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August 22, 2012

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
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 -- Supplement to August 15, 2012 CenturyLink Submission*

On August 15, 2012, CenturyLink, Inc. ("CenturyLink") filed a notice of a written *Ex Parte* communication in hard copy with the Office of the Secretary in the above-captioned proceeding. The submission was made in redacted and non-redacted formats pursuant to the January 17, 2012 Second Protective Order in WT Docket No. 12-4. On August 21, 2012, the redacted cover letter associated with the August 15, 2012 CenturyLink submission was posted to ECFS (inexplicably, the attached redacted *Ex Parte* notice was not included). In order to ensure the completeness of the record, CenturyLink is refileing today its redacted submission of August 15, 2012 (attached is the copy that was stamped as received by the Office of the Secretary on August 15, 2012).

Please direct any questions concerning this matter to me

Very truly yours,



Ilene Knable Gotts
Counsel to CenturyLink, Inc.

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August 15, 2012

REDACTED – FOR PUBLIC INSPECTION

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
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:

On behalf of CenturyLink, Inc., two copies of the enclosed document redacted for public inspection are enclosed for filing in accordance with the Second Protective Order, released January 17, 2012, in the above-captioned proceeding.¹ Also enclosed is an additional copy of the

¹ Pursuant to an agreement with the Applicants, as Outside Counsel for CenturyLink, Inc., I was provided access to certain Confidential and Highly Confidential Information subject to the protections and use restrictions of the protective orders adopted in this proceeding. See *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*

FILED/ACCEPTED

AUG 15 2012

Federal Communications Commission
Office of the Secretary

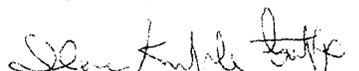
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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch, Secretary
Federal Communications Commission
August 15, 2012
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filing to be stamped and returned to the messenger as a file copy.

Please direct any questions concerning this matter to me.

Very truly yours,


Ilene Knable Gotts
Counsel to CenturyLink, Inc.

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FILED/ACCEPTED

AUG 15 2012

Federal Communications Commission
Office of the Secretary

REDACTED—FOR PUBLIC INSPECTION

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

AUGUST 15, 2012

BY HAND

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
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-Notice of Ex Parte Communication

Dear Ms. Dortch:

I am submitting these comments to the Federal Communications Commission (the "Commission") on behalf of CenturyLink, Inc. ("CenturyLink").

CenturyLink is the third largest telecommunications company in the United States, offering broadband, voice, wireless, advanced entertainment, and managed services to

Ms. Marlene H. Dortch

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consumers and businesses across the country. The company's services are made available through its high-quality advanced fiber optic network and multiple data centers. CenturyLink offers PrismTV, a television service via CenturyLink's dynamic fiber optic network. CenturyLink also offers a telephone, high-speed Internet access and television services bundle to its residential customers. CenturyLink is very familiar with the evolving landscape in which telecommunications and content are converging and is committed to developing new products and services to enhance the communications and entertainment offerings of its subscribers nationwide.

The undersigned, as outside counsel, had access to the redacted agreements provided under the Second Protective Order. Although access to these agreements provided some sense of the relationships that will be created by the Applicants, some material aspects of the agreements appear to be redacted and the redacted agreements provided may not reflect the total agreements and understanding among the transaction parties. What is clear, even after reviewing these commercial agreements, is that the arrangements create an infrastructure and interdependency among the Applicants that *could* significantly impact the conduct of the parties by aligning their interests and providing incentives for the parties to work collectively in the future on a *de facto* exclusive basis.

Moreover, the Joint Operating Entity (the "JOE") may become the facilitating vehicle for such collective and broad-ranging activity,¹ particularly when coupled with the reseller and agency agreements entered into by Verizon Wireless ("VZW") and the cable companies (the "MSOs"). The potential adverse competitive effects from collaborative activities when the joint activity includes the potential for input or customer exclusion of rivals of the participants have been well recognized in legal and economic literature.² Professor Joseph Brodley focused on these effects from the operation of joint venture activity three decades ago in his seminal *Harvard Law Review* article,³ which recognized

¹ [Begin Highly Confidential]

[End Highly Confidential]

² In the antitrust and economics literature and for purposes of this submission, the term "exclusion" includes not only outright foreclosure of third-parties from the input or distribution, but also strategies to discriminate or to raise rivals' costs in granting access to the input or distribution.

³ Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521 (1982). Among other things, the article indicates that strategic group analysis finds that joint ventures can facilitate collusion by giving participating firms symmetrical goals and strategies. *Id.* at 1530. Ownership structure and the resulting incentive system of joint ventures help participants to enforce agreements, with the ownership

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the harm that can arise through collaborations involving firms that control access to inputs or distribution. Most recently, a forthcoming article by former FCC chief economist Jonathan Baker finds that dealing with exclusion is as important as collusion as a matter of sound competition policy.⁴ Professor Baker notes that “anticompetitive exclusion may be the more important problem [than collusion is] because of the particular threat [it] poses to economic growth.”⁵ His article urges enforcers to place a higher priority on attacking exclusion, particularly conduct foreclosing potential entry into markets subject to rapid technological change.

The Commission previously recognized the potential harm of exclusionary conduct in the NBC Universal/Comcast application.⁶ Although NBC Universal/Comcast involved an acquisition of a significant ownership interest in *existing* assets rather than the formation of a joint venture vehicle purportedly for development of *future* products, services, and intellectual property (“IP”), the same concerns arise, particularly given the extensive operations of the participants as incumbents in this industry and the reseller and agency agreements. Similar to the NBC Universal/Comcast transaction, the commercial arrangements in the instant application could alter the incentives of the incumbent participants in their dealings with third-parties, resulting in greater likelihood of exclusionary practices. Absent similar conditions, the commercial arrangements here are likely to have a dulling effect on competition and innovation to the detriment of consumers. Accordingly, the Commission should impose upon the Applicants appropriate safeguards to protect competition from such exclusionary practices.

The Identity of the Parties and the Potential Impact on Emerging Technologies Are Key to these Concerns

The Applicants involved in the JOE are the titans of the communications, entertainment, and media sectors.⁷ As the incumbent providers, they have every incentive

interests in the joint venture providing for the sharing of the economic benefits of collusions. *Id.* at 1530 n. 22.

⁴ Jonathan B. Baker, *Exclusion as a Core Competition Concern*, – Antitrust L. J. – (publication forthcoming). See also Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 Am. Econ. Rev. 837 (1990); Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. Rev. 135, 188-97 (2002); Scott Hemphill & Tim Wu, *Parallel Exclusion*, – Yale L. J. – (publication forthcoming).

⁵ Baker, *supra* note 4, at 34.

⁶ Memorandum Opinion and Order, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd. 4238 (2011), 2011 WL 194538 (Comcast could disadvantage rival video distributors by denying them access to NBC programming or by raising prices, and disadvantage rival programming suppliers by denying them access to Comcast’s customers or charging them more) (the “Comcast FCC Order”).

⁷ VZW currently is the largest national wireless telephone provider, as measured by retail customers and revenue. It provides wireless voice and data services with the largest 4G LTE and 3G networks that literally reach across the continent. Verizon Wireless, About Us – Best Network, Network Facts, <http://aboutus>.

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to slow the entry of others into their traditional markets as well as to try to leverage their existing relationships with customers into complementary and emerging products and services. Indeed, as set forth below, the public documents of the parties recognize the potential threat of new technologies and services to their core businesses. The commercial agreements could eliminate the parties' incentives to enter or expand into each others' market strongholds, and make it more difficult in the future for other firms to enter and compete against these parties.⁸

The Applicants seem to be taking the position that the "but for" world was not one in which the Applicants would have continued to invest alone in the complementary products, even though they clearly have vast resources and had independent initiatives underway before these commercial arrangements were entered into. We are to believe that absent these commercial agreements Verizon would not have continued to develop FiOS⁹ and that the MSOs would not have built the wireless networks to compete with VZW.¹⁰ Even assuming such an outcome were true absent the commercial arrangements, it still would be appropriate to minimize the harm to competition from third-parties these

verizonwireless.com/bestnetwork/network_facts.html. Verizon Communications Inc. ("Verizon"), which owns a controlling 55% interest in VZW, is comprised of parts of the original Bell System and, as such, is one of the largest wireline companies in the United States, with expansive local and long distance operations. Verizon offers a bundled voice, video and Internet product. The MSOs offer a full-range of video, Internet, and telephony services, and on a combined basis pass over 97 million households (based on 2012 data) and serve approximately 47 million customers (based on 2011 data). In addition, the MSOs have extensive holdings in the cable programming networks. See Bright House Networks, About Us, <http://www.brighthouse.com/corporate/about> (last visited August 13, 2012); Time Warner Cable, About Us – Company Highlights, <http://www.timewarnercable.com/Corporate/about/highlights/> (last visited August 13, 2012); Comcast Business Class, About Us, <http://business.comcast.com/smb/about> (last visited August 13, 2012); Cox Communications, About Us – Our Story, <http://ww2.cox.com/aboutus/our-story.cox> (last visited August 13, 2012).

⁸ Verizon's Annual Report on Form 10-K lists as "risks," the threat posed by converging technology in the wireless/wireline industry to its competitive viability, and that with such convergence, the MSOs and others are encroaching on its territory. Verizon Commc'ns Inc., Annual Report (Form 10-K) at 15 (Feb. 24, 2012) ("Verizon, Form 10-K"). Time Warner Cable, for instance, noted in its most recent Annual Report on Form 10-K, "Technological advancements, such as new video formats and Internet streaming and downloading, many of which have been beneficial to TWC's business, have nonetheless increased the number of entertainment and information delivery choices." Time Warner Cable Inc., Annual Report (Form 10-K) at 20 (Feb. 17, 2012).

⁹ Even at the beginning of this year, Verizon touted its FiOS product, stating that it was well on its way to being the "premier broadband and entertainment service provider" in its service areas. Verizon, Form 10-K, at 10 (Feb. 24, 2012).

¹⁰ Comcast has been perhaps the most active of the MSOs, having undertaken many technology initiatives, including: enabling diverse consumer devices (such as tablets and smartphones) to search, control and display its programming and other content provided to its video customers; expanding its network; developing and launching a next generation media and content delivery platform to deliver video and search capability to customers on multiple devices; developing wireless options for customers to use Comcast services outside the house; and deploying tools to recapture bandwidth and optimize its network. Comcast Corp., Annual Report (Form 10-K) at 5-6 (Feb. 23, 2012).

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arrangements would cause. In the event and to the extent that the elimination of potential competition among the Applicants is permitted, the arrangements should be countered with conditions to ensure that third-parties are able to enter and expand into the existing and developing services.

Moreover, the commercial arrangements impact not only existing products and services, but also products and services that have yet to be developed or marketed. The Applicants have publicly recognized the desirability of developing integrated products and services using wireless and wired technologies.¹¹ The MSOs, via CableLabs, have an extensive R&D operation that has yielded many patented processes and technologies historically.¹² Similarly, Verizon has viewed as a priority its development of technology.¹³ The JOE appears to be premised upon the concept that the Applicants will jointly develop IP, products, and services that integrate wireless and wired products and services. The commercial arrangements entered into by the Applicants have the potential of combining currently competing technological efforts, locking out the new products, technologies, and services of third-parties, thereby foreclosing possible competitors. The sales and marketing arrangements described in the commercial agreements, including the JOE Agreement, are particularly troubling to the extent that these arrangements result in bundling and create strong incentives to lock customers into their jointly sold service packages and proprietary technologies. The situation is further worsened to the extent that the products and services developed by the JOE can be designed to recognize only the offerings of the parties in service “handoffs” or to prefer such offerings over those of third-parties. Moreover, the parties could further stack the deck against third-parties by discriminating against customers that attempt to choose an alternative provider, for instance, by treating data usage differently for customers of third-parties than for one of the Applicants.

Professor Baker’s article discusses extensively the potential harm to competition and innovation from exclusion of new technologies:

When antitrust cases address the suppression of new technologies, products, or business models, the disputes are almost always framed as exclusionary conduct allegations.¹⁴ . . . [M]uch of the relief accepted by

¹¹ Verizon notes that “[c]onverged features, such as integrated wireless and wireline functionality, are becoming similarly important, driven by both customer demand and technological advancement.” Verizon, Form 10-K, at 12 (Feb. 24, 2012).

¹² See generally <http://www.cablelabs.com/about/patents>.

¹³ See <http://www.computerworld.com/spring/bp/detail/804>.

¹⁴ The article footnotes Michelle S. Goeree & Eri Helland, *Do Research Joint Ventures Serve a Collusive Function?*, Twelfth CEPR CEPR/JIE Conf. Applied Indus. Org. (May 24-27, 2011), available at <http://www.cepr.org/meets/wkcn/6/6691/papers/GoereeFinal-P.pdf>, as providing empirical evidence that research joint ventures among rivals may facilitate collusion. Baker, *supra* note 4, at 34 n.142. Professor Baker further notes that “for this purpose, cases alleging conspiracies to exclude . . . are counted as exclusionary.” *Id.*

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the Justice Department and the Federal Communications Commission in their concurrent reviews of Comcast's acquisition of NBC Universal programming aimed to protect the development of nascent competition from a new technology, online video distribution, and new business models that could threaten Comcast's market power in cable television. . . . These prominent examples make clear that antitrust is an "inclusive" economic institution that supports economic growth and prosperity by preventing successful incumbent firms and industries from erecting barriers to entry of rivals with lower costs, superior production technologies or better products.¹⁵

To the extent that the JOE develops proprietary technology, other potential competitive concerns arise. Without any conditions, there is the potential that the JOE could use the jointly developed technology to block rivals by integrating functions and by engaging in patent aggression against rivals to create an environment of fear, intimidation, and doubt among potential competitors.¹⁶ The members of the JOE constitute a sufficient portion of the firms that have the footprint and customer base such that whatever equipment and technology they develop is likely to become the "standard" for this industry. Moreover, whereas some of the potential harm from denial of access to needed intellectual property has been dealt with in other industries by standards-setting bodies that require essential patents for equipment and technology be licensed to third-parties on fair, reasonable, and non-discriminatory terms ("FRAND"),¹⁷ there are no assurances here that the JOE will do the same if left to its initiatives.

The potential harm from cooperation replacing competition among these potential rivals is further compounded by the extensive content holdings of some of the MSOs. Access to content is likely to remain an important component of consumer service offerings. As recognized by the Commission in prior decisions, including the NBC Universal/Comcast FCC Order (which involved one of the MSOs to these agreements—Comcast), access at fair market rates is a critical input for broadband delivery platform providers, and discrimination against unaffiliated providers should be prohibited. Moreover, while NBC Universal/Comcast involved only one MSO with programming interests, the current situation involves multiple MSOs, each with programming interests, which further compounds the potential incentives—and harm—that could arise from each

¹⁵ Baker, *supra* note 4, at 35-36.

¹⁶ See generally Ilene Gotts and Scott Sher, *The Particular Antitrust Concerns with Patent Acquisitions*, Vol. 8, No. 2, Comp. L. Int'l 28 (publication forthcoming, Sept. 2012) (copy on file with author); Press Release, U.S. Dep't of Justice, Antitrust Div., *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. 13, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/280190.htm. ("DOJ Patent Closing Statement").

¹⁷ DOJ Patent Closing Statement, *supra* note 16.

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of these firms strategically engaging in input foreclosure to further limit the ability of other firms to compete against the transaction parties. Moreover, the interdependency created by the JOE potentially provides the incentives for Verizon and the MSOs to favor one another to the detriment of other competitors.

Similarly, the commercial agreements could further increase the incentives of the MSOs to deny their telecommunications, broadband, and video rivals access to cable advertising on their systems.¹⁸ It is quite possible that these agreements will result in the MSOs developing exclusive service bundles and proprietary video distribution platforms. Cable advertising is likely to remain an attractive means to promote service offerings to consumers. It is important that rivals of the MSOs, Verizon, and VZW be granted access on fair and nondiscriminatory terms to cable advertising as well as in the promotion of their product and service offerings.

Prohibitions on Discriminatory and Exclusionary Conduct Important

Even accepting *arguendo* the Applicants' arguments for why they should be permitted to proceed with the commercial agreements (and the public interest they posit will be served) does not lead to the conclusion that the commercial agreements should be "blessed" without condition. Rather, the imposition of appropriate safeguards would permit the Applicants to obtain the benefits of their proposed lawful collaboration while protecting competition and consumers from the potential of irreparable injury from unlawful exclusionary conduct. The commercial agreements provide the foundation for interrelationships that go far beyond those contained in the limited agreements provided for review. Therefore, the safeguards must be broad enough to address the concerns raised more broadly by this landmark combination. The FCC, within its public interest mandate, can and should adopt conditions to ensure that competition and consumers are not harmed by the combination of these mammoth corporations. The five categories of conditions that are essential for this purpose are:

¹⁸ [Begin Highly Confidential]

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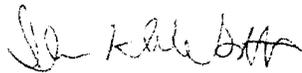
- (1) Prohibit discriminatory or proprietary technical standards for the hand-off between wireless and wireline networks, data sharing, and content storage and access to competitive networks.
- (2) Prohibit the Applicants from enforcing data usage limits on customers using unaffiliated service providers unless the same data usage limits apply to the transaction parties' customers.
- (3) Require the JOE to license intellectual property and/or make available proprietary equipment developed by or for the JOE on FRAND terms.
- (4) Prohibit discriminatory or exclusionary access to video content controlled by any of the Applicants.
- (5) Prohibit the cable Applicants from discriminatory or exclusionary sales practices for cable advertising.

Conclusion

For the reasons described above, CenturyLink urges the Commission not to grant the pending Applications without appropriate conditions to preserve competition and protect consumers. Such conditions will not impede the achievement of any of the purported benefits of the proposed transactions and will be in the public interest.

Please do not hesitate to contact me with any questions concerning this submission.

Sincerely,



Ilene Knable Gotts
Counsel to CenturyLink, Inc.