



August 13, 2012

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation in 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; Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52.

Dear Ms. Dortch:

On Friday, August 10, I met with Richard A. Kaplan and Maria Kirby of the Federal Communications Commission. I was joined by Markham C. Erickson, Holch & Erickson LLP.

In our meeting, Netflix Inc. (“Netflix”) discussed the state of the online video distributor (“OVD”) industry and the relationship between current market conditions and the transaction pending before this Commission. We reiterated that Internet delivery of video provides consumers with unprecedented freedom and control over what video programming they can watch as well as when and where they can watch it. Increased demand for Internet video is driving consumer adoption of broadband. It is spurring a wave of innovation in the consumer electronics industry as virtually all new content viewing devices are connected to the Internet. The future is bright for Internet-delivered video, and it’s important for policy makers to make smart decisions to help assure a continued bright future.

I. Comments on the Joint Operating Entity (“JOE”)¹ Agreement.

We also provided comments on the JOE Agreement that is part of the proposed transaction in the above-referenced docket. Netflix acknowledged that collaborative research efforts can be both efficient and procompetitive. With appropriate safeguards, a joint venture “to develop innovative technology and intellectual property that will integrate wired video, voice and high-speed Internet with wireless technologies [and] create a seamless environment in which consumers can enjoy multiple services across multiple communications platforms”² could benefit both consumers and marketplace competition.

We expressed concern, however, that without proper safeguards an agreement among putative marketplace competitors to integrate their services could choke off competition from companies outside of that joint venture. In this joint venture in particular, we expressed concern that it could discriminate against unaffiliated network traffic by, among other things, imposing additional costs either on the unaffiliated network content provider or upon consumers for the use of the unaffiliated service. Accordingly, we asked that the Commission place meaningful conditions, discussed below, on the transaction to ensure that the assignments and the integrated commercial agreements do not unreasonably constrain competition or otherwise negatively impact consumers.

Specifically, we indicated that the Commission should seek clarification that content that is “seamlessly” transferred to and from the JOE member companies’ wireline and wireless platforms will be treated identically to non-affiliated content. This is not a theoretical concern. Today in the wireline environment, Comcast – a JOE member – discriminates in favor of its Xbox application over unaffiliated video applications such as Netflix by charging unaffiliated video against a consumer’s data cap while its own Xfinity content is not counted against these caps. The applicants’ “TV Anywhere” strategies increase their incentives to discriminate against unaffiliated content by subjecting it to onerous wireless caps while it exempts its own content from these caps.

¹ The relevance of the side agreements to the proposed spectrum assignments is well-covered ground in this proceeding and the Commission has correctly seen fit to include the agreements in its review of the transaction. Ideally, the Commission’s review would involve a record that is far more complete and transparent than the one here. Pursuant to an agreement with Verizon Wireless and the SpectrumCo parties, Netflix’s outside counsel has limited access to the confidential and highly confidential record in this proceeding. Nonetheless, Netflix agrees with other comments in this proceeding who have observed that the inability of outside counsel to discuss that record with their clients – and the inability of anyone to discuss it publicly – has significantly impeded a full and fair consideration of the proposed transaction. Given that the public and those entities most likely to be harmed by the anticompetitive effects of the side agreements are denied access to them, it falls to the Commission to safeguard the public and those entities from the potential harms that could flow from granting the license assignments.

² Public Interest Statement, attached to Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC, for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 12-4, ULS File No. 0004993617 at 24 n.71 (2011).

We also noted that in the D.C. Circuit, Verizon has challenged the Commission's Open Internet rules by arguing, among other things, that the rules limit Verizon's ability to discriminate among content providers. Remarkably, Verizon complains to the D.C. Circuit that the Open Internet rules may limit Verizon's ability to discriminate against over-the-top video providers:

Just as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others. Although broadband providers have generally exercised their discretion to allow all content in an undifferentiated manner, they nonetheless possess discretion that these rules preclude them from exercising. For example, they could distinguish their own content from that of other speakers or offer that capability to others. ... *Broadband providers could also give differential pricing or priority access to their over-the-top video services or other applications they provide, or otherwise feature that content.*³

Verizon's expansive argument runs directly contrary to federal policy, as recently underscored by both the Department of Justice and the Commission in its review of the Comcast-NBCU merger. In its Memorandum and Order, the Commission stated:

OVDs offer a tangible opportunity to bring customers substantial benefits. They can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices. The availability of OVD choices may also drive consumers to purchase broadband services where they have not already.⁴

Likewise, the Department of Justice stated:

OVDs, therefore, represent the most likely prospect for successful competitive entry into the existing video programming distribution market.... OVDs rely upon the infrastructure of others, including Comcast, to deliver service to their customers.⁵

In the current matter, the Commission should clarify that it will not allow disparate treatment of unaffiliated network traffic from carrying over into the "seamless environment" that the JOE members seek to create. Spectral constraints exist in the wireless environment that could provide a pretext for further implementation of discriminatorily applied tiered and capped broadband services. The Commission should inquire how wireless and wireline providers intend to implement each other's caps, tiers, and "traffic management" policies in the seamless environment they seek to create. The

³ Brief for Appellant at 43-44, *Verizon v. FCC*, (D.C. Cir. 2012) (No. 11-1355) (emphasis added).

⁴ [Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4268-69, ¶ 78 \(2011\).](#)

⁵ *United States, et al. v. Comcast Corp., et al; Proposed Final Judgment and Competitive Impact Statement*, 76 Fed. Reg. 5440, 5454 (Jan. 31, 2011).

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Commission also should seek assurances that unaffiliated content will not be discriminated against in that environment.

Further, the Commission should impose conditions to ensure that the JOE does not lead to discriminatory treatment of unaffiliated over-the-top content and services. Similar to the Comcast-NBCU merger, where such a condition was put in place, the JOE raises unique competition and consumer choice concerns given the participants' ability to treat favorably affiliated content and services or impose additional costs or impediments on competitors or consumers seeking access to a competitor's content or services. The Commission was mindful of these concerns in the *Open Internet Order*, and they are no less warranted here.

Accordingly, Netflix suggests the following condition:

Parties shall not meter, cap, or prioritize network traffic in a manner that discriminates against providers of content and services unaffiliated with members of the Joint Operating Entity.

II. Conclusion

The Commission should know whether the JOE member companies intend (as would seem to be contemplated by Verizon given the recent court filing mentioned above) to coordinate the imposition of caps, tiers or other forms of discrimination against unaffiliated network traffic. And, the Commission should ensure that the JOE is not used to create or export discriminatory treatment of network traffic in the wired or wireless environment. If the JOE and other side agreements are used to favor content and services owned by its members or their affiliates, or to otherwise stave off competition from rival service providers, the public's interest, convenience, and necessity will suffer.

Sincerely,

/s/

Christopher D. Libertelli
Head of Global Public Policy
Netflix, Inc.

CC: Julius Genachowski, Chairman
Robert M. McDowell, Commissioner
Mignon Clyburn, Commissioner
Jessica Rosenworcel, Commissioner
Ajit Pai, Commissioner