REDACTED—FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

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

CHALLENGE TO CONFIDENTIALITY DESIGNATION OF PUBLIC KNOWLEDGE

Jodie Griffin
Harold Feld
PUBLIC KNOWLEDGE
1818 N Street, NW, Suite 410
Washington, DC 20036

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INTRODUCTION

Pursuant to the Commission's Protective Order[1] and Second Protective Order[2] in the current proceeding, Public Knowledge hereby challenges the Applicants' designation of certain portions of their Joint Operating Entity ("JOE") Agreement as highly confidential. Specifically, Public Knowledge challenges the Applicants' claims to confidentiality of **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** and **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** of the Joint Operating Entity Agreement. This challenge seeks to make public information regarding the basic governance structure of the JOE. The governance structure of the JOE is neither highly confidential nor confidential, but is critical to assessing the public interest impacts of the proposed transactions; understanding the connections between the Applicants' spectrum, marketing, resale, and JOE agreements; and determining whether the JOE will establish the basis for a future cartel between its members. This information must therefore be made available for public review and discourse.[3]

ARGUMENT

The proposed deals between Verizon and SpectrumCo and Verizon and Cox TMI Wireless present a host of concerns for both competitors and consumers and threaten to stifle

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[1] *Applications 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*, Protective Order, WT Docket No. 12-4, DA 12-50, ¶ 3 (Jan. 17, 2012) ("Protective Order").

[2] *Applications 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*, Second Protective Order, WT Docket No. 12-4, DA 12-51, ¶ 4 (Jan. 17, 2012) ("Second Protective Order").

[3] Portions of the JOE Agreement that contain confidential or highly confidential information may still be redacted from public inspection.

innovation in the delivery of voice, video, and data service.[4] If approved, the ramifications of these deals would reach consumers, competitors, future innovators, and the very landscape of the communications ecosystem. The Commission has therefore recognized the public's right to access information about the proposed transactions, while protecting the Applicants' legitimate need to prevent competitors from accessing certain commercially-sensitive information. Unfortunately, the Applicants have upset this balance by flouting the Commission's rules and taking advantage of the Protective Orders to hide non-confidential information from the public eye. This conduct undermines the Commission's purpose of respecting "the right of the public to participate in this proceeding in a meaningful way."[5]

Applicants Verizon Wireless and SpectrumCo have unjustifiably designated portions of their Joint Operating Entity ("JOE") Agreement as highly confidential. Those portions are neither highly confidential nor even confidential, and so must be resubmitted in this proceeding with non-confidential portions unredacted and available for public inspection.[6] The Commission has established that the burden falls upon a submitting party to justify treating its information as confidential or highly confidential.[7] Here, the Applicants have failed to make the requisite showing, and therefore must stop attempting to hide this relevant and important information from the public eye.

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[4] *See generally* Petition to Deny of Public Knowledge *et al.*, WT Docket No. 12-4 (Feb. 21, 2012); Reply Comments of Public Knowledge *et al.*, WT Docket No. 12-4 (Mar. 26, 2012).

[5] Protective Order at ¶ 1; Second Protective Order at ¶ 1.

[6] Applicants may clearly designate information that is in fact confidential or highly confidential as such, and redact such information as appropriate in the resubmitted version of the JOE Agreement.

[7] Protective Order at ¶ 3 (citing 47 C.F.R. § 0.459(b)); Second Protective Order at ¶ 4 (citing 47 C.F.R. § 0.459(b)).

In its protective orders for this proceeding, the Commission has allowed parties to claim confidentiality for "information that is not otherwise available from publicly available sources and that is subject to protection under FOIA and the Commission's implementing rules."[8] A party claiming highly confidential treatment must show that the information at issue "is not otherwise available from publicly available sources; that the Submitting Party has kept strictly confidential; that is subject to protection under FOIA and the Commission's implementing rules; that the Submitting Party claims constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations; and that it is described in Appendix A to this Second Protective Order, as the same may be amended from time to time."[9]

The Commission's rules effectively grant confidential treatment to trade secrets and commercially confidential information exempted from mandatory disclosure by Exemption 4 of the Freedom of Information Act ("FOIA")[10] or protected by the Trade Secrets Act.[11] Any information that does not qualify as a trade secret or commercially confidential information therefore may not receive confidential treatment and be kept secret from the public.

I. THE INFORMATION AT ISSUE ONLY PERTAINS TO THE BASIC GOVERNANCE STRUCTURE OF THE JOINT OPERATING ENTITY.

Applicants have claimed confidentiality for the entire JOE Agreement, including information that pertains to the basic governance of the JOE. This information is not

[8] Protective Order at ¶ 2.

[9] Second Protective Order at ¶ 2.

[10] *See* 5 U.S.C. § 552(b)(4).

[11] *See* 18 U.S.C. § 1905.

commercially confidential and offers no competitive advantage to other companies, but does shed light on the management and motivations of the JOE, information that is critical to public review and input in this proceeding. Outside entities and members of the public cannot fully appreciate the anticompetitive threats of the JOE or the JOE's connection to other agreements under review in this proceeding without having access to basic information as to who controls the JOE and how it is governed. The mere fact that this information undermines the Applicants' arguments to the Commission does not justify hiding the information from the public—indeed, it only gives the Commission more reason to ensure that the public has a meaningful opportunity to review and discuss the information.

Here Public Knowledge only challenges Applicants' claim of confidentiality for information pertinent to the basic governance of the JOE. **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** which contains this information, does not include any information that constitutes a trade secret or commercially confidential information. **[BEGIN HIGHLY CONFIDENTIAL]**

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This information—namely, **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**—holds no competitive value for the Applicants. The fact that **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** is unsurprising and tells competitors nothing about the JOE's product plans, pricing mechanisms, or financial health. Similarly, **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** provides no insight into the competitive offerings or operations of the JOE, and indeed offers little information beyond shedding light on the opportunity the JOE presents for the Applicants to collude or otherwise behave anticompetitively.

The remainder of **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** similarly contains no information that is commercially confidential or would give competitors an advantage over the JOE and its members. **[BEGIN HIGHLY CONFIDENTIAL]**

[14] **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[15] **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

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None of these provisions contain any commercially sensitive information. **[BEGIN HIGHLY CONFIDENTIAL]**

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[END HIGHLY CONFIDENTIAL] This information is limited to the basic governance of the JOE; information that cannot offer any competitive advantage but nonetheless is critical to understanding the anticompetitive implications of the proposed transactions in this proceeding.

II. THE INFORMATION AT ISSUE DOES NOT FALL WITHIN EXEMPTIONS FROM THE DISCLOSURE MANDATE OF THE FREEDOM OF INFORMATION ACT.

The Freedom of Information Act was enacted as "an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making," and its "basic objective . . . is disclosure."[27] The limited exceptions to FOIA's disclosure mandate are tailored to serve the efficient operation of the government and protect the legitimate interests of persons in protecting specific kinds of information.[28]

To be clear, FOIA, standing alone, does not *forbid* the release of any information. To the contrary, FOIA imposes upon agencies "a general obligation . . . to make information available to the public."[29] FOIA then creates certain enumerated exceptions, to which agencies' disclosure mandate does not apply.[30] Under Exemption 4, agencies are not required to publicly disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[31] While FOIA does not require the Commission to disclose trade secrets or confidential commercial information, it also does not, on its own, prohibit such disclosure. Indeed, FOIA's basic purpose of openness means that a party opposing disclosure bears the

[26] *See* 47 C.F.R. § 0.457.

[27] *Chrysler Corp. v. Brown*, 441 U.S. 281, 290–92 (1979).

[28] *Nat'l Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974) ("*Nat'l Parks I*").

[29] *Chrysler*, 441 U.S. at 291–92; *see* 5 U.S.C. § 552(a).

[30] 5 U.S.C. § 552(b). *See also Chrysler*, 441 U.S. at 292 ("By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure.").

[31] 5 U.S.C. § 552(b)(4).

burden of proving that an exemption applies.[32] "Conclusory and generalized allegations are . . . unacceptable" to "sustain[] the burden of nondisclosure under the FOIA."[33]

When combined with the Trade Secrets Act ("TSA"), Exemption 4 of FOIA generally delineates the contours of what the Commission will automatically disclose of the information it receives from companies. The TSA prohibits the Commission from making known "in any manner or to any extent not authorized by law" information it receives from companies that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . . ."[34] The Trade Secrets Act therefore "limit[s] an agency's ability to make a discretionary release of otherwise exempt material."[35] The scope of information covered by the TSA is "at least coextensive with . . . Exemption 4 of FOIA,"[36] which means that "unless another statute or a regulation authorizes

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[32] *See Nat'l Parks & Conserv. Ass'n v. Kleppe*, 547 F.2d 673, 679 n.20 (D.C. Cir. 1976) ("*Nat'l Parks II*").

[33] *Nat'l Parks II*, 547 F.2d at 680.

[34] 18 U.S.C. § 1905 (punishing anyone who "publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law . . . .").

[35] *Department of Justice Guide to the Freedom of Information Act*, UNITED STATES DEP'T OF JUSTICE, at 355 (2009), *available at* http://www.justice.gov/oip/foia_guide09.htm.

[36] *CNA Fin. Corp. v. Donovan,* 830 F.2d 1132, 1151 (D.C.Cir.1987).

disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4 of the FOIA."[37]

However, the TSA's prohibition does not include disclosures that are "authorized by law."[38] FOIA, for example, authorizes certain disclosures because it "provide[s] legal authorization for and compel[s] disclosure of financial or commercial material that falls outside of Exemption 4."[39] Additionally, "properly promulgated, substantive agency regulations [with] the 'force and effect of law'" may qualify as "authoriz[ations] by law" for the purposes of § 1905.[40] Accordingly, the Commission's rules have in fact provided for the public inspection of documents that fall under Exemption 4, following a "persuasive showing as to the reasons for inspection."[41] The Commission has confirmed that these provisions "constitute the requisite legal authorization for disclosure of competitively sensitive information under the Trade Secrets Act."[42]

Here, the information for which Public Knowledge is challenging confidentiality protection is neither a trade secret nor confidential commercial information. As a result, the information cannot be hidden behind claims of confidentiality and must be released to the public in this proceeding.

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[37] *Canadian Commercial Corp. v. Dep't of the Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008).

[38] 18 U.S.C. § 1905.

[39] *CNA Fin. Corp. v. Donovan*, 830 F.2d at 1151–52 & n.139.

[40] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295–302 (1979).

[41] 47 U.S.C. §§ 457(d)(1), (d)(2).

[42] *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Notice of Inquiry & Notice of Proposed Rulemaking, 11 FCC Rcd. 12,406, ¶ 12 (1996).

A. THE INFORMATION AT ISSUE DOES NOT QUALIFY AS A TRADE SECRET FOR PURPOSES OF FOIA EXEMPTION 4.

FOIA itself does not define the term "trade secret."[43] The U.S. Court of Appeals for the District of Columbia Circuit defines a "trade secret" for purposes of FOIA Exemption 4 as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort," with "a direct relationship between the information at issue and the productive process."[44] Trade secrets have thus been defined very narrowly for purposes of FOIA Exemption 4. For example, in past cases computer models of the costs of providing telecommunications services have been given confidential treatment only as confidential commercial information, rather than as trade secrets.[45]

Here, the information at issue does not even come close to qualifying under the narrow definition of a trade secret. As described above,[46] Public Knowledge is only challenging confidential treatment of information pertaining to the basic governance of the Joint Operating Entity that the Applicants are creating as part of their spectrum transfer agreement.[47] None of this information is used to process or otherwise prepare any commodities the JOE will offer, nor does the JOE's governance structure show any sign of being the result of "innovation or substantial effort"—it is simply the resolution of basic management decisions that all persons forming a new company must make when they create a new legal entity.

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[43] *See* 5 U.S.C. § 552.

[44] *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[45] *Allnet Commc'n Servs., Inc. v. FCC*, 800 F. Supp. 984, 988–90 (D.D.C. 1992).

[46] *See supra* Section I.

[47] *See* **[BEGIN HIGHLY CONFIDENTIAL]**

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B. THE INFORMATION AT ISSUE DOES NOT QUALIFY AS CONFIDENTIAL COMMERCIAL INFORMATION FOR PURPOSES OF FOIA EXEMPTION 4.

To qualify under the second prong of the FOIA Exemption 4, "information must be (1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential."[48] "Privileged" information is a rare justification for non-disclosure and might only encompass the attorney-client privilege.[49] Information is considered "confidential" if its disclosure would be likely to (1) "impair the Government's ability to obtain necessary information in the future" or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained."[50]

Under the first prong, when "pursuant to statute, regulation or some less formal mandate," parties "are *required* to provide . . . information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future," so the first prong generally does not apply to situations where, as here, the government can compel parties to submit the information at issue by statute and regulation.[51]

Here, the Commission has ample authority to compel the production of the agreements pursuant to its authority under Section 310(d) over license transfer applications.[52] Indeed, the Commission explicitly acted on that authority when it required the Applicants to submit revised

[48] *Gulf & W. Industs., Inc. v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1979).

[49] *See Wash. Post Co. v. Dep't of Health*, 690 F.2d 252, 267–68 & n.50 (D.C. Cir. 1982).

[50] *Nat'l Parks I*, 498 F.2d at 770; *see Critical Mass Energy Project v. NRC*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993).

[51] *Nat'l Parks I*, 498 F.2d at 770. *See* also *Nat'l Org. of Women v. Social Sec. Admin.*, 736 F.2d 727, 737 n.97 (D.C. Cir. 1984); *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

[52] *See* 47 U.S.C. § 310(d).

copies of the agreements without certain redactions that the Applicants had made in the highly confidential versions of the documents.[53] Moreover, pursuant to its authority under Section 308,[54] the Commission has demanded and received further information about the JOE Agreement, in addition to the agency and resale agreements, including information about how and why the Applicants decided to enter into the agreements and which of the Applicants' respective directors negotiated and agreed to the deals.[55] The Commission's broad authority to compel disclosure of and information about the agreements means that disclosure here will not impair the Commission's ability to collect similar information in the future.

As a result, the information may only fall within FOIA Exemption 4 if it would likely cause substantial competitive harm to the Applicants.[56] In this context, competitive harm is "limited to harm flowing from the affirmative use of proprietary information *by competitors*."[57] Here, there is no likelihood that Applicants' competitors will leverage information about the

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[53] *See* Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Michael Samsock, Cellco Partnership, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Lynn Charytan, Vice President of Legal Regulatory Affairs and Senior Deputy General Counsel, Comcast Corp., WT Docket No. 12-4 (Mar. 8, 2012).

[54] *See* 4 U.S.C. § 308(b).

[55] *See* Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Michael Samsock, Cellco Partnership, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Lynn Charytan, Comcast Corp., WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Steven Teplitz, Senior Vice President, Government Affairs, Time Warner Cable Inc., WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Bright House Networks, LLC, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Jennifer Hightower, Cox TMI Wireless, LLC, WT Docket No. 12-4 (Mar. 8, 2012).

[56] *Nat'l Parks I*, 498 F.2d at 770; *see Critical Mass Energy Project v. NRC*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993).

[57] *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (quoting Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data,* 1981 WIS. L. REV. 207, 225–26) (emphasis in original).

governance of the JOE to competitively harm the Applicants. This information does not pertain to any potential product plans or competitive operations of the JOE or of any of its members, and in fact the Applicants themselves routinely make the identities of their own respective leadership teams available to the public.[58] Verizon Communications, for example, publishes its bylaws on the company's website, including the structure of the company's board of directors and officers.[59] The fact that Applicants routinely make this information available for their own respective companies belies their implicit assertion that similar information about the JOE must be kept highly confidential.

Additionally, as the Commission acknowledges in its protective orders,[60] information that is already publicly available does not fall within FOIA Exemption 4 and therefore the person submitting that information cannot make any claim to confidentiality.[61] Public Knowledge therefore also requests that the Commission also require public disclosure of **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]**, which only states **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** This information is already publicly

[58] *See, e.g.*, Executive Leadership, Verizon Wireless (last visited May 8, 2012), http://aboutus.verizonwireless.com/leadership/executive/index.html; *Verizon Clarifies Succession Plans; Names Lowell McAdam as COO*, Verizon Wireless (Sept. 20, 2010), http://news.verizonwireless.com/news/2010/09/pr2010-09-20.html (announcing McAdam's membership on the Verizon Wireless Board of Representatives).

[59] Verizon Communications Bylaws, Arts. IV-V, *available at* http://www22.verizon.com/investor/bylaws.htm. *See also Verizon Communications Inc.*, BLOOMBERG BUSINESSWEEK (last updated May 8, 2012), http://investing.businessweek.com/research/stocks/people/board.asp?ticker=VZ:US (detailing the names and primary affiliations of Verizon Communication's Board of Directors).

[60] Protective Order at ¶ 2; Second Protective Order at ¶ 2.

[61] *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 332 (D.C. Cir. 1989) ("[I]f the information was already public, of course, the documents could not be withheld from disclosure under the FOIA exemption for confidential business information.").

available through the website of the Delaware Department of State Division of Corporations,[62] and the Applicants therefore have no claim of confidentiality to this portion of the JOE Agreement.

CONCLUSION

For these reasons, the Commission should order the Applicants to resubmit their Joint Operating Entity Agreement with the portions discussed above unredacted and available for public inspection.

Respectfully submitted,

/s Jodie Griffin
/s Harold Feld
PUBLIC KNOWLEDGE

May 9, 2012

[62] *See* State of Delaware, Department of State: Division of Corporations, https://delecorp.delaware.gov/tin/GINameSearch.jsp (Entity Name "Joint Operating Entity LLC" or File Number 5069799) (last visited May 8, 2012).

CERTIFICATE OF SERVICE

I certify that on May 9, 2012, I caused a copy of the foregoing Challenge to Confidentiality Designation to be served on each of the following:

Michael Samsock
Cellco Partnership/Verizon Wireless
1300 I Street, NW, Suite 400 West
Washington, DC 20005
michael.samsock@verizonwireless.com

Nancy J. Victory
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
nvictory@wileyrein.com
Counsel for Verizon Wireless

Adam Krinsky
Wilkinson Barker Knaur LLP
2300 N Street, NW, Suite 700
Washington, DC 20037
AKrinsky@wbklaw.com
Counsel for Verizon Wireless

Lynn Charytan
David Don
SpectrumCo LLC
300 New Jersey Avenue, NW, Suite 700
Washington, DC 20001-2030
lynn_charytan@comcast.com
david_don@comcast.com

Michael Hammer
Michael G. Jones
Brien C. Bell
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006
mhammer@willkie.com
mjones@willkie.com
bbell@willkie.com
Counsel for SpectrumCo LLC

Jennifer Hightower
Cox TMI Wireless, LLC
1400 Lake Hearn Drive, NE
Atlanta, GA 30319
jennifer.hightower@cox.com

Christina H. Burrow
J.G. Harrington
Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036
cburrow@dowlohnes.com
jharrington@dowlohnes.com
Counsel for Cox TMI Wireless, LLC

Best Copy and Printing, Inc.
FCC@BCPIWEB.COM

Sandra Danner
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
sandra.danner@fcc.gov

Jim Bird
Office of General Counsel
Federal Communications Commission
jim.bird@fcc.gov
TransactionTeam@fcc.gov

Joel Taubenblatt
Spectrum and Competition Policy Division
Federal Communications Commission
joel.taubenblatt@fcc.gov

/s Jodie Griffin
Staff Attorney
PUBLIC KNOWLEDGE