

REDACTED - FOR PUBLIC INSPECTION

Eric J. Branfman
Direct Phone: +1.202.373.6553
Direct Fax: +1.202.373.6015
eric.branfman@bingham.com

August 20, 2012

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: Application of Cellco Partnership d/b/a Verizon Wireless and
SpectrumCo LLC For Consent To Assign Licenses; Application of
Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC
For Consent To Assign Licenses, WT Docket No. 12-4**

Dear Ms. Dortch:

RCN Telecom Services, LLC (“RCN”), through its undersigned counsel, again expresses its extreme concern that the commercial agreements entered into among Verizon Wireless and the SpectrumCo cable companies (*i.e.*, Comcast, Time Warner Cable, and Bright House Networks) and Cox TMI Wireless (collectively, the “CableCos”), which are part of the spectrum transfer application now before the Commission, are not in the public interest, as presently constituted. RCN believes that despite the United States Department of Justice’s (“DOJ”) Proposed Final Judgment¹, many concerns remain. Unless these concerns are addressed by the Commission, the proposed transaction would not be in the public interest.

The joint sales and marketing and joint product research and development agreements will cause harm to competition in the markets for voice, high-speed Internet access (wireless and wireline) and wireline video programming services. Specifically, the agreements will unlawfully enhance the CableCos’ and Verizon Wireless’s already dominant market positions and will facilitate coordinated action among those companies that will harm competition. Accordingly, RCN requests that if the Commission authorizes the transfer of the wireless licenses from SpectrumCo to Verizon Wireless, it impose the conditions discussed below on the joint sales and marketing and joint product research and development

Beijing
Boston
Frankfurt
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T +1.202.373.6000
F +1.202.373.6001
bingham.com

¹ *United States v. Verizon Communications Inc.*, Proposed Final Judgment, ¶ II.M. (filed Aug. 16, 2012 Dist. Ct. DC).

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 2

agreement among Verizon Wireless and the CableCos that are recommended herein.

I. The Proposed Final Judgment Does not Adequately Prevent the Harms from the Joint Marketing Agreements

The DOJ's Competitive Impact Statement ("CIS") recognizes the need to prevent Verizon Wireless from selling the CableCos' products where Verizon offers or is authorized to sell FiOS, Verizon's video and broadband product that is directly competitive with the CableCos' video and broadband products. The CIS asserts that the provisions of the commercial agreements that call for Verizon Wireless to sell the CableCos' video products create two harms. First, they "are likely to diminish Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offerings."² Second, they "create an opportunity for harmful coordinated interaction among the Defendants regarding, among other things, the pricing of competing offerings."³ These are both serious harms, not only from the DOJ's antitrust perspective, but also from the FCC's public interest perspective. The relief found in the Proposed Final Judgment does not adequately prevent these harms. In fact, the Proposed Final Judgment does nothing at all to prevent the second of these harms.

As shown in RCN's July 31, 2012 *ex parte*, the FCC has the authority to prevent these harms.⁴ Because the relief obtained by the DOJ in the Proposed Final Judgment does not adequately prevent these harms, the FCC must not approve the Application absent significant additional relief that will in fact prevent these harms. As detailed below, RCN believes that the joint market and sales arrangements can be made much more pro-competitive by three modifications to the relief provided by the Proposed Final Judgment: (1) the territory subject to the joint marketing restrictions should be enlarged; (2) regional joint marketing should be prohibited; and (3) Verizon Stores within the FiOS Footprint should not be permitted to provide information regarding the CableCos' products.

² *United States v. Verizon Communications Inc.*, Competitive Impact Statement, at 3-4 (filed Aug. 16, 2012, Dist. Ct. DC) ("Competitive Impact Statement" or "CIS").

³ *Id.*

⁴ See Letter from Eric J. Branfman & Frank G. Lamancusa, Bingham McCutchen LLP to Marlene H. Dortch, Secretary, WT Docket No. 12-4 (July 31, 2012) at pp. 9-12.

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 3

A. The Region Subject to Joint Marketing Prohibition Is Too Small

As an initial matter, in the Proposed Final Judgment, the customers to whom Verizon Wireless is precluded from selling the CableCos' services are limited to the narrowly defined "FiOS Footprint," which the Proposed Final Judgment defines in Section II.M. This definition ensures that Verizon Wireless can (and under the commercial agreements is required to) market the CableCos' services except where Verizon (i) has built out FiOS, (ii) has entered into a legally binding commitment to build out FiOS, (iii) is authorized by a non-statewide franchise to build out FiOS, or (iv) has delivered notice of intention to build out FiOS pursuant to a statewide franchise. This means that as a practical matter, Verizon will be required, in many cases, to sell the CableCos' services in neighborhoods or towns immediately adjacent to ones where it is offering FiOS. The DOJ notes in the CIS that:

The Commercial Agreements diminish the incentives and ability of Verizon and the Cable Defendants to compete in those areas where the Cable Defendants' territories overlap with those in which Verizon has built, or is likely to build, FiOS infrastructure. They transform the Defendants' relationship from one in which the firms are direct, horizontal competitors to one in which they are also partners in the sale of the Cable Defendants' services. Rather than having an unqualified, uninhibited incentive and ability to promote its FiOS video and broadband products as aggressively as possible, Verizon will be contractually required and have a financial incentive to market and sell the Cable Defendants' products through Verizon Wireless channels in the same local geographic markets where Verizon also sells FiOS. The Commercial Agreements deprive FiOS of the ability to exploit fully a valuable marketing channel and alter Verizon's incentives with respect to pricing, marketing, and innovation. They unreasonably diminish competition between Verizon and the Cable Defendants—competition that is critical to maintaining low prices, high quality, and continued innovation.⁵

⁵ CIS at 13-14.

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 4

Because the Proposed Final Judgment permits the provisions of the commercial agreements that require Verizon Wireless to sell the CableCos' products in neighborhoods and towns immediately adjacent to those where Verizon offers FiOS, the Proposed Final Judgment does not eliminate these harms. Verizon and the CableCos are still "partners in the sale" of the CableCos' services and the marketing agreements still "unreasonably diminish competition" between Verizon and the CableCos. In addition, the combination of the marketing clout of Verizon Wireless with that of the CableCos threatens to overwhelm competition from RCN and other companies that currently offer competitive video and broadband service or are considering entry into those markets.

Moreover, as the DOJ recognizes in the CIS, "Verizon still considers, from time to time, whether to invest further in the expansion of its FiOS infrastructure."⁶ The CIS goes on to state that:

The Commercial Agreements also significantly and adversely affect Verizon's long-term competitive incentives to reconsider, in future years, its pre-existing decision not to build out FiOS beyond its current commitments. The requirement and financial incentive for Verizon Wireless to sell the Cable Defendants' services, combined with the unlimited duration of the Commercial Agreements, could, in the long-term, create a disincentive to additional buildout in some areas within Verizon's wireline territory but outside the currently planned FiOS footprint.⁷

The most logical and economical area for FiOS expansion is adjacent to the area that it presently serves or is authorized to serve. Thus, the fact that Verizon Wireless is earning revenue by marketing the CableCos' products in adjacent towns and neighborhoods will dramatically dampen Verizon's incentive to expand its offering of FiOS into those adjacent towns and neighborhoods. This will eliminate potential competition from FiOS. Therefore, Verizon Wireless should be precluded from selling Cable Services in any Designated Market Area ("DMA") in which FiOS is offered or authorized to be offered to at least 10% of

⁶ CIS, p. 12.

⁷ CIS, p. 15

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 5

residents. At the very least, Verizon Wireless should be precluded from marketing Cable Services in any Zip Code adjacent to a Zip Code in which Verizon offers FiOS or is authorized to offer FiOS.

Finally, the use of the phrase “non-statewide franchise” in Section II.M(iii) of the Proposed Final Judgment creates additional ambiguity with respect to the District of Columbia. Verizon may take the position that its franchise to provide service throughout the District of Columbia is not a “non-statewide franchise” because the District of Columbia has many of the attributes of a State. The FCC should require Verizon to agree that for purposes of this provision, its franchise for the District of Columbia is not “statewide.”

B. Regional Marketing Exceptions Subsume Prohibitions

RCN agrees with DOJ’s conditions, if modified in accordance with the suggestions in Section I.A., above, that Verizon Wireless cannot sell the Cable Defendants’ Cable Services in areas where Verizon Wireless offers, or is likely to offer in the near future, FiOS services.⁸ However, DOJ’s proposed exceptions that allow Verizon Wireless to market and disseminate information regarding the CableCos’ Cable Services through regional advertising will eviscerate any meaningful reduction in the unreasonable loss of competition between Verizon and the CableCos obtained through Verizon Wireless’ sales prohibition in FiOS areas.⁹ Accordingly, RCN requests that the FCC close that loophole and eliminate the exceptions that allow Verizon Wireless to engage in regional advertising of Cable Services, at least in any DMA in which FiOS is offered or authorized to be offered to at least 10% of residents.

The regional marketing exception proposed by the DOJ largely swallows the rule. The DOJ correctly points out in its CIS that the joint marketing agreements between Verizon Wireless and the Cable Defendants “transform the Defendants’ relationship from one in which the firms are direct, horizontal competitors to one in which they are also partners in the sale of the Cable Defendants’ services.”¹⁰ To address those concerns, the DOJ proposes that Verizon Wireless be prohibited

⁸ Proposed Final Judgment, ¶ V.C.; Competitive Impact Statement, p. 17.

⁹ CIS, pp. 13-14.

¹⁰ CIS, p. 13.

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 6

from selling any Cable Service within the FiOS Footprint or in a FiOS Footprint Store.¹¹ The DOJ, however, permits Verizon Wireless to market Cable Services in national or regional advertising that “may reach or is likely to reach” locations within the FiOS Footprint so long as Verizon Wireless does not “specifically target advertising of Cable Services to local areas in which Verizon Wireless is prohibited from selling Cable Services.”¹² The DOJ explains that “this provision preserves the ability of Verizon Wireless to engage in advertising to an efficient-sized area while at the same time, preventing any advertising directed specifically at areas where Verizon Wireless is not permitted to sell Cable Services.”¹³ This exception to the prohibitions goes too far.

Allowing Verizon to engage in advertising of Cable Services within a FiOS region defeats the purpose of the prohibition. While allowing Verizon Wireless to advertise *its own service* to an “efficient-size area” is a reasonable goal, allowing Verizon Wireless to advertise *the CableCos’ Cable Services* regionally is not reasonable, and defeats the purpose of the prohibitions if the region contains large numbers of customers within the FiOS Footprint. At a minimum, the exception will enable Verizon Wireless to advertise Cable Services within a FiOS region until the issue is raised with the DOJ and the DOJ investigates and concludes that the conduct has resulted in the harm that DOJ predicted would occur when it established the prohibition in the first place – all the while, competition in the video, broadband, and wireless markets will be harmed by Verizon Wireless’ action, potentially irrevocably.

As discussed previously, the definition of “FiOS Footprint” is flawed and, therefore, would fail to address the competitive harms DOJ identified in its Competitive Impact Statement.¹⁴ Given the additional uncertainty associated with the non-specific marketing exception, RCN requests that the FCC address these deficiencies and bring the scope of permissible marketing activity within acceptable boundaries.

RCN notes that the DOJ also proposes to dilute even further its efforts to constrain anticompetitive conduct by allowing information about the availability

¹¹ Proposed Final Judgment, ¶ V.A.

¹² Proposed Final Judgment, ¶ V.C.

¹³ CIS, p. 19

¹⁴ CIS, pp. 13-16.

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 7

of the CableCos' Cable Services to be provided in any Verizon Store, regardless of its location.¹⁵ The only "restrictions" are that Verizon Wireless cannot be *compelled* to provide such information and that it cannot be compensated for providing that information in any Verizon Store where Verizon Wireless is prohibited from selling Cable Services (*i.e.*, with the FiOS Footprint).¹⁶

The practical problems created by these interrelated exceptions include the following:

a. Verizon Wireless could arguably market Cable Services in a region that is predominantly served by FiOS services so long as the advertising "does not specifically target advertising of Cable Services to local areas within the FiOS Footprint."¹⁷ Verizon Wireless can use this exception to circumvent the DOJ's proposed prohibition of selling Cable Services within the FiOS Footprint. Verizon Wireless could arguably advertise the CableCos' Cable Services in the Washington DC DMA, for example, by advertising in the *Washington Post* and on Washington DC television stations, because FiOS is not sold *throughout* the Washington DC DMA and thus the advertising would arguably not "specifically target" those portions of the Washington DC DMA where Verizon Wireless is prohibited from selling Cable Services. The objective of Verizon Wireless not marketing to the FiOS Footprint would be decimated by this loophole in the Proposed Final Judgment.

b. A potential Cable Services customer can walk into any Verizon Store regardless of location and receive information (e.g., brochures, coverage maps, pricing details) about the CableCos' Cable Services. Verizon Wireless is only restrained in that it cannot be required to provide that information and that it cannot sell the service or be compensated for providing that information in a Verizon Store located within the FiOS Footprint. To provide this information is tantamount to marketing and selling the CableCos' Cable Services within the FiOS Footprint, whether or not Verizon Wireless is compensated. Verizon Wireless stores within the FiOS Footprint should be prohibited from providing to customers any written materials, videos, brochures or similar information about

¹⁵ Proposed Final Judgment, ¶ V.C.ii.

¹⁶ Proposed Final Judgment, ¶ V.C.ii.

¹⁷ Proposed Final Judgment, ¶ V.C

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 8

the CableCos' Cable Services. Verizon Wireless stores do not provide such information about competitive services today. If the FCC is serious about preserving competition in the FiOS Footprint, that state of affairs should continue. As an increasing number of consumers purchase services either over the telephone or via a website, the only conduct prohibited by the exception are the "impulse buys" of someone within a Verizon Store located within a Zip Code where FiOS is offered or authorized to be offered.

Thus, the DOJ's proposed exceptions create gaping holes in the prohibitions, with the result that the prohibitions do relatively little in the way of actually curtailing the anticompetitive conduct identified in the CIS. Accordingly, RCN urges the FCC to correct the exceptions found in DOJ's proposed prohibitions and prohibit regional advertising of the CableCos' Cable Services in any Designated Market Area in which FiOS is offered or authorized to be offered to 10% or more of the residences and prohibit Verizon Wireless Stores within the FiOS Footprint or in a DMA in which FiOS is offered or authorized to be offered to at least 10% of residents from providing any information regarding the CableCos' Cable Services apart from referring consumers to Internet sites or providing toll-free numbers.

II. The Proposed Final Judgment Does Not Prevent the Harms from the JOE Agreement

Despite the fact that the JOE Agreement combines the research and development assets of the largest U.S. wireless provider with four of the largest U.S. cable providers, the Proposed Final Judgment does little in the way of addressing the competitive harms identified in the DOJ's CIS. As stated in the CIS, the JOE "contains restrictions on its members' abilities to innovate outside of the JOE or to collaborate using JOE technology with any partner that is not also a member of the JOE."¹⁸ The DOJ concluded that "these aspects of the JOE," along with several others, "unreasonably reduce the incentives and ability of Defendants to compete on product and feature development, and create an enhanced potential for anticompetitive coordination."¹⁹ To address those concerns, DOJ limits the duration of the JOE Agreement without prior governmental approval to five

¹⁸ CIS, p. 14.

¹⁹ CIS, p. 14.

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 9

years,²⁰ expands the right for Time Warner Cable and Bright House Networks to engage in independent development of technology not being pursued under the JOE,²¹ and requires that after a company leaves the JOE, that company be allowed to sublicense any of the JOE's intellectual property rights.²² These modifications do not fully remedy the restrictions on a member's ability to engage in innovation outside of the JOE and do not counteract the anticompetitive reductions in research and development related to products similar to those proposed to be developed by the JOE. RCN requests that the FCC address those deficiencies.

As noted above, given that the JOE agreement combines the research and development efforts of the largest wireless provider with four of the largest cable companies to work together to develop an integrated wireline and wireless future product that all of the JOE participants will use, the market for a competing similar product is significantly reduced. First, as stated explicitly by the JOE Agreement, the JOE is the [BEGIN HIGHLY CONFIDENTIAL INFORMATION]²³

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁰ Proposed Final Judgment, ¶ V.F.

²¹ Proposed Final Judgment, ¶ IV.D.

²² Proposed Final Judgment, ¶ IV.E.

²³ See, e.g., JOE Agreement, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].

²⁴ JOE Agreement, [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

²⁵ See, e.g., JOE Agreement, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 10

██████████. [END HIGHLY CONFIDENTIAL]²⁶ Consequently, the provisions of the Proposed Final Judgment limiting the JOE to five years, absent DOJ approval, and allowing Time Warner and Bright House Networks to conduct research that the JOE is not pursuing and does not intend to pursue do little to the curtail the overall disincentives created by the JOE.

In addition, the condition in the Proposed Final Judgment that ex-JOE members can sublicense JOE products is of little benefit as those products are not required to be made available under commercially reasonable rates, terms and conditions. Because the JOE combines the resources of the largest wireless provider with those of four of the largest cable companies, other companies with equivalent resources and similar expertise to pursue products for wireless and wireline integration are not otherwise available. Accordingly, the products developed under the JOE will likely form the standard for such devices for years to come. They will likely become “must have” products without which a competitor is severely disadvantaged. This will enable Verizon Wireless and the CableCos, who will jointly possess the exclusive right to license the products, either to demand an exorbitant license fee that will place competitors at a huge cost disadvantage, or to withhold licensing altogether, depriving competitors of a product that is necessary for their economic survival. RCN therefore strongly urges that the FCC require that JOE products be made available under commercially reasonable and nondiscriminatory terms and conditions, within six months after they are made available to JOE members, and that this condition apply whether or not any party has withdrawn from the JOE.

III. Requested Relief

For the reasons set forth above, RCN respectfully requests that the FCC not approve the spectrum transfer unless the following conditions are added to those in the Proposed Final Judgment.

²⁶ JOE Agreement, [BEGIN HIGHLY CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL]

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
August 20, 2012
Page 11

1. Verizon Wireless should be prohibited from marketing and selling the CableCos' Cable Services in any DMA in which FiOS is offered or authorized to be offered to 10% or more of the residences, or at the very least, in any Zip Code adjacent to a Zip Code in which Verizon offers FiOS or is authorized to offer FiOS.
2. Verizon Wireless should be prohibited from engaging in regional advertising of the CableCos' Cable Services in any DMA in which FiOS is offered or authorized to be offered to 10% or more of the residences.
3. Verizon Wireless Stores within the FiOS Footprint or within a DMA in which FiOS is offered or authorized to be offered to at least 10% of residents should be prohibited from providing any information regarding the CableCos' Cable Services apart from referring consumers to Internet sites or providing toll-free numbers.
4. The definition of "FiOS Footprint" should be clarified to establish that a franchise agreement to build out FiOS throughout the District of Columbia is not a statewide franchise agreement.
5. Applicants should be required to license, under commercially reasonable and nondiscriminatory rates, terms and conditions, products and services developed by the JOE within six months after they are made available to JOE members.

Respectfully submitted,

/s/
Eric J. Branfman
Frank G. Lamancusa

*Counsel for RCN Telecom Services,
LLC.*

A/75109978