"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

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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

[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.

[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.