

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C., 20554**

In re Applications of )  
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 )  
Cellco Partnership d/b/a )  
Verizon Wireless and )  
SpectrumCo. LLC and ) WT Docket No. 12-4  
Cox TMI Wireless, LLC )  
For Consent to Assign Wireless )  
Licenses )  
 )

**REPLY COMMENTS OF  
THE COMPETITIVE ENTERPRISE INSTITUTE**

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## **Executive Summary**

The Federal Communications Commission should approve the applications of Verizon Wireless to acquire spectrum licenses from SpectrumCo. and Cox Wireless, as the denial of the applications would be detrimental to the public interest. The acquisition of the spectrum at issue by Verizon Wireless would neither threaten consumer welfare nor hinder competition in the wireless marketplace. The Commission's prompt approval of the Verizon Wireless applications will hasten the deployment of robust wireless services, spur greater competition among mobile operators, and help alleviate the capacity constraints facing wireless companies due to spectrum exhaustion.

### **1. Statement of Interest**

The Competitive Enterprise Institute (CEI) is a non-profit, non-partisan public interest organization dedicated to promoting consumer well-being by empowering individuals to make their own choices in a free market. Founded in 1984, CEI has grown into a powerful advocate for individual freedom on a wide range of policy issues, including energy, finance, technology, telecommunications, and health care. CEI has in recent years participated in numerous proceedings before this Commission in which we have argued for pro-market, pro-consumer telecommunications policies.

### **2. Granting the Verizon Wireless applications will advance the public interest, convenience, and necessity**

#### **a. The Commission should assess the merits of the Verizon Wireless applications by evaluating their implications for consumer welfare**

The Commission must grant the Verizon Wireless applications if it finds that they will “serve the public interest, convenience, and necessity.”<sup>1</sup> Congress has delegated to the Commission the responsibility for defining and implementing this “public interest” standard, and courts afford the Commission substantial deference in formulating and weighing the various policy objectives underlying the standard.<sup>2</sup>

In determining whether the Verizon Wireless applications would serve the public interest, the Commission should focus its inquiry on whether the applications would advance

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<sup>1</sup> 47 U.S.C. § 310(d).

<sup>2</sup> *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (emphasizing that “the Commission’s judgment regarding how the public interest is best served is entitled to *substantial judicial deference*. . . .”) (emphasis added).

consumer welfare. Although the Commission has historically evaluated proposed license transfers using a variety of criteria—including “public discourse,” “broadband penetration,” and “competitiveness”<sup>3</sup>—the Commission need not, and should not, weigh these policy considerations in assessing the Verizon Wireless applications.

Notwithstanding commentators who argue that the Commission’s application of the public interest standard has been, in the words of former FCC Chairman Reed Hundt, “vague, general, amorphous,”<sup>4</sup> the Commission is empowered under current law to interpret the public interest standard as concomitant with consumer welfare.<sup>5</sup> Moreover, as the Court of Appeals for the D.C. Circuit has noted, the “Commission is not at liberty . . . to subordinate the public interest to the interest of ‘equalizing competition among competitors.’”<sup>6</sup>

By assessing the public interest implications of proposed license transfers through the lens of consumer welfare, the Commission can best ensure that spectrum is used in a manner that, over time, fosters lower wireless prices, better mobile services, and more efficient uses of scarce airwaves.<sup>7</sup> This approach also reduces the likelihood that the Commission will fall prey to illegitimate “public interest explanation[s]” that “can easily be manufactured” by “influential interest groups.”<sup>8</sup> Finally, a consumer welfare-based standard enables the Commission to avoid “sacrific[ing]” the well-being of consumers as a means of furthering alternative, “poorly defined” values.<sup>9</sup>

#### **b. Granting the Verizon Wireless applications will increase expected consumer welfare**

The licenses that Verizon Wireless seeks to acquire are currently owned by SpectrumCo.

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<sup>3</sup> Jerry Brito & Jerry Ellig, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, 16 *CommLaw Conspectus* 1, 32 (2007).

<sup>4</sup> Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 *Harv. J.L. & Tech.* 335, 401 (2001).

<sup>5</sup> Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 *Yale L.J.* 417, 420 (1999) (arguing that the FCC “should regard the public interest as primarily determined by consumer welfare . . .”).

<sup>6</sup> *SBC Communications Inc. v. F.C.C.*, 56 F.3d 1484, 1491 (D.C. Cir. 1995); see also Thomas M. Koutsky & Lawrence J. Spiwak., *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard* 18 *CommLaw Conspectus* 329, 343 (2010).

<sup>7</sup> See generally Ronald H. Coase, *The Federal Communications Commission*, 2 *J.L. & Econ.* 1 (1959).

<sup>8</sup> Hazlett, *supra* note 4, at 403.

<sup>9</sup> Brito & Ellig, *supra* note 3, at 15.

and Cox Wireless,<sup>10</sup> both of which acquired the licenses in the 2006 Advanced Wireless Services (“AWS”) auction.<sup>11</sup> In the six years since the AWS auction, the licenses at issue—which collectively cover nearly 300 million Americans<sup>12</sup>—have lain fallow.<sup>13</sup> Verizon Wireless intends to use this spectrum to expand its deployment 4G mobile broadband service, which currently provides coverage to approximately 200 million users nationwide.<sup>14</sup>

Some commenters have urged the Commission to reject the Verizon Wireless applications on the grounds that they would undermine competition in the wireless marketplace. One commenting organization, Free Press, argued in a recent filing that granting the applications would “doom the wireless market to permanent duopoly status” and “forever end[] any hope of wireless-wireline or cable-telco competition.”<sup>15</sup> Underlying these arguments is the notion that greater concentration in the spectrum input market threatens the competitive state of the wireless market in the long run.<sup>16</sup>

At best, these concerns are unfounded; at worst, they amount to hyperbole. Concentration in the wireless market poses no inherent threat to consumer welfare; if anything, increased concentration in the U.S. wireless market is likely to *benefit* consumers, not harm them. The empirical evidence strongly suggests that under input constraints, a reduction in the number of firms competing in the wireless market poses no risk to consumer welfare. A 2011 study by economists Gerald R. Faulhaber (a former FCC Chief Economist), Robert Hahn, and Hal Singer, analyzed the relationship between wireless pricing and provider concentration across U.S. markets.<sup>17</sup> They concluded that

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<sup>10</sup> See Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004993617 at 24 n.71 (“Verizon/SpectrumCo Public Interest Statement”); see also Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004996680, at 20 n.62 (“Verizon/Cox Public Interest Statement”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Statement of Verizon Wireless (Dec. 5, 2011) (“On Dec. 15, more than 200 million Americans will be able to experience the blazingly fast speed and reliability of our 4G LTE network.”), available at <http://news.verizonwireless.com/news/2011/12/pr2011-12-05a.html>.

<sup>15</sup> Free Press at 2, available at <http://apps.fcc.gov/ecfs/document/view?id=7021862229>.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> Gerald R. Faulhaber, Robert W. Hahn & Hal J. Singer, *Assessing Competition in U.S. Wireless Markets: Review of the FCC’s Competition Reports* (2011), paper available at <http://ssrn.com/abstract=1880964>.

no “statistically significant relationship” exists between wireless prices and market concentration.<sup>18</sup> Contrary to the Commission’s most recent Mobile Wireless Competition Report evaluating wireless competition,<sup>20</sup> Faulhaber et al. concluded that the report ignored “direct evidence of competition—namely, aggressive pricing behavior, robust entry, and continued long-term reduction in prices, all of which strongly support a conclusion of ‘effective competition.’”<sup>21</sup>

Among the most serious flaws in the Commission’s fifteenth Mobile Wireless Competition Report, the economists argue, is that it “presume[s] a relationship between prices and the number of providers, when such a relationship *does not always exist*.”<sup>22</sup> This phenomenon is not unique to the wireless market; as economist Geoffrey Manne has observed, “[t]he evolution of unilateral effects analysis in modern merger thinking is that market concentration *is not a good predictor* of effect.”<sup>23</sup> In other words, economists are ill-equipped to determine, *ex ante*, the relationship between the level of concentration and the state of competition in a given market. While this conclusion may seem counter-intuitive, it comports with modern economic thinking about the nature of scale and scope in network industries, including the mobile broadband market.<sup>24</sup> Even under the oft-invoked Cournot model of competition—which many economists consider to be inapplicable to modern network industries<sup>25</sup>—increases in market concentration may actually *improve* performance in industries characterized by intractable capacity constraints.<sup>26</sup>

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<sup>18</sup> *Id.* at 1.

<sup>20</sup> In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, 26 F.C.C.R. 9664 (2011).

<sup>21</sup> Faulhaber et al., *supra* note 19, at 7.

<sup>22</sup> *Id.* at 9 (emphasis added).

<sup>23</sup> Geoffrey A. Manne, *Assuming More Than We Know About Innovation Markets: A Review of Michael Carrier’s Innovation in the 21st Century*, 61 Ala. L. Rev. 553, 555 (2010).

<sup>24</sup> See George L. Priest, *Rethinking Antitrust Law in an Age of Network Industries*, Olin Ctr. for Studies in Law, Econ., and Public Policy, Research Paper No. 352 at 2 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1031166](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031166).

<sup>25</sup> Howard A. Shelanski, *Adjusting Regulation to Competition: Toward A New Model for U.S. Telecommunications Policy*, 24 Yale J. on Reg. 55, 90 (2007) (“neither the basic Cournot nor Bertrand approach captures how telecommunications firms are likely to behave.”).

<sup>26</sup> T. Randolph Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *Wireless Competition Under Spectrum Exhaust*, Phoenix Center Policy Paper Series, No. 43, at 4 (2012), available at <http://www.phoenix-center.org/pcpp/PCPP43Final.pdf> (“our analysis finds that under a binding spectrum constraint, competition among few firms will produce lower prices and possibly increase sector investment and employment than competition among many firms.”).

Despite the findings of the economists who have examined the relationship between performance and market structure in the wireless industry, a number of commenters now urge the Commission to reject the Verizon Wireless applications. These commenters, such as Free Press, conflate the concept of competition—which focuses on consumer well-being—with competitor welfare.<sup>27</sup> For instance, Free Press warns of increasing concentration in the wireless market, arguing that this “trend[] should generally worry the Commission.”<sup>28</sup> But this warning fails to appreciate a core tenet of modern antitrust thinking; namely, that government should intervene in the marketplace only when doing so is necessary to protect *competition*, not competitors.<sup>29</sup> As Congress emphasized in the 1996 Telecommunications Act, the Commission must take heed of the crucial distinction between competitor welfare and consumer welfare in reviewing proposed market arrangements in the communications sector.<sup>31</sup>

Free Press bases its objection in large part on how the Verizon Wireless applications would impact wireless industry concentration.<sup>32</sup> To be sure, the Herfindahl-Hirschman Index (“HHI”) represents one element of competition analysis.<sup>33</sup> However, according to Carl Shapiro, a former Deputy Assistant Attorney General for Economics in the Antitrust Division, the Justice Department’s Merger Guidelines “stress *direct evidence* of likely competitive effects” on the relevant market.<sup>34</sup> Reflecting this sentiment, federal courts have recently moved “away from simple rules and towards an approach emphasizing the practical reality of the market and the likely effects of the practice in question.”<sup>35</sup> The Commission would be remiss to ignore these important lessons from antitrust jurisprudence in evaluating the welfare effects of a proposed transfer of

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<sup>27</sup> *e.g.*, Free Press, In re Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo. LLC and Cox TMI Wireless, LLC For Consent to Assign Wireless Licenses, WT Docket No. 12-4, Petition to Deny of Free Press, *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021862229>.

<sup>28</sup> Free Press comments, *supra* at 27, at 23.

<sup>29</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

<sup>31</sup> *See* Hausman & Sidak, *supra* note 5, at 450 (noting that Congress emphasized the improvement of “consumer welfare” as the “overarching purpose” of the 1996 Telecommunications Act.); *see also AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 390 (1999).

<sup>32</sup> Free Press Comments, *supra* note 27, at 18 (“If Verizon is allowed to acquire SpectrumCo. and Cox’s AWS-1 licenses . . . the HHI for the mobile broadband spectrum input market will increase by more than 350 points . . .”).

<sup>33</sup> *See* Department of Justice and Federal Trade Commission, “Horizontal Merger Guidelines” 19 (2010) (Horizontal Merger Guidelines), *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

<sup>34</sup> Faulhaber et al., *supra* note 19, at 10 (emphasis added).

<sup>35</sup> Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L. J. 701, 703 (2010).

spectrum licenses—particularly because direct evidence shows that concentration in the wireless market is, at worst, innocuous, and at best, beneficial to consumers.<sup>36</sup>

The absence of supracompetitive returns among wireless companies reinforces the presumption that the wireless industry is not unduly concentrated. As Professor Joshua D. Wright observed in recent testimony before Congress, “even in the midst of dramatic growth and increasing industry consolidation . . . neither AT&T nor Verizon has been able to generate *returns in excess of the cost of capital* in the past decade due to the cost of continued capital investments in new spectrum and facilities to keep up with data traffic loads.”<sup>37</sup> By “[r]elaxing capacity constraints,” Professor Wright argues, the Commission can “facilitate[] benefits to consumers including increased output and lower prices.”<sup>38</sup>

In 2001, the Bush Administration recommended that the Commission delay the 3G auction until 2004. The result was a “lost decade” of new spectrum allocation, lasting from 1995 through the 2006 AWS auction.<sup>41</sup> While this delay pushed up license prices at auction—and, with them, treasury receipts—it came at a severe cost to consumer welfare and economic growth.<sup>42</sup> As numerous empirical studies have demonstrated, a flexible, market-based approach to spectrum allocation and license transfers contributes to technological development.<sup>43</sup> While Congress recently enacted legislation<sup>44</sup> empowering the Commission to auction 65MHz of new spectrum, experts anticipate the Commission will need several years to fully execute this auction.<sup>45</sup> Until then, creative spectrum arrangements (such as the license transfers currently sought by Verizon Wireless) will be

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<sup>36</sup> See Faulhaber et al., *supra* note 19, at 1.

<sup>37</sup> How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition? before House Subcomm. on Intellectual Property, Comp., and the Internet. at 5, *available at* <http://judiciary.house.gov/hearings/pdf/Wright05262011.pdf>. (emphasis added).

<sup>38</sup> *Id.* at 6.

<sup>41</sup> Thomas W. Hazlett, *What Really Matters in Spectrum Allocation Design*, 10 Nw. J. Tech. & Intell. Prop. 93.

<sup>42</sup> *Id.*

<sup>43</sup> Robert J. Shapiro & Kevin A. Hassett, *The Employment Effects of Advances in Internet and Wireless Technology: Evaluating the Transitions from 2G to 3G and from 3G to 4G*, NDN/New Policy Institute, January 2012, [http://www.sonecon.com/docs/studies/Wireless\\_Technology\\_and\\_Jobs-Shapiro\\_Hassett-January\\_2012.pdf](http://www.sonecon.com/docs/studies/Wireless_Technology_and_Jobs-Shapiro_Hassett-January_2012.pdf).

<sup>44</sup> Middle Class Tax Relief and Job Creation Act of 2012, PL 112-96, § 6401, February 22, 2012, 126 Stat 156 (2012).

<sup>45</sup> See, e.g., Cecilia Kang, *FCC spectrum auction to fund payroll tax cut, public-safety network*, Wash. Post (Feb. 17, 2012) (noting that “[i]t could take years — as long as a decade — for consumers to feel the impact of the government’s spectrum push”), *available at* [http://www.washingtonpost.com/business/technology/fcc-spectrum-auction-to-fund-payroll-tax-cut-public-safety-network/2012/02/17/gIQAYmWgKR\\_story.html](http://www.washingtonpost.com/business/technology/fcc-spectrum-auction-to-fund-payroll-tax-cut-public-safety-network/2012/02/17/gIQAYmWgKR_story.html).

crucial if the wireless industry is to meet rapidly growing consumer demand for bandwidth-intensive mobile applications.<sup>46</sup> As Professor Wright notes, “[g]iven the practical difficulties and delays associated with expanding spectrum holdings through new auctions, acquisition of incremental spectrum through merger is desirable relative to delay and rationing existing spectrum through higher prices.”<sup>47</sup>

**c. Denying the Verizon Wireless applications will harm consumer welfare**

While the denial of the applications would prevent consumers from realizing the efficiency gains the transaction would produce, it would also have affirmative harms on consumer markets. The wireless industry is a network market, wherein benefits to consumers increase as the network expands.<sup>48</sup> Past government intervention in network industries has largely failed, due to the courts’ recognition that the challenged conduct is actually beneficial to consumers through efficiencies and economies of scale.<sup>49</sup>

Because network industries share several characteristics with “natural monopolies,” regulators often conclude that such industries will, absent intervention, devolve into monopolies. However, decades of experience reveal this assumption to be without merit.<sup>50</sup> Network industries compete on multiple dimensions—between horizontal competitors, across networks, and with platform operators. Perhaps most importantly, wireless consumers increasingly care a great deal about the type of device they own, the operating system it runs, and the applications they can use. While cell phones have long varied in terms of features, design, and capabilities, the degree of differentiation among competing devices and platforms is greater than ever before. For consumers in the market for a new mobile phone, the device type is often the most important factor, while the carrier is often a secondary concern. When AT&T secured an exclusive arrangement with Apple to offer the iPhone in 2007, millions of consumers who previously subscribed

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<sup>46</sup> See, e.g., B. Feldman & D. Mitchelson, *Coping with the Spectrum Crunch: Part 1*, Deutsche Bank (September 30, 2011) (“95% of wireless subscribers are supported by carriers that hold only 3% of licensed mobile spectrum” . . . “most carriers don’t own enough spectrum to deliver competitive 4G services”).

<sup>47</sup> *Id.* at 6.

<sup>48</sup> George L. Priest, *Flawed Efforts to Apply Modern Antitrust Law to Network Industries*, in *High-Stakes Antitrust: The Last Hurrah?*, 129 (Robert W. Hahn, ed. 2003).

<sup>49</sup> See generally, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 1999); *United States v. AMR Corp.*, 140 F.Supp. 2d 1155 (D.Kan. 2001).

<sup>50</sup> Priest *supra* note 48, at 129.



to competing carriers flocked to AT&T so they could own a coveted iPhone.<sup>51</sup>

In recent years, various mobile operating system (“OS”) vendors and wireless carriers have on numerous occasions forged major partnerships. Such partnerships have been a boon for not only for carriers and OS vendors but also for consumers. Examples of highly successful partnerships include Apple’s deal with AT&T to distribute the iPhone,<sup>52</sup> Google’s deal with Verizon to collaborate closely to create a suite of Android mobile devices,<sup>53</sup> and Microsoft’s decision to make AT&T its “premier partner” for its Windows Phone 7 platform.<sup>54</sup> More recently, Google and Sprint Nextel unveiled a partnership to offer a near-field communications-based mobile payment system.<sup>55</sup>

This evolving market structure imposes substantial limitations on the ability and incentive of wireless carriers to engage in conduct that would harm consumers or otherwise undermine the public interest. The largest mobile platform vendors now possess a substantial amount of influence over the decisions of wireless carriers, which now routinely court mobile OS vendors.<sup>56</sup> While no single personal mobile phone user possesses the bargaining power to meaningfully negotiate terms with a major wireless carrier, popular mobile platform vendors with sizable market shares carry a great deal of weight in their negotiations with carriers.<sup>57</sup>

Wireless firms compete aggressively along both business and technological lines.<sup>58</sup> For

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<sup>51</sup> See Om Malik, *Why AT&T is Desperately Addicted to the iPhone*, GigaOm (Apr. 22, 2009), available at <http://gigaom.com/2009/04/22/why-att-is-desperately-addicted-to-the-iphone/>.

<sup>52</sup> See Gregg Keizer, *Apple breaks iPhone sales record again*, Comp. World, (Apr. 20, 2011), available at [http://www.computerworld.com/s/article/9216004/Apple\\_breaks\\_iPhone\\_sales\\_record\\_again](http://www.computerworld.com/s/article/9216004/Apple_breaks_iPhone_sales_record_again).

<sup>53</sup> See Peter Svensson, *Verizon, Google in Android partnership*, Associated Press (Oct. 6, 2009), available at [http://www.msnbc.msn.com/id/33192558/ns/technology\\_and\\_science-tech\\_and\\_gadgets/t/verizon-google-android-partnership/](http://www.msnbc.msn.com/id/33192558/ns/technology_and_science-tech_and_gadgets/t/verizon-google-android-partnership/).

<sup>54</sup> Tony Bradley, *Microsoft Anoints AT&T as Preferred Windows Phone 7 Carrier*, PC World (Feb. 16, 2010), available at [http://www.pcworld.com/businesscenter/article/189452/microsoft\\_anoints\\_atandt\\_as\\_preferred\\_windows\\_phone\\_7\\_carrier.html](http://www.pcworld.com/businesscenter/article/189452/microsoft_anoints_atandt_as_preferred_windows_phone_7_carrier.html).

<sup>55</sup> See Melvin Magadia, *Google-Sprint Partnership For Mobile Payment System To Be Unveiled May 26*, News Chronicle (May 25, 2011), available at <http://thenewschronicle.com/googlesprint-partnership-mobile-payment-system-unveiled-26/0525014365>.

<sup>56</sup> See, e.g., Chris Foresman, *Verizon: we're "interested" in iPhone, ball in Apple's court*, ArsTechnica (Sep. 2010), available at <http://arstechnica.com/apple/news/2009/10/verizon-were-interested-in-iphone-ball-in-apples-court.ars>.

<sup>57</sup> Int'l Data Corp., *Worldwide Smartphone Market Expected to Grow 55% in 2011 and Approach Shipments of One Billion in 2015* (Jun. 9, 2011), available at <http://www.idc.com/getdoc.jsp?containerId=prUS22871611>.

<sup>58</sup> Thomas W. Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, 58 Fed. Comm. L.J. 477, 500.

competing wireless firms, acquiring spectrum is crucial to innovate, and therefore, rigorously compete with rivals. A separate market for spectrum naturally exists in which those firms with excess capacity wish to sell to those with insufficient spectrum allocations, in order to innovate and expand their customer bases.

If the Commission denies the Verizon Wireless applications, the prospects of resulting market entry are hardly assured. For all the talk of “barriers to entry” by commenters such as Free Press,<sup>59</sup> opponents of the license transfers have marshaled no evidence that the denial of transfer will benefit consumers. What is certain, however, is that denial of the applications will diminish the prospect of quality improvements by Verizon Wireless, leaving its customers worse off than they would be otherwise. Without the SpectrumCo. and Cox Wireless spectrum, Verizon Wireless will be less able to develop new mobile offerings in response to competitive pressure from smaller rivals—such as lower cost plans—and expand coverage in rural areas where service quality is spotty. Other mobile users will also suffer, as competitive pressure from Verizon Wireless is a crucial driver of innovation by its rivals.

There is also no evidence that the SpectrumCo. and Cox Wireless spectrum will be purchased by a smaller Verizon rival. Sprint currently holds the greatest amount of free spectrum,<sup>60</sup> but would require massive capital investments to take advantage of it, and pass the benefits on to consumers. While T-Mobile has the least amount of free spectrum,<sup>61</sup> its parent, Deutsche Telekom, is eager to sell it off for its existing spectrum, and is unlikely to purchase the SpectrumCo. and Cox Wireless spectrum.

**d. The Commission should err on the side of granting license transfer applications if harmful competitive effects cannot be decisively shown**

The dynamic nature of the wireless market does not lend itself to predictable economic analyses, particularly when competitive effects are in question. While applicants seeking license transfers “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest applicants,”<sup>62</sup> the Commission is

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<sup>59</sup> See, e.g., Free Press Comments, *supra* note 27, at 21.

<sup>60</sup> David Goldman, *The Spectrum War's Winners and Losers*, CNN Money (Feb. 22, 2012), [http://money.cnn.com/2012/02/22/technology/wireless\\_carrier\\_mergers/index.htm](http://money.cnn.com/2012/02/22/technology/wireless_carrier_mergers/index.htm).

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, Memorandum Op. and Order, 19 FCC Rcd 21522, ¶ 40 (2004).

empowered to define the nature and scope of this burden.<sup>63</sup> Especially given the substantial deference courts accord the Commission in its public interest determinations, the Commission should presume that license transfer applications serve consumer welfare, denying them only when presented with decisive economic evidence to the contrary. This approach is best equipped to minimize the error costs described by Judge Frank Easterbrook in his seminal 1984 article *The Limits of Antitrust*, in which he wrote that “judicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not.”<sup>64</sup> Therefore, as the Commission assesses whether a proposed license transfer threatens consumer welfare, it should be mindful of the notion that “the costs of monopoly wrongly permitted are small, while the costs of competition wrongly condemned are large.”<sup>65</sup> While the self-correcting nature of the market stands ready to overcome any harmful behavior of Verizon Wireless, no wireless firm can overcome an arbitrary limit on concentration established by regulators in Washington.

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<sup>63</sup> *GTE Serm. Corp. v. F.C.C.*, 782 F.2d 263, 268 (D.C. Cir. 1986) (“The public-interest standard is, after all, ‘a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.’”) (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)).

<sup>64</sup> Frank H. Easterbrook, *The Limits of Antitrust*, 63 *Tex. L. Rev.* 1, 3 (1984).

<sup>65</sup> *Id.* at 15.