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

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

WT Docket No. 12-4

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I. Introduction

It has been said that sometimes the best way to know the weather, is to step outside. For the FCC, it is time to take that first step outside into the reality of competition in the mobile marketplace. The mobile market stands as one of the few bright spots in the economy, limited primarily by severe constraints on its chief asset: spectrum. Verizon has decided to undertake what any prudent business would do—obtain those inputs necessary for its continued growth.

Critics of the proposed transaction lament the concentration of more spectrum in the hands of one of the industry's biggest players. But this implicit equation of concentration with harm to consumers is unsupported and misplaced. Concentration of resources in the hands of the largest wireless providers has not slowed the growth of the market; the problem is that growth in demand has dramatically outpaced capacity. Meanwhile, whatever the claimed merits may be of other, smaller companies holding this spectrum (as the deal's opponents seem to want), that theoretical deal is not before the Agency, and the Commission is precluded from evaluating this deal in light of that hypothetical alternative.

While the FCC undeniably has authority to review the license transfers under the Federal Communications Act, its purview to review transactions is intentionally limited in substantive scope, and the Commercial Agreements that the deal's opponents want to bootstrap into the FCC's review are outside of it. Whether those agreements have anticompetitive effect is properly the province of the Department of Justice and their effect on competition is best measured under the antitrust laws, not by the FCC under its vague "public interest" standard. Indeed, if the FCC can assert jurisdiction over the Commercial Agreements as part of its public interest review, its authority over license transfers will become a license to regulate all aspects of business—duplicating merger review by the DOJ, but under a standard of review that lacks any clear limiting principles and analytical rigor. This is a recipe for certain mischief.

In the final analysis, the mobile wireless telecommunications services market is not concentrated to the extent that anticompetitive effects would result from this transaction.

At the same time, the need for all competitors, including Verizon, to obtain sufficient spectrum to meet increasing demand is so large that the transfer this deal contemplates of unused spectrum from companies with no means to deploy it to a company that has demonstrated itself to be one of the most significant in the industry is plainly in the public interest and should be approved.

II. Background

The wireless market is growing at a remarkable rate, leaping from 38 million subscribers in June 2006 to 293 million in June 2010. In order to keep up with such high demand, wireless carriers must compete across a wide range of price and non-price factors in order to attract the increasing number of subscribers to their wireless and broadband services. Most importantly, they must continue to build out capacity to service ever-increasing demand at higher speeds, requiring, most importantly, more spectrum.

As a result of the competitive response to high demand, the current wireless market is characterized by "falling prices, accelerating output, technological dynamism, surging investment, ubiquitous advertising wars, and multidimensional competition," all of which are indicative of a highly competitive market.[3] Moreover, the market itself is shifting, and as "wireless" becomes increasingly synonymous with "broadband," this competition is continually expanding: where once the wireless market comprised essentially only cellular networks offering voice service and competing with each other and wire line phone service providers, the relevant competitors now include DSL, satellite, cable, Municipal Wi-Fi, and broadband over power line networks capable of transmitting *data* at high speeds. Thus, while much attention has been paid to the relevant characteristics, market structure, and prices of purely *wireless* markets (comprising competitors like Verizon Wireless ("Verizon"), MetroPCS, Cellular South, and others) in assessing the effects of the proposed

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[3] Description of Transaction, Public Interest Showing and Related Demonstrations, Applications of AT&T Inc. & Deutsche Telekom AG, No. 11-65 (FCC Apr. 21, 2011).

transaction, a more accurate—but less well quantified—assessment would also incorporate *wire-line* competitors offering data and phone services via cable and DSL—including some of the parties to this transaction.

The FCC's *Fifteenth Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services* ("Fifteenth Report") documents that prices have been decreasing, and coverage and technology increasing, with remarkable consistency in the wireless industry. According to the FCC, following the Consumer Price Index (CPI), wireless service prices have decreased every year since 1997.[4]

Consumer behavior also strongly indicates the market is competitive. Consumers' ability to switch wireless providers at low cost in response to changes in price or quality encourages providers to vigorously compete to gain consumers. The term used to describe the percentage of current customers a service provider loses over a given time is the "churn rate." Recent trends have shown that churn rates have been increasing over the past few quarters, indicating the mobility of consumers. Although early termination fees tend to increase switching costs, all four nationwide carriers offer pro-rated early termination fee polices that lower the costs to consumers who transfer services. Consumers also have access to information through resources provided by wireless carriers and third parties[5] to aid them in making more informed decisions as to price, availability, quality, and features of mobile wireless services. And, at least since October 2010, costs associated with wireless number portability are "insignificant."[6] Easily

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4 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, No. 10-133, ¶ 31 (FCC June 27, 2011) ("Fifteenth Report"), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0630/FCC-11-103A1.pdf.

5 Such as Consumer Reports, trade associations, marketing and consulting firms. Id. ¶ 241.

6 Fifteenth Report ¶ 240.

accessible information and limited barriers indicate that there are low transaction costs in switching carriers.[7]

What has emerged from all of this is an arguably concentrated but remarkably vibrant, competitive market. Concentration of resources in the hands of the largest wireless providers has not slowed the growth of the market; rather the central problem is one of spectrum scarcity. According to the Fifteenth Report, "mobile broadband growth is likely to outpace the ability of technology and network improvements to keep up by an estimated factor of three, leading to a spectrum deficit that is likely to approach 300 megahertz within the next five years."[8]

The spectrum crunch has arisen from this unexpected and unprecedented jump in demand for mobile broadband. Since the debut of the iPhone in 2007, AT&T, for example, has reported that "data volumes had increased by 8,000 percent by 2010."[9] The growth of smartphones, mobile devices, and tablets has led to a 100% increase in data traffic between 2009 and 2010.[10] This growth is not expected to slow. AT&T also estimates that within five years data traffic will expand eight to ten times its level in 2010.[11] Investment in this area has expanded greatly with expectations of investment levels of "$25-$53 billion during

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7 Id. ¶ 238-52.

8 Fifteenth Report, ¶ 267 (citing FED. COMMC'NS COMM'N, MOBILE BROADBAND: THE BENEFITS OF ADDITIONAL SPECTRUM (2010), available at http://download.broadband.gov/plan/fcc-staff-technical-paper-mobile-broadband-benefits-of-additional-spectrum.pdf).

9 Larry Downes, Averting a Spectrum Disaster: Now for the Hard Part, CNET News, Feb. 25, 2012, available at http://news.cnet.com/8301-1035_3-57385202-94/averting-a-spectrum-disaster-now-for-the-hard-part/

10 The Economic Benefits of New Spectrum for Wireless Broadband, Executive Office of the President, Council of Economic Advisers (Feb. 2012)

11 Marguerite Reardon, Is AT&T Considering Throttling Heavy Data Users?, CNET News, July 28, 2011, available at http://news.cnet.com/8301-30686_3-20085179-266/is-at-t-considering-throttling-heavy-data-users/.

2012-2016; conservatively, these investments could account for $73-$151 billion in GDP growth and 371,000-771,000 new jobs."[12]

Some actions can be taken by private firms to solve this crunch, including building and expanding infrastructure.[13] AT&T, for instance, has been "bulking up its network with higher capacity links from cell towers to the Internet"[14] and last year invested close to $20 billion. Verizon has invested similarly. While new technological innovations also will serve to improve the performance of networks,[15] growing demand has shown that these efforts are insufficient without opening up further spectrum space.[16] A recent report by the Council of Economic Advisors agrees that "the projected growth in data traffic can be

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[12] The Impact of 4G Technology on Commercial Interactions, Economic Growth, and U.S. Competitiveness, Deloitte (Aug. 2011), available at http://www.deloitte.com/us/impactof4g.

[13] Larry Downes, *Averting a Spectrum Disaster: Now for the Hard Part*, CNET News, Feb. 25, 2012, http://news.cnet.com/8301-1035_3-57385202-94/averting-a-spectrum-disaster-now-for-the-hard-part/. Many of these efforts have hit administrative pitfalls at the local government level. "Despite a 2009 FCC rule requiring local authorities to decide on cell tower modification and construction requests within 90 and 150 days respectively, thousands of applications are languishing in political limbo." Larry Downes, *Does Your iPhone Service Suck? Blame City Hall*, CNET News, Sept. 8, 2011, http://news.cnet.com/8301-1035_3-20102911-94/does-your-iphone-service-suck-blame-city-hall/. This problem has become pronounced enough to inspire federal legislation to preempt local foot dragging and force action. See, e.g., Donald Evans, *Congress Requires State/Local Rubber Stamp Approval of Some Wireless Tower Modifications*, Comm L. Blog (Feb. 22, 2012), http://www.commlawblog.com/2012/02/articles/cellular/congress-requires-statelocal-rubber-stamp-approval-of-some-wireless-tower-modifications/.

[14] Marguerite Reardon, Is AT&T Considering Throttling Heavy Data Users?, CNET News, July 28, 2011, available at http://news.cnet.com/8301-30686_3-20085179-266/is-at-t-considering-throttling-heavy-data-users/.

[15] Larry Downes, Averting a Spectrum Disaster: Now for the Hard Part, CNET News, Feb. 25, 2012, available at http://news.cnet.com/8301-1035_3-57385202-94/averting-a-spectrum-disaster-now-for-the-hard-part/. Some developing innovations include "smart antennae, miniature cell towers, home-based femtocels, and software" that streamlines the use of multiple bands.

[16] The failed AT&T-T-Mobile deal may be the best evidence of the desperate efforts companies are willing to take to get access to more spectrum. In that case, AT&T was willing to spend $39 billion, primarily for T-Mobile's spectrum. Marguerite Reardon, Is AT&T Considering Throttling Heavy Data Users?, CNET News, July 28, 2011, available at http://news.cnet.com/8301-30686_3-20085179-266/is-at-t-considering-throttling-heavy-data-users/.

achieved only by making more spectrum available for wireless use."[17] The National Broadband Plan states that it will "[e]nable incentives and mechanisms to repurpose spectrum to more flexible uses. Mechanisms include incentive auctions, which allow auction proceeds to be shared in an equitable manner with current licensees as market demands change."[18]

Despite clear recognition of this reality (the National Broadband Plan makes the same claim and estimates further that mobile broadband will need 500 MHz of additional spectrum in the next ten years[19]) the FCC and Congress have made little progress to make available the underutilized spectrum in both public and private hands.[20] In fact, the last government-run auction of any significance for spectrum suitable for broadband was held in 2008. It was highly politicized and auctioned off only 62 MHz of spectrum.[21] Another 24 MHz was auctioned off last year,[22] but there remains a significant chunk of spectrum in both government and private (but unused) hands that is tied up in political fights.

Another impediment to efficient deployment of wireless broadband is the limited ability of networks to build or modify (collocate) additional physical infrastructure—cell

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17 The Economic Benefits of New Spectrum for Wireless Broadband, Executive Office of the President, Council of Economic Advisers (Feb. 2012).

18 National Broadband Plan, Federal Communications Commission (March 2010), available at http://www.broadband.gov/plan/executive-summary/ (its number one stated goal is to ensure that "[a] t least 100 million U.S. homes should have affordable access to actual download speeds of at least 100 megabits per second and actual upload speeds of at least 50 megabits per second.").

19 See FED. COMMC'NS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 75 (2010), available at http://www.broadband.gov/plan/.

20 L. Gordon Crovitz, AT&T and the Economics of Monopoly, WALL STREET J., Sept. 18, 2011, http://online.wsj.com/article/SB10001424053111904060604576574681950740922.html.

21 Auction 73 Fact Sheet, FCC, http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73 (last updated Mar. 20, 2008).

22 Auction 92 Fact Sheet, FCC, http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=92 (last updated July 25, 2011).

towers—because of local regulatory impediments and physical siting scarcity.[23] According to the Fifteenth Report, improving coverage by modifying or adding cell towers is subject to considerable delay at the local level. In fact, "[o]f 3,300 zoning applications for wireless facilities pending in 2009, nearly 25 percent had been idling for more than a year. Some had been languishing for more than three years;"[24] this delay occurred despite an FCC Declaratory Ruling that applications be decided within 150 days.[25]

All told, these pressures on wireless carriers have compelled them to squeeze greater capacity out of existing spectrum and to obtain larger spectrum holdings in frequency bands already supporting their existing network equipment and devices. Carriers have further attempted to respond to the capacity problem by deploying more spectrally efficient technology, but regulatory constraints likewise impede their ability to undertake the investments necessary to adopt new technology sufficiently to meet ever-growing demand.

In contrast to past FCC practice, the government no longer has considerable spectrum to sell, auction, or hand out.[26] The FCC's National Broadband Plan aims to free up

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[23] Fifteenth Report, ¶¶ 311-18.

[24] Larry Downes and Geoffrey A. Manne, FCC Mobile Competition Report Is One Green Light for AT&T/T-Mobile Deal, THE TECHNOLOGY LIBERATION FRONT, July 12, 2011, http://techliberation.com/2011/07/12/fcc-mobile-competition-report-is-one-green-light-for-attt-mobile-deal/.

[25] Declaratory Ruling, WT Docket No. 08-165, 24 FCC Rcd, 13,994, 14,021 ¶ 71 (2009). Unfortunately "many local jurisdictions continue to delay collocation application approval by subjecting these applications to the 'same costly and time-consuming process' required of applications for new towers…. [Moreover], it is unclear to what extent the Declaratory Ruling has been effective in speeding approval of tower siting applications." Fifteenth Report, ¶ 314.

[26] Larry Downes, Averting a Spectrum Disaster: Now for the Hard Part, CNET News, Feb. 25, 2012, available at http://news.cnet.com/8301-1035_3-57385202-94/averting-a-spectrum-disaster-now-for-the-hard-part/. Downes references a recent Hudson Institute presentation by George Mason Law Professor Thomas Hazlett. Downes states that "the U.S. has run out. We don't have 500 or even 300MHz of usable spectrum left to auction, at any price. Today's available inventory is closer to zero."

500 MHz of wireless spectrum in the next 10 years, with 300 of those in the next five. Two years into this plan, the FCC appears to be well behind schedule.

Following the model of spectrum auctions undertaken in the 1990s, recent legislation plans to ask television broadcasters to name a price on spectrum they currently hold, then share the revenues generated from the re-selling of that spectrum in new auctions.[27] The FCC recently approved of new rules to open up use of unlicensed "white space" spectrum, and Congress has also acted to speed action by local governments to approve of wireless tower modifications and construction.[28] The FCC imposed a similar "shot clock" of either 90 or 150 days for local governments to act on wireless "collocation" applications,[29] (but as yet the requirement has had little effect in practice).

Moving forward, a clear schism has opened between the FCC Commissioners and Congress over the FCC's ability to impose regulations and sanctions on spectrum auctions,[30] and there can be little doubt that the FCC's inability to move forward on planned auctions and spectrum sales is at primarily a political artifact. A compromise was included in the payroll tax cut and unemployment benefit extension passed by Congress in February

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[27] Larry Downes, Averting a Spectrum Disaster: Now for the Hard Part, CNET News, Feb. 25, 2012, available at http://news.cnet.com/8301-1035_3-57385202-94/averting-a-spectrum-disaster-now-for-the-hard-part/.

[28] See Donald Evans, Congress Requires State/Local Rubber Stamp Approval of Some Wireless Tower Modifications, Comm L. Blog (Feb. 22, 2012), http://www.commlawblog.com/2012/02/articles/cellular/congress-requires-statelocal-rubber-stamp-approval-of-some-wireless-tower-modifications/.

[29] Donald Evans, FCC "Shot Clock" Presumptions for Wireless Tower Permitting Upheld, Comm L. Blog (Jan. 27, 2012), http://www.commlawblog.com/2012/01/articles/cellular/fcc-shot-clock-presumptions-for-wireless-tower-permitting-upheld/. The Fifth Circuit upheld these regulations when local governments challenged them in court.

[30] Larry Downes, For Incentive Auctions, The FCC Reaps what it Sowed, LarryDownes.com, (Jan. 16, 2012), available at http://www.larrydownes.com/for-incentive-auctions-the-fcc-reaps-what-it-sowed/. The FCC clearly believes it needs the ability to exclude and impose limitations on carriers who already have significant spectrum. A recent House bill would prohibit the FCC from imposing bidder qualifications. The FCC believes it needs flexibility in its expert agency process.

which allows these auctions to go forward.[31] The result was that there were no outright limits on the FCC's auctions but any restrictions they do impose will proceed through notice and comment rulemaking and will be closely watched, it is claimed, by Congress.

The government does hold some spectrum which has not yet been cleared for commercial use, but nearly all the spectrum targeted by the National Broadband Plan has hit snags in its auction plans.[32] The political impediments to commercial availability of this spectrum is a relic of exactly the sort of over-exuberant market intervention being pushed by this transaction's critics, relying on precedent set by years of outdated and often irrelevant restrictions by the FCC on spectrum's purposes. In fact, the "FCC has become a bottleneck in effective network design and management."[33]

Meanwhile, in response to calls made in the Broadband Plan, the NTIA identified 115 MHz of federally allocated spectrum that will be made available for wireless broadband use within the next 5 years, but only 26MHz of the 95 MHz of spectrum in the

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[31] Marguerite Reardon, How Politics inflame the Spectrum Crisis, CNET News, Feb 16, 2012, available at http://news.cnet.com/8301-30686_3-57379526-266/how-politics-inflame-the-spectrum-crisis/ (contending that "the FCC has still not gotten the necessary authorization from Congress to even begin designing the auction or identifying spectrum that could be sold in the auction.").

[32] The WCS spectrum in the 2.3 GHz band is being held up by rules imposed to prevent it from interfering with Sirius-XM satellite radio; the auctioning of 60MHz of spectrum from the Advanced Wireless Services (AWS) bands is being evaluated for potential commercial use but not yet made available; the D Block spectrum available after the transition of television from analog to digital has been given entirely to the Public Safety Network; the 90MHz Mobile Satellite Spectrum, despite being owned by Lightsquared and its predecessors for over a decade, has been unutilized because of political lobbying by the GPS industry; and the 120 MHz of TV Broadcast Spectrum is only now being organized for auctions.

[33] Larry Downes, Property Rights for Spectrum Make More Sense All the Time, CNET News, March 22, 2012, http://news.cnet.com/8301-1035_3-57402199-94/property-rights-for-spectrum-makes-more-sense-all-the-time/.

1755-1850 band is slated for "fast track" availability—itself only committing to make available this limited spectrum within five years.[34]

These problems reflect a common issue of a lack of technical foresight by the FCC. As Commissioner McDowell has noted, "The Commission has a checkered past of micromanaging spectrum use only to find years later that technical innovation and market demands have evolved past the government's myopic view."[35]

III. Public Interest Review

While many claim that remaining spectrum, like that already held by Verizon Wireless, is being warehoused or horded, it is clear to everyone, including the government, that that spectrum is minimally necessary for expected demand—and even insufficient for it. Wireless carriers need more spectrum, and the government is unable to provide it at reasonable speed. It is only left for these firms to buy it on the private market. This transaction represents Verizon's efforts to do just that, and the claims of opponents to the deal that it should be prevented from doing so are simply untenable in this environment.

Critics repeatedly claim that Verizon is "hoarding" spectrum—and has "enough for the short and medium term." But everyone agrees that spectrum is in short supply, and the "long term" will arrive as soon as 2013—by which time little additional spectrum will likely be available and Verizon's current holdings will be inadequate.[36] Here critics claim that VZ is paying $3.6 billion for spectrum it allegedly has no use for simply in an effort to prevent

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[34] An Assessment of the Near-Term Viability of Accommodating Wireless Broadband Systems in the 1675-1710 MHz, 1755-1780 MHz, 3500-3650 MHz, and 4200-4220 MHz, 4380-4400 MHz Bands (President's Spectrum Plan Report), available at http://www.ntia.doc.gov/report/2010/assessment-near-term-viability-accommodating-wireless-broadband-systems-1675-1710-mhz-17.

[35] Larry Downes, Property Rights for Spectrum Make More Sense All the Time, CNET News, March 22, 2012, http://news.cnet.com/8301-1035_3-57402199-94/property-rights-for-spectrum-makes-more-sense-all-the-time/.

[36] Verizon, SpectrumCo and Cox, Joint Opposition to Petitions to Deny and Comments (March 2, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021897886.

competitors from accessing it—it's an incredibly costly and risky strategy, and given spectrum realities, far less likely than the alternative explanation that Verizon simply needs to spectrum.

While it may well be true that other competitors similarly "need" the spectrum, the proper standard for the FCC's review is not what other transaction could conceivably occur but whether the one before it serves the public interest. Critics imply that this spectrum should remain in its sellers' hands so that the FCC may approve its sale to another theoretical party at some theoretical future date. While this sort of industrial policy is economically insidious, it is also illegal. Rather Section 310(d) of the Federal Communications Act makes it clear that the Commission may review only the transaction before it, and not compare it to a hypothetical alternative use of the spectrum.[37] The Commission itself agrees that "Section 310(d) of the Act limits our consideration to the buyer proposed in an assignment application, and we cannot consider whether some other proposal might comparatively better serve the public interest."[38] By the proper standard, opponents must rather demonstrate that the public would be better served by the spectrum remaining in its sellers' hands—where by their own practice and admission it will not readily be deployed for public use at all.

In fact, it is surely the case that some of the current spectrum scarcity—of demand outstripping supply—is a function precisely of its ownership by private and government entities that under-utilize it. The value of a scarce resource is a function not only of its scarcity value, but also the opportunity cost of capital, which varies considerably depending on the capacity of its owners to exploit it. In other words, while Verizon believes it can make a greater return on these spectrum licenses than on the $3.9 billion it

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[37] 47 U.S.C. § 310(d). The provision was explicitly intended to preclude the Commission from such economic engineering by ensuring that it undertakes its reviews "as though no other person were interested in securing [the] permit or license." H.R. Rep. No. 82-1750 at 12 (1952).

[38] *Citadel Communications Co., Ltd. and Act III Broad. of Buffalo, Inc*., Memorandum Opinion and Order, 5 FCC Rcd 3842, 3844 ¶ 16 (1990).

will cost to buy them, SpectrumCo and Cox value the licenses less, precisely because their capacity to earn returns from them are less than their capacity to earn returns from $3.9 billion in cash. For the deal's opponents or the FCC to intervene would contravene the public interest standard, ensuring instead that the licenses remain with owners less able to make efficient use of them.

Meanwhile, it appear that other firms, including deal opponent T-Mobile, were presented with the opportunity to purchase the spectrum at issue here but were similarly unable to meet the opportunity cost of purchasing it. As Comcast Executive Vice President David Cohen noted at a recent Senate hearing, "We engaged in discussions with virtually every wireless carrier in the country with regard to this spectrum," including T-Mobile.[39] At the same hearing, Charles Rule pointed out: "So far as I can tell from the opponents' filings there is no concrete alternative transaction, much less one that would have generated more output."[40]

While most of the critics' arguments center on the scarcity of spectrum and every competitor's need for it, little is said about differential ability to exploit spectrum. Verizon and AT&T both invest on the order of $20 billion per year in their networks.[41] Spectrum alone is useless if it isn't coupled with towers, switches, routers, security, maintenance, customer service, and risky investment in innovation to improve all of these. T-Mobile, flush with the prospect of new spectrum from the failed AT&T deal, for all its bluster in this

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[39] Maisie Ramsay, Comcast: We Tried to Sell AWS to "Virtually Every" U.S. Carrier, Wireless Week, March 22, 2012, available at http://www.wirelessweek.com/News/2012/03/business-Comcast-tried-to-sell-AWS-to-Virtually-every-US-carrier/.

[40] Charles Rule, Senate Judiciary Committee Hearing Testimony, "The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?", March 21, 2012, available at http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8b30fa475a5089d793576cd94706f84e.

[41] Lance Whitney, AT&T data traffic doubling as users complain about throttling, CNET, Feb. 15, 2012, http://news.cnet.com/8301-1023_3-57378453-93/at-t-data-traffic-doubling-as-users-complain-about-throttling/?tag=mncol;txt.

case is still going to have a hard time coming up with the resources to make the costly and disruptive switch from 3G to HSPA+ (let alone LTE), and even more spectrum (and depleted cash) won't do much to help if it doesn't also come up with billions in capital and organizational capacity to build the infrastructure to use it.

IV. Competitiveness Analysis

It is a mistake to assess the likely competitive effects of this or any other transaction in this industry by assessing concentration based on spectrum holdings. Of key importance here is the reality that spectrum alone—though essential to effective competitiveness—is not enough to amass customers, let alone confer market power. In this regard it is well worth noting that the very spectrum holdings at issue in this proposed transfer, though significant in size, produced precisely zero market share for its owners.

Currently, four large, nationwide service carriers—Verizon, Sprint Nextel, AT&T, and T-Mobile—provide service for about 90 percent of wireless subscribers.[42] Regional and smaller national carriers, such as MetroPCS, Leap, and Cellular South, account for most of the remainder.[43] But while a relatively small number of wireless providers serve a substantial majority of subscribers in the United States, it is broadly recognized that counting the number of firms and their market shares does not indicate the intensity of competition. The FCC recognizes the weakness of reliance upon market structure as an indicator of market competitiveness in its Fifteenth Report, observing that highly concentrated markets may be intensely competitive given market factors including "entry conditions [and] degree of price and non-price rivalry."[44] These measures are particularly misleading when aggregated at the national level. While each local market comprises a different set of specific providers, varying by size, service offerings, coverage, and price, almost 90 percent of the U.S. population is covered by five or more service providers

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[42] Fifteenth Report, ¶ 31.

[43] Id.

[44] Id. ¶ 40.

offering at least voice service, and almost 68 percent is covered by four or more service providers offering mobile broadband.[45] The presumption that increasing Verizon Wireless' spectrum holdings in any of these markets will automatically reduce competition and harm consumers is unsupported and unwarranted.

The DOJ, in fact, in assessing the status of broadband competition, has likewise concluded both that these markets are *likely* to be concentrated and that such concentration *does not raise* competitive concerns. In the first place, in large-scale networks "with differentiated products subject to large economies of scale (relative to the size of the market), the Department does not expect to see a large number of suppliers."[46] Rather, the DOJ cautioned the FCC against "striving for broadband markets that look like textbook markets of perfect competition, with many price-taking firms. That market structure is unsuitable for the provision of broadband services."[47] At the same time, these competitive markets—like most network markets—will be characterized by complicated and varied pricing and usage schemes, in which the DOJ has stated previously that it does not expect robust competition to lead to "prices … equated with incremental costs. If they were, suppliers could not earn a normal, risk-adjusted rate of return on their investments in R&D and infrastructure."[48] Although commonly trotted out as a conclusion in support of monopolization, the fact that a market may be concentrated is simply not a reliable indicator of anticompetitive effects, and naked reliance on such conclusions is inconsistent with modern understandings of markets and competition. As former FCC economists Michelle Connolly and James Prieger have explained, "[t]raditional market definition analysis, based on whether a firm's price is constrained by existing competitors, can give a

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[45] Id. And these numbers do not include the additional, important competition between mobile and wire line broadband.

[46] *Ex Parte* Submission of the Department of Justice at 7, Economic Issues in Broadband Competition: A National Broadband Plan for Our Future, GN Docket No. 09-51 (2009) at 7.

[47] Id. at 29.

[48] Id. at 7.

seriously misleading picture of competitive relations in dynamic markets with rapidly developing technology."[49]

As it happens, there is detailed evidence in the Fifteenth Report on actual competitive dynamics; market share analysis alone is unlikely to provide any additional insight. The available evidence suggests that the tide toward concentration has resulted in considerable benefits and certainly does not warrant a presumption of harm in the absence of compelling evidence to the contrary specific to this license transfer. In reality, there is considerable evidence of rapidly falling prices, quality expansion, capital investment, and a host of other characteristics inconsistent with a monopoly assumption that might otherwise be erroneously inferred from a structural analysis like that employed by this deal's critics.

In fact, as Faulhaber et al. point out, a simple plotting of cellular prices against market concentration (rather than *revenue* against concentration, as the Fifteenth Report does) shows a strong inverse relationship seemingly inconsistent with an inference of monopoly power from market shares.[50]

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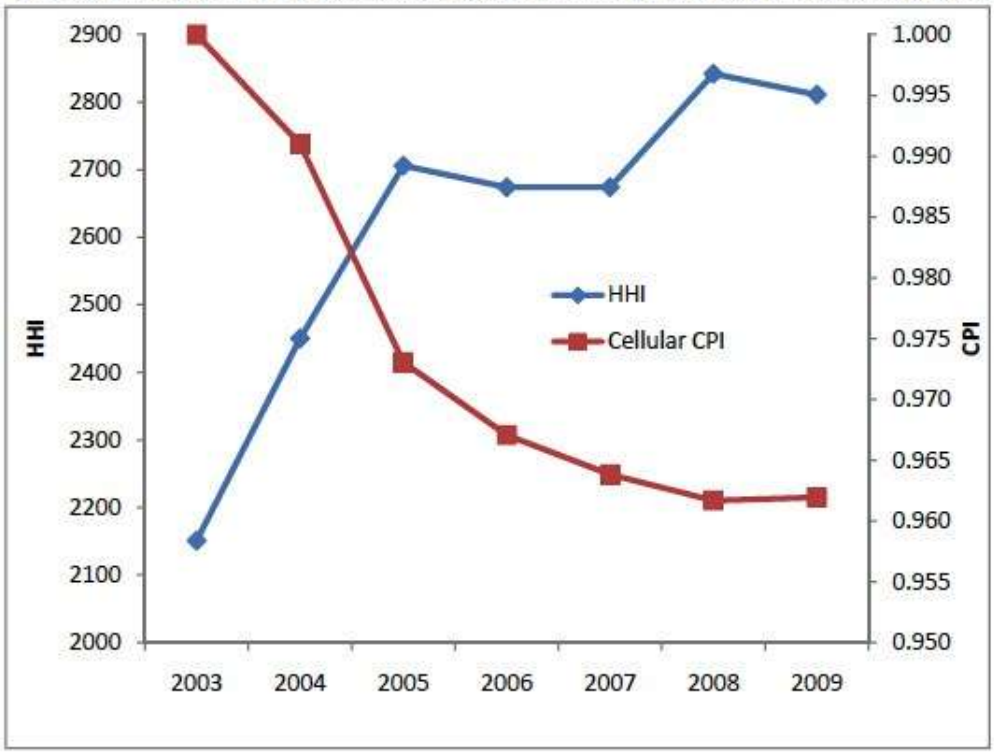
[49] Michelle Connolly & James Prieger, Economics at the FCC, 2008-2009: Broadband and Merger Review, 35 REV. INDUS. ORG. 387, 404 (2009).

[50] Gerald R. Faulhaber, Robert W. Hahn & Hal J. Singer, *Assessing Competition in U.S. Wireless Markets: Review of the FCC's Competition Reports* (2011), *available at* http://ssrn.com/abstract=1880964. It is worth noting that, although critics of concentration in in the industry cite to empirical literature purporting to demonstrate that concentration causes price increases, not only the casual empiricism cited here, but an extensive literature more generally (dating back to Harold Demsetz's 1973 article, Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973), demolishing the concentration-profits analysis) refutes those claims, pointing out that concentration and high prices, where they occur together, may both be correlated with non-price competition, rather than concentration causing high prices. See, e.g., William N. Evans, Luke M. Froeb & Gregory J. Werden, Endogeneity in the Concentration-Price Relationship: Causes, Consequences, and Cures, 41 J. INDUS. ECON. 431 (1993).

FIGURE 1: INDUSTRY CONCENTRATION IS RISING WHILE CELLULAR PRICES ARE FALLING



Source: HHI from 15th Wireless Report Table 9; Cellular CPI from 15th Wireless Report Table 19.
Notes: Population-weighted average HHI of 172 Economic Areas as computed by the Commission. Cellular CPI is denominated in 2003 prices.

At the same time, the deal's critics all consistently disregard significant potential competitors like Dish Network, which recently announced plans to build out a 4G Long Term Evolution (LTE) network and offer wireless broadband service,[51] to say nothing of existing large, regional competitors—at least one of which (MetroPCS) currently offers LTE service in more than a dozen cities. Even more remarkably, the constant refrain of "duopoly" simply disregards the existence of Sprint and T-Mobile, even as these two competitors are among the most persistent in making such claims.

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[51] See Cecilia Kang, Dish Network Moves into Wireless, Taking on AT&T, Verizon, LightSquared, WASH. POST, Aug. 24, 2011, http://www.washingtonpost.com/blogs/post-tech/post/dish-network-moves-into-wireless-taking-on-atandt-verizon-lightsquared/2011/08/24/gIQAmy5UbJ_blog.html.

In the end, there is no evidence that this transfer will harm consumers or the public interest. The need for spectrum is so substantial, and the evidence against harms emanating from its concentration so scant, that there is no basis for denying the transaction on these grounds.

V. The Commercial Agreements

As with any transfer of FCC licenses, the Commission must decide whether Verizon's purchase of spectrum ("the License Transfer") from SpectrumCo, a consortium of cable companies, and Cox Cable ("Cox") is in the "public interest." The FCC has no authority to review the separate commercial arrangements, including both a series of cross-marketing agreements as well as a joint research agreement (collectively, "the Commercial Agreements"). These agreements, instead, are currently being evaluated by the Department of Justice under the consumer welfare standard of antitrust law.

Claims by this deal's critics that the FCC must evaluate the Commercial Agreements as part of the transaction are unsupported. These critics contend that the Commercial Agreements and the license transfers are both parts of the same transaction, properly reviewable by the Commission and, thus, the interested parties. We believe that they are plainly incorrect.

In the first place, claims surrounding the disclosure of redacted information in the Agreements and thus interested parties' ability to participate in their evaluation are misplaced. We agree, of course, that the parties can and should participate in the substantive assessment of the public interest if the Commercial Agreements are indeed properly determined to be necessary and appropriate to the FCC's review. But we do not agree that they should participate in the FCC's evidentiary and preliminary assessment to determine the scope of the transaction that is properly before the Commission.

The FCC (and now, to a large extent, even the interested parties) already has access to the full, unredacted agreements (as well as other documents) so the agency can, in consultation with the DOJ, assess the scope of its jurisdiction, and consult and communicate openly with the DOJ. But these are not decisions in which public parties should participate.

Instead, they are internal procedural matters, no more subject to interested parties' comment than the agency's determinations of which staff members to put on the case team, how much and how to consult with the DOJ, and when to begin review, toll the clock, request more information, etc. They are internal operations of the agency *prior* to its review of the transaction, and are simply not subject to the FCC's public comment process through which outside parties may properly weigh in on the outcome of the FCC's review.

The parties also, throughout their filings, make claims about the public interestedness of the overall Transaction, under the assumption both transactions are subject to the FCC's review under the public interest standard. But the FCC lacks the authority to review these transactions.

The FCC and the interested parties derive authority to comment on the joint venture under the Communications Act of 1934, as amended in 1996. The FCC reviews these transfers under § 310(d). In relevant part that section maintains that "[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner … to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby … in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."[52] By its clear language the statute authorizes the Commission to assess only license transfers for their effect on the public interest.

The FCC has repeatedly declined to consider—and there is no legal support for it to do otherwise—commercial agreements in cases similar to this one. Thus the agency declined to consider a related agreement in the AT&T-Centennial transaction, noting that "we agree with the Applicants that the Agreement constitutes a private contractual matter

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[52] 47 U.S.C. § 310(d).

between New Cingular Wireless and Cellular South that is beyond the Commission's jurisdiction."[53] Likewise the agency did not assess the commercial arrangements surrounding the Sprint Nextel-Clearwire transaction.[54]

Even if the Commercial Agreements were executed at the same time as the license transfer and even if, as at least one of the parties has claimed,[55] the Agreements were necessary to their decision to undertake the license transfer, they are not properly reviewed as part of this transfer. Of note, the spectrum licenses are being transferred from SpectrumCo and Cox to Verizon. None of the commercial agreements deals with, discusses or in any way turns on decisions respecting the use of the transferred spectrum. The spectrum licenses do not become part of the joint venture, and the transferors do not retain any interest in or special access to them. Instead, the joint research agreement contemplates the formation of a new entity, Joint Operating Entity, LLC, relating to entirely different assets and aspects of the Applicants' businesses. Deriving authority to review the Commercial Agreements from its undisputed jurisdiction over the License Transfer would be tantamount to granting the FCC authority to review conduct wholly outside of its legal purview and expertise. By the this logic, if Company A agrees to sell licenses to Company B and, at the same time, Company A's COO agrees to join Company B as its new CEO to help build out its new assets, the FCC would have the authority to scrutinize the COO's new compensation package and employment agreement as "relevant to the proceeding." But this is fanciful on its face, no matter how much the COO's employment is conditioned on the sale going through and his compensation explicitly tied to his success in deploying

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[53] AT&T-Centennial Order, 24 FCC Rcd at 13976 ¶ 152.

[54] Press Release, "Clearwire, Sprint and Clearwire to combine WiMAX businesses, creating a new mobile broadband company," (May 7, 2008), available at http://corporate.clearwire.com/common/download/download.cfm?CompanyID=CLWR&FileID=442757&FileKey=0556727d-310e-4cae-abf5-48824fdd8098&FileName=CLWR_News_2008_5_7_General_Releases.pdf.

[55] Bright House Networks, Response to "Information and Discovery Request for Bright House Networks" (March 22, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021902927.

Company B's new assets. It would be a bastardization of the English language to say these two transactions weren't related and "relevant" to each other; but it would be a subversion of the law to say this brings them both under the FCC's authority.

Moreover, at the same time, it may well be that the transactions are "related" in that collectively they offered value in return for spectrum necessary to induce SpectrumCo and Cox to sell. In other words, they are related in the way that price is related to any license transfer. But to our knowledge the FCC has never questioned the price of a transfer as part of its analysis—even though this could have competitive effects just as the Commercial Agreements are purported to. Plenty of things could conceivably have "competitive effect" and be "related to" this transfer, but they don't fall under the FCC's limited substantive purview under 310(b) as a result.

Consideration of the competitive effects of the Commercial Agreements is appropriately under the DOJ's purview. For critics to assert that FCC review of the same transactions is necessary to preserve the public interest is to denigrate the capacity of the Antitrust Division and the very structure of the Federal Government. As former FCC Commissioner Harold Furchgott-Roth has aptly noted:

> We have no jurisdiction to enforce rules not promulgated under the Communications Act …, and we cannot and should not do the enforcement work of others. This is not to say that we should not take official notice, in the course of making licensing decisions, of findings by another agency that an applicant has violated a regulation in its bailiwick. We should certainly consider such findings in determining whether to grant or deny a license application. But we should not condition such a decision on compliance with another agency's regulation, thus putting ourselves in the position of potential enforcer of non-FCC rules should the transferee fail to conform to that regulation ….

> When we give formal weight to anything short of formal, final findings by other agencies, we create a situation that is rife with incentives for inter-agency gaming of the system, *e.g.,* registering an objection with an agency about a matter that the complaining agency is not prepared to pursue itself, and requires the Commission to do extensive reviews in areas where it simply has no experience or authority.[56]

VI. Conclusion

The mobile wireless telecommunications services market is not concentrated to the extent that anticompetitive effects would result from this transaction. At the same time, the need for all competitors, including Verizon, to obtain sufficient spectrum to meet increasing demand is so large that the transfer this deal contemplates of unused spectrum from companies with no means to deploy it to a company that has demonstrated itself to be one of the most significant in the industry is of great public interest. The fact that there are few national wireless providers is irrelevant because of local geographic markets with multiple competitors, the dynamic nature of the market, and the fact that competitive benefits would be independent of defined markets.

Furthermore, in light of the benefits the proposed transaction would create, the under-utilization of the spectrum in its current hands, and the lack of incentive or ability to raise prices, either unilaterally or in coordination with other market participants, consumers would almost certainly benefit from this transfer. Technological progress has been the hallmark of this industry, but it is dependent on the resources necessary to facilitate it. Verizon can seize this opportunity to obtain the spectrum it needs to maintain and expand its service and pursue technological innovation, and it can remain a

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[56] Separate Statement of Commissioner Harold Furchgott-Roth in Re: Applications for Consent to the Transfer and Control of Licenses and Section 214 Authorization from Tele-Communications, Inc., Transferor, To AT&T Corp., Transferee, CS Docket No. 98-178, http://transition.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr906.html.

competitive force if the transaction is approved. The potential benefits from the proposed transfer are large, while the risk of harm is minimal. The public interest would be well served by its approval.