

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Applications of

Comcast Corp. and
Time Warner Cable, Inc.

MB Docket No. 14-57

For Consent To Assign Or Transfer Control
of Licenses And Authorizations

To: The Commission

LEGAL COMMENTS OF SPOT ON NETWORKS, LLC

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AND NOW COMES SPOT ON NETWORKS, LLC (“Spot On”) by and through its counsel, Frederick A. Polner, Esq., and hereby submits this its LEGAL COMMENTS in the above captioned matter. In support whereof it is averred as follows:

SUMMARY

In 2010, the Federal Communications Commission (the “Commission” or “FCC”) adopted The National Broadband Plan (the “Plan” or “NBP”). Three key goals of that Plan are 1) ensure competition in broadband services; 2) encourage better use of unlicensed spectrum; and, 3) foster innovation. Unless the four specific conditions delineated on page 15 of these Comments (the “Conditions”) are attached to any approval of the proposed merger, the Commission will be seriously impairing achievement of these goals. And, as a consequence,

approval of the merger without attaching the Conditions would be directly contrary to the public interest, convenience and necessity.

ENCOURAGING GREATER USE OF WI-FI

In April of this year, in Docket No. 13-49, the FCC unanimously recognized that the public interest is best served if there is more robust use of unlicensed spectrum space, especially wi-fi, to connect wireless traffic to the Internet. In voting for adoption of this item, Chairman Wheeler explicitly recognized how use of unlicensed spectrum is vital to how wireless users connect to the Internet and can be a seamless onramp for smartphones, tablets, and other wireless devices. In voting for expanded wi-fi use, the Chairman remarked,¹

In 2014, licensed and unlicensed spectrum are more complimentary than competitive. They are less oil & vinegar and more peanut butter & jelly. Today, virtually every smartphone has two unlicensed technologies, Wi-Fi and Bluetooth, with a third- near field communications – beginning to be added for mobile transactions.

And, the increasing utility of using wi-fi as a component part of the wireless infrastructure was highlighted by the Chairman's observation that,²

... wireless carriers are using Wi-Fi to offload more than 45% of smartphone traffic to fixed networks.

This central role of wi-fi and the Commission's role of encouraging its greater use for connection to the Internet was echoed by each and every one of the FCC commissioners.

Commissioner Clyburn said,

¹ Revision of Part 15 of the Commission's Rules, Statement of Chairman Tom Wheeler, April 1, 2014.

² id.

Once criticized by licensed wireless providers, unlicensed spectrum is now being heavily used to off load data traffic. The economists who have studied the area have different estimates, but there is a consensus that Wi-Fi off load saves wireless companies tens of billions of dollars in network costs each year. Demand for unlicensed services, has spiked so much that the 2.4 GHz band is now congested particularly in major cities. We have to be ambitious in finding more ways to provide licensed and unlicensed spectrum for commercial services.³

Commissioner Rosenworcel said,⁴

So what does that mean? For starters, if you like Wi-Fi, that is a lot more. Cheers for that. But the power of unlicensed goes beyond onramps to the Internet and offloading for licensed services. It is the power of setting aside more of our airwaves for experiment and innovation without license. It is bound to yield new and exciting developments. It is also bound to be an economic boon. After all, the economic impact of unlicensed spectrum has been estimated at \$140 billion annually. By any measure, that is a lot.

Commissioner Pai said,⁵

I love Wi-Fi. And so does the American public. Consumer demand for high-speed, wireless broadband is expected to increase nine-fold over the next four years, with 64 percent of mobile data traffic handled by Wi-Fi and small cell networks.

Commissioner O’Rielly said,⁶

By some estimates, unlicensed spectrum generates as much as \$220 billion in value annually to the economy. And, in 2013, approximately .5 exabytes, or 57 percent, of mobile data was offloaded onto Wi-Fi networks each month. By 2018, this monthly offload is expected to reach 4.8 exabytes and make up 64 percent of all mobile data traffic.

Companies like Spot On take the Commission’s manifest regarding greater use of wi-fi very seriously and make it their business to implement it. Spot On is an innovator in bringing managed wi-fi service to building owners across America.

³ Revision of Part 15 of the Commission’s Rules, Statement of Commissioner Clyburn, April 1, 2014.

⁴ Revision of Part 15 of the Commission’s Rules, Statement of Commissioner Rosenworcel, April 1, 2014.

⁵ Revision of Part 15 of the Commission’s Rules, Statement of Commissioner Pai, April 1, 2014.

⁶ Revision of Part 15 of the Commission’s Rules, Statement of Commissioner O’Rielly, April 1, 2014.

THE NATIONAL BROADBAND PLAN

The National Broadband Plan is the culmination of many months of hard work on the part of many at the FCC, including, the work of a task force which worked on nothing but the Plan, as well as several Commission-level field hearings and a comprehensive series of staff-level public workshops. The FCC created the Plan at the behest of Congress, which charged the FCC with developing a plan to ensure every American has access to broadband capability.

The public interest was benefited by adoption of the Plan and will be even more so by achievement of its goals. The overarching aim of the Plan is to help every American have affordable access to robust broadband service.

Spot On is helping to implement the Plan by providing managed wi-fi to multi-tenant building owners, office building owners, and hotels.

Competition

The Plan stresses the importance of stimulating competition in the deployment of broadband. It recognizes that competition provides consumers the benefits of choice, better service and lower prices. Two key aspects in promoting such competition are: 1) bringing down the cost of entry; and, 2) ensuring competing service providers have access to backhaul at a reasonable cost. More specifically, the Plan observes that “Bringing down the costs of entry and expansion of wireless broadband by facilitating access to...*high capacity backhaul* may spur additional facilities-based competition.”⁷

⁷ NBP, p. 36.

But, the Plan does not stop there. In addition to spurring competition in the retail sector, the Commission's Plan speaks to the importance of fostering competition in the wholesale sector, as a means of benefiting consumers. Speaking directly to the importance of stimulating competition in the wholesale sector, the Commission opines:

Residential broadband competition—as important as it is—is not the only type of competition we must foster to lay the foundation for America's broadband future. Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of *wholesale* markets, through which providers of broadband services secure critical inputs from one another. Because of the economies of scale, scope and density that characterize telecommunications networks, well functioning wholesale markets can help foster retail competition, as it is not economically or practically feasible for competitors to build facilities in all geographic areas. Therefore, the nation's regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers. (emphasis added)⁸

As mentioned, Spot On furnishes managed wi-fi services to multi-tenant residential building owners, office building owners, and hotels. But, just as the Commission observes in the foregoing quoted portion of the Plan, it is not economically or practically feasible for Spot On to build its own access to the Internet in all geographic areas. In those areas where it is not feasible to do so, Spot On purchases its connections to the Internet from wireline broadband providers, including Comcast and Time-Warner, and depends on them for backhaul.

⁸ NBP, p. 47.

Absent attaching the Conditions, the proposed merger would undermine competition in the provision of wi-fi broadband access. As more fully explained in these Comments, the proposed merger would give the merged entity both the ability and the incentive to deny Internet connections to competing wi-fi provider companies, like Spot On, or to discriminate against those competitors by furnishing such service on commercially unreasonable terms, conditions, and prices.

But, even more worrisome, as more fully explained in the subsection “Actual History” at page 10 of these Comments, beyond Comcast’s ability and incentive to deny Internet connection to competing wi-fi providers, Spot On already has experienced actual difficulty in obtaining Internet connection from Comcast, including a nationwide “moratorium” imposed by Comcast on Spot On closing off Spot On’s access to backhaul.

To be consistent with the goals of the Plan, any approval the Commission might give to the proposed merger must not defeat competition in the wholesale sector. That is why it is vitally important for the Commission to attach the Conditions to any approval.

Interconnection

In the Plan, the Commission recognizes that part and parcel of competition in furnishing broadband connection is the requirement that competing providers not deny access to an Internet connection. The Plan emphasizes how important this is to ensuring competition.

Recommendation 4.10 of the Plan specifically says that the FCC should encourage the shift to IP-to-IP interconnection where efficient. The Plan goes on to explain:⁹

⁹ NBP, p. 49.

For consumers to have a choice of service providers, competitive carriers need to be able to interconnect their networks with incumbent providers.

And,

For competition to thrive, the principle of interconnection - in which customers of one service provider can communicate with customers of another – needs to be maintained.

If the proposed merger is to be approved, any such approval must protect the connection of competing wi-fi providers, such as Spot On, who depend on Comcast or Time-Warner Cable to connect to the Internet and to furnish to Spot On highspeed backhaul.

Ability and Incentive to Squelch Competition

As earlier mentioned in these Comments, Spot On does not have its own facilities for broadband access to the Internet in all geographic areas. In order for it to furnish its managed wi-fi service to its customers, it needs to purchase Internet connections from wireline broadband providers, including Comcast and Time-Warner. Until 2013, Spot On did not encounter difficulty in purchasing Internet connections from Comcast. But, within the past year, Comcast has made a push into furnishing to its customers not only traditional wireline broadband access, but wireless broadband access utilizing unlicensed spectrum, and more particularly, the IEEE suite of 802.11 protocols, *i.e.*, wi-fi.¹⁰

In its Public Interest Statement accompanying its Application in the captioned matter, Comcast boasts,¹¹

¹⁰ USA Today, May 5, 2014, MONEY, p. 4B.

¹¹ Public Interest Statement, p. 39.

Comcast has led the industry – not just the cable industry, but all broadband providers – in rolling out in-home Wi-Fi gateways that give customers the nation’s fastest wireless speeds and excellent performance over their home wireless network (these gateways are capable of speeds of up to 270 Mbps as compared to speeds of 85 Mbps from the prior generation devices)

In fact, on April 26, 2013, Comcast announced,¹²

What many of today’s consumers may not yet realize, however, is that the wireless router they’re using to power their connected home may be significantly slower than Internet speeds they get from their Internet provider. Today we are launching a new device that solves this problem and creates the fastest in-home wireless network available anywhere in the US.

Its Public Interest Statement explains that achieving scale is important in rolling out its push into wi-fi, as reason why it should be allowed to bulk up on scale by acquiring control over Time-Warner Cable (“Time-Warner”). Unabashedly, it explains why scale is so important, stating,¹³

...scale is important in purchasing and deploying such equipment – and even more so for investing in the next generation of the technology.

Comcast can achieve this scale in one of two ways: 1) growing by providing a better product and service than its competitors; or 2) squelching its competition. An easy way for Comcast to squelch its competition is to degrade or even outright deny highspeed connection to the Internet to companies, like Spot On, which compete with Comcast in offering highspeed wi-fi access to the Internet.

¹² See Rob Slinkard, *Newest Xfinity Wireless Gateway Powers Connected Home with the Fastest WiFi in the Nation*, Comcast Voices (Apr. 26, 2013), <http://corporate.comcast.com/comcast-voices/newest-xfinity-wirelessgateway-powers-connected-home-with-fastest-wifi-in-the-nation>.

¹³ Public Interest Statement, p. 39.

Certainly, Comcast has the ability to degrade or outright deny connection; and, without doubt, to achieve the scale it so desires, it has the motivation to squelch competition.

But, there is still another reason why Comcast has an interest in crushing competition. In its Public Interest Statement, again, as reason for bulking up its size by acquiring Time-Warner Cable, Comcast emphasizes as its coverage increase, the value of its network increases too. Specifically, it says,¹⁴

A Wi-Fi network becomes much more valuable as its coverage becomes more ubiquitous. Comcast has made W-Fi deployment a central focus of its investment and service strategy and is in the process of building one of the largest and most robust Wi-Fi networks in the nation....

Obviously, an easy way to achieve its goal of becoming more ubiquitous is to clear the path for its expansion by squelching whatever competition may be in the way. So, here, again, it is evident from Comcast's own words that it has the motivation to eliminate competitors.

And, most frightening to companies like Spot On is Comcast's revelation that it has placed them directly in the bull's-eye of Comcast's target. This is evident from the language of Comcast's Public Interest Statement, wherein Comcast specifically says it is focused on furnishing wi-fi to small and medium sized businesses.¹⁵ This is precisely the sector now served by independent providers of managed wi-fi services like Spot On.

Absent attaching the Conditions, the proposed merger would undermine competition in the provision of wi-fi broadband access. The proposed merger would give the merged entity both the ability and the incentive to deny Internet connections service

¹⁴ id.

¹⁵ Public Interest Statement, p. 40.

to competing wi-fi provider companies, like Spot On, or to discriminate against those competitors by furnishing the connections on commercially unreasonable terms, conditions, and prices.

Where, as here, there is present the *ability and incentive* to reduce competition, there is precedent for the FCC to attach conditions to its approval of a proposed transaction. This may be seen from the conditions which the FCC attached in 2011 to its approval of Comcast's acquisition of control from General Electric in Docket No. 10-56 (released January 20, 2011). And, the Commission did so in that proceeding on the basis of "the harms that *could* result" (emphasis added)¹⁶ from consummating the transaction, as well on the basis of its concern that Comcast would have the ability and incentive to harm the public interest:

ie., Comcast-NBCU would have both the *ability and incentive* to raise prices.¹⁷

ie., Comcast-NBC-U would have both the *ability and incentive* to disadvantage Comcast's rival multichannel distributors.¹⁸

ie., Comcast would have the *ability and incentive* to hinder the development of rival online video offerings.¹⁹

ie., Comcast would have the *ability and incentive* to inhibit potential competition from emerging that could challenge Comcast's business.²⁰

Actual History of Squelching Competition

¹⁶ At para. 3

¹⁷ *id.*

¹⁸ *id.*

¹⁹ *id.*

²⁰ *Id.*

But, beyond the ability and incentive to deny Internet connections to competing wi-fi providers, Spot On has experienced actual difficulty in obtaining Internet connections from Comcast.

Until 2013, Spot On did not encounter difficulty in purchasing Internet connections from Comcast. But, within the past year, Comcast has made a push into furnishing to its customers not only traditional wireline broadband access, but wireless broadband access utilizing unlicensed spectrum, and more particularly, the IEEE suite of 802.11 protocols, *i.e.*, wi-fi.²¹

As the attached Declaration of Richard J. Sherwin, Spot On's chief executive officer recounts, in April 2013, Comcast started to deny Spot On's requests for Internet connections and even threatened to consider bringing possible civil and criminal charges against Spot On as a weapon to deter Spot On from competing with Comcast's rollout of its own wi-fi service. Comcast made an about face, eventually, furnishing connections to Spot On, for those buildings in which SPOT ON would not directly compete for subscribers, within days of Mr. Sherwin going public with Comcast's treatment of Spot On by testifying before the Senate Judiciary Committee which was holding a hearing on the proposed merger.²²

Different Experience With Time-Warner Cable

The experience Spot On has had with Time-Warner Cable is very different from Spot On's experience with Comcast. In certain geographic areas of the country Spot On purchases its connections to the Internet from Time-Warner Cable. Overall, this

²¹ USA Today, May 5, 2014, MONEY, p. 4B.

²² Mr. Sherwin was one of only five witnesses to present oral testimony to the Senate Judiciary Committee on April 9, 2014.

experience contrasts markedly from its experience with Comcast. Rather than being denied access to service and being subject to threats of civil and criminal charges, Time-Warner Cable has been a consistent and reliable business relationship. Indeed, testifying before the Senate Judiciary Committee on April 9, 2014 at a hearing on the proposed merger, Arthur Minson, CFO of Time-Warner Cable said that his company furnishes wholesale Internet connections to companies like Spot On because it makes good business sense for his company to do so.²³

If the FCC approves Comcast's acquisition of control over Time Warner, it is likely Time Warner will change its business practices to replicate how Comcast has treated Spot On. Should that happen, in those geographic areas where Time Warner presently operates (but Comcast does not) it is likely that Spot On will begin to encounter the same difficulties it has encountered in those geographic areas now served by Comcast and the public interest will suffer due to reduced competition and reduced innovation.

ESSENTIAL FACILITIES DOCTRINE

The Essential Facilities Doctrine compels attaching the Conditions to any approval which the FCC may give to the proposed merger.

The Essential Facilities Doctrine is a part of antitrust law which says that a company which controls a sufficiently important resource may be compelled to share that resource with its competitors. But, in addition to its grounding in antitrust law, its gravamen is soundly within the province of the Commission and is integral to a consideration of the public interest.

²³ Testimony of Arthur Minson, Time-Warner Cable CFO, April 9, 2014 at appx. 12:58 p.m.

The core elements necessary to prove an antitrust violation under the Essential Facilities Doctrine are:

1. control of the essential facility;
2. a competitor's inability practically or reasonably to duplicate the essential facility;
3. the denial of the use of the facility to a competitor; and
4. the feasibility of providing the facility.

MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.1982).

As earlier mentioned in these Comments, Spot On depends on obtaining highspeed access to the Internet by purchasing that from both Comcast and Time-Warner. It is essential that Comcast and Time-Warner allow Spot On to connect with each of their facilities to reach the Internet. It is simply not feasible nor reasonably practical for Spot On to duplicate those facilities. By degrading or outright denying such connection, the merged entity not only would be squelching competition, but it would be stifling innovation in the provision of services in the unlicensed spectrum by snuffing out innovators in the wi-fi space. Moreover, and as may be gleaned from Mr. Sherwin's accompanying Declaration, it is entirely feasible for Comcast and Time-Warner Cable to allow Spot On, and companies like it, to use the Comcast and Time-Warner Cable facilities to obtain the needed connection to the Internet. Thus, there is good reason to find the attachment of the Conditions is warranted and is in the public interest.

The importance of attaching the Conditions on any approval is spotlighted by the recent United States Supreme Court decision in Verizon Communications v. Trinko, 540 U.S. 398 (2004) which stands for the proposition that resorting to a remedy under antitrust law for violation of the Essential Facilities Doctrine will be virtually impossible

if the FCC has the opportunity to attach the Conditions under its mandate to act in the public interest, but fails to do so.

THE PUBLIC INTEREST ALLOWS THE FCC TO ATTACH CONDITIONS

There is precedent for the Commission to impose conditions on any approval it may give to the proposed merger. The Commission has recognized that a proposed transaction may lead to both beneficial and harmful consequences,²⁴ and the Commission's public interest authority enables it, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions to ensure that the public interest is served.²⁵ Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Act.²⁶ Similarly, section 214(c) of the Act authorizes the Commission to impose "such terms and conditions as in its judgment the public convenience and necessity may require."²⁷ Unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits.²⁸ In using this broad authority, the Commission has generally imposed

²⁴ See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 21.

²⁵ See, e.g., *Verizon Wireless/Alltel Order*, 23 FCC Rcd at 17462, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22.

²⁶ 47 U.S.C. § 303(r); see also *Verizon Wireless/Alltel Order*, 23 FCC Rcd at 17463, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22.

²⁷ 47 U.S.C. § 214(c); see also *Verizon Wireless/Alltel Order*, 23 FCC Rcd at 17463, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22.

²⁸ See, e.g., *Verizon Wireless/Alltel Order*, 23 FCC Rcd at 17463, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22; see also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

conditions to remedy specific harms *likely* to arise from transactions and that are related to the Commission's responsibilities under the Act and related statutes.²⁹

THE CONDITIONS

In view of the above, the following four conditions need to be attached to any approval the Commission might give to the proposed merger in order to find such approval would serve the public interest, convenience, and necessity:

1. Comcast shall offer to competitors for resale its upstream and downstream high speed broadband access service without diminishing its speed for use in a competitor's provision of Wi-Fi service.
2. Such offering shall be on commercially reasonable wholesale terms and conditions.
3. In multifamily residential or multitenant commercial buildings, where Comcast is the sole wired provider of high speed broadband access, Comcast shall not, directly or indirectly, limit competitive choice to consumers in those buildings. More specifically, Comcast shall (a) offer wholesale high speed broadband access to competitors at industry standard wholesale pricing for all available speeds and capacities and (b) refrain from offering retail services at predatory pricing.
4. In the event Comcast shall fail to comply with (1), (2) or (3) above, Comcast shall be liable to the United States of America in the amount of \$100,000 for each violation for each day during the period of time of such noncompliance.

CONCLUSION

The Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions to ensure that the public interest is served.

The foregoing Comments amply demonstrate that any approval of the captioned applications will *not* serve the public interest, convenience, and necessity *unless* the Conditions are attached.

²⁹ See, e.g., *Verizon Wireless/Alltel Order*, 23 FCC Rcd at 17463, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22.

Respectfully Submitted

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/s/

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