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August 10, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

On August 2, 2012, SpectrumCo (on behalf of its members Comcast, Time Warner Cable Inc., and Bright House Networks, LLC) and Cox TMI Wireless LLC (together, the "MSOs") submitted a letter ("Letter") in the above-referenced docket, with regard to the Commercial Agreements with Verizon Wireless ("VZW"),¹ including a report by an economist, Mark Israel.² In these materials, the MSOs argue that the Commercial Agreements will not reduce competition in the provision of WiFi or backhaul services for a number of reasons, most prominently because the Agreements do not provide a "mechanism" that allows the parties either to punish each other for competing too aggressively with one another or reward them for taking actions to benefit their partner.

¹ Comcast, Time Warner Cable, Bright House, Cox and VZW are referred to collectively as the "Applicants."

² Dr. Mark Israel, Implications of the Verizon Wireless & SpectrumCo/Cox Commercial Agreements for Backhaul and WiFi Services Competition, WT Docket No. 12-4 (August 1, 2012) ("Israel Report").

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WiFi

The Applicants make three principal arguments with respect to reduction in competition relating to WiFi. First, they argue that WiFi offload services are not currently being provided by the MSOs directly to wireless carriers; thus, WiFi is “not an input into wireless service, and it may never become an input into wireless service.” Therefore, any theory of harm relating to WiFi is “purely speculative.”³ Second, they argue that competition cannot be reduced through the MSO's control of WiFi because WiFi uses unlicensed spectrum and therefore “[a]nyone can enter the WiFi marketplace.”⁴ Finally, they argue that the Commercial Agreements have no effect on the sale of WiFi services because “no provision of any of the Commercial Agreements grants Verizon Wireless the right to offload its traffic onto the MSO’s WiFi access points, and the MSO’s are free to sell WiFi service to Verizon Wireless’ competitors.”⁵

Importance of WiFi

The importance of WiFi offload for wireless carriers is neither remote nor speculative. To the contrary, WiFi is widely seen as a critical tool for managing increased data demands throughout the wireless industry, including by Verizon, which has publicly stated that the Commercial Agreements will enable VZW to offload traffic to the MSOs’ WiFi network.⁶ Any wireless carrier that is not able to offer WiFi offloading would be at a significant competitive disadvantage against wireless carriers who could offer such a service.

MSOs and ILECs Are Uniquely Positioned

Although WiFi does not require a spectrum license, it is not the case that “anyone” can efficiently build a WiFi network. WiFi hotspots must at some point be

³ Letter pp. 3, 10-11.

⁴ *Id.*

⁵ *Id.*

⁶ Lowell McAdam, Verizon Communications Chair and CEO, has explained that the Commercial Agreements create an arrangement that “gives us the ability nationwide to offload traffic. It is interesting that a lot of people have said, well, I can't believe you're going to partner with them. You are not going to use their WiFi are you? Well, of course, we are...I don't expect anybody to sit in their home watching video over LTE. I want them to be able to watch it on their tablet anywhere in the house using the WiFi network. And the same thing, if you are around the city and there is a WiFi hotspot, we are happy to have you offload onto that.” See Edited Transcript, Verizon at Guggenheim Securities Symposium (June 21, 2012), available at http://www.phillipdampier.com/documents/vz-guggen_6_21_12.pdf.

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connected to a wireline network. As such, the MSOs and Incumbent Local Exchange Carriers (“ILECs”) are the only entities with the practical ability to deploy large WiFi networks and that has been demonstrated in the marketplace. The MSOs have built an extensive WiFi system with 50,000 hotspots and “thousands more to come.”⁷ Already, they have begun to pursue third-party offload arrangements.⁸ Similarly, AT&T has already begun using WiFi offload, and currently offers over 30,000 WiFi hotspots at no cost to its subscribers with certain plans, and for a fee to other users.⁹ WiFi offload is already here and, due to its dependence on the existing wireline networks, it is largely in the hands of the MSOs and ILECs.

Effect of the Commercial Agreements

The Commercial Agreements between Verizon and the MSOs have the potential to reduce competition by changing the MSOs’ incentives with respect to WiFi in a number of ways. The terms of the Agreements themselves appear to directly limit the MSOs’ freedom to provide WiFi services to VZW competitors. According to Comcast’s July 2, 2012 ex parte notice and its attached “Handout,” “the cable companies are free to sell WiFi offload service to Verizon Wireless’ competitors, provided that the service is not offered under a non-Verizon Wireless carrier’s brand.”¹⁰ Under such a provision, the MSOs are not likely to sell to wireless carriers other than VZW because competing carriers want service that they can resell to customers under their own brands.

Even without this specific exclusionary contractual provision, however, the new relationship between Verizon and the MSOs makes it much more likely that the MSOs will not act in a manner contrary to Verizon's interests. As discussed below, as a result

⁷ Compare Comcast July 2, 2012 Handout at p. 0.

⁸ See Comcast Letter from David Don, Senior Director, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 at presentation attachment p. 2 (June 2, 2012) (“Comcast July 2, 2012 presentation”) (“Comcast has pursued, and will continue to pursue, third-party offload arrangements”).

⁹ AT&T WiFi, <http://www.att.com/gen/general?pid=5949>.

¹⁰ Handout, p. 1. [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[END HIGHLY CONFIDENTIAL].

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of all the various Agent Agreements, Reseller Agreements, and the IT Joint Venture, the fundamental nature of the relationship between Verizon and the MSOs has changed and therefore the MSOs have more limited incentives to cooperate with VZW's rivals. No longer are the MSOs and VZW actual and potential competitors, but instead they have become partners with multiple interrelated financial interests.

Remedies

Finally, the Applicants claim that the Commission should not impose any type of prophylactic remedy because “imposing regulatory restrictions or conditions on a market that does not yet exist runs a serious risk of imposing unnecessary costs on WiFi providers and wireless carriers.”¹¹ However, the principal remedy that various parties have sought with respect to WiFi is a simple non-discrimination provision requiring only that the MSOs treat wireless carriers equally. It is difficult to see how such a provision would impose any costs on the Applicants. Moreover, if WiFi does not become important for wireless carriers (as the MSOs argue), the provision would be irrelevant, and therefore costless. However, if WiFi offload services do in fact become competitively significant, as we believe they will, given the relationship between the MSOs and Verizon, a non-discrimination provision may prove essential to ensure a level playing field with respect to access to the MSOs' WiFi facilities. That, in turn, would promote continued competition in the wireless market.

Backhaul

The Applicants claim that, even if the Agreements led to an increase in backhaul prices, that would not have any substantial effect on the wireless market because backhaul costs are a small percentage of the costs of wireless carriers.¹² However, even if this were true, this is hardly an excuse to permit the MSOs and Verizon to compete less aggressively against one another in order to increase backhaul prices.

Contrary to the claims of the Applicants, increases in backhaul prices *are* likely to significantly affect the ability of other wireless carriers to compete with VZW. Because backhaul is an essential input for wireless carriers, and therefore has inelastic demand, Verizon and the MSOs can subject backhaul purchasers to very large price increases. Moreover, as wireless carriers build out their networks with picocells, backhaul will make up an increasingly large percentage of their costs.

¹¹ Letter p. 4, Israel Report ¶ 30.

¹² Letter p. 7; Israel Report ¶¶ 18, 23.

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Dr. Israel argues that wireless carriers can respond to backhaul price increases by choosing “to absorb (fully or partially) higher backhaul costs rather than increase their wireless service prices.”¹³ However, Sprint and other wireless carriers cannot simply “absorb” a cost increase without raising their prices and/or decreasing investments in their networks, which will harm their subscribers and make the carriers less competitively viable.

Incentives and Ability to Coordinate

The Applicants contend that the Commercial Agreements cannot affect their conduct related to backhaul or WiFi sales to VZW’s rivals, because the agreements do not prohibit backhaul or WiFi arrangements with other parties or contain a “mechanism” that compensates MSOs for foregoing what would otherwise be profitable WiFi and backhaul opportunities.¹⁴ With respect to the latter, they argue that the Commercial Agreements do not offer sufficient direct incentives to alter the MSO’s conduct, because “an MSO receives only a small, one time commission” for selling VZW’s service¹⁵ and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]¹⁶ [END HIGHLY CONFIDENTIAL].¹⁷

¹³ *Id.* ¶ 25.

¹⁴ See Letter p. 2 (“There is no provision in the Commercial Agreements that prohibits the MSOs from providing backhaul services to any other party, or that prohibits Verizon Wireless from purchasing backhaul services from any provider other than one of the MSOs”); p. 3 (“no provision of any of the Commercial Agreements grants Verizon Wireless the right to offload its traffic onto the MSOs’ Wi-Fi access points, and the MSOs are free to sell Wi-Fi service to Verizon Wireless’ competitors”); p. 5 (describing Commercial Agreement provisions); p. 6 (“The Commercial Agreements do not provide any mechanism under which an MSO’s loss of a backhaul customer to Verizon Telecom would either directly or indirectly benefit the MSO.”); p. 7 (“an MSO receives only a small, one-time commission when it signs up Verizon Wireless customers”); p. 9 (“The MSOs are free to sell Wi-Fi offload service to Verizon Wireless’ competitors”); p. 10 (“Sprint, et al. have not identified any provision of the ITJV Agreement that prevents Verizon Wireless’ competitors from accessing the MSOs’ Wi-Fi hotspots –and, in fact, there is no such provision”; “Sprint, et al. do not describe a mechanism for competitive harm under the Commercial Agreements”). See also Israel Report ¶¶ 10, 26, 32.

¹⁵ Letter p. 18; Israel Report ¶ 26.

¹⁶ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
 [REDACTED] [END HIGHLY CONFIDENTIAL].

¹⁷ To the extent that the Applicants argue the Commercial Agreements’ value to the parties is quite limited, it is evident that the Agreements are valuable to the Applicants because they have been willing to expend resources to negotiate and defend the Agreements, and to market each others’ products.

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This argument focuses only on the specific terms of the Agreements, and thereby ignores the broader context in which these Agreements have changed the nature of the relationship between VZW and the MSOs. Under the Commercial Agreements, the Applicants “have closely aligned interests to maximize profits via anticompetitive behavior.” See *United States v. Dairy Farmers of America*, 426 F.3d 850, 861 (6th Cir. 2005).¹⁸ The Commercial Agreements make coordination more likely, not because they contain a direct “mechanism” controlling conduct, but because they provide a structure within which the Applicants may reward and punish each other to ensure that their joint profits are maximized. For example, punishments and rewards can now be implemented by an MSO and Verizon doing less or more to promote each others’ products. They also can punish or reward by altering their promotion of their competing broadband and cable services in the FiOS / cable overlap areas, and Verizon can alter its FiOS rollout. **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[END HIGHLY CONFIDENTIAL].

¹⁸ See Letter from Tara S. Emory, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (July 12, 2012).

¹⁹ **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[END HIGHLY CONFIDENTIAL].

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Of course, the parties arguably have incentives to coordinate regardless of the Commercial Agreements. Verizon's FiOS is a current head-to-head competitor with MSOs in the provision of broadband cable services. In addition, the extent of competition between Verizon and the MSOs for backhaul services was likely to have increased in the future. Nonetheless, the Commercial Agreements enable the parties to act on those incentives by providing a vehicle within which to coordinate their behavior. As a result, the Commercial Agreements will likely reduce competition between Verizon and the MSOs today as well as the threat of potential competition to come.

Sincerely,

/s/

Tara S. Emory
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