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WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

**REDACTED – FOR PUBLIC INSPECTION**

August 2, 2012

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AUG - 2 2012

Federal Communications Commission
Office of the Secretary

**VIA HAND DELIVERY & ELECTRONIC FILING**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses*, WT Docket No. 12-4
**REDACTED – FOR PUBLIC INSPECTION**

Dear Ms. Dortch:

The enclosed *ex parte* letter and accompanying report by Dr. Mark Israel contain Highly Confidential Information and are being submitted in redacted form pursuant to the Second Protective Order in this proceeding.[1] The unredacted, Highly Confidential version is being filed separately pursuant to the Second Protective Order. Comcast will make the Highly Confidential version available upon request to authorized reviewing parties who have signed the Protective Orders. Copies of each version of this filing are being provided to the Secretary's Office and the Wireless Telecommunications Bureau as directed by the Second Protective Order.

Please contact me should you have any questions regarding this matter.

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[1] *In re Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses*, Second Protective Order, WT Docket No. 12-4, DA 12-51 (WTB Jan. 17, 2012).



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Respectfully submitted,

Mia Guizzetti Hayes
*Counsel for Comcast Corp. and SpectrumCo, LLC*

Enclosures

cc: Sandra Danner, WTB

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**REDACTED – FOR PUBLIC INSPECTION**

Dear Ms. Dortch:

SpectrumCo (on behalf of its members, Comcast, Time Warner Cable, and Bright House) and Cox submit this response to recent filings by Sprint Nextel Corporation ("Sprint") and others in the above-referenced docket.[1] Sprint asserts that the Commercial Agreements among the MSOs and Verizon Wireless provide the MSOs with the incentive to foreclose access to their backhaul services and Wi-Fi networks.[2] Others have made similar arguments with respect to

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[1] Comcast, Time Warner Cable, Bright House, and Cox are referred to collectively as the "MSOs." Comcast, Time Warner Cable, Bright House, Cox, and Verizon Wireless are referred to collectively as the "Applicants."

[2] *See* Letter from David H. Pawlik, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2 (Apr. 24, 2012); Letter from David H. Pawlik, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-3 (May 25, 2012); Letter from David H. Pawlik, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-4 (June 19, 2012); Letter from David H. Pawlik, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-2 (June 20, 2012); Letter from Tara S. Emory, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-4 (July 9, 2012); Letter from David H. Pawlik, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (July 11, 2012) ("Sprint July 11 Ex Parte"); Letter from Tara S. Emory, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-2 (July 12, 2012) ("Sprint July 12 Ex Parte"); Letter from Antoinette Cook Bush & David H. Pawlik, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-3 (July 19, 2012) ("Sprint July 19 Ex Parte"); Letter from Tara S. Emory, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2-5 (July

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backhaul[3] and Wi-Fi.[4] As demonstrated below and in the attached economic analysis prepared by Dr. Mark Israel,[5] Sprint, *et al.* have not advanced any credible theory that the Commercial Agreements will harm backhaul or Wi-Fi competition. Moreover, the facts are entirely inconsistent with allegations that the MSOs have engaged or will engage in backhaul or Wi-Fi foreclosure. In particular:

- ***The Commercial Agreements in no way impede backhaul competition***. There is no provision in the Commercial Agreements that prohibits the MSOs from providing backhaul services to any other party, or that prohibits Verizon Wireless from purchasing backhaul services from any provider other than one of the MSOs. The Commercial Agreements *do* give the MSOs opportunities to grow their backhaul businesses, but do not restrict the provision of backhaul as Sprint, *et al.* assert.

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25, 2012); Letter from Antoinette Cook Bush, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-2 (July 26, 2012).

[3] *See* Letter from Michael Lazarus, Telecommunications Law Professionals PLLC, Counsel for RCA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-3 (Apr. 12, 2012); Letter from Eric J. Branfman, Bingham McCutchen LLP, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2-3 (Apr. 30, 2012); Letter from Rebecca Murphy Thompson, General Counsel, RCA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2 (May 3, 2012); Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1 (June 28, 2012); Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1 (July 5, 2012); Letter from Karen Brinkmann & Robin Tuttle, Karen Brinkmann PLLC, Counsel for FairPoint Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2-3 (July 10, 2012); Letter from Genevieve Morelli, President, & Micah M. Caldwell, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 3-4 (July 10, 2012) ("ITTA July 10 Ex Parte"); Letter from Catherine R. Sloan, Vice President, Government Relations, CCIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 1-2 (July 17, 2012) ("CCIA July 17 Ex Parte"); Letter from Rebecca Murphy Thompson, General Counsel, RCA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2 (July 20, 2012) ("RCA July 20 Ex Parte"); Letter from John T. Komeiji, Senior Vice President and General Counsel, Hawaiian Telcom, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2 (July 23, 2012); Letter from Eric J. Branfman, Bingham McCutchen, Counsel for RCN, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 8 (July 31, 2012) ("RCN July 31 Ex Parte").

[4] *See* Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2-3 (June 18, 2012); ITTA July 10 Ex Parte at 5-6; Letter from Carl W. Northrop, Telecommunications Law Professionals PLLC, Counsel to MetroPCS, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2-3 (July 13, 2012) ("MetroPCS July 13 Ex Parte"); Letter from Melissa Newman, VP – Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2 (July 13, 2012); Letter from Caressa D. Bennet, General Counsel, Rural Telecommunications Group, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2 (July 19, 2012) ("RTG July 19 Ex Parte"); RCA July 20 Ex Parte at 2; RCN July 31 Ex Parte at 8.

[5] Dr. Mark Israel, "*Implications of the Verizon Wireless & SpectrumCo/Cox Commercial Agreements for Backhaul and Wi-Fi Services Competition*," WT Docket No. 12-4 (August 1, 2012) ("Israel Report").

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- ***There is no credible theory of harm to backhaul competition***. Dr. Israel's Report confirms that the Commercial Agreements do not create incentives for the MSOs to act in a way that harms backhaul competition, and the conjured theories of harm are not supportable.
- ***There is no current Wi-Fi offload market and thus no market to regulate***. Wi-Fi "offload" services – that is, if wireless carriers purchase Wi-Fi services to divert traffic that would otherwise be carried over their networks in order to help reduce network congestion – are not currently sold and are not being provided by the MSOs directly to any wireless provider, including Verizon Wireless. Any allegations that the Commercial Agreements would harm Wi-Fi are, thus, purely speculative. Indeed, a Wi-Fi offload market has yet to develop and may never become an input into wireless service.
- ***The Commercial Agreements in no way impact Wi-Fi***. The MSOs provide Wi-Fi capabilities to their residential high-speed Internet customers without regard to their customers' choice of wireless carrier, and the Commercial Agreements will not change this fact. Further, no provision of any of the Commercial Agreements grants Verizon Wireless the right to offload its traffic onto the MSOs' Wi-Fi access points, and the MSOs are free to sell Wi-Fi service to Verizon Wireless' competitors.
- ***Anyone can enter the Wi-Fi marketplace***. Because Wi-Fi is an unlicensed service, companies can freely create their own Wi-Fi hotspots without Commission approval. If a market develops for Wi-Fi offload services, there is no reason to believe the MSOs could impede entry.

Additionally, Sprint has mischaracterized **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** and Comcast and Time Warner Cable correct the record below.[6]

It bears emphasis at the outset that the Applications pending before the Commission have nothing to do with backhaul or Wi-Fi. Applicants intend to transfer no assets – including Commission authorizations – pertinent to backhaul or Wi-Fi. And even the Commercial Agreements that some parties have improperly tried to make part of this license assignment proceeding are focused on issues other than backhaul and Wi-Fi; they are focused on technology development and on cross-marketing of wireless, cable, voice, and Internet services and have only the most tangential references to backhaul and Wi-Fi.

Notwithstanding this, Sprint, *et al.* ask the Commission to make backhaul and Wi-Fi central parts of the spectrum proceeding. And their specific request would have the Commission

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6 *See* Sprint July 11 Ex Parte at 1-2.

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depart from longstanding policy in two ways. First, they ask the Commission to impose rate regulation on the backhaul services provided by the MSOs, even though the Commission previously has declined to impose regulations on new entrants.[7] Second, they ask the Commission to impose common carrier-style regulations on Wi-Fi and Wi-Fi offload, both unlicensed services. Indeed, in the case of Wi-Fi offload, there currently is no market.[8] As Dr. Israel points out, "imposing regulatory restrictions or conditions on a market that does not yet exist runs a serious risk of imposing unnecessary costs on Wi-Fi providers and wireless carriers, and perhaps even harming the development and function of that market should it come into being."[9] The Commission should reject these extraordinary requests.

## I. The Commercial Agreements Will Not Harm Backhaul Competition, Nor Will They Harm Wi-Fi Competition.

The Commercial Agreements will not impede competition for the provision of backhaul and Wi-Fi services, nor will they cause the MSOs to alter their provision of backhaul or Wi-Fi services in a way that would harm wireless competition. Sprint, *et al.*'s claims to the contrary should be given no weight.

### A. Backhaul

The MSOs' backhaul businesses are important parts of their strategies to grow their business services product lines, and the MSOs are eager to expand their backhaul businesses. For example, Comcast has offered backhaul services for only **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** but the business is growing, **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** among its backhaul customers. As described below, arguments that the Commercial Agreements will somehow diminish the MSOs' ability and incentive to compete in this market are plainly wrong.

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7 *See, e.g.*, *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion & Order, 19 FCC Rcd 3307, ¶ 19 (2004) (concluding that Pulver's Free World Dialup is an unregulated information service and noting the importance of ensuring that the service remained unregulated because to do otherwise "would effectively apply a regulatory paradigm that was previously developed for different types of services, which were provided over a vastly different type of network[]" and "risk eliminating an innovative service offering" that promotes consumer choice and technological development); *see also Hearing Before the H. Subcomm. on Telecomms., Trade, and Consumer Protection*, 106th Cong. 4 (1999) (report entitled *A New Federal Communications Commission for the 21st Century* submitted with testimony of William E. Kennard, Chairman, FCC), *available at* http://transition.fcc.gov/Reports/fcc21.pdf ("[The FCC's] guiding principle should be to presume that new entrants and competitors should not be subjected to legacy regulation.").

8 *See* Israel Report ¶ 32.

9 Israel Report ¶ 30.

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### 1. The Commercial Agreements in No Way Impede Backhaul Competition.

Sprint argues that the Commercial Agreements give the MSOs and Verizon Wireless "the ability and incentive to cooperate and reduce competition to make . . . ventures [including backhaul] as a whole more successful and profitable for each other, or risk retribution for taking pro-competitive independent actions that are not in their broad mutual economic best interests."[10] There is no provision of any of the Commercial Agreements that prohibits the MSOs from providing backhaul services to any other party, and no provision of any of the Commercial Agreements prohibits Verizon Wireless from purchasing backhaul services from any provider other than one of the MSOs.[11] *The only provisions related to backhaul in the Commercial Agreements are designed to give the MSOs opportunities to grow their backhaul businesses (inuring to the benefit of all wireless providers), not to restrict the provision of backhaul as Sprint,* et al. *assert.* **[BEGIN HIGHLY CONFIDENTIAL]**

**[END HIGHLY CONFIDENTIAL]** No other provisions of the Commercial Agreements relate to backhaul.

*Moreover, the facts demonstrate conclusively that the agreements with Verizon Wireless do not give the MSOs an incentive to foreclose backhaul services.* Since the Verizon Wireless/SpectrumCo transaction was announced, for example, Comcast has entered into long-term contracts to provide backhaul to approximately **[BEGIN HIGHLY CONFIDENTIAL]**

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[10] Sprint July 12 Ex Parte at 2.

[11] Verizon Telecom is not a party to the Commercial Agreements and, of course, there are no restrictions on its ability to provide backhaul to any other party.

[12] *See* VZW Agent Agreement § 3.9 (Comcast); VZW Agent Agreement § 3.9 (Bright House); VZW Agent Agreement § 3.9 (Time Warner Cable); VZW Agent Agreement § 3.9 (Cox); Comcast Reseller Agreement § 6.21; Bright House Reseller Agreement § 6.21; Time Warner Cable Reseller Agreement § 6.21; Cox Reseller Agreement § 6.21.

[13] *Id.*

[14] *See* Israel Report ¶ 27.

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**[END HIGHLY CONFIDENTIAL]** The Commercial Agreements, which are executed and in force, have not caused the MSOs to discriminate against or decline to do business with wireless carriers other than Verizon Wireless.

**2. There Is No Credible Theory of Harm to Backhaul Competition.**

Dr. Israel's Report confirms this conclusion from an economic perspective. He demonstrates that the Commercial Agreements do not create incentives for the MSOs to act in a way that harms backhaul competition. Dr. Israel examines both Sprint, *et al.*'s horizontal and vertical theories of harm and finds that neither is supportable.

*Arguments that the Commercial Agreements will reduce competition among providers of backhaul services – a horizontal concern – are unfounded.*[17]

- The Commercial Agreements do not provide any mechanism under which an MSO's loss of a backhaul customer to Verizon Telecom would either directly or indirectly benefit the MSO. Likewise, they do not provide any mechanism under which Verizon Telecom's loss of a backhaul customer to an MSO would either directly or indirectly benefit Verizon Telecom.[18]
- It would be illogical for the MSOs to soften backhaul competition with Verizon Telecom (or vice versa) when there is no corresponding benefit to the MSOs (or vice versa). And, the Commercial Agreements do not require the parties to do so.[19]
- Concerns about the effect of the **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** on other backhaul providers are misplaced. Given the MSOs' limited role in the marketplace for backhaul services, the opportunity to provide such services **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** cannot reasonably be deemed anticompetitive. Antitrust law and the public interest standard protect *competition*, not competitors. By allowing the MSOs to become stronger competitors in this space, the Commercial Agreements will make the backhaul business *more competitive, not less*. In fact, to the extent it has any effect at all, **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY**

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15 *Id.* ¶ 7, n.49.

16 *Id.*

17 *Id.* ¶¶ 9-13.

18 *Id.* ¶ 10.

19 *Id.*

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**CONFIDENTIAL]** is likely to encourage other backhaul providers to bid more aggressively **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** a pro-competitive effect.[20]

- For these reasons, the MSOs and Verizon Telecom will continue to compete aggressively against each other and all other backhaul providers. Where there are profits to be made by providing these services, there is every reason to expect that the MSOs and Verizon Telecom will pursue opportunities to earn them.[21]

*Sprint,* et al.*'s arguments that the MSOs and Verizon Wireless will become "friendly" and that this will entice the MSOs to discriminate against other wireless carriers in order to help Verizon Wireless – a vertical concern – also are unfounded.*[22]

- The only material effect of the MSOs discriminating against other wireless carriers would be to hurt the MSOs' emerging backhaul businesses. For example, if an MSO raised prices to non-Verizon Wireless carriers, or refused to do business with them, it would reduce the MSO's competitiveness as a backhaul provider. It would be illogical for an MSO to harm a profitable and emerging segment of its business in order to aid Verizon Wireless.[23]
- Opponents argue that the MSOs might raise other wireless carriers' backhaul costs in order to raise the opponents' costs and thereby, arguably, make Verizon Wireless a more attractive option for consumers, thus increasing the MSOs' opportunities to earn commissions when they sell Verizon Wireless services. However, an MSO receives only a small, one-time commission when it signs up Verizon Wireless customers. As Dr. Israel explains, these small commission payments pale in comparison to the substantial recurring backhaul revenue an MSO would lose from such a discriminatory strategy.[24]
- Moreover, the MSOs are relatively new entrants to this competitive space and, therefore, have little – if any – *ability* to raise prices.[25]
- Backhaul costs make up a fraction of wireless carriers' prices. So, even if the MSOs could increase their backhaul prices to the wireless carriers, those increases likely would not be significant enough to cause wireless carriers to change their

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20 *Id.* ¶¶ 11-12.

21 *Id.* ¶ 13.

22 *Id.* ¶¶ 14-27.

23 *Id.* ¶¶ 25-27.

24 *Id.* ¶ 26.

25 *Id.* ¶ 22.

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> retail prices or service offerings in any way that would benefit Verizon Wireless or the MSOs' sale of Verizon Wireless services.[26]

*Far from harming competition, the backhaul provisions in the Commercial Agreements have the potential to make the marketplace for backhaul services even more competitive.* The MSOs compete with numerous other backhaul providers, including AT&T, CenturyLink, DragonWave, DukeNet, FPL Fiber, Level 3, TMI, tw telecom, Verizon Telecom, Windstream, XO, and Zayo. To the extent the backhaul provisions in the Commercial Agreements would enable an MSO to compete and secure more backhaul business from Verizon Wireless, the MSOs will become more effective competitors in offering backhaul to non-Verizon Wireless carriers, and the marketplace will become even more competitive (especially because if an MSO wins a contract to provide backhaul services to Verizon Wireless at a particular location, it becomes more economical for the MSO to provide backhaul services to other wireless carriers at that location).

*In any event, Sprint,* et al.*'s complaints about backhaul are not relevant to the license assignment applications that are before the Commission and should be addressed (if at all) in the pending industry-wide rulemaking.* The Commission recently held in the *AT&T-Qualcomm Order* that access to backhaul facilities is an industry-wide issue that is the subject of a pending rulemaking proceeding and is not related to any transaction-specific harm.[27] The same is true here.

### B. Wi-Fi

#### 1. The Commercial Agreements in No Way Affect Wi-Fi.

The MSOs established their Wi-Fi hotspots as extensions of their residential high-speed Internet ("HSI") businesses and as key components of their efforts to reduce HSI churn and increase HSI customer subscriptions. Because Wi-Fi is an unlicensed service, Commission approval of the MSOs' Wi-Fi business plans is not required and has not been requested in the context of the MSOs' spectrum sale to Verizon Wireless or otherwise. The MSOs provide Wi-Fi capabilities to their HSI customers (and, through CableWiFi, to one another's HSI customers and those of Cablevision) as a value-added feature of their HSI services. This capability is provided to MSO HSI customers without regard to their choice of wireless carrier; it does not matter whether they are customers of Verizon Wireless, AT&T Wireless, T-Mobile, Sprint, MetroPCS, or any one of the scores of other wireless carriers. Nothing about the license assignments or the separate Commercial Agreements will change this fact.

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26 *Id.* ¶ 23.

27 *Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589, ¶ 79 (2011) ("*AT&T-Qualcomm Order*") (noting that the Commission "will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction" and that requests for relief related to backhaul are better addressed in the ongoing industry-wide proceeding).

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To date, these Wi-Fi arrangements are entirely between HSI providers and HSI customers. Although certain traffic that might otherwise be transported over wireless carriers' networks may instead be routed over MSOs' Wi-Fi hotspots and then their Internet backbones, the MSOs have not yet made business arrangements with wireless carriers to facilitate "Wi-Fi offload." Sprint, *et al.* are making speculative assertions about a business that does not even exist, the very kind of conjecture – devoid of any supporting facts – that the Commission has traditionally said it would not entertain in license transfer proceedings.[28] But, again, if there are profitable business arrangements to be struck, the MSOs would be glad to explore them, and nothing about the license assignments or the Commercial Agreements will diminish the MSOs' incentives or ability to pursue such opportunities.

*Sprint,* et al. *can point to no provision of any of the Commercial Agreements that grants Verizon Wireless the right to offload its traffic onto the MSOs' Wi-Fi access points.* Moreover, nothing in the agreements *precludes* the MSOs from providing Wi-Fi to any other party. **[BEGIN HIGHLY CONFIDENTIAL]**

**[END HIGHLY CONFIDENTIAL]** The MSOs are free to sell Wi-Fi offload service to Verizon Wireless' competitors. **[BEGIN HIGHLY CONFIDENTIAL]**

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[28] *See, e.g., Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 19 FCC Rcd 21522, ¶ 181 (2004) ("We are therefore not persuaded by [] arguments . . . that, after the merger, Cingular will have the ability and the incentive to use its larger share of subscribers to exact discriminatory rates from roaming partners. We find these claims to be unsupported speculation. The parties making these claims have not presented any evidence, or made any specific allegations, that Cingular has taken steps in the past to charge a particular carrier unreasonable roaming rates . . . ." (internal citations omitted)); *Applications of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations, et al.*, Memorandum Opinion & Order, 15 FCC Rcd 14032, ¶ 428 (2000) ("We reject claims that we should prohibit these license transfers because of speculation that service quality in the merged company's service areas will deteriorate . . . ."); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control, et al.*, Memorandum Opinion & Order, 14 FCC Rcd 14172, ¶ 547 (1999) (rejecting claims that service quality in the Ameritech region will deteriorate as speculative); *see also id.*, Statement of Commissioner Harold Furchtgott-Roth ("The record, however, presents no clear evidence that either SBC or Ameritech had developed plans to provide substantial in-region competition for local exchange services in the other company's territory. Whether plans that might have been developed at some future date are affected by the proposed license transfers is idle speculation."); *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994) (finding allegations that Comcast, post-license transfer, would engage in anticompetitive action to drive down roaming revenues of another carrier "amounts to nothing more than 'unadorned speculation.'" (internal citation omitted)).

[29] *See* VZW Agent Agreement § 2.2.2(b) (Comcast); VZW Agent Agreement § 2.2.2(b) (Bright House); VZW Agent Agreement § 2.2.2(b) (Time Warner Cable); VZW Agent Agreement § 2.2.2(b) (Cox); Comcast Reseller Agreement § 2.2.3.1; Bright House Reseller Agreement § 2.2.3.1; Time Warner Cable Reseller Agreement § 2.2.3.1; Cox Reseller Agreement § 2.2.3.1.

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**[END HIGHLY CONFIDENTIAL]** And nothing about the Innovation Technology Joint Venture ("ITJV") will foreclose Verizon Wireless' competitors' access to the MSOs' Wi-Fi connections, as Sprint, *et al.* have claimed. Sprint, *et al.* have not identified any provision of the ITJV Agreement that prevents Verizon Wireless' competitors from accessing the MSOs' Wi-Fi hotspots – and, in fact, there is no such provision. Moreover, no provision of the ITJV Agreement requires ITJV members to develop Wi-Fi technologies through the ITJV. To the contrary, the ITJV Agreement **[BEGIN HIGHLY CONFIDENTIAL]**

**[END HIGHLY CONFIDENTIAL]** No other provisions of the Commercial Agreements relate to Wi-Fi.

### 2. There Is No Credible Theory of Harm to Wi-Fi Competition.

*As the Israel Report demonstrates, Sprint,* et al. *'s arguments that the Commercial Agreements will result in vertical foreclosure of access to the MSOs' Wi-Fi hotspots are without merit.* Nothing about the Commercial Agreements creates incentives for the MSOs to act in a way that harms Wi-Fi competition.

- Wi-Fi offload services – the provision of Wi-Fi to wireless carriers enabling them to divert traffic in order to reduce network congestion – are not currently being provided by the MSOs directly to wireless carriers. Sprint, *et al.* have suggested a theory of vertical foreclosure (which generally relies on the restriction of a scarce input) without an actual scarce input to be restricted.[33]
- Wi-Fi offload is not an input into wireless service, and it may never become an input into wireless service. Therefore, claims that lack of access to Wi-Fi will harm the wireless business are entirely speculative.[34]
- Even assuming Wi-Fi offload services were to become an important input into wireless service, Sprint, *et al.* do not describe a mechanism for competitive harm under the Commercial Agreements. Sprint posits that the relationship between

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[30] *See* VZW Agent Agreement § 2.2.2(b) (Comcast) ; VZW Agent Agreement § 2.2.2(b) (Bright House); VZW Agent Agreement § 2.2.2(b) (Time Warner Cable); VZW Agent Agreement § 2.2.2(b) (Cox).

[31] *See* Comcast Reseller Agreement § 2.2.3.1; Bright House Reseller Agreement § 2.2.3.1; Time Warner Cable Reseller Agreement § 2.2.3.1; Cox Reseller Agreement § 2.2.3.1.

[32] *See* Limited Liability Company Agreement of Joint Operating Entity, LLC ("ITJV Agreement") § 10.02(a).

[33] *See* Israel Report ¶ 30.

[34] *Id.* ¶ 35.

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the MSOs and Verizon Wireless under the Commercial Agreements provides an incentive for the MSOs to engage in a "raising rivals' costs" strategy against Verizon Wireless' rivals. To begin with, this is an odd theory because the MSOs do not currently compete with Verizon Wireless' rivals.[35]

- More to the point, the economic literature is clear that a raising rivals' costs strategy will only cause harm if four conditions are all simultaneously present. Here, however, *none* of those conditions are present. Because Wi-Fi offload services are not currently sold, Sprint cannot demonstrate that: 1) the MSOs have the ability to raise Wi-Fi offload costs; 2) the increased cost to Verizon Wireless' rivals is significant enough to cause the rivals to increase their service prices; 3) the rivals' increased service prices translate into increased sales of Verizon Wireless' service by the MSOs; and 4) the commissions the MSOs earn from those increased sales are sufficient to cover profits the MSOs lose as a result of raising their prices to Verizon Wireless' rivals.[36] None of these critical elements can be shown because there is no market for Wi-Fi offload service. Sprint is speculating about a hypothetical market,[37] an approach the Commission has declined to accept in license transfer proceedings.[38]

In short, theories of vertical harm based on Wi-Fi are wholly speculative, positing a market that does not exist today in which the MSOs sell Wi-Fi offload services to wireless carriers. The extent of future demand for Wi-Fi offload services, the number of competitors, and other features of this hypothetical market are unknown. In addition, by degrading the Wi-Fi capabilities they currently provide to their HSI customers, the MSOs would risk alienating the millions of their customers who have chosen non-Verizon Wireless services. This strategy makes no sense. The Commission should disregard Sprint, *et al.*'s speculative claims about Wi-Fi and a Wi-Fi offload market that has yet to develop.

*Sprint,* et al. *make other incorrect assertions about the MSOs' Wi-Fi services.*[39] MetroPCS and RCA claim that the *Data Roaming Order* applies to the MSOs' unlicensed Wi-Fi services,[40] and other parties claim that the *Data Roaming Order* supports a Wi-Fi roaming

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35 *Id.* ¶¶ 33, 37.

36 These same conditions are required to show that a raising rivals' costs theory will cause harm in the backhaul context. As Dr. Israel demonstrates, the conditions are not present in that context either. *Id.* ¶¶ 34-37.

37 *Id.* ¶ 28-37.

38 *See supra* note 28.

39 Although plainly irrelevant to this proceeding, Sprint asserts that "recent model cable set top boxes even contain[] [Wi-Fi] chip sets that convert every customer's home into a [Wi-Fi] hotspot controlled by the Cable Company." Sprint June 19 Ex Parte at 3. This is incorrect. None of the set-top boxes currently offered by the MSOs contain Wi-Fi chip sets.

40 MetroPCS July 13 Ex Parte at 2-3; RCA July 20 Ex Parte at 2.

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condition.[41] MetroPCS also cites baseless "indications" that the MSOs "may not plan to provide wireless companies with access [to the MSOs'] CableWiFi network on commercially reasonable terms" as grounds for requesting that the Commission regulate Wi-Fi as a common carrier service.[42] These proposals mischaracterize the law and would be bad public policy for the Commission to adopt. First, MetroPCS and RCA are incorrect when they assert that the *Data Roaming Order* already applies to Wi-Fi. The *Data Roaming Order* applies to facilities-based providers of mobile data services.[43] Plainly, the *Data Roaming Order* does not apply to unlicensed uses of spectrum, such as Wi-Fi, that rely on Part 15 devices, because the Act defines "mobile service" to include services "for which a license is required," and the Commission has determined expressly that this language excludes Part 15 unlicensed radio frequency devices from the definition of "mobile services."[44] Second, the Commission has recognized that imposing regulations on nascent offerings, such as the MSOs' networks of Wi-Fi hotspots, has more risk than reward.[45]

### 3. There Is No Barrier to Entering the Wi-Fi Marketplace.

*Finally, nothing about the proposed license assignments prevents other companies from creating their own Wi-Fi hotspots – because Wi-Fi is an unlicensed service, they would not even need Commission approval to do so.* If and to the extent that a market develops for Wi-Fi offload services, some wireless carriers may well choose to enter that market, and there is no reason to believe the MSOs could impede their entry.

## II. The MSOs Welcome Sprint's Interest In Becoming A Wi-Fi Offload Customer.

It's important to set the record straight regarding **[BEGIN HIGHLY CONFIDENTIAL]**

**[END HIGHLY CONFIDENTIAL]** both as to events that occurred before SpectrumCo's agreements with Verizon Wireless were announced and afterwards.[46]

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41 *See* RTG July 19 Ex Parte at 2; Sprint July 19 Ex Parte at 2.

42 MetroPCS July 13 Ex Parte at 2.

43 *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report & Order, 26 FCC Rcd 5411, ¶ 1 (2011) ("*Data Roaming Order*"), *recon. pending, appeal pending.*

44 *See* 47 U.S.C. § 153(33)(C); 47 C.F.R. § 20.7(h); *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report & Order, 9 FCC Rcd 1411, ¶ 37 (1994) (clarifying that the definition of "mobile services" does not include Part 15 devices and unlicensed PCS and noting that an unlicensed approach could be expected to foster new technologies by permitting manufacturers to introduce new products without the delays associated with licensing).

45 *See supra* note 7.

46 As a matter of practice, and often agreement between the parties, Comcast regards business-to-business discussions as confidential. Comcast recounts here its executives' recollections of **[BEGIN HIGHLY**

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Sprint states that, **[BEGIN HIGHLY CONFIDENTIAL]**

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**CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** only to the extent that Sprint has chosen to provide **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[47] Sprint July 11 Ex Parte at 1.

[48] *Id.* at 1-2.

[49] *Id.* at 2.

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**[END HIGHLY CONFIDENTIAL]**

Plainly, entering into the Commercial Agreements has not prevented the MSOs from evaluating opportunities to provide Wi-Fi offload services to non-Verizon Wireless carriers, **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

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The provision of backhaul and Wi-Fi services is irrelevant to this license assignment proceeding, and Sprint, *et al.* have offered no credible theory or any facts to support their claims that the Commercial Agreements will harm the backhaul or Wi-Fi businesses. The Commission should reject these speculative claims and approve the proposed license assignment transactions.

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[50] *See* Israel Report ¶ 36.

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Respectfully submitted,

/s/

J.G. Harrington
DOW LOHNES PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 776-2000

*Attorney for Cox Wireless*

Michael H. Hammer
Mia Guizzetti Hayes
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
(202) 303-1000

*Attorneys for SpectrumCo*

cc: Charles Mathias
Angela Giancarlo
Louis Peraertz
David Goldman
Courtney Reinhard
Sean Lev
Rick Kaplan

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# Implications of the Verizon Wireless & SpectrumCo/Cox Commercial Agreements for Backhaul and Wi-Fi Services Competition

WT Docket No. 12-4

Mark Israel

August 1, 2012

# I. INTRODUCTION

## A. ASSIGNMENT AND SUMMARY OF CONCLUSIONS

1. I have been asked by counsel for the involved parties to review the Commercial Agreements between Verizon Wireless ("VZW") and a set of Multi System Operators—Comcast Cable, Time Warner Cable, Bright House Networks, and Cox Communications (collectively, the "MSOs")—and to respond to certain arguments made by parties opposed to these transactions (the "opposing parties").[1] In particular, I have been asked to comment on the economic implications of the Commercial Agreements for the provision and pricing of both backhaul and Wi-Fi services.

2. By way of background:

- Backhaul is the name for a service in which a service provider transports data and voice traffic from a carrier's cell sites to its network backbone. It is an important input in the provision of wireless services.
- Wi-Fi services allow consumers using wireless devices to send and receive information wirelessly over local computer networks. Use of Wi-Fi services may provide consumers with faster data speeds (relative to cellular networks) and, by removing traffic from the cellular network, Wi-Fi services may help customers avoid data overage charges.

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[1] *See* Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, WT Docket No. 12-4, File No. 0004993617 (filed Dec. 16, 2011) (seeking consent to assign 122 Advanced Wireless Services licenses to Verizon Wireless from SpectrumCo); Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses, WT Docket No. 12-4, File No. 0004996680 (filed Dec. 21, 2011) (seeking consent to assign 30 Advanced Wireless Services licenses to Verizon Wireless from Cox Wireless).

- The use of Wi-Fi services to divert traffic that would otherwise be transmitted over cellular networks—particularly when this helps to reduce cellular network congestion—is sometimes referred to as "Wi-Fi offload." One might hypothesize that, distinct from the existing usage of Wi-Fi services by end consumers, wireless carriers may at some point contract directly with Wi-Fi providers to purchase Wi-Fi offload services, thus arranging to have data that would otherwise be carried over their cellular networks instead be transmitted over Wi-Fi networks. For clarity, I refer to such potential arrangements between wireless carries and Wi-Fi providers as "carrier-purchased Wi-Fi offload services." To my knowledge, no such service contracts exist in the U.S. today.[2]

3. Based on my review of the Commercial Agreement and other relevant evidence, I find that the opposing parties' arguments with regard to backhaul and Wi-Fi services are without merit, as they lack both a sound economic basis and sound factual support. In particular, I find no support for a claim that the Commercial Agreements will impede competition in the provision of backhaul or Wi-Fi services. I also find no support for a claim that the Commercial Agreements will cause the MSOs to alter their provision of backhaul or Wi-Fi services in a way that would harm downstream competition among wireless service providers.

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[2] Interview with Tom Nagel, Senior Vice President and General Manager of Wireless Services, Comcast Communications, July 18, 2012.

## B. BACKGROUND AND OVERVIEW

### 1. The Commercial Agreements

4. The Commercial Agreements between VZW and the MSOs include the Agency Agreements, Reseller Agreements, and an Innovation Technology Joint Venture Agreement ("ITJV").[3] The Agency Agreements enable VZW and the MSOs to act as sales agents for one another's products and services.[4] The Reseller Agreements give each MSO the option to sell its own branded wireless service using the VZW network starting in 2016.[5] The ITJV is intended to facilitate the development of intellectual property and technology to integrate wired multichannel video and high speed Internet ("wired") and wireless services and technologies.[6]

### 2. Opposing parties' concerns regarding backhaul services

5. The opposing parties raise two distinct types of concerns regarding the impact of the

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[3] Cox Communications does not have an ownership interest in the ITJV.

[4] VZW Agent Agreement between Cellco Partnership d/b/a Verizon Wireless and Comcast Cable Communications, dated 12/2/11; VZW Agent Agreement between Cellco Partnership d/b/a Verizon Wireless and Time Warner Cable Inc., dated 12/2/11; VZW Agent Agreement between Cellco Partnership d/b/a Verizon Wireless and Bright House Networks, LLC, dated 12/2/11; VZW Agent Agreement between Cellco Partnership d/b/a Verizon Wireless and Cox Communications, Inc., dated 12/16/11; Comcast Agent Agreement between Comcast Cable Communications, LLC and Cellco Partnership d/b/a Verizon Wireless, dated 12/2/11; TWC Agent Agreement between Time Warner Cable Inc. and Cellco Partnership d/b/a Verizon Wireless, dated 12/2/11; BHN Agent Agreement between Bright House Networks, LLC and Cellco Partnership d/b/a Verizon Wireless, dated 12/2/11; Cox Agent Agreement between Cox Communications, Inc. and Cellco Partnership d/b/a Verizon Wireless, dated 12/16/11.

[5] Reseller Agreement for Comcast Cable Communications, LLC between Cellco Partnership d/b/a Verizon Wireless and Comcast Cable Communications, LLC; Reseller Agreement for Time Warner Cable Inc. between Cellco Partnership d/b/a Verizon Wireless and Time Warner Cable Inc.; Reseller Agreement for Bright House Networks, LLC between Cellco Partnership d/b/a Verizon Wireless and Bright House Networks, LLC; Reseller Agreement for Cox Communications, Inc. between Cellco Partnership d/b/a Verizon Wireless and Cox Communications, Inc.

[6] *See* Limited Liability Company Agreement of Joint Operating Entity, LLC, dated 12/2/11.

Commercial Agreements on competition in backhaul services.

- First, they raise "horizontal" concerns, including (i) that the Commercial Agreements may soften competition between Verizon and the MSOs in the provision of backhaul services,[7] or alternatively (ii) that VZW may discriminate in favor of the MSOs' backhaul services and against independent suppliers of backhaul.[8]
- Second, they raise "vertical" concerns, namely that the Commercial Agreements may give the MSOs an incentive to bolster VZW's wireless service by providing backhaul services on terms that favor VZW and disadvantage VZW's rivals, thus harming competition among wireless carriers.[9]

6. As explained in Section II, I conclude that neither the horizontal concerns nor the vertical concerns that have been raised regarding the effects of the Commercial Agreements on competition in backhaul services hold up to scrutiny. This conclusion is supported by the economic analysis presented throughout Section II, but one simple fact may best illustrate the key points: Since Comcast signed the Commercial Agreements with VZW on December 2, 2011, **[BEGIN HIGHLY CONFIDENTIAL]**

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[7] *See* Mar. 26, 2012 RCA Reply Comments at 17, 34, 39-40; Feb. 21, 2012 Sprint Comments at 9-13; Feb. 21, 2012 NTCH Petition to Deny at 12-13.

[8] *See* Mar. 26, 2012 Level 3 Reply Comments at 7-9. Such concerns are "horizontal" because they involve horizontal competition within the backhaul market.

[9] *See* Sprint Reply Comments at 14-15. Such concerns are "vertical" because they reflect ways in which changes in backhaul market conditions may affect downstream competition among wireless services providers.

**HIGHLY CONFIDENTIAL]** The Commercial Agreements clearly have not stopped the MSOs from doing backhaul business with VZW's rivals on mutually agreeable terms.[10]

### 3. Opposing parties' concerns regarding Wi-Fi services

7. In addition to the backhaul concerns, the opposing parties have expressed concern that the Commercial Agreements will induce the MSOs to provide Wi-Fi services, particularly carrier-purchased Wi-Fi offload services, in a way that discriminates against VZW's rivals and in favor of VZW.[11] Like the concerns about backhaul—and indeed for many of the same reasons—the Wi-Fi concerns are without basis. But unlike backhaul, which is at least currently an input into wireless service, carrier-purchased Wi-Fi offload services are not currently an input purchased by any U.S. wireless service provider.[12] As a result, my discussion focuses first and primarily on backhaul, and then in Section III I turn to a shorter discussion of the even more speculative and less factually supported theories regarding carrier-purchased Wi-Fi offload services.

## II. BACKHAUL ISSUES

8. As an initial matter, it is important to place the MSOs' limited role in the provision of

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[10] Interview with Terrence Connell, Senior Vice President of Sales & Operations, Comcast Business Services, July 17, 2012. **[BEGIN HIGHLY CONFIDENTIAL]**

**[END HIGHLY CONFIDENTIAL]**

[11] *See, e.g.*, Mar. 26, 2012 Sprint Reply Comments at 12, 13; Mar. 26, 2012 Computer & Communications Industry Association (CCIA) Reply Comments at 19.

[12] Interview with Tom Nagel, Senior Vice President and General Manager of Wireless Services, Comcast Communications, July 18, 2012.

backhaul services in proper perspective. For example, Comcast, the largest MSO in terms of number of subscribers, entered its first backhaul service contract **[BEGIN HIGHLY CONFIDENTIAL]**

**[END HIGHLY CONFIDENTIAL]**

### A. THE HORIZONTAL BACKHAUL CONCERNS RAISED BY OPPOSING PARTIES ARE WITHOUT MERIT

9. The MSOs compete against Verizon Telecom, AT&T, and a host of other wired, wireless, and cable companies in the provision of backhaul services to wireless carriers.[15] Verizon Communications, Inc. ("Verizon") is the majority owner of VZW and the parent of Verizon Telecom.[16] The opposing parties' horizontal concern is apparently that, because of the affiliation between Verizon and VZW, the Commercial Agreements may attenuate the intensity of backhaul competition between the MSOs and Verizon Telecom. This claim is without basis.

10. Although the opposing parties argue vaguely that the Commercial Agreements will result in softening of competition between the MSOs and Verizon Telecom, an analysis of the Commercial Agreements does not support this concern. The opposing parties point to no provision of the Commercial Agreements and establish no reasonable mechanism under which the agreements would diminish competition between Verizon Telecom and the MSOs

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[13] Interview with Terrence Connell, Senior Vice President of Sales & Operations, Comcast Business Services, July 17, 2012.

[14] *See* ¶ 22.

[15] *See* ¶ 21 for details.

[16] VZW is a joint venture between Verizon and Vodafone Group Plc (Vodafone). Verizon owns a controlling 55 percent interest in Verizon Wireless, and Vodafone owns the remaining 45 percent. (*See* Verizon 2011 10K).

in the provision of backhaul services. In particular, the agreements do not provide any mechanism (*e.g.*, a direct ownership share in Verizon by an MSO, or a full merger) under which an MSO's loss of a backhaul customer to Verizon Telecom would either directly or indirectly benefit the MSO. Likewise, the agreements do not provide any mechanism under which Verizon Telecom's loss of a backhaul customer to an MSO would either directly or indirectly benefit Verizon Telecom. Similarly, there is no mechanism whereby Verizon will benefit if a user purchases backhaul from the MSOs rather than a third party, or any mechanism whereby the MSOs will benefit if a user purchases backhaul from Verizon rather than a third party.[17]

11. Level 3 Communications ("Level 3") raises a separate but related concern about a provision of the Agency Agreements under which **[BEGIN HIGHLY CONFIDENTIAL]**

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[17] In its July 12, 2012 and July 25, 2012 *Ex Parte* filings, Sprint provides a vague outline of a theory that seems to claim that the Commercial Agreements may facilitate collusion. For example, it argues that if an MSO refuses to take actions to help Verizon, Verizon may punish the MSO by expanding (or increasing promotions of) FiOS in that MSO's territory. Alternatively, it argues that if Verizon refuses to help the MSOs, the MSOs could punish Verizon by providing other carriers with preferential Wi-Fi access. (Sprint, Notice of *Ex Parte* Communications, WT Docket No. 12-4, July 12, 2012; Sprint, Notice of *Ex Parte* Communications, WT Docket No. 12-4, July 25, 2012.)

Notably, however, Sprint provides no indication of how the Commercial Agreements change Verizon's ability or incentive to use FiOS in this (highly speculative) way, or how the Commercial Agreements change the MSOs' ability or incentive to use Wi-Fi access in this (highly speculative) way.

More generally, one could use similarly vague arguments to speculate that any joint venture or cooperative arrangement *could* lead to collusion. In order to avoid eliminating many pro-competitive ventures such as this one—and generally stifling firms' willingness to seek out pro-competitive joint ventures—such claims must be bolstered by *actual evidence that such theoretical possibilities are, in fact, likely*. I have seen no such evidence.