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

In re Application of:	)	
E.N.M.R. Telephone Cooperative, its Wholly-Owned Subsidiary Plateau Telecommunications, Incorporated, and Cellco Partnership d/b/a Verizon Wireless for Consent to the Assignment of Cellular, Personal Communications Service, AWS-1, and Related Point-to-Point Microwave Licenses and International Section 214 Authority	)	ULS File Nos. 0005034870, 0005034877, and 0005063051; File No. ITC-ASG-20120420-00105

JOINT OPPOSITION TO PETITION TO DENY

By this filing, E.N.M.R. Telephone Cooperative ("E.N.M.R."), E.N.M.R.'s wholly-owned subsidiary Plateau Telecommunications, Incorporated ("Plateau"), and Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") (collectively, the "Applicants"), oppose the Petition to Deny ("Petition") filed in the above-referenced transaction by Mescalero Apache Telecommunications, Inc. ("MATI").[1] In March 2012, Applicants jointly filed applications with the Commission seeking to assign four licenses and related microwave call signs from E.N.M.R. and Plateau to Verizon Wireless.[2] As detailed in the Public Interest Statement accompanying the Applications, the proposed assignments will serve the public interest and are fully consistent with the Communications Act of 1934, as amended ("Act"). Specifically, the proposed assignments will help Verizon Wireless expand its 3G EVDO Rev A voice and broadband

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[1] Mescalero Apache Telecommunications, Inc., Petition to Deny, ULS File Nos. 0005034870, 0005034877, 0005063051 (filed May 23, 2012).

[2] *Applications of E.N.M.R. Telephone Cooperative and its Wholly-Owned Subsidiary Plateau Telecommunications, Inc. and Cellco Partnership d/b/a Verizon Wireless*, ULS File Nos.

services in the New Mexico – 6 RSA (the "Market"), and pave the way for the deployment of 4G Long Term Evolution ("LTE") in the area.

The MATI Petition was the only petition or comment filed against the proposed assignments and, as detailed below, the Commission should dispose of the Petition on purely procedural grounds. Indeed, MATI has not established standing and thus its Petition is barred by the Act and the Commission's rules. Further, MATI's competition-related allegations are factually unsupported and have no merit whatsoever, nor do its statements regarding Verizon Wireless's participation in the Mobility Fund Phase I proceeding. Accordingly, the Commission should promptly dismiss or deny the Petition and grant the above-captioned Applications.

I. MATI LACKS STANDING TO FILE THE PETITION TO DENY.

MATI has failed to establish standing and thus its Petition is fatally defective under the Act and the Commission's rules. As detailed below, MATI fails to explain not only how Commission approval of the assignment of spectrum to Verizon Wireless would directly harm MATI, but also how denial of the Applications would prevent or redress any cognizable injury to MATI. Nor is there any plausible basis for MATI to make such a showing.

Under Section 309(d)(1) of the Act,[3] and Section 1.939 of the Commission's rules,[4] only a "party in interest" may file a petition to deny. To qualify as a "party in interest," the petitioner must satisfy the familiar standing test used by federal courts.[5] Specifically, the petitioner must

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0005034870, 0005034877, and 0005063051; File No. ITC-ASG-20120420-00105, at Exhibit 1: Description of Transaction and Public Interest Statement at 2 ("Applications").

[3] 47 U.S.C. § 309(d)(1).

[4] 47 C.F.R. § 1.939.

[5] The FCC has concluded that in "determining whether a petitioner qualifies as a 'party in interest,' we must apply judicial standing principles." *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, ¶¶ 19-20 (1989); *see also In the Matter of Rockne Educational TV*, Memorandum

establish that: (1) a "grant of the challenged application would cause the petitioner to suffer a direct injury"; (2) "the injury can be traced to the challenged action"; and (3) it is "likely, as opposed to merely speculative, that the injury would be prevented or redressed by the relief requested."[6] The petitioner must do more than make generalized statements in support of these elements; instead, the Act requires that its petition contain "specific allegations of fact."[7] In this case, MATI has failed to satisfy any of the elements of this inquiry.

MATI's claim that assigning Plateau's spectrum to Verizon Wireless could harm MATI's prospects of becoming a wireless competitor in the geographic areas[8] covered by the licenses in question at some point in the future is not a direct injury that justifies standing. Well-established Commission and court precedent makes clear that speculative or potential injuries—including injuries premised on a petitioner's future intent to apply for or purchase licenses—do not suffice to give a party standing.[9] Just last year in the 800 MHz rebanding proceeding, for example, the

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Opinion and Order, 26 FCC Rcd 14402, ¶ 7 (2011) ("We disagree with [the petitioner's] claim that it need not demonstrate traditional Article III standing. In fact, in the context of wireless applications, the Bureau has used the Article III test to determine whether standing exists.").

6 *Alaska Native Wireless*, Order, 18 FCC Rcd 11640, ¶ 10 (2003).

7 47 U.S.C. § 309(d)(1); *see also* 47 C.F.R. § 1.939(d) (same).

8 In its Petition, MATI asserts that the Mescalero Apache reservation is "located in parts of Otero and Lincoln counties, New Mexico" and covers "approximately 780 square miles." Petition at 2. According to MATI's website, however, the reservation "is approximately 720 square miles" and appears to lie entirely within Otero county. *See* http://www.mescaleroapache.com/ (last visited May 25, 2012) (copyright is shown on the page for "Mescalero Apache Telecom, Inc."). The MATI website corresponds with data from the Census Bureau, where the cartographic boundary files for the Mescalero Apache tribe are shown as 719.7 square miles apparently in Otero county. *See* http://www.census.gov/geo/www/cob/na1990.html (last visited May 25, 2012). On that basis, any claim to injury in Lincoln county appears particularly speculative.

9 *Improving Public Safety Communications in the 800 MHz Band*, Order, 26 FCC Rcd 5004, ¶ 16 (2011). *See also SunCom Mobile & Data v. FCC*, 87 F.3d 1386 (D.C. Cir. 1996) (holding that future intent to purchase licenses is insufficient to establish standing under Article

Commission dismissed claims that were raised by "potential competitors" of Sprint.[10] Sprint's opponents stated that they were potential licensees, "poised to apply" for spectrum and having the intent to purchase spectrum.[11] The FCC dismissed the parties' oppositions for lack of standing, holding that "claims based on hypothetical future applications for spectrum are too remote and speculative to confer standing."[12]

MATI's claimed harm—that the proposed assignment will hurt MATI's ability to compete in the wireless broadband marketplace—suffers from the same deficiency. MATI does not currently provide wireless broadband service, nor does it hold the FCC licenses that are the necessary prerequisite to providing such service. As such, MATI's harm is purely speculative and does not justify standing to oppose the proposed assignment.[13] Notably, having failed to

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III); *Application of KIRV Radio,* Memorandum Opinion and Order, 50 F.C.C. 2d 1010 (1975) (stating that "the claim of potential economic injury by a mere applicant for a broadcast facility is too remote and speculative to show standing as a 'party in interest'"); *Wireless Co., L.P.*, Order, 10 FCC Rcd 13233, ¶ 9 (1995) (denying standing due to "hypothetical and contingent injury"); *Application of Mel-Eau Broadcasting Corp. and WMEG, Inc. for Assignment of the License of Radio Station WMEG*, 10 F.C.C. 2d 537, ¶ 4 (1967) ("pleading 'standing' by speculation and conjecture is not acceptable").

[10] *Improving Public Safety Communications in the 800 MHz Band*, Order, 26 FCC Rcd 5004 (2011).

[11] *Id*. at ¶ 16.

[12] *Id*.

[13] MATI's other claimed injury—that it has a "keen interest in preventing an accumulation of spectrum by a single party that would reduce existing competition"—also is insufficient to justify standing. Petition at 3. Satisfying the "direct injury" element of the standing inquiry requires "more than allegations of damage to an interest in seeing the law obeyed or a social goal furthered." *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987). Here, MATI's claim of a generic injury to the social goal of competition is inadequate to justify standing for MATI.

establish any legally cognizable injury, MATI also fails the second prong of the standing test—showing that "the injury can be traced to the challenged action."[14]

Finally, MATI has failed to establish that it is "'likely' as opposed to merely 'speculative'" that any alleged injury would "be 'redressed by a favorable decision.'"[15] MATI speculates that granting the Applications would prevent MATI from becoming a wireless broadband provider. But denying the Applications does not make it "likely" that MATI would become a wireless broadband provider.

II. THE PROPOSED TRANSACTION OFFERS PUBLIC INTEREST BENEFITS AND PRESENTS NO HARM TO COMPETITION.

As detailed in the Applications, the proposed transaction will serve the public interest by allowing Verizon Wireless to expand its voice and 3G CDMA EVDO services in the New Mexico – 6 RSA.[16] The customers Verizon Wireless acquires in the Market will also enjoy the benefits resulting from Verizon Wireless's planned deployment of 4G LTE on its existing 700 MHz C Block spectrum. As detailed in the Applications, Verizon Wireless has publicly announced its plans to overlay its entire EVDO network—including the portion of its network that serves the Mescalero Apache reservation—with 4G LTE in 2013.[17]

The expansion of 3G services and the deployment of 4G LTE in the Market will enable consumers to experience robust and reliable service on their smartphones, tablets, and other mobile devices. Verizon Wireless agrees, as MATI notes in its Petition, that the widely

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14 *Alaska Native Wireless*, Order, 18 FCC Rcd 11640, ¶ 10 (2003).

15 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

16 Applications at Exhibit 1: Description of Transaction and Public Interest Statement at 2.

17 *See* Verizon Wireless, Deploying LTE, *available at* http://aboutus.verizonwireless.com/rural/Deploying.html.

dispersed populations and terrain anomalies have made providing coverage in the Market difficult.[18] In addition to these challenges, MATI has also cited poor coverage within its "Inn of the Mountain Gods Resort & Casino."[19] Hotels and especially casinos often experience interior coverage holes as they are typically cavernous buildings with limited windows designed to minimize distractions to patrons. These attributes add to the difficulty of providing reliable in-building coverage. Since Verizon Wireless does provide 3G coverage in the vicinity of the inn, as acknowledged by MATI, there are technical remedies to improving in-building coverage. In other similar structures, such as industrial campus buildings or large malls, for example, building owners have installed signal enhancing equipment, such as in-building systems, to improve coverage. With MATI's cooperation, Verizon Wireless could install repeaters or an in-building system to improve coverage and signal strength at this location. Notwithstanding the coverage challenges encountered by every wireless carrier trying to serve remote areas, Verizon Wireless covers more of the geography and population on the reservation than any other carrier, including Plateau, and 100 percent of Verizon Wireless's coverage is 3G EVDO Rev A.[20] Given Verizon Wireless's commitment to overlay Plateau's network with 3G EVDO Rev A and its further commitment to 4G LTE service everywhere it offers 3G service, it is clear that the proposed transaction holds particular benefits for consumers in the Market.

Independent of countervailing public interest benefits, the proposed transactions should be approved because there will be no harm to competition within the Market. The Applications show that a number of providers hold licenses in the Market, including AT&T, Sprint, and T-

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18 Petition at 2-3, 5.

19 Petition at 2-3.

20 Petition at 5.

Mobile, as well as a range of smaller providers.[21] And, as documented in the Applications, the number of operating wireless providers will not be reduced due to this transaction, except in the portion of Lincoln County where Verizon Wireless currently operates and in Otero County, although Plateau offers only roaming service in Otero county. Amid the robust competition for wireless services, the loss of Plateau as a "roam only" carrier that does not offer retail service will not negatively impact the competitive landscape.

Moreover, following consummation of the transaction, Verizon Wireless will be at or below the Commission's spectrum screen in all counties.[22] The FCC has consistently held that "the purpose of this initial screen is *to eliminate from further review those markets in which there is clearly no competitive harm* relative to today's generally competitive marketplace."[23] In this case, Verizon Wireless will not exceed the screen, making any further competitive analysis unnecessary. MATI's allegations to the contrary are unfounded.[24] Based on the public interest benefits and absence of harm to competition, the Commission should grant the proposed assignments.

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[21] Applications at Exhibit 3, Wireless Licensees by Market.

[22] Applications at Exhibit 1, Description of Transaction and Public Interest Statement at 3.

[23] *Sprint Nextel Corp. and Clearwire Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 17570, 17601 ¶ 76 (2008) (emphasis added); *see also AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21569 ¶ 109 (2004).

[24] The Petition claims that Verizon Wireless, post-transaction, would hold spectrum which "exceeds the FCC's 'spectrum screen.'" Petition at 3. As noted, Verizon Wireless will not exceed the FCC's spectrum screen in any county within the Market. The Petition also asserts harm "regardless of what arbitrary 'spectrum screen' applies." Petition at 4. In fact, the FCC's spectrum screen is well-defined and has been applied in a wide range of transactions, and it is therefore unclear why MATI views the test as "arbitrary."

III. MATI'S ALLEGATIONS REGARDING VERIZON WIRELESS'S PARTICIPATION IN THE MOBILITY FUND PROCEEDING ARE BASELESS.

MATI's allegation that Verizon Wireless attempted to "manipulate" the Mobility Fund proceeding in an effort to "suppress competition" is also factually unsupported and patently incorrect.[25] For purposes of Phase I of the new Mobility Fund, the *USF-ICC Transformation Order* required wireless ETCs to review a preliminary list of eligible census blocks and to advise the Commission whether the carrier was offering 3G (or better) service in a particular area on the list pursuant to a "regulatory commitment."[26] Verizon Wireless, following the Commission's directives, did not file in the initial comment round because it did not identify any applicable areas where it was under a "regulatory commitment" to offer service. However, after reviewing the data submitted by other carriers in the comment round, where other carriers claimed coverage even in the absence of a regulatory mandate to serve the areas, Verizon Wireless submitted additional data in the reply comment round. Verizon Wireless provides service (without any regulatory requirement to do so) in a small subset—less than 5 percent—of the census blocks on the Commission's list. As a result, Verizon Wireless's reply comments provided the Commission with a list of those census blocks where—like other carriers—it provides 3G (or better) coverage at the census block "centroid." The Commission ultimately decided to rely largely on its original list of eligible census blocks, to which Verizon did not object. Verizon Wireless submitted the data to help the Commission better target limited Mobility Fund support to those areas that still truly lack access to 3G (or better) service, which is the goal of the new program. While MATI attempts to characterize Verizon Wireless's filing as an attempt to

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[25] Petition at 5.

[26] *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 34 2 (2011) ("*USF-ICC Transformation Order*").

restrict MATI's opportunity to respond, MATI was free to file an *ex parte* addressing Verizon Wireless's filing even after the close of the comment cycle in WC Docket No. 10-208. Numerous *ex parte* filings, in fact, have been made in that docket.

IV. CONCLUSION

Grant of the Applications will support the public interest and will not result in any competitive harms. And MATI—whose Petition is procedurally defective to begin with—fails to provide any valid basis for denying the Applications. Accordingly, the Commission should grant the Applications expeditiously and deny the Petition.

Respectfully submitted,

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June 4, 2012

DECLARATION OF JOHN SCHREIBER

I, John Schreiber, am the Executive Director – Property Planning and Acquisitions for Verizon Wireless. I hereby declare under penalty of perjury that I am qualified to speak on behalf of Verizon Wireless and that I have reviewed the preceding Opposition submitted on behalf of Verizon Wireless, and the factual statements therein are complete and accurate to the best of my knowledge, information, and belief.

Executed on June 4, 2012.

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CERTIFICATE OF SERVICE

I, Katy Milner, certify that on this 4th day of June, 2012, a copy of the foregoing Joint Opposition was sent via first class mail to the following persons (unless another delivery method is specified):

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