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THE VERIZON/CABLE DEALS: HARMLESS COLLABORATION OR A THREAT TO COMPETITION AND CONSUMER RIGHTS?

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

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UNITED STATES SENATE

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THE VERIZON/CABLE DEALS: HARMLESS COLLABORATION OR A THREAT TO COMPETITION AND CONSUMER RIGHTS?

WEDNESDAY, MARCH 21, 2012

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Subcommittee met, pursuant to notice, at 4:34 p.m., Room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Klobuchar, Franken, Blumenthal, and Lee.

OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Today we meet to consider the series of transactions between Verizon Wireless and four of the Nation's largest cable TV companies announced last December. These deals, coming on the heels of the now-abandoned proposed merger between AT&T and T-Mobile, are the latest transactions that seek to reshape the wireless phone, Internet access, and cable television markets.

Under these deals, Verizon Wireless, the Nation's largest cell phone company, would acquire large chunks of Spectrum from Comcast, Time Warner, Cable Cox, and Bright House. And at the same time, these companies have all signed agreements in which Verizon Wireless and the cable companies agree to cross-market each other's services and form a joint technology venture.

The parties to these transactions argue that these deals are highly beneficial both to their companies, as well as to consumers. It will give Verizon Wireless additional spectrum necessary to meet the exploding demand for Internet applications used by consumers with smart phones, and it will permit the four cable companies, which collectively account for over 70 percent of the Nation's cable TV subscribers, to offer a quad-play bundle to their customers: video, Internet, landline phone, and now wireless services, as well.

Yet these transactions have come under serious criticism from consumer advocates and competitors. The basic premise of the landmark Telecommunications Act of 1996 was that cable companies and phone companies would enter each other's markets and compete. And this vision was well on the way to being realized with cable companies offering landline phone service, phone companies, like Verizon, offering cable TV through its VIAS service, and

both offering consumers an on-ramp to the Internet, so crucial in today's economy.

In addition, recent years have seen a tremendous expansion of cell phone service and wireless devices as a way both to make phone calls and access the Internet.

Many now wonder if these agreements that we are examining today will roll back these advances in competition and even amount to a truce between one of the two largest phone companies and over 70 percent of the cable TV industry.

Under these agreements, cable company represents will be present in Verizon Wireless stores, and cable representative will be selling products and services that directly compete with Verizon's, including VIAS.

After these deals, will Verizon continue to develop and aggressively market VIAS?

Furthermore, rather than attempt to develop competing wireless services with the spectrum the cable companies bought in 2006, the cable companies are selling that spectrum to Verizon Wireless and will be offering Verizon Wireless services to their customers.

In addition, Verizon Wireless will be acquiring what is likely the last swath of crucial spectrum available for years to come, keeping this vital input for wireless service out of the hands of its competitors.

After this deal, Verizon Wireless and AT&T will have, together, two-thirds of the Nation's cell phone customers, as well as the lion's share of the most valuable spectrum.

Given the exploding consumer demand for smart phones and the spectrum they require, will the other cell phone carriers truly be able to compete?

Having won the battle for competition by blocking last year's AT&T and T-Mobile merger, are we now in danger, indeed, of losing the war?

So we enter today's hearing with more questions than answers, while cognizant of the very high stakes for competition in consumers in these transactions. We know that both Verizon and Comcast, as well as the other cable companies, believe that they are acting in the best interest of their own businesses and shareholders. Yet we need to ensure that consumers' best interests will be served in the long run.

We urge their regulators to ensure that nothing in these deals reverse the historic gains in competition between phone and cable companies ushered in by the Telecom Act of 1996.

The fundamental question we must answer is whether these deals will bring beneficial new choices to consumers or amount to previously fierce rivals standing down from competition.

We look forward to the testimony of our panel of witnesses to shed light on these important issues.

[The prepared statement of Senator Kohl appears as a submission for the record.]

Senator KOHL. At this time, we turn to Senator Lee for his comments.

STATEMENT OF HON. MIKE LEE, A U.S. SENATOR FROM UTAH

Senator LEE. Thank you very much, Chairman Kohl. Hundreds of millions of Americans pay for cell phones, cable television, home Internet connections, and for home landline connections to the telephone network. In fact, there are over 320 million wireless subscriber connections in the United States, meaning that there are more cell phone contracts than there are people in the United States.

Over 100 million households have cable-video service, and nearly 50 million pay for high-speed cable Internet. So the announcement late last year of commercial agreements between four of the country's largest cable companies and the country's largest wireless phone services company understandably attracted some attention.

These agreements include the sale of wireless spectrum to Verizon Wireless from a group of cable companies, most of which had purchased the spectrum in 2006 and were not using it at the time.

In separate agreements announced on the same day the cable companies and Verizon Wireless agreed to potential marketing arrangements for each other's products. For each Verizon Wireless contract obtained through cable marketing, Verizon will pay the cable company a commission of a few hundred dollars, and vice versa.

The companies have also agreed to fund a joint research and development project. And these agreements provide cable companies a future option of renting from Verizon the necessary inputs to create their own wireless cell phone offerings.

Since these deals were announced, competitors of Verizon Wireless and the cable companies, as well as consumer advocate and public interest groups, have voiced a number of concerns. Some have argued that the wireless market is tending toward a duopoly and that additional spectrum should be sold only to smaller wireless service providers.

Others have argued that the Federal Communications Commission current spectrum screens, which are not implicated by Verizon's spectrum acquisitions, except in a few distinct localities, do not sufficiently account for the value of spectrum holdings and should be changed.

Critics of the joint marketing agreements fear that Verizon Wireless' parent company, which owns Verizon VIAS, a fiber optic offering providing cable, phone and Internet services on a combined basis, will no longer compete as vigorously with the cable companies. They also worry over the potential competitive implications of the companies' joint venture and speculate that its resulting products and technology may give the member companies an undue advantage in the marketplace.

It needs hardly be said that competition is essential to consumer welfare in the wireless and cable industries, just as it is elsewhere. The competitive state of the wireless market has recently received a lot of attention, including a hearing in this Subcommittee on the proposed merger between AT&T and T-Mobile, which the companies were forced to abandon late last year.

The competitive state of the cable and video industries is likewise worthy of consideration, both in the course of today's hearing

and as part of future Subcommittee discussions. The concerns expressed by critics of the agreements between Verizon Wireless and the cable companies highlight important issues facing these industries, and I am hopeful that this hearing can help shed some light on the proper role of government in this context.

With respect to the wireless spectrum, consumer demand for data has exploded and continues to increase at exponential rates. Some estimates suggest that data traffic will surge to as much as 18 times current levels in the next few years alone. Particularly because government agencies have been slow to free up unused spectrum and make it available in the marketplace, many analysts fear an increasingly severe spectrum crunch.

Given this context, we must give significant weight to efficiencies that will result from the Verizon acquisition, including the substantial benefit of putting previously fallow spectrum to use by a highly efficient wireless network. Although this scarce and limited resource is overseen and administered by government agencies, regulators must take care to incentivize productive use of spectrum and must not punish private enterprise for government mismanagement.

With respect to the joint marketing agreements, I believe we ought to pay close attention to the relevant business incentives at play. Perhaps the most important question in this regard is whether the joint marketing agreement signed by Verizon Wireless does, in fact, interfere with the motivation and the ability of its parent company to propagate VIAS. If the deal leaves Verizon's incentives with respect to VIAS unchanged, the agreement may be seen as pro-competitive, enhancing consumer choice in the form of new quadruple-play service.

Absent evidence of anti-competitive conduct, the companies' joint venture and agreement allowing cable companies to brand their own wireless service offerings may likewise be seen as primarily pro-competitive deals that encourage innovation through collaborative research and development of new technologies and new services.

Throughout our consideration of these agreements, we should remember that the purpose of our antitrust laws is simply to maximize consumer welfare. Although antitrust law, by its very nature, is forward looking, unmoored speculation must not be allowed to overtake rational economic analysis. Government may sometimes have a proper role in ensuring that businesses fairly compete and do not collude, but it is improper for government agencies to pick winners and losers in the marketplace or to run interference with private enterprise where robust market forces are in operation.

I look forward to hearing from each of the witnesses and thank them for their cooperation and joining us today.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Lee.

I would call our first panel witnesses. First to testify today will be Randal Milch. Mr. Milch is Executive Vice President and General Counsel of Verizon, a position he has held since 2008.

Our next witness to testify will be David Cohen, Executive Vice President of Comcast Corporation. Mr. Cohen joined Comcast in 2002.

Next, we will be hearing from Charles Rule. Mr. Rule is the managing partner of the Washington office and head of the antitrust group at Cadwalader, Wickersham & Taft. He served as assistant attorney general in charge of the antitrust division at the Department of Justice under President Reagan.

Next to testify will be Steven Berry, President and CEO of the Rural Cellular Association. Mr. Berry has also served as senior vice president of government relations for the National Cable and Telecommunications Association.

Our fifth witness today will be Joel Kelsey. Mr. Kelsey is a policy advisor at Free Press; he previously worked as a policy advisor for Consumers Union.

Finally, we will be hearing from Timothy Wu, Professor of Law at Columbia University. Before that, Mr. Wu served as senior advisor at the Federal Trade Commission, and he is the author of several publications, including books, "The Master Switch" and "Who Controls the Internet?"

We thank you all for appearing here before the Subcommittee. I ask you now to stand and raise your right hand as I administer the oath.

[Witnesses sworn.]

Senator KOHL. Thank you. So we will start with you, Mr. Milch. And, gentlemen, please keep your testimony to about five minutes or less.

Thank you, Mr. Milch.

STATEMENT OF RANDAL S. MILCH, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON COMMUNICATIONS, INC., NEW YORK, NEW YORK

Mr. MILCH. Thank you, Chairman Kohl. And good afternoon to you and Ranking Member Lee and the other Members of the Subcommittee.

I wish to make three points this afternoon, and then I'd be happy to respond to your questions.

First, it's critical that this previously unused spectrum be put to use to meet customers' growing needs in the mobile broadband economy. Mobile broadband is a continuing bright spot in our national economy, and it's built on investment in facilities and networks, startling daily innovation in applications, and widespread societal benefits.

But it's no secret that we're currently in a critical situation. Customer demand for mobile bandwidth is growing faster than currently available spectrum. Customers using data-intensive devices, like iPads, iPhones, tablets, as well as data-intensive applications, like streaming video and audio, are driving the need for more spectrum. According to public estimates, total smart phone traffic in 2015 will be 25 to 50 times greater than it is today, and the FCC predicts that if additional spectrum is not made available in the near term, mobile data demand will likely exceed capacity by 2014.

From Verizon's own perspective, on our networks, data usage has been doubling each of the last three years and we expect that trend to continue going forward. In some of our largest markets, the spectrum crunch will come as soon as 2013 and start hurting our cus-

tomers and your constituents who expect and demand high-quality service.

Finally, I would note that one thing has been true about all data estimates—they have been underestimates. The spectrum purchase will allow us, in the short term, to meet our customers' growing needs.

Second, allowing Verizon Wireless to purchase this spectrum and build it and invest in it is a good reallocation of an important asset. Verizon is a good steward of spectrum. We put it to use, and we do it more efficiently than anyone else in the United States.

As this chart demonstrates, Verizon Wireless serves more customers per megahertz of spectrum than any other carrier in the United States, despite the huge growth of data traffic from smart phone usage.

For example, Verizon Wireless, which is here on the right, serves over 1.2 million customers per megahertz of spectrum; and, for instance, T-Mobile, which is right here, serves 660,000 customers per megahertz of spectrum.

Verizon Wireless is almost twice as efficient as T-Mobile. And I want to point out that we are not seeking to buy this spectrum without already having taken other expensive steps to best use the spectrum we already have. We have spent $22.3 billion over the past three years, $8.3 billion alone in 2011, on our network, and that's more than any other wireless provider in the United States.

Roughly half of that spend has been investments to increase our capacity within our existing spectrum limits by numerous engineering techniques, such as cell splitting and denser cell site deployment.

Now, of course, these engineering techniques are available to any carrier who chooses to invest in them, but I would also point out that we do not believe that we can engineer our way out of the spectrum crunch. More spectrum is necessary.

I would also push back on the notion that Verizon Wireless is somehow taking more than its fair share of available spectrum. After acquiring this additional spectrum, our holdings in nearly all geographic areas will remain below the level where the FCC has said that no further competitive inquiry is necessary, because there is clearly no competitive harm.

This is the so-called "spectrum screen," which identifies areas where there's competitive concern. Ninety-eight percent of the counties involved here fall below the spectrum screen.

Third, let me talk for one second about the separate cross-marketing agreements. I fully believe they will be good for consumers in the competitive marketplace by providing them more choice.

Let me explain why we did this. Verizon's award-winning FiOS service has always been intended to reach a relatively small portion of the country. As this chart indicates, Verizon FiOS, here in the blue, hugs the east coast largely, a small bit in Florida, Texas, and in southern California.

This represents our current build, which is about 80 percent of the total FiOS build that we had intended to begin in 2005 and announced in 2009 was going to be our FiOS build.

Now, on the other hand, Verizon Wireless provides service across the country, which is provided in this chart. This is our 3G foot-

print, our current footprint, but our 4G footprint will match this by the middle of the next year when we finish building out our high-speed 4G bandwidth service.

So what we needed to do was figure out a way to ensure that Verizon Wireless, which covers the entire country, would have the ability to be part of bundles and of wireless and wire line services in the parts of the country where FiOS didn't exist.

We also wanted to be able to compete in the innovation race and tried to create new technical capabilities to allow customers to more seamlessly use mobile and wired broadband products. That's what these various agreements do. Verizon Wireless and the cable companies will have the ability to act as sales agents for one another. They will not control the price of the input. So the cable companies don't control the price of the Verizon Wireless service and Verizon Wireless doesn't control the price of the cable service. They merely sell it for a one-time agency commission.

There are thousands of such agency commissions in the marketplace today. Verizon Wireless has over 1,000 itself. They've never attracted any anti-competitive attention.

The companies also have created a joint venture in order to try to produce this new product. We don't have it yet. If we do have it, it will be successful only if the marketplace deems it so.

Finally, let me dispel the notion that Verizon would somehow disadvantage FiOS in this transaction. FiOS is one of the largest investments by a private company in the last decade in this country, $23 billion invested to do this. We have only just recently begun to see positive cash-flow out of this investment. It's important for us to continue it and there will be no stopping it, because it's a superior product that customers like and that we are going to push as hard as we can.

Thank you very much for your time. I'd be happy to answer your questions.

[The prepared testimony of Mr. Milch appears as a submission for the record.]

Senator KOHL. Thank you, Mr. Milch.

Mr. Cohen.

STATEMENT OF DAVID L. COHEN, EXECUTIVE VICE PRESIDENT, COMCAST CORPORATION, PHILADELPHIA, PENNSYLVANIA

Mr. COHEN. Thank you, Mr. Chairman and Members of the Subcommittee. It's a pleasure to be back in this room, and I thank you for the opportunity to testify today on the substantial benefits consumers will realize from SpectrumCo's sale of spectrum to Verizon Wireless and the reseller, technology joint venture, and joint marketing agreements the companies entered into in this transaction.

Because Mr. Milch from Verizon has really fully covered the spectrum aspects of the transaction, I'm going to focus on the commercial agreements. So the commercial agreements at issue here are ordinary and customary, market-standard agreements. There is no merger here, like there was in AT&T/T-Mobile. There is no acquisition of customers or of ongoing business operations. Not one competitor will be removed from the marketplace as a result of this transaction.

Let's break those commercial agreements down into the three types. The reseller agreements will allow us to become a mobile virtual network operator, an MVNO, and offer consumers our own unique branded wireless services.

The FCC consistently has acknowledged the benefits that resellers can provide to consumers. The government has never insisted on preapproving such agreements. In fact, it has encouraged and even compelled them in certain transactions. They are a slam-dunk win for consumers.

The technology joint venture will lead to more innovation as we develop amazing new technologies that will offer consumers the ability to use all of their communications devices and services seamlessly across multiple platforms. This innovation will compete with other innovation already occurring in the marketplace. Joint ventures such as these have also been viewed favorably by the government.

The agency agreements allow us immediately to begin selling Verizon Wireless services as part of multi-product bundles, and they also allow Verizon Wireless to do the same. There are many, many examples of our competitors entering into similar agency agreements to offer multi-product bundles.

The latest example is the announcement by AT&T and DirecTV of an agency agreement at the end of last year. Again, so far as we are aware, the government has never questioned or challenged any of these agreements.

Contrary to certain parties' claims, these agreements will not affect Verizon's or the cable companies' incentives to compete vigorously against each other. Such claims ignore basic business realities.

Initially, please remember that Verizon Wireless and Verizon are separate companies, with Verizon owning 55 percent of Verizon Wireless. As a matter of simple business economics, as Mr. Milch just testified, Verizon is hardly going to walk away from its $23 billion investment in FiOS, which generates 61 percent of its consumer wireline revenues today.

Second, it is important to note that there is no FiOS overlap with the cable company partners of SpectrumCo—it's an analog to that chart—in over 85 percent of our collective footprint nor is there any incentive for Verizon to lay down its weapons in the fierce FiOS/cable battle in the remaining 15 percent of the country.

Put yourself in Verizon's position. Would you rather hold on to an existing or attract a new FiOS subscriber worth thousands of dollars in ongoing monthly subscription fees, or would you rather get 55 percent of a one-time commission worth, at most, only a few percentage points of the value of a FiOS customer? This isn't even a close call.

Arguments that are predicated on the idea that this set of agreements will encourage Verizon not to expand its FiOS footprint or discourage the cable companies from entering the wireless marketplace ignore clear market realities. Verizon announced over two and a half years ago that it did not intend to build FiOS out to additional areas of the country outside of its existing franchise areas, and the cable companies have made a considered business decision not to build a new wireless network.

Speculative claims that ignore the reality of considered business decisions are not what the antitrust laws were intended to address.

Finally, and with all due respect, opposition by some of our competitors should also be seen in its proper context. What they are really concerned about is that our agreements will increase competition and compel them to respond accordingly.

The antitrust laws, however, are designed to protect competition, not to insulate competitors from having to respond to competition. In our view, the proper focus here should be on the consumer. And for the consumer, these agreements are entirely additive—more choice, more competition, more investment, and more innovation.

So thank you for the opportunity to testify, and I look forward to answering your questions.

[The prepared testimony of Mr. Cohen appears as a submission for the record.]

Senator KOHL. Thank you, Mr. Cohen.

Mr. Rule.

STATEMENT OF CHARLES F. RULE, MANAGING PARTNER, WASHINGTON, DC, OFFICE, CADWALADER, WICKERSHAM & TAFT, LLP, WASHINGTON, DC

Mr. RULE. Thank you, Mr. Chairman, Senator Lee, and Members of the Subcommittee. It's an honor to be invited to discuss with you the antitrust aspects of the Verizon Wireless/cable deals.

The views that I am expressing today are mine and mine alone. I have no clients involved in this transaction or really have any interest in it one way or the other. And until I was invited to come here today to talk to you, I hadn't spent that much time thinking about the transaction.

As a consequence, my analysis is based on a review that I've been able to do over the last few days of the principal filings made with the FCC and then consideration of those arguments for and against the deal.

My analysis, such as it is, has been provided in written form to the Committee and I won't dwell on it, but I will summarize it.

The analysis is strictly through the lens of the antitrust laws. There may be and seem to be other arguments made at the FCC, but they are not necessarily antitrust issues.

The antitrust lens is shaped by three core principles. First, the antitrust laws are, the Supreme Court has said, a consumer welfare prescription. A merger, acquisition or collaboration is ultimately judged by whether, on balance, it is likely to increase quality-adjusted total output.

Second, private mergers and acquisitions are critical to a dynamic economy and facilitate the movement of assets from lower- to higher-valued uses. While due to factors such as market structure, the position of the parties and so forth, a very small fraction of such deals may threaten harm to consumer welfare. Antitrust should not unduly interfere with or raise obstacles to the market for the flow of assets.

Third, short of an M&A transaction, collaboration among firms, even competitors, is critical to the economy and generally holds the potential for increasing consumer welfare. Sure, under certain circumstances, collaboration can threaten consumer welfare and com-

petition, but the antitrust laws are sensitive to the welfare-enhancing promise of collaboration.

Ultimately, the antitrust analysis of any transaction, including this one, is heavily dependent on the relevant facts surrounding the particular transaction. Gathering those facts and examining them under the antitrust lens is currently underway at the Department of Justice, and I would imagine that that will continue for several months more.

Given my limited time and access to the facts, I'm able to reach only tentative views about the agreements. Based on those constraints, let me briefly summarize my tentative views on three aspects of the deal—Verizon Wireless acquisition of the cable companies AWS spectrum licenses, the commercial collaboration agreements between Verizon Wireless and the cable companies, and the R&D collaboration between the parties.

First, with respect to the acquisition of spectrum, the cable companies have never developed that spectrum. They've never gotten into the business of competing for wireless service on a facilities basis.

Moreover, in the absence of the transfer, the spectrum that they hold will continue to generate zero wireless service for the foreseeable future. As a consequence, Verizon Wireless acquisition of that spectrum will not eliminate any existing competition.

Moreover, Verizon Wireless claims to have a roadmap for the use of the spectrum to generate 4G LTE service in the next three years or so. So the transaction appears to increase output.

The fact that opponents can conjure up that there may be some conceivable alternative deal that will increase output even more is not, under existing antitrust law, a basis to challenge the transaction.

Second, the commercial agreements. Those I have an interest in, I actually happen to be a happy, satisfied customer of FiOS. So I am concerned, like everybody else should be, as to whether or not these agreements are going to impact that competition.

However, looking at the deals that are fairly standard commercial agreements, the structure and economics of them do not appear to materially impact either the cable companies' incentives to go into facilities-based wireless communication or Verizon's incentives and ability to continue to compete with FiOS.

However, it's important for the department, as they look at these transactions, to make sure that there are adequate safeguards to prevent anti-competitive spillover.

Last, with respect to the cable/wireless collaboration on innovation, it seems to me, on its face, this collaboration raises little concern. Joint R&D is treated favorably by the antitrust laws, and the consortium will face vigorous competition from others.

The basis of my views is, as I said, provided in the written submission. I hope it's of help.

Mr. Chairman, that concludes my remarks and I look forward to any questions that the Committee may have.

[The prepared testimony of Mr. Rule appears as a submission for the record.]

Senator KOHL. Thank you very much, Mr. Rule.

Now, we will hear from Mr. Berry.

STATEMENT OF STEVEN K. BERRY, PRESIDENT AND CEO, RURAL CELLULAR ASSOCIATION, WASHINGTON, DC

Mr. BERRY. Thank you, Mr. Chairman. Chairman Kohl, Ranking Member Lee, and Members of the Subcommittee. Thank you for the opportunity and inviting me to testify before this Committee about the proposed spectrum transfer and integrated commercial agreements between Verizon Wireless and the cable companies.

These transactions will further cement Verizon's dominant control over every input and resource critical to provide mobile broadband services to the detriment of every other smaller competitor.

Mr. Chairman, the RCA, the competitive carriers' association, represents over 100 wireless carriers. You might recognize Celcom if you're from Wisconsin or Union Wireless Telephone if you're from Utah, and Duet Wireless if you're from St. Cloud, Minnesota. But I think you'll also recognize some of the other names, T-Mobile, Sprint, Metro PCS, Cricket, US Cellular, Alltel, Cincinnati Bell, C Spire, and I Wireless.

All have come together at RCA because of the dangerous pattern of consolidation in the once-competitive wireless industry. There used to be the big four. Now, we talk about the big two, the twin bells, the duopoly of Verizon and AT&T.

It's difficult to explain the potential impact of this deal without getting bogged down into the minutia of spectrum policy. However, I must say that the Verizon/cable deal is elegantly contrived, is superbly clever, and very difficult to deconstruct. But it will deliver the same insidious and disastrous impact on competition, and, unless conditioned, would not be in the public interest.

Because of the massive consolidation and the dominant control of all inputs into the mobile services, RCA filed a petition to condition this deal to allow competitive carriers an opportunity to access spectrum, back-haul, and ensure data roaming and interoperability.

This deal is not about price, except maybe perhaps higher prices for consumers. And these arrangements are integrated transactions. This is about control of the market share, and the deal is effectively a non-compete agreement. Verizon will not compete with cable on the wire line service side and cable will not compete against Verizon on the wireless side.

Over 60 million households will immediately be affected by this deal on the wire line side and far greater on the wireless side. If this were only about spectrum price, higher prices could be commanded in the marketplace by multiple carriers starved for green field spectrum. Verizon owns substantial spectrum reserves, as much as 44 megahertz of unused spectrum in most markets currently. And if this deal is approved, they could warehouse as much as 72 megahertz of unused spectrum in many of the top markets. And the Verizon heat map before you over here shows their holdings and their superior position.

These companies, all products of decades of state-sanctioned monopoly, have figured out a way to guarantee and solidify market share in their respective areas. This is not in the public interest, and it certainly impacts market conditions contemplated by the Clayton Act.

Spectrum is a finite and unique taxpayer resource. And make no mistake about it, manipulation of spectrum resources is, unfortunately, a reliable and effective tool to eliminate competition. Spectrum is the lifeblood of the wireless industry. You cutoff the lifeblood and the heart does not pump for long.

The Verizon/cable team wants you to believe that this is merely about a spectrum transfer, a license transfer, albeit the largest single spectrum license transfer the FCC has ever considered, covering approximately 280 million consumer pops and spanning almost the entire United States, as the map before you shows.

This is the equivalent of eliminating a national carrier in the marketplace or, in this case, it does eliminate four potential wireless competitors.

RCA did not file a petition to deny. We filed a petition to condition this transaction. The very considerations that forced cable to exit the wireless industry must become transaction conditions if we are going to promote a competitive industry and avoid additional regulation.

In summary, Mr. Chairman, in their own words, Comcast, Cox, and the SpectrumCo members provided us with an excellent roadmap of the conditions needed for a competitive wireless market.

Clearly, the deal must be conditioned by significant spectrum divestitures under an updated spectrum screen; commercially reasonable roaming requirements; affordable and available back-haul; and interoperable standards. Denying competitive carriers an opportunity to access these critical inputs is denying their ability to survive.

Mr. Chairman, America's competitive telecom policy should not be relegated to the mantra—if you can't beat them, join them.

I'll be more than happy to answer your questions.

[The prepared testimony of Mr. Berry appears as a submission for the record.]

Senator KOHL. Thanks, Mr. Berry.

Now, we will hear from Mr. Kelsey.

STATEMENT OF JOEL KELSEY, POLICY ADVISOR, FREE PRESS, WASHINGTON, DC

Mr. KELSEY. Chairman Kohl, Ranking Member Lee, and esteemed Members of the Committee, thank you for the opportunity to testify before you today on behalf of Free Press.

In my testimony, I plan to cover three topics. First, I'd like to provide a consumer perspective on the consolidating telecom market in which these deals are being proposed; second, I'd like to explain what it means to put this much control over our Nation's spectrum market into the hands of one company; and, last, I'd like to explain how the joint marketing arrangements would leave many of our Nation's households facing monopoly conditions in the market for residential Internet access.

We've heard a lot about the spectrum crisis, but today I'd like to point out we have an equally large competition crisis. This is a crisis that consumers are already facing today as they get locked into more expensive multi-year bundles, while competitors are locked out of entering the marketplace to offer better alternatives.

The market for wireless service is concentrated at the top, with Verizon and AT&T together controlling nearly 65 percent of the market share and capturing nearly 80 percent of the entire wireless industry's profits. To put this in perspective, this dwarfs the level of concentration that we see in the oil, banking, or airline industry.

The market for at-home broadband service has long been a duopoly, and FCC data predict that most American households will have no other choice than their cable company for next-generation Internet access. These trends have real consequences for consumers. J.D. Power reports the average wireless bill in 2011 was $86. That's a 25 percent increase in just the last four years.

The central theme that I'd like to get across here today is that these market conditions will be made much worse if this deal is approved. For example, this deal will result in AT&T and Verizon controlling a combined 60 percent value share of all mobile broadband spectrum in America.

The benefit here for Verizon is not just in using the spectrum. It is also in foreclosing other companies from using this critical resource to challenge Verizon's market dominance.

Not all spectrum is created equal. The more high-quality spectrum a carrier controls, the more market power it has, making it easier to mount a competitive challenge.

Put simply, with better spectrum, cell towers can carry signals for longer distances, so fewer towers are needed. So for a dominant firm like Verizon, with more spectrum depth than any of its competitors, acquiring more spectrum is not the only way to meet growing consumer data demand. Verizon could continue to build more towers, conduct spectrum swaps in congested areas, or use Wi-Fi offloading to carry traffic. Acquiring more spectrum is, however, the best way to ensure competitors cannot mount a serious challenge by using that spectrum to offer high-quality services at lower prices.

If Federal regulators are serious about protecting the public interest, they must act to preserve the limited amount of competition in the wireless market that exists today, and that starts with denying this license transfer.

The spectrum sale is enough to tilt this transaction against the public interest in the wireless market. However, the joint marketing arrangements will also exacerbate consolidation in the residential broadband market.

These agreements simply represent a deal between these companies to stay out of each other's way in perpetuity. They put former rivals on the path to collaboration rather than competition, and they send a clear signal to Wall Street that the largest cable and wireless companies in America are aligned together, and it will be nearly impossible for any competitor to mount a viable threat in either market.

Congress recognized the danger in these sorts of arrangements when it passed the 1996 Telecom Act. That Act specifically bans local telephone companies and cable companies joining forces. That's because Congress intended to encourage competition between cable and telephone companies, competition that would be eliminated through these agreements.

For example, these agreements eliminate the incentives for Verizon to aggressively market its fiber to the home broadband service in markets where it competes head-to-head with cable companies. Competition benefits consumers when companies are trying to win subscribers from their competitors, not when they are offering to sign up their own customers for their rival's services.

In conclusion, I'd like to point out that the consolidation that we've been experiencing is no accident. It is not the hand of the free market. Rather, it's the outcome of public policy decisions that have unwound protections on competition and placed a disproportionate amount of our Nation's most valuable spectrum into the hands of just two companies.

There is no reason this pattern of poorly protecting the public interest has to continue. The DOJ and the FCC showed immense analytical skill and political courage in rejecting the AT&T/T-Mobile merger. And if that was the down payment on future competition, preventing this proposed transaction should be the next installment.

Thank you very much. I look forward to your questions.

[The prepared testimony of Mr. Kelsey appears as a submission for the record.]

Senator KOHL. Thank you, Mr. Kelsey.

Now, Professor Wu.

STATEMENT OF TIMOTHY WU, ISIDOR & SEVILLE SULZBACHER PROFESSOR OF LAW, COLUMBIA UNIVERSITY, NEW YORK, NEW YORK

Mr. WU. Thank you, Mr. Chairman, Senator Lee, and Members of the Subcommittee.

Does support for robust competition remain the communications policy for the United States?

It may sound like a rhetorical question, yet it is the right question to ask as we witness increasing concentration in every single communication market, including the prospect of a de facto duopoly in wireless communications.

This was the same question that this Committee faced—the Subcommittee faced—when it addressed the AT&T/T-Mobile merger last year. And it's the same question raised by the sale of spectrum and the marketing agreements that we examine today.

As compared to the spectacle of T-Mobile and AT&T, Verizon's softer strategy may seem like a sideshow, but subtle action is often the more powerful, particularly in the distracted age.

Verizon holds more valuable spectrum than anyone else and should it complete this transaction, it will actually be left with spectrum holdings that are, by book value, even larger than AT&T and T-Mobile would have been.

Yes, AT&T's challenge to competition was feckless and loud, but Verizon's deal affects the very competitive structure of the communications industry. This transaction, and others that are like it, does not threaten to be the single grand coup that ends competition in our time. The danger rather is the prospect of a creeping duopoly in wireless and a quiet end to the contest once thought to be the most important to the consumers of all, namely, competition for last mile access.

That is why the Federal Communications Commission must examine this transaction just as closely as it did the AT&T/T-Mobile merger.

The usual dangers of excessive concentration are well known—higher prices, poor customer service, and, over time, a kind of depressing stagnancy. But I would like to highlight the particular dangers to innovation that are the likely byproduct of non-competition between Verizon and the main cable companies.

I'm going to make two quick points. First of all, I want to point out that communications policy, not antitrust law, is the appropriate lens for addressing this transaction. The reason is that spectrum belongs to the public and it is the government's role to make sure that the asset of the public is used properly.

The Commission cannot sit idly by, as it were, and say that nature is taking its course when the government has such a central intrinsic role of deciding what competition is in this industry. On an ongoing basis, the Commission needs to decide whether more competition or more concentration will be better for the people of the United States.

If the Commission truly believes that greater concentration, in this case, in the wireless industry serves the interest of the American public, it is free to make that choice. Congress, similarly, is free to pass a law that supersedes the 1996 Telecom Act and remove competition as the policy of the United States.

But if we take these actions, we owe it to the public to explain that we are changing the communications policy of the United States from a policy of competition and back toward something along the lines of regulated monopoly or regulated duopoly.

Second, I want to point out that over the last decade, Verizon has been the clearest and strongest competitor to the cable industry, and what we face here is the prospect of the elimination of that competition. I don't want to simply focus on the FiOS arrangement, which I think is important, but not the only thing at issue here.

What is at issue is the future of disruptive innovation. That is to say, the innovations we don't understand right now, but the innovations that could potentially undermine the stranglehold that cable has over the viewing habits of the American public.

Consider, for example, something we haven't discussed much, which is 4G broadband to the home. *PC Magazine* wrote, "The mobile broadband service that has the best chance of being a true cable replacement is Verizon's new 4G LTE service. The firm has an admirable home fusion product it just launched which shows much promise."

But the fact is that 4G is a cable replacement, not a complement. It is not clear how selling a cable replacement can be consistent with promoting cable's products at the same time.

Thank you very much, and I welcome any questions you have.

[The prepared testimony of Mr. Wu appears as a submission for the record.]

Senator KOHL. Thank you, Professor Wu.

We will now start our questions in seven-minute rounds.

Mr. Milch, the vision of the landmark 1996 Telecommunications Act was that the phone companies and cable companies would, for the first time, compete with each other in each other's markets.

In the last few years, we have seen this vision on its way to being realized, particularly with Verizon FiOS, which offers consumers high-speed Internet connections and video in direct competition to the cable companies. FiOS has grown to be a strong competitive rival to cable, recently capturing market shares of 29 percent for FiOS TV and 33 percent for FiOS Internet in its service areas. Even outside the areas where Verizon has deployed FiOS, Verizon competes with cable for connections to the Internet and landline phone service. Consumers reap the benefits of this competition each and every day.

Now, many are concerned that the joint marketing agreements represent a truce between these fierce rivals. Under the marketing agreements, cable company representatives will be in Verizon Wireless stores selling the very cable products that Verizon competes against, and Verizon Wireless will realize a commission for every cable product sold.

So, Mr. Milch, what does this deal mean for the future of competition between Verizon and the cable companies? How can we expect you to compete as vigorously against cable when your subsidiary, Verizon Wireless, is partnering with these cable companies?

We know you argue that you will not end your FiOS service for merely a commission of a few hundred dollars. But the question here is the level and vigor of competition.

How do we know that you will maintain your same level of price competition and promotion or will not instead pull your punches in competing with the cable companies?

Mr. Milch.

Mr. MILCH. Thank you, Senator—I mean, Chairman Kohl. Thank you for the question.

Just to reiterate, these various agreements are between the cable companies and Verizon Wireless, not with the parts of Verizon that provide our FiOS service, our landline service.

Number one, I think it's just important to know what the square corners of the agreements are so that we're clear on that. Verizon FiOS, which is part of our telecom part of Verizon, is going to vigorously compete, Senator, because its primary goal is to continue to provide the best level of service it can and extend its reach within its franchise areas, which have already been set out, and provide a world-leading service, a service that we believe beats cable because it's superior.

And we want to continue to provide that service, Senator, because of the economics that you pointed out. It doesn't make us—there is no rationale for saying that you're going to go halfway if you want that sale, and that sale of FiOS is the clear winner, from a financial services—from a financial perspective.

So a half-baked effort would leave you without that sale and would have—redound negatively to our bottom line.

All the financial impetus is to compete vigorously. Verizon Telecom spends hundreds of millions of dollars a year advertising FiOS services where it's available. They're going to continue to spend hundreds of millions of dollars a year selling those services, and we will continue to compete vigorously, because it's a superior product.

Senator KOHL. Mr. Milch, in an interview with *Politico* two weeks ago, Mr. Cohen of Comcast stated that, quote, "Within the FiOS footprint, all we have agreed is that Verizon Wireless stores will be Switzerland. They can sell Comcast products and they can sell FiOS products. There is no favoritism," quote.

But until now, Verizon and Comcast have been fierce rivals where you overlap. Now, Mr. Cohen says your wireless subsidiary stores will be like, quote, "neutral Switzerland."

Is this not another way of saying the competitive battle, if not entirely over, is, for the most part, over?

Mr. MILCH. Senator, no, I disagree. Right now, our Verizon Wireless stores don't sell FiOS. They don't sell anything on the landline side. So they are already—the status quo is that they don't sell any landline services.

If, in fact, we end up with a situation in which those in-region stores, those FiOS in-region wireless stores provide—sell landline services and do it neutrally, then there will be both wire line services there.

Neutrality is also achieved, Senator, I might add, by selling neither. So it's entirely possible that those wireless stores within the FiOS perimeter will not sell either service and the status quo will be absolutely the same.

Senator KOHL. All right.

Mr. MILCH. We market FiOS through the—not through those stores.

Senator KOHL. Mr. Cohen, what did you mean by saying Verizon Wireless stores would be like Switzerland? Does that not imply that Verizon will not be able to compete as vigorously or will not compete as vigorously against you?

Mr. COHEN. No. Actually, I think Mr. Milch gave the right answer. The full context of that question really was the question of, well, if Verizon Wireless stores sell Comcast's Xfinity product, does that give the Xfinity product a leg up on the FiOS product, and the answer is no.

Those stores are like Switzerland and they're going to become additional battlegrounds for Comcast to compete against FiOS and for FiOS to compete against Comcast. And the critical issue here, as Mr. Milch said, is right now there is nobody in those stores.

So a consumer who walks into a Verizon Wireless store doesn't have the option to buy a wireline service from anyone. And once we are in the stores, if we are in the stores, Verizon Wireless doesn't control the Xfinity offer that's in the stores and they don't control the FiOS offer that's in the stores.

If we come in and say, "You can buy a quad-play in the store for a $300 Visa card," FiOS could come in and say, "Well, we're going to sell the bundle at $69.95 instead of $99.95," and then requiring us to respond, requiring them to respond. And so that Switzerland, if you will, creates a hotbed of potential competition between Xfinity and FiOS that does not exist today.

Senator KOHL. Professor Wu, does the Verizon/cable joint marketing agreement signal a, quote, "standing down from competition" between Verizon and these four cable companies?

Mr. WU. Mr. Chairman, I am very concerned that it does. You can see very clearly it's in the companies' interests often not to

compete. It's something that the government always has to remain vigilant about. And if I were in their shoes, why would you compete after this?

The incentives are for them to cooperate as opposed to compete, which is very good for both companies, but it's not clear that it's good for consumers.

I want to add one thing. Verizon was saying that at present, Verizon Wireless does not sell wireline services, which is true, but they do sell a service that competes directly or could compete directly with cable. You can use wireless, 4G wireless, very fast wireless, to offer a competitor to a cable service, to a cable broadband service in the home, and they also sell that product and I think their incentive to sell that product will be diminished.

Senator KOHL. Thank you very much.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman. And thanks to all of you for coming.

Mr. Rule, first of all, I appreciate you joining us. I understand you do not represent any particular business interest in this, and I appreciate your willingness to come and testify even in the absence of having such an interest.

As you know, the primary focus of our antitrust laws is on consumer welfare. So accordingly, in considering the effects of a transaction and the effects that it might have on competition, we have to give appropriate weight to any efficiencies that might be produced as a result of that transaction.

What, if any, efficiencies do you see that could come from this transaction and how might those efficiencies translate into some kind of benefit for consumers on the ground level?

Mr. RULE. Senator, as I indicate in the written comments, a form of efficiency, if you will, or what efficiency ultimately generates is increased output. And anytime you take an asset that—and I view the AWS spectrum as an asset, and it's not being used to generate any output, it's, in effect, inefficient.

What—and there are certainly arguments, I think Professor Wu has made them, that maybe in the hands of the cable companies, you couldn't expect them to be fully developed. I don't know. I don't think that's that important.

What is important is that there's a market transaction where Verizon is willing to pay for it. Verizon has represented, and I'm sure that government will find out whether or not that's an accurate representation in their investigation, that they're going to take that spectrum, they're going to put it into their network, and it's going to allow them to keep up with demand for advanced 4G service, it may improve the quality of the service that they have. All those things, that is, the increased output, the improved quality, are very beneficial.

With respect to the commercial agreements, I'm going to admit that I don't know that those efficiencies knock my socks off. I do think that these are agreements that are not unfamiliar to most of us out there in the marketplace.

The real question from the antitrust perspective, though, is what sort of impact do those agreements have on the incentives of the two parties to compete. And it strikes me, again, as a FiOS con-

sumer, customer, I'm concerned about that. But I think if you look at those commercial agreements, it's just hard to tell a story that they really significantly or even materially impact the incentives of the companies.

So to me, that sort of need to get a communications service that each doesn't have on its own to fill in a bundled package makes sense. I think it reflects what consumers want, in some cases. But what everybody needs to understand is you're still going to be able to get FiOS service directly from Verizon. You're still going to be able to get wireless service directly from the wireless provider.

As I said, I'm a FiOS customer. I'm a Verizon Wireless customer. I bought them in two separate places. And so to me, I don't think the competitive threat of those commercial agreements, when you actually look at them, is all that significant. And while there may be some benefits, I don't think it's incumbent on the parties under the antitrust laws to come forward with a lot of efficiencies to justify those sort of standard commercial agreements.

Senator LEE. And you say the efficiencies do not necessarily knock your socks off. Does that mean that—you are not necessarily suggesting it is producing inefficiencies.

Mr. RULE. No. No, not at all. And, again, under the antitrust laws, the way they're structured, if the government or a plaintiff wants to challenge a transaction, the burden is on them to show that welfare is being harmed, that allocative efficiency, if you will, is being reduced, total output is threatened with being reduced as a result of the transaction.

It's only if you could sort of establish that first that the courts will look at efficiencies. So the burden on a party to an agreement is not to prove that their transaction will increase efficiency or increase output, it's really to prove that the transaction will not lower output, will not lower efficiency. And so I think that's the issue.

But, again, they certainly have arguments for where the efficiencies lie in all three of these transactions. As I said, while it doesn't knock my socks off in the commercial agreement, I think in the joint R&D, there, there are real possible efficiencies that, again, I think Congress has recognized in the *National Cooperative Research Act* of 1984 and elsewhere and recognized that the antitrust laws needed to be sensitive to the potential benefits that joint R&D develop, for example.

Senator LEE. Thank you. Thank you.

Mr. Milch, one of the chief purposes of the Telecommunications Act of 1996 was to encourage increased competition between cable companies, on the one hand, and telephone companies, on the other hand.

Some have suggested that FiOS, which competes directly with cable in areas where it has been built out, is exactly the kind of competition that the Act envisioned and was trying to encourage.

Now, I understand that Verizon announced in 2010 that it did not intend to expand FiOS to areas where it is not already present, where it has not already been built out, but some have now expressed concerns that Verizon Wireless' cross-selling agreement will interfere with any remaining incentive that Verizon Communications might have to build out FiOS at some later date and that

that deal symbolizes, it represents, it signals some kind of an end to any competition between FiOS and cable.

Can you comment on that and on Verizon's decision not to expand FiOS beyond its current footprint?

Mr. MILCH. Yes, Senator. Thank you. Verizon made it clear in 2009, Senator, I believe, that it had reached—that it was near to the point of beginning to lower its capital commitment and had reached a point where it could see the end of its FiOS commitment.

It announced then that it was not going to expand beyond the 18 million homes that were its target. We were very transparent with Wall Street and everyone else, because Wall Street punished us quite a bit for the massive investment we made in FiOS. That massive investment is the investment that we are going to continue to seek to recoup by providing the best service we can to our existing and to new customers to hold on and increase that revenue stream.

But the confines of FiOS have been set since the very beginning. When we began this in 2005, we had a target in mind. We were clear on the target, and we were clear on the amount of money we were going to—of our shareholders' money that we were going to commit to this.

So we owe it to our shareholders, Senator, to give them some return on this. We owe it to our customers to continue to provide them a service, that they're going to want to stay with us. And we owe it to our future customers in our franchise areas to continue to provide a service that they want us over our cable competitors.

Senator LEE. It sounds like Mr. Rule will be pretty upset if you would go back on that. He will hold you accountable.

Thank you, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Lee.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you, Mr. Chairman and Ranking Member Lee, for holding this important hearing. Thank you to our witnesses.

I wanted to just start out with one thing that happened today, and, that is, Mr. Milch, I want to acknowledge Verizon's announcement today on the measure that your company is taking to stop cramming and the unauthorized phone charges, third-party phone charges that appear on bills.

As you know, I have been long involved in this and have been asking this, and the Commerce Committee has been investigating this for quite some time. And so I am encouraged that you have taken these steps. And I am also going to ask other national phone companies, especially the top phone companies that have been engaged in this, to follow Verizon's lead and protect consumers from these fraudulent charges.

But now back to the topic at hand. I would start out with just the issue of bundled services. Almost one-third of American households have cut the cord and rely on the wireless instead of a landline.

Part of the business incentive behind this transaction is that the companies that are party to these deals want consumers to subscribe to a bundle of communications services, what we call the tri-

ple play of video, broadband, and traditional telephone service, and now a quad-play that also includes a wireless plan.

On one hand, many consumers like the convenience of one-stop shopping, purchasing a bundle of communications services. On the other hand, locking consumers into bundled services plans could potentially result in less competition, higher rates, and less innovation.

So I would, I guess, start with you, Mr. Milch and Mr. Cohen, and then go over to Mr. Wu and ask—what are the consumer impacts as companies increasingly look to offer triple-play or quad-play bundles of service?

Mr. MILCH. Senator, thank you very much, first, for the kind words. We believe that we're going to be able to offer consumers more choices. So if right now the consumer doesn't have the choice of buying a bundle of services from Comcast that includes Verizon Wireless or vice versa and they want that convenience, they can get that convenience.

As I said, it's important to note that the prices are set not by the agent selling it, but by the principal who provides it.

Second, no one is constrained to buy it in these bundles. These are not bundles that are exclusive in some fashion. Verizon Wireless is going to continue to sell through all of its channels. FiOS will sell through its channels in its FiOS region, and I assume that Comcast is going to vigorously sell across its region.

So there is nothing to get from this bundle other than convenience or a discount of some sort, but the consumer can choose or not choose.

Senator KLOBUCHAR. Mr. Cohen.

Mr. COHEN. I will be short and give you plenty of time. I think Mr. Milch covers it from the Comcast or cable company perspective. The motivation for this transaction was to be able to afford our customers who wanted a quad-play bundle the opportunity to purchase one and to gain the convenience of the single purchase, particularly because our major competitors are going into that space and providing their customers with that opportunity; that is, AT&T, Verizon, DirecTV through its agency agreement with AT&T. And we did not have the opportunity to give our customers that particular option.

So I think it's about optionality. About half of our customers buy a bundle today. The other half do not. And we are all about flexibility and providing our customers with the option to purchase our services in the way in which they want to purchase the services.

So that's one of the reasons why this transaction increases customer choice, does not take away any optionality, and only improves, I believe, the consumer welfare and benefit, which maybe we can't quantify, but which we can certainly talk about in terms of improving customer flexibility and customer optionality.

Senator KLOBUCHAR. Mr. Wu. Thank you.

Mr. WU. Senator, thank you for raising the issue of triple or quadruple play. The industry loves quadruple play for many reasons, one of which that it means four streams of income.

But for the consumer, it's not always so clear that the consumer is served by a quadruple play strategy, which can start to migrate into something more like a market allocation scheme.

What the consumer really wants is one play that's fighting with the rest of them. It wants, that is to say, one service to try to start to try to compete with and kind of destroy the other three services and be the only bill that the consumer needs to get.

The consumer is served by destructive innovation, not by bundling. And I think the problem with these agreements is they sort of foresee, I fear, a perpetual quadruple play, when, in fact, particularly with the advancement of Internet services, eventually one service could replace the rest.

Senator KLOBUCHAR. Thank you. I am going to come back to you, Mr. Kelsey, on something else.

But, Mr. Milch, I am a sponsor of the Next Generation Wireless Disclosure Act, a bill that would require wireless carriers to give consumers complete and accurate information about their 4G service, including information about minimum data speeds, coverage maps, and network reliability.

When consumers purchase a 4G wireless plan, I believe they have a right to know exactly what they are getting.

What do the joint marketing arrangements mean in terms of the transparency and information that consumers can expect to receive about their wireless speeds and coverage?

And then I would ask Mr. Kelsey the same and anything he would want to respond to.

Mr. Milch.

Mr. MILCH. Senator, first, I applaud the introduction of this. We believe it's a real problem with people passing off faux-G for 4G. So we want to try to prevent that.

As for the effect on these marketing agreements, we don't believe there is any effect in this sense. Whatever the rules are about disclosure, they will follow through to our agents. Our agents are very carefully—have to follow all the rules that we have to follow as Verizon Wireless.

So if there are rules about disclosure, they will be followed through. So there is no aspect in which these agreements affect the utility of your efforts here.

Senator KLOBUCHAR. Mr. Kelsey. Thank you. Mr. Kelsey.

Mr. KELSEY. I would say that for the most part, in the telecom marketplace, we see that when these companies are making deals with one another, there is not the types of incentives that are there to try to differentiate their products in ways that are valuable to consumers.

So I would fear a lack of transparency as a result. And I would go back to some of the comments that Professor Wu made and that were made earlier in the panel, that, specifically, what's interesting with these deals is that the cable companies that jointly own SpectrumCo have shown that they really want to get involved with the wireless market and offer a 4G service.

And that's well and good, but there's lots of ways for them to do that that it isn't harmful to the competitive environment. They could make deals with other wireless carriers that offer a competitive alternative to the dominant AT&T and Verizon.

With this deal, that threat is removed from the table. And so I think the real question here is, do these deals make the prospect for competition in the wireless marketplace in particular better or

worse? We would say no, and, as a result, the FCC should reject the license transfer.

Senator KLOBUCHAR. Thank you very much.

Senator KOHL. Thank you, Senator Klobuchar.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, for holding this very important hearing.

Mr. Milch, when you received that phone call a little earlier, was that on your Verizon Wireless?

Mr. MILCH. Yes, sir.

Senator FRANKEN. Because the ring seemed very, very clear and a very good, clear connection.

Mr. MILCH. It was over a blazing fast 4G phone.

[Laughter.]

Senator FRANKEN. And was the call from Brian Roberts? Is there any collusion here?

[Laughter.]

Senator FRANKEN. No. All right. That was a joke.

[Laughter.]

Senator FRANKEN. Mr. Milch and Mr. Cohen, the FCC found in its 2011 report on cable industry prices that over a 14-year period, cable prices have increased by 134 percent. That means an average family used to be paying $22 per month for cable, but as of 2009, they were paying $53 per month.

This is a pretty large increase. That is more than three times the rate of inflation, and this was three years ago I am talking about.

But even more tellingly, the FCC found that cable rates were lower in communities where there was effective competition and higher in places where there was no real rival operator.

This is really at the heart of why I am skeptical about this deal. It is almost as if your company has gotten a room with the other big cable companies and you agreed to throw in the towel and stop competing with each other. And I fear that will mean consumers will just keep seeing their cable rates rise.

How can we be assured that will not happen? And, again, this is for the two of you.

Mr. COHEN. I will go first this time. Thank you, Senator Franken. And let me respond in two ways, if I can, which is, first of all, as in looking at any government report, you can sort of find what you want in the report.

So I don't want to quibble with the premise of your question except to point out that in the same report, the FCC also concluded that the price per channel for cable subscribers had actually declined almost seven percent over the preceding 12-month period.

And I think in the cable business, we're looking at providing more channels, more high definition——

Senator FRANKEN. I am sorry. Excuse me for——

Mr. COHEN [CONTINUING]. More choice.

Senator FRANKEN [CONTINUING]. Being amused. Go ahead.

Mr. COHEN. So I think—so I actually think that market is robustly competitive. I think it has improved quality. I think it has lowered price for the consumers.

In terms of the concern that you have expressed, which I think is the legitimate concern and each of the questions have gone to

this, I'm a believer, at the end of the day, that businesses are going to perform primarily in their best economic interest, and there's just nothing in these transactions that is going to stop us from trying to beat the brains out of FiOS, continuing to compete against FiOS on quality and on price, and there's nothing in this transaction that's going to prevent them from trying to do the same thing to us.

So just look what's happened since the transaction has been announced. FiOS has come out with a $69.95 a month bundle in a chunk of its footprint, reducing the price of its bundle by a third in that particular area.

They have announced a deal with Redbox to provide a new over-the-top service to FiOS customers that is exclusive to FiOS, and we have responded by launching Streampix, which is our new——

Senator FRANKEN. All right. I got it. I only have a certain amount of time, but thank you for your very complete answer.

Mr. Milch, thanks for being here.

Mr. Cohen, one of my many hearings or of the many hearings that was held prior to the passage of the 1996 Telecommunications Act, the Comcast CEO at the time testified that the company planned to, quote, "combine wireless and wire technologies in a bold new way to give American consumers unprecedented choice, convenience, and competitive prices," unquote.

He went on to say, quote, "When we are done, America will be the first nation on earth to have full-fledged facilities-based telephone competition everywhere. We will achieve the vision of the two-wired world," unquote.

This deal seems to completely abandon the goals of the Telecom Act and seems to signify that the promises that Comcast made in 1996 will no longer come to fruition.

Do you disagree with me on that? And do you think that this means that we, Congress, need to reevaluate the deregulation that took place in the Telecom Act?

Mr. COHEN. I never like disagreeing with you, Senator. So I think I'd rather just put the comments in a slightly different perspective that's reflective——

Senator FRANKEN. I appreciate that.

Mr. COHEN. I think the comments at the time were reflective of a marketplace that existed in the mid-1990s. At that time, Comcast actually owned a small wireless business, Metrophone in Philadelphia, and I think we have seen a dramatic change in the marketplace over time.

So we got out of that business. Then starting in the mid-2000s, we decided we needed to be in that business. We tried a joint venture with Sprint around Pivot. We formed SpectrumCo. We bought spectrum. We spent tens of millions of dollars evaluating the opportunities, clearing that spectrum, concluded we couldn't enter the wireless space on our own, and now we have ended up in the sale of the spectrum and these commercial agreements, I believe, to——

Senator FRANKEN. I am sorry, but could you——

Mr. COHEN. I am sorry—I believe, to accomplish exactly what it is that Mr. Roberts said in 1996. So I don't think we have changed the goal. I think we have changed the tactics to be able to get to the goal.

Senator FRANKEN. Just very quickly. Did you consider—because you made the sale right before the AT&T/T-Mobile deal was scuttled. Did you consider maybe holding out and using competition on who could buy the spectrum? Would not that have been a smart thing to do from a business perspective?

Mr. COHEN. We engaged—I'll answer with one sentence and if you want to probe beyond that, we engaged in discussions with virtually every wireless carrier in the country with respect to this spectrum and the types of commercial agreements that ended up being the product, and ended up believing that the transaction that is in front of you is the best transaction for our customers.

Senator FRANKEN. Thank you.

One last question for Mr. Wu and Mr. Kelsey. I am worried about what this deal might mean for consumers not just two years from now or five years from now, but 10 or 20 years from now.

The fact that this is a joint venture can live on and the fact that it can live on indefinitely has me worried about the long-range impact of the deal.

Can you tell me what you expect to be the downside for consumers if the deal goes through?

Mr. KELSEY. I'll just jump in first. As I mentioned in the oral remarks, there is such a trend toward duopoly in the wireless market that would be exacerbated by putting close to a third of the Nation's broadband spectrum, measured by value, into the hands of Verizon, and that's something that the FCC really ought to take into consideration.

I'm from Upstate New York, and if the State of New York was in charge of handing out all of the valuable farmland in Upstate New York and they decided to give 80 percent of that land only to two farmers, no one would be surprised when the price of corn all of a sudden skyrocketed.

But we would expect the State then to come in and start to figure out how to protect consumers in that regard. That, to us, sounds like a whole lot of government. We would rather the FCC reject these deals in favor of more competition in the wireless marketplace, and we think that there are a number of items before the Commission that they could do to make sure that there are stronger competitors there.

Senator FRANKEN. Mr. Wu.

Mr. WU. I think the prospect is a slow drift back to the conditions of the 1960s and 1950s, which I think were good in some ways, great music, things like that, but in terms of innovation in communications, they were fairly dead. And the reason is we'd drift slowly back to a duopoly/monopoly structure, the only difference being no regulation against customer abuse.

So I think those are serious problems. To be more concrete, I think we would gradually move toward the natural monopoly in the wireline side focused on cable. At least for now, we'd go toward the duopoly in wireless.

And I want to add, finally, there's a lot of technologies that everyone was thinking were just around the corner that may just remain around the corner maybe forever. The idea that maybe America will have a fiber optic network to the home at some point in our Nation's history would be put on hold, perhaps perpetually.

And the idea that wireless services might end up being a significant way of moving information to the home on a fixed basis, I mean, 4G, and people cutting their cable connections and just using their 4G modems, to be more technical, to get Internet access, that that as a major competitor to cable might disappear.

So we drift back to sort of the stagnant, depressing communications markets of the 1960s and 1970s, and I think that wouldn't be so good.

Senator FRANKEN. Thank you all. Thank all of you, gentlemen. Mr. Chairman.

Senator KOHL. Thank you, Senator Franken.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. And thank you for holding this hearing.

Let me begin by thanking Mr. Milch for your endorsement of the bill that I have introduced that Senator Klobuchar mentioned, the next generation wireless bill, and hope to be working with you in light of your endorsement on it, because I think it is very important.

I would begin by asking you about these agreements, referring to, in the plural, the spectrum agreement and the marketing agreement. I take it your view is that they should be and can be reviewed separately.

Mr. MILCH. Yes, Senator. The agreements are not contingent upon one another. The spectrum agreement will move forward regardless of what happens to the marketing agreements. The marketing agreements will move forward regardless of what happens to the spectrum agreement.

There are differences in the process, as you are very well aware, Senator. The spectrum agreement needs affirmative approval. The marketing agreements can move forward, and then there will be investigations that are already ongoing about them at Department of Justice and at the FTC.

Senator BLUMENTHAL. And in those reviews, they are separate reviews done by the Department of Justice and the FTC. Is that correct?

Mr. MILCH. Yes, sir.

Senator BLUMENTHAL. And with different standards and different laws that apply.

Mr. MILCH. Yes, sir.

Senator BLUMENTHAL. But it seems to me, in light of the market concentration that exists here, that the antitrust review is an important one. Would you agree?

Mr. MILCH. Yes, sir. And the Department of Justice is doing a thorough job.

Senator BLUMENTHAL. And should be.

Mr. MILCH. Yes, sir.

Senator BLUMENTHAL. In fact, my feeling has been over the years that the Department of Justice really has failed to be as rigorous or vigorous as it should be in enforcing antitrust laws going back for some years, perhaps not to Mr. Rule's time, without any criticism of that era.

But with all due respect to the ladies and gentlemen who sit on this panel, the Department of Justice really has the primary enforcement role in this area. Would you agree?

Mr. MILCH. Yes, sir, I would.

Senator BLUMENTHAL. Really, the Department of Justice has that responsibility, and now the ball is in the Department of Justice's court. Is that correct?

Mr. MILCH. Yes, sir.

Senator BLUMENTHAL. Is there anyone who disagrees with that basic premise?

Professor Wu.

Mr. WU. I disagree with that with respect to the spectrum sales. Those are the Federal Communications Commission's duty. And I think they should apply different standards to those than they would for a normal antitrust transaction.

Senator BLUMENTHAL. And I thank you for that clarification, because we were really talking about the antitrust issue, I think, primarily.

Mr. WU. The marketing agreements, correct? That's what I understood your question to be.

Senator BLUMENTHAL. Exactly. But you are absolutely right, Professor, and, luckily, we have a professor in the house to keep us on the straight and narrow.

Let me ask the panel as a whole where you think, in effect, the burden of proof should be, because in this kind of antitrust review, I think there is a very strong argument that when you come to the Department of Justice, the companies bear a burden of proof because of the market concentration that exists in these respective areas of enterprise. And that is an open question.

Mr. Cohen.

Mr. COHEN. I'll take a shot, but I'm going to quote Mr. Rule, who is the only active practicing antitrust lawyer on the panel. Actually—and if I can, again, I hate to always be picky about this.

Yes, we're the largest cable company. Yes, Verizon Wireless is the largest wireless provider. But we both function in intensely competitive markets. And notwithstanding our size, there are large numbers of competitors with robust competition and a pretty clear demonstration across the board as to the benefits of that competition to consumers.

So I don't think our size alone would dictate a change in what the normal course of conduct would be, which is, on a strict antitrust analysis, as Mr. Rule stated in response to a prior question, the Justice Department analysis is to look, in the first instance, as to whether there is anti-competitive harm, whether there is harm to consumers. And in the absence of such harm to consumers, the proponents of a transaction actually do not have an obligation to come forward to demonstrate consumer benefit in order to outweigh that consumer harm.

So I will tell you that in our—in this review, as in probably all reviews, we are aggressively making the case to the Department of Justice both that there is no consumer harm and that there is consumer benefit.

So we're certainly at least assuming a burden of making an affirmative case that this is not a problem under the antitrust laws.

But I think strictly speaking, in this case, we actually don't have a burden, because I don't think there is anti-competitive harm that we need to overcome. But if we did, there is plenty of consumer benefit that we can put on the table to offset any anti-competitive harm that the Justice Department would articulate.

Senator BLUMENTHAL. Mr. Rule.

Mr. RULE. Let me just say, put in a word for the U.S. antitrust system, the system isn't a law enforcement system and, essentially, the Department, when it investigates a merger, is trying to decide whether or not, under the precedents that are in place at that time, they can go in and block the transaction.

So technically, the way the law is set up, the burden is on the Department, at least that's the way the Department views it, as to whether or not they can go into court and prove that merger may tend substantially to lessen competition.

And so in that sense, the burden is on the government. The sort of notion——

Senator BLUMENTHAL. Well, the burden is on the government when it gets to court.

Mr. RULE. When it gets to court.

Senator BLUMENTHAL. When it reviews the transaction, the burden is on the government, as well, to uncover the facts and do a thorough investigation. And my point earlier was simply that in many instances, States have filled a gap left by the lack of Federal antitrust enforcement.

Mr. RULE. And I think that's fair, but I will—I mean, it's a fair comment. I don't know that I agree with it, but I understand where the comment comes from.

I will say that, look, the Department of Justice and, particularly, the career folks, you take me and my successors out of it, they are very committed, they work very hard. They're going to put these guys through quite a bit of expense and effort in looking at all these issues.

But I think the one thing that's important about this transaction in the spectrum part of it is they have to answer, I think, at the outset, the fundamental question whether or not the cable companies, simply because they own spectrum, are actual or potential competitors to Verizon Wireless.

And the problem is that they are going to have if they go in and bring a lawsuit is it looks like the facts that at least I can see, it's going to be very difficult to argue that the cable companies are even a viable potential competitor under the existing case law, much less an actual competitor.

So that's the dilemma that the Department faces.

Senator BLUMENTHAL. My time has expired, but I want to thank really all the witnesses for addressing these questions so well. And I understand and think that your points on the standard of proof issue are certainly fair points, and I will be very interested in seeing what the Department of Justice and the FCC determine.

Thank you.

Senator KOHL. Thank you, Senator Blumenthal.

Mr. Cohen, when Comcast and the other cable companies that are part of SpectrumCo partnership bought spectrum at FCC auc-

tion in 2006, there was hope that the cable companies would develop a competing wireless service.

Instead, these cable companies decided that it would be not economical to spend the resources to deploy this spectrum and enter the wireless market. Instead, you are now selling all of the spectrum to the largest wireless company, Verizon.

We are not suggesting that you and your cable partners should be compelled to operate a cell phone service if you determine it is not economical and not in the interest of your shareholders. However, spectrum is government-granted public airwaves to be used in the public interest.

Indeed, there are FCC rules against speculation in and warehousing of spectrum. And that is why we were disappointed when your CFO told an investors conference in January that, quote, "We never really intended to build that spectrum."

So is it in the public interest, Mr. Cohen, for you to sell this valuable spectrum to Verizon, the Nation's biggest wireless company, which will keep it out of the hands of any of the competitors?

Would it not have been better to at least have a public auction for the spectrum? The competitors would have a fair chance to bid on it, Mr. Cohen.

Mr. COHEN. I think there are two questions embedded there. One is the warehousing argument, if I could address briefly, and I already gave a lot of this answer in response to Senator Franken's question.

At the time we bought this spectrum, we had every intention of at least exploring whether we had a viable wireless business. We cleared the spectrum. We engaged in technology tests on the spectrum. We invited companies to come in and test their devices on the spectrum. We expended tens of millions of dollars in those efforts.

We engaged in a detailed analysis of the viability of launching a wireless business. Over that period of time, things happened, like the launch of the iPhone and the iPad that dramatically increased the amount of data that was going over wireless networks, and we concluded that 20 megahertz of spectrum was wholly inadequate to be able to build a business.

We would have to buy more spectrum. We'd have to invest more dollars in the build-out of that spectrum, and we could not figure out a viable business model to be able to launch the fifth national wireless competitor. And that's the reason we made the judgment not to go into the wireless business.

Mr. Angelakis' comments were in a Q-and-A at an investor conference, I think. I think they were—I think in the overall context of the five years of work that they did, they reflected our current view. The word "never," I think, was unfortunate.

We did explain that subsequently publicly, but I know and our documents will reflect that we did anything but engage in spectrum warehousing. We seriously studied this alternative and just determined there was not a viable business for it.

In terms of whether we should have auctioned it off or made it available, as I, again, said in response to a question from Senator Franken, we marketed this spectrum. We talked to virtually every wireless player in the marketplace.

And at the end of the day, we made the conclusion that the transaction we entered into with Verizon Wireless was the best transaction for our company and for our customers. And under Section 310(b) of the Communications Act, Congress has directed the FCC that its appropriate standard of review is of this transaction, not of some other hypothetical transaction that we might have entered into, and the antitrust laws through case law have established exactly the same principle in the antitrust context.

Senator KOHL. All right. Mr. Milch, just a few minutes ago, you said these agreements are separate. However, Mr. Cohen, in his interview with *Politico* on March 8, said, "The transaction is an integrated transaction. There was never any discussion about selling the spectrum without having the commercial agreements."

So I suppose, Mr. Milch, you would be challenging that view. And if you do not, does that not mean that the regulators should consider these together?

Mr. MILCH. Senator, I don't challenge his view. I interpret it a certain way. I don't think that he meant by integrated that they are contingent upon one another, which they are not contingent upon one another.

And there is no doubt that they were negotiated at the same time. That's obvious. They were signed at the same time. That's also obvious, as they are part of a larger set of deals. That's also obvious.

But the law is you look at deals on their square corners. These deals are not contingent upon one another. And, finally, I would say, Senator, that the responsible agencies, both the Department of Justice and the FCC, are undertaking investigations.

So if the concern is will the appropriate authorities look at them, the appropriate authorities are looking at them.

Senator KOHL. Mr. Cohen, just to understand your statement, you are saying that you would have not done the spectrum sale unless you obtained the commercial agreements. Is that not what you said?

Mr. COHEN. That is basically correct. From a Comcast or a cable company perspective, our interest was in having an integrated solution and a comprehensive strategic wireless solution for our company and for our customers. And sale of the spectrum, as well as entering into the commercial agreements, provides us with that integrated comprehensive solution.

And to be clear, I do not disagree with Mr. Milch that the agreements are not contingent upon each other. There is no legal connection between them. The Justice Department could challenge the commercial agreements and nobody could do anything with respect to the spectrum agreements. That is absolutely something that could occur.

So legally, it's not the agreements that are integrated. It's the fact that the sale of the spectrum, plus our entry into the commercial agreements, provided us with an integrated wireless solution.

Senator KOHL. Professor Wu, is it your view that in keeping with the goals of competition and communications policy to permit cable companies to sell this spectrum to Verizon Wireless?

Mr. WU. I certainly don't think it's in the spirit of a policy which maximizes competition in these industries, spectrum-based indus-

tries. And I want to repeat again that the appropriate lens for analysis here of the spectrum sale is not antitrust law, with respect to Senator Blumenthal.

This is a matter of communications policy and this Nation decided almost three decades ago that we are embarking on a course of competition, not regulated monopoly. And these transactions threaten to take us back in the direction of duopoly/monopoly, this time unregulated.

Senator KOHL. Thank you very much.

Senator Lee.

Senator LEE. Thank you.

Mr. Berry, some have made the estimate that the U.S. Government may own as much as 61 percent of the best airwaves, and, meanwhile, the mobile broadband providers may own only about 10 percent.

Some commentators have argued that the impending spectrum crunch that everyone is anticipating and, in many respect, fearing, has been made worse by government mismanagement and failure to free up spectrum in a more timely manner.

Could you comment for us just kind of the role of government, the role that it has played in the spectrum market, what could be done separate and apart from efforts to scrutinize this deal, to help ensure that more spectrum is available for all wireless companies that might need it?

Mr. BERRY. Thank you, Senator. Thank you for the question. I was starting to feel like a potted plant here.

Senator LEE. I did not want you to feel left out.

Mr. BERRY. Appreciate it. Thank you for the question. Yes, you're right. The government, most notoriously in the President's broadband plan, identified a hope of having 300 to 500 megahertz of additional spectrum made available for broadband, and I understand that that is a very difficult role.

Over the past 15–20 years, I have been involved in numerous legislative efforts to free up more spectrum for wireless uses and, particularly, broadband. That is a government function.

We also have a government function directly related to this particular transaction, and it is incumbent upon the FCC to look at not only the efficiencies, as Verizon had indicated, but the spectrum that they currently have warehoused and currently not utilizing as we move forward, because many of our carriers didn't have an opportunity to purchase the spectrum.

T-Mobile, who was otherwise engaged in an AT&T event, was unable to acquire this spectrum. I don't think that any——

Senator LEE. Unable from a financial——

Mr. BERRY. No. They were involved with the AT&T/T-Mobile acquisition.

Senator LEE. So in that respect.

Mr. BERRY. So that sort of took them off the market during that period of time, for sure. But the overall issue is how do you get spectrum in the hands of competitors, competitive carriers that can utilize it efficiently, effectively, immediately.

And what I'm saying is in this particular case, the FCC is going to review that and I think they're going to find that there is additional spectrum that Verizon has that will only be enhanced by this

particular deal, and it may be best in the U.S. public interest that spectrum divestiture and spectrum screen be applied to this particular deal so you can get that spectrum out there.

It's a real shame that private companies throughout the wireless world may, in fact, be continually harmed by spectrum policies that have not brought spectrum to the marketplace in time to meet customer and consumer demand.

And since we are in a very, very limited market, with tight, very finite resources, I think we have to be very prudent about how those spectrum resources get assigned. And I'm not so sure that it is in the public interest for the largest company that is not only one of the best and most efficient, but still has spectrum warehoused.

They may pay $3.9 billion for this slice of spectrum. They're warehousing over $5 billion worth of spectrum that is currently not in use. We think we would like to see more competitive carriers get access to that.

Senator LEE. Mr. Cohen, did you talk to T-Mobile? Was T-Mobile somebody you consulted in this offering?

Mr. COHEN. Senator, I have generically said that we talked to virtually everyone in this space. Most of those discussions, as I know you appreciate, take place pursuant to non-disclosure agreements. So I'm a little limited in what I can say.

The good news for your question, however, is that I don't think anything would prevent me from disclosing something that is already in the public domain. And the fact of the matter is that Robert Dotson, in 2010, who was the president of T-Mobile at the time, stated publicly that T-Mobile was engaged in discussions with cable companies about spectrum. And I think it's probably a pretty natural extension—it doesn't take is very far to know who else could he have been engaged in discussions with other than us.

And so I'm happy to confirm Mr. Dotson's public representation that he was in discussions with us about this spectrum.

Senator LEE. Mr. Berry seems eager to respond.

Mr. BERRY. And I think it's important to note. Mr. Cohen has said this is an integrated transaction, and I think it's very important that they made the decision, the corporate business decision that this particular transaction could only be given by Verizon. No one else could, in fact, sign a non-compete agreement nationwide that would impact wireless and give cable companies, SpectrumCo, the ability to have nationwide wireless access to a network.

Senator LEE. Understood. Understood.

Mr. Milch, I would like to raise with you the same question that I originally presented to Mr. Berry regarding the fact that apparently 61 percent of the best airwaves are held by the government, 10 percent only are available to broadband, wireless broadband providers.

What can the government do to help free up some of that spectrum?

Mr. MILCH. Senator, thank you. Surprisingly, I agree with Mr. Berry that there is a great deal of spectrum that is available that's in the government's hands, but it is a very difficult job for the Federal Communications Commission, given the intergovernmental

issues and the priority that seems to be claimed by certain government agencies over their spectrum, to free up that spectrum.

Nevertheless, there is considerable spectrum that's potentially coming on board, and I do want to stress that this notion that some spectrum is so much better than another spectrum is reasonably well concocted for the purposes of this hearing, particularly when you weight certain spectrum based on book values and an arbitrary analysis that was done for the purposes of trying to take spectrum out of play in order to artificially inflate Verizon's alleged proportion of valuable spectrum.

Senator LEE. That is not to say that all spectrum is created equal.

Mr. MILCH. It is not created equal. But, for instance, the Sprint head of technology recently—in 2010, I believe it was, opined how certain higher frequency spectrum is much better for mobile broadband in congested areas because it has more carrying capacity.

All spectrum is created differently. But you have the spectrum you have, you do the best you can with it, and if you invest in your technology, you can have a world-leading service, like Verizon Wireless does.

Senator LEE. With the higher frequency, it has got more carrying capacity, but one of the disadvantages is it cannot go through——

Mr. MILCH. Different propagation characteristics through walls and the like. Yes, Senator.

Mr. BERRY. For example, a high-frequency spectrum of 2.3, 2.5 would cost more than four times as much to build out to have the same capacity and use as a 700 megahertz spectrum, especially the propagation values and characteristics are great for Utah and Wisconsin and other large States.

So it's not created equal, and I think this particular spectrum is one of the four slices of spectrum that LTE, 4G LTE is going to be rolled out on nationwide, which makes it extremely attractive and very valuable.

Senator LEE. Thank you. I see my time has expired, Mr. Chairman.

Mr. KELSEY. Excuse me. Since he seemed to indicate the value stream that we had tried to place on it, I would just jump in and say we agree that spectrum is absolutely not created equal, but the way that the FCC currently measures it is by just looking at square foot.

So if you are in the property market where location drives the value of property, you wouldn't just look at the square feet of a house. You'd look at is it beachfront, is it beach-adjacent, does it have a beach view. The FCC does not do that in its spectrum screen.

And I also think it's important to remember that the spectrum screen is not a bright line test, you fall inside or outside of it. It's more of a guideline to indicate to the FCC when there is enough consolidation in a spectrum sale for them to be interested in it and to take a deeper look at the competitive impacts that that spectrum sale will have on the larger wireless market.

And in this particular sale, we're saying that Verizon already has quite a bit of the beachfront, sub–1 gigahertz spectrum. This is the

last piece of nationwide spectrum that will come on the market for some time and giving it to Verizon for the foreseeable future would have an adverse impact on competition and consumers going forward.

Senator LEE. I see my time has expired. Thank you, Mr. Kelsey. Thank you, Chairman.

Senator KOHL. Thank you.

Senator Franken.

Senator FRANKEN. Thank you. Mr. Milch and Mr. Cohen, one of my big concerns with this deal is the joint venture that your companies have agreed to create. I am imagining that you could produce some very valuable technology that you could also keep locked up between yourselves, similar to what we now see with cable set-top boxes.

Will you commit to opening up the technology and the intellectual property that your companies create to your competitors so that they can obtain the technology at fair, reasonable, and nondiscriminatory rates?

Mr. MILCH. Senator, I hope you are right that we are going to create something valuable. Right now, we have nothing. We are starting from scratch in, as Mr. Cohen said, a very competitive market with Apple, Google, everyone else. And if we do, Senator, then the question is why would it be that this particular set of intellectual property is commanded to be opened up when other people's intellectual property isn't.

For me, Senator, the question is going to come down to this joint venture to decide what the best way to monetize that intellectual property is and whether it is in its interest to open it up or not.

One thing we have seen is that closed technologies do not survive as well in the marketplace as open technologies do.

Senator FRANKEN. I guess one of the reasons—the answer to your question is that we worry about this agreement, this joint venture agreement. That is why I am asking you this question.

Mr. MILCH. Yes, Senator. But as I said, we have nothing in comparison to some very, very successful and well-heeled competitors who have a lot.

Senator FRANKEN. You guys are very successful and very well heeled, and, presumably, your joint venture will yield some really exciting stuff and that, I think, is the point of it.

Let me move on. Mr. Rule, if you had known in 1996 what you know now, that cable would never enter the wireless market and Verizon would abandon its copper infrastructure and stop marketing it, its DSL technology, do you not think you would have been—we would have been foolhardy or Congress would have been to completely deregulate the market?

Mr. RULE. Well, let me start the answer by indicating that one of the things I did when I was at the Department of Justice back in the 1980s was administer the AT&T decree, which, de facto, at least, was the way in which the industry was regulated.

And notwithstanding, again, a lot of good faith efforts by people at the Department of Justice, I think we created some issues. And one of the reasons I always viewed the 1996 Act as being important was because it took this sort of regulation out of the antitrust divi-

sion and tried to open an area up to competition. But it didn't—after all, it did not completely deregulate.

I guess I would not say that I would have been an advocate of the status quo in 1996, even if I knew what I know now. You might have done things a little differently. I don't know exactly, because I haven't thought about it.

Senator FRANKEN. Well, let us ask Professor Wu. Have you thought about it?

Mr. WU. I have thought about the 1996 Act, and I think the 1996 Act, as you suggested, Senator Franken, was a deal. The idea was that the government would proactively take a policy of promoting competition, not just sort of sitting around seeing whether competition happened, but trying to promote competition in exchange for deregulation. And it did so in an effort to move away from a regulated monopoly and still attempt to keep alive the policy of the 1984 AT&T breakup.

And what we're doing here is we're going back to the conditions before, slowly, but gradually and without stopping, going back to the conditions before the 1984 breakup, just without any deregulation to protect consumers, and I think that is not a good thing.

Senator FRANKEN. Thank you. Mr. Cohen, you confirmed that Comcast talked with T-Mobile in or before 2010 about spectrum. Presumably, those meetings are subject to the same non-disclosure agreements that any 2011 talks were subject to.

So can you confirm that you talked to them before you made this deal in 2011?

Mr. COHEN. I mean, talk to them in 2011, I honestly don't know when the discussions with T-Mobile that Mr. Dotson referenced publicly ended.

Senator FRANKEN. Well, he made them in 2010, he made those remarks. He said in 2010.

Mr. COHEN. Correct. But I don't know when those discussions ended. That's what I'm saying.

Senator FRANKEN. But you don't know when your spectrum discussions with T-Mobile ended.

Mr. COHEN. I don't know that, off the top of my head, correct. I can get that information to you.

Senator FRANKEN. I would really like to have that, because you said you talked to everyone you could talk to before making this agreement. T-Mobile seems to be kind of, "Who'd you talk to," and this is like a big——

Mr. COHEN. I'm in a difficult position. It's not like all of our discussions were in 2011. We talked over a long period of time to multiple players in the market before we ended up making this deal Verizon Wireless.

Senator FRANKEN. I know. But I am asking you specifically about T-Mobile and I feel that you are getting—I just want to know if, before you made this deal with Verizon, you talked to Sprint and to T-Mobile about this, and you were willing to confirm that you had talked to T-Mobile at least in 2010 or before then.

Mr. COHEN. Only because I was limiting my confirmation to Mr. Dotson's public comments, which relieves me of any obligation under the NDA, and that's why I made the 2010 reference.

But the bottom line is before we entered into this transaction with Verizon Wireless, we talked to virtually everyone in this space.

Senator FRANKEN. Virtually everyone. All right. Well, the point is that T-Mobile did not say they had talked to you. They said they had talked to cable. And so you felt that it was fine for you to disclose that you had talked to T-Mobile, but now you cannot tell me, with this very, very important deal, whether you were trying to make a deal with T-Mobile, who would be one of two likely suspects for this.

You cannot tell me whether they were one of the players that you were trying to sell this spectrum to, spectrum that is worth an awful lot of money, and you cannot even remember whether in 2011 you talked to them.

Mr. COHEN. I can't remember when the discussions with them stopped. I can remember that—I can remember that we engaged in discussions with them before we made the deal with Verizon Wireless.

Let me say this. I know the discussions stopped by the—at the time AT&T and T-Mobile announced their deal. I don't remember when that was either. That was sometime in 2011, I believe.

Senator FRANKEN. Fair enough. Good. Thanks. I really appreciate your testimony. And my time has run out. Thank you.

Senator KOHL. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

I want to thank all the witnesses for being so cooperative and forthright and straightforward in your responses today.

Mr. Rule, you have qualified your answers by saying that you had—I think I am quoting you—restricted access to information. I wonder if you could tell us what facts or other information you would need to know to further evaluate the legal and factual issues here.

Mr. RULE. I think that there are a lot and there are a lot of issues that I think the Department is exploring and should explore. But there are two things that one would like to know if you're trying to judge this.

The first is you'd actually like to see the agreements. I understand why they're not available and I'm certainly not criticizing the parties, because that's typical in these sorts of arrangements. And I will also say that these guys are very well represented by people who are well known in the antitrust bar. So I'm sure they did a good job.

Senator BLUMENTHAL. "These guys" meaning, just for the record?

Mr. RULE. Everybody on both sides with me——

Senator BLUMENTHAL. Swayed your arm in one direction and not the other.

Mr. RULE. Right. But I don't want to leave the folks to my left out either. But I'm sure that the people to the right of me, Verizon and the cable companies, their agreement was well vetted and well considered in terms of the way it was structured.

But, frankly, you would want to look at that to sort of confirm what my view is based on what I've seen publicly, that this really doesn't materially change their incentives.

Senator BLUMENTHAL. And those agreements will be reviewed by the Department of Justice.

Mr. RULE. They'll definitely be—yes. I'm sure the Department has seen them in complete unredacted form. They've probably seen drafts of them and so forth.

The second thing that I'd like to see and I think would answer a lot of questions are planning documents, quite frankly, of both companies, but particularly of Verizon Wireless, because—and of the cable companies, because part of what the opponents are charging in terms of hoarding and other things is at odds with what Verizon has said, that this is going to be molded or folded into their network and they're going to make the investment so that they can deploy this spectrum in a sort of rational plan moving forward.

If they are right about that, it strikes me that that suggests that sort of some of these hoarding concerns and everything else are off to one side. I believe, based on my experience representing companies, but also being at the Department of Justice, that the Department will get to the bottom of that. They'll understand what was motivating Verizon Wireless, whether Verizon Wireless really wanted to use this spectrum to enhance their ability to produce wireless services, or whether they're just buying it to warehouse it and keep it out of the hands of others.

Senator BLUMENTHAL. And all that information in the form of documents and testimony, interviews and so forth, would be freely available to whatever government agency was reviewing these issues.

Mr. RULE. Correct. But it won't be available to me.

Senator BLUMENTHAL. We are talking about the government agencies.

Mr. RULE. That's true. And I'm sure and I have a great deal of faith that they will chase down all the appropriate alleys. It's just that if you're a third party who were trying to look at this on the outside in a few days, I don't have access to that.

I can speculate about what they'll find, but since I'm not involved, not representing the parties, I don't know.

Senator BLUMENTHAL. But a full evaluation of this deal would really depend on an examination of those kinds of material, that kind of information, testimony, interviews, documents, all of the stuff that you review as an antitrust enforcer, that the FCC could review in evaluating motive, purpose, effect, and so forth, even though many of these documents and those materials are not available to this subcommittee.

Mr. RULE. That is correct. And, again, my experience both being somebody who has represented companies that had to spend a lot of money to sort of respond to that, but, also, being at the government, is that they are very thorough and I trust that they will be very thorough here.

And I think it's pretty clear the kinds of things they'll want to look at. I think they'll also get their economists involved, because as I mentioned in my testimony, two of the more interesting filings are the competing declarations of the economists, Judith Chevalier, I guess, for the opponents and Michael Katz for the companies. And the government will engage in that and probably look at a lot of data.

But, again, I have a lot of confidence that they'll do a thorough job.

Senator BLUMENTHAL. And the reasons that those documents are not available to the Committee would be the proprietary information that they include or—as now a private antitrust lawyer, maybe you could explain that.

Mr. RULE. Sure. A lot of the documents that the government gets are highly confidential. The *Hart-Scott-Rodino Act*, in the wisdom of Congress, limits significantly the use to which the government can put the information and to whom they can disclose it.

Senator BLUMENTHAL. And part of the reasons—excuse me for interrupting—is, very simple, Hart-Scott-Rodino review occurs before the transaction actually goes forward so that it can be stopped before the eggs have to be unscrambled, so to speak.

Mr. RULE. Correct. And the thought was in the 1970s when the Act was passed, because it has turned out to be very common to all of us, at the time, it was kind of a radical idea, but the notion was that if businesses were going to be subjected to those kinds of investigations, that really has to go to the most sensitive, competitively sensitive confidential information in order to answer the questions that you've raised, that the government had to guarantee the confidentiality of that material.

And that's why it's so limited in terms of who the government can disclose it to. I'm sure they'd love to disclose it to this Committee and others. That sometimes would make their lives easier. But the fact is the law prevents them from doing that.

Senator BLUMENTHAL. Thank you very much.

Thank you, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Blumenthal.

Mr. Berry, critics of this deal are concerned that, as they see it, Verizon Wireless and AT&T own the large majority of the spectrum best suited for wireless, especially given the exploding demand for spectrum created by smart phones and other mobile devices.

They believe Verizon Wireless' acquisition of this large amount of spectrum will only make the situation worse and that we are in danger of creating a duopoly in the wireless market.

What is your opinion?

Mr. BERRY. Thank you, Mr. Chairman. I think we're very dangerously close to a duopoly already. You have 73, 75 percent of all the spectrum under one gigahertz, which has really unique propagation values and allows for deployment of services at lower cost owned by two companies. They own well over 80 percent of the EBITDA in the wireless world.

So it truly is, as the cable companies found out, a very difficult place to enter in as a new entrant. And that's what concerns me greatly now, is because if someone like Comcast and the cable companies cannot find a way into the wireless ecosystem with their substantial resources and literally green field spectrum that could be used immediately, then you should expect very few new entrants into the wireless world will be available.

Senator KOHL. All right. Professor Wu, Mr. Kelsey, Mr. Berry, and Mr. Rule, in the event that this deal would go down, do you believe that there are any conditions either the Justice Department

or the FCC should place on this deal, should they decide to approve it?

Who goes first? Mr. Kelsey.

Mr. KELSEY. I'll go first. Thank you for the question, Senator.

We haven't seen any conditions, any proposed conditions that would mitigate the long-term harms that this transaction would cause. In a consolidated market—in a market as consolidated as the telecom market, I think the behavioral conditions have a short shelf life. They sunset. In the long term, harms to competition remain.

So if there are any conditions that are considered, I think you'd look at structural conditions, spectrum divestitures from Verizon, foreclosing the ability of these companies to enter into the joint marketing arrangements in areas where they compete head to head and where their wireline infrastructures overlap.

But that really seems like a band-aid. This market has a competition problem and consumers need a long-term solution. And so I think it would be much cleaner for the FCC to outright deny the transaction in favor of more competition and promote a more equitable distribution of the very finite spectrum we have.

Senator KOHL. Thank you very much.

Mr. Wu.

Mr. WU. All my answers, Mr. Chairman, stem from the fundamental fact that spectrum is the public's property. It's the property of the citizens of the United States, and we have special duties to oversee that this asset is used properly.

I agree with Mr. Kelsey that probably the best thing to do would be to stop the sale of the spectrum, in particular. But if it is to be used, I'd put just two types of conditions if the sale is to go forward, two types of conditions to be imposed by the Federal Communications Commission.

First of all, Verizon has promised—the centerpiece of all its filings is that it's actually going to use this spectrum, put it to use, it's not going to warehouse it. Well, if that's true, then the Commission should put some teeth into that promise—sorry, that's not the right metaphor. But it should somehow make sure that promise is carried out and put in some safeguards against warehousing, including, I think, maybe one of the best ones would be allowing unlicensed use of that spectrum if it's not put to use by a certain amount of time.

Second, this is something that the competitive carriers have been talking about, there needs to be oversight or conditions on roaming and handset exclusivity. We cannot allow the prospect of parallel exclusion by AT&T and Verizon, the two biggest carriers, putting roaming rates up at such a level that competitive carriers don't have a chance.

With more spectrum, the possibilities of the abuse increase and the Commission should pay attention to that.

Thank you.

Senator KOHL. Mr. Berry.

Mr. BERRY. Yes, sir. Mr. Chairman, thank you.

As I had mentioned in my opening statement, we believe there should be spectrum divestiture, especially after a thorough review at the FCC, with a new spectrum screen, and identify those areas

where we can more efficiently and effectively utilize that spectrum for competitors in the marketplace.

Commercially reasonable roaming agreements, requirements that are permanent. This spectrum is being taken now to the market. There will be four competitors that will not now come into the marketplace, which we viewed as potential roaming partners.

Now, Verizon is going to lease their spectrum, i.e., allow Comcast to sell their devices as an agent. So Comcast is coming into the wireless market as a competitor, but only as an MVNO, and no one will be able to roam on the MVNO arrangement of Comcast. Verizon will control that wholeheartedly.

The last thing is affordable back-haul, because, yes, you can have a very effective, efficient network if you have access to back-haul, and we haven't even mentioned the fact that Comcast owns over 20,000 Wi-Fi hot spots, i.e., offload opportunities between here and New York, very important for the wireless industry to stay competitive.

And, of course, interoperable standards. Every customer wants to know, wherever they are, whenever they make a call, it ought to be able to go through, and we agree with that.

Senator KOHL. Thank you.

Mr. Rule.

Mr. RULE. Thank you, Mr. Chairman.

I, first off, want to clarify that I'll defer to others on what the FCC should do, and let me just focus on what DOJ might do.

From the perspective of DOJ and the antitrust laws, there first ought to be a determination that there is a violation of law, and then any fix, if you will, should flow from that.

With respect to spectrum, again, as I've said, I question whether or not they're going to be able to prove that that's a violation. But if they did, then one would think that either they would prevent that deal from going through or they might require that Verizon Wireless not acquire all of it.

But, again, that depends on what they conclude in concluding that the deal would lessen competition.

With respect to the collaboration agreements, again, that really depends on the agreements themselves. Those, though, are pretty easy to fix and to the extent that the government sees that there are problems that create bad incentives in terms of keeping these two companies independent and competitive in their relative spheres, then the government can ask the parties to change the agreements in that way.

So, again, it depends on what the agreements say and how the government—if the government concludes any particular feature of those agreements violates the antitrust laws.

Senator KOHL. Finally, Mr. Milch, do you accept all of these conditions?

[Laughter.]

Mr. MILCH. Surprisingly, no, Mr. Chairman, I don't. Let me explain. I won't go to the suggestion that it should simply be denied outright. I don't think that there is any basis for that.

However lugubrious people feel at the moment, the Telecom Act of 1996 was a spectacular success and has produced unbelievable public good and will continue to do so.

As for the notion of teeth in the build-out requirement, the spectrum at issue is already subject to the AWS substantial service requirements that were put on it when it was auctioned. No party has shown that those have not been complied with. And to the extent that they want to provide new or novel things, that's inconsistent with the Commission build-out rules, which Verizon is not seeking to change.

It will be subject to whatever the build-out requirements were. We're getting it, obviously, many years later than we would have originally, but we will stick to the timeline that the FCC has already put on for the build-out.

As for interoperability of handsets, back-haul and roaming, it's a very complete regulatory agenda that Mr. Berry has put forward. He puts it forward very ably on every transaction that comes around, and it's—in fact, he's very successful.

The FCC has dealt with every one of these or is dealing with them. It has issued roaming rule. It is looking at back-haul. Just today, it issued a notice of proposed rulemaking on interoperability at Mr. Berry's request.

So all of these issues are squarely teed up at the FCC, and that is the appropriate place to deal with them, not in the middle of a license transaction.

Mr. BERRY. With his help, we might be able to move some of those even a little faster in the future.

Senator KOHL. Do you want to make one follow-up?

Mr. WU. Just one comment. With respect, I think the current build-out requirements can't be considered effective given the fact that in the—first of all, they are 15 years long. And second of all, given the fact that they didn't prevent cable from sitting on this spectrum for multiple years, which everyone was complaining about.

So it's clear that the current requirements are not good enough and, at the minimum, that's what the Commission should do is speed up this build-out.

Senator KOHL. Very good.

Senator Lee.

Senator LEE. At the conclusion of and in response to my last round of questioning, Mr. Kelsey made a pretty articulate plea, a pretty articulate statement regarding the value of your spectrum holdings, Mr. Milch. I just wanted to know if you wanted a chance to respond to that.

Mr. MILCH. Thank you, Senator. Spectrum does have different propagation and other qualities. There is no doubt about it. However, the FCC has a very well-established approach to dealing with this issue.

It has a spectrum screen, which, as ably said, below which there is a presumption that there is no competitive harm and above which it deserves further look.

If there is a—the whole reason that the value proposition has been put forward with this weighting, which is a very arcane and mysterious formula that's been proposed, is because the existing rules, which have been set out and upon which businesses rely to do their business, defeat the effort to stop this transaction, because

there are no competitive effects under the rules that are in place right now.

If there is to be some new set of rules, if the Commission were to want to look at the spectrum screen again, that certainly is something that's within its power to do in a separate proceeding. I would note, however, that in such a proceeding, the denominator of the spectrum screen, that is, the amount that's available to be used, would likely increase, not decrease, because we are finding that there is much more available broadband spectrum than is currently being counted.

Indeed, just today, the Commission decided that it was going to start a proceeding to see if one of the satellite companies could reuse its 40 megahertz of spectrum that is now used for satellite for broadband. And there are other pockets of such spectrum which are available for broadband use.

Senator LEE. So you do not necessarily disagree with those who are suggesting that the spectrum screen ought to be revised.

Mr. MILCH. No. I do not believe the spectrum screen is deserving of revision, certainly not in the middle of a license proceeding, Senator. But I also would point out that we would—that if such a spectrum screen were to be revised, an appropriate spectrum screen would include more spectrum and not less. So it would actually decrease Verizon Wireless' share of the spectrum.

Senator LEE. Such that the ratio between the numerator and the denominator under the new spectrum screen analysis would, in fact, be lower.

Mr. MILCH. Yes, sir. That's what we believe.

Senator LEE. Is the precedent, by the way, for the FCC coming up with a spectrum screen, a new spectrum screen or something analogous to that in the middle of a transaction without going through the notice and comment process first?

Mr. MILCH. I can't give you a complete answer, but I would note that the same argument was made very recently in a deal between AT&T and Qualcomm. The FCC declined to change its spectrum screen. The exact same sort of requests were made, and it declined to do so in the middle of a license transaction.

Mr. BERRY. Senator, if I can respond to that, because they did address the issue on the spectrum screen, saying that it should reflect four National competitors in the AT&T/Qualcomm. But specifically, the spectrum screen is not a product of an NPRN, a notice of public rulemaking or inquiry.

Verizon itself argued for a change in the spectrum screen when they bought Alltel, and that was during the middle of a negotiation, and there's dozens of examples on record where the spectrum screen, after the spectrum cap was removed, was modified and changed during the ongoing proceeding, and it's happened from AT&T and Verizon, and many of our carriers, also.

When it is to your advantage, you want it changed to your advantage. When it's not, you want it held the way it is.

Senator LEE. And it was imposed initially without a notice of proposed rulemaking.

Mr. BERRY. My understanding is that that is a tool that the FCC used and developed over a period of years after the spectrum caps were eliminated.

Mr. MILCH. That is true, Senator. It is a tool. And I would point out that the spectrum screen changes because more spectrum becomes available or goes off the market. So that's one of the reasons it changes.

It's a flexible tool that allows the denominator to grow and shrink depending on what's available or not available.

So we believe that it should remain a flexible tool. That doesn't mean, however, that you would have a clear rule about the spectrum screen and then change it in the middle of a license proceeding.

People may go to the FCC and argue about whether they ought to have a different view on what the spectrum screen is. But as party to the Alltel transaction, I can tell you, Senator, the result of that was the imposition of the spectrum screen and significant divestitures as a part of that because they went above the spectrum screen.

Senator LEE. Before I run out of time, Mr. Milch, I want to ask you. Can you comment about Verizon's need for additional spectrum and tell us whether you agree with Mr. Berry's claims about unused spectrum and what Verizon might be doing to ensure that excess spectrum is being put to good use?

Before you do that, I want to commend you on a very effective use of the word "lugubrious."

[Laughter.]

Senator LEE. I didn't expect to use that word today or to hear it in the context of the 1996 Telecommunications Act. So good job.

Mr. MILCH. Thank you, Senator. I'm going to get a lot of ribbing for that, Senator. Thank you very much.

[Laughter.]

Mr. MILCH. Yes. Thank you for the opportunity. As I pointed out with my chart earlier, Verizon Wireless is the most efficient user of spectrum in the Nation. So we very much disagree with the notion that there is any warehousing going on.

In the mobile world, them's fighting words, and it's not true about Verizon Wireless. We invest more than anyone else, we utilize—we have the most efficient network, and we take all sorts of steps, from an engineering perspective, to further increase the use of our spectrum that we do hold as quickly as we can.

The notion that we have somehow warehoused this goes directly against all the facts that are on the record.

Senator LEE. Thank you very much.

Senator KOHL. Thank you very much, Senator Lee.

And, Senator Blumenthal, you have the last crack at it.

Senator BLUMENTHAL. Thank you. While we are on the subject of linguistics, I want to compliment Mr. Cohen on the use of the word "optionality," which probably has not been uttered with great frequency in these halls. I had not expected to hear "lugubrious" in the context of antitrust law, but some might say that it could be applied to enforcement from time to time.

I want to just briefly explore an area which I think is important to the future of this agreement, assuming it goes forward, and it relates to the value of the marketing agreements to the respective parties, and so it is relevant to the antitrust issues here. And that

is the potential sharing of information, consumer information, and the security measures that will be applied to that information.

And I know that you are aware of the importance of this area. It may not be one that you are prepared to address today. And so if you wish to comment on it in more detail in a written submission, I would be perfectly happy to accept it in that way.

But, essentially, the focus of my interest is in protecting consumer information that is obtained by virtue of the agreements and the shared marketing and so forth and the keeping of that information confidential or notifying consumers in the event that it is shared or sold or exchanged with other companies as part of agreements that may not be encompassed by this direct agreement.

So if you wish to comment on that area, I would welcome it.

Mr. COHEN. I will comment quickly, and we can provide a much more detailed response. I think you have to break the agreements down. Let's do the easy one, which is the reseller/MVNO agreements. Once they go into effect, those customers that we will market to and that we will sell the service to over the Verizon Wireless network are our customers, and, in fact, no customer information would be shared with Verizon Wireless. They are integrated into our system and they would be just like our regular customers.

In the marketing agreements, and this is—Mr. Milch can help me or correct me, but the structure of these agreements is that if we sell—if we, Comcast, sell a quad-play, for example, and we sell a Verizon Wireless product with an Xfinity triple play, the wireless customer is a Verizon Wireless customer. They are not a Comcast customer.

It's an artificial quad-play. They get a Verizon Wireless bill. They're a Verizon Wireless customer. We don't get access to their customer information once we've sold them the service and vice versa. If Verizon Wireless, in a Verizon Wireless store, sells a quad-play with a triple-play Xfinity plus a Verizon Wireless phone, the Xfinity triple play customer is a Comcast customer. And it's no different than when Best Buy sells a Comcast—an Xfinity triple play in the Best Buy store.

Verizon Wireless and Best Buy do not have access to that customer information. So it's structured in the traditional way that agency agreements are structured to protect the very privacy concerns that the Senator is concerned about.

Mr. MILCH. And I would only add, Senator, that there is a very comprehensive set of rules in the FCC governing both cable information, customer proprietary network information on the telco side. All those rules are going to be respected throughout this effort.

On Verizon's part, we have a very well-documented privacy policy that's available to all of our customers, who will be our customers, and all of our activities under these agreements will be governed by our privacy policies, which, by the way, we extend to our agents if they are acting on our behalf.

Senator LEE. Thank you. Thank you, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Lee and Senator Blumenthal.

In closing, I would just like to say that this hearing today, which has been very interesting—and I would note that no one has left

in the audience and we have been at this for two and a half hours, which I think is testimony to the expertise and the vigor that you have brought to this discussion, and we appreciate your being here.

The hearing demonstrates that these agreements between Verizon Wireless and the four cable companies have potentially far-reaching consequences for competition in the wireless phone and cable industry. We will continue to examine these issues carefully.

While this Subcommittee does not have the power to block or alter these deals, we very much hope and we expect that the regulators at Justice and the FCC will carefully examine the record from today's hearing and our witnesses' testimony as they decide whether or not to approve these deals and in what form.

We thank you all for being here. This hearing is closed.

[Whereupon, at 4:34 p.m., the Subcommittee was adjourned.]

[Questions and answers and submission for the record follow.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

On

"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"

Wednesday, March 21, 2012
Dirksen Senate Office Building, Room 226
2:00 p.m.

Randal S. Milch
Executive Vice President & General Counsel
Verizon Communications Inc.
New York, NY

David L. Cohen
Executive Vice President
Comcast Corporation
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Charles F. (Rick) Rule
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Steven K. Berry
President & CEO
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news from

HERB KOHL

United States Senator
Democrat of Wisconsin

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Statement of U.S. Senator Herb Kohl

Chairman of the Judiciary Subcommittee on Antitrust, Competition Policy & Consumer Rights

The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?

March 21, 2011

Today we meet to consider the series of transactions between Verizon Wireless and four of the nation's largest cable TV companies announced last December. These deals – coming on the heels of the now abandoned proposed merger between AT&T and T-Mobile – are the latest transactions that seek to reshape the wireless phone, internet access, and cable TV markets.

Under these deals, Verizon Wireless, the nation's largest cell phone company, would acquire large chunks of spectrum from Comcast, Time Warner Cable, Cox, and Bright House. At the same time, these companies have all signed agreements in which Verizon Wireless and the cable companies agree to cross-market each others' services and form a joint technology venture.

The parties to these transactions argue that these deals are highly beneficial both to their companies and to consumers. It will give Verizon Wireless additional spectrum necessary to meet the exploding demand for Internet applications used by consumers with smartphones. And it will permit the four cable companies – which collectively account for over 70% of the nation's cable TV subscribers – to offer a "quad play" bundle to their customers – video, internet, landline phone, and, now, wireless service as well.

Yet these transactions have come under serious criticism from consumer advocates and competitors. The basic premise of the landmark Telecommunications Act of 1996 was that cable companies and phone companies would enter each other's markets and compete. And this vision was well on the way to being realized – with cable companies offering landline phone service, phone companies like Verizon offering cable TV through its FiOS service, and both offering consumers an on ramp to the Internet so crucial in today's economy. In addition, recent years

have seen a tremendous expansion of cell phone service and wireless devices as a way both to make phone calls and access the Internet.

Many now wonder if these agreements that we are examining today will roll back these advances in competition and even amount to a truce between one of the two largest phone companies and over 70% of the cable TV industry. Under these agreements, cable company representatives will be present in Verizon Wireless stores. And cable representatives will be selling products and services that directly compete with Verizon's, including FiOS. After these deals, will Verizon continue to develop and aggressively market FiOS? Furthermore, rather than attempt to develop competing wireless service with the spectrum the cable companies bought in 2006, the cable companies are selling that spectrum to Verizon Wireless and will be offering Verizon Wireless services to their customers.

In addition, Verizon Wireless will be acquiring what is likely the last swath of crucial spectrum available for years to come, keeping this vital input for wireless service out of the hands of its competitors. After this deal, Verizon Wireless and AT&T will have together two thirds of the nation's cell phone customers and the lion's share of the most valuable spectrum. Given the exploding consumer demand for smartphones and the spectrum they require, will the other cell phone carriers truly be able to compete? Having won the battle for competition by blocking last year's AT&T/T-Mobile merger, are we now in danger of losing the war?

So we enter today's hearing with more questions than answers, while cognizant of the very high stakes for competition and consumers in these transactions. We know that both Verizon and Comcast, as well as the other cable companies, believe that they are acting in the best interest of their own businesses and shareholders. Yet, we need to ensure that consumers' best interests will be served in the long run. We urge the regulators to ensure that nothing in these deals reverse the historic gains in competition between phone and cable companies ushered in by the Telecom Act of 1996. The fundamental question we must answer is whether these deals will bring beneficial new choices to consumers, or amount to previously fierce rivals standing down from competition. We look forward to the testimony of our panel of witnesses to shed light on these important issues.

Statement of Senator Patrick Leahy (D-Vt.)
Chairman, Senate Judiciary Committee
Subcommittee Hearing on "The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"
March 21, 2012

Today, the Antitrust Subcommittee examines the state of competition in the wireless industry. We are focused on the sale of valuable spectrum to Verizon Wireless and related agreements. I look forward to hearing from our panel of witnesses as they assess the merits of the proposed sale and agreements, and the state of competition in the wireless industry more generally.

Strong and vibrant competition in the wireless industry is important for consumers across the country. Competition increases choice, lowers price, and promotes innovation.

Late last year, Verizon Wireless and several cable companies announced a joint venture under which the cable companies would sell Verizon Wireless spectrum licenses, and entered into certain other relevant agreements. This is a significant transaction that will provide Verizon Wireless access to more nationwide spectrum, but will also remove a potential competitor from the wireless market.

The demand for wireless services is at an all time high. Any agreement between Verizon Wireless and the cable industry must ensure that the needs of consumers are met and competition is not threatened. The Department of Justice and the Federal Communications Commission will both examine these transactions, and I have confidence in their commitment to ensure a fair investigation and review.

There is no doubt that putting unused spectrum to use will benefit consumers. In Vermont, a few companies hold portions of our airwaves that are not in use today, including some that are the subject of this proposed transaction. Leaving this spectrum unused means that Vermonters face more dropped calls and fewer wireless options. Regardless of the outcome of this proposed sale, it is critical that this spectrum be utilized in a way that improves service and options for rural customers in Vermont and elsewhere.

I thank Senator Kohl and Senator Lee for their continued efforts to raise the profile of important competition issues, and to ensure that our antitrust laws are enforced.

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PREPARED STATEMENTS OF WITNESSES

TESTIMONY

OF

RANDAL S. MILCH
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL
VERIZON COMMUNICATIONS INC.

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY,
AND CONSUMER RIGHTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

"THE VERIZON/CABLE DEALS: HARMLESS COLLABORATION OR A THREAT TO COMPETITION AND CONSUMERS?"

March 21, 2012

Good afternoon, Mr. Chairman and members of the Subcommittee. I am pleased to appear before you today on behalf of Verizon to discuss both Verizon Wireless' acquisition of currently unused spectrum that we will put to work for the benefit of our customers, as well as separate commercial agreements Verizon Wireless has entered into with a number of cable companies that will help bring more innovation, choice and convenience to consumers.

Verizon Wireless Needs Spectrum

The 20 MHz of spectrum that Verizon Wireless is purchasing from SpectrumCo and Cox Communications is today not being used to serve customers; with this purchase, it will be deployed to provide the additional capacity that consumers, companies, and entrepreneurs need to meet their rapidly growing data demands and upon which they depend.

Providing the best possible network experience for our customers has been a guiding principle for Verizon Wireless since its very inception and the company routinely wins awards for highest network quality from independent, third party evaluators. To cite just two: Based on a recent survey of customers, J.D. Power and Associates concluded that Verizon Wireless offers the best customer service in the wireless industry. In late February J.D. Power and Associates also concluded that Verizon Wireless has the best Network Quality of any national wireless carrier. We have won these awards – and

many others -- because we have anticipated the needs of our customers and have repeatedly invested in our network and in the spectrum required to meet those needs.

Verizon Wireless' latest investment, and one of our most substantial, is in our new 4G Long Term Evolution, or LTE, network. LTE gives our customers average download speeds of 5-12 Mbps – up to ten times the speeds available on 3G networks. As of today, Verizon Wireless's LTE deployment covers more than 200 million people in 196 markets across the United States, incredible progress since we turned on the first LTE market a mere 15 months ago, in December 2010. Verizon Wireless recently announced that we are accelerating by six months our plans to cover 95% of the U.S. population with LTE, meaning we'll achieve that goal for the country by mid-2013. And through our LTE rural initiative, we are working with fifteen rural carriers to help ensure this critical innovative technology is also available to rural America. Verizon Wireless' rapid deployment of this network has placed the United States at the forefront of global LTE deployment. Following our lead, other companies are now moving aggressively ahead to deploy their own LTE networks. In addition to providing consumers with the fastest wireless network in the world, our LTE deployment also provides a platform for other companies – including much-needed startup businesses -- to develop new technologies and new products that will benefit both consumers and the American economy.

What does this have to do with spectrum? First, Verizon Wireless' network quality depends on having adequate spectrum. Without it, we can't provide our customers with the high-quality network experience that they expect and deserve. Second, the need for spectrum has been heightened by the explosive use of smartphones,

tablets and other data intensive devices, as well as data intensive applications such as video and audio streaming. A mobile application and content economy has blossomed because of advanced wireless networks. FCC Chairman Genachowski has insistently and quite properly emphasized that the ready availability of additional spectrum is essential for the expanding ecosystem of mobile applications and content to flourish. Estimates of data use have almost always proven to be too conservative. Data usage on Verizon's network has been more than doubling each of the last three years, and is expected to continue that trend going forward. According to FCC estimates the demand for mobile data by 2015 will be 25-50 times greater than it was in 2010. Customers and indeed the entire mobile Internet economy are benefiting from our tens of billions of dollars in wireless network investment, and the responsive multi-billion dollar investments of our competitors. Our customers and our competitors' customers are streaming movies and video clips over their wireless devices, uploading and downloading large .pdf files, and doing business on the go. That's great for all wireless users. Just as importantly, it's been great for Silicon Valley and Silicon Alley and the many places between. There currently are more than half a million apps available for both Apple and Android devices. Content providers have more ways to get their content to people who want to consume it. This entire ecosystem depends on the availability of high-quality, advanced networks.

Verizon Wireless has taken active steps to help foster the mobile broadband economy by promoting the development of third party devices and applications that use the LTE network. We have established a Technology Innovation Center in Waltham, MA, to help develop technology companies that are focused on LTE and the opportunities created by our investments in mobile broadband. Many innovations are

being developed which will serve a wide variety of industries – including areas of vital national importance such as healthcare, energy and transportation, and public safety. For example, Verizon Wireless and In Motion Technology recently announced the first wireless mobile router system available for securely extending the enterprise network to the vehicle over our 4G LTE network. In Motion Technology is widely deployed in public safety, public transit and utilities, and will be demonstrating how its onBoard™ Mobile Gateway can be used in ambulances. By securely connecting laptops, tablets, electrocardiograms (EKGs), Electronic Patient Care Reporting (EPCR), IP cameras, Computer Aided Dispatch (CAD) and vehicle diagnostic systems, the onBoard Mobile Gateway will improve operational efficiency for emergency responders. We also have opened an Applications Innovation Center in San Francisco so that developers large and small can work closely with Verizon Wireless and our many partners to create, optimize and polish their ideas and turn them into viable applications for wireless customers. Finally, we have created a 4G Venture Forum which serves to link innovators and entrepreneurs with venture capitalists – again bringing solutions to the market.

But all this good news also means that there is a tremendous, growing need for more spectrum. The Federal Communications Commission predicts that, if additional spectrum is not made available in the near-term, mobile data demand will likely exceed capacity by 2014, resulting in a broadband spectrum deficit of nearly 300 MHz. And other than unused spectrum held by existing owners – such as the Spectrum Co. assets – there's currently no other place to go to buy spectrum. We applaud Congress and the Administration for freeing up more spectrum in the landmark legislation you recently passed and the President signed into law – but it will be some years before that spectrum

can be put into use. The only practical solution available now to the looming spectrum deficit is to tap the unused spectrum held by existing owners – a solution Verizon Wireless is undertaking now.

In some of our largest markets, the spectrum crunch will come soon and start hurting our customers – and your constituents - who expect and demand high-quality service. And as we recently demonstrated in our FCC filings, we will need spectrum to meet our customers' growing demands in markets of all sizes, large and small. We will need this spectrum in a number of significant markets by 2013, so there is no time to lose in making this spectrum available. It generally takes years, not months, from the time of purchase before new spectrum can actually be used to provide services. Among other things, we will need to acquire and deploy network equipment and work with device manufacturers to develop and make available LTE devices that can use this spectrum. This means we need the spectrum now in order to do the work required to put it to use when our customers need it.

We are working closely with the Department of Justice and the Federal Communications Commission as they review our spectrum purchase, and we're confident the regulators will understand our spectrum purchase is good not just for Verizon Wireless' customers and the mobile broadband economy but that it also creates no competitive problems. Why? The spectrum we're buying from Comcast, Time Warner Cable, Bright House and Cox is not in use today. Verizon Wireless is not buying a competitor and is not buying any customers or facilities. We are only buying spectrum not currently in commercial use in order to put it to use serving customers, and no customer will see fewer choices or increased prices as a result of this transaction.

There is no basis for a concern that Verizon Wireless somehow is "hoarding" or "warehousing" spectrum. In fact, Verizon Wireless is the most efficient user of spectrum in the U.S., serving more customers per megahertz of spectrum than any other carrier, despite the explosion of data traffic from smartphone usage. T-Mobile has made allegations in this area, so let's look at the facts. As an example: Verizon Wireless is almost twice as efficient in its use of spectrum as T-Mobile: Verizon Wireless serves over 1.2 million customers per MHz of spectrum, while T-Mobile serves 660 thousand customers per MHz of spectrum. Verizon Wireless is so efficient, that after the addition of the Spectrum Co. spectrum but before we even put the spectrum to use, we will still be the second most efficient user of spectrum in the United States.

Moreover, Verizon Wireless is not simply an acquirer of spectrum. We also have worked to rationalize our spectrum holdings when we identify particular blocks of spectrum that no longer fit in our network deployment plans, and have made those spectrum assets available on the secondary market so they can be put to productive use by others.

Verizon Wireless is an efficient user and good steward of the spectrum we have. We have spent $22.3 billion over the last three years – and $8.3 billion in 2011 alone – on our network, more than any other wireless company. Roughly half of that spend has been investments to increase our capacity within our existing spectrum through numerous engineering techniques, such as cell splitting and denser cell site deployments. These capacity increasing techniques are of course available to all carriers that wish to invest in them.

But the most direct answer to charges that Verizon Wireless is somehow taking more than its 'fair share' of spectrum is to look to the standards that the FCC has used to review this very issue. After acquiring the additional spectrum, Verizon Wireless' holdings in nearly all geographic areas will remain below the level where Federal Communications Commission precedent says that no further competitive inquiry is necessary, because there is "clearly no competitive harm." The FCC employs a spectrum "screen" to identify areas below which no further inquiry is needed. The screen is based on one-third of the spectrum that the FCC concludes is available for mobile use, and is 145 MHz in nearly all markets at issue here. Verizon Wireless would remain below this level in 2,230 of the 2,276 of the counties covered by the SpectrumCo licenses – or nearly 98 percent of the covered counties. In the few areas where the screen would be exceeded, it is typically only by a few MHz and there are multiple other providers with spectrum in each.

In summary, Verizon Wireless' purchase of currently unused spectrum from the SpectrumCo companies and Cox addresses a critical need without any harm to competition.

Other Agreements with the SpectrumCo Companies and Cox

In addition to the spectrum agreement, Verizon Wireless also entered into separate commercial agreements with these companies. These agreements are intended to address a basic challenge: How to create an opportunity to provide innovative national services seamlessly integrating wireline and wireless capabilities. Verizon

Wireless provides services across the entire United States, but Verizon's wireline FiOS services cover only a small part of the country. To justify the investment to create innovative converged wireless and wireline products and to offer convenient bundles of services to those customers across the United States who want them, Verizon Wireless needed to find wireline partners with footprints that cover the rest of the country. More than 85% of households served by the SpectrumCo companies and Cox are not in an area currently served by FiOS. This business need resulted in three sets of agreements.

First, Verizon Wireless and all four cable companies (Comcast, Cox, Bright House and Time Warner) gain the ability to act as a sales agent for the others' services. One set of agreements provides for the cable companies to act as agents for Verizon Wireless, selling wireless service as part of a bundle of services and receiving a one-time commission for the wireless services they sell. Such agent arrangements are not unusual. For example, AT&T and Frontier have such a relationship, as do Verizon Wireless and CenturyLink. Similarly, Verizon Wireless will act as an agent for the cable companies, so if Verizon Wireless sells cable services, we receive a one-time commission. These agreements create another sales channel for Verizon Wireless, which has well over a thousand agency agreements in place already, and a way for Verizon Wireless to offer a new option to customers who are interested in bundled services. In both instances – where Verizon Wireless or a cable company is acting as an agent – the underlying service provider (and not the agent) sets the prices for the product being sold.

Second, Verizon Wireless and the SpectrumCo companies are working together to create next-generation technical capabilities enabling customers to more seamlessly have wireless devices such as smartphones and tablets interact with home entertainment

systems and wired computers. For example, we hope to give our customers the ability to share user-generated content across multiple screens and devices in real time -- if you're at your child's soccer game, you can send video streams to other family members wherever they might be.

This breakthrough innovation will be good for consumers and competition, by adding a new offering in the already hotly competitive market for converged technical solutions. At the same time, nothing in this agreement prevents other innovative companies from using our networks to send content to their customers – something that many companies from Google to Hulu to Netflix do today - or from developing and deploying their own innovative services over our networks.

Finally, the cable companies that are parties to the agency agreement have the option in the future to move away from an agency relationship and instead become resellers of Verizon Wireless services. It will be in their sole discretion as to whether to do so, and they will no doubt make this decision based on the competitive environment in perhaps the most challenging and rapidly evolving industry in the United States.

These commercial arrangements will benefit customers. Customers nationally will now have the convenience of buying bundled services, if that's what they want. Those services often will have a discount – our first offering in Seattle includes a $300 gift card to induce customers to sign up. Furthermore, customers will get the fruits of the companies' innovation venture, making these bundled services more useful, while remaining free to choose many other innovative converged technologies. And down the road, the cable companies may elect to resell Verizon Wireless' service, adding a different competitive dimension to the market.

There's been a lot of ill-informed noise about these agreements, so let me very briefly address what I understand the chief concern to be. Critics have complained that these agreements somehow signal that Verizon is abandoning its FiOS service. This is a groundless concern.

First, Verizon's shareholders have invested $23 billion into FiOS, and those shareholders are only now beginning to see a return on that massive investment. FiOS now makes up 61% of Verizon landline consumer revenues, and FiOS revenues grew 18.2% year over year. In just two years, we've grown video penetration in existing FiOS areas from 25.4% to 31.5%, and our Internet penetration from 29% to 35.5%. We've no intention of slowing down in our competitive efforts – indeed our shareholders have every economic incentive for us to push ahead.

FiOS is a hugely successful product that is taking market share from cable and satellite competitors because, frankly, it's superior to the products with which it competes. FiOS has won numerous accolades, including an industry-leading customer satisfaction rating. We're confident that customers will continue to choose FiOS over cable services when presented with a choice, and choose a bundle of Verizon FiOS and Verizon Wireless where they have that choice. Verizon Telecom – which is the group within Verizon that provides landline consumer services - will continue to vigorously sell double plays, triple plays, and quad plays using Verizon Wireless services.

Thus, we have every incentive to continue to compete hard with FiOS against cable to continue our FiOS success. The notion that we would undermine FiOS – one of the largest capital investments made anywhere in the United States over the last decade – merely to obtain one-time agency commissions is to ignore the most fundamental facts.

In short, Verizon is full speed ahead with FiOS and nothing in these commercial agreements – to which Verizon's wireline FiOS group is not even a signatory – changes this commitment.

Conclusion

From Verizon Wireless' perspective, it is critical that we receive timely regulatory approvals for the spectrum we're purchasing from the cable companies. Verizon is proud that our investments in LTE and network quality have attracted so many customers using so much data, but all that data use has accelerated our need for new spectrum. We're investing the money to buy this spectrum and put it to work for our customers; any delay in our ability to do so can only harm those customers.

Verizon also believes the other, separate commercial agreements have significant consumer benefits: They will give Verizon Wireless the ability to offer convenient bundles of services to all of our customers across the United States and hold open the promise of new and innovative products and services that customers will want and need. I appreciate the opportunity to be here and I look forward to your questions.

TESTIMONY OF
DAVID L. COHEN
EXECUTIVE VICE PRESIDENT
COMCAST CORPORATION

BEFORE THE
U.S. SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS

HEARING ON
"THE VERIZON/CABLE DEALS: HARMLESS COLLABORATION OR A THREAT TO COMPETITION AND CONSUMERS?"

MARCH 21, 2012

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify today. I welcome the opportunity to discuss the intensely competitive marketplace for communications and media services and how SpectrumCo, LLC's ("SpectrumCo") proposed sale of spectrum to Verizon Wireless and the commercial agreements entered into between Verizon Wireless and Comcast, Bright House Networks, LLC, Cox Communications, Inc., and Time Warner Cable Inc. (collectively, the "Cable Companies") will promote competition, bring more convenience and choice to consumers, increase investment, and drive innovation in next-generation technologies.

At the outset, it is important to recognize that the video, high-speed Internet, and telephone marketplace in which Comcast operates and the wireless marketplace in which Verizon Wireless operates are intensely competitive. American consumers enjoy access to a greater abundance and diversity of video programming, delivered in more ways, on more devices, by more competitors, than at any point in history. The story of broadband competition is one of dramatic increases in capacity and speeds, coupled with consistently declining prices per megabit of service. And, for the first time in history, the cable industry offers a meaningful facilities-based alternative to historical incumbents in providing wireline voice service. The same is true of competition in the wireless business: consumers have an abundance of options for obtaining wireless services and devices, and their appetite for broadband mobility is accelerating rapidly.

Nothing about these transactions will reduce this robust competition in any way. The spectrum sale is just that – an assignment of licenses only (the "License Assignment"). It involves no transfer of customers, assets, or operating businesses. And, the series of commercial agreements the parties have entered into (collectively, the "Commercial Agreements") are the same sorts of agreements that have stimulated competition and innovation in the marketplace for decades: reseller agreements that allow the Cable Companies to elect to sell individually-branded wireless services using the Verizon Wireless network (the "Reseller Agreements"); a research and development ("R&D")

joint venture agreement to develop innovative new technologies (the "Innovation Technology Joint Venture Agreement"); and, finally, agency agreements that authorize the companies to act as sales agents for each others' services (the "Agency Agreements"). All the companies that previously provided voice, video, broadband, and wireless services will continue to do so. These transactions will only increase consumers' options, not limit them, and will allow us to answer consumers' calls for "anytime, anywhere" communications by bringing amazing new devices and services into a marketplace already crowded with innovators. The simple fact is that these transactions are entirely additive for consumers – more choice, more competition, more investment, and more innovation.

I want to make three main points about the License Assignment and Commercial Agreements.

First, the proposed License Assignment will benefit consumers and further the spectrum policy goals of Congress, the Administration, and the National Broadband Plan. The President has recognized that our country's "new era in global technology leadership will only happen if there is adequate spectrum available to support the forthcoming myriad of wireless devices."[1] Approval of the sale is the best and quickest way to put spectrum not currently being used to provide services to consumers in the hands of a company that will use it to meet consumers' rapidly escalating demand for broadband mobility.

Second, the Commercial Agreements will provide short- and long-term benefits to consumers. They give the Cable Companies a path to quickly and efficiently offer wireless services in competition with the multiproduct bundles being offered by AT&T, DIRECTV, and other competitors. These bundles provide consumers with more choice and convenience and increased competition. They also enable Verizon Wireless to offer its customers new options for subscribing to wired video, voice, and high-speed Internet services. And, through the technology joint venture, the companies expect to develop technologies that offer seamless connectivity and enhanced features and services across multiple platforms. By enhancing the Cable Companies' and Verizon Wireless's own products and services, the Joint Venture will compete with similar solutions that AT&T, Dish Network, Google, Apple, Microsoft, and others already have introduced into the marketplace. This, in turn, will spur other companies to respond, perpetuating a cycle of competitive investment and innovation.

Third, the License Assignment and Commercial Agreements are consistent with the Communications Act, FCC rules, and the antitrust laws, and will promote the Subcommittee's competition policies as well. What should not be lost in all the rhetoric is the fact that neither the License Assignment nor the Commercial Agreements will reduce or harm competition in any product or geographic market. Contrary to the claims of certain parties, the License Assignment and Commercial Agreements will not reduce Verizon Telecom's or the Cable Companies' incentives to compete vigorously against

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[1] President Barack Obama, *Unleashing the Wireless Broadband Revolution* (June 28, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution.

each other, will not facilitate collusion, and will not otherwise blunt or impede competition. The harms that have been alleged are hypothetical and speculative, and opponents of the transactions – several of which are competitors that simply fear increased competition – ignore the benefits the transactions will bring to consumers. Similarly, criticisms that without these agreements, the Cable Companies would build a wireless network and Verizon would further expand its FiOS footprint beyond its current plans ignore the reality that the companies involved here made the decisions not to do so well before this transaction. The antitrust laws are not designed to force companies with fiduciary obligations to their shareholders to undertake business decisions that they have concluded do not make sound business sense.

I. THE LICENSE ASSIGNMENT IS AN EFFICIENT WAY TO TRANSFER SPECTRUM TO A COMPANY THAT WILL USE IT TO PROVIDE SERVICES TO CONSUMERS.

For many years, Comcast has believed that it needed a comprehensive wireless strategy. In 2005, the Cable Companies partnered with Sprint Nextel to form Pivot Wireless, a $200 million joint venture to develop a wireless strategy for delivering advanced wireless services to the companies' customers.[2] The following year, the joint venture partners created SpectrumCo in order "to obtain greater flexibility in developing options for more advanced wireless services," including exploring the possibility of building new networks.[3] As has been the case with many business plans, however, subsequent developments in the marketplace significantly altered the technological and economic landscape. Like everyone else, SpectrumCo has had to adapt to this new marketplace.

A. SpectrumCo's Wireless Strategy.

For nearly two decades, the concept of technological "convergence" has held out promise that traditional single-service networks – such as the telephone and cable networks – could be upgraded and re-engineered to deliver multiple communications services to residential customers. With convergence, providers could offer consumers a one-stop-shop for discounted bundles of video, voice, and Internet services, and the convenience of one integrated bill. Convergence and its benefits, however, would not happen overnight.

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[2] Press Release, Comcast Corp., *Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture* (Nov. 2, 2005).

[3] Press Release, Comcast Corp., *Cable Consortium Acquires Spectrum Licenses Covering National Footprint* (Oct. 5, 2006). The original SpectrumCo partners included Comcast, Time Warner Cable Inc., Cox Communications, Inc., Bright House Networks, LLC, and Sprint Nextel Corporation. In 2007, Sprint withdrew from SpectrumCo, and the SpectrumCo members purchased Sprint's interest for an amount equal to Sprint's capital contribution to the joint venture. In 2009, Cox withdrew from SpectrumCo, taking with it the share of AWS spectrum to which it was entitled under the SpectrumCo LLC agreement. Today, SpectrumCo is owned by Comcast (63.6 percent), Time Warner Cable (31.2 percent), and Bright House (5.3 percent).

Cable companies played a leading role in driving convergence when we were the first to deploy a reasonably-priced residential broadband Internet service back in 1996.[4] Since then, cable companies invested more than $185 billion to upgrade their networks to offer consumers broadband Internet service along with a host of other advanced services, such as high-definition television, video-on-demand, digital video recorders, and a residential voice-over-IP telephone service.[5] Cable companies made these investments despite the high risks associated with the venture and negative predictions about the cable companies' success espoused by industry leaders, market analysts, and technology experts.[6] In the late 1990s, cable operators began to offer discounted "double play" bundles of video and broadband Internet services, and in the early 2000s, we began to offer discounted "triple play" bundles of video, Internet, and wireline voice services in certain markets.[7]

Not wanting to be left behind, the telephone companies began to deploy their own broadband Internet offerings bundled with their traditional voice services. Satellite providers, working with the telephone companies through agency agreements – the very same types of agency agreements the Cable Companies have entered into with Verizon Wireless – followed with their own bundles of video, voice, and broadband Internet service.[8] In 2004, telephone companies and satellite video providers, began offering

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[4] In the mid-1990s, dial-up was the primary means by which consumers could access the Internet. Although ISDN and T-1 services were potential alternatives at the time, they were far too costly to be a realistic option for most consumers. *See* Intelligent Network News, *Citizens Group Breaks ISDN Catch*, Apr. 15, 1992, *available at* LEXIS, News Library (noting that, in addition to service fees, "subscribers will have to shell out between $500 and $1,000 for the ISDN board that will go into their personal computers"); FCC, Cable Servs. Bureau, *Broadband Today: A Staff Report to William E Kennard, Chairman, Federal Communications Commission, on Industry Monitoring Sessions Convened by the Cable Services Bureau* 27 & n.73 (Oct. 13, 1999), *available at* http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf ("With a price range of $300 to $3000 per month, the T1 business generated high profit margins for the telephone companies. Since the price point of DSL was lower, ranging from $50 to $1000 per month (depending on the type of DSL), the deployment of DSL service would undercut the T1 business.").

[5] *See* National Cable & Telecomm. Ass'n, *Cable Industry Capital Expenditures 1996-2011*, http://www.ncta.com/Stats/InfrastructureExpense.aspx (last visited Feb. 27, 2012). As a result of this significant investment, millions of consumers have access to affordable residential broadband service.

[6] *See, e.g.*, Brahm Eiley, *Can Cable Companies Afford to Believe Their Own Internet Hype?*, Digital Media, May 31, 1996, *available at* LEXIS, News Library ("The facts at hand would seem to indicate that it's not possible to recoup the investment, much less make money on cable-based two-way Internet access. . . . Right now, it appears as if cable companies may run out of money before they hit the Internet jackpot.").

[7] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 1605 ¶ 49 (2001) ("Virtually all the major MSOs offer Internet access via cable modems in portions of their nationwide service areas."); *id.* ¶ 55 ("MSOs, such as Cox and AT&T, continue to deploy circuit-switched cable telephony. Others, like Cablevision and Comcast, are offering cable telephony on a limited basis, waiting instead for IP technology to become widely available before accelerating rollout of telephone services to customers."). Not until the widespread deployment of cable digital voice service in 2005 and 2006 were cable companies able to replicate competitors' triple-play bundle of video, Internet, and wireline voice in most markets.

[8] *See id.* ¶¶ 77-79, 121 (highlighting DBS broadband Internet services and noting that telephone companies were marketing DBS video services); *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 118

"quadruple-play" packages of video, Internet, residential voice, and wireless services by entering into joint-marketing agreements to sell each others' services in a discounted bundle.[9] At the time, the Cable Companies had not developed a strategy for how we could compete in a marketplace where consumers might want bundled options that included wireless services. The Cable Companies' joint venture with Sprint was created to explore how we could change that.[10]

The hope was that the joint venture would enable Comcast and its partners to "offer consumers access to the expanded four element bundle . . . or any combination of services including video, wireless voice and data services, high-speed Internet and cable phone service" and develop and offer new services "to customers through a combination of 1,600 Sprint retail stores, cable retail outlets and other third-party distributors."[11] Although the joint venture originally contemplated that these services would be delivered using Sprint's network, the FCC's AWS auction offered the opportunity to explore the use of this spectrum as a means to provide wireless services and, thus, SpectrumCo was created.

In September 2006, SpectrumCo was the successful bidder for 137 Advanced Wireless Services ("AWS") licenses, 122 of which it holds today and 30 (because the licenses were partitioned) of which Cox holds. SpectrumCo purchased the AWS licenses as a first step in developing the capability to provide its owners' customers with new and advanced wireless services. The scale, type, and business cases for such services were not yet determined at the time of the auction. SpectrumCo did not acquire the licenses with the goal of simply launching the company into a capital-intensive and competitive marketplace without a sound business plan, and it proceeded over the next several years to develop and explore potential uses of the spectrum, including:

(2004) ("BellSouth, SBC, and Qwest have all recently announced agreements to sell DBS service as part of a telecommunications bundle.").

[9] *See, e.g., SBC Communications Adds New "Dish" to the Menu, Launches "Quadruple Play" Bundle with Satellite TV,* Business Wire, Mar. 3, 2004, *available at* http://findarticles.com/p/articles/mi_m0EIN/is_2004_March_3/ai_113829987/.

[10] Press Release, Comcast Corp., *supra* note 2.

[11] *Id.*

- ***Clearing Incumbent Microwave Links from the AWS Spectrum.*** SpectrumCo identified more than 500 incumbent microwave links that would need to be cleared in order to deploy services using the spectrum.[12] SpectrumCo spent more than $20 million to clear or confirm the clearance of these microwave links.[13]

- ***Testing 4G Technologies and Equipment for Use with the AWS Spectrum.*** At the time of the AWS auction, there was no AWS equipment available to auction winners. Between 2007 and 2009, SpectrumCo created and operated an AWS 4G technology test bed in King of Prussia, Pennsylvania to evaluate the three leading 4G technology candidates at that time: WiMAX, Ultra Mobile Broadband, and Long Term Evolution ("LTE").[14] SpectrumCo subjected each 4G technology to a set of live, operational tests that included installing transmission equipment at several outdoor cell sites and testing prototype handsets with each 4G technology at three fixed locations and on a 12-mile drive route.[15] After the King of Prussia tests, SpectrumCo collaborated with Nortel on LTE testing in the AWS band and obtained performance data from the multi-site LTE system at Nortel's Ottawa, Canada research and development facility. The Nortel data reinforced SpectrumCo's conclusion that LTE was the optimal technology for use in the AWS band.[16]

- ***Facilitating the Testing of Equipment for Use with the AWS Spectrum.*** SpectrumCo also leased spectrum to original equipment manufacturers, including

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[12] *See* Verizon Wireless-SpectrumCo Application Form 603, WT Docket No. 12-4, Ex. 4 ¶ 3 (Dec. 16, 2011) (Declaration of Robert Pick) ("Pick Decl."), *available at* http://transition.fcc.gov/transaction/verizonwireless-spectrumcocox.html; *see also Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report & Order, 18 FCC Rcd. 25,162 ¶ 70 (2003). The Commission established an initial license term of 15 years for licensees in the AWS-1 band, agreeing with commenters that argued that the need to clear the band and relocate incumbents warranted a longer-than-usual initial license term:

> AT&T Wireless, Cingular, CTIA, Ericsson, RCA, and Verizon Wireless argue that given the relocation and band clearance issues associated with these bands, it makes sense to adjust our usual ten-year license term. We agree with these commenters that the circumstances surrounding the future development and deployment of services in these bands warrant an initial license term longer than 10 years in order to encourage the investment necessary to develop these bands.

Id.; *see also* Letter from James A. Assey, Executive Vice President, NCTA, to The Honorable Jay Rockefeller, et al. (Mar. 3, 2011) ("With respect to the AWS spectrum held by several cable companies, it is well-understood that it will take years to clear that spectrum of incumbent licensees and build out an advanced broadband wireless network.").

[13] *See* Pick Decl. ¶ 3.

[14] Leading wireless equipment manufacturers, including Alcatel Lucent, Qualcomm, and Huawei participated with SpectrumCo in the King of Prussia tests.

[15] *See* Pick Decl. ¶ 5.

[16] *See id.* ¶ 8.

Qualcomm, Nokia, and Samsung, to test devices for use in the AWS band.[17] These leasing activities further facilitated the development of the AWS spectrum.

- ***Exploring Alternative Scenarios for Use of the AWS Spectrum.*** Even while these technical efforts were underway, SpectrumCo investigated alternative ways that its owners might use the AWS spectrum to provide their customers with advanced wireless services. For example, SpectrumCo entered into business arrangements with two nationwide wireless companies, Sprint and Clearwire; for a variety of reasons, those arrangements ultimately were not successful. SpectrumCo also considered other acquisitions, joint ventures, and network sharing arrangements with other wireless companies,[18] but concluded, for a variety of reasons, that each had significant limitations and would not provide a comprehensive and viable long-term wireless solution.

SpectrumCo expended substantial resources investigating these options and "did everything a reasonably diligent new entrant AWS licensee might be expected to do within the first third of its license term and took meaningful steps to develop, use, and identify long-term business plans for the spectrum."[19] SpectrumCo concluded that the costs and risks of building a wireless network were substantial and had increased greatly since it had acquired the licenses; depending upon how such a network was deployed, the cost would be at least $10-11 billion with a very uncertain business outcome.[20]

SpectrumCo also concluded that, although 20 MHz of AWS spectrum might be sufficient to initially deploy a wireless network, if it were successful in attracting a significant number of customers, it ultimately would have to incur further costs to acquire additional spectrum to serve those customers and meet their increasing demand for mobile services.[21] Since SpectrumCo acquired the AWS spectrum, consumer demand for wireless broadband services has exploded. In June 2007, just seven months after SpectrumCo acquired the AWS licenses, the first iPhone became available to consumers,

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17 *See id.* ¶ 9.

18 *See id.* ¶ 16.

19 *See* Verizon Wireless, et al. Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, Ex. 3, at 17 ¶ 35 (Mar. 2, 2012) (Declaration of David E. Borth) ("Borth Decl.").

20 *See* Pick Decl. ¶ 11.

21 *See* Verizon Wireless-SpectrumCo Application Form 603, WT Docket No. 12-4, Ex. 1, at 21-22 (Dec. 16, 2011) ("Public Interest Statement"), *available at* http://transition.fcc.gov/transaction/verizonwireless-spectrumcocox.html; *see also* Pick Decl. ¶ 12 ("SpectrumCo recognized that consumers' appetite for data rich and spectrum intensive services is growing rapidly and believed that this dynamic would continue for the foreseeable future."); Borth Decl. at 24 ¶ 48 ("SpectrumCo reasonably determined that 20 MHz of AWS spectrum was not enough to fulfill the long-term business plans of its owners . . . ."). As the FCC has acknowledged, other industry players have reached the same conclusion: "operators, regulators and others have attempted to forecast the amount of spectrum that will be needed. Given current trends and future uncertainty, virtually all the major players in the wireless industry have stated on the record that more spectrum is needed. Estimates range from 40 to 150 megahertz *per operator*." FCC, *Connecting America: The National Broadband Plan* 84 (2010) ("*National Broadband Plan*") (citations omitted; emphasis in original), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.

with the iPad following in 2010.[22] The first Android-powered phone became commercially available in late 2008.[23] As the President's Council of Economic Advisors reported just last month, "Thanks to the proliferation of mobile devices with wireless internet access, along with the growth of media-rich consumer applications, the volume of data traffic traveling over the wireless networks has been exploding."[24] And this growth is expected to increase significantly more in the years to come.[25] In short, "[t]he surge in wireless data traffic has caused a 'spectrum crunch'" that all wireless providers, regardless of their current spectrum assets, are experiencing.[26]

Moreover, as wireless broadband usage has expanded, speed has become an increasingly important end-user consideration, as well as a differentiator among wireless competitors, as is reflected in the frequent advertising touting mobile providers' speeds.[27] As one analyst recently noted about the release of the new 4G-equipped iPad, "'This is the device people want. They want the fastest speed.'"[28] Speed and spectrum capacity are directly related, and high-speed services demand substantial bandwidth. To meet this increasing demand, SpectrumCo would have had to acquire significantly more spectrum – and incur substantial costs to provision and build the network.[29] Acquiring more spectrum, however, would have increased the cost of deploying the service; but just as importantly, it was unclear when additional spectrum licenses would be available.[30]

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[22] *See* Press Release, Apple, *iPhone Premieres This Friday Night at Apple Retail Stores* (June 28, 2007), *available at* http://www.apple.com/pr/library/2007/06/28iPhone-Premieres-This-Friday-Night-at-Apple-Retail-Stores.html; Press Release, Apple, *Apple Launches iPad* (Jan. 27, 2010), *available at* http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html.

[23] *See* Google, *The First Android-Powered Phone* (Sept. 23, 2008), http://googleblog.blogspot.com/2008/09/first-android-powered-phone.html.

[24] Council of Economic Advisers, Executive Office of the President, *The Economic Benefits of New Spectrum for Wireless Broadband* 1 (Feb. 2012) ("*President's Council of Economic Advisers Report*"), *available at* http://www.whitehouse.gov/sites/default/files/cea_spectrum_report_2-21-2012.pdf. In fact, the "number of mobile wireless connections in the U.S. (with speeds over 200 kilobits per second) grew by over 160% from the end of 2008 through June 2010, while the average data used per line increased almost fivefold from the first quarter of 2009 through the second quarter of 2010." *Id.* at 3.

[25] *See National Broadband Plan* at 85 ("As smartphones, laptops, and other devices become increasingly integral to consumers' mobile experiences, mobile data demand is expected to grow between 25 and 50 times current levels within 5 years."). "Cisco projects that mobile data traffic in the U.S. will increase by a factor of 20 between 2010 and 2015." *President's Council of Economic Advisers Report* at 5.

[26] *President's Council of Economic Advisers Report* Executive Summary.

[27] High-speed network access is critical for applications that require high responsiveness, like two-way video communications.

[28] Poornima Gupta & Sinead Carew, *Apple's Next iPad May be a 4G Game Changer*, Reuters, Mar. 6, 2012, *available at* http://www.reuters.com/article/2012/03/07/us-apple-ipad-idUSTRE8250WJ20120307 (quoting UBS analyst John Hodulik).

[29] *See* Borth Decl. ¶¶ 37-47.

[30] Historically, it has taken the FCC 6-13 years to make new spectrum available. Omnibus Broadband Initiative, FCC, *Mobile Broadband: The Benefits of Additional Spectrum*, FCC Staff Technical Paper No. 6, at 26 (Oct. 2010), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1021/DOC-302324A1.pdf; *see also National Broadband Plan* at 79 & Exhibit 5-C.

In the end, SpectrumCo found that the substantial costs associated with construction of a wireless network, the lack of a reasonable guarantee of a return on the investment, and the risks associated with becoming an additional facilities-based competitor in the highly competitive wireless marketplace did not make business sense and could not be justified.[31] Accordingly, SpectrumCo explored other options with almost every participant in the wireless industry, including the sale of the spectrum to other companies and acquisitions, joint ventures, and network sharing arrangements with other wireless companies. Ultimately, SpectrumCo was not able to reach agreements or find solutions – sometimes because SpectrumCo decided not to pursue the transaction, and other times because the other party decided not to pursue it – that made as much sense as selling the spectrum to Verizon Wireless.[32]

B. SpectrumCo's Decision to Sell the AWS Spectrum to Verizon Wireless.

After many months of negotiations, on December 16, 2011, Verizon Wireless and the Cable Companies filed with the FCC applications to assign the SpectrumCo AWS licenses to Verizon Wireless.[33] The applications included a detailed Public Interest Statement and declarations explaining the specifics of the transaction and why approval would benefit consumers, enhance competition, and promote the public interest. The FCC put the applications on public notice on January 19, 2012, and set a pleading cycle for petitions to deny, oppositions, and replies that (as recently extended) will be completed on March 26, 2012. Although there were a number of comments and petitions to deny filed in response, none of the parties opposing the assignment of the licenses offered a convincing or rational reason, let alone any evidence, why the applications should be denied. In addition to filing the applications at the FCC, Verizon Wireless and the Cable Companies submitted the License Assignment and the Commercial Agreements to the DoJ for it to review.[34] The companies subsequently submitted the Commercial Agreements to the FCC for review in the license assignment proceeding as well, subject to protective orders to protect confidential commercial information. The License Assignment and Commercial Agreements, therefore, are being thoroughly reviewed by the responsible agencies.

Selling the AWS licenses to Verizon Wireless is the most efficient and expeditious way to put the spectrum to use for the benefit of consumers. Verizon Wireless is rapidly deploying the first national 4G LTE wireless network. Yet, despite the spectral

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[31] *See* Pick Decl. ¶¶ 11-15. Cox actually constructed a facilities-based network in two markets, but decommissioned its network after it became clear that it would be unable to deploy its services "without sustaining unacceptably large losses." Verizon Wireless, et al. Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, Ex. 6, at 13 (Mar. 2, 2012) ("Commercial Agreements Addendum").

[32] *See* Pick Decl. ¶ 16.

[33] Verizon Wireless and Cox Communications filed the application to assign Cox's licenses on December 21, 2011.

[34] The parties have filed and produced hundreds of thousands of documents with the DoJ and have had cooperative discussions with the DoJ economists and staff to explain the pro-competitive and pro-consumer effects of the Commercial Agreements.

efficiencies and enhanced throughput provided by 4G LTE technology, accelerating demand for wireless broadband services will outpace the company's available spectrum capacity. The AWS spectrum will allow Verizon Wireless to supplement the spectrum it currently uses to provide 4G LTE service, and by doing so will alleviate spectrum constraints that otherwise could affect service; Verizon Wireless predicts that service could be affected in some areas as early as 2013 and in many others by 2015.[35]

The License Assignment will promote the government's objective of putting more spectrum to use delivering wireless broadband. As the President and other policymakers have explained, "[e]xpanded wireless broadband access will trigger the creation of innovative new businesses, provide cost-effective connections in rural areas, increase productivity, improve public safety, and allow for the development of mobile telemedicine, telework, distance learning, and other new applications that will transform American lives."[36] "[I]f wireless data traffic is constrained by shortages of available spectrum, the potential for wireless broadband to generate substantial economic benefits by serving as a platform for innovation will be severely limited."[37]

The FCC has recognized that the most efficient way to put more spectrum to use delivering wireless broadband is to "permit spectrum to flow more freely among users and uses in response to economic demand."[38] Verizon Wireless is in a position where it can make efficient and effective use of the AWS spectrum in the very near future, whereas the Cable Companies are not in the same position and cannot make a business case for using the spectrum to build a new wireless network. The assignment of the licenses will ensure that Verizon Wireless will continue to offer innovative, fast, and high-capacity data and voice services – services that are very highly valued and increasingly demanded by consumers. And, as explained in detail below, selling the AWS licenses to Verizon Wireless to efficiently deploy services to consumers does not raise any competitive concerns.[39]

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[35] Verizon Wireless, et al. Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, Ex. 2 ¶ 3 (Mar. 2, 2012).

[36] President Barack Obama, *Unleashing the Wireless Broadband Revolution* (June 28, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution; *see President's Council of Economic Advisors Report* at 7 ("With access to sufficient spectrum, wireless broadband has the potential to transform many different areas of the American economy, as new wireless technologies give new capabilities to consumers, businesses, and the public sector."); *id.* at Executive Summary ("Like other information and communication technologies that have transformed the economy in the past, the spread of wireless broadband is likely to increase the rate of growth in per capita income; spur economic activity through new business investment; and support many new high-quality jobs.").

[37] *President's Council of Economic Advisers Report* at 7.

[38] *Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd. 11322 ¶ 33 n.27 (2009); *see also Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report & Order, Order on Reconsideration, & Second FNPRM, 19 FCC Rcd. 17503, 17505 ¶ 1 (Sept. 2, 2004); Public Interest Statement at 16-19.

[39] *See infra* Section III.B.; *see also* Public Interest Statement at 19-33.

At the same time, the Cable Companies' need for a wireless solution remained a priority so that we could compete and deliver the services our customers wanted. As described in the next section, we have found that solution in the form of a series of Commercial Agreements with Verizon Wireless that will produce significant benefits for consumers without diminishing competition.

II. THE COMMERCIAL AGREEMENTS WILL BENEFIT CONSUMERS, PROMOTE COMPETITION, AND ACCELERATE INNOVATION IN THE BROADBAND MARKETPLACE.

The Reseller Agreements provided the Cable Companies with a long-term wireless strategy for developing and marketing their own branded wireless services, one that may provide more flexibility and potential upside for the Cable Companies, consumers, and competition. The Innovation Technology Joint Venture Agreement offered the opportunity to combine the wired expertise of the Cable Companies with the wireless expertise of Verizon Wireless to research and develop technology and intellectual property that would integrate wired video, voice, and high-speed data services with wireless technologies and would compete with integrated marketplace solutions being offered by others. Finally, the Agency Agreements gave the Cable Companies a short-term solution that provides them a path to quickly and efficiently offer wireless services and to compete with other marketplace providers' multiproduct bundles. These Commercial Agreements will benefit consumers and competition and lead to expanded choice; improved quality; technological innovation and integration; and increased efficiency for consumers.[40]

A. The Commercial Agreements Offer Significant Consumer Benefits.

1. The Reseller Agreements

The Reseller Agreements allow the Cable Companies to elect, beginning in 2016, to sell individually-branded wireless services using the Verizon Wireless network, marketed at prices and in packages determined by each Cable Company. Customers who purchase these services would be the customers of the Cable Company that sold them the services and not Verizon Wireless. These types of agreements, called Mobile Virtual Network Operator ("MVNO") agreements, enable companies that do not have their own wireless networks to develop and market their own branded wireless service offerings to attract customers and are common in the industry (at last count, there were over 50 according to the FCC).[41]

For example, in exchange for a per unit fee (e.g., per minute of use or gigabyte of use), the Reseller Agreements would allow Comcast to combine its existing infrastructure,

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[40] *See* Commercial Agreements Addendum at 1-4, 16-19.

[41] *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, 26 FCC Rcd. 9664, app. C, Table C-6 (2011) ("*Fifteenth Wireless Report*").

cutting-edge intellectual property and technology, branding and marketing expertise, and back-office support with Verizon Wireless's sophisticated, high-speed wireless network to create a highly desirable, differentiated Comcast wireless service offering. Under these mutually-beneficial, marketplace-negotiated agreements, consumers would be the clear winners from this additional competition in the wireless marketplace.

The Reseller Agreements also would equip each Cable Company with the ability to offer an even more attractive suite of four compelling products than we can offer under the Agency Agreements. Comcast, for example, would be able to sell its own Comcast-branded wireless service as part of a bundle of services with at least one of its video, voice, or high-speed Internet products.[42]

The FCC has observed that "MVNOs often increase the range of services offered . . . by targeting certain market segments, including segments previously not served by the hosting facilities-based provider," and that MVNOs often offer industry-leading pricing packages.[43] Not only do they tend to serve underserved consumer segments, but they also expand consumer choice over wireless bundles, and more fully and efficiently employ spectrum and other network infrastructure. In addition, MVNOs increasingly have the ability to provide their subscribers access to feature-laden and heavily-demanded devices.[44]

A growing number of consumers perceive real value in MVNO offerings and view MVNOs as substitutes for facilities-based carriers. For example:

- Although the third quarter of 2011 was a difficult period for many wireless carriers, TracFone, a subsidiary of América Móvil that operates as an MVNO in the United States, added 515,000 subscribers, an increase of 15.7 percent over the previous year, bringing the company's total subscribers to 19.3 million.[45]

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[42] *See* Commercial Agreements Addendum at 4.

[43] *Fifteenth Wireless Report* ¶ 33; *see id.* ¶ 96 (noting that TracFone is "generally regarded as the leader in the low-end prepaid niche"). "In particular, independent resellers and MVNOs may be able to undercut the market leaders and thereby provide an additional constraint on coordinated interaction in markets which have the potential to be dominated by the two or three largest carriers." *Applications of Cellco P'ship d/b/a Verizon Wireless and AT&T, Inc.*, Memorandum Op. & Order and Declaratory Ruling, 25 FCC Rcd. 10985 ¶ 36 (2010); *Applications of AT&T Inc. and Centennial Communications Corp.*, Memorandum Opinion & Order, 24 FCC Rcd. 13915 ¶ 45 (2009); *Applications of Nextel Communications, Inc. and Sprint Corp.*, Memorandum Op. & Order, 20 FCC Rcd. 13967 ¶ 88 (2005).

[44] For example, TracFone recently released its first Android-based smartphone through its Straight Talk brand. *See* Chris Burns, *Samsung Galaxy Precedent Makes Off-Contract Android Ultra Cheap*, SlashGear, Aug. 20, 2011, *available at* http://www.slashgear.com/samsung-galaxy-precedent-makes-off-contract-android-ultra-cheap-20173260/. News reports also have indicated that Sprint's "flagship smartphones" may soon become available through its prepaid and wholesale partners. *See* Roger Cheng, *Could Sprint's Galaxy S II become a prepaid phone?*, CNET News, Nov. 2, 2011, *available at* http://news.cnet.com/8301-1035_3-20129115-94/could-sprints-galaxy-s-ii-become-a-prepaid-phone/.

[45] América Móvil, S.A.B. De C.V., SEC Form 6-K, at 15 (Nov. 7, 2011).

- Another MVNO, Virgin Mobile USA ("Virgin Mobile"), became so popular reselling Sprint Nextel's service that Sprint Nextel acquired the MVNO in 2009.[46] Virgin Mobile continues to be a successful player in the pre-paid mobile wireless marketplace and has had particular success attracting younger subscribers.[47]

The government consistently has acknowledged the benefits that resellers can provide to consumers and has never insisted on pre-approving such agreements. In fact, it has encouraged – and even compelled – them. And the FCC has reported the existence of more than 50 reseller agreements in the wireless space.[48]

The Reseller Agreements offer the possibility for even greater benefits for consumers. Unlike prior MVNO providers (which offered solely wireless products), the Cable Companies have the ability to combine wireless services with wired services to create attractive bundles on a large scale for consumers.

In short, the Reseller Agreements will enable the Cable Companies to create and offer their own branded wireless services to their customers in direct competition with all other existing wireless providers. The result will be that over 30 million current cable customers and tens of millions of other consumers will have another option for how they get their wireless services. More significantly, Comcast and the other Cable Companies will be able to develop their own sophisticated suite of wireless products and services that, like their other products and services, will be at the vanguard of technology, convenience, and functionality and of a quality and reliability that the Cable Companies' customers have come to expect. And the Reseller Agreements will enable Comcast to provide its own, unique competitive wireless and multiproduct alternatives.

2. The Innovation Technology Joint Venture Agreement

The Innovation Technology Joint Venture Agreement formed a new limited liability company (the "Innovation Technology Joint Venture" or "Joint Venture") for the purpose of developing technology and intellectual property to create innovative and compelling new products that compete with the integrated wired and wireless solutions developed by AT&T, Dish Network, Google, Microsoft, Apple, and others.[49] The Joint Venture will increase competition and benefit consumers by allowing Verizon Wireless and the Cable Companies to develop next-generation technologies that will enhance consumers' communications and media services.[50]

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[46] *See Sprint Acquires Virgin Mobile USA*, Seeking Alpha, Nov. 25, 2009, *available at* http://seekingalpha.com/article/175378-sprint-acquires-virgin-mobile-usa. Virgin Mobile had 5.2 million subscribers at the time of its acquisition by Sprint Nextel.

[47] *See* Peter Svensson, *Sprint Overhauls Virgin Mobile, Includes Data*, Associated Press, May 6, 2010, *available at* http://www.msnbc.msn.com/id/36998575/ns/technology_and_science-wireless/t/sprint-overhauls-virgin-mobile-includes-data/.

[48] *See Fifteenth Wireless Report* app. C, Table C-6.

[49] *See* Commercial Agreements Addendum at 4.

[50] *See id.*

The Joint Venture will allow Verizon Wireless to use its wireless expertise and the Cable Companies to use their wired network expertise to collaborate in developing next-generation technologies that will significantly enhance consumers' communications and media experiences.[51] For example, the Joint Venture will explore technology developments that allow consumers' devices to seamlessly transition between WiFi and mobile wireless networks. This would allow consumers to experience optimal data transfer speeds and enhanced mobility, while also reducing demands on heavily stressed mobile wireless networks. The Joint Venture also will explore ways to provide feature-rich video content on consumers' mobile devices. And the companies will work to integrate services like voice mail, caller ID, and contact lists across home and wireless phones, while also enabling seamless access to content like photos, videos, and music, on both home televisions and mobile devices.

By enabling this cross fertilization, the Joint Venture will spur innovation and new technology, increase consumer choice and competition, and reduce transaction costs. Congress and the federal antitrust agencies have long recognized that research and development collaborations like the Joint Venture are procompetitive.[52] As the DoJ and FTC have explained: "an R&D collaboration may enable participants more quickly or more efficiently to research and develop new or improved goods, services, or product processes."[53] In fact, the DOJ has repeatedly endorsed the procompetitive benefits of R&D joint ventures in multiple industries, including the communications and media industries.[54] And we are not aware of any government challenge to an R&D joint venture in the wireline or wireless space. Thousands of R&D joint ventures have filed notifications with the Justice Department and FTC under the National Cooperative

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[51] *See* Tech. Policy Inst. Comments, WT Docket No. 12-4, at 18 (Feb. 21, 2012) ("[W]ireless and wireline operators working together may be more likely to make breakthroughs in creating technological complementarities across the two technologies . . . . It is plausible that working together the companies will make advances they would not have made otherwise.").

[52] For example, to ensure that the antitrust laws do not inappropriately deter procompetitive R&D joint ventures, Congress adopted the National Cooperative Research Act of 1984, which provides that such ventures are not illegal *per se* and are subject to only single damages (rather than the usual treble damages) in antitrust lawsuits. *See* Pub. L. No. 98-462, 98 Stat. 1815 (1984). The goals of the Act are even more pertinent today, where "[t]he single most vibrant part of [the] economy is the communications sector" which has "generate[d] almost a half million jobs, while the rest of the economy has stagnated." Progressive Policy Inst. Comments, WT Docket No. 12-4, at 1 (Feb. 21, 2012) (citing Michael Mandel, *Where the Jobs Are: The App Economy*, TechNet, Feb. 7, 2012, *available at* http://www.technet.org/wp-content/uploads/2012/02/TechNet-App-Economy-Jobs-Study.pdf).

[53] Dep't of Justice & FTC, *Antitrust Guidelines for Collaboration Among Competitors* 14, § 3.31(a) (2000). Although the *Guidelines* also note that such collaborations can increase market power or facilitate its exercise by limiting independent decisionmaking or combining control over competitively significant assets or a participant's individual competitive R&D efforts, the Innovation Technology Joint Venture does not limit decisionmaking or combine control over assets or R&D efforts.

[54] *See* Commercial Agreements Addendum at 19.

Research and Production Act of 1993 ("NCRPA"),[55] including a number researching and developing wireless technologies.

Those procompetitive benefits will be present here as well. By enhancing the Cable Companies' and Verizon Wireless's own products and services, the Joint Venture will likely spur other companies – satellite providers, telcos, cable operators, wireless providers, and technology companies – to develop their own competing technologies. In the end, consumers will benefit from this sort of investment and innovation, as they will be able to enjoy more and better products that work across wired and wireless platforms.

3. The Agency Agreements

The Agency Agreements authorize Verizon Wireless and each of the Cable Companies to act as sales agents for the other company's services. The Cable Companies are authorized to sell Verizon Wireless services to consumers within their cable network footprints through various sales channels (e.g., websites and telesales) but under service and rate plans established by Verizon Wireless. Each Cable Company receives a one-time commission for each Verizon Wireless sale it makes, but all customers that subscribe to Verizon Wireless service through one of the Cable Companies will become wireless customers of Verizon Wireless (not the Cable Company that signed up the customer).

Similarly, Verizon Wireless is authorized to sell each of the Cable Companies' video, digital voice, and high-speed Internet services to customers within the companies' respective footprints through Verizon Wireless's sales channels (e.g., retail stores, websites, and telesales), but under service and rate plans established by each Cable Company. Verizon Wireless receives a one-time commission for the sale, but all customers who sign up for a Cable Company's service through Verizon Wireless become customers of the Cable Company (not Verizon Wireless).

The Agency Agreements provide the Cable Companies and Verizon Wireless with a quick and efficient path to offer wireless and wired services individually and in multiproduct bundles that compete against the offerings of companies such as AT&T, DIRECTV, Dish Network, CenturyLink, and others, which already offer bundles of wireless and wired services to consumers.[56] The FCC has acknowledged the consumer benefits of multiproduct bundles,[57] and the Agency Agreements will enable the Cable

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[55] Joint ventures that file notifications under the NCRPA, 15 U.S.C. §§ 4301-4306, are entitled to certain protections under the Act. Notifications are filed with the Justice Department and FTC and then published in the Federal Register. *See* Dep't of Justice, *Filing a Notification Under the NCRPA*, http://www.justice.gov/atr/public/guidelines/ncrpa.html (last visited Mar. 16, 2012).

[56] *See* Commercial Agreements Addendum at 3 ("Today, AT&T, DIRECTV, Dish Network, CenturyLink, and others offer multi-product bundles. The Commercial Agreements allow the MSOs and Verizon Wireless to respond to this competition with a top-notch suite of products of their own.").

[57] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd. 542 ¶ 70 (2009) ("Cable companies are combining video, high-speed Internet, and telephone services into bundles of two or three products and offering them

Companies and Verizon Wireless each to offer the benefits of these bundles to tens of millions of consumers.[58] Consumers will continue to have the same number of choices among video, broadband, wired voice, and wireless service providers as they do now, but they will have additional options for how, where, and when they subscribe to multiproduct bundles.

These Agency Agreements are market standard agreements, comparable to the literally thousands of agency agreements already in place in the wireless marketplace.

Comcast and Verizon Wireless already have initiated the Agency Agreements in several markets and are providing these benefits to consumers in those markets today.[59] In their initial implementation, Comcast and Verizon Wireless are offering qualifying customers who subscribe to both companies' services up to $300 on a prepaid debit card, which can be used for anything they want, including to cover the price of a new smart phone or tablet.[60] We expect that the Agency Agreements will result in other financial benefits and product offers going forward.

Importantly, as explained in more detail below, these benefits are being achieved without any *loss* of competition – all the parties that previously provided voice, video, broadband, and wireless services continue to do so. In fact, consumers in the markets where the Agency Agreements have been initiated now have *new* options – to order Verizon Wireless's services from Comcast and to order Comcast's services from Verizon Wireless. And, by enabling Verizon Wireless and each Cable Company to offer more attractive packages and pricing incentives to their subscribers, the Agency Agreements, in turn, will likely incent competitors to respond with their own pro-consumer offerings.[61]

B. The Commercial Agreements Will Not Reduce or Harm Competition.

The Commercial Agreements do not involve the acquisition of any competitor or any merger with a rival. There is no acquisition of customers or of ongoing business operations. Rather, the Commercial Agreements are commonplace, industry-standard reseller, technology development, and agency agreements that provide substantial consumer benefits and are prevalent throughout the communications marketplace. Claims to the contrary – including by some competitors – appear to be motivated in part by certain parties' desire to have the AWS licenses for themselves or their concern that the License Assignment and Commercial Agreements will *increase* competition in the

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at discounted introductory prices and/or savings on long-term prices, when compared with the price of buying each service separately.").

[58] *See* Commercial Agreements Addendum at 3.

[59] *See, e.g.*, Press Release, Comcast Corp., *Verizon Wireless and Comcast Team Up in Seattle to Deliver to Consumers the Best Video Entertainment, Communications and Internet Experiences at Home and Away* (Jan. 17, 2012), *available at* http://www.comcast.com/about/pressrelease/pressreleasedetail.ashx?SCRedirect=true&PRID=1144.

[60] *See id.*

[61] *See* Commercial Agreements Addendum at 3 ("This, in turn, will prompt competitive responses from other providers, all of which advances consumer welfare.").

marketplace and require them to respond accordingly. The antitrust laws and competition policy, however, are designed to *protect competition*, not to insulate competitors from having to respond to competition.[62]

1. The Commercial Agreements Are Similar to Other Marketplace Arrangements.

As noted above, Comcast and Verizon Wireless already have initiated certain of the Commercial Agreements in some markets. The launch of these agreements already has demonstrated that the benefits to consumers are achieved with no detrimental change to the marketplace – all the parties that previously provided voice, video, broadband, and wireless services continue to do so. No outlets for buying these services were eliminated. All that happened was that consumers now have *new options* – to order Verizon Wireless's services from Comcast, and to order Comcast's services through Verizon Wireless – for purchasing their services individually or as part of a new discounted bundle of services (with additional sign-up incentives) that gives consumers an alternative to existing multiproduct options already offered in those markets.

There are no barriers to entry here. Other providers of communications services can enter into similar arrangements – and have done so. For example, with respect to MVNOs, in its most recent Wireless Competition Report, the FCC identified more than 50 MVNOs in the marketplace today.[63] And just last week, Clearwire and Leap Wireless signed a new reseller agreement for Leap to offer its Cricket service over Clearwire's LTE network.[64]

With respect to agency agreements, there are thousands of agency agreements in the wireless marketplace. In fact, just in the last year, several of our competitors have signed similar agreements:

- Frontier Communications and AT&T Mobility announced a three-year agency agreement on November 15, 2011 that enables Frontier to offer customers access to AT&T smartphones and the AT&T mobile broadband network bundled with Frontier's broadband Internet, voice, and satellite TV services, all on a single bill from Frontier.[65]

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[62] *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986); *Applications of OTI Corp., and Its Shareholders, Transferors, and MCI Communications Corp., and MCI/OTI Corp., Transferees*, Order, 6 FCC Rcd. 1611 ¶ 13 (Common Carrier Bureau 1991) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[63] *Fifteenth Wireless Report* app. C, Table C-6.

[64] *See* Scott Moritz, *Clearwire Wins "Milestone" Wireless Contract with Leap*, Bloomberg Businessweek, Mar. 14, 2012, *available at* http://www.businessweek.com/news/2012-03-14/clearwire-wins-contract-to-provide-network-for-leap-s-4g-service.

[65] *See* Press Release, Frontier Communications Corp., *Frontier Communications Teams with AT&T to Offer Wireless Voice and Data Products* (Nov. 15, 2011), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=66508&p=irol-newsArticle&ID=1630726&highlight=.

- AT&T and DIRECTV signed a three-year commercial agreement on November 3, 2011 through which both companies are able to offer customers a quadruple-play bundle of AT&T/DIRECTV video service and AT&T broadband, home phone, and wireless voice services, as well as bundled discounts.[66]

- CenturyLink and Verizon Wireless announced an agreement on February 15, 2011, under which CenturyLink became an authorized agent of Verizon Wireless and can offer customers Verizon Wireless service with CenturyLink's High-Speed Internet, unlimited local and long distance, and television services.[67] (Qwest, which CenturyLink acquired in 2011, entered into a similar agreement with Verizon Wireless in 2008.)[68]

Reseller and agency agreements have been routine in the marketplace throughout the past decade. For example, the FCC has identified MVNOs as competitors in the wireless marketplace since 2002.[69] And with respect to agency agreements, our competitors entered into their own agency agreements to offer multiproduct bundles of services nearly ten years ago:

- In 2003, SBC (now AT&T) announced plans to offer a co-branded service with EchoStar Communications, called the "SBC Dish Network," to homes in its footprint as part of a package of local, long-distance, wireless, and DSL services. The agreement allowed SBC to manage customer relationships, and SBC invested

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[66] *See* Press Release, DIRECTV, Inc., *AT&T and DIRECTV Sign Three-Year Extension Agreement to Deliver AT&T / DIRECTV to AT&T Customers* (Nov. 3, 2011), *available at* http://investor.directv.com/releasedetail.cfm?ReleaseID=620738. Through a separate agreement, DIRECTV also sells AT&T broadband Internet services, including AT&T U-verse High Speed Internet, through its sales distribution channels and to existing DIRECTV customers. *Id.*

[67] *See* Press Release, CenturyLink, Inc., *CenturyLink to Offer Verizon Wireless Equipment, Service Plans* (Feb. 15, 2011), *available at* http://news.centurylink.com/index.php?s=43&item=101.

[68] *See* Press Release, Verizon Wireless, *Qwest to Deliver Verizon Wireless Products and Services to Its Customers* (May 5, 2008), *available at* http://news.verizonwireless.com/news/2008/05/pr2008-05-05a.html. Many retailers sell the wireless services of unaffiliated providers to consumers. For example, Best Buy is a sales agent for Verizon Wireless, AT&T Mobility, Sprint, and T-Mobile, and RadioShack is a sales agent for Verizon Wireless, AT&T Mobility, and Sprint. *See* Best Buy, Mobile Phones, http://www.bestbuy.com/site/Electronics/Mobile-Cell-Phones/abcat0800000.c?id=abcat0800000 (last visited Mar. 19, 2012); Radio Shack, Cell Phones & Plans, http://radioshackwireless.com/mobile/?r=radioshack&refcode1=RSK_0000_000_CELLTOP (last visited Mar. 19, 2012).

[69] *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*, Seventh Report, 17 FCC Rcd. 12985, 13025-26 (2002) ("Recently, a new version of reseller, referred to as a 'mobile virtual network operator,' or 'MVNO,' has begun to appear in this country after experiencing some success in Europe and Asia.").

$500 million in EchoStar as part of the deal.[70] The agreement was extended in 2005.[71]

- In 2003, Qwest and EchoStar entered into an agreement that allowed Qwest to sell Dish Network service to Qwest subscribers.[72]

- In 2002, SBC and Dish Network entered into an agreement that allowed both parties to offer video and DSL services to their customers.[73]

The government has never publicly raised concerns about, questioned the benefits of, or challenged any of our competitors' agency agreements that enable them to do exactly what the Agency Agreements at issue here allow the Cable Companies and Verizon Wireless to do. Importantly, as the multiple examples of agency and reseller agreements set forth in this testimony demonstrate, the Agency and Reseller Agreements at issue in this transaction are industry standard and commonplace.

So too is the Innovation Technology Joint Venture. As noted above, thousands of R&D joint ventures have filed notifications with the Justice Department and FTC under the NCRPA,[74] including a number researching and developing wireless technologies. For example, Bellcore and RIM created a joint venture "to engage in cooperative research related to wireless paging, data, protocols, and other services and networks to better understand the feasibility and application of such technologies for leading edge wireless and messaging services."[75] More recently, Citrix created a joint venture with Intel and others to "promote the use, sale and adoption of mobile computing and communications technologies, architectures, methodologies, services and solutions."[76]

Many companies, such as AT&T, Dish Network, Apple, Microsoft, Google, and others have been developing wireless/wired integration technology for years.[77] The Joint

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[70] *See* Press Release, EchoStar Communications Corp., *SBC Communications, EchoStar Forge Strategic Partnership, Will Offer 'SBC Dish Network' Television Service* (July 21, 2003), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=243629.

[71] *See* Press Release, EchoStar Communications Corp., *SBC Communications, EchoStar Reach New Strategic Pact* (Sept. 20, 2005), *available at* http://press.dishnetwork.com/Press-Center/News-from-DISH/page/SBC-Communications,-EchoStar-Reach-New-Strategic-P.

[72] *See* Press Release, Qwest Communications Int'l Inc., *Qwest Forges Agreement with EchoStar to Offer Satellite Services as Part of Communications Bundle* (July 21, 2003), *available at* http://news.centurylink.com/index.php?s=43&item=1003.

[73] *See* Ray Wilkins, Group President, SBC Marketing & Sales, *SBC/Dish Network Changes Everything* 3 (Spring 2004), *available at* www.att.com/Common/files/pdf/sbc_dish_mailer.pdf.

[74] *See supra* note 55 and accompanying text.

[75] *Notice Pursuant to the Nat'l Coop. Research & Prod. Act of 1993; Bell Communications Research, Inc.*, 62 Fed. Reg. 26554, 26555 (1997).

[76] *Notice Pursuant to the Nat'l Coop. Research & Prod. Act of 1993; Mobile Enterprise Alliance, Inc.*, 69 Fed. Reg. 44062, 44062 (2004).

[77] *See* Press Release, Google Inc., *Industry Leaders Announce Open Platform for Mobile Devices* (Nov. 5, 2007), *available at* http://ww.google.com/intl/en/press/pressrel/20071105_mobile_open.html;

Venture is not different in concept from joint R&D activities undertaken by other communications companies.[78] For example, Sprint already offers "integrated wireless and wireline solutions," and it has been able to do so in part because of its collaboration with companies such as BroadSoft.[79]

The Innovative Technology Joint Venture simply will enable Verizon Wireless and the Cable Companies to compete more effectively against other companies' communications technology solutions in the rapidly changing technology marketplace. R&D joint ventures such as this one rarely raise anticompetitive concerns.[80] Comcast is not aware of any R&D joint venture in the wireline or wireless space ever having been questioned or challenged by the government.

In sum, the Commercial Agreements will not harm competition. Instead, just like other similar agreements that have been in existence for decades, the Commercial Agreements will enhance consumer welfare by offering more choices and attractive pricing incentives; they will enhance competition by allowing the companies to respond more effectively to competitors' offerings; and they will foster innovation and creativity.

2. The License Assignment and Commercial Agreements Do Not Eliminate Any Actual or Potential Competitors.

The License Assignment and Commercial Agreements do not result in the elimination of any present (or foreseeable) wireless competitor. Following the License Assignment, Verizon Wireless will continue to compete with every wireless provider with which it competes today. AT&T, Sprint, T-Mobile, Leap Wireless, MetroPCS, US Cellular, and dozens of regional wireless companies will continue fighting for customers with each

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Press Release, Google Inc., *Sprint and Google Expand Relationship to Enable Richer Mobile Experience and More Choices for Sprint Customers* (May 7, 2008), *available at* http://www.google.com/intl/en/press/pressrel/20080507_sprint_mobile.html; Press Release, Apple Inc., *Apple Launches iPad* (Jan. 27, 2010), *available at* http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html. Several of these firms recently agreed to acquire large portfolios of intellectual property that pertain to wireless technology. Press Release, Google Inc., *Google to Acquire Motorola Mobility* (Aug. 5, 2011), *available at* http://investor.google.com/releases/2011/0815.html; Press Release, Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd.* (Feb. 3, 2012), *available at* http://www.justice.gov/opa/pr/2012/February/12-at-210.html.

[78] *See* Commercial Agreements Addendum at 19.

[79] Press Release, BroadSoft, Inc., *Sprint Introduces Wholesale Mobile Integration* (Sept. 13, 2010), *available at* http://www.broadsoft.com/news/2010/sprint-introduces-wholesale-mobile-integration/.

[80] *See Princo Corp. v. Int'l Trade Commission*, 616 F.3d 1318, 1334-35 (Fed. Cir. 2010) ("Although joint ventures can be used to facilitate collusion among competitors and are therefore subject to antitrust scrutiny, research joint ventures . . . can have significant pro-competitive features, and it is now well settled that an agreement among joint venturers to pool their research efforts is analyzed under the rule of reason."); *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir. 1998) ("Where the venture is producing a new product . . . there is patently a potential for a productive contribution to the economy, and conduct that is strictly ancillary to this productive effort . . . is evaluated under the rule of reason.").

other and with Verizon Wireless, offering a wide range of different services, including discounted bundles of services through their own agency agreements.

As explained above, the Cable Companies do not currently operate any meaningful wireless network and have concluded that building such a network would not be economically viable.[81] In fact, Cox constructed a facilities-based network in two markets, but decommissioned its network after it became clear that it would be unable to deploy its services "without sustaining unacceptably large losses."[82] There is no basis in the antitrust laws to compel companies to make investments in businesses when they independently have concluded that such investments would not be profitable.[83]

Similarly, the License Assignment and Commercial Agreements do not result in the elimination of any present (or foreseeable) video, broadband Internet, or voice competitor. Comcast will continue to compete for video customers with satellite providers, telephone companies (including Verizon FiOS), smaller cable overbuilders, SMATV operators, and various emerging online competitors. It will continue to compete against telephone companies, smaller cable overbuilders, satellite broadband ISPs, and wireless broadband ISPs (both fixed and mobile) for broadband Internet customers. And, it will continue to compete for voice customers against telephone companies, wireless companies, and over-the-top voice providers such as Vonage, Google Voice, and Skype.

3. The Commercial Agreements Will Not Blunt Competition Between Verizon FiOS and the Cable Companies.

Contrary to the suggestions of some critics, the Commercial Agreements will not diminish Verizon Telecom's incentive to compete with the Cable Companies within the FiOS footprint. As a preliminary matter, this argument does not even make sense for most of the country; FiOS is not even available in more than 85 percent of the areas where the Cable Companies offer services.[84] But in all events, the notion that FiOS and the Cable Companies will no longer compete with one another is just not plausible in the face of the plain economic and business realities.

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[81] *See supra* Section I.A.

[82] Commercial Agreements Addendum Ex. 6, at 13.

[83] *See 7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.)*, 191 F.3d 1090, 1101 (9th Cir. 1999) ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute."); Deborah Platt Majoras, Chairman, FTC, Remarks as Prepared for Opening Session Hearings on Section 2 of the Sherman Act Sponsored by the FTC and the Antitrust Division, U.S. Dep't of Justice (June 20, 2006), *available at* http://www.justice.gov/atr/public/hearings/single_firm/docs/219108.htm ("[A]ny legal framework needs to avoid second-guessing business judgments that were objectively reasonable at the time that they were made. An *ex post facto* examination of the hypothetical effects of alternative courses of conduct is likely to chill legitimate business behavior.").

[84] *See* Commercial Agreements Addendum at 7-8.

Verizon Communications has invested more than $23 billion in its FiOS network, and it is not simply going to walk away from that investment. Indeed, FiOS revenues now represent 61 percent of Verizon Telecom's (which operates Verizon FiOS and Verizon's wired broadband Internet services) wireline customer revenues, and grew 18.2 percent over the last year alone.[85] And FiOS is taking market share from its competitors – FiOS increased its penetration in both the video and Internet marketplaces by roughly 4 percent over the last year. Verizon's publicly stated strategy is to continue increasing FiOS's penetration, since having more customers over the same shared plant increases FiOS's – and thus Verizon's – profitability. With the substantial initial investments in FiOS now largely complete, this product has become an ever-growing source of positive cash flow for the company.

Verizon Telecom will continue to have every incentive it had before the Commercial Agreements to compete vigorously against the Cable Companies. The one-time commission Verizon Wireless would receive for signing up a customer with Comcast would not come close to the ongoing revenue Verizon Communications would receive if that customer signed up for Verizon FiOS.

Basic economics confirms that Verizon would only injure itself if it "pulled its punches" in competition with the Cable Companies. Each FiOS subscriber provides Verizon an ongoing revenue stream that translates into a net present value of many thousands of dollars per customer. By contrast, Verizon stands to earn only a small fraction of that – at most an amount equal to a few percentage points of the value of a FiOS customer – in a one-time commission if a subscriber signs up for service with an MVPD other than FiOS, and then only if (1) the subscriber signs up for service with the Cable Companies, rather than another MVPD, and (2) does so through Verizon Wireless, as opposed to signing up with the Cable Companies directly or through other sales agents. Moreover, Verizon Communications owns only 55 percent of Verizon Wireless and would therefore receive only the benefit of that fraction of any commissions Verizon Wireless earns.

In sum, Verizon Communications would never sacrifice 100 percent of the many thousands of dollars associated with a FiOS subscriber in order to earn a fraction of a fraction of a fraction of a one-time commission paid to Verizon Wireless. It would be economically irrational for Verizon to forego further increased FiOS market share gains, with resulting recurring revenue and margin hits to FiOS, in return for little more than half of some small, one-time commission payments to Verizon Wireless. The Commercial Agreements simply do not and will not create any incentives for Verizon Telecom to increase the prices or otherwise reduce competition in the sale and marketing of its wireline services.

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[85] *See* Press Release, Verizon Communications, *Verizon Generates Strong Cash Flow, 18.2 Percent Shareholder Returns in 2011* (Jan. 24, 2012), *available at* http://www22.verizon.com/investor/news_verizon_reports_record_revenue_growth_in_4q_fueled_by_strong_demand_for_wireless_fios_and_strategic_.htm; *Verizon Provides Generous Dividends and Stock Appreciation*, Seeking Alpha, Mar. 9, 2012, *available at* http://seekingalpha.com/article/423581-verizon-provides-generous-dividends-and-stock-appreciation.

4. The Commercial Agreements Will Not Affect Verizon Telecom's Plans to Build Out the FiOS Network.

Nor will the Commercial Agreements have any impact on Verizon Telecom's plans to build out the FiOS network, either in local franchise areas ("LFAs") where FiOS is already present or into LFAs where FiOS has no presence or regulatory approval to operate.

As an initial matter, Verizon Telecom has existing legal commitments to build out FiOS in the LFAs where it is already present; the Commercial Agreements have no impact on these legal obligations of Verizon Telecom.

The Commercial Agreements will also have no impact on Verizon's plans regarding LFAs where FiOS has no presence, because Verizon decided to end substantial new capital investment in these LFAs over two years ago – well before Verizon Wireless entered into the Commercial Agreements. In particular, beginning in mid-2009, Verizon announced that it had no plans to expand the FiOS footprint:

- On a July 27, 2009 earnings call, for example, Verizon CFO John Killian stated that Verizon was "on track to be substantially finished with [FiOS] deployment by the end of 2010, which has positive implications for both capital spending and free cash flow."[86]

- On September 10, 2009, Mr. Killian reiterated that Verizon would "be substantially done with [its FiOS build out] at the end of 2010."[87]

- On October 26, 2009, Mr. Killian again stated that Verizon would "substantially complete [its] FiOS build program by the end of 2010, which alone should result in about $2 billion of capital savings each year."[88]

As Mr. Killian noted, Verizon chose to generate free cash flow by slowing capital spending and focusing instead on market share gains in areas where capital had been

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[86] John Killian, Executive Vice President & Chief Financial Officer, Verizon, Q2 2009 Verizon Earnings Conference Call at 5 (July 27, 2009), *available at* http://www22.verizon.com/idc/groups/public/documents/adacct/event_895_trans.pdf.

[87] John Killian, Executive Vice President & Chief Financial Officer, Verizon, Verizon at Bank of America Securities Media, Communications & Entertainment Conference at 6 (Sept. 10, 2009), *available at* http://www22.verizon.com/idc/groups/public/documents/adacct/event_905_trans.pdf.

[88] John Killian, Executive Vice President & Chief Financial Officer, Verizon, Q3 2009 Verizon Earnings Conference Call at 6 (Oct. 26, 2009), *available at* http://www22.verizon.com/idc/groups/public/documents/adacct/event_917_trans.pdf; Marguerite Reardon, CNET News, *Verizon Nears FiOS Network Completion* (Mar. 29, 2010), http://news.cnet.com/8301-30686_3-20001377-266.html ("Verizon Communications is nearly finished building its FiOS fiber-to-the-home network."); Peter Svensson, *Verizon Winds Down Expensive FiOS Expansion*, USA Today, Mar. 26, 2010, http://www.usatoday.com/money/industries/telecom/2010-03-26-verizon-fios_N.htm ("Verizon is nearing the end of its program to replace copper phone lines with optical fibers that provide much higher Internet speeds and TV service.").

spent.[89] Speculation that at some point Verizon, absent the Commercial Agreements, would reverse its current plan of record and spend billions more in scarce capital to further expand the FiOS footprint – beyond the expansion it is already undertaking – is completely speculative. Again, as explained above, the antitrust laws are not intended to compel companies to engage in hypothetical commercial ventures that they have already rejected based on marketplace realities.

5. Other Competitors Can Continue to Offer Multi-Product Bundles Regardless of the Agency and Reseller Agreements.

Contrary to the suggestions of some critics, the Agency and Reseller Agreements will not harm competition by precluding other competitors from offering multi-product bundles. As noted above, the relevant marketplaces are highly competitive, and consumers typically enjoy a choice among several wireless, broadband Internet, and voice providers, as well as MVPDs, including two direct broadcast satellite providers. Wireless service providers and other service providers therefore can create – and indeed have created – their own exclusive multiproduct bundles by combining their offerings.[90]

In addition, the exclusivity provisions contained in the Agency and Reseller Agreements are necessary to ensure the pro-competitive benefits of those agreements. The antitrust laws recognize that exclusivity commitments are common in agency agreements and frequently enhance the procompetitive benefits of such agreements.[91] These agreements cannot be successful unless the parties remain committed to their success; the exclusivity provisions are needed to ensure this commitment.[92] Indeed, other sales partnerships in the relevant markets – including partnerships that DIRECTV has entered into with AT&T and Verizon Telecom – have incorporated exclusivity provisions, without any objection from the DoJ, FTC, or FCC.

Moreover, while some providers offer multiproduct bundles that include wireless and wireline services, such offerings are not a prerequisite for participation in the communications marketplace. For example, while Sprint and the Cable Companies have offered bundles that feature wireless and wireline services, those bundles have historically not accounted for a material percentage of Sprint's or the Cable Companies'

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[89] *See* John Killian, Executive Vice President & Chief Financial Officer, Verizon, Q3 2009 Verizon Earnings Conference Call at 5–6 (Oct. 26, 2009), *available at* http://www22.verizon.com/idc/groups/public/documents/adacct/event_917_trans.pdf.

[90] *E.g.*, Press Release, DIRECTV, *AT&T and DIRECTV Sign Three-Year Extension Agreement to Deliver AT&T | DIRECTV Service to AT&T Customers* (Nov. 3, 2011), http://news.directv.com/2011/11/03/att-and-directv-sign-three-year-extension-agreement-to-deliver-att-directv-service-to-att-customers/.

[91] *See, e.g.*, Sheila F. Anthony, Commissioner, FTC, *Vertical Issues in Federal Antitrust Law* (Mar. 19, 1998) (explaining that an exclusivity commitment "may be procompetitive when it encourages retailers to invest in promoting the manufacturer's line, thereby enhancing *interbrand* competition at the retail level"), *available at* http://www.ftc.gov/speeches/anthony/aliabaps.shtm.

[92] *See Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) (Posner, J.) (explaining that exclusive arrangements often prevent free riding).

subscribers.[93] And other providers, such as Cricket Wireless, continue to focus on offering services that consumers can purchase on a stand-alone basis.[94] Stand-alone-service providers will remain vital competitors because consumers can and do create their own bundles of wireless and wireline services by selecting services from different providers.[95] These consumer-created bundles compete against providers' own multi-product bundles, and the Commercial Agreements in no way alter this dynamic.

Finally, to the extent some critics have complained that the Agency and Reseller Agreements will adversely affect other competitors by forcing them to offer lower prices or improved services in order to compete with Verizon Wireless's and the Cable Companies' improved product offerings (such as by offering discounts or other benefits as Comcast and Verizon Wireless have already done in Seattle, Portland, and San Francisco), these effects promote competition, benefit consumers, and further the public interest. To proscribe the Commercial Agreements because they promote competition and generate tangible consumer benefits would turn the antitrust laws on their heads.[96]

6. The Commercial Agreements Will Not Facilitate Illegal Collusion.

The Commercial Agreements do not and will not facilitate illegal collusion between the Cable Companies and Verizon Telecom. The Commercial Agreements are between the Cable Companies and Verizon Wireless, not Verizon Communications or Verizon Telecom. The Commercial Agreements require Verizon Wireless to establish comprehensive firewalls to prevent Verizon Telecom from getting access to any of the Cable Companies' competitively-sensitive information, or vice versa, which effectively will prevent any collusion. Nor will the Innovation Technology Joint Venture facilitate collusion; the Joint Venture's scope is limited to developing technologies and includes protections against the sharing of competitively-sensitive information.

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93 *See, e.g.*, Erica Ogg, *Comcast Walks Away from Pivot*, CNET News, Apr. 23, 2008, http://news.cnet.com/8301-10784_3-9927428-7.html (explaining that "[b]y the end of [2007], demand was so low for Pivot [a partnership between Sprint and the MSOs] that they stopped marketing it").

94 Cricket Wireless, *Company Information*, http://www.mycricket.com/learn/cricket-wireless; Alex Pham, *Cricket Wireless Has the Music Industry Feeling Chirpy*, Los Angeles Times, Feb. 7, 2012, http://www.latimes.com/business/la-fi-ct-cricket-20120207,0,2200481.story (explaining how Cricket Wireless customers appeal to individuals whose cell phones, not computers, "are the center of their digital lives").

95 *See* Ogg, *supra* note 93 (explaining that "[p]art of [Pivot's] problem [was] that nearly 80 percent of U.S. residents already subscribe to a cell phone service").

96 *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977) (noting that every transaction "has the potential for producing economic readjustments that adversely affect some persons," but "Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects"); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986) ("To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for [it] is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." (internal quotation marks omitted)).

To the extent any collusion occurs, the antitrust laws provide ample authority to investigate and challenge such collusion. The Commercial Agreements each require implementation of firewalls and other safeguards to prevent the sharing of commercially-sensitive information. The DOJ has recognized that these safeguards mitigate the likelihood of collusion and, to Comcast's knowledge, the DoJ has never challenged collaborative ventures incorporating such safeguards based on speculation that they might nonetheless facilitate collusion.

III. THE LICENSE ASSIGNMENT AND COMMERCIAL AGREEMENTS ARE CONSISTENT WITH THE COMMUNICATIONS ACT, FCC RULES, ANTITRUST LAW, AND THE OBJECTIVES OF CONGRESS, THE ADMINISTRATION, THE FCC, AND THE NATIONAL BROADBAND PLAN.

The License Assignment and Commercial Agreements currently are being reviewed by both the FCC and the DoJ to determine what, if any, policy and competition concerns these transactions raise and whether they are consistent with the Communications Act, FCC rules, and antitrust law. As detailed above, the License Assignment will yield substantial and verifiable public interest benefits – and align with the objectives of Congress, the Administration, the FCC, and the National Broadband Plan – by shifting spectrum not currently being used to provide service to consumers to a provider that will use that spectrum to deliver wireless broadband services to consumers. Although the Commercial Agreements are separate from, and not contingent on, the License Assignment, they too will yield substantial and verifiable public interest benefits and are consistent with long-standing industry practice that the FCC has openly embraced. Moreover, the DoJ already is reviewing the Commercial Agreements and, based on the documents and economic analysis we have submitted, should find that those agreements are consistent with competition law and policy and do not raise any concerns.

The FCC has stated that secondary market transactions are important to ensure that existing spectrum can get into the hands of providers that can use it efficiently to serve customers.[97] Just this past January, FCC Chairman Genachowski cited secondary markets as one of the key measures necessary "to meet th[e] demand" for more spectrum dedicated to mobile broadband use.[98] And in its December 2011 order (literally issued in the shadow of the withdrawal of the AT&T/T-Mobile applications) approving AT&T's acquisition of 6 MHz of nationwide spectrum and an additional 6 MHz of spectrum in five major metropolitan markets from Qualcomm, the Commission found that the transfer of "underutilized" 700 MHz spectrum would "facilitate [that spectrum's] transition . . .

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[97] *See Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd. 24178 ¶¶ 1, 18 (2000) (The FCC has sought to "promote the operation of competitive markets for the sale and lease of spectrum usage rights . . . , and thereby facilitate both the transfer of the right to use spectrum for existing services to new, higher valued uses, and the availability of unused and underutilized spectrum to those who would use it for providing services.").

[98] Julius Genachowski, Chairman, FCC, Remarks at Consumer Electronics Show 5 (Jan. 11, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311974A1.pdf.

towards mobile broadband, thereby supporting [the FCC's] goal of expanding mobile broadband deployment throughout the country."[99] The FCC stressed that "to compete effectively and innovate, a wireless provider must have access to adequate spectrum."[100]

As explained in further detail in our filings at the FCC, this License Assignment will further that important goal.[101] No party opposing the applications has challenged that goal as illegitimate or explained why the License Assignment would be in conflict with it. To the contrary, Verizon Wireless and the Cable Companies have shown that the License Assignment would precisely track those goals by moving spectrum not being used to serve customers to productive use.

Similarly, the License Assignment furthers the goals of Congress, the Administration, and the National Broadband Plan. As the President explained, "America's future competitiveness and global technology leadership" is contingent on the availability of "adequate spectrum," "finding ways to use spectrum more efficiently," and "unlock[ing] the value of otherwise underutilized spectrum."[102] The National Broadband Plan also had as a core objective the transition of spectrum to more valuable and efficient uses in order to meet the "growing demand for wireless broadband services and ensure that America keeps pace with the global wireless revolution."[103] The National Broadband Plan recommended that the FCC "promote access to unused and underutilized spectrum," and "permit a variety of secondary market transactions,"[104] transactions precisely like the ones Verizon Wireless and the Cable Companies have proposed. The National Broadband Plan ultimately concluded that failing to address the spectrum crunch "could mean higher prices, poor service quality, an inability for the U.S. to compete internationally, depressed demand, and ultimately a drag on innovation."[105] Of course, Congress just recently passed legislation (on a bipartisan basis) to address this spectrum crunch by authorizing the FCC to make additional spectrum available for commercial use to serve the growing and evolving demand of consumers.

In addition to furthering important government goals, the License Assignment is consistent with FCC rules. Parties routinely transfer spectrum to each other and these

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99 *Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd. 17589 ¶ 95 (2011) ("*AT&T-Qualcomm Order*").

100 *AT&T-Qualcomm Order* ¶ 30.

101 *See* Public Interest Statement at 16-19; Verizon Wireless, et al. Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, at 8-12 (Mar. 2, 2012) ("Verizon Wireless, et al. Joint Opposition").

102 President Barack Obama, *Unleashing the Wireless Broadband Revolution* (June 28, 2010), http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution.

103 *National Broadband Plan* at 76-77, 84.

104 *Id.* at 83.

105 *Id.* at 77.

transfers are reviewed and routinely approved by the FCC.[106] According to press reports, "The FCC has approved more than 150 commercial wireless transaction applications in the past year and more than 300 in the past two years."[107] In fact, every two years, the FCC approves spectrum transfers between licensees totaling as much as the 17.4 billion MHz-POPs of spectrum sold by the FCC in its last major auction in 2008. And, between 1998 and 2009, the FCC approved 38 major spectrum transfers covering *PCS spectrum alone* in which a total of approximately 30.4 billion MHz-POPs of PCS spectrum changed hands.[108] The FCC has routinely consented to the transfer where the transfers do not trigger the FCC's "spectrum screen" – a tool to assess wireless concentration in a geographic market – and "there is clearly no competitive harm relative to today's generally competitive marketplace."[109] That is the case here.

The total amount of spectrum Verizon Wireless will hold after the assignments in more than 98 percent of the covered counties will be at a level that the FCC has determined does not raise competitive concerns, and thus, is not subject to further competitive review.[110] Even in the remaining areas, multiple competitors are operating, and many more hold unused spectrum.[111] At a national level, Verizon Wireless would hold barely more than one-quarter of the spectrum currently counted as available – and even less if other spectrum that is in fact being used is counted. In similar circumstances where licensees tried to develop their spectrum but the business case ultimately did not materialize, the FCC found that assignment to a party able to put the spectrum to use would serve the public interest and would not harm competition.[112] And in none of those

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106 The FCC processes hundreds of wireless assignments each year. In fact, Verizon Wireless itself has assigned spectrum to other licensees nearly 25 times over the past 4 years. *See* Verizon Wireless, et al., Joint Opposition Ex. 1.

107 *AT&T CEO Slams FCC; Carrier Posts Loss in Q4 Due to Breakup Fee, Charges*, Communications Daily, Jan. 27, 2012 (citing an FCC spokesperson).

108 *See* John W. Mayo & Scott Wallsten, *Enabling Efficient Wireless Communications: The Role of Secondary Spectrum Markets* 22 Info. Econ. & Policy 61, 70 Table 8 (2010).

109 *Sprint Nextel Corp. & Clearwire Corp., Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Op. & Order, 23 FCC Rcd. 17570 ¶ 76 (2008); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd. 21522 ¶ 109 (2004) ("[T]he function of [the screen] was simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of th[e] transaction.").

110 *See* Public Interest Statement at 25; Verizon Wireless, et al. Joint Opposition at 44.

111 *See* Public Interest Statement at 26; Verizon Wireless, et al. Joint Opposition at 45.

112 *See, e.g., AT&T-Qualcomm Order* ¶¶ 94, 96 (approving in December 2011 the transfer of spectrum previously used to provide a mobile video service that proved not to be viable from Qualcomm to AT&T and concluding it "would facilitate the transition of underutilized unpaired 700 MHz spectrum towards mobile broadband use, thereby supporting [the Commission's] goal of expanding mobile broadband deployment through the country"); *Aloha Spectrum Holdings Co. (Assignor) and AT&T Mobility II LLC (Assignee) Seeking FCC Consent for Assignment of Licenses and Authorizations*, Memorandum Op. & Order, 23 FCC Rcd. 2234 ¶¶ 13-14 (2008) (approving the transfer of spectrum from Aloha Partners to AT&T after Aloha conducted two trials and determined that it would need to partner with a "national wireless carrier or other companies . . . to ensure the roll out of a 700 MHz network and associated services as an economically valuable enterprise" and could not find such a partner, *see*

cases did the FCC give weight to claims that the FCC should deny its approval because the spectrum would be put to better use by a different purchaser, as some opponents (primarily other competitors) urge the FCC to do in this transaction. As the FCC has explained, its review is limited "to the buyer proposed in an assignment application, and [it] cannot consider whether some other proposal might comparatively better serve the public interest."[113]

Finally, with respect to the Commercial Agreements, those agreements are fully consistent with FCC rules and antitrust law. These types of agreements have been commonplace in the communications industry for decades and have been found to be pro-competitive. Contrary to some parties' claims, the Commercial Agreements are not the "end of the world" or even a "market-division" conspiracy among leading market participants; they are just the same sort of ordinary agency, reseller, and technology joint venture agreements that appropriately passed with little notice when entered into by numerous other entities. The DoJ is assessing whether the Commercial Agreements raise potential competition concerns and are consistent with antitrust law; we are confident that they are.

IV. CONCLUSION.

Competition in the communications and media marketplaces is driving innovation in all areas of the industry. The constant pressure to respond to competition has compelled Comcast to upgrade its networks, enhance its existing services, research and develop new services, improve customer service, and even rebrand its products and marketing approach. Yet at least one missing piece has eluded us: a wireless strategy to offer wireless services as part of our multiproduct bundles. The Commercial Agreements supply that missing piece to the benefit of our current and future customers.

The sale of the spectrum to Verizon Wireless cannot come at a better time for Americans; it will inject much-needed spectrum into the wireless broadband marketplace to meet consumer demand and drive innovation. At the same time, the Commercial Agreements will provide consumers one-stop shopping for their home and mobile needs; will offer the Cable Companies the ability to enhance competition in the wireless marketplace by becoming resellers; and will accelerate innovation in the broadband marketplace,

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Application to Assign Licenses Held by Aloha Spectrum Holdings Company LLC to AT&T Mobility II LLC, File No. 0003205282, Declaration of Charles C. Townsend, President and CEO, Townsend Enterprises II ¶ 8 (Oct. 23, 2007)); *NextWave Personal Communications, Inc. and Cingular Wireless LLC*, Memorandum Opinion & Order, 19 FCC Rcd. 2570 ¶ 31 (2004) (approving the transfer of additional spectrum to Cingular even in areas where it already operated because the spectrum acquisition would not "affect the number of currently active competitors in any of the markets involved given the fact that NextWave currently ha[d] limited operations and trial (non-paying) customers in [those] markets" (quoting the parties' application at 11-12)).

[113] *Citadel Communications Co. & Act III Broad. of Buffalo, Inc.*, Memorandum Op. & Order, 5 FCC Rcd. 3842 ¶ 16 (1990). The FCC has explained that this is necessary to "avoid 'an unwise invasion by a governmental agency into private business practice . . . and undue delay in passing upon transfers of licenses.'" *MMM Holdings, Inc. & LIN Broad. Corp.*, Memorandum Op. & Order, 4 FCC Rcd. 6838 ¶ 8 (Mass Media Bureau 1989) (quoting S. Rep. No. 82-44, at 8 (1951)), *aff'd*, 4 FCC Rcd. 8243 ¶¶ 8-9 (1989).

allowing consumers simple, seamless access to content and applications from any location on any device and leveraging the best available network, whether it be wired, licensed wireless, or WiFi.

We have begun what clearly will be a very thorough review process with the DoJ and look forward to satisfying them that the License Assignment and Commercial Agreements are pro-competitive and pro-consumer. The FCC is currently conducting its own thorough review of the spectrum license assignments to determine whether the assignment of the AWS licenses to Verizon Wireless is consistent with Commission rules and would be in the public interest, which is precisely what the FCC is supposed to (and has authority to) review. As explained above, the proposed License Assignment and Commercial Agreements will not reduce or harm competition in any product or geographic market but, rather, will provide consumers with more choice, increased competition, and new services and technologies. From Comcast's perspective, the License Assignment and Commercial Agreements will provide new areas where we can continue to invest and innovate to bring new services to our customers.

Thank you for the opportunity to testify today.

"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"

Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights

March 21, 2012

Testimony of Charles F. Rule
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I. *Introduction*

A. Mr. Chairman, Senator Lee, and Members of the Subcommittee, I am pleased to be here today to discuss antitrust aspects of the Verizon/Cable deals.

B. I am appearing at the request of the Subcommittee. The views expressed are mine and mine alone. I have no current client with an interest in or against the Verizon/Cable deals. While I have done work for wireless telcos and cable companies in the past, it has been several years since those engagements.

C. In fact until I was asked to give my views to the Subcommittee, I was only casually following the progress of the deals. As a result of my past work in the wireless and cable industries as well as more recent work for clients in related industries, I do have a working familiarity with the structure of the industries and the technologies. With respect to the deals, however, the sum total of my knowledge is based on a review over the last several days of filings made in favor of and against the transaction at the Federal Communications Commission (FCC).

D. As a consequence, my view of the relevant facts is unavoidably limited and certainly far less complete than the views of Verizon, Comcast, their lawyers and economists, and the opponents of the deals. For example, I haven't seen the agreements themselves; rather, I have only read a description of those agreements in the publicly available FCC filings. Certainly, given its access to the documents and data of the parties and other participants in the industry, the Department of Justice (DOJ or the Department) will have the best view of the facts. (Of course, assembling the facts and properly analyzing the antitrust issues are two different things.) Of necessity my views are heavy on what I believe to be the proper analysis and light on the facts.

E. My final disclaimer reflects wisdom handed down from my dad. As he always used to say, "you get what you pay for," and the Subcommittee should keep in mind that I am doing this pro bono.

II. *The Transaction*

A. Given my "outsider" status, I defer to other members of the panel to describe the details of the transactions at issue here. In general, Verizon Wireless (actually Cellco, of which Verizon owns 55%) is going to acquire 122 Advanced Wireless Services (AWS) spectrum licenses from SpectrumCo, a joint venture (JV) among Comcast Corporation, Time Warner Cable, and Bright House Networks.[1] In a separate transaction, Verizon Wireless will acquire 30 AWS spectrum licenses from Cox Wireless, a wholly owned subsidiary of Cox Cable. As the FCC indicated in its Public Notice of the transactions, "the proposed assignment of licenses to Verizon Wireless would result in [the acquisition of] either 20 or 30 megahertz of spectrum . . . covering 259.7 million people (or approximately 84% of the U.S. population)."

B. SpectrumCo and Cox were awarded licenses to the spectrum in an auction by the U.S. Government in 2006.[2] Cox and the members of SpectrumCo bid on and acquired the licenses with plans to use the spectrum to create a new wireless provider; however, sometime in the last year or so, they decided to drop their plans and late last year entered into an agreement with Verizon Wireless to sell the spectrum for a combined $3.915 billion.[3]

C. At the same time, the members of SpectrumCo and Cox entered into several commercial agreements. The agreements will allow the cable companies, on one hand, and Verizon Wireless, on the other, to act as agents to sell each other's products and services. After four years, the cable companies will have the ability

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[1] *Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses, Response to Alien Ownership Questions.* WT Docket No. 12-4, Exhibit 2 (December 16, 2011).

[2] Actually, Cox as well as Sprint were members of SpectrumCo at the time of the auction. Sprint sold its interests in the venture to the other members in 2007. Subsequently, Cox withdrew from SpectrumCo, taking at least 30 licenses representing spectrum covering its cable franchise territories, apparently forming Cox Wireless in anticipation of the use of that spectrum to build out and launch a wireless service. While Cox and what remained of SpectrumCo each took various steps to develop their spectrum, both assert that they ultimately abandoned those efforts in light of escalating costs and increasing technical demands.

[3] Verizon, News Release: "Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for $3.6 Billion: The Companies Also Announce Commercial Agreements That Will Deliver Mobile Products to Consumers" (December 2, 2011), http://newscenter.verizon.com/press-releases/verizon/2011/comcast-time-warner-cable.html; Verizon, News Release: "Cox Communications Announces Agreement to Sell Advanced Wireless Spectrum to Verizon Wireless: Cox and Verizon Wireless will become agents to sell each other's residential and commercial products" (December 16, 2011), http://newscenter.verizon.com/press-releases/verizon/2011/cox-communications-announces.html.

to act as resellers of Verizon Wireless's service (in effect buying access to the service at wholesale and reselling the service at retail under the cable companies' brands). The cable companies and Verizon Wireless have also formed a research and development (R&D) JV intended to develop "technology to better integrate wireline and wireless products and services."[4]

III. *An Overview of the Analysis*

A. In analyzing the transaction, at least from the perspective of the antitrust laws, the Subcommittee should keep three principles in mind.[5]

B. First, as the Supreme Court has noted, the antitrust laws are a "consumer welfare prescription."[6] That is, the ultimate metric for determining whether a transaction or agreement is "anticompetitive" is the transaction/agreement's impact on total welfare. Or put in economic terms, a transaction or agreement should only be condemned if it threatens to reduce a market's output or reduce quality; the corollary is that antitrust should not condemn conduct that, on balance, will increase market output and/or increase quality. Over the past thirty-five years, the evolution of antitrust jurisprudence reflects the courts' efforts to ensure that antitrust rules and their enforcement do just that. The merger policies of the Federal Trade Commission (FTC) and the DOJ have evolved over that same period in order to bring merger enforcement closer to that goal.

C. Second, mergers and acquisitions are essential to a dynamic economy. They are the mechanism by which assets move to higher value uses and thereby increase social output and consumer welfare. Under certain circumstances, a merger or acquisition can so change the structure of a market that on balance market output will be reduced without any countervailing increase in quality. Section 7 of the Clayton Act and DOJ/FTC merger enforcement policy are intended to detect and deter such mergers. However, as an empirical matter, mergers that lessen competition are a tiny fraction of all deals. It is important then that antitrust enforcement not unduly dampen the vibrancy and dynamism of the market for mergers and acquisitions.

D. Third, beyond mergers and asset transfers, collaboration among firms, even those that compete, can increase consumer welfare. Particularly if the collaborating firms face competition from others outside the collaboration and thus cannot threaten total welfare, then society is generally better off allowing the

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[4] *See supra* note 3.

[5] The FCC presumably will apply a broader "public interest" analysis in order to determine whether to grant permission to the parties to transfer the spectrum licenses. For the most part, I have ignored the arguments against the transaction that are based on broader FCC principles. It suffices to say that those arguments do not raise legitimate issues under the antitrust laws.

[6] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

collaboration. Often times such collaboration fails, but so long as competition on price and output among the collaborators or from those outside the collaboration remains vigorous then cost of failure falls on the collaborators not on consumers. On the other hand, when collaboration increases efficiency, generates new technology, improves quality, or lowers input costs, the collaborators *and* consumers are rewarded.

E. Of course, applying these principles to any particular transaction is a very intensive exercise. Based on published reports, Verizon Wireless and the cable companies are in the early stages of responding to a Second Request, and no doubt the Department is out canvassing others within and surrounding the industry. Ultimately, how the Verizon Wireless/Cable deals stack up against these three principles will depend on what the Department finds. That being said and because I have been invited here today, in the remainder of my testimony I will briefly consider the arguments for and against, first, Verizon Wireless's acquisition of the cable companies' spectrum licenses; second, the commercial agreements (or at least so much as is publicly known about those agreements) between Verizon Wireless and the cable companies; and third, the proposed R&D JV between Verizon Wireless and the cable companies.

IV. *Verizon's Acquisition of the Cable Companies' Spectrum*

A. Notwithstanding the Department's recent challenge of AT&T's proposed acquisition of T-Mobile, the arguments that Verizon Wireless's acquisition of the cable companies' spectrum licenses threatens consumer welfare – or in the language of Section 7 of the Clayton Act, "may tend substantially to lessen competition" – seem weak. Opponents of the transaction have put forward one plausible economic argument that the acquisition could harm consumer welfare, namely that Verizon Wireless is "dominant" and has acquired the spectrum to prevent other smaller rivals from developing the spectrum. There is, however, a real question whether that theory could be the basis of an antitrust challenge. Even if the Department decides that the argument merits investigation, it should be a relatively straight-forward matter for the Department to determine whether the facts here support that argument. Based on what is in the publicly available filings, it appears unlikely that the facts support the theory.

B. First, the basic concern that led the Department, rightly or wrongly, to seek to block AT&T's acquisition of T-Mobile simply is inapplicable here. The AT&T/T-Mobile case was premised upon the combination of two of four nationwide wireless providers who were head-to-head rivals. The Department concluded that the elimination of that actual competition would lead to restricted output, higher prices, and a net decrease in consumer welfare. Whatever one thinks of the Department's case challenging that transaction, such an argument is not viable here because the indisputable fact is that after more than five years neither SpectrumCo nor Cox has developed and launched a wireless service on the licensed spectrum. Whether the cable companies ever intended to start a

service or were merely "speculating" when they submitted the highest bid for the spectrum years ago – and, by the way, the argument that the high bidder at an open auction run by the United States Government is a pure speculator is dubious at best – is irrelevant to the antitrust laws. The fact is the cable companies are not today – and will not be for the foreseeable future – facilities-based providers of wireless service. I have seen nothing that casts doubt on that conclusion.

C. Moreover, there is no indication that either SpectrumCo or Cox are one of only a few uniquely positioned entrants who are ready and willing to enter. In fact the parties make a pretty convincing case that, before seeking to sell their spectrum, SpectrumCo and Cox each determined that building out and launching a wireless service using the AWS spectrum at issue is no longer an economically viable option. In short, nothing in the filings suggests that the Department could bring a viable "potential competition" challenge to Verizon Wireless's acquisition. The caselaw in the area of potential competition challenges to mergers is notoriously unfavorable to the plaintiffs and the antitrust agencies, and merger challenges based purely on potential competition arguments are of late as "rare as hens' teeth." Based on what I've seen, this acquisition does not appear to be a good candidate to try to revive that theory as a viable merger enforcement option.

D. Rather, this acquisition seems to be an archetypal example of a welfare-enhancing transaction – moving fallow assets that have long gone unproductive to an entity that intends to invest in the assets and use them to generate, for the first time, market output. Or put differently, since the cable companies' spectrum licenses have never produced more than zero (or in the famous words of Dean Wormer in *Animal House*, "zero-point-zero") wireless service, *any* output that Verizon Wireless produces from the spectrum will enhance consumer welfare. The fact that Verizon Wireless will not immediately deploy the spectrum does not seem to me particularly damning. One does not just "turn on" spectrum; it requires much investment and development to transform fallow spectrum into a productive asset.

E. From the perspective of antitrust, the fact that the acquisition of spectrum will give the market leader even more productive capacity is beside the point. The fact that it will make Verizon more attractive or make it more difficult for smaller providers to compete (because Verizon's prices decrease or its quality increases) is good for consumer welfare and procompetitive. All that matters is that output will increase.

F. Second, and in response, the opponents of the transaction assert that this is not the whole story. Instead they argue that Verizon is acquiring the spectrum to keep it out of the hands of a smaller rival and that in the hands of another, less well-endowed wireless provider the AWS spectrum would generate even more output. Under certain circumstances – such as high share of market output, significant disparities in relative marginal costs, and supracompetitive margins being earned by the acquirer of assets – some might argue that a "dominant" acquirer theoretically could have the incentive and ability to acquire fallow assets in order

to ensure that they remain fallow or at least less productive than they would be in the hands of a smaller, maverick rival. This is the so-called "hoarding" hypothesis, probably best described in the declaration of Professor Judith Chevalier, which is attached to T-Mobile's Petition to Deny the Verizon Wireless/Cable deals. While there may be a few holes in the theory, it is at least conceivable that a monopolist might buy up assets that fringe players and/or new entrants could use to expand market output and to put downward pressure on the monopolist's prices and margins.[7]

1. However, just because it is *conceivable* that an acquisition of assets might lead to less total output than other "more competitive' alternative transaction(s) that will be preempted by the acquisition, it does not follow that the acquisition violates the antitrust laws. The theory inevitably depends on speculation. 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.[8] Section 7, however, "deals in probabilities, not ephemeral possibilities."[9] "[U]ncabined speculation cannot be the basis of a finding that Section 7 has been violated."[10] At the end of the day, the question is whether the identified transaction – Verizon Wireless's acquisition of the cable companies' AWS spectrum licenses – may tend to reduce competition (or consumer welfare). The question is not whether one can imagine deals in which someone other than Verizon Wireless might use the cable companies' spectrum more extensively or more quickly than Verizon Wireless. In other words, Verizon's acquisition does not merit antitrust intervention just because one can imagine a *more* procompetitive deal.

2. Even if one assumes for the sake of argument that the hoarding theory is a viable basis on which to mount a merger challenge, it is dubious that Verizon Wireless is spending billions just to hoard the to-be-acquired spectrum. First, the theory might be plausible if Verizon had a monopoly share of the wireless market or if the cable companies' AWS spectrum represents the only, or at least the most efficient, spectrum available to

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[7] *Applications of Cellco Partnership d/b/a/ Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless, LLC for Consent to Assign Wireless Licenses: Joint Opposition to Petitions to Deny And Comments. Exhibit 4: Declaration of Michael L. Katz.* WT Docket No. 12-4, (March 2, 2012), .

[8] T-Mobile suggests that the spectrum would generate greater output in its hands; however, it admits that it never entered into negotiations with the cable companies because it was preoccupied with trying to obtain approval for its erstwhile deal with AT&T. It is difficult not to be somewhat sympathetic to T-Mobile's plight; nevertheless, such sympathy does not change the fact that no deal between T-Mobile and the cable companies has materialized.

[9] United States v. Marine Bancorporation, 418 U.S. 602, 622-23 (1974).

[10] BOC International Ltd. v. FTC, 557 F.2d 24, 29 (2d Cir. 1977).

competitors. Based on my reading of the filings with the FCC, neither appears to be the case here. Second, as a factual matter, for the hoarding theory to present a true concern, it should first be established that Verizon in fact has no intention to deploy the spectrum as it claims. While this is a difficult question to answer based on the parties' self-serving public filings with the FCC, the Department has the ability to decipher Verizon Wireless's true intentions by reviewing its confidential planning documents, by deposing the relevant Verizon Wireless decision makers, and through the use of other investigatory tools. If Verizon bought the spectrum just to "sit on it," the Subcommittee can rest assured that the Department will figure that out.

G. The bottom line is that it appears unlikely that the facts would support antitrust condemnation of Verizon Wireless's acquisition of the cable companies' AWS spectrum. Unlike AT&T/T-Mobile, these deals will not eliminate actual competition, and on the surface it appears that the cable companies made unilateral decisions before negotiating with Verizon Wireless that substantially lessen, if not eliminate entirely, any concern that the deals significantly reduce potential competition in the wireless space. As alluded to earlier, there is a theoretical possibility that Verizon Wireless is acquiring the licenses to keep the cable companies' spectrum out of the hands of competitors that purportedly would use the spectrum to expand the output of wireless services more than Verizon Wireless is likely to do. As economists like to say, however, this theory does not seem particularly robust; the likelihood that the circumstances exist to make this threat of hoarding a worthy economic concern, much less an antitrust concern, appears small. Based on the available information, Verizon Wireless's acquisition of the cable companies' spectrum appears to increase total output and/or quality – *i.e.*, consumer welfare.

V. *Commercial Agreements between Verizon Wireless and the Cable Companies*

A. Just because Verizon Wireless's acquisition of AWS spectrum from the cable companies appears to increase output and consumer welfare, it does not follow that post-acquisition collaboration between Verizon Wireless and the cable companies automatically increases consumer welfare. As I mentioned earlier collaboration, even among rivals, can increase consumer welfare. Collaboration is prevalent throughout the economy and, without it, the economy would literally grind to a halt. Nevertheless, under certain circumstances, collaboration between or among otherwise independent companies can result in quality-adjusted net reductions of consumer welfare. The most obvious examples of harmful collaboration are "naked" price-fixing, market allocation, and bid-rigging among rivals; those agreements are per se illegal and business men and women routinely go to jail for those types of collaboration. The truly naked agreements hold no promise of efficiency or better quality, are *designed* to restrict output in order to raise prices and profits, and are almost always covert (because in this country most business people understand that such conduct is felonious).

B. None of the opponents of the transaction has gone so far as to argue that the commercial agreements between Verizon Wireless and the cable companies amount to naked restraints. Nevertheless, under some circumstances, even collaboration that is not naked – that is, collaboration that plausibly holds the promise of increasing welfare – can have a net negative impact on total output and welfare.

1. This is particularly true where the parties to the collaboration are competitors. The potential threat to welfare of such a collaboration among rivals depends on the structure of the market in which the collaborators compete as well as the scope and structure of the collaboration (*i.e.*, the extent to which the collaborators share competitively sensitive information, the extent to which they share profits on activity outside the collaboration, the extent to which the agreement is exclusive as to third parties, etc.). So, for example, there is little reason to be concerned about collaboration among competing furniture manufacturers, representing twenty-five percent of the market's output, to buy a commodity like paper goods: regardless of the potential efficiencies from the collaboration, the collaboration represents little if any threat to output, particularly if there are appropriate safeguards against, *e.g.*, the exchange of competitively sensitive information about furniture manufacturing and sales.

2. In more limited circumstances, even if the collaborators are not competitors in any market, there could be cause for concern if, for example, one of the participants controls a large share of a critical input or channel of distribution and that participant grants the other participant(s) exclusive access to that input or channel.

3. In either case, where the collaboration does not constitute a naked agreement to restrict output (or serve as a sham to disguise such a naked agreement), the simple threat of a competitive concern is only the beginning of the analysis and is not sufficient to warrant antitrust condemnation. Rather, two further factors must be considered. First, have the parties structured the collaboration in a way to eliminate or at least appropriately ameliorate the anticompetitive concern? We antitrust lawyers spend a lot of time counseling clients on the safeguards and measures that are prudent to ameliorate, if not eliminate, such issues. Second, what are the countervailing efficiencies that the collaboration generally and the aspects causing competitive concern specifically are likely to create or enhance? This analysis can be difficult, but the good news is that the law has developed in a way that is deferential to legitimate collaboration. In most cases an initial analysis of the structure of the market, the competitive significance of the venture, and the structure of the venture will indicate that the threat to competition and consumer welfare is ephemeral, if not completely absent. In those cases, there is no need for considering, much less balancing, efficiencies.

4. Finally, it is important to remember that unlike mergers, collaboration through commercial agreements tends to be impermanent. As a consequence, there is not as strong an argument for stopping in advance a proposed commercial collaboration based on potential competitive threats, at least in the absence of a "clear and present" threat to consumer welfare.[11] If any aspect of the collaboration proves anticompetitive in practice, the government can investigate and seek to enjoin the offensive aspect at that point. To the extent private parties suffer antitrust injury from the collaboration, they too can seek to enjoin the collaboration, as well as obtain treble damages.

C. Turning to the commercial agreements between Verizon Wireless and the cable companies – or at least what I know about them from public sources – the opponents have identified two areas where the collaboration arguably raises competitive concerns: the market for facilities-based wireless service and the market for wireline broadband service.[12] Essentially, the opponents argue that the collaboration allocates the wireless market to Verizon Wireless in exchange for Verizon Wireless's (and through it, Verizon Wireless's majority owner, Verizon's) allocation of the broadband wireline market to the cable companies. In other words, according to the opponents, together with Verizon Wireless spectrum acquisition, the collaboration ensures that Verizon will focus on providing wireless service and the cable companies will focus on broadband wireline while Verizon will stop competing as vigorously to develop and market its FiOS service.

1. First, to the extent that these transactions pose any risk to potential competition in the wireless market, it is due to Verizon Wireless's acquisition of the cable companies' AWS spectrum licenses.[13] Let's assume that the Department of Justice determines that, because, *e.g.*, the cable companies unilaterally decided not to enter the facilities-based wireless market, there is no basis to challenge the acquisition on a

[11] In contrast, experience tells us that a "wait and watch" approach towards mergers and acquisitions – permanent changes to the structure of the parties and the market – is imprudent. If a transaction such as Verizon Wireless's acquisition of the cable companies' spectrum is consummated and later actually harms consumer welfare, it will be infinitely more difficult to "unscramble" the assets and restore the competitive status quo. That is why the Hart-Scott-Rodino Act requires that all substantial mergers and acquisitions, including Verizon Wireless's acquisition of the cable companies' spectrum, be notified to the Department and the FTC before the parties can close.

[12] *Applications of Cellco Partnership d/b/a/ Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless, LLC for Consent to Assign Wireless Licenses: Comments of Sprint Nextel Corporation* WT Docket No. 12-4, (February 21, 2012) at 16. *Applications of Cellco Partnership d/b/a/ Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless, LLC for Consent to Assign Wireless Licenses: Petition to Deny of T-Mobile, USA, Inc.* WT Docket No. 12-4, (February 21, 2012) ("Petition to Deny of T-Mobile") at 15.

[13] *See, e.g,* Petition to Deny of T-Mobile at 36.

potential competition theory. Under that analysis, it seems highly unlikely that the cable companies in the foreseeable future will decide to reacquire wireless spectrum in order to start providing facilities-based wireless service, regardless of the collaboration contemplated in their commercial agreements with Verizon Wireless. Rather, assuming the facts show that the cable companies have decided not to enter the market, they are simply no longer competitors – actual or potential – in facilities-based wireless service. The collaboration is designed to provide them with access to a telecommunications service that they think is an important component of the bundle of services that their customers demand. As a general matter (though see the discussion below), obtaining access to a complementary product generally increases output and consumer welfare. It is unlikely that the commission that the cable companies will earn from selling Verizon Wireless's service will create any additional material disincentive to enter the wireless service market by buying and developing new spectrum.

2. Second and potentially more problematic, some opponents have alleged that as a result of the acquisition and collaboration, Verizon Communications will compete less aggressively with its FiOS service following implementation of the commercial agreements.[14] As a loyal customer of FiOS, I must admit that I was particularly interested in this argument. Until Verizon deployed FiOS in my neighborhood, I was the "victim" of my local cable monopoly, which offered to bring broadband wireline service to my house for the princely sum of $30,000! Shortly thereafter, my cable company's scrappy competitor, Verizon laid FiOS cables voluntarily and with no surcharge throughout my neighborhood, endearing itself to myself and a number of my grateful neighbors along the way. So, I know first-hand that wireline broadband competition is highly preferred to a monopoly, and the last thing I personally want to see is any attenuation of Verizon's competition in this space. By all means, the Department of Justice should look at this issue!

3. Having said this, based on what I have been able to glean from the public filings, the parties have presented some sound reasons why the collaboration should have little if any impact on Verizon's competitive plans for FiOS. Those reasons include:

    a. First, Verizon Wireless will earn a fixed commission on the sale of the cable companies' wireline broadband service, and that commission is dwarfed by the revenue that Verizon earns from signing up a new FiOS customer. Moreover, Verizon owns less than 60% of Verizon Wireless. As a consequence, Verizon only

[14] *Id.*at 19.

receives a fraction of the commission Verizon Wireless earns from selling the services of the cable companies, whereas Verizon keeps 100% of the much larger chunk of FiOS revenue.[15] In short, the promise of a fraction of a relatively small fixed commission seems unlikely to impact significantly Verizon's competitive strategy for FiOS.

b. Second, there is limited overlap between FiOS and the cable companies' franchise territory. FiOS is present in just 15% of the collective franchise territories of the collaborating cable companies. So in the vast majority of the country represented by the cable companies, FiOS does not compete. In those areas where FiOS is not available, the cable companies' service is a pure complement to the service provided by Verizon Wireless or its parents.

c. Third, in 2009 before the deal between Verizon Wireless and the cable companies was negotiated, Verizon had announced that it was ending its expansion of the FiOS footprint. As a result, FiOS is neither an actual *nor* a potential competitor in those franchise territories where FiOS is not currently present.

d. Fourth, although the commercial agreements are confidential and the FCC filings defending the agreements are heavily redacted, the parties claim that the collaboration has been structured with safeguards to prevent the exchange of competitively sensitive information and the like between the cable companies and Verizon (that is, the parent company of Verizon Wireless). I have confidence that the Department of Justice will carefully examine those safeguards and will let the parties know if the safeguards are inadequate.

4. Finally, even assuming the collaboration does not adversely affect competition between the cable companies and Verizon Wireless (or its parent Verizon), there still could be a concern if either the cable companies or Verizon Wireless controls essential channels of distribution and has agreed to provide exclusive access to those channels to the other party to the agreements. Based on my own casual empiricism concerning the numerous ways that consumers access and procure both wireless and wireline service, I am somewhat skeptical that the commercial agreements

[15] *Applications of Cellco Partnership d/b/a/ Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless, LLC for Consent to Assign Wireless Licenses: Joint Opposition to Petitions to Deny And Comments, Exhibit 6* WT Docket No. 12-4, (March 2, 2012) ("Exhibit 6").

present such an exclusionary threat. Nevertheless, this is another area that the Department should review.

5. Of course, with respect to all these points, the Department should "trust but verify" as President Reagan used to say. If the parties' statements and documents prove untrue or at least insufficient to alleviate concerns that the collaboration might undermine Verizon's incentive to compete for the provision of broadband wireline service or otherwise threaten competition, then the Department should consider the magnitude of efficiencies made possible by the reciprocal sales agency agreements. Often such marketing efficiencies can be somewhat underwhelming. Nonetheless, the parties' efficiency claims should be given fair consideration.

VI. *The Innovation Collaboration Between Verizon Wireless and the Cable Companies*

A. Lastly, the opponents have raised concerns about the agreement between the parties to engage in joint R&D of "technology to better integrate wireline and wireless products and services." Of all the aspects of the transactions between Verizon Wireless and the cable companies, this one on its face seems least troubling, for several reasons.

B. Generally, collaborative R&D is important and a positive contributor to consumer welfare, so much so that Congress enacted a statute, the National Cooperative Research Act of 1984, to ensure that the antitrust laws treat collaborative R&D sympathetically and that certain features of the antitrust laws (such as treble damages and per se rules) do not deter such R&D.[16] The Senate Judiciary Committee's report on the law remains worthwhile reading, for it provides a thoughtful description of how the antitrust "rule of reason" should apply to collaborative research. To summarize, so long as there is room for several other competing R&D efforts – that is, as long as there are others outside the venture competing to create and develop innovations – in the same space, then the collaboration poses little if any conceivable threat to consumer welfare.

C. Here, there is an explosion of competition to integrate wireline and wireless products and services. A great deal of that work is being done by platform vendors (like Google, RIM, Apple, and Microsoft), device OEMs (like Samsung, HTC, LG, Nokia, and Motorola), hardware and infrastructure manufacturers (like Cisco, Juniper, Ericsson, Intel, Qualcomm, and Broadcom), and content providers (like Yahoo!, Fox, Viacom, and AOL). If anything, wireless and wireline service

[16] National Cooperative Research Act of 1984, Pub. L. No. 98-462, § 3(a), Stat. 117 (1984) (current version at 15 U.S.C. § 4301 (2004)). As a young lawyer in the Justice Department, I had the opportunity to work with the predecessor of this Subcommittee in developing the statute. At the time, there was a recognition that, so long as legitimate and appropriately structured, joint R&D rarely if ever threatens consumer welfare. Since the enactment of the law, I'm unaware of any court condemning a legitimate R&D JV.

providers have been laggards. In short, there is no cause for concern that a collaboration between Verizon Wireless and the cable companies will corner the market on such R&D efforts.

D. Nonetheless, some opponents to the deals have argued that there is reason to be concerned that the innovation collaboration may develop proprietary interfaces that the collaborators can use to exclude competitors.

1. The first and best response is "we'll cross that bridge *if* we ever get to it." The venture has developed nothing yet, and it may never do so.

2. Second, to the extent that the JV develops proprietary interfaces that are closed, it is unlikely that those interfaces will gain traction. Apple, for example, is unlikely to embrace a technology that locks it into a limited number of providers who represent a small fraction of the market; if others in the ecosystem refuse to embrace a closed interface, it is dead on arrival.

3. Third, many such interfaces in the wireless and wireline area are set and administered by standards bodies. Typically, standards bodies will only adopt proprietary technology into their standard if the owners of committed essential IP (sometimes referred to as Standards Essential Patents or SEPs) agree to make their SEPs available on fair, reasonable, and non-discriminatory (FRAND or RAND) terms. Moreover, there is a strong argument under the antitrust laws that an owner of SEPs who has agreed to the FRAND commitment should not be able to use SEPs to enjoin or exclude anyone seeking to implement the standard.[17] To the extent that is the rule, the ability of Verizon Wireless and the cable companies to use their proprietary technology developments to frustrate interoperability or seize control of standard interfaces is diminished.

VII. *Conclusion*

A. Based on my limited time and restricted access to information, the foregoing reflects my current view on how best to analyze the proposed transactions between Verizon Wireless and the cable companies.

B. Thank you for your attention. I am happy to answer any questions.

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[17] *See Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd.* at 5 ("If [Apple and Microsoft's commitments are] adhered to in practice, these positions could significantly reduce the possibility of a hold up or use of an injunction as a threat to inhibit or preclude innovation and competition."), http://www.justice.gov/atr/public/press_releases-/2012/280190.pdf.

"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"

Testimony of Steven K. Berry

President and Chief Executive Officer

RCA-The Competitive Carriers Association

Before the

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights

March 21, 2012

Chairman Kohl, Ranking Member Lee, and members of the Subcommittee, thank you for inviting me to testify about the proposed spectrum transfer and the integrated commercial agreements between Verizon Wireless and SpectrumCo LLC (consisting of Comcast, Time Warner Cable, and Bright House Networks) and Cox TMI Wireless LLC. Together these transactions will further cement Verizon's control over several critical resources for providing mobile broadband service, including most notably spectrum and access to roaming, while also potentially expanding Verizon's control over access to content, innovative services, and intellectual property. These deals merit a thorough investigation into the anticompetitive effects they may have on consumers and the future of our industry. This inquiry will prove that substantial and stringent conditions must be used to mitigate the anticompetitive effects of these transactions, and if these conditions are not included, the transaction must be denied.

RCA is an association representing more than 100 competitive wireless providers across the United States, including many rural and regional carriers, providing commercial services to subscribers throughout the nation. Many of RCA's members individually serve fewer than 50,000 customers, while RCA membership also includes larger regional and national carriers.

A significant change has occurred in the wireless industry over the past half decade. We have moved from talking about the "Big 4" national wireless carriers to increasingly referring to the "Big 2," a reflection of the level of control that these massive carriers hold over the industry against all competitors. In the once-competitive wireless

industry, the dominance of the two largest wireless carriers is visible by nearly any measure, including industry earnings before interest, taxes, depreciation, and amortization (EBITDA), total revenues, quantity of prime spectrum and value of spectrum.

This deal is not about spectrum price. This deal is "an integrated transaction. There was never any discussion about selling the spectrum without having the commercial agreements," as Comcast's David Cohen recently stated, in which the major wireline providers in many markets will be at best joining forces to provide joint services – and at worst effectively agreeing not to compete with each other. Through the spectrum transaction, related marketing deals, and joint venture between the companies, Verizon will not compete for wired services with the cable companies, and the cable companies will not compete for wireless service with Verizon. If this deal concerned spectrum only, the cable companies could garner a much higher price for the spectrum from spectrum-starved carriers.

In AT&T's defunct attempt to takeover T-Mobile USA, the Department of Justice and the Federal Communications Commission recognized that the market has become imbalanced between the Twin Bells (AT&T and Verizon Wireless) and the rest of the industry. Just before AT&T abandoned the T-Mobile takeover, Verizon struck a deal with the cable companies, attempting to crowd out competitors and push the precarious state of the industry over its tipping point. While Verizon and the cable companies' transactions are distinguishable, the result would be the same. Without substantial conditions, this deal would send an anticompetitive wave crashing through the industry.

Spectrum

Proponents of this deal have stated that these transactions are only about spectrum and that inquiry and oversight are not needed, while at the same time openly stating that spectrum is the lifeblood of the wireless industry. Because spectrum is a scarce and finite taxpayer owned resource, it is a unique, fundamental input for wireless services. Federal policymakers must ensure that further spectrum resources are made available to feed the proliferation of wireless services. But it is even more critical that federal policymakers ensure that spectrum be made available to competitive operators who can and will immediately put it to use to expand mobile broadband and consumer choice. Verizon has shifted its public stance of having adequate spectrum resources to meet its needs through at least 2015 to stating to the FCC that it will need additional spectrum as early as 2013. All the while, Verizon maintains a vast spectrum warehouse of prime, unused spectrum and now looks to add additional spectrum resources to its stock pile. Putting aside the current transaction for this brief moment, I can assure you that virtually all RCA members would be ecstatic to find themselves in a similar spectral position as Verizon.

This transaction would transfer at least 20 MHz of prime, unused, and nearly nationwide spectrum into the hands of a carrier that already holds as much as 44 MHz of unused spectrum in many markets. At the same time, many competitive carriers are approaching exhaustion of their current holdings. Verizon's dominant control over other critical market inputs, including wireline backhaul, roaming for both voice and data services, and monopsony control over access to cutting-edge, interoperable devices, exacerbates this problem.

All Spectrum is not Created Equal

Reviewing the spectrum holdings of multiple carriers will not result in an apples-to-apples comparison, as all spectrum is not created equal. Based on the propagation characteristics of the different frequencies as well as the potential for interference and various operations in neighboring spectrum bands, a direct megahertz to megahertz comparison is virtually impossible. However the spectrum band is sliced, Verizon demonstrates a stronger portfolio than most of its competitors, which would be bolstered if these transactions proceed as proposed. Federal policymakers must analyze this current transaction in the context of how much spectrum Verizon holds and how efficiently Verizon is using it.

Verizon seeks to purchase at least 20 MHz of spectrum in the Advanced Wireless Service (AWS) band. Since it has already been cleared, this spectrum is ready for immediate 4G Long Term Evolution (LTE) mobile broadband deployments. Importantly, it is not encumbered by existing operations from other wireless operators or government users and the standards for LTE service over AWS have already been established as "Band 4." AWS is one of four spectrum bands, along with Cellular, PCS, and 700 MHz, that will be used for the deployment of domestic LTE service.

Not surprisingly, Verizon holds all four of the spectrum bands ready for 4G LTE deployment, and Verizon has significant amounts of under-used or unused spectrum. This spectrum grab is premature at best and nefarious at worst based on this underutilization of spectral resources which are primed and ready for LTE deployment. To put this in context, Verizon has proposed to spend $3.9 billion for the cable companies' AWS spectrum while over $5 billion in other spectrum it has previously

purchased remains unused. This spectrum warehousing forecloses the opportunity for other carriers to expand services.

Verizon holds 22 MHz of nationwide 700 MHz Upper C Block spectrum, as well as an additional 12 to 24 MHz of Lower 700 MHz in several markets. Yet based on its buildout status reports filed with the FCC earlier this year, Verizon has begun constructing and offering service only on the C Block, while nearly $5 billion in spectral resourees purchased at auction lie fallow in Verizon's spectrum warehouse, and while many of our members struggle to offer competitive services to consumers over significantly less spectrum.

Further, Verizon's massive spectrum warehouse and purchasing power has a chilling effect on the secondary spectrum market. Verizon is able to pay staggering amounts for spectrum on the secondary markets, which encourages spectrum speculation for unfair financial gain. Instead, some speculators with no intention of constructing and operating wireless facilities are holding on to fallow spectrum in the hopes of a "big score" from one of the duopoly carriers. If the deal is approved as proposed, Verizon will add even more spectrum to its warehouse while competitive, spectrum-starved carriers are left behind.

Lack of Interoperability Further Tips the Competitive Balance in Verizon's Favor

Long Term Evolution (LTE) promised to bring together GSM and CDMA technologies and unite the industry. As the FCC was attempting to establish the 700 MHz spectrum as the 4G LTE spectrum band, Verizon and AT&T were creating separate band plans on which only their devices would operate. AT&T and Verizon successfully

bifurcated the 700 MHz spectrum, isolating lower A block holders, and stranding them without access to interoperable mobile broadband devices. Smaller carriers without a sufficient number of customers to demand the direct attention of equipment manufacturers found their frequencies orphaned. As a result they have been largely unable to deploy LTE services on 12 MHz of prime, low-band spectrum.

Beyond the impact to Lower A Block licensees, this bifurcation has had a chilling effect on competition throughout the entire industry. The most telling example comes from Cox Communications. This past year, Cox decided to exit the wireless market. In its press release, Cox stated that its decision to no longer sell its 3G wireless service was based on the lack of wireless scale necessary to compete in the marketplace, the acceleration of competitive 4G networks, as well as the inability to access iconic wireless devices. Lack of interoperability has a negative competitive impact on the entire market.

RCA members spent nearly $2 billion on 700 MHz spectrum, which they cannot use as a result of anticompetitive practices of the larger carriers. Smaller carriers, and their now stranded investment, continue to sit on the sidelines while Verizon and AT&T get a head start on deploying 4G LTE throughout the country. Verizon itself could mitigate some of the harms by deploying its 700 MHz lower A and B block licenses and demand inclusion of these bands on procured devices. Instead, that spectrum remains unused in Verizon's warehouse.

Additionally, the boutique specifications, known as band classes, have created a new, technical barrier to roaming. Where devices are not technically compatible, even when operating on the same technology in the same spectrum band, roaming will not be

possible. Restoring interoperability remains one of the most pressing competitive issues in the industry today.

Roaming Is Fundamental to Competition

No carrier provides ubiquitous service. Wireless customers must roam onto other compatible networks to receive service when outside of their provider's coverage footprint. By their very nature, rural and regional carriers have less spectrum and smaller coverage footprints than the national carriers. The geographic service areas of RCA's members do not replicate the massive national footprints of Verizon and AT&T, and so RCA's members are heavily reliant on voice and data roaming arrangements to fill the gaps. The Commission has repeatedly recognized that roaming agreements can be critical to providers, especially smaller providers, remaining competitive in the mobile services marketplace.

Roaming agreements were once commonplace. However, as the industry consolidated and market power became concentrated in the hands of fewer carriers, Verizon and AT&T have built a roaming duopoly where they rarely, if ever, need smaller carriers' networks to fill coverage gaps. As a result, Verizon and AT&T have increasingly been able to hamstring the ability of other carriers to compete by refusing to offer voice and data roaming on commercially reasonable terms and conditions. RCA is pleased the FCC took action last year to ensure voice and data roaming where technically possible, but RCA members continue to struggle to negotiate commercially reasonable data roaming agreements. This is because Verizon has appealed the data roaming order, leaving the impact in limbo. Further, while the order is an important back-stop in private

negotiations, these negotiations remain very one-sided with the larger carriers having significant bargaining advantages over the smaller carriers. Simply put, Verizon has the power and incentive to stall negotiations to foreclose competition. This transaction will only increase Verizon's dominance over the roaming market by eliminating four potential roaming partners.

Not coincidentally, it is partially through Verizon's dominant control over the roaming market that brought the cable companies to the table to surrender their spectrum to a one-time competitor rather than build out their own networks. When the FCC adopted its Data Roaming Order, NCTA, a trade association representing cable providers, stated that, "adopting enforceable data-roaming rights will enable new entrants to compete on a nationwide basis and give consumers more choice and flexibility in wireless services." The most telling example of the importance of data roaming comes from the Applicants themselves. In explaining some of the challenges to building a network to the FCC, and in public statements, the Cable Companies said they would need to secure nationwide roaming agreements[1]. They rightly noted that wireless consumers expect service coverage wherever they travel and that no carrier, and especially not a new entrant, can provide service in all areas, which necessitates that it obtain roaming arrangements with other carriers. Indeed, Comcast stated publicly that "access to roaming agreements is next to impossible."

The roaming challenges expressed by the cable companies involved in the transaction today are experienced throughout the industry by all competitive carriers, as they noted. Increasing Verizon's market power will only exacerbate these issues.

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[1] David L. Cohen, *Clarifying Comcast's Spectrum Position*, Comcast Voices, Jan. 17, 2012, http://blog.comcast.com/2012/01/clarifying-comcasts-spectrum-position.html.

Federal policymakers should not implicitly endorse the "If you can't beat 'em, join 'em" philosophy.

Cable's Competition with the Telephone Company

Despite the cable companies' inability to successfully launch their own facilities-based wireless services to compete with Verizon, the cable companies have found success in competing with Verizon's other service offerings, including FiOS. With unconditioned approval of these transactions, such competition will vanish. As the one-time competitors join forces to market and sell each others' services, federal policymakers must publicly establish clear rules of the road to ensure that this cozy arrangement does not stifle future innovation.

For example, cable companies provided a threat to land line phone companies, such as Verizon, with the development and launch of voice over internet protocol (VoIP) services, giving consumers a choice of purchasing phone service from the phone company or their cable provider. The cable companies' broadband products also provided an alternative internet offering to Verizon's digital subscriber line (DSL) service.

Essentially, in much of America there are two wires reaching most consumers – one from the phone company and one from the local cable franchise. In many markets, these wires are controlled by Verizon and one of the cable companies involved in this deal. In fact, nearly 70% of the 82.5 million Americans covered by Verizon's local exchange carrier (LEC) territory are covered by the franchise area of one of these cable companies. For these nearly 60 million consumers, the only wires reaching their homes

will be operated by companies working together through these joint agreements. This raises serious questions regarding Verizon and the cable companies' willingness to compete on services or costs. This Committee, the DOJ, and the FCC must carefully consider this competition issue.

Backhaul and Control Over the Wires

In addition to being the two largest wireless providers, Verizon and AT&T are also the two largest wireline providers. This provides the two carriers with a significant competitive advantage, as they effectively control the backhaul networks that provide the pathway from wireless towers to the public switched telephone network. These two largest providers have a history of discriminating against RCA members in the sale of backhaul capacity, not surprisingly favoring their own wireless affiliates.

Increasingly, cable companies have provided an alternative backhaul service for wireless carriers. The growth of cable backhaul has also been lucrative for the cable companies. For example, in its fourth quarter 2011 earnings release, Time Warner Cable noted an almost 70% growth in backhaul revenues in just one year, from 2010 to 2011. The availability of cable backhaul capacity acts as a constraint on Verizon's and AT&T's incentives to raise backhaul prices even further. Now, however, Verizon and the cable companies have entered into a series of agreements, which raises the serious question of whether the cable companies have an incentive to continue to provide other wireless carriers with competitive offerings in the backhaul and special access markets.

With the cable companies reselling Verizon Wireless service, it is critical that cable companies do not discriminate against competitive carriers in the provision of

backhaul service in favor of Verizon Wireless. Similarly, the FCC must carefully watch what Verizon, which has built out fiber networks to support its FiOS offering and to provide its own backhaul to Verizon Wireless cell sites, does not abandon the strategy of investing in and upgrading their own wired network. With Verizon and the cable companies now jointly marketing each others' services on a cooperative basis, in many areas the backhaul market may go from a duopoly (Verizon and the cable companies) to an effective monopoly (the cooperative Verizon/cable companies' joint effort).

WiFi Services and Offload as an Alternative Solution to Network Congestion

One way to reduce network congestion, without as great reliance on purchasing backhaul from a competitor, is to utilize WiFi offload capabilities. Congestion issues are resolved by moving traffic off the cellular network utilizing exclusively licensed spectrum and on to an internet protocol network. By connecting mobile devices to WiFi networks, traffic can be more immediately taken off the air and onto a wired network, allowing the operator to better handle capacity issues. Beyond the network operator side, consumers are also increasingly relying on WiFi networks with an ever-increasing number of connected devices.

A growing trend in the industry is to shrink the size of cells through use of pico- and femto-cells and other systems to bolster this moving traffic off the air. All of these options rely on access to the wired network through either the phone company or the cable company. Cut off this access, and a WiFi offloading solution is eliminated. As the industry faces what many, including FCC Chairman Julius Genachowski, have referred to

as a "looming spectrum crunch," we should work to identify ways to expand access, not give one set of teamed companies control over most of the solutions.

Cable has been a leader in building out WiFi hotspots, utilizing unlicensed spectrum to provide unlimited and efficient wireless network access to their customers. For example, Comcast has over 20,000 WiFi hotspots from Philadelphia to New York City alone. With increased incentives to rely on Verizon for wireless service, cable companies may reduce expansion of WiFi networks, or make them available only to Verizon Wireless customers for mobile offload. Unfortunately, the removal of competition in this area will slow innovation and deployment of the high speed mobile broadband networks that all consumers and our economy rely on.

Joint Marketing

The agreements between the cable companies and Verizon shield each others' core businesses from competition. Each company would have a stake in the success of the other, and accordingly even if there is no formal arrangement not to compete, the incentives are dramatically reduced. Regarding wired services, the two wires going to the home are wrapped up into one.

As wireless broadband has grown and speeds have increased, LTE technology has brought us a potential third "line" to the home. Affix a "cantenna," a cylinder-shaped antenna for receiving the LTE signal, to a structure and a customer can gain access to wireless broadband using the latest network technology to access the internet at speeds that are comparable or better to other potential offerings, particularly in rural areas. Yet

this third connection to the home is also under the control of the Verizon-Cable team, essentially wrapping up all three means of connecting the home under one banner.

Moreover, other anticompetitive effects may loom within these agreements as well – but since they have been designated as "highly confidential" by the companies, I am unable to review or comment on them. A thorough examination of such agreements must be made to determine whether other potential anticompetitive harms exist behind the curtain of the secret highly confidential documents.

FCC Must Update the Spectrum Screen

The FCC has recognized that the control of spectrum licenses can translate into control of the market, and has historically taken steps to ensure that licenses are accessible to a range of companies and interests. At one point we had a spectrum cap, with a limit on the amount of spectrum that one entity could hold. Following the sunset of the spectrum cap, the FCC moved to using a spectrum screen. For the past eight years, the Commission has used this now-outdated tool to determine whether or not to closely examine particular markets for competitive harm due to the consolidation of spectrum into the hands of too few entities. Because the operative facts in the dynamic broadband market were constantly changing, the Commission found it necessary to modify the screen constantly on a transaction-by-transaction basis, leading to recurring complaints of *ad hoc* decision making. While the spectrum screen may have been a useful transitional mechanism as the Commission moved away from spectrum caps in local markets, the Commission should now use a new approach to determine competitive harm. The

spectrum screen approach is no longer an adequate tool to consider whether competitive harm may be occurring in a particular market.

Under the current spectrum screen, this transaction triggers additional scrutiny in only a few markets. As an informal tool for evaluating transactions, this points to the need for the screen to be updated to reflect today's market realities – such as the fact that the FCC no longer considers the wireless marketplace to be "effectively competitive" and the fact that a duopoly now exists between AT&T and Verizon. Moreover, the standard spectrum screen analysis does not adequately account for the fact that not all spectrum for broadband use is comparable as indicated above. The Commission should abandon the spectrum screen approach in favor of a new paradigm, used in the AT&T/Qualcomm transaction, in which the Commission reviews the potential anti-competitive effects of each proposed transaction on a national level, using a case-by-case analysis. This approach would more closely approximate the reality of the current mobile wireless industry. If the FCC continues to utilize its spectrum screen, it should properly apply weighted values to different bands and blocks of spectrum based on the favorable, or unfavorable, characteristics that each band possesses for use in the provision of mobile broadband services. The spectrum screen should also more accurately reflect the current availability of wireless spectrum, which should result in a decrease of the spectrum screen. Finally, the FCC should consider a spectrum screen that is different for the dominant carriers in the industry – AT&T and Verizon – than it utilizes for the rest of the industry. The FCC must retain the ability to modify or alter the spectrum screen to adjust to new market conditions, including conditions created by the transaction at hand.

Verizon has previously agreed that the spectrum screen should be revised during a pending transaction.

By adopting a screen that takes into account (1) the proper amount of usable spectrum; (2) a proper valuation of spectrum and (3) the current marketplace reality that four carriers are needed for competition in a market, the Commission would be able to more accurately determine the competitive harm caused by spectrum aggregation, particular in the context of additional spectrum aggregation by the two dominant carriers – Verizon and AT&T.

Conditions Must Be Imposed If These Deals Go Forward

For all of the reasons described, this deal cannot be granted unless the Commission imposes stringent transaction-specific conditions that limit the competitive harms that would result. Specifically, the FCC must impose:

1. Significant spectrum divestitures;
2. Commercially feasible provisioning of roaming;
3. Interoperability and availability of interoperable devices; and,
4. Affordable provision of backhaul and special access services.

Where Verizon clearly holds a sufficient amount of spectrum to meet near-term demand, approval of the deal should include robust divestitures of unencumbered useable spectrum that can be deployed by one or more competing operating carriers to provide wireless broadband services. In considering spectrum divestitures, the FCC must conduct a full review of Verizon's holdings and use in each market across the nation to determine where spectrum may otherwise be put to better and more efficient use, rather than sit in a

spectrum warehouse. This is particularly important in rural areas, where Verizon appears not to be utilizing spectrum it already holds to its full capacity. The FCC should require divestitures to operating entities willing to enhance their current offerings or expand their current operations in markets where it is clear that Verizon's spectrum inventory unreasonably exceeds the capacity necessary to meet near-term demand. It is also critical that all spectrum divested be immediately available and suitable for deployment of 4G LTE services, including availability of interoperable devices and robust roaming opportunities.

Verizon must be required to provide voice and data roaming on commercially reasonable terms and conditions. Roaming supports both consumer expectations and competition among carriers, and a stringent roaming condition will allow both existing operators and new entrants to compete in the market. Close scrutiny of the resale provisions contained in the joint market agreements with the cable companies should guide the justification of what is deemed to be commercially reasonable terms and conditions for roaming, and should in fact be lower than these reseller rates as roaming carriers impose fewer costs on a host carrier than do resellers. Further, a stringent roaming condition along these lines will not unduly benefit the cable companies for their unwillingness or inability to deploy their AWS spectrum as they compete against other facilities based providers.

The Commission must also impose an interoperability condition, ensuring that equipment for all bands – particularly for 700 MHz and AWS – remains open and competitive, with all carriers having access to devices that are interoperable within a band. The Commission must ensure that Verizon is prevented from restricting the best

and most innovative handsets to its own spectrum bands and technologies. Although an interoperability *NPRM* is forthcoming, the rulemaking and related appeal process on such a contested issue may be protracted. An interoperability condition on this transaction will mitigate competitive harms in the interim, and will be subject to revision in accordance with the Commission's ultimate conclusions in the interoperability proceeding. In addition, Verizon must commit to deploying mobile wireless services on its Lower 700 MHz A and B Block spectrum in the near term. In doing so, Verizon would create an equipment and infrastructure market that would both decrease its own warehousing of spectrum, as well as allow other providers to deploy on their own Lower 700 MHz A and B Block spectrum.

Finally, the FCC must impose conditions for the provision of wireline backhaul and special access. Verizon and AT&T, the two largest providers, have a history of discriminating against competitors in the sale of backhaul capacity, tending to favor their own wireless affiliates. What already is a significant competitive disadvantage for smaller carriers may become seriously exacerbated by the proposed Transactions. The joint marketing and resale agreements raise the serious question of whether the cable companies have an incentive to continue to provide other wireless carriers with competitive offerings in the backhaul and special access markets. The Commission must condition this deal on access to Verizon's and the cable companies' backhaul capacity.

Conclusion

Further concentration in the wireless industry will continue to crowd out competition and ultimately harm consumers. In looking at the Verizon-cable deals from a wireless industry perspective, Verizon Wireless will continue to grow stronger, the viability of competitors will be further stressed, and four potential new entrants will be eliminated as the march to duopoly continues. Absent imposing each of the conditions discussed today, competitive carriers will continue to struggle to provide service as an alternative to an even stronger market dominant player. These deals must be conditioned, or they must be stopped. Otherwise, new regulations to artificially create the benefits of market competition will be required.

Thank you again for the opportunity to testify today, and I welcome any questions.

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before the

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights

On

March 21, 2012

Regarding

"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"

INTRODUCTION

Chairman Kohl, Ranking Member Lee and esteemed members of the Committee, I thank you for the opportunity to testify before you today on behalf of Free Press. We are a nonpartisan nonprofit organization that works exclusively on technology and media policy. Through education, organizing and advocacy, we promote diverse and independent media ownership, strong public media, quality journalism and universal access to communications.

Mobile technology has transformed our society and our economy at a breakneck pace during the past decade. In 2011, there were close to 323 million wireless subscriber connections in the United States. Almost one-third of households in this country have severed their landline service and become fully dependent on wireless service to connect them to their friends, loved ones, and emergency services.[1]

Residential broadband service provides the foundation for the most vibrant sector of our economy. The Federal Communications Commission correctly writes in the National Broadband Plan that, "[Broadband] is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge."[2]

However, as the consumer base for these services grows, the market providing them is quickly consolidating. The mobile wireless market has become top-heavy, with just two carriers controlling a vast amount of the profits and market share.[3] Most consumers have the choice of only one, at most two, providers of residential wired

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[1] *See* CTIA, "Wireless Quick Facts: Year End Figures," *at* http://www.ctia.org/media/industry_info/index.cfm/AID/10323

[2] Federal Communications Commission, *Connecting America: The National Broadband Plan*,xi (2010) (*National Broadband Plan*).

[3] Verizon and AT&T together control nearly two-thirds of all wireless subscribers and nearly four-fifths of the entire wireless industry's profits. *See Wireless Industry Benchmarks*, SNL Kagan (2012).

broadband service.[4] Prices have remained high through artificially constructed bundles that force consumers into buying larger packages of services than they want or need.[5]

This lessening of competition and the discipline it provided for the market has left consumers with fewer choices, higher prices and unfair terms and conditions. This is no accident. It is the result of public policy decisions over the last 12 years to deregulate the broadband marketplace while it still faced monopoly conditions, and to place a disproportionate amount of the nation's most valuable spectrum into the hands of just two wireless carriers.

Throughout much of my testimony I will focus on the specific consumer and competitive harms associated with the proposed transaction we are here to consider today. However, I would also like to provide a broader perspective to bring into focus the backdrop of consolidation against which this transaction is being proposed.

THE LOOMING CRISIS IN COMPETITION

In South Korea, connections are three times as fast as those in the United States and one-third less expensive per month. As a result, adoption rates are close to 94 percent.[6]

In France, you can get Internet service that offer speeds twice as fast as Comcast's DOCSIS 3.0, or Verizon's DSL. You can get that service, bundled with high definition TV *and* mobile data service, for your laptop throughout most of the country for $33 per month. Here in the United States, consumers pay three to five times that amount for the fastest speeds.[7]

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[4] *See National Broadband Plan* at 37.

[5] For example, a report from the industry-supported Technology Policy Institute found that broadband prices in the U.S. increased even as prices around the globe dropped. *See* Matt Lasar, "Broadband prices dropping around the world, but not US," *ArsTechnica*, Dec. 15, 2010. ISP earnings indicate broadband prices are on the rise. Over the past two years Comcast's average data revenue per user increased more than 5 percent, from $38.09 in 2009 to $40.11 in 2011. TimeWarner Cable's average data revenue per residential user also increased more than 5 percent during this period, from $36.39 in 2009 to $38.32 in 2011. Survey data indicates most U.S. broadband customers believe they are paying too much for their service, with one-quarter reporting they have only one provider offering service where they live. *See*"Broadband Expert Survey of US Consumers Finds 94% Believe They Are Overpaying for Their Broadband Service," Broadband Expert, Feb. 6, 2012.

[6] Sutter, John,"Why Internet Connections Are Faster in South Korea,"*CNN*, Mar 31, 2010.http://goo.gl/gRPS8

[7] Benkler, Yochai,"Ending the Internet's Trench Warfare,"*New York Times*, Mar 20, 2010. http://www.nytimes.com/2010/03/21/opinion/21Benkler.html?_r=1&adxnnl=1&adxnnlx=1311011445-7xRvradDUFNpBg1e/CJXmA

This is not a result of the free hand of the market. This is the result of a failure on the part of our nation's policymakers over the past 15 years to protect and promote competition.

In March 2010, the FCC published its National Broadband Plan, in which the Commission predicted that soon 75 percent of American households will have only one choice for at-home high-speed Internet service: their local cable monopoly.[8] These companies, which spent significant investments to upgrade their networks in the last decade, now stand poised to reap the windfall of an unregulated monopoly environment where they are currently raking in over 90 percent margins on providing data services.[9] But despite these incredibly high profits, prices for U.S. consumers continue to rise, even as they fall for consumers in other countries around the world.[10]

For example, over the past decade, the monthly price for basic cable has increased more than 50 percent, from under $33 in 2001 to nearly $50 in 2011.[11] A recent FCC report once again confirmed that prices are higher in areas where cable companies have been granted pricing relief based on a finding of "effective competition" as defined in the Cable Act.[12]

In addition to higher prices, this unconstrained consolidation means that the pipe providing access to news, entertainment, education, health care and communication is increasingly controlled by a single actor unconstrained by the forces of competition and free of government oversight.

Similarly, the market for mobile broadband data is quickly trending toward a duopoly. The Justice Department and the FCC forestalled this trend by correctly and courageously denying the merger of AT&T and T-Mobile. However, this momentary pause in consolidation won't last long if the proposed transaction is allowed to proceed unaltered.

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[8] *See National Broadband Plan* at 42. ("[I]n areas that include 75% of the population, consumers will likely have only one service provider (cable companies with DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds.").

[9] *See* Crawford, Susan. The Crisis in Communications, note 32 (citing Bernstein Research, Dec. 2010 Black Book 81 (2010)).

[10] *Supra* note 5.

[11] And for most consumers, add to this another $40 in charges for set-top boxes, digital, and HD services. See SNL Kagan U.S. Multichannel Industry Benchmarks, SNL Kagan, (2012).

[12] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* MM Docket No. 92-266, Mar. 9 (2012).

Verizon and AT&T control two-thirds of all wireless subscriptions and 70 percent of the most lucrative post-paid market customers.[13] Verizon's profit margin on wireless services is substantially higher than that for all other competitors, except for AT&T; and Verizon and AT&T together account for four-fifths of the entire wireless industry's profits — the only two carriers that can claim double-digit shares of industry profits.[14]

These increasing profits are a reality because consumers are shelling out more and more each month for wireless services. Recent data indicates that the average monthly wireless bill was $86 in 2011, some 25 percent higher than just four years prior.[15]

Figure 1:
U.S. Wireless Market – Key Financial Metrics

Carrier	Spectrum Book Value	Subscribers (2011)	Wireless Market Share	Wireless EBITDA Margin	Share of Wireless Industry EBITDA	Wireless ARPU (2011)	Wireless CapEx as % of Revenue (2011)
Verizon	$73,250,000,000	108,667,000	33%	48%	42%	$53.80	12.8%
AT&T	$51,374,000,000	103,247,000	31%	44%	37%	$51.02	18.6%
Sprint	$20,529,000,000	55,021,000	16%	18%	7%	$45.89	8.0%
T-Mobile^	$15,265,000,000	33,711,000	10%	31%	9%	$46.00	14.1%
MetroPCS	$2,538,600,000	9,346,659	3%	28%	2%	$40.80	22.2%
U.S. Cellular^	$1,470,550,000	5,932,000	2%	23%	1%	$58.09	16.5%
Leap Wireless	$1,940,824,000	5,934,000	2%	21%	1%	$42.09	14.7%

Source: Company SEC filings; SNL Kagan; Free Press Analysis

^ 4Q 2011 results not available; 3Q or YTD 2011 values used

Verizon and AT&T's spectrum holdings have nearly four times the value of T-Mobile's and Sprint's combined. These two dominant market players hold 80 percent of the most valuable beachfront spectrum for traveling long distances and penetrating buildings and rough terrain.[16]

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[13] *See* Petition to Deny of Free Press, *In re Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo. LLA and Cox TMI Wireless, LLC For Consent to Assign Wireless Licenses*, WT Docket No. 12-4, Feb. 21, 2012 (*Free Press Petition to Deny*), at note 26.

[14] *See Free Press Petition to Deny*, at note 27.

[15] *See* "J.D. Power and Associates Reports: Prevalence of Non-Contract Monthly Service Plans Continues to Grow, as Product Offerings Become More Competitive with Those of Traditional Contract Service Plans," JD Power and Associates, Mar. 31, 2011; and "J.D. Power and Associates Reports: Average Length of Time Wireless Customers Keep Their Mobile Phones Increases Notably," JD Power and Associates, Sep. 23, 2010. The 2011 data quotes above is a weighted average based on the 2011 results reported separately for contract and non-contract services.

[16] *See Free Press Petition to Deny*, at 21.

It is against this backdrop that Verizon, Comcast, Time Warner Cable, Bright House Networks and Cox Communications have proposed to sell one another's services, divide the market for at-home wireline broadband, and provide Verizon Wireless with the incentive and ability to leverage its market position, infrastructure and business relationships to stave off any serious competitive threat in the wireless marketplace.

Allowing for further consolidation in this marketplace will only drive prices higher, reduce consumer choice, and have drastic consequences on the rate of innovation as the companies involved are freed from competition and find diminishing value in investing in better infrastructure.

THE PROPOSED TRANSACTION CEMENTS THE TREND TOWARD A WIRELESS DUOPOLY

The public airwaves over which broadband data is transmitted — spectrum — is the lifeblood of wireless technologies. There is a finite amount of it available and managing this scarcity is one of the most important functions of the Federal Communications Commission.

Control Over the Input Market

In this transaction, Verizon Wireless has agreed to weaken its competitive position in the markets where it offers at-home fiber broadband service in exchange for the opportunity to buy the last nationwide block of highly valuable wireless spectrum that will be available for the foreseeable future. The result will put Verizon in control of close to a third of all mobile broadband spectrum measured by value[17], and it will give Verizon and AT&T a combined 60 percent value share of this critical input market.

When policymakers weigh whether or not this transaction will harm competition or benefit the public interest, they must look across the wireless marketplace and ask questions about the future prospects for competition and how they will be impacted by this deal.

As explained below, excessive control over the essential spectrum-input market will raise barriers to new entrants, inhibit the provisioning of new competitive services to consumers, and ultimately foreclose the ability of smaller competitors to mount serious challenges to the incumbent twin Bell wireless companies.

Not All Spectrum is Created Equal

Each band of spectrum in each local market has unique characteristics that result in no two identically sized blocks holding identical value. These differences are due in

[17] *See Free Press Petition to Deny*, at 17.

part to the propagation characteristics of the spectrum — how far they can carry a signal and how well that signal can penetrate buildings and terrain. The geographic location of spectrum also plays a role — spectrum licenses serving areas with a higher population density are valued differently than more rural areas.

As with property, the location of broadband spectrum is the main driving force of its value. Unfortunately, the screens that the FCC uses to measure spectrum holdings don't measure this dynamic. These antiquated screens are out of date — they measure only for the square footage of holdings (the amount of Mega-Hertz, or MHz) and fail to acknowledge whether the spectrum holdings are beachfront, beach adjacent, or have only a beach view.[18]

Any analysis of this transaction must take into account the value of the spectrum being sold in order to adequately examine the concentration of market power that results from this deal. Simply counting the total MHz of available spectrum held by any one carrier provides an inaccurate and distorted portrait of market power.

An analysis of the spectrum holdings most valued for providing mobile data services reveals a significant imbalance in ownership. Currently two companies — AT&T and Verizon Wireless — hold a disproportionate percentage of beachfront spectrum, with Verizon alone controlling one-third of the spectrum best suited for nationwide mobile broadband.

However, even accounting for the value in spectrum best suited for mobile broadband offers inaccuracies. Spectrum values can vary based on geography and population density, as discussed earlier, and they can also become distorted in the presence of incumbents who can place a higher value on acquiring spectrum to disadvantage potential competitors.[19]

Free Press attempted to provide a crude perspective of spectrum market share based on value by constructing a weighting scheme based on the book value of spectrum holdings reported to the SEC, recent auction prices, and recent prices reported on the secondary markets. The result can be seen in the table below:

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[18] For a more in depth account of the inherent differences in the value of spectrum *see Free Press Petition to Deny*, at10-19.

[19] *See e.g.*Ex ParteSubmission of The United States Department of Justice, *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, (2009) (*DoJ Broadband Plan Ex Parte*), at 22-25.

Figure 2:
U.S. Wireless Market
Value-Weighted Shares of Mobile Broadband Spectrum

Carrier	Share of Each Band's Total MHz-Pops							
	700MHz	Cellular	PCS	AWS	BRS	EBS	All Mobile Broadband Spectrum	All Mobile Broadband Spectrum (Value Weighted)*
Verizon	43%	48%	15%	15%	0%	0%	17%	29%
AT&T	24%	44%	26%	8%	0%	0%	16%	25%
Sprint	0%	0%	27%	0%	0%	0%	7%	7%
T-Mobile	0%	0%	20%	27%	0%	0%	10%	10%
MetroPCS	1%	0%	3%	9%	0%	0%	2%	2%
U.S. Cellular	3%	4%	2%	2%	0%	0%	1%	2%
Leap Wireless	0%	0%	2%	9%	0%	0%	2%	2%
Clearwire Corp.	0%	0%	0%	0%	86%	62%	25%	5%
SpectrumCo.	0%	0%	0%	21%	0%	0%	4%	4%
Cox	1%	0%	0%	2%	0%	0%	1%	1%
Other	29%	4%	6%	8%	14%	38%	16%	14%

Source: Fifteenth Report; Free Press Analysis; does not reflect subsequent transactions

*700MHz and cellular spectrum MHz-pops were weighted by a value of 1; PCS and AWS-1 were weighted by a value of 0.5; BRS and EBS were weighted by a value of 0.1. Weights chosen based on recent market valuations.

Using this approach, we observe that if these applications are approved, Verizon will control fully 35 percent of all value-weighted mobile broadband spectrum. If a more finely tuned valuation methodology is used by the expert federal agency to assess market shares, this level of control over the spectrum input market would clearly be considered moderately concentrated and should raise red flags at the DoJ and the FCC. Given the highly concentrated nature of the overall wireless market, the FCC and the DoJ must conclude that this transaction would significantly weaken future prospects for meaningful wireless competition.

The Impact of Spectrum on Wireless Competition

Without access to a sufficient amount of high-quality spectrum, a wireless company cannot offer first-class wireless services. It cannot scale its business in a cost-efficient way, or keep up with growing consumer demand for wireless data. Spectrum, particularly highly valuable spectrum, is the input market on which the entire wireless industry is built.

The higher the quality of spectrum a carrier controls, the less costly it is for that carrier to expand the capacity of its network. Cell towers can carry signals longer distances with beachfront spectrum, so fewer towers are needed to provide coverage

in a given area.[20]With more spectrum, towers are also less likely to get overloaded with traffic, because the data demands on the tower from surrounding subscribers can be easily spread among the channels that the carrier owns licenses for.

If a carrier lacks higher-quality spectrum, it must build more towers to carry its signal over even short distances, and to ensure its network keeps pace with consumer demand. The FCC has repeatedly noted that to provide coverage that requires one cell site with high-quality spectrum would necessitate nine cells with lower-quality spectrum.[21]

Building a wireless network over low-quality spectrum requires an increase in the ratio of capital expenditures to profit. Put simply, a carrier must spend more of its revenue on building infrastructure and there is less left over for profits.

Therefore, having a weaker spectrum position vis à vis your competitors makes it near impossible to mount a serious competitive challenge. To offer a comparable quality of service to consumers, a wireless company must spend much more to make efficient use of its less valuable spectrum holdings, driving the retail cost of that service to consumers ever higher.

Foreclosure Value

The DoJ has pointed out that because of the important role spectrum plays in the investment strategies of wireless carriers, the value of that spectrum to incumbent providers is increased.[22] The private value of spectrum for an incumbent in a given market includes not only the revenue from use of the spectrum but also any benefits gained by preventing rivals from using that spectrum to erode the incumbents' existing businesses. Therefore, even though a carrier may not need spectrum to meet an immediate demand, it has significant incentives to keep that resource away from its would-be rivals.

Indeed, that appears to be the case in this transaction. The companies seeking approval for this transaction freely admit that "Verizon Wireless has sufficient spectrum to meet its immediate needs, and generally to meet increased demand in many areas until 2015."[23]

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[20]*See 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*, WT Docket No. 09-66, Fifteenth Report, 26 FCC Rcd 9664, at para. 293 (rel. June 27, 2011) (*Fifteenth Report*).

[21]*Id.*

[22]*DoJ Broadband Plan Ex Parte.*

[23]*See e.g. Cox Application,* p. 12; *SpectrumCo. Application*, p. 13.

Purchasing this spectrum is not the only way Verizon can meet increasing consumer demand for data, but it is the only way it can foreclose its competitors from providing a serious competitive threat by offering lower-cost high-speed mobile services.

This Spectrum Will Not Be Put to Its Most Immediate and Efficient Use

Verizon fails to offer a detailed explanation of when and in what geographic markets it plans to use the spectrum being sold in this transaction. Without such a showing, it is reasonable to expect that other wireless carriers that do not enjoy Verizon's superior spectrum depth would better serve the public interest by putting these licenses to use immediately.

Indeed, putting this spectrum in the hands of other carriers would promote more balanced use of all broadband spectrum across multiple carriers' networks. That just two carriers hold most of the spectrum available for broadband use (and in turn most of the market share) while pleading spectrum poverty should send a strong signal to the FCC that it is not living up to its congressional mandate to "improve the efficiency of spectrum use."[24]

Verizon also fails to offer any cost-benefit analysis detailing why hoarding this valuable spectrum for multiple years is more beneficial to the public interest than Verizon simply investing in other methods for increasing its capacity locally where it experiences increased data demand.

Verizon emphasizes the ever-increasing number of smartphones and data-heavy devices on its network, but fails to mention the massive increase in revenues that come from this trend.[25] These are profits that can and should be re-invested in the network to increase capacity via cell splitting, Wi-Fi offload and spectrum sharing. A quick look at Verizon's revenues and capital expenditures reveals that the company is well placed to make these investments. The intensity of Verizon's capital expenditures actually declined even as it accelerated its LTE rollout, indicating that it has substantial resources to meet network demand without increasing prices or reducing services.

Verizon could do all of the routine things that carriers do to increase capacity to meet predictable increases in demand. And if Verizon fails to do these routine things, if it fails to invest in capacity enhancements like cell splits, then putting this spectrum in the hands of maverick competitors means customers will have alternatives. This is a reality that the duopoly carriers do not seem to understand — their customers are not and should not be theirs forever, unless the carriers do what is necessary to earn their

[24] 47 U.S.C. § 332(a)(2)

[25] Verizon's wireless revenues for 2007-2011 were $43.824B, $49.298B, $60.325B, $63.407B, and $70.154B. Verizon's net operating profits from its wireless division for 2007-2011 were $11.737B, $13.96B, $16.638B, $18.724B, and $18.527B.

loyalty. Further, it is not the job of government to assist carriers in retaining their customers at the expense of competition and innovation.

THE PROPOSED JOINT OPERATING ENTITY AND JOINT MARKETING AGREEMENTS END WHAT LITTLE HOPE REMAINS FOR COMPETITION IN HOME BROADBAND SERVICE

The joint operating entity (JOE) arrangement and joint marketing agreements (JMAs) represent an agreement between these companies to stay out of one another's way, in perpetuity. The agreements are designed to divide the market for wireline at-home broadband service between the cartel of companies that are party to the deal, and to give these companies more control over the pace of innovation to ensure that any future products and services do not undermine their legacy revenue streams of video and fixed broadband services.

Congress recognized the danger in this sort of arrangement when it passed the 1996 Telecommunications Act. That legislation specifically bars joint collaborations between local cable and local long-distance carriers.[26] That is because in 1996 Congress intended to encourage the kind of intramodal competition between cable and telephone companies that these agreements will eliminate.

The word "competition" was used 196 times on the floor of the Senate to describe the Telecommunications Act.

"Allowing cable companies to provide phones and phone companies to provide cable, this bill will spur competition and reduce costs to the Nation," Sen. Ted Stevens said of the bill his committee helped author.[27]

Openly striking deals to sell your rival's services is not the kind of competition the Telecommunications Act envisioned. The cutthroat competitive environment that pushes innovation forward and forces companies to continually invest in rolling out

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[26]47 U.S.C. § 572. See also Conference Report, Telecommunications Act of 1996, House of Representatives, 104th Congress, 2d Session, H.Rept. 104-458, at p.174. "The conference agreement adopts the provisions of the Senate bill limiting acquisitions and prohibiting joint ventures between local exchange companies and cable operators that operate in the same market to provide video programming to subscribers or to provide telecommunications services in such market. Such carriers or cable operators may enter into a joint venture or partnership for other purposes, including the construction of facilities for the provision of such programming or services. With respect to exceptions to these general rules contained in new section 652 (a), (b), and (c), the conferees agreed, in general, to take the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets."

[27]http://thomas.loc.gov/cgi-bin/query/z?r104:S07JN5-541:/

better products and services is born from companies doing everything they can to steal away their competitors' customers, not by offering to sign up your own customers for rivals' services.

With this transaction, it is clear that offering perpetual reciprocal marketing was the price Verizon paid for a seat at the table to negotiate the price of keeping this spectrum out of the hands of potential competitors. On the other side of the ledger, the cable companies need an assurance that the spectrum asset they are selling would not be used against them either in areas where they directly compete with Verizon FiOS, or by Verizon striking deals to offer quad-play services with satellite video providers.[28]

For the average American consumer, this means higher cable and Internet bills every month; it means higher wireless bills; it means the cable-programming cartel will likely never be broken up; and ultimately it means the quality of U.S. communications networks will continue to trail that of many other developed nations, as the lack of real competition will mean less incentive to invest in R&D and network upgrades.

The Agreements Reduce Verizon's Incentives to Promote FiOS as a Competitive Alternative to Cable Services

Verizon Communications competes head to head with the big cable companies that comprise SpectrumCo in certain markets. It provides its FiOS bundle of voice, video and high-speed broadband service in direct competition with Comcast, Time Warner, Cox and Bright House in markets in the Northeast, Mid-Atlantic and Pacific Northwest regions.

The JMA's and JOE provide a roadmap for these former rivals to collaborate rather than compete. The JMAs in particular remove the incentive for Verizon to aggressively market its FiOS product where the carrier competes head to head with the cable companies that are a party to this deal.

Verizon Communications put it best when it submitted an expert analysis to the FCC in 2009: "[Cable and FiOS] have strong incentives to maintain and expand their subscriber base to spread their fixed costs over a large network of users. When a cable

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[28] *See* remarks of Lowell C. McAdam, President, Chief Executive Officer, COO & Director, Verizon Communications, Inc., UBS Global Media & Communications Conference, December 7, 2011. "I think that's the reality of the situation we are in. As I talked with Brian Roberts, he said '*look, Lowell. If I sell you the spectrum, that puts me on a particular path. I need to have a fallback that if this doesn't work as well as we hope that I'm not blocked out of wireless*,' so I had to respect that as a partner. And an MVNO will have added burdens for them if they choose to go that path. They'll have to make that call, but it will be profitable for us if they do go that way. So it's a win-win I think for both of us." (emphasis added).

company or telco loses a subscriber to its competitors, it loses both the variable profit contribution from that subscriber as well as the subscriber's contribution to its fixed costs of building and maintaining its network."[29]

Now, each time Verizon FiOS' cable competitors sign up a subscriber, the company does not experience this "loss in contribution to its fixed costs"; it sees a new potential mobile data subscriber where its margins are much higher. As a result, this transaction recalibrates the incentives in the market for wireline telecommunications services. The transaction weakens the incentives for Verizon to compete for market share and forecloses the hope that Verizon may expand its FiOS deployment to offer a competitive alternative to the cable monopoly in other markets.

The result will be monthly subscription rates unconstrained by competitive pressure, and a reduction in investment for broadband deployment and infrastructure upgrades. Put simply, this means higher prices and slower speeds for consumers.

The Agreements Prevent a Future Wireless Competitor from Market Entry

The cable companies that jointly comprise SpectrumCo have argued that while their wireline infrastructure puts them in a position to build towers and invest in their own wireless broadband infrastructure, the costs and economies of scale associated with creating a new facilities-based wireless company are prohibitive. That is, they do not believe they can amass wireless market share quickly enough to justify building their own infrastructure.[30]

Therefore, the companies argue, this transaction does not foreclose the entry of wireless competitors since they do not plan to invest in towers, contract with phone manufacturers, and deploy a network in the first place. However, there are several ways to enter the wireless market apart from building a proprietary network. Cable companies could have used this spectrum as leverage to partner with a non-competitive wireless provider, like Sprint or T-Mobile, to buy wholesale access to their infrastructure and become a retail reseller of mobile service.

In fact, many companies engage in this kind of agreement already, operating as so-called "mobile virtual network operators," or MVNOs. For example, Ting is a mobile operator that obtains wholesale access to Sprints network and resells that connection to consumers, offering monthly no-contract services that are below the retail prices charged by Sprint itself.[31]

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[29] *See Petition to Deny of the Communications Workers of America*, at note 15.

[30] *See e.g.* Declaration of Robert Pick, Chief Executive Officer of SpectrumCo, LLC, Exhibit 4 of Public Interest Statement in *Verizon-SpectrumCo Application.*

[31] See https://ting.com/why-ting/ . "We will make less money per customer in hopes of building more loyal relationships and earning referrals."

Moreover, the cable companies selling this spectrum have shown their perceived need to offer quad-play services through the JMAs. However, under these agreements, the companies are not re-selling access to wireless services under competitive rates, terms and conditions. They are merely signing their own customers into Verizon Wireless' two-year contracts in exchange for an assurance they won't face competition from Verizon FiOS in the monthly video and broadband at-home market.

For example, Verizon Wireless had been working with DIRECT TV to create a bundle of voice, video and mobile broadband that would have competed with cable offerings across the country, but terminated the project directly after announcing this deal.[32] Similarly, the big cable companies had been working with the mobile broadband operator Clearwire to develop a quad-play bundle, and they too terminated that deal as soon as they entered into these JMAs that protect their services from the competition of Verizon FiOS.[33]

From the perspective of consumers, a far better outcome would be for the cable companies to partner with a non-dominant wireless carrier, like Clearwire or T-Mobile, to offer quad-play packages that compete with the current Verizon/AT&T wireless duopoly. This would not only introduce a new competitive threat in the mobile market, it would also preserve what little competition exists in the at-home broadband market that this deal dooms.

The Agreements Signal the End of the FCC's Current Broadband Competition Policy

"Next-generation" wireless service — commonly marketed as 4G LTE — has long been hailed as the coming competitive savior to free consumers from their monopoly cable-broadband prison.

Comcast has used wireless to downplay the harms of the wireline duopoly.[34] Both the current[35] and prior[36] FCC chairmen have cited future wireless competition as the answer to concerns about the wireline duopoly.

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[32] *See* Comments of DIRECT TV, *In re Applications of Verizon et. al.*, at 3.

[33] Peter Svensson, "Cable Companies Drop Wireless Dreams," *Associated Press*, Dec. 2, 2011.

[34] *See e.g.* Comments of Comcast Corporation, GN Docket No. 09-51, June 8, 2009, p. 41; Reply Comments of Comcast Corporation, GN Docket No. 09-51, July 21, 2009, p. 7.

[35] *See e.g.* Steven Levy, "The Wired Interview: FCC Chair Julius Genachowski on Broadband, Google and His iPhone," Wired, March 4, 2010.

[36] *See e.g.* Written Testimony of Chairman Kevin J. Martin, Federal Communication Commission, Before the Committee on Energy and Commerce, U.S. House of Representatives, P. 4, July 24, 2007.

The Commission's Wireless Broadband Access Task Force plainly suggested that "wireless networks can provide competition to existing broadband services delivered through the currently more prevalent wireline and cable technologies. Wireless broadband can create a competitive broadband marketplace and bring the benefits of lower prices, better quality, and greater innovation to consumers."[37]

But be it 3G or 4G, the wireless savior has yet to show up and with these cartelization arrangements, it's clear that Verizon intends its 4G service to be a complement rather than a competitor to the cable broadband monopoly that most consumers face.

These agreements remove any incentive for Verizon Wireless to use its 4G network to offer high-speed Internet access at competitive prices or terms with the current cable broadband packages. Instead, it will continue to keep low caps on the total amount of bandwidth consumed, and it will force would-be subscribers to buy through tiers and bundles of needless other services before purchasing Internet access.[38]

The Agreements Should Trigger Antitrust Scrutiny in Light of the DoJ's Competitor Collaboration Guidelines

The DoJ's "Competitor Collaboration Guidelines" and the "Intellectual Property Guidelines" provide an outline for the kinds of collaboration that would negatively impact competition.

The fact that the companies involved in this transaction are vertically integrated in the markets of monthly cable service, must-have content production and sports coverage, and wireline and wireless broadband services implicates several of the concerns raised in these guidelines and should trigger a strict antitrust review.

For example, conditioning the rights to jointly developed research and development, by an entity outside the agreements, on the purchase of an additional item or contract obligation, could constitute illegal tying as described in Section 5.3 of the "Intellectual Property Guidelines."

If pooling arrangements require the companies to share competitively sensitive technology, this could deter or discourage innovation because none of the companies want the others to have a free ride on their R&D investment.[39]

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[37] *See* "Connected on the Go: Broadband Goes Wireless," Report by the Wireless Broadband Access Task Force ("FCC Wireless Broadband Task Force Report"), Federal Communications Commission, GN Docket No. 04-163, February 2005, at pp. 13-14.

[38] For further commentary on the perils of bundling and tying in the wireless market, *see e.g.* Written Testimony of Joel Kelsey, Consumers Union, Before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, June 16, 2009.

[39] *See* Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for the

Antitrust concerns should also be triggered if the parties engaged in cross-licensing technology possess aggregate market power, because the likelihood these companies will exclusively deal with one another to exclude potential competitors is heightened.[40]

CONCLUSION

Effective or meaningful competition occurs when 1) the barriers to entry for new competitors in the market are low; 2) consumers have a choice of alternative providers and services in the market and the costs of switching providers do not present an undue burden; 3) innovations in technology are encouraged and lead to expansion of services and product offerings for consumers; and 4) no single firm or a group of firms have the power to influence the prices of the products and services.

However, in the market for wireless and wireline telecommunications services, there are pronounced and extensive barriers to effective competition. Consumers are being locked in to the few large incumbents offering service and competitors are being locked out of the marketplace.

There is no reason this pattern of poorly protecting the public interest has to continue. The DoJ and the FCC showed immense analytical skill and political courage in rejecting the AT&T/T-Mobile merger, even if they did send AT&T home with the Qualcomm parting gift.

Though the transaction we are considering now does not appear on the surface to be as harmful as AT&T's most recent horizontal empire plans, Verizon's consolidation of valuable spectrum raises as many long-term competitive concerns. These concerns alone would be enough to reject these applications, but when viewed along with the unprecedented Verizon-cable cartelization agreements, the federal agencies reviewing this deal have no choice but to tell Verizon no if they intend to protect competition.

Wireless companies are fond of evangelizing about the "spectrum crisis." Well, it's long past time we all get serious about the competition crisis that consumers are already facing, and that begins with the rejection of these anticompetitive license transfers.

Licensing of Intellectual Property (1995) (Intellectual *Property Guidelines)* at Section 5.5.

[40] *Id.*

Creeping Duopoly?

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Does support for robust competition remain the communications policy of the United States? It may sound like a rhetorical question. Yet it is the right question to ask as we witness increasing concentration in most communication markets, including the prospect of *de facto* duopoly in wireless communications. It was the question underlying the AT&T/T-Mobile merger last year. And it is the same question raised by the sale of spectrum and marketing agreements we examine today.

As compared with the spectacle of T-Mobile - AT&T, Verizon's softer strategy may seem a sideshow. But subtle action is often the more powerful, particularly in a distracted age. Verizon holds more valuable spectrum than anyone else, and should it complete this transaction, it will actually be left with spectrum holdings that are, by book value, larger than an AT&T/T-Mobile combination.* Yes, AT&T's challenge to competition was feckless and loud. But Verizon's deal affects the very competitive structure of the communications market.

This transaction (and others like it) does not threaten to be the grand coup that ends competition in our time. The danger, rather, is the prospect of a "creeping duopoly" in wireless, and in addition, a quiet end to the contest once thought to be the most important of all, namely, competition for the last mile. That is why the Commission must examine this transaction as closely as it did in the AT&T/T-Mobile merger.

The usual dangers of excessive concentration are well-known: higher prices, poor customer service, and, over time, a kind of depressing stagnancy. But I would also like to highlight the particular dangers to *innovation* that are the likely byproduct of non-competition between Verizon and the main cable companies.

My testimony covers three points.

1. The Duty to Decide

* *See* Comments of Sprint Nextel Corp., WT Docket No. 12-4, at 18-19.

There is nothing natural about the markets under consideration here, for the United States Government sets the structure of competition. Because spectrum is finite, necessary, and public, every decision the Government makes cannot help but affect the structure of the market. Even a decision not to intervene in a particular sale is a substantive decision with real and important effects on structure.

Unlike in normal markets, the federal government has a particular duty as regards industry structure, for spectrum belongs to the public, and it is the Government's role to make sure their asset is being used properly. That means the Federal Communications Commission cannot sit idly by and say it is allowing nature to take its course. It must, on an ongoing basis, decide whether more competition or more concentration will be better for the people of the United States. This is the essence of the "public interest and convenience" standard - it is simply the duty of managers of any asset to maximize the interests of the actual owners, the citizens.

The choice between concentration and competition is not necessarily easy. Once upon a time, Government believed that concentrated monopolies or duopolies, regulated to avoid abuse, would best serve the people. That was basically the policy behind the Commission's support of the NBC and CBS networks from the 1930s onward, the regulated duopoly in wireless in the 1980s, and even more clearly the theory behind the AT&T monopoly for most of the 20th century. Despite rhetorical nods to competition, that approach remains the favorite of AT&T and Verizon today (without the regulation, that is).

This nation's experience with both concentration and competition tends to suggest that competition yields better results for the public. The communications markets under monopoly were reliable, but began to stagnate; under competition, the same markets have been a source of abundant innovation, economic growth, and new gadgets for one and all. Relying on a few dominant firms is very good for the firms involved, but not so good for spectrum's owners, the public.

It is true that Congress or the Commission remain free to decide that a regulated duopoly or monopoly best serves the people, as it thought it did in the 1920s. But the greater danger is that Congress or the Commission will never actively make that choice. We face the prospect of falling into unregulated duopoly almost as if by accident, through choices never really made but made nonetheless.

If the Commission truly believes that greater concentration in the wireless markets serves the interest of the American public, then it should approve the

sale. It is free to choose concentration over competition, if it is willing to explain that choice to the spectrum's owners. But it does the public a disservice to passively support a drift toward duopoly without explaining why we have decided against a policy of trying to maximize competition.

2. There is always a Tradeoff between Competition and Concentration

Verizon, in its filings at the Commission, suggests its gain of spectrum will improve customer service and have no effect on competition. But that, of course, is impossible. In the wireless markets, spectrum is scale. Every hertz that Verizon gains is a hertz denied a smaller competitor. And so neither Congress nor the Commission ought pretend for that tradeoff between concentration and competition does not exist.

Rather, the tradeoff faced is a familiar one. Over the last three decades, in defense of its competition policy, the United States has repeatedly faced the conflict between concentration and competition. Consider cases ranging from the AT&T breakup in 1984, the beginning of spectrum auctions in the 1990s, and most recently, the challenges to the AT&T/T-Mobile merger. In all of these cases the narrative was similar. The dominant firm argued that a more centralized and concentrated communications sector would do a better job of serving the needs of Americans. Bigger is better, the argument went; greater scale and size, said the dominant firm, will yield benefits not just for itself, but for everyone. But in each case the Government declined to take those claims at face value.

When the United States left behind the ideals of regulated monopoly in exchange for a competitive communications policy, it committed itself to a different course. It found that competition, while messier, offers more for consumers over the long run than duopolies or monopolies. This means that the Government must question claims that industry concentration is necessary for better service to consumers, and in every case must weigh any claimed efficiencies of concentration against the competitive harms.

It is true, as Verizon's filings suggest, that scale and size can yield certain efficiencies. There is no such thing as an effective one-man cell phone provider. But at some point the operational advantages of scale end and the strategic advantages begin. More concentration ceases to yield further efficiency, and becomes a means of weakening competitors. That is because a smaller competitor, denied scale (or, its equivalent here, spectrum) will remain at a disadvantage compared to the dominant firms. And so, every time we face a case like this, the question must be: will increased concentration actually be

better for the spectrum owners, the people of the United States, or simply provide strategic benefits for the dominant firms?

The consideration of the AT&T/T-Mobile merger was the latest installment of this contest between concentration and competition. AT&T argued (as AT&T has almost always argued) † that a more concentrated industry would yield better service for consumers. The Commission and the Justice Department declined to take AT&T at its word. Instead, the agencies pointed out that the effect on service was ambiguous, that the merger's main effect was to eliminate a "challenger" competitor, and ultimately concluded that the merger would substantially lessen competition.

Today, the Verizon/ - Cable transaction forces us to confront exactly the same problem. Like its predecessors, Verizon argues that concentrating more spectrum (and therefore even more of the industry) in its hands will benefit consumers. But the real question is whether further concentration of spectrum in one firm will actually be good for consumers if it means less competition. The nation's policy demands this question be answered.

3. The Public's Interest in Innovation

Over the last several decades, the public and the economy has benefited enormously from the pace of innovation under a competition policy, as opposed to regulated monopoly. Much of that innovation has been of a highly dynamic, creatively destructive nature. In many cases, the once powerful have been humbled, and the meek have inherited markets.

Concerns for innovation must inform the Justice Department's scrutiny of the marketing agreements between Verizon and the Cable firms. As marketing allies, the firms on each side now have reasons to avoid developing or aggressively promoting products that might seriously threaten the revenue streams of a partner.

Verizon has been an important innovator. It was the first to try bringing fiber optics to the home, with the FiOS project. Its 4G LTE network is the furthest along. And as an innovator, Verizon Wireless is the greatest natural threat to disrupt the cable industry.

Consider, for example, 4G broadband to the home. As *PC Magazine* wrote, "[t]he mobile broadband service that has the best chance of being a true cable

† With the exception of the years between 1984 and 2006, when AT&T was a "competitive" firm.

replacement is Verizon's new 4G LTE service." The firm's admirable "Home Fusion" product, just launched in rural areas, shows promise. Yet it is clear that 4G to the home is a cable *replacement*, not a complement. And it is not clear how selling a cable replacement can be consistent with promoting cable's products.

While a technology much promised but hard to deliver, the advent of wireless broadband to the home could turn the industry upside down. The promotion of competition in the "last mile" between the consumer and the national information networks is a long-standing policy goal of the United States. Our record of duopoly competition between cable and DSL is better than no competition. However, the potential of a "third wire" has long been something of a promised land, albeit one currently littered with the corpses of firms who have tried and failed to overcome infrastructure economics.‡

The greater, long term concern is that the industry's beloved "quadruple play" (telephone, wireless, Internet, and cable TV service), begun as a convenience for customers, could in time drift into a kind of market allocation scheme. For in truth the consumer benefits less from four services, than when one of the services tries to replace the rest.

The fate of wireless 4G is an example of the danger to disruptive innovation presented by cooperation between the cable and the telephone companies. As allies, neither side has strong reasons to disturb each other's main sources of revenue with highly innovative products. But this is precisely what a strong innovation policy requires.

* * *

The last 30 years have shown that the commitment to actual competition in communications is not a one-time decision. It is not something that can be announced and then ignored, but rather requires constant diligence. The dominant firms in a communications industry, whatever they may say, have little interest in competition. Left alone, history suggests the industry will drift toward monopoly or duopoly. The life in monopoly or duopoly is simply sweeter and more secure, and Wall Street prefers firms that immunize themselves from competitive attack. That is why it must remain the ongoing mission of the United States government to, as Felix Frankfurter put it, "secure the maximum benefits of radio to all the people of the United States."

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‡ Verizon itself might be counted as one of the firms to have tasted some of the bitterness of the last-mile with the challenges it has met in FiOS.

QUESTIONS FOR DAVID COHEN SUBMITTED BY SENATOR AL FRANKEN

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Hearing on "The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"
March 21, 2012

Questions for the Record from U.S. Senator Al Franken
for David Cohen, Executive Vice President, Comcast Corporation

1. In December, AT&T announced that it was terminating its plans to acquire T-Mobile USA. This occurred just days after you announced your plans to sell your spectrum to Verizon Wireless. As we discussed during the hearing, there were many indicators that this deal was on the verge of collapsing long before AT&T's announcement in December. Can you please indicate when you talked to T-Mobile about acquiring your spectrum? Did you talk to them subsequent to the Justice Department's decision to sue to block the deal, or after the FCC signaled that it intended to fight the merger as well? If not, please explain why Comcast did not engage with T-Mobile at that time, especially since it seems likely that T-Mobile would have been willing to pay a premium over what Verizon paid to acquire this spectrum, which is adjacent to its current spectrum holdings.

2. Please explain why Comcast chose to accept Verizon's bid over other companies' bids? Did Verizon bid more for this spectrum than all other companies? How did Comcast account for the potential economic benefits that it could derive from Verizon's decision to permit Comcast to market its products in areas where FiOS was available? Did this factor into Comcast's decision to accept Verizon's bid over other companies that do not have a product that competes directly with Comcast's products?

QUESTIONS FOR RANDAL MILCH SUBMITTED BY SENATOR AL FRANKEN

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Hearing on "The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"
March 21, 2012

Questions for the Record from U.S. Senator Al Franken
for Randal Milch, Executive Vice President and General Counsel, Verizon Communications, Inc.

1. Please provide a list of locations where Verizon has a video franchise; where FiOS TV is available; where Verizon is still in the process of deploying FiOS; and locations where there is no existing plan to deploy FiOS.

2. Verizon has previously stated that wireless and FiOS represent the two greatest engines for growth and increased revenue per customer. On March 25, 2012, Citi Investment Research & Analysis wrote: "We believe Verizon's lower wireline margin relative to most of its peers represents an opportunity for improvement partly by increasing FiOS scale with time..." Given this positive financial assessment of FiOS, it seems unusual that Verizon would not contemplate continuing to build out FiOS in currently unserved areas, especially if there is adequate demand. Can you please explain (a) why Verizon has no further plans to build out FiOS based on demand; and (b) why Verizon has decided not to build out FiOS to cities such as Baltimore, Boston, Buffalo, Albany, Syracuse and other urban, metropolitan areas where there is high population density?

3. During your testimony, you stated that Verizon Wireless stores do not sell FiOS. We have received reports to the contrary. Can you please verify that is indeed correct? Do these stores market FiOS products or offer other information about FiOS to customers seeking wireless services?

4. Will Verizon Wireless commit to not market or sell the cable company's broadband and video products in locations where Verizon FiOS is available to customers?

5. During an October 21, 2011 earnings call, Verizon's Chief Financial Officer Francis Shammo said: "By further penetrating existing [FiOS] markets, we will enhance our capital and operating efficiency and improve overall returns." Please explain how the joint marketing agreements do not alter or reduce Verizon's incentives to continue to maintain and build out FiOS and other wireline services.

6. Verizon has touted the importance of broadband deployment for job creation, economic development, and improvements in education, health care, and public safety.

    a. Doesn't this deal create further incentives for Verizon to sell off more rural lines, reducing vital broadband services in underserved areas?

b. By reducing Verizon's incentives to build out its FiOS network to cities with significant low-income and minority populations, doesn't this transaction increase the digital divide?

7. Do the joint marketing agreements contain exclusivity provisions that require the parties to terminate similar agreements with other companies?

8. During the hearing, I asked you whether Verizon would commit to opening up any of the technology and intellectual property that your companies create as part of your joint venture to your competitors at fair, reasonable, and non-discriminatory rates. Can you please explain in detail why you do not think this would be an appropriate condition to place on this transaction?

9. Has Verizon entered into similar commercial marketing agreements with Cablevision, Charter, or other major cable operators?

10. Several Verizon employees have reported that Verizon has ceased hiring engineers and technicians to work on its copper lines. They think this means Verizon has already abandoned its copper infrastructure—and they are worried that this means their jobs are at risk and that Verizon is quickly shifting its resources to wireless and away from wireline. Please explain what impact you think this transaction will have on jobs in the next year, two years, and five years. Do you anticipate laying off any Verizon employees?

QUESTIONS FOR STEVEN BERRY SUBMITTED BY SENATOR HERB KOHL

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For Steven Berry

1. Before assuming your position at RCA, you served as head of governmental affairs at NCTA, the cable industry's trade association. While you were there, and since then, wasn't it a strategy of the cable industry during the last decade to vigorously compete with phone companies in offering wireline phone and internet connections to consumers? Do you worry about this alliance between cable and one of the two largest phone companies – Verizon – as harming that competitive battle?

2. One thing that competitive wireless companies require is what is known as "special access" or "backhaul" – access over wired phone lines from cell phone towers to long distance phone and Internet networks. For years, the competitive wireless companies have complained about what they see as very high prices for special access from incumbent phone companies such as Verizon and AT&T. One way around the incumbents is to contract with the cable companies for special access. Do you have any concerns that this deal will change the incentives of cable companies to provide special access?

3. In his March 8 Politico interview, David Cohen said that one of the reasons Comcast decided not to enter the wireless business was the presence of insurmountable hurdles like roaming – which he described as "next to impossible" to secure. If roaming is next to impossible for a company like Comcast to secure, what does that say about the ability of smaller carriers to effectively compete with Verizon?

4. One very interesting facet of this deal is its timing. Verizon's deals with the cable companies were announced last December, just days before AT&T and T-Mobile announced that they abandoned their proposed merger. Some industry observers suspect that these deals were deliberately reached at a time when T-Mobile was not free to bid on this spectrum. T-Mobile's FCC filing states "it is likely no coincidence that Verizon Wireless signed this deal while the AT&T/T-Mobile transaction was still pending, so that T-Mobile was unable to compete to purchase this spectrum." What is your view? Do you believe that the timing of the deal had anything to do with Verizon Wireless's desire to keep this spectrum out of the hands of competitors such as T-Mobile?

5. The FCC has a test for evaluating acquisitions of spectrum, what they call the "spectrum screen." Verizon Wireless points out that this deal falls under the FCC's thresholds in 121 of the 136 markets in the transaction. Should that settle the question for those markets? Do you believe the spectrum screen – first developed in 2001 – is adequate to evaluate spectrum acquisitions today? Why or why not?

QUESTIONS FOR DAVID COHEN SUBMITTED BY SENATOR HERB KOHL

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For David Cohen

1. Comcast and your cable company partners concluded the sale of this spectrum to Verizon Wireless just days before T-Mobile's arrangement with AT&T formally came to an end. Why not wait to see whether T-Mobile would pay more for the spectrum assets, which T-Mobile has suggested it would? Did Comcast not owe a fiduciary duty to your shareholders to entertain other potentially higher bids for the spectrum?

2. Verizon Wireless and Comcast, and your cable partners, have agreed to establish a joint venture to develop technologies to integrate wireless and wireline services – creating seamless Internet connections between consumers' TVs and their cell phones or iPads. We must be especially cautious here because this means that top executives from both of your companies – competitors for pay TV customers – will meet regularly and work very closely together and in ways that could compromise your current or future competition. Investment in technology is generally good for consumers, but the concern here is that the joint venture will develop proprietary technology, and limit its content to platforms meeting standards set to that proprietary technology. Or, it might eliminate your incentives to compete against each other for future products and services. Can you give us any assurance that this won't happen with the joint venture?

3. As you pointed out in your written testimony, Comcast's deal with Verizon Wireless allows you to be a reseller of Verizon Wireless service beginning in 2016. Why wait until then – why doesn't the deal allow Comcast to be a reseller right now?

4. One thing that competitive wireless companies require is what is known as "special access" or "backhaul" – access over wired phone lines from cell phone tower to long distance phone and Internet networks. For years, the competitive wireless companies have complained about what they see as very high prices for special access from incumbent phone companies such as Verizon and AT&T. One way around the incumbents is to contract with the cable companies for special access.

Will Comcast continue to provide backhaul competition to Verizon for competitive cell phone carriers at reasonable and nondiscriminatory terms, or will this deal change your incentives so that you will no longer wish to compete with Verizon?

5. Do the commercial agreements between Comcast and Verizon Wireless have any term or time limit? If so, what is that term?

6. It has been reported in the media, and was alluded to at the hearing, that the commercial agreements between Verizon Wireless and Comcast were exclusive. In what sense are the agreements exclusive? What does the exclusivity cover?

7. Under the commercial agreements, what is the amount of commission payment that Comcast will receive from Verizon Wireless for selling Comcast services? Can this amount change during the life of the agreements?

8. (a) At the hearing, you testified that Comcast did not begin to study and do research on deploying the SpectrumCo spectrum you acquired with your cable company partners in 2006 until after you acquired that spectrum. In fact, you testified, that "at the time we bought the spectrum we had every intention of at least exploring whether we had a viable wireless business." Why was this – why wasn't this issue explored before Comcast and your SpectrumCo partners acquired the spectrum? Shouldn't Comcast have taken these steps prior to acquiring the spectrum, if it was serious about deploying the spectrum?

(b) Does your answer that you had "every intention of at least exploring whether we had a viable wireless business" (emphasis added) when SpectrumCo bought the spectrum indicate that you recognized at that time there was a possibility that Comcast would never be able to economically launch a wireless business with this spectrum?

9. Our subcommittee has heard concerns that the commercial agreements between Verizon Wireless and the cable companies could contain provisions allowing the parties to jointly negotiate for programming content. The concern is that, if so, the parties to these deals could obtain lower rates for content because of volume discounts that competitive pay TV services would not be able to obtain. Do the commercial agreements contain any provisions allowing Verizon Wireless and the cable companies to jointly negotiate for programming? If so, won't this disadvantage competitive pay TV providers?

10. (a) In an FCC filing made on September 30, 2009, Comcast described a "wireless marketplace that has come to be dominated by two firms, AT&T and Verizon."[1] Comcast also noted that "AT&T and Verizon not only have substantial 'first mover' advantages, but they have amassed prime spectrum in the 700 MHz and 800 MHz bands that, due to propagation characteristics, creates a significant economic advantage in the construction and deployment of broadband wireless networks." Does the sale of the AWS spectrum to one of these two firms not exacerbate the competitive concerns you described in 2009?

(b) In your September 30, 2009 FCC filing, Comcast further wrote that, "Scarcity of spectrum acutely affects the ability of companies to enter the wireless market and compete with incumbent carriers. AT&T and Verizon in particular have over the years amassed substantial amounts of spectrum, much of it in the lower bands" – which you identify as spectrum below 3 GHz – "that, as explained below, are in many ways the best suited for wireless broadband services." You also noted that these factors "create significant challenges for new entrants and threaten to diminish wireless investment and innovation," adding that "The Commission should examine these issues and consider appropriate policies to address them." By your own logic, doesn't this transaction – which further concentrates valuable commercial spectrum in the hands

[1] Comments of Comcast Corporation, *Fostering Innovation and Investment in the Wireless Communications Market and A National Broadband Plan for Our Future*, GN Docket Nos. 09-157, 09-51 (filed September 30, 2009), *available at*: http://apps.fcc.gov/ecfs/comment/view?id=6015191537

of one of these two dominant firms – creates "significant challenges for new entrants" and further "threaten to diminish wireless investment and innovation?"

11. One of the key ways of increasing capacity on wireless networks is to offload demand onto WiFi networks, such as those the cable companies and Verizon have built into consumers' homes. Will you commit to offer WiFi offload on an open, non-discriminatory basis to other carriers not parties to the commercial agreements? If not, why not?

12. Do you have any response to the suggestions of Prof. Wu, Mr. Kelsey and Berry given at the hearing as to possible conditions the Justice Department or FCC ought to place on your deals with the cable companies, should the deals be approved?

QUESTIONS FOR JOEL KELSEY SUBMITTED BY SENATOR HERB KOHL

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For Joel Kelsey

1. One thing that competitive wireless companies require is what is known as "special access" or "backhaul" – access over wired phone lines from cell phone towers to long distance phone and Internet networks. For years, the competitive wireless companies have complained about what they see as very high prices for special access from incumbent phone companies such as Verizon and AT&T. One way around the incumbents is to contract with the cable companies for special access. Do you have any concerns that this deal will change the incentives of cable companies to provide special access?

2. In his March 8 Politico interview, David Cohen said that one of the reasons Comcast decided not to enter the wireless business was the presence of insurmountable hurdles like roaming – which he described as "next to impossible" to secure. If roaming is next to impossible for a company like Comcast to secure, what does that say about the ability of smaller carriers to effectively compete with Verizon?

3. One very interesting facet of this deal is its timing. Verizon's deals with the cable companies were announced last December, just days before AT&T and T-Mobile announced that they abandoned their proposed merger. Some industry observers suspect that these deals were deliberately reached at a time when T-Mobile was not free to bid on this spectrum. T-Mobile's FCC filing states "it is likely no coincidence that Verizon Wireless signed this deal while the AT&T/T-Mobile transaction was still pending, so that T-Mobile was unable to compete to purchase this spectrum." What is your view? Do you believe that the timing of the deal had anything to do with Verizon Wireless's desire to keep this spectrum out of the hands of competitors such as T-Mobile?

4. The FCC has a test for evaluating acquisitions of spectrum, what they call the "spectrum screen." Verizon Wireless points out that this deal falls under the FCC's thresholds in 121 of the 136 markets in the transaction. Should that settle the question for those markets? Do you believe the spectrum screen – first developed in 2001 – is adequate to evaluate spectrum acquisitions today? Why or why not?

5. Verizon and its cable partners have agreed to establish a joint venture to develop technologies to integrate wireless and wireline services – creating seamless Internet connections between consumers' TVs and their cell phones or iPads. This has raised concerns because this means that top executives from the companies to these deals – competitors for pay TV customers – will meet regularly and work very closely together and in ways that could compromise their current or future competition. Investment in technology is generally good for consumers, but the concern here is that the joint venture will develop proprietary technology, and limit its content to platforms meeting standards set to that proprietary technology. Or, it might eliminate the parties incentives to compete against each other for future products and services. What's your view? Are you worried about the joint venture being used to disadvantage competitors?

QUESTIONS FOR RANDAL MILCH SUBMITTED BY SENATOR HERB KOHL

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For Randy Milch

1. One very interesting facet of this deal is its timing. Verizon's deals with the cable companies were announced last December, just days before AT&T and T-Mobile announced that they abandoned their proposed merger. Your competitors suspect that these deals were deliberately reached at a time when T-Mobile was not free to bid on this spectrum. T-Mobile's FCC filing states "it is likely no coincidence that Verizon Wireless signed this deal while the AT&T/T-Mobile transaction was still pending, so that T-Mobile was unable to compete to purchase this spectrum." What is your response? Did the timing of the deal have anything to do with your desire to keep this spectrum out of the hands of T-Mobile?

2. Verizon Wireless and its cable partners have agreed to establish a joint venture to develop technologies to integrate wireless and wireline services – creating seamless Internet connections between consumers' TVs and their cell phones or iPads. We must be especially cautious here because this means that top executives from both of your companies – competitors for pay TV customers – will meet regularly and work very closely together and in ways that could compromise your current or future competition. Investment in technology is generally good for consumers, but the concern here is that the joint venture will develop proprietary technology, and limit its content to platforms meeting standards set to that proprietary technology. Or, it might eliminate your incentives to compete against each other for future products and services. Can you give us any assurance that this won't happen with the joint venture?

3. Verizon most directly competes with the cable companies through its FiOS product, but FiOS is only sold in 14% of the cable companies' footprint, so why not just carve out the FiOS territory from the joint marketing agreements? Would you agree to do that as a condition of the Justice Department permitting this deal?

4. We understand that FiOS now accounts for over 60% of Verizon's consumer wireline revenues. Yet Verizon decided in November 2009 to halt expanding FiOS into any new markets. Given the growth in the importance of FiOS to Verizon overall, wouldn't we expect Verizon to reconsider this decision in the future, if not for the joint marketing agreement? Put another way, doesn't your wireless subsidiary's agreement with the cable companies substantially reduce the chance you will ever decide to build FiOS in new areas?

5. We have heard reports that Verizon is "slow walking" the build out of FiOS in its local franchise areas. Will you commit today to fully complete your buildout in an expeditious manner in areas you have already obtained franchise authority?

6. Do the commercial agreements between the cable companies and Verizon Wireless have any term or time limit? If so, what is that term?

7. It has been reported in the media, and was alluded to at the hearing, that the commercial agreements between Verizon Wireless and the cable companies were exclusive. In what sense are the agreements exclusive? What does the exclusivity cover?

8. Under the commercial agreements, what is the amount of commission payment that Verizon Wireless will receive from the cable companies for selling Verizon Wireless services? Can this amount change during the life of the agreements?

9. At one point during the hearing, you noted that the deals we are examining are with Verizon Wireless, not Verizon, implying that Verizon's incentive to compete will be unaffected by these deals. But Verizon owns 55% of Verizon Wireless, Verizon appoints five members of Verizon Wireless's nine-member board of directors, including Verizon Wireless's Chairman and CEO, and its Executive Vice President and Chief Financial Officer, and Executive Vice President and Chief Marketing Officer. I also understand that Verizon Wireless links long-term compensation to performance of its parent company, Verizon. It has also been reported that Verizon Wireless and Verizon share a single Political Action Committee, the so-called "Verizon /Verizon Wireless Good Government Club." And Verizon Wireless accounted for 63% of Verizon's aggregate revenues in 2011. Under these circumstances, you don't contest the fact that Verizon and Verizon Wireless are distinct companies whose interest are not, at the very least, intertwined and closely aligned with one another, do you?

10. Under current FCC rules, The SpectrumCo spectrum licenses that Verizon Wireless seeks to acquire have a partial build out requirement of 15 years, with a complete build out required in 25 years, from date of issuance of the spectrum licenses. Thus a complete build out won't even be required for this spectrum until the latter half of the 2020s. Your competitors have accused Verizon Wireless of seeking to "warehouse" this spectrum in order to keep it away from Verizon Wireless's competitors. You testified at the hearing that Verizon Wireless needs this spectrum today to meet the burgeoning demand for spectrum caused by consumers' use of smartphones. In light of this, would you agree to build out this spectrum much sooner, say in 5 years? If your answer is no, why not?

11. (a) In response to concerns expressed at the hearing about consumers' privacy and possible sharing of consumer information between Verizon Wireless and the cable companies, you stated that Verizon Wireless would keep consumers' bills separate even if Verizon Wireless sold a cable service (and vice versa). But if the bills are separate, where is the convenience in a "quad play" (i.e., video, internet access, landline phone, and wireless service)? Wouldn't consumers paying for all of these services on one bill be a key part of the consumer convenience of a quad play?

(b) In a December 7, 2011 investor call with UBS Securities, Verizon CEO Lowell McAdam stated that consumers don't want separate bills for each service because it "drives them crazy." He added that "getting to one bill and having account-level pricing is the right way to go." So is it possible that the idea that consumers get separate bills from Verizon Wireless and the cable companies for services they cross-sell as you stated in your testimony change in the future?

12. You testified that consumers prefer a quad play and that consumers like to buy wireless together with the other services. Could you provide marketing research or other studies that support this?

13. (a) In your March 22, 2012 letter to Senator Lee and me correcting your testimony at the hearing that Verizon Wireless does not sell FiOS in its stores today, you stated that "in a number of Verizon Wireless stores, Verizon Telecom has placed FiOS kiosks, which are manned by representatives of Verizon's wireline business." Can you be more specific – how many Verizon Wireless stores have these FiOS kiosks, and what percentage of the FiOS footprint do these stores represent?

(b) In your letter, you state that "[n]o decision has been made as to maintaining these kiosks once the cross-marketing agreements are implemented in the FiOS footprint." If in fact these kiosks are withdrawn, won't this represent a real example of a loss of competition between Verizon and the cable companies? Why won't you commit to keeping these kiosks in place?

(c) In defending this deal, you have pointed to the consumer benefit of having wireline representatives in your wireless stores. If they provide such a consumer benefit, why did you not have any Verizon wireline representatives in your Verizon wireless stores, at the very least within your FIOS footprint?

14. How will your commercial agreements with the cable companies affect your pricing, marketing or promotion of FiOS in areas where you compete with the cable companies that are parties to these agreements? If your answer is that there will be no such effect, how do we know that will be the case? Are you willing to make a commitment to the DOJ on this point?

15. (a) Beyond its FiOS service, Verizon also competes with the cable companies for Internet service via DSL using traditional copper landline phone wires. Will the commercial agreements affect in any respect this competition, and the pricing, marketing, or promotion of DSL in the areas where you compete with the cable companies that are parties to these agreements?

(b) Some analysts and industry observers believe that Verizon will abandon or sell off its DSL services in the future. What are you plans for your DSL service in the future? Will you continue to offer it to the same extent you do now?

16. Our subcommittee has heard concerns that the commercial agreements between Verizon Wireless and the cable companies could contain provisions allowing the parties to jointly negotiate for programming content, or might lead to such agreements in the future. The concern is that, if so, the parties to these deals could obtain lower rates for content because of volume discounts that competitive pay TV services would not be able to obtain. Do the commercial agreements contain any provisions allowing Verizon Wireless and the cable companies to jointly negotiate for programming? If so, won't this disadvantage competitive pay TV providers? If not, does the agreement allow for such joint negotiations, or do you anticipate such negotiations to occur in the future?

17. One of the key ways of increasing capacity on wireless networks is to offload demand onto WiFi networks, such as those the cable companies and Verizon have built into

consumers' homes. Will you commit to offer WiFi offload on an open, non-discriminatory basis to other carriers not parties to the commercial agreements? If not, why not?

18. Do you have any response to the suggestions of Prof. Wu, and Mr. Kelsey and Berry given at the hearing as to possible conditions the Justice Department or FCC ought to place on your deals with the cable companies, should the deals be approved?

QUESTIONS FOR CHARLES RULE SUBMITTED BY SENATOR HERB KOHL

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For Charles (Rick) Rule

1. You state in your written testimony that, until Verizon deployed FiOS in your neighborhood, you were "the victim of my local wireline cable monopoly. . . . I know firsthand that wireline broadband competition is highly preferred to monopoly." Can you explain what you mean by this? Why is the competition from providers such as FiOS so important?

2. As a former Justice Department antitrust enforcer, does it bother you that Verizon Wireless stores will sell Comcast products that compete with the products of Verizon, the parent of Verizon Wireless? Isn't this a little like Ford dealers being in Chrysler showrooms selling Fords, and Chrysler receiving a commission for every Ford sold?

3. It has been widely reported in the press that the commercial agreements have no fixed term. The joint FTC/Justice Department Competitor Collaboration Guidelines state that "the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger." If these agreements indeed have no fixed term, what are the implications for the antitrust analysis of these agreements?

QUESTIONS FOR TIMOTHY WU SUBMITTED BY SENATOR HERB KOHL

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For Tim Wu

1. At the hearing, Randy Milch of Verizon argued that the commercial agreements would not mean that Verizon would lessen its competition with the cable companies with respect to FiOS, because all Verizon would realize if the cable companies sold their services was a portion of a one-time commission in the hundreds of dollars. Mr. Milch argued that he would not sacrifice a potential revenue stream in the thousands of dollars per customer for such a relatively small one-time payment. What is your response to this argument?

2. It has been widely reported in the press that the commercial agreements have no fixed term. The joint FTC/Justice Department Competitor Collaboration Guidelines state that "the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger." If these agreements indeed have no fixed term, what are the implications for the antitrust analysis of these agreements?

QUESTIONS FOR STEVEN BERRY SUBMITTED BY SENATOR MICHAEL S. LEE

Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)

Steven K. Berry-President & CEO (Rural Cellular Association)

1. In your testimony, you state that Verizon does not need spectrum but rather "holds as much as 44 MHz of unused spectrum in many markets."

    - Could you comment on the nature of the markets where you believe Verizon Wireless has an excess supply of spectrum, whether these are limited to rural areas, and if so, what you believe should be done to protect against unused spectrum while allowing Verizon Wireless to obtain spectrum where it needs it?

2. Testimony at the hearing strongly suggested that many, if not most, potential buyers of the spectrum at issue in this transaction were approached by the cable companies.

    - Do you dispute that to be the case, and if not, how would that affect your analysis with respect to the government's intervention in the spectrum transfer?

3. In your written testimony, you stated that "[t]his transaction will only increase Verizon's dominance over the roaming market by eliminating four potential roaming partners." Other testimony at the hearing suggested that the cable companies had at some point prior to this transaction definitely determined not to enter into the wireless market using this spectrum.

    - Is it your view that this transaction is the cause of the cable companies not entering into the wireless market?

    - Do you believe the cable companies would use this spectrum to enter into the wireless market if this transaction were not allowed?

QUESTIONS FOR DAVID COHEN SUBMITTED BY SENATOR MICHAEL S. LEE

Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)

David L. Cohen-Executive Vice President (Comcast)

1. I understand that Verizon Wireless purchased the spectrum at issue in these agreements for a total of about $3.9 billion. Some, including Mr. Berry who was at the hearing, have suggested that the licenses are really worth significantly more and that the cable companies could have commanded a much higher price for the spectrum from other carriers. Although there was discussion of negotiations and incentives at the hearing, there still seems to be some confusion about this issue.

    - Can you please explain what Comcast did to make certain that it got the best deal possible for its spectrum sale?

2. The primary consideration of our antitrust laws is consumer welfare. Accordingly, in considering the effects of a transaction on competition, we must give appropriate weight to resulting efficiencies. At the hearing, there was some discussion of the efficiencies resulting from having a quadruple play available.

    - Can you please describe any evidence or marketing research information Comcast has indicating that consumers do in fact want a quad play?

3. Some have expressed concerns about potential anticompetitive effects of the agreement between Verizon and the cable companies to invest in a new joint operating entity. Critics speculate that this agreement contains exclusive arrangements with respect to backhaul and Wi-Fi offloading, or that the companies will use the new product to gain an undue advantage and force others out of the market.

    - Could you comment on the joint operating entity—specifically, what is included in that arrangement, what types of products you anticipate might be developed, whether those technologies will be licensed to third parties, and why your company felt it important to enter into this arrangement?

4. At the hearing, Senator Franken asked Randall Milch: "Will you commit to opening up the technology and intellectual property that your companies create to your competitors so that they can obtain the technology at fair reasonable and non-discriminatory rates?"

    - On behalf of Comcast, what is your reaction to this request?

- If Comcast and Verizon are forced to license or sell new technologies, how will this reduce the incentives that Comcast has to invest capital in this research and development joint operating agreement?

QUESTIONS FOR JOEL KELSEY SUBMITTED BY SENATOR MICHAEL S. LEE

Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)

Joel Kelsey-Policy Advisor (Free Press)

1. In your filing before the FCC, you assert that the current spectrum screen is outdated and should be changed to take account of the monetary value of spectrum. When AT&T sought to merge with T-Mobile and argued that the spectrum screens should be changed, you opposed making any changes to the screens and asserted that seeking a change to the screens in the middle of a transaction was "self-serving."

    - Do you now think it proper for the FCC to change its spectrum screens during the middle of a transaction, and if so, how do you account for your changed position?

2. I have concerns about potential error costs involved in government intervention. For example, if the FCC were to mandate an approach for Verizon Wireless such as cell-splitting and it turns out that the agency is mistaken and cell-splitting is more costly than spectrum to accomplish the same objective, that the government will have imposed unnecessary costs.

    - What is your view of such potential error costs and the role they should play in our analysis?

3. Smart phones, tablets, and similar products have drastically increased the demand for spectrum in the past few years. Some estimate that global mobile traffic will increase 26-fold between 2010 and 2015, and that this year alone over 500 million smartphones and 100 million tablets could be sold worldwide.

    - In light of this clear trend towards exponential use of data, do you dispute that Verizon Wireless does not need additional spectrum, would not put it to use, or at the very least would not be exercising proper business judgment to obtain as much spectrum as possible?

4. At the hearing, you stated that "the cable companies . . . have shown that they really want to be involved in the wireless market . . . [however] there are lots of ways for them to do that which isn't harmful to consumers." I understand that the mobile virtual network operator ("MVNO") provisions of the agreements between the cable companies and Verizon Wireless will allow the cable companies to potentially create their own wireless offerings in the near future.

- What is your view of the MVNO and how does its inclusion in the agreements affect your analysis of those agreements?

QUESTIONS FOR RANDAL MILCH SUBMITTED BY SENATOR MICHAEL S. LEE

Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)

Randal S. Milch, Verizon (Executive Vice President & General Counsel)

1. At the hearing there appeared to remain some degree of confusion about Verizon Communication's incentives to continue marketing FiOS in light of Verizon Wireless's agreements with the cable companies.

    - Could you please explain the incentives Verizon Communications has to market FiOS and whether the portion of a commission Verizon Communications would receive from the sale of cable contract would affect those incentives?

    - In what ways, if any, will this agreement increase FiOS's ability to compete with the cable companies?

2. At the hearing, I understand Professor Wu to have suggested that Verizon Wireless's agreements with the cable companies might decrease Verizon Wireless's incentives to compete with cable for high speed internet offerings.

    - Is Verizon's Wireless's internet offering a viable competitor to wire line internet?

    - How will your agreements with Comcast impact your incentives with respect to your internet service offerings?

3. Some have expressed concerns that Verizon Wireless does not need additional spectrum. These arguments include assertions that because Verizon Wireless is efficient with its spectrum, currently has spectrum it is not using, and can make its current spectrum even more efficient by means of technologies such as cell-splitting, the company is in fact well positioned on spectrum for the foreseeable future. Mr. Berry, who was at the hearing, has stated that Verizon holds as much as 44 MHz of unused spectrum in many markets and would hold up to 72 MHz of unused spectrum in those markets after this transaction.

    - What is your response to these claims, and what is Verizon Wireless doing to ensure that excess spectrum is put to good use in areas where it has a surplus?

4. At the hearing, in regards to the research and development joint operating entity, Senator Franken asked, "Will you commit to opening up the technology and intellectual property that your companies create to your competitors so that they can obtain the technology at fair reasonable and non-discriminatory rates?"

- If the members of the joint operating entity were forced to license and sell any newly developed products or technologies, how would this change your decision to invest capital in the research and development joint operating entity?

5. At the hearing, there was some discussion about the Federal Communications Commission's ("FCC") spectrum screen and whether such a screen could or should be changed while reviewing a specific transaction and whether there is any precedent for such a change.

    - What is your view of FCC precedent for changing spectrum screens during a transaction and the propriety of such a change?

6. At the hearing, you explained that if the spectrum screens were recalculated, it would decrease Verizon's share of spectrum holdings because the size of the denominator would increase as new spectrum is included in the screens.

    - Can you please elaborate on this answer?

    - Do you believe the spectrum screens are fair and proper as presently calculated?

QUESTIONS FOR CHARLES RULE SUBMITTED BY SENATOR MICHAEL S. LEE

Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)

Charles F. (Rick) Rule-Managing Partner (Cadwalader, Wickersham & Taft LLP)

1. Critics have argued that Verizon Wireless is hoarding spectrum to foreclose competitors from a necessary input. It is my understanding that the FCC spectrum screen is intended to ensure that competitors are not excluded from spectrum necessary to compete vigorously. Under these screens, the FCC gives additional scrutiny to spectrum acquisitions when an acquisition will push a company beyond certain thresholds—about 145 MHz or 1/3 of available spectrum in an area. Verizon Wireless's spectrum acquisition does not implicate this spectrum screen on a national level and implicates the screen on a local level in less than 2 percent of counties.

    - In your view, is it proper to apply antitrust theories of foreclosure to Verizon Wireless when the FCC already imposes a more demanding regulatory requirement concerning spectrum? Is the fact that this deal passes muster under the FCC's screens fatal to any attempt to apply such antitrust theories to this deal?

2. In my view, antitrust policy and enforcement is often similar to other types of government regulation in its costs and intrusion on private enterprise. It was suggested at the hearing that a perceived lack of competition in an industry could lead to increased government regulation of that industry beyond antitrust enforcement. At the same time, where competition is robust and market forces operation properly, there is typically little need for burdensome and costly government regulations.

    - Could you comment on the relationship between antitrust enforcement and other types of government regulation, with particular reference to your view of the competitive state of the wireless and cable industries?

3. At the hearing, there was some disagreement about the efficiencies associated with the option to bundle goods (non-mandatory bundling). Mr. Wu stated that "the consumer is served by destructive innovation, not by bundling."

    - Can you explain how antitrust laws generally treat the option to bundle?

    - Will you also comment on the benefits, if any, that consumers enjoy from the option to bundle?

QUESTIONS FOR TIMOTHY WU SUBMITTED BY SENATOR MICHAEL S. LEE

Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)

Timothy Wu-Professor of Law (Columbia University)

1. In your testimony, you have stated that this transaction "forces us to confront exactly the same problem" that was faced in the AT&T/T-Mobile transaction. However, the spectrum transaction at issue here seems fundamentally different to me as no customers, facilities, or other assets beyond spectrum are being transferred, and the spectrum being transferred was not previously in use. These differences seem significant because the transaction does not eliminate a viable competitor and also entails efficiencies such as putting to use spectrum that was not previously being put to any use.

    - How do you account for these differences and do you dispute that this transaction entails what antitrust law generally views as an important efficiency—that is, moving assets from a low value use to a high value use?

2. The primary consideration of our antitrust laws is consumer welfare, and several factors in the wireless market indicate that consumers are benefitting from robust competition. Wireless prices are falling, consumers have competitive choices with about a third of all U.S. consumers having switched wireless carriers at some point, vibrant innovation is occurring with new devices and services being announced on a regular basis, and companies are investing heavily in 4G and 4G LTE deployment.

    - Much of your testimony depends on the premise that the wireless industry is not in fact competitive. How do you reconcile this view with the benefits to consumers we are seeing in this industry?

3. At the hearing, I understand you to have suggested that that the agreements might diminish competition between Verizon Wireless's 4G internet service and the cable companies.

    - Can you elaborate on how this deal affects competition between the wireless and wire-line internet products?

    - Do you believe that wireless and wire-line internet services are substitutes?

4. During the hearing, you said that "the consumer is served by destructive innovation, not by bundling."

    - Can you please elaborate on this point?

- In your view, under what circumstances is bundling a good thing for consumers?

- Why is the bundling in this circumstance not welfare enhancing since consumers still have the choice not to bundle their purchase?

QUESTIONS FOR DAVID COHEN SUBMITTED BY SENATOR CHARLES E. SCHUMER

Questions for the Record from Senator Charles E. Schumer
Hearing of the Senate Judiciary Committee,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights:
"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"
March 21, 2012

Question for David Cohen, EVP, Comcast Corporation

1. I understand that, under the terms of Joint Marketing Agreements, Comcast, Time Warner, Cox, Bright House Networks, and Verizon Wireless will now each be able to offer the quadruple play of video programming, broadband, voice, and mobile wireless services. I have heard concerns that this bundling of services will reduce the value of a competing company's video and broadband product because it will be more expensive for competitors to get access to must-have programming, resulting in consumers suffering through higher costs. Can you respond to these concerns?

2. The 1996 Telecommunications Act reduced regulation based on the assumption that cross-platform competition would drive innovation, lower prices, and new services to benefit consumers. Just two years ago, Verizon touted the importance of the "competitive rivalry between cable companies and telcos" resulting in benefits to consumers of "better broadband services and lower prices."

   a. What is your view of that rivalry now?

   b. How do the joint marketing agreements affect that view?

QUESTIONS FOR RANDAL MILCH SUBMITTED BY SENATOR CHARLES E. SCHUMER

Questions for the Record from Senator Charles E. Schumer
Hearing of the Senate Judiciary Committee,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights:
"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"
March 21, 2012

Questions for Randal Milch, EVP & General Counsel, Verizon Communications, Inc.

FiOS is the most advanced broadband delivery platform, making Verizon the only major U.S. telecommunications company to draw fiber all the way to homes, and the only one to offer broadband speeds approaching those available in Japan and South Korea. Verizon has touted the importance of broadband deployment for job creation, economic development, and improvements in education, health care, and public safety.

I have been a strong supporter of FiOS's buildout of its fiber-optic network in New York, and believe that Verizon should be applauded for its great work in bringing both jobs to communications workers and meaningful competition to cable customers in many of the major population centers of the state. However, I am interested in how this deal will affect FiOS in New York. Specifically,

1. I understand that under the terms of the commercial agreements, Verizon Wireless stores can sell Comcast or Time Warner cable services including in markets where FiOS is offered.

   a. How does this agreement affect Verizon's marketing strategy for FiOS?

   b. Can FiOS continue to increase its market share if Verizon Wireless stores are marketing services that compete directly against FiOS?

   c. How do the Joint Marketing Agreements affect Verizon's incentives to build out its fiberoptic pipe to compete?

2. The 1996 Telecommunications Act reduced regulation based on the assumption that cross-platform competition would drive innovation, lower prices, and new services to benefit consumers. Just two years ago, Verizon touted the importance of the "competitive rivalry between cable companies and telcos" resulting in benefits to consumers of "better broadband services and lower prices."

   a. What is your view of that rivalry now?

   b. How do the joint marketing agreements affect that view?

3. In recent years Verizon has sold off many of its rural lines, first to FairPoint in Maine, New Hampshire, and Vermont, and later to Frontier in 14 states. Does this deal affect Verizon's plans for its wireline business in the future?

4. After this deal was announced, I understand that Verizon announced the end of its relationship with DirecTV.

   a. Was this announcement related to the spectrum deal?

   b. Do the Joint Marketing Agreements contain exclusivity provisions that require the parties to terminate similar agreements with other companies?

c. Would exclusivity provisions be consistent with vibrant competition for telecommunications or satellite firms?

RESPONSES BY STEVEN BERRY TO QUESTIONS FOR THE RECORD

"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"

Questions for the Record Responses of Steven K. Berry

President and Chief Executive Officer

RCA-The Competitive Carriers Association

Before the

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights

April 19, 2012

Questions for the Record from Senator Kohl

1. Before assuming your position at RCA, you served as head of governmental affairs at NCTA, the cable industry's trade association. While you were there, and since then, wasn't it a strategy of the cable industry during the last decade to vigorously compete with phone companies in offering wireline phone and internet connections to consumers? Do you worry about this alliance between cable and one of the two largest phone companies – Verizon – as harming that competitive battle?

During the time that I was fortunate enough to work for the cable industry, a major aspect of industry strategy was competing with the phone companies in digital phone service and high-speed internet, with wireless service emerging as the next competitor. In fact, during that time we had a slogan: "Competition Works. Consumers Win!"

The competition between cable and the phone companies truly provided significant benefits to consumers. Through digital phone service, cable was able to offer a full suite of features, including unlimited calling plans, with studies finding that consumers and small businesses could save $100 billion over five years as a result of that voice competition. In providing competition for high-speed internet service, cable offered connections with significantly faster speeds than the digital subscriber line (DSL) service provided by the phone companies. In addition to giving consumers a choice of their service provider, these superior speeds for internet access through cable drove the phone companies to increase their own internet offerings and begin to deploy fiber, like Verizon's FiOS offering.

Cable looked forward to competing in providing wireless service. With the growth of mobile services, integration of a wireless platform into the existing "triple play" would allow cable to enter a new market and provide a new alternative for consumers – and again, consumers would win.

I have serious reservations about the degradation of competition in these markets. If competition works and consumers win, then it follows that when competition is eliminated, consumers lose.

As I stated during my testimony, these deals amount to a non-compete agreement. If approved, Verizon would not need to worry about new competitive entry from the cable companies encroaching on its duopolistic control over the wireless industry, and in return Verizon will resell cable wireline service instead of looking at ways to expand its own fiber offering.

These deals not only wipe out the threat of competition from the cable providers, but also eliminate four potential partners, and providers of critical competitive inputs, for all other competitive wireless carriers, such as RCA members.

2. One thing that competitive wireless companies require is what is known as "special access" or "backhaul" – access over wired phone lines from cell phone towers to long distance phone and Internet networks. For years, the competitive wireless companies have complained about what they see as very high prices for special access from incumbent phone companies such as Verizon and AT&T. One way

around the incumbents is to contract with the cable companies for special access. Do you have any concerns that this deal will change the incentives of cable companies to provide special access?

The Verizon-cable company deals will reduce the number of backhaul partners, thereby increasing the artificially high rates that competitive carriers pay to get access to special access facilities. Because cell towers need to be connected to a network, wireless carriers are dependent on "backhauling" traffic through wired or wireless connections. Oftentimes these connections are made through "special access" services provided by the ILEC phone companies, who, as descendents of the Bell monopoly system, have sole control and access to a network of wires funded through decades of government-sanctioned monopoly control. In much of the country, these facilities are controlled by Verizon or AT&T. In turn, wireless companies are often forced to pay the equivalent of monopoly rents to Verizon or AT&T while directly competing with their wireless affiliates.

As I testified during the hearing, one bright spot in the backhaul market has been the emergence of cable increasingly providing backhaul services for wireless operators. This alternative option helped to provide competition in the provision of backhaul services, which may eventually force Verizon and AT&T to provide market-driven prices for special access. The increase in cable backhaul has also been lucrative for the cable companies, with Time Warner Cable noting an increase in backhaul revenues of nearly 70% from 2010 – 2011. Further, in purchasing backhaul services from one of the cable companies rather than Verizon or AT&T, a wireless competitor is not contributing to increased revenues of their direct competition.

These deals create grave concerns regarding the incentives of the cable companies to provide special access to competitive wireless carriers. With a direct financial interest in the traffic carried on Verizon Wireless' network, at first as agents and later as mobile virtual network operators, the cable companies have strong incentives to favor the backhaul of Verizon Wireless traffic. In turn, this could raise the costs for backhaul for competitors. Additionally, as Verizon Wireless increasingly relies on the cable networks for its own backhaul, the incentives for Verizon to deploy fiber offerings to backhaul its own traffic are diminished, and overall capacity for backhaul is decreased. What has begun to develop as the choice of a second wired network for these services will be collapsed back into one monopoly choice for wireline services.

With the deployment of 4G LTE mobile broadband networks by wireless operators and the continued explosion of demand for wireless service, the reliance on backhaul is increased. The sooner traffic can be moved from wireless to wireline, the more capacity can be provided to consumers while increasing the efficiency of spectrum holdings. That is why the development of new methods and processes to alleviate increased traffic are critical to continued growth in the wireless industry.

Cable companies are seen as partners to help increase wireless capacity not only through backhaul on wired networks, but as key partners for the provision of WiFi connections and WiFi offload of mobile traffic. Through exponential increases in the number of WiFi hotspots, including many provided by the cable companies, carriers can efficiently use a mix of their exclusively licensed spectrum as well as unlicensed spectrum. WiFi hotspot growth has been particularly focused on urban areas, where

exclusive spectrum holdings by wireless providers are most taxed for capacity based on customer density and where in-building penetration can be difficult for wireless frequencies above 1 GHz; for example, Comcast has over 20,000 WiFi hotspots from Philadelphia to New York alone.

As the incentives to provide competitive access for backhaul through the cable companies' wired networks are changed through these deals, so too are the incentives to offer equal access to WiFi services. Again, the cable companies may have incentives to favor Verizon Wireless traffic. The impacts on WiFi services are particularly alarming due to Time Warner Cable's recent move to patent a method for seamless roaming between WiFi and cellular networks for smartphones and other devices.

Wireless carriers need to offload traffic through backhaul and other means, and these deals raise serious concerns regarding economically feasible access to these services that must be addressed by regulators if approved.

3. In his March 8 Politico interview, David Cohen said that one of the reasons Comcast decided not to enter the wireless business was the presence of insurmountable hurdles like roaming – which he described as "next to impossible" to secure. If roaming is next to impossible for a company like Comcast to secure, what does that say about the ability of smaller carriers to effectively compete with Verizon?

Mr. Cohen is correct; achieving commercially reasonable roaming arrangements with Verizon and AT&T remains a challenge despite the FCC's Data Roaming Order. Reaching roaming agreements for the latest generation technologies at economically feasible and commercially reasonable rates and terms is critical to effectively competing with Verizon (as well as AT&T). In recent years, RCA has urged policymakers to support a commercially feasible voice and data roaming ecosystem within the industry, and, due to the fact that roaming remains "next to impossible" to secure, it should not come as a surprise that the FCC has not been able to certify the industry as "effectively competitive" for over two years.

Problems in securing roaming agreements have grown as the industry has consolidated. In earlier, competitive times, no one carrier could provide nationwide service to its customers through its network alone, and in turn carriers of all sizes were properly incented to negotiate and enter into roaming agreements. Through the wireless industry's march to consolidation, competition has decreased, and Verizon and AT&T have emerged as the only 3G roaming options for their given technology paths for some carriers to provide nationwide service. As Mr. Cohen described, they are largely unwilling to discuss 4G roaming, and have little incentive to do so.

Verizon's assault on roaming extends beyond stonewalling competitive carriers seeking equitable roaming agreements. In fact, Verizon is currently in the process of appealing the FCC's 2011 Data Roaming Order, which would require negotiations for data roaming services where technologically feasible.

As you noted, Comcast has described access to roaming agreements as "next to impossible." Cox stated that it takes eight months to get Verizon to the table to discuss roaming. Bright House filed an affidavit stating that roaming was needed to unleash significant investment in wireless services. It is resoundingly clear that issues relating to roaming played a critical role in foreclosing these cable operators from entering the

facilities-based wireless market. Had these cable companies built out their spectrum holdings, there potentially would be four additional carriers in need of roaming, with incentives to foster additional roaming for all competitive carriers. Their exit only removes potential roaming partners for other competitive carriers, continuing an anticompetitive cycle of limited potential for roaming agreements. This circumstance does not bode well for smaller carriers or new entrants who wish to compete with Verizon. Strict roaming conditions must appropriately be applied to these transactions to ease the competitive harms related to roaming that are exacerbated by these deals.

4. One very interesting facet of this deal is its timing. Verizon's deals with the cable companies were announced last December, just days before AT&T and T-Mobile announced that they abandoned their proposed merger. Some industry observers suspect that these deals were deliberately reached at a time when T-Mobile was not free to bid on this spectrum. T-Mobile's FCC filing states "it is likely no coincidence that Verizon Wireless signed this deal while the AT&T/T-Mobile transaction was still pending, so that T-Mobile was unable to compete to purchase this spectrum." What is your view? Do you believe that the timing of the deal had anything to do with Verizon Wireless's desire to keep this spectrum out of the hands of competitors such as T-Mobile?

While the timing of the deal is clearly suspect, as T-Mobile was not in a position to purchase the spectrum due to the since abandoned transaction with AT&T, Verizon was also able to offer something that no other wireless provider could – a pathway into the wireless market and a non-compete agreement for significant portions of cable's footprint. Otherwise, the cable companies could have returned the spectrum to the FCC for an incentive auction based on their demanded reserve price or commanded a higher price on the secondary market. As part of an "integrated transaction," as Mr. Cohen has stated, the deal was not about price for the cable companies, and for Verizon the deal has everything to do with eliminating competition – potential competition by the cable companies and decreased competition from other carriers.

Verizon was able to use that offer to satisfy its desire to keep the spectrum out of the hands of spectrum-starved competitors, such as T-Mobile. Indeed, Verizon has demonstrated how manipulation of spectrum holdings can impact not only its offerings but the ability of other would-be competitors from providing service on similar spectrum holdings by withholding an ecosystem for commercially feasible devices and services to develop. This can be seen in Verizon's departure from interoperability, as well as its newly-seen desire to sell its Lower 700 MHz spectrum rather than deploy services.

It is clear that Verizon plans to deploy 4G LTE services in spectrum blocks where only it controls nearly all of the spectrum nationwide – a pattern that fits the AWS licenses held by the cable companies but not Verizon's lower 700 MHz holdings. In doing this, Verizon has complete control over the ecosystem, creating technical barriers to roaming and *de facto* exclusivity for all devices that operate within their "walled garden" network.

As I stated at the hearing, this deal is indeed "elegantly contrived" and "superbly clever." Verizon has seized an opportunity to gobble up LTE-ready spectrum while competitors were unable to negotiate for the spectrum and with an offer that no other suitors for the spectrum could provide.

5. The FCC has a test for evaluating acquisitions of spectrum, what they call the "spectrum screen." Verizon Wireless points out that this deal falls under the FCC's thresholds in 121 of the 136 markets in the transaction. Should that settle the question for those markets? Do you believe the spectrum screen – first developed in 2001 – is adequate to evaluate spectrum acquisitions today? Why or why not?

In light of the competitive challenges in the wireless market, including consolidation of numerous prior competitors into the largest two carriers, the spectrum screen is broken. Regardless, the spectrum screen was developed as a tool to aid the FCC in evaluation spectrum transactions, and was not designed to serve as an up or down test to determine if a transaction is in the public interest. Where the spectrum screen does not properly account for potential competitive harms in a transaction, it must be adjusted or other forms of competitive analyses must be conducted in reviewing the transaction.

The spectrum screen is not adequate to evaluate its competitive harms. The FCC should adjust the screen to reflect today's market realities. Indeed, other adjustments to the spectrum screen since 2004 – including raising the thresholds at Verizon's request – have taken place in the context of a pending transaction review. The Commission has always reviewed the spectrum screen on a case-by-case basis in the context of transactions before it, and should continue to do so in this instance.

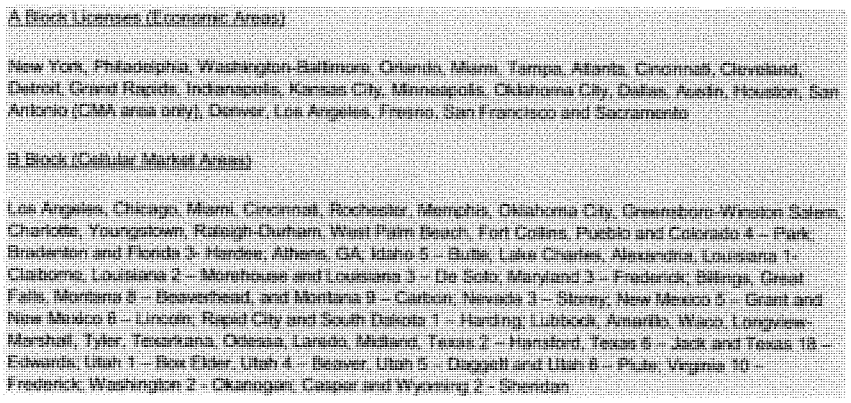
In adjusting the screen to reflect today's market realities, the FCC must take into account the recent views of the Department of Justice and its own recent affirmations that a competitive market has four competitors at a national level as well as additional rural and regional competitors. The screen also should be reduced to eliminate spectrum that will not be available in the immediate future for commercial mobile broadband use, such as the 700 MHz Upper D block, which has been reallocated for public safety use, and additional SMR spectrum, which the FCC has admitted is not immediately useable for mobile broadband. Further, all spectrum is not created equal, and different spectrum frequencies should be weighted differently to appropriately account for spectrum value. For example, as the FCC has noted, "beachfront" spectrum below 1 GHz is of higher value for mobile broadband and should be weighted accordingly.

The inadequacy of the current spectrum screen to evaluate these acquisitions is demonstrated by the few markets triggered in the face of significant potential competitive harms, despite the fact that this transaction is the largest spectrum-only transfer the FCC has ever reviewed. Accordingly, the FCC must use all tools at its disposal to evaluate these transactions and/or the screen should be revised for this transaction to reflect the current market realities.

Questions for the Record from Senator Lee

1. ***In your testimony, you state that Verizon does not need spectrum but rather "holds as much as 44 MHz of unused spectrum in many markets."***
    - ***Could you comment on the nature of the markets where you believe Verizon Wireless has an excess supply of spectrum, whether these are limited to rural areas, and if so, what you believe should be done to protect against unused spectrum while allowing Verizon Wireless to obtain spectrum where it needs it?***

As I stated at the hearing, Verizon maintains a warehouse of spectrum in excess to its needs. Since the hearing, a new development – Verizon's announcement of intent to sell its 700 MHz lower A and B block licenses, which have been in its warehouse since auction in 2008 – confirms that Verizon currently holds spectrum that it does not use and may not have any plans to use. As Verizon noted in a press release, this spectrum is located in the following markets, representing a mix of rural, suburban, and urban markets:


A Block Licenses (Economic Areas)

New York, Philadelphia, Washington-Baltimore, Orlando, Miami, Tampa, Atlanta, Cincinnati, Cleveland, Detroit, Grand Rapids, Indianapolis, Kansas City, Minneapolis, Oklahoma City, Dallas, Austin, Houston, San Antonio (CMA areas only), Denver, Los Angeles, Fresno, San Francisco and Sacramento

B Block (Cellular Market Areas)

Los Angeles, Chicago, Miami, Cincinnati, Rochester, Memphis, Oklahoma City, Greensboro-Winston Salem, Charlotte, Youngstown, Raleigh-Durham, West Palm Beach, Fort Collins, Pueblo and Colorado 4 – Park, Bradenton and Florida 3- Hardee, Athens, GA; Idaho 5 – Butte, Lake Charles, Alexandria, Louisiana 1- Claiborne, Louisiana 2 – Morehouse and Louisiana 3 – De Soto, Maryland 3 – Frederick, Billings, Great Falls, Montana 8 – Beaverhead, and Montana 9 – Carbon, Nevada 3 – Storey, New Mexico 5 – Grant and New Mexico 6 – Lincoln, Rapid City and South Dakota 1 – Harding, Lubbock, Amarillo, Waco, Longview-Marshall, Tyler, Texarkana, Odessa, Laredo, Midland, Texas 2 – Hansford, Texas 6 – Jack and Texas 18 – Edwards, Utah 1 – Box Elder, Utah 4 – Beaver, Utah 5 – Daggett and Utah 8 – Piute, Virginia 10 – Frederick, Washington 2 - Okanogan, Casper and Wyoming 2 - Sheridan

Additionally, Verizon holds almost 65% of the AWS-1 Band F Block, which it is currently not using, covering the eastern half of the nation. Again, this covers markets that are urban, rural, and suburban.

The sale of its unused 700 MHz licenses alone is not sufficient to resolve competitive concerns in the industry, and the FCC must work to resolve the concerns of spectrum aggregation as well as the integrated agreements involved with the transaction at hand. Further, withholding the sale of the 700 MHz licenses until after the integrated transactions with the cable companies are closed makes any guesses at who will buy the 700 MHz licenses, and at what price, pure speculation. In the most recent Verizon earnings call, Verizon further noted that if it cannot get the price it desires, it will not sell the 700 MHz licenses, at its discretion.

The FCC has the authority in reviewing the transaction to take a close look at Verizon's spectrum holdings, both pre- and post-transaction, and the Commission can use

this authority to ensure Verizon has sufficient access to the spectrum it needs while also requiring significant divestitures to spectrum-starved competitive operators.

2. ***Testimony at the hearing strongly suggested that many, if not most, potential buyers of the spectrum at issue in this transaction were approached by the cable companies.***
    - ***Do you dispute that to be the case, and if not, how would that affect your analysis with respect to the government's intervention in the spectrum transfer?***

I take Mr. Cohen at his word from the testimony that SpectrumCo had several discussions with potential buyers of this near nation-wide swath of 4G LTE ready AWS spectrum, however it is clear from discussion with my members that all potential buyers were not at the table. Differences of opinion about whether many or most potential buyers for the AWS spectrum were approached may be attributed to the characteristics of a potential buyer from the cable companies' point-of-view.

Demonstrated through the marketing and operating agreements that make up part of these integrated deals, it becomes clear that the cable companies' definition of a potential buyer has the characteristics of:

- An advanced technology nationwide network with access to the latest devices and excess capacity to allow for eventual wholesale access for the cable companies;
- A willingness to market the cable companies' core wired operations in addition to, or more likely instead of, the potential buyer's own wire or nascent fiber operations – essentially a non-compete agreement; and,
- An absence of regulatory scrutiny over other transactions to attempt to deflect attention from potential competitive impacts of such a deal.

Accordingly, there was only one potential buyer who met these characteristics: Verizon Wireless. In this suitor alone could the cable companies essentially reach a non-compete pact while still gaining access to offering a quad play through adding wireless service to their existing triple play package.

3. ***In your written testimony, you stated that "[t]his transaction will only increase Verizon's dominance over the roaming market by eliminating four potential***

roaming partners." Other testimony at the hearing suggested that the cable companies had at some point prior to this transaction definitely determined not to enter into the wireless market using this spectrum.

- ***Is it your view that this transaction is the cause of the cable companies not entering into the wireless market?***
- ***Do you believe the cable companies would use this spectrum to enter into the wireless market if this transaction were not allowed?***

Through the integrated marketing and operating agreements that make up part of these deals, the cable companies will indeed be entering the wireless market. However, rather than entering the market as facilities-based competitors, they will enter the market first as agents to and later as mobile virtual network operators (MVNOs) of Verizon Wireless. This is an important distinction, particularly as it relates to Verizon's dominance over the roaming market.

Were the cable companies to enter the market through facilities-based competition, they would be important roaming partners for other competitive carriers. As not one of the cable companies would have the scope to provide nationwide service on their own, they would actively work to develop a healthy roaming market. Indeed, several of the cable companies were among the leading advocates for the 2011 data roaming order, based on the importance of adequate voice and data roaming to facilitate their entry into wireless. Upon adoption of the data roaming order, NCTA, the cable trade association, unequivocally stated that, "adopting enforceable data-roaming rights will enable new entrants to compete on a nationwide basis and give consumers more choice and flexibility in wireless services." More recently, each of the companies has stated the difficulty in reaching these agreements as a primary reason for their decision not to enter through deploying their own network.

As things would stand based on the proposed deals, these cable companies' entries into wireless will further increase Verizon's dominance over the roaming market as four would-be roaming partners are now essentially an extension of Verizon's network. A competitive carrier cannot reach roaming agreements with MVNOs to roam on the host network; the negotiations would have to be with an even more dominant Verizon, who owns and controls the network.

It would be speculation to say whether or not these companies would enter the facilities-based wireless market were this transaction not allowed; however their entry is unlikely if policymakers do not take steps to support a more competitive market. The cable companies provided a blueprint for the successful entry of a competitive carrier into the facilities-based wireless marketplace through their justification in abandoning that path. These same policies that competitive carriers have clamored for – commercially feasible roaming, affordable access to backhaul, special access, and WiFi networks, interoperable standards, and access to useable 4G LTE-ready spectrum – are the reasons stated by the cable companies that their own wireless deployment could not go forward. These policies should be conditioned on these transactions and the ends of wireless policy if the goal is competitive markets.

RESPONSES BY DAVID COHEN TO QUESTIONS FOR THE RECORD

U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumer?"

Responses to Questions for the Record from Senator Herb Kohl

1. **Comcast and your cable company partners concluded the sale of this spectrum to Verizon Wireless just days before T-Mobile's arrangement with AT&T formally came to an end. Why not wait to see whether T-Mobile would pay more for the spectrum assets, which T-Mobile has suggested it would? Did Comcast not owe a fiduciary duty to your shareholders to entertain other potentially higher bids for the spectrum?**

As I testified, SpectrumCo reached out to virtually every major party in the wireless industry. We considered a number of different potential transactions and expended substantial resources investigating these options. Ultimately, as to the other alternatives we pursued, we were not able to reach agreements or find solutions – sometimes because SpectrumCo decided not to pursue the transaction, and other times because the other party decided not to pursue it.

Discussions with various potential buyers and partners proceeded in parallel at various points in time over the past several years. Our discussions with Verizon Wireless were our primary focus during most of 2011, while T-Mobile was intensely pursuing a separate transaction; Deutsche Telekom ("DT") announced it was selling T-Mobile to AT&T in March 2011. After many months of negotiations, we finalized and announced our agreements with Verizon Wireless in early December 2011, while AT&T, T-Mobile, and DT were still pursuing their planned transaction. At the time we concluded our negotiations with Verizon Wireless, we did not know that T-Mobile's transaction with AT&T was going to be abandoned.

The agreements we reached with Verizon Wireless are consistent with Comcast's best interests. In today's marketplace, basing decisions like these on what might happen in another company's pending transaction is simply not practical or sound business practice. We were and still are unaware of any statement by T-Mobile that it would pay more for the spectrum than Verizon Wireless agreed to pay, and we are confident that no such statements were communicated to us during the period that we were negotiating with Verizon Wireless. In any event, as I have said, our concern was not solely with the price we received for the spectrum, but also with the provisions of the Commercial Agreements that provide us with a comprehensive strategic wireless solution for our company, shareholders, and customers. Our agreements with Verizon Wireless provide us with the best solution.

2. **Verizon Wireless and Comcast, and your cable partners, have agreed to establish a joint venture to develop technologies to integrate wireless and wireline services – creating seamless Internet connections between consumers' TVs and their cell phones or iPads. We must be especially cautious here because this means that top executives from both of your companies – competitors for pay TV customers – will meet regularly and work very closely together and in ways that could compromise your current or future competition. Investment in technology is generally good for consumers, but the concern here is that the joint venture will develop proprietary**

technology, and limit its content to platforms meeting standards set to that proprietary technology. Or, it might eliminate your incentives to compete against each other for future products and services. Can you give us any assurance that this won't happen with the joint venture?

As you note, the Innovation Technology Joint Venture (often referred to as the "joint operating entity" or "JOE") is being created by Verizon Wireless, Comcast, and the other cable partners. Comcast and the other cable partners are not direct competitors of Verizon Wireless; JOE does *not* involve competitors for pay-TV customers. We do compete with Verizon Telecom, but Verizon Telecom is not included in the joint venture at all. Verizon Telecom and Comcast will continue to have every incentive to compete vigorously, and nothing about the Innovation Technology Joint Venture changes that. Both Comcast and Verizon Telecom have invested billions of dollars to provide what each believes is the best service to consumers. Both will continue to compete with each other in order to maximize returns from those investments. Moreover, the parties to JOE all have strong incentives to prevent the exchange of commercially sensitive information as such exchanges could disadvantage them in the marketplace, a fact that is reflected in the agreements. Verizon Wireless has represented to Comcast that it is maintaining an information firewall with Verizon Telecom. Comcast, in consultation with outside antitrust counsel, has also developed guidelines for team members to follow in an effort to guard against transmission of competitively sensitive information to Verizon Telecom. The DOJ has recognized that these kinds of safeguards mitigate any anticompetitive concerns.

While we hope that JOE will develop valuable technology (that is its purpose, after all), there is certainly no guarantee. As with all joint ventures, JOE is an investment risk for the companies involved. There is no likelihood that JOE or its owners will limit the distribution of any content they may control to platforms meeting standards designed around technology developed by JOE; to the contrary, content owners generally have powerful incentives to license their content broadly to maximize revenues. That is especially true in today's vibrantly competitive, dynamic, fragmented, and multi-platform marketplace. Plus, in the case of NBCUniversal content, there are FCC rules and both FCC and DOJ conditions that address the availability of content to multichannel video programmer distributors ("MVPDs") and online video distributors ("OVDs").

3. **As you pointed out in your written testimony, Comcast's deal with Verizon Wireless allows you to be a reseller of Verizon Wireless service beginning in 2016. Why wait until then – why doesn't the deal allow Comcast to be a reseller right now?**

The agency arrangements provide a mechanism that allows us to move swiftly to start offering a wireless option to our customers. In fact, although these agreements were only announced in early December, Comcast began marketing Verizon Wireless services in Seattle by mid-January and expanded within weeks to Portland (OR) and San Francisco. Refining and perfecting the customer interaction scripts, marketing plans, and order flows is currently underway, and other valuable experience regarding the wireless marketplace is being gained. Consumers are benefiting today.

Reseller arrangements, such as Mobile Virtual Network Operator agreements, are much more complicated and require the reseller to dedicate significant resources to developing and

marketing its own branded offerings. As a business matter, it made little sense to invest significant resources in diving into the highly-competitive wireless marketplace as a reseller when the agency agreements provided Comcast with the ability to offer wireless services almost immediately with minimal investment. This will allow Comcast to test the reception such services receive from consumers and to gain experience in the wireless marketplace that will be valuable in future endeavors. After extensive negotiations, the parties agreed that the option for Comcast and its cable partners to convert to resale arrangements would ripen in 2016.

4. **One thing that competitive wireless companies require is what is known as "special access" or "backhaul" – access over wired phone lines from cell phone tower to long distance phone and Internet networks. For years, the competitive wireless companies have complained about what they see as very high prices for special access from incumbent phone companies such as Verizon and AT&T. One way around the incumbents is to contract with the cable companies for special access.**

   Will Comcast continue to provide backhaul competition to Verizon for competitive cell phone carriers at reasonable and nondiscriminatory terms, or will this deal change your incentives so that you will no longer wish to compete with Verizon?

Yes, Comcast will continue to provide backhaul competition. As an initial matter, Comcast is a recent entrant to the wireless backhaul business, and we are a relatively small part of the overall wireless backhaul marketplace. That said, it is part of our growth strategy, and we are excited about the opportunities presented in this space. We have every incentive to invest in and grow this business and to provide services to as many wireless companies as possible. Nothing in the Commercial Agreements restricts our ability to sell (or gives incentive not to sell) backhaul at competitive rates to anyone who wants it. There are no exclusives with respect to backhaul arrangements.

More generally, the marketplace for backhaul services is marked by growth, competition, diverse suppliers and service offerings, and continuous innovation. These are not just my assertions; they are the FCC's conclusions from last year's *AT&T/Qualcomm* decision. There are – and will continue to be – many different competitive alternatives for backhaul.

5. **Do the commercial agreements between Comcast and Verizon Wireless have any term or time limit? If so, what is that term?**

As Senator Blumenthal discussed with former Assistant Attorney General Rule at the hearing, antitrust reviews typically involve highly sensitive business information that is reviewed under strict confidentiality restrictions established by Congress. As I discussed with Senator Franken, many discussions and agreements between companies are subject to non-disclosure obligations which we are duty-bound to respect. So I hope you will understand that I cannot go further than the applicable non-disclosure provisions allow in providing a public record response to this question.

I can say this. The terms of the Commercial Agreements are commercially reasonable, and neither Comcast nor Verizon Wireless is locked into any of these agreements for unreasonably long periods of time. That is to say, the parties each have options at various points in time, or

upon the occurrence of specified events, to terminate the agreements. Or, by mutual agreement, they can do so at any time.

Beyond that, I respectfully suggest that further inquiries into this subject be reserved for the antitrust authorities who I can assure you are reviewing (on a confidential basis) all the agreements, and all the underlying documentation, with great care.

6. It has been reported in the media, and was alluded to at the hearing, that the commercial agreements between Verizon Wireless and Comcast were exclusive. In what sense are the agreements exclusive? What does the exclusivity cover?

I must refer again to the confidentiality concerns referenced in my preceding answer and limit my comments to a few general observations.

First, it is important to note that the net effect of the Commercial Agreements will be to *increase* consumer choice and flexibility, not to restrict it in any way. Comcast will still sell Xfinity video, voice, and Internet services directly to consumers as well as at Best Buy stores, mall kiosks, and other retail outlets; we are simply adding more outlets where consumers can purchase Xfinity services. Likewise, Verizon Wireless service and handsets will still be available at Verizon Wireless stores as well as Best Buy stores, Radio Shacks, and other retail outlets and websites; Verizon Wireless is adding to the list of outlets where consumers can purchase its services.

Not only are we *adding* to the list of outlets where consumers can acquire these services, but we're also making it easier for them to do so by giving consumers convenient one-stop shopping for a greater variety of products and services, including bundles of communications services. Of course, consumers will not have to buy a bundle of services, but, if they want to, that option will be available.

What exclusivity provisions there are in the Agency and Reseller Agreements are necessary to ensure the pro-competitive benefits of those agreements. They reflect the common-sense proposition that these agreements cannot be successful unless the parties are and remain committed to their success; the exclusivity provisions ensure that all sides share this commitment. This concept is well-established under the antitrust laws.[1] Indeed, other sales partnerships in the relevant markets – including partnerships that DirecTV has entered into with AT&T and Verizon Telecom – have incorporated exclusivity provisions, without any objection from the DOJ, FTC, or FCC as far as we are aware.

7. Under the commercial agreements, what is the amount of commission payment that Comcast will receive from Verizon Wireless for selling Comcast services? Can this amount change during the life of the agreements?

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[1] *See, e.g.*, Sheila F. Anthony, Commissioner, FTC, *Vertical Issues in Federal Antitrust Law* (Mar. 19, 1998) (explaining that an exclusivity commitment "may be procompetitive when it encourages retailers to invest in promoting the manufacturer's line, thereby enhancing *interbrand* competition at the retail level"), *available at* http://www.ftc.gov/speeches/anthony/aliabaps.shtm.

Comcast will not receive any commission from Verizon Wireless for selling *Comcast* services. As far as the commission Comcast will receive from Verizon Wireless for selling *Verizon Wireless* services, the precise amounts of the commissions to be paid under the agency agreements are highly confidential. For the same reason I have stated previously, I am not at liberty to disclose the precise commission that Verizon Wireless will receive from Comcast for selling Comcast services. I can say that these mutual Agency Agreements are market-standard agreements, comparable to the literally thousands of agency agreements already in place in the wireless marketplace and that the commission amounts are commercially reasonable. Beyond that, I can state only that the commission Comcast will pay Verizon Wireless for selling Comcast services is a one-time payment that is worth at most only a few percentage points of the net present value of a FiOS customer, which is many thousands of dollars per customer.

8. **(a) At the hearing, you testified that Comcast did not begin to study and do research on deploying the SpectrumCo spectrum you acquired with your cable company partners in 2006 until after you acquired that spectrum. In fact, you testified, that "at the time we bought the spectrum we had every intention of at least exploring whether we had a viable wireless business." Why was this – why wasn't this issue explored before Comcast and your SpectrumCo partners acquired the spectrum? Shouldn't Comcast have taken these steps prior to acquiring the spectrum, if it was serious about deploying the spectrum?**

Comcast has long believed that it needed a comprehensive wireless strategy. The FCC's AWS auction offered Comcast, along with its SpectrumCo partners, the opportunity to explore the use of that spectrum to provide wireless services. Before the auction, and before we spent over $2 billion, SpectrumCo expended significant time and resources to studying the feasibility of using the spectrum to deploy new wireless services. That said, there were a number of unknowns that all AWS bidders and eventual licensees faced – especially those that didn't have an existing facilities-based wireless business. SpectrumCo made the considered decision to bid on the spectrum knowing that the Commission had determined that a 15-year build out requirement was appropriate (as opposed to the regular 10-year period).[2] In other words, it was obvious to the Commission and all the bidders that the exploration, development, and deployment of wireless services over the AWS spectrum was subject to greater uncertainties and complications than applied to previously-auctioned spectrum. Nonetheless, the AWS spectrum appeared to offer an opportunity for the SpectrumCo owners to invest in a long-term wireless strategy, with the knowledge that the license purchase was only the first step in developing the capability to offer new and advanced wireless services to consumers.

SpectrumCo did not acquire the licenses with the goal of simply launching the company into a capital-intensive and competitive marketplace without a sound business plan. It proceeded over the next several years to develop and explore potential uses of the AWS spectrum, including

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[2] The Commission established an initial license term of 15 years for licensees in the AWS-1 band, agreeing with commenters that argued that the need to clear the band and relocate incumbents warranted a longer-than-usual initial license term. *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report & Order, 18 FCC Rcd. 25,162 ¶ 70 (2003) (" We agree with these commenters that the circumstances surrounding the future development and deployment of services in these bands warrant an initial license term longer than 10 years in order to encourage the investment necessary to develop these bands.").

clearing the spectrum and testing 4G technologies and equipment on the spectrum. Meanwhile, consumers' demand for wireless broadband increased dramatically, beginning shortly after the AWS licenses were issued, with the release of the iPhone, iPad, and Android phones, and making it increasingly likely that SpectrumCo would only be able to deploy a competitive network if it were able to acquire additional spectrum or partner with an established provider. SpectrumCo expended substantial resources investigating all of its options, did everything a diligent new licensee could reasonably be expected to do, and took meaningful steps to develop, use, and identify long-term business plans for the spectrum. Ultimately it concluded that a sale to Verizon Wireless – coupled with the Commercial Agreements – was the best strategy.

(b) Does your answer that you had "every intention of at least exploring whether we had a viable wireless business" (emphasis added) when SpectrumCo bought the spectrum indicate that you recognized at that time there was a possibility that Comcast would never be able to economically launch a wireless business with this spectrum?

Given the substantial uncertainties involved with deploying a competitive nationwide wireless network at a time when consumer demand for broadband was (and still is) ever-growing, it was always possible that the launch of a successful wireless service might not be economically feasible. This is the nature of business in a highly competitive marketplace. Nevertheless, we hoped and expected that, having invested substantial time and resources, as well as several billion dollars in spectrum licenses, the AWS spectrum would enable us to develop a comprehensive wireless strategy. Our hopes for a comprehensive wireless strategy never changed, but the marketplace did. After acquiring the spectrum licenses, SpectrumCo proceeded over the next several years to develop and explore potential uses of the spectrum, doing everything a reasonably diligent new licensee might be expected to do. In the end, SpectrumCo's owners found that the substantial costs associated with construction of a wireless network, the lack of a reasonable guarantee of a return on the investment, and the risks associated with becoming an additional facilities-based competitor in the highly competitive wireless marketplace did not make business sense and could not be justified.

9. **Our subcommittee has heard concerns that the commercial agreements between Verizon Wireless and the cable companies could contain provisions allowing the parties to jointly negotiate for programming content. The concern is that, if so, the parties to these deals could obtain lower rates for content because of volume discounts that competitive pay TV services would not be able to obtain. Do the commercial agreements contain any provisions allowing Verizon Wireless and the cable companies to jointly negotiate for programming? If so, won't this disadvantage competitive pay TV providers?**

There are no provisions in the Commercial Agreements addressing Verizon Wireless' and the cable companies' acquisition of programming.

10. **(a) In an FCC filing made on September 30, 2009, Comcast described a "wireless marketplace that has come to be dominated by two firms, AT&T and Verizon."[3]**

[3] Comments of Comcast Corporation, *Fostering Innovation and Investment in the Wireless Communications Market and A National Broadband Plan for Our Future*, GN Docket Nos. 09-157, 09-51 (filed September 30, 2009), *available at*: http://apps.fcc.gov/ecfs/comment/view?id=6015191537

Comcast also noted that "AT&T and Verizon not only have substantial 'first mover' advantages, but they have amassed prime spectrum in the 700 MHz and 800 MHz bands that, due to propagation characteristics, creates a significant economic advantage in the construction and deployment of broadband wireless networks." Does the sale of the AWS spectrum to one of these two firms not exacerbate the competitive concerns you described in 2009?

The statements you quote are from comments filed in connection with the FCC's development of the National Broadband Plan ("NBP"). While the passages you quote are from an introductory section, our primary objective in this filing was to persuade the FCC to address three priority issues: spectrum availability, automatic data roaming and home roaming, and pole attachment rates and availability. The NBP agreed with Comcast that all of these are high-priority areas to promote a more competitive wireless marketplace, and the Commission has taken meaningful action on each over the period since the comments you quote were filed. On roaming and pole attachments, the FCC has since adopted rules that substantially address the issues we raised. As to spectrum availability, the FCC successfully urged Congress to enact legislation to free up valuable spectrum through the use of incentive auctions – but this is an immensely complicated process that will take years to come to fruition, and it remains to be seen how much spectrum will become available and when. As the NBP noted, the difficulties associated with making new spectrum available make it all the more important that secondary markets remain capable of reallocating spectrum swiftly and efficiently, as is occurring in the SpectrumCo sale to Verizon Wireless. So the FCC, through its actions, and this Congress, through its recent legislation, have begun to address the concerns we raised in our comments in 2009.

Moreover, the 20 megahertz of spectrum we are proposing to transfer to Verizon Wireless will not take Verizon Wireless above the FCC-established spectrum screen in almost every single market in which Verizon Wireless operates. I would note, also, that the spectrum involved in the SpectrumCo sale is in the 1710-1755 and 2110-2155 MHz bands. No spectrum in the 700 or 800 MHz bands is involved here.

(b) In your September 30, 2009 FCC filing, Comcast further wrote that, "Scarcity of spectrum acutely affects the ability of companies to enter the wireless market and compete with incumbent carriers. AT&T and Verizon in particular have over the years amassed substantial amounts of spectrum, much of it in the lower bands" – which you identify as spectrum below 3 GHz – "that, as explained below, are in many ways the best suited for wireless broadband services." You also noted that these factors "create significant challenges for new entrants and threaten to diminish wireless investment and innovation," adding that "The Commission should examine these issues and consider appropriate policies to address them." By your own logic, doesn't this transaction – which further concentrates valuable commercial spectrum in the hands of one of these two dominant firms – create "significant challenges for new entrants" and further "threaten to diminish wireless investment and innovation?"

As I noted in my answer to the previous question, the FCC has in fact examined the issues Comcast raised in its 2009 filing and has not just considered but has actually adopted appropriate policies to address them. In describing the challenges faced by new entrants, it was entirely

appropriate for Comcast to identify the advantages enjoyed by long-established and successful carriers. Comcast did not propose that those carriers be prevented from acquiring additional spectrum, but it did urge that additional spectrum be made available in the marketplace. With additional authority recently provided by Congress, the FCC is working hard to do just that. Finally, the FCC has a well-established mechanism for determining whether a proposed spectrum transaction is in the public interest, and Verizon Wireless and SpectrumCo have demonstrated that the proposed transaction meets the public interest standard.

11. One of the key ways of increasing capacity on wireless networks is to offload demand onto WiFi networks, such as those the cable companies and Verizon have built into consumers' homes. Will you commit to offer WiFi offload on an open, non-discriminatory basis to other carriers not parties to the commercial agreements? If not, why not?

There is nothing in these agreements that grants any rights to Verizon Wireless to offload its traffic onto Comcast's Wi-Fi network. Comcast has viewed its network of Wi-Fi hotspots as an extension of its residential Xfinity Internet business, and we provide this service to our Xfinity Internet customers (and to Internet customers of Cablevision and Time Warner Cable) regardless of whether they use Verizon Wireless, AT&T Wireless, T-Mobile, Sprint, MetroPCS, or any one of the scores of other wireless carriers. Any efforts we may undertake to reach commercial arrangements with wireless carriers in connection with Wi-Fi offloads would be independent of and unrelated to the spectrum assignment and the Commercial Agreements.

12. Do you have any response to the suggestions of Prof. Wu, Mr. Kelsey and Mr. Berry given at the hearing as to possible conditions the Justice Department or FCC ought to place on your deals with the cable companies, should the deals be approved?

Our transactions with Verizon Wireless are pro-competitive and pro-consumer. They comply with all applicable laws, rules, and policies. There is no basis for imposing any conditions on these agreements.

Responses to Questions for the Record from Senator Mike Lee

1. **I understand that Verizon Wireless purchased the spectrum at issue in these agreements for a total of about $3.9 billion. Some, including Mr. Berry who was at the hearing, have suggested that the licenses are really worth significantly more and that the cable companies could have commanded a much higher price for the spectrum from other carriers. Although there was discussion of negotiations and incentives at the hearing, there still seems to be some confusion about this issue.**

   Can you please explain what Comcast did to make certain that it got the best deal possible for its spectrum sale?

As I testified, Comcast engaged in discussions with almost every major party in the wireless industry with respect to this spectrum. The specific details of our discussions with individual parties are highly confidential, and for the most part are subject to non-disclosure obligations. I can say that SpectrumCo fully explored (1) building out its own wireless network, (2) acquisitions, joint ventures, and network sharing arrangements with other wireless companies, and (3) transactions of the sort that we ultimately entered into with Verizon Wireless. SpectrumCo expended substantial resources investigating these options, but concluded, for a variety of reasons, that each option had significant limitations and would not provide a comprehensive and viable long-term wireless solution.[4]

While we appreciate the reasons why Mr. Berry might now claim that the spectrum at issue is worth more than Verizon Wireless has agreed to pay, I can assure you that those who negotiated the sale on behalf of SpectrumCo were informed and sophisticated experts who were committed to achieving the best bargain possible for SpectrumCo's owners. Had they been able to get a better deal elsewhere, they would have.

2. **The primary consideration of our antitrust laws is consumer welfare. Accordingly, in considering the effects of a transaction on competition, we must give appropriate weight to resulting efficiencies. At the hearing, there was some discussion of the efficiencies resulting from having a quadruple play available.**

   Can you please describe any evidence or marketing research information Comcast has indicating that consumers do in fact want a quad play?

We don't really know what percentage of consumers will find it important to obtain their video, voice, Internet, and wireless services from a single supplier – or from two suppliers but a single sales agent. We do know that many of our customers value the option to procure two or three

[4] *See* Verizon Wireless-SpectrumCo Application Form 603, WT Docket 12-4, Ex. 4 ¶¶ 3-14 (Dec. 16, 2011) (Declaration of Robert Pick). In its efforts to develop and explore potential uses of the AWS spectrum, SpectrumCo expended many millions of dollars to identify and clear incumbent microwave links; test different 4G technologies and equipment; and evaluate the investment necessary to deploy and operate a network using AWS spectrum. SpectrumCo ultimately decided not to enter the wireless marketplace as a standalone facilities-based provider for a number of reasons, not the least of which include a massive capital-intensive investment (estimated at $10 - $11 billion) that carried with it substantial risks and no assurance of a return; a likewise capital-intensive and ongoing need for additional spectrum as consumers' appetite for spectrum-intensive services grows; the high cost of obtaining and providing cutting-edge wireless devices; and the difficulty of securing roaming agreements. *See id.*

products in a money-saving package; currently, about two thirds of our video customers buy voice or data services from us, and about one third buy all three services (video, voice, *and* data). About 95 percent of Comcast's customers already have wireless service, so we do not have inflated assumptions about the extent to which they will wish to order wireless service from Comcast. On the other hand, we think this is an option they ought to be able to have. Moreover, this is an option our competitors are already offering.

3. **Some have expressed concerns about potential anticompetitive effects of the agreement between Verizon and the cable companies to invest in a new joint operating entity. Critics speculate that this agreement contains exclusive arrangements with respect to backhaul and Wi-Fi offloading, or that the companies will use the new product to gain an undue advantage and force others out of the market.**

   Could you comment on the joint operating entity—specifically, what is included in that arrangement, what types of products you anticipate might be developed, whether those technologies will be licensed to third parties, and why your company felt it important to enter into this arrangement?

We formed the Innovation Technology Joint Venture, or JOE, for the purpose of developing technology and intellectual property to create innovative and compelling new products that seamlessly integrate wired and wireless technologies. We hope JOE's products will effectively compete with products developed by AT&T, Dish Network, Google, Microsoft, Apple, and others. JOE will allow Verizon Wireless and the cable companies to bring their collective expertise to the table to develop next-generation technologies that the companies alone could not effectively develop.

JOE is still a nascent organization and has not yet developed any specific processes for deciding what products should be developed or how they should be developed. But it may explore a range of consumer-friendly technologies that include, for example: allowing consumer devices to seamlessly transition between Wi-Fi and mobile wireless networks; integrating services like voice mail, caller ID, and contact lists across home and wireless phones; and enabling seamless access to content like photos, videos, and music on both home televisions and mobile devices.

While it is our hope that JOE will develop many exciting integrated technologies, it is far too early to speculate as to the success of JOE and its technologies. If we succeed in this competitive marketplace in creating valuable technologies that enhance consumer products, we will evaluate ways to monetize those technologies, including through third-party licensing agreements. And JOE is generally permitted to license technology to third parties. But those business decisions should remain with JOE. We are entering a very competitive space with well-heeled players like Apple, Microsoft, and Google, who are under no obligation to open up their intellectual property to others. Preserving the freedom of intellectual property owners to license or not, and if so on what terms, spurs all market players to continue investing and innovating, which ultimately benefits consumers.

4. **At the hearing, Senator Franken asked Randall Milch: "Will you commit to opening up the technology and intellectual property that your companies create to your**

competitors so that they can obtain the technology at fair reasonable and non-discriminatory rates?"

(a) On behalf of Comcast, what is your reaction to this request?

I think Mr. Milch answered this question appropriately. He made three key points. First, we are starting from scratch and do not currently have any technology or intellectual property. Second, we are entering a very competitive marketplace with formidable players such as Apple and Google. And third, if we are successful in developing a new technology, it isn't clear why our intellectual property shouldn't have the same protections as other companies' intellectual property. We should be permitted to do as we see fit with our intellectual property, in the same way that Apple and Google do. I agree with Mr. Milch on each of these points.

I might add that our efforts to develop new technology will spur other companies to respond, perpetuating a cycle of competitive investment and innovation. This virtuous circle of innovation would be thwarted if we were required to license our technology to all comers.

(b) If Comcast and Verizon are forced to license or sell new technologies, how will this reduce the incentives that Comcast has to invest capital in this research and development joint operating agreement?

A forced licensing regime necessarily reduces incentives to invest and innovate. The best way to promote the investment of time and capital necessary to develop intellectual property is to respect the creators' property rights in the fruits of their labors. The Framers understood this, which is why they concluded that "[t]o promote the Progress of Science and useful Arts," Congress should be empowered to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." It is on this authority that Congress has since the 18th Century enacted (and from time to time revised) patent and copyright laws.

Responses to Questions for the Record from Senator Charles Schumer

1. **I understand that, under the terms of Joint Marketing Agreements, Comcast, Time Warner, Cox, Bright House Networks, and Verizon Wireless will now each be able to offer the quadruple play of video programming, broadband, voice, and mobile wireless services. I have heard concerns that this bundling of services will reduce the value of a competing company's video and broadband product because it will be more expensive for competitors to get access to must-have programming, resulting in consumers suffering through higher costs. Can you respond to these concerns?**

Nothing about these transactions will in any way affect the ability of Comcast's video competitors to obtain must-have programming. Nor will anything in these transactions affect Comcast's incentive to license programming to its competitors. I can say categorically that no term of any of the Commercial Agreements provides for the licensing of NBCUniversal content to Verizon Wireless (or, of course, Verizon, which is not even a party to these agreements). And, in all events, any content licensing deal between NBCUniversal and either Verizon or Verizon Wireless would have to be consistent with the relevant FCC and DOJ conditions from the NBCUniversal transaction, and the FCC's rules.

Moreover, the joint marketing arrangements are by no means unique to Comcast, Time Warner Cable, Cox, Bright House Networks, and Verizon Wireless. In this highly competitive and dynamic marketplace, there are numerous of situations where one provider markets the services of another. I gave several examples in my written testimony, including the following:

- Frontier Communications and AT&T Mobility announced a three-year agency agreement on November 15, 2011 that enables Frontier to offer customers access to AT&T smartphones and the AT&T mobile broadband network bundled with Frontier's broadband Internet, voice, and satellite TV services, all on a single bill from Frontier;

- AT&T and DIRECTV signed a three-year commercial agreement on November 3, 2011 through which both companies are able to offer customers a quadruple-play bundle of AT&T/DIRECTV video service and AT&T broadband, home phone, and wireless voice services, as well as bundled discounts; and

- CenturyLink and Verizon Wireless announced an agreement on February 15, 2011, under which CenturyLink became an authorized agent of Verizon Wireless and can offer customers Verizon Wireless service with CenturyLink's High-Speed Internet, unlimited local and long distance, and television services.

2. **The 1996 Telecommunications Act reduced regulation based on the assumption that cross-platform competition would drive innovation, lower prices, and new services to benefit consumers. Just two years ago, Verizon touted the importance of the "competitive rivalry between cable companies and telcos" resulting in benefits to consumers of "better broadband services and lower prices."**

   a. **What is your view of that rivalry now?**

Competition that has emerged since the passage of the Telecommunications Act of 1996 is more robust and vibrant than could reasonably have been expected 16 years ago. Certainly the century-old Bell monopoly in phone services has been destroyed; Comcast (which did not provide any phone services in 1996) has now become a major residential phone services provider in the United States. The video marketplace has become vastly more competitive as well, with AT&T and Verizon (neither of which provided any video services in 1996) having become the seventh and eighth largest MVPDs, DirecTV and Dish Network (which were both quite small in 1996) having become the second and third largest MVPDs, and online video providers (Netflix, Amazon, YouTube, Hulu, and countless others, none of which could hardly have been imagined in 1996) flourishing beyond anyone's expectations. Competition has driven massive investment and innovation in broadband networks, with Comcast having deployed DOCSIS 3.0 across nearly all of our footprint, thereby enabling competitive video and voice services along with innumerable new opportunities in social networking, telehealth, distance learning, telecommuting, and on and on.

b. How do the joint marketing agreements affect that view?

The Agency Agreements are entirely consistent with the views just expressed. As noted above, these arrangements are not unusual. These kinds of arrangements are reflective of intense competition, and they do in fact bring lower prices and new purchase options to consumers.

It is important to note that Comcast's joint marketing agreements are with Verizon Wireless, not with Verizon Telecom. Comcast and Verizon will continue to compete vigorously against one another for voice, video, and Internet services and Comcast will continue to have powerful incentives to invest and innovate in its services.

Responses to Questions for the Record from Senator Al Franken

1. **In December, AT&T announced that it was terminating its plans to acquire T-Mobile USA. This occurred just days after you announced your plans to sell your spectrum to Verizon Wireless. As we discussed during the hearing, there were many indicators that this deal was on the verge of collapsing long before AT&T's announcement in December. Can you please indicate when you talked to T-Mobile about acquiring your spectrum? Did you talk to them subsequent to the Justice Department's decision to sue to block the deal, or after the FCC signaled that it intended to fight the merger as well? If not, please explain why Comcast did not engage with T-Mobile at that time, especially since it seems likely that T-Mobile would have been willing to pay a premium over what Verizon paid to acquire this spectrum, which is adjacent to its current spectrum holdings.**

As I explained at the hearing, my ability to divulge the timing of our discussions with T-Mobile is constrained by non-disclosure agreements. I was comfortable confirming that we spoke to T-Mobile in 2010 because I was merely confirming the representation of Robert Dotson, then-President of T-Mobile, that he was in discussions with us about this spectrum. As I also said at the hearing, the discussions stopped no later than the time Deutsche Telekom ("DT") announced it was selling T-Mobile to AT&T (which they did on March 20, 2011). I think it is fair to add that T-Mobile did not approach us about purchasing the spectrum while its deal with AT&T was pending. After many months of negotiations, we finalized our agreements with Verizon Wireless in early December 2011, while AT&T, T-Mobile, and DT were still pursuing their planned transaction. We announced our agreements on December 2, 2011. AT&T and DT did not abandon their transaction until December 19, 2011. Comcast and T-Mobile did not engage in discussions at that time because by then we had already entered into binding commitments with Verizon Wireless.

2. **Please explain why Comcast chose to accept Verizon's bid over other companies' bids? Did Verizon bid more for this spectrum than <u>all</u> other companies? How did Comcast account for the potential economic benefits that it could derive from Verizon's decision to permit Comcast to market its products in areas where FiOS was available? Did this factor into Comcast's decision to accept Verizon's bid over other companies that do not have a product that competes directly with Comcast's products?**

We did not formally auction the spectrum. We did market the spectrum, in the sense of holding discussions with virtually every major player in wireless industry either about selling them the spectrum or partnering with them to develop it. We were looking to develop a comprehensive strategic wireless solution for our company and for our customers, and ultimately we found that solution with Verizon Wireless.

We see the Agency and Reseller Agreements as beneficial across our entire footprint, with no particular advantages in areas where FiOS is available as opposed to areas where it is not. The Agreements enable us to be more competitive by offering a quad-play bundle across our entire footprint, in much the same way as our competitors are doing. Any suggestion of competitive concerns does not even make sense for most of the country; FiOS is not even available in more

than 85 percent of the cable companies' footprint. In those areas in which FiOS is available, we have no advantage over FiOS in our relationship with Verizon Wireless. Verizon is free to market Verizon Wireless services in competition with the cable companies, and Verizon Wireless itself will market both the cable companies' and the FiOS services on an equal basis. Indeed, in those areas in which FiOS is available, Verizon Wireless retail stores may simply become another space in which the cable companies and Verizon FiOS compete head to head for wired services (Verizon Wireless is not required to sell the services of either Comcast or Verizon FiOS in its retail stores, but, to the extent that it chooses to do so, it must treat both equally).

RESPONSES BY JOEL KELSEY TO QUESTIONS FOR THE RECORD

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For Joel Kelsey

1. One thing that competitive wireless companies require is what is known as "special access" or "backhaul" – access over wired phone lines from cell phone towers to long distance phone and Internet networks. For years, the competitive wireless companies have complained about what they see as very high prices for special access from incumbent phone companies such as Verizon and AT&T. One way around the incumbents is to contract with the cable companies for special access. Do you have any concerns that this deal will change the incentives of cable companies to provide special access?

Yes. There are only two wired ecosystems in the United States – cable companies and telephone companies. Access to the Internet backbone, which is necessary to provide consumers with Internet service, is wholly dependent upon relationships with the companies that own these "on ramps".

The "special access" rulemaking proceeding at the Federal Communications Commission is full of evidence demonstrating the severe lack of competition in this market for special access or other dedicated high-capacity connections. This has allowed Verizon and AT&T, the two dominant incumbent local exchange carriers, to favor their own wireless affiliates, charge supra-competitive rates and impose onerous contracts on their smaller wireless competitors who have no alternatives for special access lines. Cable companies have demonstrated some interest in competing more aggressively in this space (albeit in a geographically limited fashion); however that interest is now dampened as a result of this proposed transaction.

In the proposed transaction, cable providers serving 75 percent of the U.S. market have partnered with Verizon, creating considerable risk that the small amount of competition that exists in the market for backhaul transit will be significantly weakened.

2. In his March 8 Politico interview, David Cohen said that one of the reasons Comcast decided not to enter the wireless business was the presence of insurmountable hurdles like roaming – which he described as "next to impossible" to secure. If roaming is next to impossible for a company like Comcast to secure, what does that say about the ability of smaller carriers to effectively compete with Verizon?

Terrestrial based cable companies are in the best position to enter the wireless market. They have expertise in providing a retail product, they have a broad consumer base that already subscribes to their monthly services, they have their own fiber infrastructure to provide backhaul within their footprint, and established business relationships with telecom transit providers outside of their footprint.

The inability of these companies to offer facilities based competition in the wireless market illustrates significant barriers to entry, and underscores a deep structural problem with competition in this marketplace. This is very troubling given the trend towards a duopoly market

that the Department of Justice and the Federal Communications Commission identified in their rejection of the AT&T / T-Mobile merger.

What is most interesting in this transaction is that the cable companies involved have signaled that their entry into the wireless market is inevitable. Even if the costs of building out their own infrastructure are prohibitive, cable companies could still enter the wireless market in other ways that strengthen, rather than lessen, competition. For example, they could have leveraged SpectrumCo's licenses to partner with a non-dominant wireless carrier like Clearwire or T-Mobile, buying wholesale access to their network and offering cable subscribers wireless service at rates, terms and conditions that are competitive to Verizon or AT&T.

However, under these agreements, the companies are not re-selling access to wireless services under competitive rates, terms and conditions. They are merely acting as sales agents, signing their own customers into Verizon Wireless' two-year contracts in exchange for an assurance they won't face competition from Verizon FiOS in the monthly video and broadband at-home market.

3. **One very interesting facet of this deal is its timing. Verizon's deals with the cable companies were announced last December, just days before AT&T and T-Mobile announced that they abandoned their proposed merger. Some industry observers suspect that these deals were deliberately reached at a time when T-Mobile was not free to bid on this spectrum. T-Mobile's FCC filing states "it is likely no coincidence that Verizon Wireless signed this deal while the AT&T/T-Mobile transaction was still pending, so that T-Mobile was unable to compete to purchase this spectrum." What is your view? Do you believe that the timing of the deal had anything to do with Verizon Wireless's desire to keep this spectrum out of the hands of competitors such as T-Mobile?**

While it's hard to know all the drivers behind the decisions of the various companies that have entered into this multi-faceted transaction, the timing suggests Verizon Wireless was motivated at least in part due to the foreclosure value of keeping this spectrum from its competitors.

The DoJ has pointed out that because of the important role spectrum plays in the investment strategies of wireless carriers, the value of that spectrum to incumbent providers is increased. The private value of spectrum for an incumbent in a given market includes not only the revenue from use of the spectrum but also foreclosure value -- the benefits gained by preventing rivals from using that spectrum to erode the incumbents' existing businesses. Therefore, even though a carrier may not need spectrum to meet an immediate demand, it has significant incentives to keep that resource away from its would-be rivals. This represents the private value of the spectrum to an individual company, and not the public value of spectrum to the public or the US economy.

Indeed, that appears to be the case in this transaction. The companies seeking approval for this transaction freely admit that "Verizon Wireless has sufficient spectrum to meet its immediate needs, and generally to meet increased demand in many areas until 2015," and the record in the FCC proceeding is replete with evidence that Verizon is well positioned even after this time period.

Purchasing this spectrum is not the only way Verizon can meet increasing consumer demand for data, but it is the only way it can foreclose its competitors from providing a serious competitive threat by offering lower-cost high-speed mobile services.

4. The FCC has a test for evaluating acquisitions of spectrum, what they call the "spectrum screen." Verizon Wireless points out that this deal falls under the FCC's thresholds in 121 of the 136 markets in the transaction. Should that settle the question for those markets? Do you believe the spectrum screen – first developed in 2001 – is adequate to evaluate spectrum acquisitions today? Why or why not?

First, it's important to keep in mind that the spectrum screen is not a bright line test that pre-determines the reaction of the Commission in any given transaction. Rather, like the Herfindahl-Herschman Index in the anti-trust context, the spectrum screen acts as a guide post to instruct the Commission when a transaction has the potential of significantly lessening competition.

In fact, in several instances the Commission has actually *changed the screen* during a transaction. In the past, it has always raised the screen to permit license transfers that have driven a dis-proportional amount of valuable spectrum to the two companies with the largest market share.

However, the screen is inadequate to measure the advantage that valuable spectrum gives to the nation's largest wireless carriers.

Each band of spectrum in each local market has unique characteristics that result in no two identically sized blocks holding identical value. These differences are due in part to the propagation characteristics of the spectrum — how far they can carry a signal and how well that signal can penetrate buildings and terrain.

As with property, the location of broadband spectrum is the main driving force of its value. Unfortunately, the screens that the FCC uses to measure spectrum holdings don't measure this dynamic. These antiquated screens are out of date — they measure only for the square footage of holdings (the amount of Mega-Hertz, or MHz) and fail to acknowledge whether the spectrum holdings are beachfront, beach adjacent, or have only a beach view.

Without access to a sufficient amount of high-quality spectrum, a wireless company cannot offer first-class wireless services. It cannot scale its business in a cost-efficient way, or keep up with growing consumer demand for wireless data. Spectrum, particularly highly valuable spectrum, is the input market on which the entire wireless industry is built.

When policymakers weigh whether or not this transaction will harm competition or benefit the public interest, they must look across the wireless marketplace and ask questions about the future prospects for competition and how they will be impacted by this deal.

Any analysis of this transaction must take into account the value of the spectrum being sold in order to adequately examine the concentration of market power that results from this deal. Simply counting the total MHz of available spectrum held by any one carrier provides an inaccurate and distorted portrait of market power.

An analysis of the spectrum holdings most valued for providing mobile data services reveals a significant imbalance in ownership. Currently two companies — AT&T and Verizon Wireless — hold a disproportionate percentage of beachfront spectrum, with Verizon alone controlling one-third of the spectrum best suited for nationwide mobile broadband.

Free Press attempted to provide a perspective of spectrum market share at the national level, based on value by constructing a weighting scheme based on the book value of spectrum holdings reported to the SEC, recent auction prices, and recent prices reported on the secondary markets. The result can be seen in the table on page 8 of my written testimony.

Using this approach, we observe that if these applications are approved, Verizon will control fully 35 percent of all value-weighted mobile broadband spectrum. If a more finely tuned valuation methodology is used by the expert federal agency to assess market shares, this level of control over the spectrum input market would clearly be considered "moderately concentrated" by DoJ standards, and should raise red flags at the Department and the FCC. Given the highly concentrated nature of the overall wireless market, the FCC and the DoJ must conclude that this transaction would significantly weaken future prospects for meaningful wireless competition.

5. **Verizon and its cable partners have agreed to establish a joint venture to develop technologies to integrate wireless and wireline services – creating seamless Internet connections between consumers' TVs and their cell phones or iPads. This has raised concerns because this means that top executives from the companies to these deals – competitors for pay TV customers – will meet regularly and work very closely together and in ways that could compromise their current or future competition. Investment in technology is generally good for consumers, but the concern here is that the joint venture will develop proprietary technology, and limit its content to platforms meeting standards set to that proprietary technology. Or, it might eliminate the parties incentives to compete against each other for future products and services. What's your view? Are you worried about the joint venture being used to disadvantage competitors?**

Yes. The joint-operating entity agreements have been described as collaborations to develop integration technology.

The entities involved in this transaction posses significant aggregate market power, so engaging in cross-licensing schemes should trigger anti-trust concerns because the likelihood these companies will exclusively deal with one another to exclude potential competitors is heightened.

We view the JOE's as an attempt by the companies involved to control the pace of innovation. Consumers have some experience in past regimes like these that have dampened incentives for innovation and held back transformative technology from becoming more ubiquitous. The cartel-like agreement between cable companies to create "Cable Labs", for example, prevents new devices from being more readily available to consumers. Acting as a gatekeeper to the broader marketplace, Cable Labs has prevented electronics manufactures from designing universal devices that would allow consumers to navigate through video through both cable platforms, IP-enable platforms like Netflix, or DVDs.

Much of the transformative nature the Internet is derived from the fact that it represents a universal language. Every Internet-enabled device can read TCP/IP and every network is designed to transmit data in this format. This "integration technology" to hand traffic off from

various wired and wireless networks is being designed by only a few of the largest broadband providers in the country. There is no guarantee that providers on the outside of this club will have access.

Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)

Joel Kelsey-Policy Advisor (Free Press)

1. In your filing before the FCC, you assert that the current spectrum screen is outdated and should be changed to take account of the monetary value of spectrum. When AT&T sought to merge with T-Mobile and argued that the spectrum screens should be changed, you opposed making any changes to the screens and asserted that seeking a change to the screens in the middle of a transaction was "self-serving."

    - Do you now think it proper for the FCC to change its spectrum screens during the middle of a transaction, and if so, how do you account for your changed position?

In our *Reply to Opposition* in the FCC's proceeding on the AT&T-T-Mobile transaction, we stated:

> Applicants assert that "the combined company's spectrum holdings will fall far short of levels that could support any reasonable concern about spectrum aggregation," *but bases this statement on its belief that the Commission should greatly expand the contours of its current spectrum screen, in part by adding spectrum bands that have not yet been made available for mobile broadband use.* With respect to the current spectrum screen, Applicants allege that on average the combined company would hold 134 MHz of spectrum, which is less than one third of the 424.5 MHz that AT&T calculates to be the total available for mobile broadband. But that estimate explicitly excludes in the numerator the Qualcomm spectrum as well as other 700 MHz licenses that AT&T also has sought permission to acquire. Together, if all of these transactions were to be approved, the combined company would hold on average well over one third of all spectrum currently considered by the Commission to be suitable for mobile broadband deployment. [...] Applicants attempt to defuse these arguments by insisting that the Commission should not care how much spectrum a company has, but instead should ask "whether the amount of spectrum a provider holds in a particular area is sufficient to handle bandwidth demands generated by its subscribers in that area." This is incorrect, and such a *self-serving formula* would sound the death knell for wireless competition policy (*internal citations omitted and emphasis added*).

Essentially, we were making the point that AT&T's request that the spectrum screen be expanded to include Lightsquared's MSS spectrum was unwise, self-serving and poor policy given the doubts about that spectrum's future viability as a resource for the provision of terrestrial mobile services. It's clear now that including Lightsquared's holdings in a spectrum screen would have been a premature move, since the interference issues with that spectrum will likely keep it from any terrestrial use for the foreseeable future.

Our point then and now is that the spectrum screen is flawed not because it is too low to account for regional competition, as AT&T argued in their failed transaction, but because it does not take into account the value of different kinds of spectrum. We argued this point in numerous filings at the FCC during both the AT&T-T-Mobile and AT&T-Qualcomm proceedings.

In both of those cases, as well as in this proposed deal, we believe that if the FCC follows its long-standing practice of altering the spectrum screen during transactions the Commission's screen should reflect the actual changes in market power that further concentration of spectrum holdings will produce. This means in addition to accounting for the *amount* of usable spectrum held by any given carrier, the screen should also account for the *value* of these holdings.

Each band of spectrum in each local market has unique characteristics that result in no two identically sized blocks holding identical value. These differences are due in part to the propagation characteristics of the spectrum — how far they can carry a signal and how well that signal can penetrate buildings and terrain.

As with property, the location of broadband spectrum is the main driving force of its value. Unfortunately, the screens that the FCC uses to measure spectrum holdings don't measure this dynamic. These antiquated screens are out of date — they measure only for the square footage of holdings (the amount of Mega-Hertz, or MHz) and fail to acknowledge whether the spectrum holdings are beachfront, beach adjacent, or have only a beach view.

Without access to a sufficient amount of high-quality spectrum, a wireless company cannot offer first-class wireless services. It cannot scale its business in a cost-efficient way, or keep up with growing consumer demand for wireless data. Spectrum, particularly highly valuable spectrum, is the input market on which the entire wireless industry is built.

As in the AT&T / T-Mobile transaction, when policymakers weigh whether or not this transaction will harm competition or benefit the public interest, they must look across the wireless marketplace and ask questions about the future prospects for competition given the consolidation this deal represents over the essential input market of spectrum access. In this regard our position is consistent.

Any analysis of this transaction must take into account the value of the spectrum being sold in order to adequately examine the concentration of market power that results from this deal. Simply counting the total MHz of available spectrum held by any one carrier provides an inaccurate and distorted portrait of market power.

2. I have concerns about potential error costs involved in government intervention. For example, if the FCC were to mandate an approach for Verizon Wireless such as cell-splitting and it turns out that the agency is mistaken and cell-splitting is more costly than spectrum to accomplish the same objective, that the government will have imposed unnecessary costs.

- What is your view of such potential error costs and the role they should play in our analysis?

The FCC ought not to mandate any particular approach for how companies choose to manage their spectrum holdings. However, it is also not the agency's duty to help a carrier meet their forecasted data demands if it means sacrificing competition, and if there are pro-investment, pro-consumer alternatives that carrier can pursue. So, while it shouldn't mandate cell-spliting, spectrum swaps, or wi-fi offloading, it should recognize that there are other strategies to meeting data demand apart from allowing two companies to monopolize control over the finite spectrum market.

As the FCC reviews license transfers it shouldn't pick winners and losers by dictating which companies control which bands of spectrum, but it also must avoid anointing kings.

In this transaction, Verizon Wireless has agreed to weaken its competitive position in the markets where it offers at-home fiber broadband service in exchange for the opportunity to buy the last nationwide block of highly valuable wireless spectrum that will be available for the foreseeable future. The result will put Verizon in control of close to a third of all mobile broadband spectrum measured by value, and it will give Verizon and AT&T a combined 60 percent value share of this critical input market.

Excessive control over the essential spectrum-input market will raise barriers to new entrants, inhibit the provisioning of new competitive services to consumers, and ultimately foreclose the ability of smaller competitors to mount serious challenges to the incumbent twin Bell wireless companies.

3. Smart phones, tablets, and similar products have drastically increased the demand for spectrum in the past few years. Some estimate that global mobile traffic will increase 26-fold between 2010 and 2015, and that this year alone over 500 million smartphones and 100 million tablets could be sold worldwide.

    - In light of this clear trend towards exponential use of data, do you dispute that Verizon Wireless does not need additional spectrum, would not put it to use, or at the very least would not be exercising proper business judgment to obtain as much spectrum as possible?

No one is disputing that this proposed transaction is a savvy business move by the companies involved, or that Verizon would put the licenses in question to use. However,

it is our position that the deal as currently proposed triggers several anti-trust concerns and does not meet the FCC's public interest standard.

Given the growing data demand, the FCC's role of bringing more spectrum to market is increasingly important. But, freeing up additional airwaves isn't the question on the table in these deals. The question before policy makers considering the transaction should be, if we put control of the last piece of valuable nationwide spectrum into the hands of Verizon, how will that impact the competitive environment going forward? Policymakers must also examine the validity of any claims about future capacity concerns, given that carriers have strong reason to overstate future demand and understate their ability to meet such demand using methods that do not harm competition.

We believe it's important for the FCC to pay attention to how much spectrum one company is permitted to own and how that impacts competition and consumers.

In the meantime, if Verizon faces spectrum constraints, it can follow the same strategies that other carriers with much less spectrum depth have been employing – wifi offloading, spectrum swaps, cell-splitting, and more efficient use of existing spectrum (e.g. refarming 2G spectrum for more efficient 4G services).

If the FCC does decide to enable a duopoly marketplace for mobile service by granting two companies control over the spectrum market, it is then the responsibility of the federal government to ensure consumers are protected from supra-competitive rates through industry-wide rules and regulations.

4. At the hearing, you stated that "the cable companies . . . have shown that they really want to be involved in the wireless market . . . [however] there are lots of ways for them to do that which isn't harmful to consumers." I understand that the mobile virtual network operator ("MVNO") provisions of the agreements between the cable companies and Verizon Wireless will allow the cable companies to potentially create their own wireless offerings in the near future.

    - What is your view of the MVNO and how does its inclusion in the agreements affect your analysis of those agreements?

While the Joint Marketing Agreements (as described publicly by the parties) do contain provisions that could result in the cable companies becoming MVNOs on the Verizon Wireless network in the future, for now these companies will simply act as agents, selling Verizon Wireless-branded services. In other words, at the outset of the arrangements the cable companies are merely signing their own customers into Verizon Wireless' two-year

contracts in exchange for an assurance they won't face competition from Verizon FiOS in the monthly video and broadband at-home market.

The companies have stated the MVNO agreement could allow the cable companies to offer competitive service at some point in the future, but without knowing the terms of the agreements, it is impossible to say whether or not any of the cable companies will actually move from acting as agents for Verizon Wireless to acting as virtual network operators. For example, the agreements could be structured in such a way that a cable operator could derive enough of a marginal benefit from selling an agent-based quadruple play service, that the additional risks and costs of acting as an MVNO may not be worth it in the short-run, even though an MVNO strategy might be more beneficial to the cable company and consumers in the long-run.

Although, the precise terms of the MVNO agreements are not public, it is our position that as long cable companies have access to a *nation-wide* wireless service component through Verizon Wireless, they will not jeopardize the market division scheme they have created with Verizon in the residential broadband market, which insulates them from competition from the telephone company's FiOS service.

RESPONSES BY RANDAL MILCH TO QUESTIONS FOR THE RECORD

Verizon Communications' Response to
Sen. Kohl's Follow-Up Questions for the Record for Hearing on
"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

April 19, 2012

For Randy Milch

1. One very interesting facet of this deal is its timing. Verizon's deals with the cable companies were announced last December, just days before AT&T and T-Mobile announced that they abandoned their proposed merger. Your competitors suspect that these deals were deliberately reached at a time when T-Mobile was not free to bid on this spectrum. T-Mobile's FCC filing states "it is likely no coincidence that Verizon Wireless signed this deal while the AT&T/T-Mobile transaction was still pending, so that T-Mobile was unable to compete to purchase this spectrum." What is your response? Did the timing of the deal have anything to do with your desire to keep this spectrum out of the hands of T-Mobile?

Response:

As we explained in detail in our FCC filings, the traffic on our network continues to grow rapidly as customers continue to use new services, applications and devices. As a result, our customers need access to more spectrum in the near term, and will begin to experience congestion in a number of major market as early as 2013 and in a number of others by 2015 without it. Since it takes years, not months, to put spectrum to work for our customers, we needed to buy the spectrum as soon as we could negotiate a deal that made sense. Verizon Wireless did this deal to get needed spectrum, not to keep spectrum out of T-Mobile's hands.

There simply is no connection between the AT&T/T-Mobile saga and Verizon Wireless' purchase of AWS spectrum. Deutsch Telekom had made it clear it hoped to exit the U.S. market in public statements and by negotiating a deal to sell T-Mobile to AT&T. As indicated at the hearing, the negotiations to purchase the spectrum were protracted and began well before there was any indication that the Department of Justice would file a lawsuit to block the proposed acquisition. Verizon Wireless had no way of knowing that AT&T and T-Mobile would not proceed with their deal.

2. Verizon Wireless and its cable partners have agreed to establish a joint venture to develop technologies to integrate wireless and wireline services – creating seamless Internet connections between consumers' TVs and their cell phones or iPads. We must be especially cautious here because this means that top executives from both of your companies – competitors for pay TV customers – will meet regularly and work very closely together and in ways that could compromise your current or future competition. Investment in technology is generally good for consumers, but the concern here is that the joint venture will develop proprietary technology, and limit its content to platforms meeting standards set to that proprietary technology. Or, it might eliminate your incentives to compete against each other for future

products and services. Can you give us any assurance that this won't happen with the joint venture?

Response:

Our innovation venture is a procompetitive collaboration among Verizon Wireless and certain cable companies, narrowly targeted at creating new technologies to integrate wireless and wireline. Many companies, including Apple and Google, already have developed technology to integrate wireless and wireline services, and this venture will add to customer choice and spur further innovation.

As I mentioned in my testimony, Verizon's experience is that closed platforms do not typically succeed in the marketplace over the longer term. As for the concern that the joint venture will limit "its content" to proprietary platforms – the joint venture does not own or control any content, and any rights held by the underlying companies to content are determined by the programmers.

3. Verizon most directly competes with the cable companies through its FiOS product, but FiOS is only sold in 14% of the cable companies' footprint, so why not just carve out the FiOS territory from the joint marketing agreements? Would you agree to do that as a condition of the Justice Department permitting this deal?

Response:

Verizon Wireless wants to provide convenient and innovative converged products to the 85% or so of its customers who do not live in FiOS areas. In order to do so, we partnered with some of the cable companies who could give us that reach. To make it worthwhile for Verizon Wireless' partners to invest resources and time into this deal, they needed to know that they could use Verizon Wireless to serve all of their customers, not just those outside of FiOS areas.

There is no need for a condition here, since the deals don't create a harm to competition. Indeed, we're confident that customers will continue to choose FiOS, since FiOS Internet and video are superior products to the offerings from the cable companies – witness all the awards we've won, and the fact that we've taken nearly a third of cable's customers away where we offer FiOS. But, if for whatever reason, a customer prefers the cable service, then we would like them to have a new way to buy Verizon Wireless – which we also believe offers a superior product. Consumers will decide.

4. We understand that FiOS now accounts for over 60% of Verizon's consumer wireline revenues. Yet Verizon decided in November 2009 to halt expanding FiOS into any new markets. Given the growth in the importance of FiOS to Verizon overall, wouldn't we expect Verizon to reconsider this decision in the future, if not for the joint marketing agreement? Put another way, doesn't your wireless subsidiary's agreement with the cable companies substantially reduce the chance you will ever decide to build FiOS in new areas?

Response:

Well before the companies began negotiating the arrangements at issue, Verizon decided to continue building out FiOS only where its franchise agreements require it to do so, an expansion process that won't be completed until 2018 and will require the ongoing expenditure of significant additional capital.

As Verizon has noted publicly, it is focusing its resources on increasing its market share against the cable and DBS companies in existing franchise areas, while generating necessary free cash flow by cutting back on capital expenditures. Verizon has no plans to expand FiOS into new franchise areas. A future decision to reverse the current course and invest substantial new capital in FiOS won't be governed by the possibility of gaining small, one-time commissions from any customers VZW can sign up for cable companies.

5. We have heard reports that Verizon is "slow walking" the build out of FiOS in its local franchise areas. Will you commit today to fully complete your buildout in an expeditious manner in areas you have already obtained franchise authority?

Response:

Verizon is making investments in its consumer wireline network that are unmatched by any other wireline carrier. Verizon is complying with its franchise build requirements and will continue to do so.

6. Do the commercial agreements between the cable companies and Verizon Wireless have any term or time limit? If so, what is that term?

Response:

The terms of the agreements confidential. We have said publicly that after four years, the cable companies may elect to become resellers of Verizon Wireless service.

7. It has been reported in the media, and was alluded to at the hearing, that the commercial agreements between Verizon Wireless and the cable companies were exclusive. In what sense are the agreements exclusive? What does the exclusivity cover?

Response:

The terms of the agreements are confidential, but any exclusivity arrangements in the agreements are necessary to ensure that the parties commit sufficient resources to the commercial arrangements to bring new products to market and offer competitive bundles of telecommunications services. The agreements do not constrain Verizon Telecom's ability to market its services or work with other partners.

8. Under the commercial agreements, what is the amount of commission payment that Verizon Wireless will receive from the cable companies for selling Verizon Wireless services? Can this amount change during the life of the agreements?

Response

The commercial terms are confidential. As I noted during the hearings, when Verizon Wireless sells cable services, it receives the payment of a small one-time commission for qualified sales. The compensation amount could vary in future years based on market conditions.

9. At one point during the hearing, you noted that the deals we are examining are with Verizon Wireless, not Verizon, implying that Verizon's incentive to compete will be unaffected by these deals. But Verizon owns 55% of Verizon Wireless, Verizon appoints five members of Verizon Wireless's nine-member board of directors, including Verizon Wireless's Chairman and CEO, and its Executive Vice President and Chief Financial Officer, and Executive Vice President and Chief Marketing Officer. I also understand that Verizon Wireless links long-term compensation to performance of its parent company, Verizon. It has also been reported that Verizon Wireless and Verizon share a single Political Action Committee, the so-called "Verizon /Verizon Wireless Good Government Club." And Verizon Wireless accounted for 63% of Verizon's aggregate revenues in 2011. Under these circumstances, you don't contest the fact that Verizon and Verizon Wireless are distinct companies whose interest are not, at the very least, intertwined and closely aligned with one another, do you?

Response:

As I noted in my testimony, Verizon's wireline Telecom unit is not a party to the agreements and is not subject to any restrictions under the commercial agreements. This fact is directly relevant here because Verizon has every incentive to aggressively market its FiOS services in competition with the cable companies in order to earn a return on the billions of dollars it has invested in FiOS. The potential to earn a few hundred dollars in a one-time commission cannot possibly offset the incentive to market FiOS aggressively in order to earn potentially thousands of dollars in recurring revenues. In addition, Verizon owns only 55% of Verizon Wireless, which means that only 55% of any commission payments paid to Verizon Wireless via the agency agreements actually accrue to the benefit of Verizon Communications, whereas 100% of the benefits from FiOS do so.

10. Under current FCC rules, The SpectrumCo spectrum licenses that Verizon Wireless seeks to acquire have a partial build out requirement of 15 years, with a complete build out required in 25 years, from date of issuance of the spectrum licenses. Thus a complete build out won't even be required for this spectrum until the latter half of the 2020s. Your competitors have accused Verizon Wireless of seeking to "warehouse" this spectrum in order to keep it away from Verizon Wireless's competitors. You testified at the hearing that Verizon Wireless needs this spectrum today to meet the burgeoning demand for spectrum caused by consumers' use of

smartphones. In light of this, would you agree to build out this spectrum much sooner, say in 5 years? If your answer is no, why not?

Response:

We don't believe that additional conditions need to be placed on this spectrum. As I said in my testimony, Verizon Wireless is the most efficient user of spectrum, and has invested heavily in making efficient use of that spectrum by using technologies such as cell splitting. But based on intensive engineering analysis, we've determined we'll reach capacity constraints in key major markets as early as 2013 and many more by 2015 – even with continued planned intensive investment in cell-splitting, small cells, and the like. We have provided extensive documentation to the FCC explaining why our existing spectrum assets are insufficient to meet the exploding growth for data. We have no choice but to put this new spectrum to work quickly.

11. (a) In response to concerns expressed at the hearing about consumers' privacy and possible sharing of consumer information between Verizon Wireless and the cable companies, you stated that Verizon Wireless would keep consumers' bills separate even if Verizon Wireless sold a cable service (and vice versa). But if the bills are separate, where is the convenience in a "quad play" (i.e., video, internet access, landline phone, and wireless service)? Wouldn't consumers paying for all of these services on one bill be a key part of the consumer convenience of a quad play?

Response:

I believe I said in the hearing that both Verizon Wireless and the cable companies have robust privacy policies and significant legal obligations that serve to protect our customers' information. The convenience of a single bill is the ability to pay that bill once – an arrangement that can be accomplished without inappropriately sharing customer information. Providing one bill certainly would be a customer convenience; providing customers with the easy ability to buy services with promotions and/or discounts also is a convenience.

(b) In a December 7, 2011 investor call with UBS Securities, Verizon CEO Lowell McAdam stated that consumers don't want separate bills for each service because it "drives them crazy." He added that "getting to one bill and having account-level pricing is the right way to go." So is it possible that the idea that consumers get separate bills from Verizon Wireless and the cable companies for services they cross-sell as you stated in your testimony change in the future?

Response:

Verizon Wireless and the cable companies are not offering a consolidated billing option now, and have yet to decide whether to do so going forward. This may change, but whether it does will depend on a variety of factors as the agency relationships develop over time.

12. You testified that consumers prefer a quad play and that consumers like to buy wireless together with the other services. Could you provide marketing research or other studies that support this?

Response:

I actually testified that Verizon Wireless wants to offer convenient bundles of services "to those customers across the United States who want them." Some customers prefer to buy a bundle, and some don't. There certainly are recent reports by analysts that seem to indicate demand for bundled services including wireless is beginning to accelerate. *See, e.g.*, MIKE JUDE & GINA VILLANUEVA, FROST & SULLIVAN, CONSUMER COMMUNICATION PREFERENCES: 2012 13 (Feb. 2012). But it is also fair to say that, to date, Verizon has not seen great demand specifically for bundled wireless and wireline services, although it obviously believes, as do many analysts, that demand will accelerate, particularly if the innovation joint venture can create a wireline/wireless product that our customers want to purchase.

13. (a) In your March 22, 2012 letter to Senator Lee and me correcting your testimony at the hearing that Verizon Wireless does not sell FiOS in its stores today, you stated that "in a number of Verizon Wireless stores, Verizon Telecom has placed FiOS kiosks, which are manned by representatives of Verizon's wireline business." Can you be more specific – how many Verizon Wireless stores have these FiOS kiosks, and what percentage of the FiOS footprint do these stores represent?

Response:

Verizon Wireless has 1700 store fronts. Verizon Wireless has 306 store fronts in Verizon Telecom's FiOS footprint. In 96 of these store fronts Verizon Telecom uses a third-party contractor to operate a FiOS fixture, sometimes known as a "kiosk." In four of these stores Verizon Telecom uses a third party contractor to conduct FiOS business in the Verizon Wireless store with a tablet computer through which they can receive customer orders. Verizon Telecom thus has kiosks today in roughly 1/3 of Verizon Wireless stores within the FiOS footprint.

(b) In your letter, you state that "[n]o decision has been made as to maintaining these kiosks once the cross-marketing agreements are implemented in the FiOS footprint." If in fact these kiosks are withdrawn, won't this represent a real example of a loss of competition between Verizon and the cable companies? Why won't you commit to keeping these kiosks in place?

Response:

Kiosks in Verizon Wireless stores have not been a substantial source of sales for Verizon Telecom, and indeed Verizon Telecom has decreased the number of FiOS kiosks in Verizon Wireless stores by over 40% over the last two years for reasons unrelated to the deals with the cable companies. FiOS market share gains have continued unabated even as kiosks have been withdrawn.

Precisely because – independent of these deals and for good business reasons – Verizon Telecom has been decreasing its kiosk presence, any commitment to force Verizon Telecom to keep particular kiosks open would more likely harm FiOS than help it.

(c) In defending this deal, you have pointed to the consumer benefit of having wireline representatives in your wireless stores. If they provide such a consumer benefit, why did you not have any Verizon wireline representatives in your Verizon wireless stores, at the very least within your FIOS footprint?

Response:

I don't believe we have defended this deal by noting the customer benefit of having wireline representatives in VZW stores.

We have had representatives for FiOS services in some Verizon Wireless stores. As noted above, Verizon Telecom has reduced its presence in Verizon Wireless stores independently of the deals with these cable companies, so the benefit of having these kiosks is not always clear. And some stores simply are not suited for having a staffed Verizon Telecom presence: There are logistical considerations such as the minimum allowable square footage of a Verizon Wireless store that must be met before Verizon Telecom can have a presence in the store.

14. How will your commercial agreements with the cable companies affect your pricing, marketing or promotion of FiOS in areas where you compete with the cable companies that are parties to these agreements? If your answer is that there will be no such effect, how do we know that will be the case? Are you willing to make a commitment to the DOJ on this point?

Response:

As I mentioned in my testimony, Verizon Telecom has every incentive to continue to compete vigorously with the cable companies on pricing, marketing and promotion of FiOS, and plans to spend hundreds of millions of dollars this year to market FiOS. The Department of Justice has inherent authority to investigate if it comes to believe that Verizon is acting in a manner that harms competition.

15. (a) Beyond its FiOS service, Verizon also competes with the cable companies for Internet service via DSL using traditional copper landline phone wires. Will the commercial agreements affect in any respect this competition, and the pricing, marketing, or promotion of DSL in the areas where you compete with the cable companies that are parties to these agreements?

Response

The commercial agreements will not affect the pricing, marketing or promotion of DSL, which faces a variety of broadband competitors.

(b) Some analysts and industry observers believe that Verizon will abandon or sell off its DSL services in the future. What are you plans for your DSL service in the future? Will you continue to offer it to the same extent you do now?

Response:

Verizon Telecom intends to offer DSL services so long as its DSL service remains competitive in the marketplace and earns a return for shareholders. In some areas where Verizon offers FiOS services, it does plan to sign up new stand-alone Internet customers for FiOS only, and hopes to upgrade existing customers to FiOS over time. In addition, Verizon may upgrade DSL customers who experience significant customer service issues to FiOS.

16. Our subcommittee has heard concerns that the commercial agreements between Verizon Wireless and the cable companies could contain provisions allowing the parties to jointly negotiate for programming content, or might lead to such agreements in the future. The concern is that, if so, the parties to these deals could obtain lower rates for content because of volume discounts that competitive pay TV services would not be able to obtain. Do the commercial agreements contain any provisions allowing Verizon Wireless and the cable companies to jointly negotiate for programming? If so, won't this disadvantage competitive pay TV providers? If not, does the agreement allow for such joint negotiations, or do you anticipate such negotiations to occur in the future?

Response:

None of the commercial agreements has provisions relating to the joint negotiation of programming or the acquisition of content. Thus, while it is true that the programmers are the ones who hold all the cards and who have been increasing content costs every year, these agreements do not address creating a counterweight to their power.

17. One of the key ways of increasing capacity on wireless networks is to offload demand onto WiFi networks, such as those the cable companies and Verizon have built into consumers' homes. Will you commit to offer WiFi offload on an open, non-discriminatory basis to other carriers not parties to the commercial agreements? If not, why not?

Response:

Tens of millions of people have put a WiFi hotspot in their homes. FiOS subscribers, for example, have the ability to make their homes a personal WiFi hotspot using their FiOS router or use an off-the-shelf base station product from companies such as Cisco and

Apple. Verizon Wireless has not built its own WiFi network, but Verizon Wireless smartphones and tablets allow customers to choose whether to use the Verizon Wireless network or a WiFi hotspot at any point in time. Whether customers choose to use a hotspot to offload traffic from the wireless network is up to them.

18. Do you have any response to the suggestions of Prof. Wu, and Mr. Kelsey and Berry given at the hearing as to possible conditions the Justice Department or FCC ought to place on your deals with the cable companies, should the deals be approved?

Response:

Verizon does not believe such conditions are justified since the agreements do not lessen competition or harm the public interest. And in addition to being substantively flawed, the proposed conditions reflect those parties' separate regulatory agenda and the issues they raise are the subject of separate industry wide proceedings under consideration at the FCC and in the courts.

Verizon Communications' Response to
Questions for the Record from Senator Charles E. Schumer
Hearing of the Senate Judiciary Committee,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights:
"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"

April 19, 2012

Questions for Randal Milch, EVP & General Counsel, Verizon Communications, Inc.

FiOS is the most advanced broadband delivery platform, making Verizon the only major U.S. telecommunications company to draw fiber all the way to homes, and the only one to offer broadband speeds approaching those available in Japan and South Korea. Verizon has touted the importance of broadband deployment for job creation, economic development, and improvements in education, health care, and public safety.

I have been a strong supporter of FiOS's buildout of its fiber-optic network in New York, and believe that Verizon should be applauded for its great work in bringing both jobs to communications workers and meaningful competition to cable customers in many of the major population centers of the state. However, I am interested in how this deal will affect FiOS in New York. Specifically,

1. I understand that under the terms of the commercial agreements, Verizon Wireless stores can sell Comcast or Time Warner cable services including in markets where FiOS is offered.

   a. How does this agreement affect Verizon's marketing strategy for FiOS?

      Response:

      The agreements at issue are between Verizon Wireless and the various cable companies, and do not bind in anyway Verizon Telecom, which markets FiOS. These agreements do not affect our marketing strategy for FiOS. As I said in my testimony, Verizon Telecom is spending hundreds of millions of dollars marketing FiOS this year, and New York in particular is a critical market for us.

   b. Can FiOS continue to increase its market share if Verizon Wireless stores are marketing services that compete directly against FiOS?

      Response:

      I am confident that in any side-by-side comparison, customers will choose FiOS over cable, just as they have to date. Additionally, FiOS has continued to increase market share against cable even though it has decreased by more than 40% the number of kiosks in Verizon Wireless stores over the last two years.

c. How do the Joint Marketing Agreements affect Verizon's incentives to build out its fiberoptic pipe to compete?

Response:

The agreements with the cable companies do not change Verizon Telecom's incentives to build or not build FiOS. Well before the companies began negotiating these arrangements, Verizon decided to continue building out FiOS only where its franchise agreements require it to do so, an expansion process that won't be completed until 2018 and will require the expenditure of significant additional capital. As Verizon has noted publicly, it is focusing its resources on increasing its market share against the cable and DBS companies in existing franchise areas. Verizon has no plans to expand FiOS into new franchise areas. A future decision to reverse the current course and invest substantial new capital in FiOS won't be governed by the possibility of gaining a few hundred dollars in commissions from any customers VZW can sign up for cable companies.

2. The 1996 Telecommunications Act reduced regulation based on the assumption that cross-platform competition would drive innovation, lower prices, and new services to benefit consumers. Just two years ago, Verizon touted the importance of the "competitive rivalry between cable companies and telcos" resulting in benefits to consumers of "better broadband services and lower prices."

a. What is your view of that rivalry now?

Response:

The "competitive rivalry between cable companies and telcos" – Verizon Telecom is a "telco" – continues vigorously. Both the cable companies and Verizon have made tens of billions of dollars in capital investments to compete with each other, and the quantum leap from dial-up Internet services in 1996 to FiOS today is evidence that the rivalry has yielded – and continues to yield – great consumer benefits.

b. How do the joint marketing agreements affect that view?

Response:

They do not. The agreements are between Verizon Wireless and the cable companies. Verizon Telecom has every incentive to grow its business.

3. In recent years Verizon has sold off many of its rural lines, first to FairPoint in Maine, New Hampshire, and Vermont, and later to Frontier in 14 states. Does this deal affect Verizon's plans for its wireline business in the future?

Response:

These deals do not affect Verizon's plans for its wireline business.

4. After this deal was announced, I understand that Verizon announced the end of its relationship with DirecTV.

   a. Was this announcement related to the spectrum deal?

      Response:

      As a clarification, Verizon Telecom continues to sell a bundle of DSL, DirecTV and voice services.

      As we've noted publicly, Verizon Wireless did do trials with DirecTV for a technology using LTE. We completed those trials as scheduled and determined after careful evaluation not to move forward with DirecTV – all *before* the deals at issue were completed.

   b. Do the Joint Marketing Agreements contain exclusivity provisions that require the parties to terminate similar agreements with other companies?

      Response:

      While the terms of the agreements are confidential, Verizon Wireless and Verizon Telecom have not terminated any commercial relationships pursuant to the commercial agreements with the cable companies.

   c. Would exclusivity provisions be consistent with vibrant competition for telecommunications or satellite firms?

      Response:

      Yes. Exclusivity provisions can under the right circumstances permit parties to commit greater resources to going to market together with innovative bundled products, secure in the knowledge their partners will not be working with other parties.

Verizon Communications' Response to
Questions for the Record from U.S. Senator Al Franken
for Randal Milch, Executive Vice President and General Counsel, Verizon Communications, Inc.

April 19, 2012

1. Please provide a list of locations where Verizon has a video franchise; where FiOS TV is available; where Verizon is still in the process of deploying FiOS; and locations where there is no existing plan to deploy FiOS.

Response:

Verizon Telecom has video franchises in 1,357 franchise areas, including franchise areas in California, Connecticut, District of Columbia, Delaware, Florida, Massachusetts, Maryland, New Jersey, New York, Pennsylvania, Rhode Island, Texas, and Virginia. Of these video franchises, Verizon offers FiOS TV in 1,321 franchise areas, and is still in the process of deploying the FiOS network in 379 franchise areas. Verizon currently passes about 16.5 million premises and plans to pass approximately 18 million premises.

2. Verizon has previously stated that wireless and FiOS represent the two greatest engines for growth and increased revenue per customer. On March 25, 2012, Citi Investment Research & Analysis wrote: "We believe Verizon's lower wireline margin relative to most of its peers represents an opportunity for improvement partly by increasing FiOS scale with time..." Given this positive financial assessment of FiOS, it seems unusual that Verizon would not contemplate continuing to build out FiOS in currently unserved areas, especially if there is adequate demand. Can you please explain (a) why Verizon has no further plans to build out FiOS based on demand; and (b) why Verizon has decided not to build out FiOS to cities such as Baltimore, Boston, Buffalo, Albany, Syracuse and other urban, metropolitan areas where there is high population density?

Response:

Verizon's wireline margins are precisely the issue being addressed by Verizon's current FiOS strategy, publicly announced well before this set of deals with this group of cable companies. In particular, beginning in mid-2009, Verizon Telecom announced that it had no present plans to expand the FiOS footprint. On a July 27, 2009 earnings call, for example, Verizon Telecom CFO John Killian stated that Verizon Telecom was "on track to be substantially finished with [FiOS] deployment by the end of 2010, which has positive implications for both capital spending and free cash flow." And in October 26, 2009, Mr. Killian again stated that Verizon Telecom would "substantially complete [its] FiOS build program by the end of 2010, which alone should result in about $2 billion of capital savings each year." As Mr. Killian noted, Verizon needed to generate free cash flow, and has done so by continuing its FiOS build only where necessary to meet

franchise obligations and focusing instead its resources on market share gains against cable and DBS in areas where capital had been spent.

Specifically as to your question (b): Verizon began offering FiOS services in 2005 with a plan to pass a certain number of premises. To meet this goal, Verizon started negotiating with many local franchising authorities in urban, suburban, and rural areas (a time-consuming and expensive process in and of itself). Negotiations with some local franchising authorities proved slow to reach fruition. Once franchise agreements had been reached covering the number of premises in Verizon's plan, Verizon ceased seeking additional franchise agreements where it had yet to build any FiOS network.

3. During your testimony, you stated that Verizon Wireless stores do not sell FiOS. We have received reports to the contrary. Can you please verify that is indeed correct? Do these stores market FiOS products or offer other information about FiOS to customers seeking wireless services?

Response:

The day after the hearing, I sent a letter to the Committee clarifying my remarks. A copy of that letter is attached.

4. Will Verizon Wireless commit to not market or sell the cable company's broadband and video products in locations where Verizon FiOS is available to customers?

Response:

Verizon Wireless does not believe it is necessary or appropriate to make such a commitment.

5. During an October 21, 2011 earnings call, Verizon's Chief Financial Officer Francis Shammo said: "By further penetrating existing [FiOS] markets, we will enhance our capital and operating efficiency and improve overall returns." Please explain how the joint marketing agreements do not alter or reduce Verizon's incentives to continue to maintain and build out FiOS and other wireline services.

Response:

Mr. Shammo's remark is consistent with the earlier statements from two years ago by former Chief Financial Officer John Killian noted above. Verizon will generate improved returns by further market share gains against cable and DBS in areas where Verizon already has spent capital. The joint marketing agreements don't alter that incentive.

Verizon's shareholders have invested $23 billion into FiOS, and those shareholders are only now beginning to see a return on that massive investment. FiOS now makes up 61%

of Verizon landline consumer revenues, and FiOS revenues grew 18.2% year over year. In just two years, we've grown video penetration in existing FiOS areas from 25.4% to 31.5%, and our Internet penetration from 29% to 35.5%. We've no intention of slowing down in our competitive efforts – indeed our shareholders have every economic incentive for us to push ahead.

6. Verizon has touted the importance of broadband deployment for job creation, economic development, and improvements in education, health care, and public safety.

a. Doesn't this deal create further incentives for Verizon to sell off more rural lines, reducing vital broadband services in underserved areas?

Response:

No. I would note, however, that there is no basis for equating the sale of lines with a reduction of broadband services. Indeed, purchasers with greater focus on rural markets may more effectively provide broadband in underserved areas.

b. By reducing Verizon's incentives to build out its FiOS network to cities with significant low-income and minority populations, doesn't this transaction increase the digital divide?

Response:

No. As I previously stated, Verizon determined to stop expansion of FiOS to new, unbuilt areas in 2009, long before these deals were contemplated.

7. Do the joint marketing agreements contain exclusivity provisions that require the parties to terminate similar agreements with other companies?

Response:

While the terms of the agreements are confidential, Verizon Wireless and Verizon Telecom have not terminated any commercial relationships pursuant to the Joint Marketing Agreements.

8. During the hearing, I asked you whether Verizon would commit to opening up any of the technology and intellectual property that your companies create as part of your joint venture to your competitors at fair, reasonable, and non-discriminatory rates. Can you please explain in detail why you do not think this would be an appropriate condition to place on this transaction?

Response:

As I mentioned at the hearing, all of the Joint Innovation Venture ("Venture") members get a license to the Venture's products, as does FiOS. Other companies are welcome to negotiate licenses with the Venture if they want to use the Venture's innovations. We don't know yet the terms on which such licenses will be negotiated. The Venture doesn't have a single patent yet, and we don't know if it ever will generate significant intellectual property (although we quite obviously hope it does). Many other players – Apple, Google, patent aggregators, others – hold patents that read on wireless/wireline integration technology, so we're a new entrant into the patent market. To the extent we create something new, we deserve protection for it, and the same freedom enjoyed by those other players to figure out the optimal terms of any licenses.

9. Has Verizon entered into similar commercial marketing agreements with Cablevision, Charter, or other major cable operators?

Response:

No.

10. Several Verizon employees have reported that Verizon has ceased hiring engineers and technicians to work on its copper lines. They think this means Verizon has already abandoned its copper infrastructure—and they are worried that this means their jobs are at risk and that Verizon is quickly shifting its resources to wireless and away from wireline. Please explain what impact you think this transaction will have on jobs in the next year, two years, and five years. Do you anticipate laying off any Verizon employees?

Response:

These transactions do not affect Verizon Telecom's business plans with respect to its copper infrastructure.

Verizon Communications' Response to
Questions for the Record for Verizon-Spectrum Co. Hearing
From Senator Lee

April 19, 2012

Randal S. Milch, Verizon (Executive Vice President & General Counsel)

1. At the hearing there appeared to remain some degree of confusion about Verizon Communication's incentives to continue marketing FiOS in light of Verizon Wireless's agreements with the cable companies.

- Could you please explain the incentives Verizon Communications has to market FiOS and whether the portion of a commission Verizon Communications would receive from the sale of cable contract would affect those incentives?

Response:

Basic economics explain why the Commercial Agreements will have no discernible impact on Verizon Telecom's incentives to market FiOS.

First, Verizon has invested over $23 billion in capital into its FiOS buildout, and grown the FiOS business from nothing in 2004 to an $8.2 billion annual revenue business today. Verizon Telecom currently has approximately 4.2 million FiOS TV and 4.8 million FiOS Internet subscribers. FiOS revenues now represent sixty-one percent of Verizon Telecom's wireline consumer revenues, and grew 18.2% over the last year alone. And FiOS is growing by taking market share from its cable competitors – FiOS increased its market penetration in both TV and Internet by nearly 4% over the last year alone.

Furthermore, any commissions received by Verizon Wireless for sales of MSO services represent a fraction of the net present value of a Verizon Telecom FiOS subscriber. It is highly unlikely that the gain of these commissions (only 55% of which would flow to Verizon Communications) would offset the loss of thousands of dollars of recurring revenue that Verizon could earn from a FiOS customer. Indeed, there's no guarantee that Verizon Wireless would be the party signing up new cable customers to bundles, and it only receives a commission if it drives the sale.

- In what ways, if any, will this agreement increase FiOS's ability to compete with the cable companies?

Response:

FiOS will have access to the Joint Innovation Venture's technology, if it chooses to use it, and thus can get access to technologies it might otherwise have a hard

time developing on its own. FiOS also is free to use other wireless/wireline technology if it proves superior.

2. At the hearing, I understand Professor Wu to have suggested that Verizon Wireless's agreements with the cable companies might decrease Verizon Wireless's incentives to compete with cable for high speed internet offerings.

- Is Verizon's Wireless's internet offering a viable competitor to wire line internet?

Response:

Customers will continue to determine for themselves the communications services that they want. There is no "one size fits all" model. For some consumers, a wireless device is all they want and need, and the speeds delivered by wireless broadband services are adequate for their needs. Other customers may want or need to have even higher speeds obtainable over certain wireline broadband products and may use these products as their primary means of voice and data communications, with wireless as a supplement. Every company in the communications space needs to be nimble and responsive to customers or risk losing these customers to competitors. It will be consumers, not companies, who will decide the way products are used.

- How will your agreements with Comcast impact your incentives with respect to your internet service offerings?

Response:

They will have no impact. Verizon has increased its FiOS Internet penetration to 35.5% at the end of last year, up from 29% two years earlier. Verizon anticipates continuing to win customers with its superior fiber-based offering, and will reap financial benefits by doing so.

3. Some have expressed concerns that Verizon Wireless does not need additional spectrum. These arguments include assertions that because Verizon Wireless is efficient with its spectrum, currently has spectrum it is not using, and can make its current spectrum even more efficient by means of technologies such as cell-splitting, the company is in fact well positioned on spectrum for the foreseeable future. Mr. Berry, who was at the hearing, has stated that Verizon holds as much as 44 MHz of unused spectrum in many markets and would hold up to 72 MHz of unused spectrum in those markets after this transaction.

- What is your response to these claims, and what is Verizon Wireless doing to ensure that excess spectrum is put to good use in areas where it has a surplus?

Response:

It is true Verizon Wireless is the most efficient user of spectrum, and has invested heavily in making efficient use of that spectrum by using technologies such as cell splitting. But based on intensive engineering analysis, we've determined we'll reach capacity constraints in key major markets as early as 2013 and many more by 2015 – even with continued planned intensive investment in cell-splitting, small cells, and the like. We have provided extensive documentation to the FCC explaining why our existing spectrum assets are insufficient to meet the exploding growth for data. We have no choice but to put this new spectrum to work quickly.

Finally, Verizon Wireless has been an active seller on the secondary spectrum market where we thought we could efficiently rationalize our spectrum holdings. Verizon Wireless announced on Wednesday, April 18, 2012 that it will conduct an open sale process of its 700 MHz A and B spectrum licenses in order to rationalize its spectrum holdings. The licenses cover dozens of major cities across the country, as well as a number of smaller and rural markets. Molly Feldman, Verizon Wireless vice president of Business Development, said that "[p]rovided our acquisition of AWS spectrum is approved, our open sale process will ensure these A and B spectrum licenses are quickly and fairly made available for the benefit of other carriers and their customers."

4. At the hearing, in regards to the research and development joint operating entity, Senator Franken asked, "Will you commit to opening up the technology and intellectual property that your companies create to your competitors so that they can obtain the technology at fair reasonable and non-discriminatory rates?"

- If the members of the joint operating entity were forced to license and sell any newly developed products or technologies, how would this change your decision to invest capital in the research and development joint operating entity?

Response:

Any government-imposed sharing mandate would make it less attractive to invest capital in the Joint Innovation Venture, since it would reduce the flexibility of the Venture to most efficiently determine how to license any innovations. The Venture doesn't have a single patent yet, and we don't know if it ever will generate significant intellectual property (although we quite obviously hope it does). Many other players – Apple, Google, patent aggregators, others – hold patents that read on wireless/wireline integration technology, so we're a new entrant into the patent market. To the extent we create something new, we deserve protection for it, and the same freedom enjoyed by those other players to figure out the optimal terms of any licenses.

5. At the hearing, there was some discussion about the Federal Communications Commission's ("FCC") spectrum screen and whether such a screen could or should be changed while reviewing a specific transaction and whether there is any precedent for such a change.

- What is your view of FCC precedent for changing spectrum screens during a transaction and the propriety of such a change?

Response:

Since 2004, the Commission consistently has used one-third of the total spectrum the Commission has concluded is available for mobile use as the threshold for its spectrum screen, providing all concerned with some measure of certainty as they consider transactions and formulate business plans. Use of a consistent one-third threshold has meant that the amount of spectrum included in the screen in past transactions has increased over time as the Commission has made available more spectrum for mobile services, thus allowing the screen to essentially self-correct for the availability of additional spectrum.

But some parties have asked the Commission to radically revise this long-established view of the screen in this transaction by valuing different bands differently or by imposing an actual cap on spectrum holding. Such extensive proposed changes should not be taken up in the context of an individual transaction, particularly where, as here, only a very limited number of post-transaction holdings would exceed the current screen. Not only do these radical and sweeping changes to the Commission's long-established policy lack merit, but they would have broad ramifications for the industry as a whole. For example, proposals to weight certain spectrum holdings in the screen (by spectrum characteristics, auction prices, book value, or other metrics) seek to achieve a pre-desired outcome, but would be fundamentally unworkable and would invite gamesmanship by parties trying to manipulate the Commission's review of a transaction.

6. At the hearing, you explained that if the spectrum screens were recalculated, it would decrease Verizon's share of spectrum holdings because the size of the denominator would increase as new spectrum is included in the screens.

- Can you please elaborate on this answer?

Response:

There is spectrum that is suitable even for broadband use that is not included in the spectrum screen. In our filings at the FCC, we noted several bands of spectrum that are suitable for wireless services that are not included in the current spectrum screen. In our filings at the FCC, we noted several bands that are suitable for broadband use and thus could be added. For example, there is the 10 MHz PCS G Block, which Sprint has announced it will use for LTE. Similarly,

there is at least 104.5 MHz of BRS/EBS spectrum (in addition to the 55.5 MHz of BRS currently included in the screen) which Clearwire uses. There also is 50 MHz of MSS ATC spectrum which is not included in the screen which the FCC has said "could potentially enhance competition in the provision of mobile terrestrial wireless services." And, there is 25 MHz of WCS spectrum, which is not currently included in the screen even though the FCC changed its technical rules to "immediately" make this spectrum available for mobile broadband services. Adding any or all of these bands to the spectrum screen would increase the "denominator" of the screen. But because Verizon Wireless holds none of these bands, the amount of spectrum it holds compared to the total amount of suitable spectrum would decrease.

- Do you believe the spectrum screens are fair and proper as presently calculated?

Response:

The spectrum screen does what it's supposed to do, which is to provide a clear threshold under which aggregations of spectrum will not be considered to cause competitive harm. This allows businesses to plan in light of a consistent regulatory structure, and it makes the regulatory review process shorter, because of the pre-determination by the regulator of where further inquiry is necessary, and where it is not. In a future proceeding, if the Commission relooks at the spectrum available for mobile use, we'll advocate for including new spectrum in the screen.

RESPONSES BY TIMOTHY WU TO QUESTIONS FOR THE RECORD

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For Tim Wu

1. At the hearing, Randy Milch of Verizon argued that the commercial agreements would not mean that Verizon would lessen its competition with the cable companies with respect to FiOS, because all Verizon would realize if the cable companies sold their services was a portion of a one-time commission in the hundreds of dollars. Mr. Milch argued that he would not sacrifice a potential revenue stream in the thousands of dollars per customer for such a relatively small one-time payment. What is your response to this argument?

In most competitive markets, companies realize zero revenue when a competitor makes a sale. The more competitors share revenue, the more their incentives align and the less they compete. By offsetting the lost revenue from each customer that chooses cable over FiOS, the agreements will dampen Verizon's incentive to compete aggressively with the cable companies.

However, the real issue is not relative revenue but relative profit. The revenues realized from a commission versus a FiOS sale do not necessarily determine Verizon's incentives. Because Verizon incurs none of the cable companies' costs, the return on investment from these commissions could potentially exceed the return on investment from FiOS subscriptions.

Finally, reduced FiOS competition with cable will not be the only harm to consumers. As I stressed in my testimony, by giving Verizon a financial interest in the future of cable sales, the agreements disincentive Verizon from developing or promoting *any* products that compete with cable. For example, Verizon will have less incentive to promote its 4G LTE network as a "cord cutting" alternative. The greatest threat from an alliance between Verizon and the cable companies is the loss of such disruptive innovation.

2. It has been widely reported in the press that the commercial agreements have no fixed term. The joint FTC/Justice Department Competitor Collaboration Guidelines state that "the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger." If these agreements indeed have no fixed term, what are the implications for the antitrust analysis of these agreements?

Under the Competitor Collaboration Guidelines, one of four factors in determining whether to evaluate competitor collaboration under the Horizontal Merger Guidelines is whether "the collaboration does not terminate within a sufficiently limited period[10] by its own specific and express terms." Footnote 10 provides: "In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger. The length of this term may vary, however, depending on industry-specific circumstances, such as technology life cycles."

Under this factor, to escape merger scrutiny, a collaboration agreement must *both* contain a "specific and express" term limit *and* that term must be a "sufficiently limited period." Ten years is simply a rule of thumb for the latter. A collaboration agreement with no fixed term, by definition, does not "terminate within a sufficiently limited period by its own specific and express terms." Therefore, this factor would be satisfied.

Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)

Timothy Wu-Professor of Law (Columbia University)

1. **In your testimony, you have stated that this transaction "forces us to confront exactly the same problem" that was faced in the AT&T/T-Mobile transaction. However, the spectrum transaction at issue here seems fundamentally different to me as no customers, facilities, or other assets beyond spectrum are being transferred, and the spectrum being transferred was not previously in use. These differences seem significant because the transaction does not eliminate a viable competitor and also entails efficiencies such as putting to use spectrum that was not previously being put to any use.**

    - **How do you account for these differences and do you dispute that this transaction entails what antitrust law generally views as an important efficiency—that is, moving assets from a low value use to a high value use?**

The problem to which I referred was the problem of creeping duopoly in the wireless industry—in other words, a return to the market conditions that predated the Telecommunications Act of 1996, only without the consumer-protective regulations from that period. Measured by book value, Verizon already controls more spectrum than the proposed AT&T–T-Mobile combination would have. If the proposed transaction were approved, Verizon would control more spectrum than its three closest competitors—AT&T, Sprint, and T-Mobile—combined.

The fact that the cable companies, with their enormous revenue streams, and ability to leverage their current product lines to offer a "quadruple play," did not view themselves as a "viable competitor" further underscores the current levels of market power and barriers to entry in this industry.

The proposed efficiencies of the transaction are minimal and outweighed by the harms to competition and innovation. There is no indication that Verizon will utilize this spectrum faster or more efficiently than any of its smaller competitors—such as Sprint or T-Mobile. In fact, by denying its competitors scale in the 4G LTE market, Verizon will substantially lessen the competitive pressures that it faces to improve the quality and efficiency of its network. Further, the harms to competition and innovation will fall not just in the wireless market. By securing détente between Verizon and the cable companies, the transaction will substantially reduce the possibility that wireless broadband will become a replacement for cable and a source of disruptive innovation.

2. **The primary consideration of our antitrust laws is consumer welfare, and several factors in the wireless market indicate that consumers are benefitting from robust competition. Wireless prices are falling, consumers have competitive choices with about a third of all U.S. consumers having switched wireless carriers at some point, vibrant innovation is occurring with new devices and services being announced on a regular basis, and companies are investing heavily in 4G and 4G LTE deployment.**

    - **Much of your testimony depends on the premise that the wireless industry is not in fact competitive. How do you reconcile this view with the benefits to consumers we are seeing in this industry?**

Current levels of competition in the wireless industry are far from robust. The FCC's most recent Mobile Wireless Competition Report placed the national weighted average Herfindahl-Hirschman Index (HHI) for the industry at 2848, as of mid-2010—far exceeding the threshold of 2500 that the DOJ and FTC regard as "Highly Concentrated."[1] While mobile wireless prices have "declined dramatically over the past 17 years," they have remained virtually unchanged in recent years.[2] According to the Report, the "most significant development" in pricing was the elimination of unlimited data plans, and "another significant development" was higher early termination fees.[3] And, the percentage of customers that switch carriers over a given time period—known as "churn"—has been decreasing for years.[4]

But, even modest levels of competition can yield some benefits to consumers. The danger of the proposed Verizon spectrum acquisition is that it will reduce wireless competition even further. As the prospect of a de facto duopoly in wireless becomes ever more real, we face a policy choice between further concentration and continued competition.

3. **At the hearing, I understand you to have suggested that that the agreements might diminish competition between Verizon Wireless's 4G internet service and the cable companies.**

    - **Can you elaborate on how this deal affects competition between the wireless and wire-line internet products?**

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[1] FCC, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, 26 F.C.C.R. 9664, 9679 (2011).
[2] Id. at 9675, 9781.
[3] Id. at 9725.
[4] Id. at 9817.

Wireless broadband has the potential to the "third pipe" that disrupts the broadband duopoly between local-monopoly cable and telephone providers (which itself is already showing signs of shifting towards a cable monopoly). The joint marketing and R&D agreements between Verizon and the cable companies dramatically reduce Verizon's incentive to aggressively promote its 4G LTE network at a substitute for wire-line broadband. Combined with the substantial increase in Verizon's market power—and the attendant creep towards an AT&T/Verizon duopoly—in the mobile wireless market, the deal makes it less likely that *any* wireless provider will mount a substantial challenge to wire-line broadband. In contrast, the acquisition of the spectrum by another provider, especially one that is not a substantial provider of wire-line services, would increase the likelihood of such a challenge.

- **Do you believe that wireless and wire-line internet services are substitutes?**

Yes. Most obviously, wireless broadband is a direct substitute for wire-line broadband. According to *PC Magazine*, "[t]he mobile broadband service that has the best chance of being a true cable replacement is Verizon's new 4G LTE service." Further, wire-line internet, combined with WiFi, is a potential substitute for wireless internet service (as well as a potential compliment, as we have seen with WiFi offloading).

4. **During the hearing, you said that "the consumer is served by destructive innovation, not by bundling."**

    - **Can you please elaborate on this point?**

With "bundling," a single wire delivers telephone, television, and internet services into the home, but the owner of the wire controls all three services.

With disruptive innovation, each transportation infrastructure—whether wire-line or wireless—would compete head-to-head, and each service—whether telephone, television, internet, or any other—could be offered in individually competitive, "over-the-top" markets.

- **In your view, under what circumstances is bundling a good thing for consumers?**

"Pure bundling" of distinct products—where the consumer may purchase either the entire bundle or nothing—may offer some conveniences, but is rarely good for consumers. If the seller exploits its power in one market to force consumers to buy a second product that they either do not desire or would prefer to purchase on different terms, such bundling is per se illegal under the Sherman Act. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 9–29 (1984).

"Mixed bundling"—where the consumer may choose either to bundle or not bundle—is sometimes good for consumers. For example, some consumers may value the convenience of a single purchase. But even mixed bundling may harm consumers by harming competition. *See, e.g., LePage's Inc. v. 3M*, 324 F.3d 141, 154–57 (3d Cir. 2003).

- **Why is the bundling in this circumstance not welfare enhancing since consumers still have the choice not to bundle their purchase?**

The marginal benefits to consumers of being offered a "quadruple play" in Verizon Wireless stores are miniscule in comparison to the harms to competition and innovation posed by the proposed transaction. Even my co-witness, Charles Rule, who testified in favor of this transaction, admitted that the efficiencies of the cross-marking deals did not "knock [his] socks off."

RESPONSES BY CHARLES RULE TO QUESTIONS FOR THE RECORD

NOTE: At the time of printing, after several attempts to obtain responses to the written questions, the Committee had not received any communication from Charles Rule.

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

March 20, 2012

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20515

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20515

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
United States Senate
Washington, DC 20515

The Honorable Mike Lee
Ranking Member
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
United States Senate
Washington, DC 20515

Dear Chairman Leahy, Ranking Member Grassley, Chairman Kohl, and Ranking Member Lee:

Consumers Union, the public policy division of *Consumer Reports*®, writes to express its concern over the proposed transaction between Verizon Wireless, SpectrumCo, and Cox (collectively "Cable Companies"). Congress enacted the Telecommunications Act of 1996 to help facilitate competition between the traditional telephone companies and the eable industry. The Act was intended to spur competition, which in turn would benefit consumers. While competition has been far less than what Congress envisioned, the cable industry has invested in spectrum needed to offer wireless services while telephone companies have rolled out video services in some parts of their service area.

However, this deal could jeopardize the goals of competition and consumer benefits that Congress intended. The deal would add to Verizon Wireless' domination in the wireless market and represents the loss of the Cable Companies as facilities-based or wholesale wireless competitors. As a result, this transaction will eliminate the chance of more choices in the wireless broadband market, while at the same time provide Verizon a disincentive from competing in the landline high-speed broadband and video market.

In this transaction, Verizon Wireless seeks to purchase spectrum licenses from SpectrumCo, a joint venture among Comcast Corporation, Time Warner Cable Inc., and Bright House. Also, cable provider Cox has agreed to sell off its spectrum to Verizon Wireless. Additionally, Verizon Wireless and the Cable Companies have entered into joint marketing agreements. Both Comcast and Verizon Wireless have indicated these joint marketing agreements are an integral part to the spectrum sale. These joint marketing agreements allow each individual cable company and Verizon Wireless to sell one another's products.

The proposed transaction is not in consumers' best interest since it will diminish competition in the video, broadband, and wireless markets. Consequently, consumers could suffer an increase in prices and face diminished competitive alternatives in the video, broadband, and wireless markets. Thus, we ask that you carefully scrutinize this proposed transaction.

Spectrum Concentration

Verizon Wireless already holds the greatest amount of spectrum compared to its competitors. Importantly, the Federal Communications Commission (FCC) has determined Verizon Wireless holds the most low-band spectrum, which is the prime band for providing mobile broadband deployment. This transaction would generally provide Verizon Wireless in most markets an additional 20 MHz of AWS spectrum, which is well suited also for mobile broadband deployment.

Also troublesome is the fact that Verizon Wireless and AT&T together hold more spectrum nationally than the other carriers combined. These two carrics also hold the vast majority of spectrum best suited also for mobile broadband deployment. This transaction would increase the dominant position that Verizon Wireless holds in the spectrum market and exacerbate the trend of consolidation the FCC has documented in the wireless market.

Collusion Instead of Competition

Under the joint-marketing agreements, Verizon Wireless and the Cable Companies "will sell each other's services on a market-standard commission basis, with the new subscribers becoming customers of the other service provider...." Essentially, under these joint-marketing plans, Verizon Wireless stores will market and offer promotions for the Cable Companies' services, with the Cable Companies doing the same for Verizon Wireless.

These joint-marketing arrangements are effectively agreements to not compete and would essentially divide up the current broadband, video, and wireless markets. As a consequence of these agreements, Verizon will have no further incentives to build out its FiOS network, which is a direct competitor to the Cable Companies, since head-to-head competition would jeopardize this deal and threaten Verizon's core revenue stream of mobile service subscriptions. On the other hand, the Cable Companies have decided they are unable to compete with AT&T and Verizon Wireless and instead will be able to now dominate the landline video and broadband markets.

Effect on Wireless Competition

The wireless industry is already concentrated, with Verizon Wireless having the largest share and two companies, Verizon Wireless and AT&T controlling over 60% of the wireless market. This transaction would further add to Verizon Wireless' dominance in the wireless market, continue to solidify a wireless duopoly, controlled by Verizon Wireless and AT&T, and further reduce competition.

For instance, there would be less spectrum available for competitors like T-Mobile, Sprint, and MetroPCS, who already are at a disadvantage when it comes to premium spectrum assets for wireless broadband deployment. Moreover, a stronger Verizon Wireless can more easily squeeze out its current competitors. For example, competitive carriers will become even more dependent on Verizon Wireless for roaming agreements. This dependency would give Verizon Wireless the incentive to raise the costs of roaming agreements. In addition, due to the lack of

interoperability, it will be even more difficult for competitors have access to popular handheld devices that consumers want. Further, the joint-marketing agreements between Verizon Wireless and the Cable Companies could give the Cable Companies little incentive to cut reasonable deals with Verizon Wireless' competitors on access points such as special access and Wi-fi off-loading capabilities, making it more difficult and expensive for the competitors to compete.

Effect on Landline Competition

The cable market is essentially a regional monopoly since the major cable providers do not compete with each other. Moreover, the FCC's National Broadband Plan concluded that for those consumers who want very high broadband speeds, nearly 75% of the population will likely only have one landline broadband provider – the cable company. This is because the speeds offered by DSL will not reach the higher speeds offered by the cable industry or fiber-to-the-premises (FTTP) services, like FiOS, which only reach about 15% of the population.

Consumers are demanding higher speeds for a variety of purposes such as tele-health or streaming television shows and movies over the Internet. As DSL may become less attractive for consumers because of the slower speeds, the only option consumers will have for high-speed broadband will be the local cable provider. Additionally, consumers looking for bundling options (for high speed broadband, voice, and video) will also face a lack of choices if competitors, like satellite providers, are unable to provide a viable high speed broadband service.

Conclusion

Consumers Union strongly believes that this transaction does not serve the public interest. If approved, it will lead to the loss of competition and choice for consumers in the video, broadband, and wireless markets. With fewer choices for consumers to choose in a duopoly or monopoly market, Verizon Wireless and the Cable Companies will no longer have incentives to price their products competitively, leading to higher prices for consumers. In tough economic times like these, it is in the public's interest to keep prices low and keep as many options for consumers as possible. For these reasons, we ask that you carefully scrutinize this proposed transaction and the effect it will ultimately have on consumers' pocketbooks.

Sincerely,

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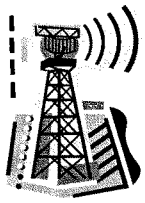
IBEW System Council T6
Massachusetts & Rhode Island
IBEW Locals 2222, 2321, 2322, 2324, 2325, 2323 , 2313
IBEW Local 824 West Central Florida
The Verizon Spectrum Purchase

- ✓Not in the Public Interest
- ✓Stifles competition and economic opportunities
- ✓Disincentive to Upgrade Copper Facilities or Expand FiOS
- ✓Creates Higher Prices for Consumers
- ✓Will Eliminate Jobs

verigreedywireless

Spectrum Deal is not in the Public's Interest



Public Interest

Standard of review - Must show that the transaction would serve the public interest, convenience and necessity, and identify the Public interest benefits versus the public interest harms; the burden on Verizon is to identify the benefits, the potential harms and detail how the acquisition serves the public interests.

Public Interest Analysis – part of this analysis includes a "deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest."

- This acquisition will NOT preserve or enhance competition or promote diversity of license holdings, but will instead increase Verizon's dominance in the mobile telephony/broadband market on both national and local levels.
- Stifles economic opportunity and competition
- Likely to eliminate jobs; the potential negative consequences of this transaction on Verizon Communications employees; bargained-for, non-bargained-for and management.

verigreedy wireless

Spectrum Deal Is Not in the Publics Interest

verigreedywireless

- Joint Marketing agreement with Cable Companies creates a Duopoly
- Diminution of Services
- Higher Prices for Consumers

Verizon is phasing-out lower cost options like High Speed Internet and driving consumers to higher priced data plans and forcing people off of the copper network with limited opportunities for basic landline services of dial-tone or internet options.

DOJ Anti-Trust Review

THE COMMON LAW IS THE WILL OF *Mankind* ISSUING FROM THE *Life* OF THE *People*

United States Department of Justice
Antitrust Division
The mission of the Antitrust Division is to promote competition in the U.S. economy through enforcement of, improvements to, and education about antitrust laws and principles.

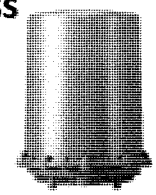
Robert F. Kennedy Department of Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530
E-mail: antitrust.atr@usdoj.gov

- **The Joint-Marketing agreement with the cable companies is inherently anti-competitive.**
- **The proposed agreement between Verizon Wireless and the consortium of cable companies, which includes Comcast, Time Warner, and Bright House Networks — will see cable companies paying Verizon hundreds of dollars for each cable contract obtained through Verizon marketing, and vice versa.**
- **this arrangement essentially a "non-compete" agreement, guaranteeing cable won't contend with Verizon on the wireless side, and Verizon won't compete with cable in cable services.**
- **this deal is basically a capitulation: Verizon has decided to give up on its own cable aspirations and instead collude with the companies that have already established themselves**

Diminution of Jobs & Disincentive to upgrade copper facilities and/or continue FiOS build

- Verizon has failed to address or consider the negative effect of the transaction on current Verizon employees, both represented and non-represented.
- Verizon CEO, Lowell McAdam announced that Verizon would no longer continue to build-out their state-of-the-art FiOS network beyond the 18 Million homes that Verizon committed to.
- Today, throughout Verizon's footprint, they currently serve or could potentially serve 30 Million landline Customers (Hoovers) only 18 Million, will have the ability to be served by FiOS.
  - Instead, Verizon now plans to bundle their wireless services with their new cable partners and as a result, Verizon will basically force current and future customers in non-FiOS areas onto their competitor's networks.
  - Verizon is beginning to deny their broadband High Speed Internet (HSI) services in areas where this broadband technology is their only option. Verizon is running a business and if it is not profitable to install HSI broadband, consumers will be left without a low-cost broadband internet option and as a result, be forced to switch their Verizon landline telephone service over to the bundled services of the cable companies. Verizon, through their cable partners will bundle their wireless cell phone services to this consumer.

HomeFusion Makes Verizon Wireless 'Cantenna' a Reality



- HomeFusion Broadband is a new service that will bring wireless LTE service into the home as a primary broadband connection for those in areas with limited options.
- Customers can choose several usage-based plans, beginning at $59.99 per month for 10 GB of data, or $120 per month for 30 GB of data. A one-time equipment fee of $199.99 applies, and installation of the antenna is free.
- With the Home Fusion service, Verizon's LTE network is delivered to an antenna that transmits the signal to a broadband router inside the home. The cylinder-shaped antenna is installed at the customer's home, and the product's design includes multiple internal antennae allowing the device to pick up Verizon's 4G LTE signal.
- The broadband router can connect up to four wired and at least 20 wireless devices inside the home using Wi-Fi.
- **Verizon Wireless is working with Asurion for installation of the service.**
- **Verizon chose NOT to let unionized workers already serving these customers in the community install these services or sell these services in the unionized sales centers across the United States.**

SEE: http://www.wirelessweek.com/News/2012/03/Home-Fusion-Makes-VZW-Cantenna-Reality-Technology/

Verizon Wireless Products

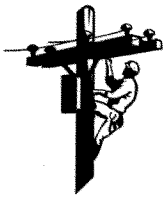
Verizon Home Monitoring and Control

- The smart home of the future is yours today with Verizon Home Monitoring and Control. Choose from a variety of easy-to-install home automation and energy management features that can be controlled remotely from your computer, Smartphone, or FiOS TV.
- Verizon announced that InstallerNet will be the professional installer of choice.
- Verizon chose NOT to let unionized workers already serving these customers in the community install these services.

Verizon Wireless Home Phone Connect

- Port your home number to Verizon Wireless or establish a new line of service.
- Activate service, and begin making and receiving calls

Verizon's End Around of Oversight?



- Verizon in many areas is lobbying at the State level for deregulation of telecommunication services.
- Verizon is actively analyzing divesting their interests in Pole ownership, locally and/or nationally, thereby avoiding oversight and their responsibilities (double poles, storm response, etc.)in the communities.
- Verizon sold off their landline services to Frontier & Fairpoint, using the Reverse Morris Trust, unloading debt onto these companies and avoiding taxes. Verizon Wireless is actively pursuing newer technologies in these 17 states to compete against Frontier & Fairpoint in the states that they abandoned.

Layoffs & Plant Closings

Verizon lays off 336 N.J. workers because of dropoff in copper line customers

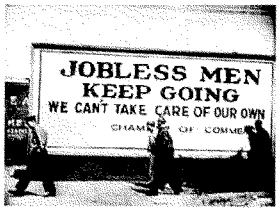
Friday, February 03, 2012

SEE: http://www.nj.com/business/index.ssf/2012/02/verizon_lays_off_336_nj_worker.html

Verizon call center closures to affect more than 3,000 jobs

March 9, 2012

See: http://www.wirelessweek.com/News/Feeds/2012/03/wireless-verizon-call-center-closures-to-affect-more-than-3/



Verizon Continues Layoffs, Over 16,000 employees to be cut in two years...

Tuesday 13-Oct-2009

Verizon has already cut 8,000 jobs in the last twelve months, and during the company's second quarter earnings conference call announced they'd be laying off another 8,000 employees during the second half of this year. While some of the layoffs are because of the housing market and Verizon's slowly dying residential phone business, the company is also making a very intentional move away from rural connectivity so they can focus on more immediately profitable urban and suburban FiOS and wireless delivery. Interestingly, the 200 employees laid off yesterday in Massachusetts and Rhode Island were mostly FiOS installers.

SEE: http://www.dslreports.com/shownews/Verizon-Continues-Layoffs-104956

Timeline of events related to Verizon's Spectrum Purchase

October 24, 2011 Report – Verizon confirms new LTE service; FiOS build essentially over. Verizon CFO Fran Shammo confirms trial of the "Cantenna" for fixed residential DSL alternative; Limited FiOS build remaining.

December 2, 2011 – Verizon Wireless announces that it will be purchase Wireless Spectrum from Comcast Corporation, Time Warner Cable, and Bright House Networks for $3.6 Billion.

- This transaction will result in 122 Advanced Wireless Spectrum Licenses transferring to Verizon Wireless.
- A "cross marketing" agreement allowing the parties to sell each other's services was announced as well.

December 16, 2011 – Verizon agrees to purchase spectrum held by Cox Communications for $315 Million.

December 21, 2011 – Verizon Executives meets with IBEW and CWA Representatives in Rye Brook, NY. Robert Mudge, Verizon President of Consumer and Mass Business Markets, informs Unions that "the Spectrum purchase will have absolutely no effect of the wireline industry".

February 2012 - Verizon HSI denial directive in Northeast. In New England and New York Verizon no longer will offer HSI services if suitable facilities are not available or if more than minimal work is required. The Company stated that if an engineering work order had to be written, the customer would be informed that they are not eligible. This means a Verizon wire line customer that would have been eligible in January 2012 and prior is denied. This drives consumers to the higher priced products Verizon wants to offer or forces consumers to Cable companies as the only option.

March 2, 2012 - Verizon announces "HomeFusion". The aforementioned "Cantenna" is officially put into play. This proposed replacement for DSL will result in a cost increase for consumers as this wireless technology will have "caps" for usage. DSL and FiOS have unlimited usage. In this instance, customers will have to pay for usage beyond designated limit.

Thank You

- This overview was brought to you by the IBEW Telephone Locals in New Jersey, Massachusetts, Rhode Island & Florida
- For Copies of this guide or the supporting documentation and reference please e-mail:

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March 20, 2012

The Honorable Herbert H. Kohl, Chairman
The Honorable Mike Lee, Ranking Member
U.S. Senate Judiciary Subcommittee on
Antitrust, Competition Policy and Consumer Rights
308 Dirksen Senate Office Building
Washington, DC 20510

Re: T-Mobile, USA Comments for the Hearing - **"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"**

Dear Chairman Kohl and Ranking Member Lee:

Thank you for this opportunity to submit T-Mobile USA's ("T-Mobile") views for the record as you conduct the hearing directed to answering the question: **"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"** Put simply, Verizon Wireless' proposal to purchase the Advanced Wireless Services ("AWS") spectrum assets of SpectrumCo, LLC (a joint venture among subsidiaries of Comcast Corp., Time Warner Cable Inc., and Bright House Networks, LLC) and Cox TMI Wireless, LLC are not in the public interest and should not simply be rushed through the regulatory process as Verizon Wireless and the other applicants urge.

Verizon Wireless has far less incentive than smaller carriers like T-Mobile to rapidly deploy the cable company spectrum efficiently to provide broadband service to consumers in the United States. Verizon Wireless already holds a strong portfolio of unused "greenfield" spectrum licenses in the AWS band, and is also dominant in the most desirable low-band spectrum below 1 GHz. Indeed, much of the already significant holdings of AWS spectrum that Verizon Wireless acquired in 2006 still lie fallow today. This is despite the almost complete clearance of legacy government and commercial users from the AWS band and the ready availability of AWS-capable devices in the marketplace. Instead, Verizon Wireless chose to hold this critically scarce spectrum in reserve, warehousing it for some future use. By contrast, T-Mobile and other smaller carriers worked to aggressively clear the AWS spectrum of incumbent users and have been using that spectrum to deploy 3G and 4G services since 2008.

If we lived in a world of plentiful spectrum resources, Verizon Wireless' behavior and the proposed transactions would be much less problematic. But that is not the world we inhabit today. Even with the recent legislation authorizing the FCC to hold incentive auctions for bands currently held by broadcasters, wireless providers cannot expect to see consequential blocks of

spectrum available in the marketplace for many years. So, by effectively cornering the remaining readily available AWS spectrum, Verizon Wireless is foreclosing T-Mobile and other smaller competitors from the potential to acquire an important resource – the spectrum they need to meet consumer demand for LTE (the next generation of mobile services) to directly compete against Verizon Wireless.

Verizon Wireless contends that the "screens" customarily applied by the FCC to review mobile services transactions are either not applicable here (the HHI-based screens) or not triggered except in a few markets (the spectrum screen). It therefore argues that under FCC precedent there is no competitive harm and no further review is appropriate. But this ignores the fact that the government has an obligation to conduct a thorough analysis to determine whether these transactions serve the public interest. That analysis will clearly show significant harms to wireless competition and consumers if these transactions are approved.

The limitation on spectrum capacity is one of the greatest impediments to robust competition among wireless providers in the United States. Indeed, Congress, the FCC, and the Administration have all recognized the imperative need to free up additional spectrum for mobile broadband. Approving the Verizon Wireless acquisition of the cable companies' spectrum is problematic not only because of the increase in Verizon Wireless' own holdings (when only a month before the announced transactions Verizon Wireless was telling the public that it had no near term need for additional spectrum), but because it would simultaneously deprive more efficient competitors of the spectrum. These acquisitions therefore potentially foreclose access to a necessary input for competitors who could make immediate use of the bandwith to directly compete against Verizon Wireless.

There is strong precedent supporting a conclusion that an acquisition of an input, such as spectrum, can cause competitive harm in violation of the Clayton Act. In 1998, for example, the Department of Justice challenged an acquisition of unused satellite television spectrum by a consortium of cable companies on the basis that the cable companies would use the spectrum in a less competitive manner than would other purchasers. And, the DOJ recently supported an FAA-ordered divestiture in airport takeoff and landing slots in a transaction between Delta and US Airways, expressing concern that the parties were engaged in "slot hoarding" with an intent to keep new entrants, who would use the scarce slots more efficiently, from the market.

T-Mobile also does not believe the FCC should rely solely on an arbitrary spectrum screen to determine which markets require review for potential anticompetitive effects. However, if it does use a screen, it should update its methodology to be more in line with the current technological and competitive marketplace to more effectively identify the markets in which no potential for such effects exists. Most importantly, the FCC should acknowledge that treating all spectrum frequencies the same for purposes of the screen does not reflect technical and market realities. In other contexts, both the FCC and DOJ have concluded that lower frequency bands – such as the 700 MHz and cellular bands below 1 GHz – possess more favorable intrinsic spectrum propagation characteristics than spectrum in higher bands. As a result, such 'low-band' spectrum can provide superior coverage over larger geographic areas, through adverse climates and terrain, and inside buildings and vehicles. This also means that networks using

such low-band spectrum can be built out at a significantly lower cost. These substantial differences in the cost and burden of utilizing spectrum are reflected in spectrum valuations in the United States.

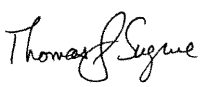
The logical consequence of this economic reality is that the FCC in evaluating these transactions should employ a spectrum screen that is based on weighted spectrum. Such an approach is typically taken in industries where there is substantial heterogeneity in value. For example, when evaluating market shares in diamonds the shares are always in value terms, rather than carats (weight). Similarly, real estate shares are stated in value terms, rather than acres. A penthouse in New York City may be considerably smaller than a barn in rural Iowa, but no one would expect to pay less for the apartment. In all three industries, value differences are so large that a pure quantity-based measure (whether it be MHz, carats, or acres) is misleading.

The FCC established its spectrum screen a decade ago to ensure it fully scrutinized all geographic areas in which any potential for anticompetitive effects exist. The unweighted approach clearly does not achieve this goal in today's increasingly broadband world. Using an approach based on actual economic value would refine the screen results and more accurately identify those markets to which the FCC should direct its attention.

Finally, T-Mobile has concerns about the scope and terms of the Joint Marketing Agreements involved in these transactions and their impact on competition. To date, these unprecedented agreements between the largest incumbent cable operators and the largest wireline (in many markets) and wireless carrier have been largely shielded from scrutiny due to the applicants' unwillingness to disclose their full terms at the FCC. Contrary to the vision of the Congress in the 1996 Telecommunications Act that incumbent cable operators and telephone companies would compete head to head, the "black box" presented by these contracts is alarming and raises significant concerns about whether the agreements pose a risk that instead of competing, they will combine to foreclose competitive access, not only to spectrum but also to broadband video content and other inputs by smaller wireless providers as the market moves to a mobile video world. T-Mobile therefore urges the government to take a careful look at these agreements and any documents that stand behind them to ensure they will not impair the wireless and wireline competition that Congress has tried to engender in legislation over the past 20 years.

Again, thank you for the opportunity to submit these comments, and thank you for conducting a hearing on such an important topic.

Respectfully submitted,



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