Verizon Wireless has been tacking onto millions of cell phone bills, month after month after month, for at least three years? How else to explain the company's repeated denials to the Federal

[7] Consent Decree, at 7

Communications Commission and to newspapers across the country -- including this one -- that anything was amiss with its billing system? As the Plain Dealer first pointed out back in August 2009 -- and Verizon finally admitted last week -- the nation's largest cell-phone company routinely billed small amounts for Internet usage to customers who weren't using their phones to access the Internet. Some of those charges showed up for phones that were sitting in drawers, broken. Some showed up for phones that didn't even have the software to connect to the Internet. Most showed up on the bills of regular folks who just weren't paying attention.

Take a close look at your old Verizon bills. Do you see any charges for $1.99 that you can't explain? Bingo.

Until now, Verizon had said none of this was possible. Somebody must have gotten a hold of those phones and downloaded something, the company insisted.

As a result, plenty of parents had contentious discussions with teenage sons and daughters, falsely accusing them of incurring extra fees for downloading music or ring tones.

Three months after the PD's expose, the New York Times picked up on the story and added another wrinkle: It quoted a Verizon insider who said that, not only did Verizon know all about the problem, but the company designed its phones so that "you can almost never avoid getting a $1.99 charge on the bill" because you would accidentally connect to the Web merely by hitting the "up" arrow key.

After the Times weighed in, the FCC said it would investigate. Meanwhile, Verizon continued to blame its customers.

After several months of seeing these fabricated charges on multiple phones, your favorite columnist -- who normally doesn't hyperventilate over a buck here or a buck there -- marched into his local Verizon store armed with a fistful of bills and some newspaper articles and demanded a refund.

After a futile 45-minute fight with several employees -- one of whom implied I was lying -- I headed home, called the company's national toll-free number and told them to turn off every feature that could conceivably trigger an extra charge on every phone in the household.

That worked -- for about six months. In April, the dreaded $1.99 started showing up again. At that point, I put on my journalist hat and contacted the company's media relations department, concluding my e-mail this way: "All of the evidence points to Verizon knowing all about this problem but dragging its feet on a solution because the glitch is extremely lucrative. Anything you can tell me to convince me otherwise?" In a return e-mail, Erica Sevilla, a regional public-relations manager based in Illinois, expressed her horror and indignation: "To suggest that Verizon Wireless is deliberately charging customers for accidental data usage is both absolutely false and against our culture." She also implied that anyone complaining was a moron.

"It's critical that customers understand the kinds of applications that require data either be sent or received," she wrote, citing Web connections, ring tones and games.

Yes, Erica, we understand. We understand completely. For at least three years, your company blamed its customers for an issue it knew was created by Verizon.

Last week, with the FCC on their heels, the fine folks at Verizon finally fessed up and promised to deliver as much as $90 million in rebates. Its news release was laughable: "Verizon Wireless issues credits to customers from time to time based on regular review and monitoring. When we identify errors, we remedy them as quickly as possible." What an absolute crock. They just now identified the problem? What actually happened is they realized the FCC was closing in, and they tried to head off the horrendous publicity as best they could.

Verizon says affected customers typically will receive a $2 to $6 credit on their next bill. But check your old bills, because your amount could be substantially higher.

And if you don't get satisfaction from Verizon, you can go online and fill out an FCC complaint at http://www.fcc.gov/cgb/consumerfacts/Form2000B.pdf -- or call 888-225-5322 weekdays between 8 a.m. and 5:30 p.m.

Last week, two days after Verizon's belated confession, I opened my latest bill. Guess what? One of our lines was charged $1.99 for data we could not possibly have accessed.

So how is Verizon going to compensate the kids whose parents falsely accused them of running up data charges? How is Verizon going to compensate the adults who took the time to challenge the charges and were accused of lying? How is Verizon going to restore one whiff of its credibility? Well, maybe the last question isn't as pressing in our area now that Verizon has gobbled up one of its main competitors, Alltel.

The FCC said in a statement that "questions remain as to why it took Verizon [more than] two years to reimburse its customers," and held out the possibility of significant penalties.

While they're at it, maybe the commissioners will take a look at Verizon's ploy to compensate for the bogus millions it no longer will be collecting: If you walk into a store today and buy one of Verizon's most popular phones, you must agree to pay $9.99 every month for a "data package" -- regardless of whether you want to use the phone to go online.

Can't you just switch to another carrier? Absolutely -- as long as you don't mind buying new phones for the whole family, paying an enormous "early termination fee" if you're still under contract, and taking a chance that the next company's reception will be spotty in your particular area.

People who own the latest smart phones and spend half the day connected to the Web might think this is much ado about nothing. But plenty of your neighbors have been battered by the recession and have no interest in paying for something they're not using.

A lot of those folks don't see much difference between the methods employed by Verizon and those employed by the people who attack ships off the coast of Somalia.

. . .

October 19, 2010 (The Akron Beacon Journal - McClatchy-Tribune Information Services) A former regional manager for Verizon Wireless retail outlets says the company knew all about the bogus $1.99 "data usage" charges that have been showing up for years on customers' bills -- and says Verizon also has been hitting millions of customers with bogus $9.99 ring-tone subscription fees.

The ex-manager says he witnessed numerous ugly confrontations between family members when parents mistakenly accused their teenage sons and daughters of using their phones to access features that cost extra.

As we told you last week, until this month Verizon had steadfastly denied a barrage of newspaper reports that said the company was erroneously billing millions of customers for data usage.

People who were not using their phones to access the Internet -- including people whose phones were broken or did not even have the software necessary to access the Internet -- were being hit repeatedly with that $1.99 fee.

The worst aspect of the situation was that, year after year, Verizon kept blaming its customers, saying they were either connecting accidentally or that someone else in their household (read: spoiled teenagers) kept downloading ring tones or music.

Then, suddenly, a light bulb went off in Verizon's head -- greatly assisted by the fact that the Federal Communications Commission was on the brink of flipping its own switch.

Well, golly, the company said, we have just now discovered a tiny little glitch that dates back a few years and has cost consumers something like $90 million.

After Verizon's announcement, I wrote a column tracing the situation and ripping the company for its dishonesty. That same day, I received a phone call from a Verizon insider who said I was correct but that only part of the story has been told. The other part involves false billings for ring tones.

The man is a former manager for the Wireless Center -- a group of about 40 retail outlets that sell exclusively for Verizon -- who oversaw three area stores. His name is being withheld because he is interviewing for another job in the same field and is worried that prospective employers would view him as a troublemaker.

He says 10 to 12 customers a day would come in asking about the $1.99 data charge. What has not been reported, he said, is that roughly the same number of customers were complaining about a continuing $9.99-a-month fee for ring tones.

Verizon customers who text certain words to certain numbers are

subscribed. The texts go to a third party, which notifies Verizon of the enrollment, and the two companies share the fee, the man said.

Many of his customers claimed never to have sent such a text -- which he often was able to confirm.

"On a lot of these devices, you can go into the history -- even if a customer has attempted to delete all of their messaging history -- to verify if they have or have not sent a text message to request a service." In case after case, an examination would reveal the customer had not, in fact, sent a text that would trigger the subscription. It happened so often that he began to contact some of the "reputable" third-party vendors and ask whether they had sent a customer's information to Verizon. And in many of those cases, the company said no.

"We could verify that Verizon put that charge on their bill without a request from a company saying to charge that amount," he said.

Any doubt in your mind that Verizon was fully aware of these things? "No doubt in my mind at all," he said during an interview at the Beacon Journal. "It's clear from the amount of customers that I've dealt with one-on-one -- being a regional manager, I paid attention to every customer, every transaction that came through the stores -- and seeing the way [things were handled].

"Absolutely. Verizon is 100 percent aware that [the fee] is in there. And it is not an error. It is intentional." The man also was a firsthand witness to nasty confrontations between parents and teens who had been falsely accused of lying about incurring the $1.99 or $9.99 charges.

"There are all kinds of parents in the world -- the parent who says, 'OK, I'm just going to take your phone,' the parents who will scream and yell, parents who will ground the kids, parents who will hit the kid.

"It can cause a whole family rift. It will start with this small argument about this $1.99 data charge and it will go into every family problem they will ever have that they chose to talk about right there. It ends ties and burn bridges -- over this $1.99 fee." As if that weren't enough, Verizon also apparently has issues with figuring the taxes on bills. "Even if they [customers] stay in their home and use their phone the exact same amount, their bill's not the same, and it's because their tax rate fluctuates at times when it

> shouldn't." Based on what? "That's something I haven't been able to figure out.
>
> "A lot of customers, when it's a dollar here or a dollar there, they don't put a lot of work into it. I wound up with a customer [he named her], and we would sit on the phone with Verizon for hours. She was a nice woman, but she was not giving up. After three months, they couldn't figure out why her tax rate had changed. They credited her, but they didn't fix it. "A penny here, a half a penny there -- with so many customers, that makes a significant impact." Verizon officials continue to insist the company rectifies billing mistakes as soon as it discovers them and has never tried to sneak through charges.
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> "If a vendor is inappropriate billing our customers and not going through the . . . opt-in process, we need to know," Verizon spokeswoman Laura Merritt said in an e-mail. "We'll take legal action against the app owner on behalf of the customer, as we have done in other situations such as spamming [and] telemarketing." She says she is not aware of Verizon taking action against any ring-tone providers.
>
> We'll see how well the company's assertions hold up when the FCC completes its investigation, which began in January.

It is not forthcoming of Verizon Wireless to call repeated, knowing overcharges a mistake. There was no mistake, only criminal conduct, deceit, lies and fraud. The available evidence suggests that as early as 2007, Verizon started charging its fraudulent data usage charges. Several Internet commentators suggest that: "Verizon was well aware of the problem but chose to do nothing." The unwanted data "usage charges are a great way to get people to upgrade to these [higher priced data] plans, mainly because people want to continue using their applications and games without paying massive fees. So people are duped into upgrading their plan and paying a rate hike for the same service they had the month before."[8] To avoid the "inadvertent" data usage charge and to allow the customer to continue to receive certain features

[8] http://stateofaffairs.info/archive/stop-verizon-charges/comment-page-1/#comments.

the customer was already paying for, Verizon had a $9.99 monthly data plan that allowed the customer to download up to 25 MB of data per month.

It appears that Verizon Wireless was imposing additional data charges and then blaming the customers for inadvertent usage, much as it tried to blame the *Cleveland Plain Dealer* reporter, Teresa Dixon Murray, claiming that her son must have inadvertently accessed the Internet. Verizon would falsely insist that it could not block a customer phone's ability to accidentally access the Internet unless it also blocked all picture-sending capability and other services. Verizon's customers were faced with a choice, upgrade or lose services like picture-sending for which they were already paying. Either through the $1.99 fraudulent charge or through misrepresentation to its customers to get them to switch to the $9.99 per month data package, Verizon was adding to its already fat bottom line.

The customer complaints, newspaper articles and the FCC's continuing investigation had exposed Verizon's $1.99 scheme and made it untenable. It decided to switch gears and require a $9.99 monthly data plan for all 3G mobile devices. Who says you can't have your cake and eat it too? Beginning in March 2010, Verizon announced it would require a $9.99 data plan for mobile devices that work fine without them, saying that it would save users from hitting the wrong button and racking up accidental web charges. One typical customer comment will suffice to make the point.

> I think that it's pretty pathetic that Verizon is mandating a $9.99 data package on 3G phones and $30 on Smart phones. I have a Moto Rival which I had activated back in 2009 and I don't have a data plan. My wife (which is on my plan) is up for a new phone (new every 2) and I noticed that data plans are now required on the Moto Rival and other 3G phones. This is ridiculous! I personally want to get a phone for the phones features, not the internet. Smart phones and Multimedia phones come with greater built in features

> that do not have anything to do with the internet (games, apps, music). If I want to get anything off of the internet, I'll do it from my laptop and transfer it over to the phone. If I had a smart phone (such as the Droid), I would use previously downloaded (from home) music, games, and apps. I'm sure I'm not the only one that doesn't need internet at their fingertips 24-7.[9]

The evidence in the public record strongly suggests that Verizon Wireless was operating a criminal enterprise designed, to first boost its revenues with phony charges and second to get its customers to switch to a more expensive data plan, one that they did not need nor want. When confronted by the FCC in December 2009, Verizon Wireless made material misrepresentations concerning its $1.99 data usage charges. As the evidence mounted, Verizon Wireless decided that its best tactic was to force its customers to take the $9.99 data plan whether they needed it or not. When it could no longer defend the $1.99 data usage charge as legitimate and the Commission apparently was closing in on the scam, it decided that it would refund the "mistakenly" billed customers $2 to $6 on average.

THE EVIDENCE VISIBLE AND INVISIBLE

Verizon Wireless's October 3, 2010 statement that it would belatedly refund (some of) the funds it improperly collected from its customers "due to mistaken past data charges," came only after the Bureau had undertake an investigation of the data charges, in response to consumer complaints and press reports that Verizon Wireless customers had experienced unexpected data charges on their bills.[10] On January 14, 2010, the Bureau issued a Letter of Inquiry ("LOI") to Verizon Wireless seeking detailed information about Verizon Wireless's $1.99 per MB data

[9] http://community.vzw.com/t5/Voice-and-Broadband-Calling/What-s-up-with-the-new-required-9-99-data-plan-on-3G-phones/td-p/175366
[10] Consent Decree at ¶2.

usage charge for certain customers.[11] The Bureau sought to assess whether violations of Section 201(b) of the Act, which prohibits common carriers from engaging in unjust and unreasonable practices, or of the Commission's truth-in-billing rules, had occurred. The Bureau's Investigation followed an initial letter, of December 4, 2009 by the Commission's Wireless Telecommunications Bureau and Consumer and Governmental Affairs Bureau seeking information about Verizon Wireless Mobile Web charges.

Verizon Wireless responded to the Bureau's January LOI on March 1, 2010, and supplemented its response on March 15, April 9, April 23, and September 10, 2010. The Bureau issued a second LOI to Verizon Wireless on July 1, 2010. Verizon Wireless responded to the second LOI on August 2, 2010, supplementing its responses on August 27, September 1, 22, and 30, and October 1, 2010.[12] On October 3, 2010, Verizon Wireless announced that it would refund some of the money it had illegally collected from its customers. Later that month Verizon Wireless and the Bureau signed the Consent Decree.

Thus far, neither Verizon Wireless, nor the FCC has provided details of the refund to assure the public that the company has made whole the many millions of customers it harmed. The scant statement on the Verizon Wireless website gives little comfort.[13] The FCC apparently

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[11] Id.
[12] Id.

[13] What is the credit / refund plan for certain "pay as you go" data customers?

In early 2010, Verizon Wireless conducted an internal investigation into whether "pay as you go" data customers may have been incorrectly billed for data usage. "Pay as you go" data customers have wireless service plans that do not include a data allowance, do not have a data package, and are billed for data usage at the rate of $1.99 per megabyte. We discovered that certain customers were inadvertently charged for data, in most cases in a $2 - $6 range. These customers received a credit and an explanatory message on their bill in October or November 2010, while former customers received a refund check in the mail. By far the single largest problem, involving the vast majority of credits, was caused by a very small data "acknowledgment" session sent by software pre-loaded on certain phones. This may have triggered an unintended "pay as you go" charge of $1.99. We have put in place

has done no follow up analysis of the refund and has given the public no assurance that Verizon Wireless complied with the requirements of the Consent Decree. The periodic compliance reports Verizon Wireless is required to file under the Consent Decree apparently are withheld from public inspection and the Bureau has not provided the public with any information on the adequacy of the compliance process, not even a summary statement. How will the public ever know that the total refund is more than a small fraction of the revenue Verizon Wireless collected from the phony charges? The magnitude and pervasiveness of the harm to consumers here warrant far greater disclosure than has been forthcoming from Verizon Wireless and the Bureau.

The Wireless Bureau's letter and Verizon Wireless's response is in the public record. However, the Enforcement Bureau's LOIs and all of Verizon Wireless's responses are not. The Enforcement Bureau has stonewalled efforts to obtain documents that tell the true story of Verizon Wireless's deception. Smithwick and Belendiuk, which represents DTP, on November 9, 2010, filed a Freedom of Information Act request seeking the narrative portions of these documents. Specifically, the following documents were requested:

- The Bureau's January 14, 2010 First LOI to Verizon Wireless.
- Verizon Wireless' March 1, 2010, response to the Bureau's First LOI along with Verizon Wireless' supplements to its response of March 15, April 9, April 23, and September 10, 2010.
- The Bureau July 1, 2010, second LOI to Verizon Wireless.

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additional improvements to resolve issues that caused these accidental charges.
http://support.verizonwireless.com/clc/faqs/Account%20Management/faq_billing.html?grp=1&faq=22

- Verizon Wireless' August 2, 2010, response to the Bureau's Second LOI along with Verizon Wireless'supplements to its second response of August 27, September 1, 22, and 30, and October 1, 2010.

- All communications (including, without limitation, communications between or among any representative of the United States Government, Commission and any representative of Verizon Wireless, relating in any way with the Bureau's investigation(s) of Verizon Wireless its direct and indirect subsidiaries, of possible violations of Section 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 201(b), and Section 64.2401 of the Commission's rules, 47 C.F.R. § 64.2401.

- All documents provided by Verizon Wireless and other sources relating in any way to the Bureau's investigation(s) of Verizon Wireless, its direct and indirect subsidiaries, of possible violations of Section 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 201(b), and Section 64.2401 of the Commission's rules, 47 C.F.R. § 64.2401.

On January 14, 2011, the Bureau finally responded to this request by letter refusing to provide its two letters of inquiry. Withholding letters of inquiry after a Commission investigation has been terminated is unprecedented. All that the Bureau did disclose was an almost completely redacted version of Verizon Wireless's narrative responses, a document prepared by Verizon Wireless itself. Rather than subject the documents to its own critical review for material covered by FOIA exemptions, the Bureau simply passed on what it had been given by Verizon Wireless. Smithwick and Belendiuk filed an Application for Review of the Bureau's decision on February 4, 2011. The Application demonstrates that most of the exemption claims on which Verizon Wireless based its wholesale redactions are meritless under established FOIA legal standards. A year has passed and no action has been taken on the Application, except for a September 30, 2011 Bureau letter purportedly supplementing the January 14, 2011 disclosure. What was included in the September 30th letter, however, was the two letters of inquiry, totally redacted except for the heading and closing addresses and boilerplate. Given this lack of

responsiveness on the part of the Bureau, it is critical that the Commission supplement the record herein with the documents requested under FOIA. These documents will help piece together how Verizon Wireless victimized millions of their customers over several years and what the company did and did not do after it was notified of the phony charges. If the Commission believes these documents must be included in this proceeding subject to a protective order, it is free to do so, although DTP is convinced that they can be safely made public except for names of employees, etc., which this firm did not request in the first place. Verizon Wireless took advantage of millions of its customers. These customers have every right to see what exactly Verizon Wireless did, what it knew and when it knew it.[14]

LEGAL ARGUMENT

Verizon Wireless has not operated its FCC authorizations in the public interest. It has repeatedly and willfully violated the provisions of the Communications Act and the FCC's rules. In addition, it has made numerous intentional misrepresentations both to its customers and the FCC.[15] The FCC cannot tolerate a licensee that deceives the Commission and conceals material

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[14] When Verizon Wireless first admitted that it had "mistakenly" overcharged 15 million of its customers, Commissioner Clyburn and Bureau Chief Ellison issued public statements pointing out that the company had been notified of these "phantom" fees more than two years earlier and demanding that the affected customers be given a full explanation of "what happened, when and why." Despite the Consent Decree, neither the FCC nor Verizon Wireless has given the wronged public the answers they deserve.

[15] Section 1.17 of the Commission's rules provides:

> **§ 1.17 Truthful and accurate statements to the Commission.**
>
> (a) In any investigatory or adjudicatory matter within the Commission's jurisdiction (including, but not limited to, any informal adjudication or informal investigation ... no person subject to this rule shall;
>
> (1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

facts. "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *WOKO v. FCC*, 329 U.S. 223, 226-227 (1946). *See also, Policy Regarding Character Qualifications,* ("*Character Policy Statement*") 102 FCC 2nd 1179, 1205 (1986)[16]

In this case the facts concealed, that Verizon Wireless was using FCC licenses to operate a scheme against the very people it has a duty to serve, are material. Verizon Wireless's deception and lies permitted it to continue wrongly charging its customers a $1.99 "gotcha" data usage charge, while it transitioned its unwitting and unwilling customers to a monthly $9.99 charge for data access they do not use or want.

When evaluating applications for consent to transfer control of licenses and authorizations, Section 310(d) of the Communications Act requires the Commission to determine whether the proposed transaction will serve "the public interest, convenience and necessity."[17] In making this assessment, the FCC first assesses whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the

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> (2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

[16] In 1988, the Commission held that the *Character Policy Statement* – which had originally been drafted for and applied to only broadcast licensees – was to be applied to common carrier licensees as well. *See MCI Telecommunications Corp.*, 3 FCC Rcd 509, para. 31 (1988)(citing *Character Policy Statement*, 1195-97, 1200-03, *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564, 6566 (1992)

[17] *47U.S.C. § 310(d).*

Commission's rules.[18] The Commission weighs any potential public interest harms of the proposed transaction against the potential public interest benefits. The applicants need to show by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.

Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications." [19] Therefore, as a threshold matter, the Commission must determine whether the applicants to the proposed transaction meet the requisite qualifications to hold and transfer licenses under Section 310(d) of the Act and the Commission's rules.[20]

In determining whether applicants have the requisite character to be Commission licensees, the FCC looks to the Commission's character policy initially developed in the broadcast area as guidance in resolving similar questions in common carrier license transfer

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[18] Section 310(d), requires that the FCC consider the application as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 *US.C.* § *308. See, e.g.* Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases, 23 FCC Rcd 12463, 12476-77 (2008) *("Verizon Wireless-RCC Order");* Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations, 22 FCC Rcd 20295, 20301 (2007) *("AT&T-Dobson Order);* AT&T Inc. and BellSouth Corporation Application for Transfer of Control, (2007) *("AT&T-BellSouth Order");* Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., 21 FCC Rcd 11526, 11535 (2006) *("ALL TEL-Midwest Wireless Order");* Applications of Nextel Communications, Inc. and Sprint Corporation, 20 FCC Rcd 13967, 13976 *(2005) ("Sprint-Nextel Order");* Applications of Western Wireless Corporation and ALLTEL Corporation" 20 FCC Rcd 13053, 13062 (2005) *("ALLTEL-Western Wireless Order");* Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, 19 FCC Rcd 21522, 21542 (2004) *("Cingular-AT&T Wireless Order")*

[19] §§ *308, 310(d) See also Verizon Wireless-RCC Order,* 23 *FCC Red at* 12477-78; *AT&T-Dobson Order,* 22 *FCC Red at 20302; ALLTEL-Midwest Wireless Order,* 21 *FCC Red at* 11536; *Sprint-Nextel Order, 20 FCC Red at* 13979; *ALLTEL-Western Wireless Order, 20 FCC Red at 13063; Cingular-AT&T Wireless Order,* 19 *FCC Red at* 21546.

[20] *See* 47 U.S.C § *310(d);* 47 *CFR.* § 1.948; *see also Verizon Wireless-RCC Order,* 23 *FCC Red at 12477-78; AT&T-Dobson Order,* 22 *FCC Red at 20302; Sprint-Nextel Order, 20 FCC Red at* 13979; *ALLTEL-Western Wireless Order, 20 FCC Red at 13063; Cingular-AT&T Wireless Order,* 19 *FCC Red at 21546*

proceedings.[21] Under this policy, the Commission has stated that it will review allegations of misconduct directly before it, as well as conduct that takes place outside of the Commission.

Lest there be any doubt that Verizon Wireless has violated the Communications Act, Section 201(b) provides:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful;

The Communications Act empowers the FCC to hold hearings to determine the reasonableness of any charges, 47 U.S.C. § 204, and to impose monetary or injunctive penalties for any violations of the Act, 47 U.S.C. §§ 203(e), 205(a)-(b).[22] The Commission has been quick to designate for hearing small carriers who violate FCC rules or make misrepresentations to the Commission, but, thus far, has been reluctant to impose similar sanctions against large, well entrenched carriers such as Verizon Wireless.

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[21] *See, e.g., WorldCom, Inc.,* 18 *FCC Rcd* 26484, 26493 *P* 13 *(2003) ("WorldCom Order) See also Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC2d* 1179, *1210-11* (1986) *(Character Policy Statement), Memorandum Opinion and Order,* 1 *FCC Red* 421 (1986); *Policy Regarding Character Qualifications in Broadcast Licensing,* 5 *FCC Red* 3252 *(1990), Memorandum Opinion and Order,* 6 *FCC Rcd* 3448 (1991), *Memorandum Opinion and Order,* 7 *FCC Rcd* 6564 (1992) The Commission applies its broadcast character standards to applicants and licensees in the other radio services. *See, e.g., 1990 Character Policy Statement,* 5 *FCC Rcd at* 3253 *P 10* (adopting 47 *CFR* § 1.17 to apply prohibition against misrepresentations and material omissions to applicants, licensees, and permittees in all radio services).

[22] *See e.g., In the Matter of Business Options, Inc.; Order to Show Cause and Notice of Opportunity for Hearing,* 18 FCC Rcd 6881 (2003). The Commission designated the case for hearing on issues to determine whether BOI engaged in a misleading and continuous telemarketing campaign in violation of Section 201(b) of the Communications Act, whether the BOI authorization pursuant to Section 214 of the Act to operate as common carriers should be revoked, and whether BOI should be ordered to cease and desist from the provision of any interstate common carrier services.

See also, In the Matter of NOS Communications, Inc., Affinity Network Incorporated and NOSVA Limited Partnership; Order to Show Cause and Notice of Opportunity for Hearing, 18 FCC Rcd 6952 (2003) The Commission designated NOS for hearing to determine whether if willfully or repeatedly violated sections 201(b) of the Communications Act by conducting a misleading marketing campaign designed to improperly induce former customers into authorizing switches back to NOS.

The Consent Decree between the Bureau and Verizon Wireless simply terminated the investigation and bound only the Bureau from taking certain further actions. Therefore, the Commission's legal authority, and indeed legal responsibility, to evaluate the effects of Verizon Wireless's conduct in this affair on its qualifications as a Commission licensee is in no way limited by the Consent Decree.[23]

The FCC has consistently found that certain actions by a licensee are so egregious and outside the realm of acceptable conduct as to disqualify it from remaining a licensee. Misconduct in its dealings with the FCC raises the question of "whether the licensee will in the future be likely to be forthright in its dealings with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's rules and policies."[24] Where the FCC has found that a licensee has intentionally deceived the FCC or recklessly disregarded the truth, it has disqualified the licensee and revoked its licenses.[25]

As the United States Court of Appeals has said: "The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest . . . . As a result the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *RKO General, Inc. v FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) *See also, SBC Communications*, 16 FCC Rcd 19091 (2001) "We consider

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[23] "The Bureau agrees that absent new material evidence that the Company's representations contained herein are inaccurate, it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion or refer to the Commission, any new proceeding, formal or informal, or to take on its own motion or refer to the Commission, any action against Verizon Wireless concerning the matters that were the subject of the Investigation or with respect to Verizon Wireless's basic qualifications, including its character qualifications, to be a Commission licensee or hold Commission authorizations." Consent Decree, at 7

[24] *Character Policy Statement*, 102 F.C.C. 2d 1179, para. 55

[25] *See, e.g. WOKO v. FCC*, 329 U.S. 223, 226-227 (1946)

misrepresentation to be a serious violation, as our entire regulatory scheme rests upon the assumption that applicants will supply [the Commission] with accurate information." In the past, the FCC has not hesitated to revoke a miscreant's licenses.

Verizon Wireless holds over 8,000 licenses. It has used these licenses to bludgeon and cheat the very people who own the frequencies, the American citizens. Its lies have not only defrauded untold numbers of innocent customers but have made a mockery of the FCC's requirement that a licensee must be honest and forthcoming with the Commission. If the Commission allows Verizon Wireless to keep its licenses, such a decision would allow others to follow in the company's dishonest footsteps. If such a precedent were to be set, all licensees will demand the same treatment as Verizon Wireless, i.e. the right to keep their licenses despite having made material misrepresentations to the FCC and defrauded millions of customers of many millions of dollars.[26] The public record in this matter unquestionably demonstrates that Verizon Wireless's violations of the Communications Act were "repeated," and strongly suggests that they were "willful," thereby satisfying the statutory requirement for administrative sanctions.

CONCLUSION

The public has a right to know to what use Verizon Wireless puts the licenses it has been granted by the FCC. The Enforcement Bureau has much of that information, but is keeping it from public review and scrutiny. At a minimum Verizon Wireless customers have a right to know how they were treated by Verizon Wireless. Without this evidence, consumers can not make educated choices concerning their wireless mobile provider. Before the FCC takes any

[26] See, *Melody Music, Inc. v. FCC*, 345 F.2d 750 (D.C. Cir. 1965) (The Commission can not arrive at different outcomes in the cases of similarly-situated licensees.)

action in this case, it should release all available evidence concerning Verizon Wireless's phantom data charges.

The Commission also must designate these applications for hearing to determine (1) whether Verizon Wireless made material misrepresentations to the Commission and its customers; (2) whether Verizon Wireless's repeated violations of Section 201(b) were either part of a deliberate scheme at the outset, or once discovered were intentionally prolonged well beyond reason; and, (3) to determine whether Verizon Wireless's conduct warrants administrative sanctions up to and including denial of these applications and revocation of its FCC licenses.

Anyone can make a "mistake"; however a licensee cannot expect to continue its status as an FCC licensee after it has cheated the public, and then made material misrepresentations to the FCC. Verizon Wireless simply lacks the character to remain an FCC licensee. Under the circumstances it would be reversible error for the Commission to decline to designate the authorization request for hearing on the issue of Verizon Wireless's qualifications.

Respectfully Submitted,

By: _____
Arthur V. Belendiuk

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February 15, 2012

DECLARATION

I, Antonio Kovar, declare under penalty of perjury, as follows:

I reside in Ocean Pines, Maryland. I am a member of The Diogenes Telecommunications Project. I am a customer of Verizon Wireless.

2-15-12
Date

Antonio Kovar
The Diogenes Telecommunications Project

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary with the law firm of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Petition to Deny" was served, as specified, this 15th day of February, 2012, to the following:

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Sherry L. Schunemann

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary with the law firm of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Petition to Deny" was served, as specified, this 10th day of July, 2012, to the following:

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