

REDACTED – FOR PUBLIC INSPECTION

August 16, 2012

**VIA HAND DELIVERY & 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:

Applicants have demonstrated that the proposed transactions will serve the public interest by transferring spectrum not currently being used to serve customers to a company that will use it to meet skyrocketing consumer demand for mobile broadband services.<sup>1</sup> Applicants have also shown that their separate commercial agreements will enhance consumer choice and strengthen competition, while raising no legitimate anticompetitive concerns.<sup>2</sup> Nonetheless, a number of parties persist in raising various issues, including many that were properly put to rest months ago, and they and various new parties – who ignored the Commission’s directive to raise all issues within the pleading cycle<sup>3</sup> – are presenting ever-more-fanciful theories of competitive harm. In particular, as explained below, allegations that the Applicants’ agreements will (1) adversely impact competition in the marketplace

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<sup>1</sup> See, e.g., Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, WT Docket No. 12-4, File No. 0004993617, Ex. 1 (Public Interest Statement) at 5-19 (filed Dec. 16, 2011); Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, at 5-40 (Mar. 2, 2012) (“Joint Opposition”).

<sup>2</sup> See generally Joint Opposition, Ex. 6 (the “Commercial Agreements Addendum”).

<sup>3</sup> See FCC, Public Notice, *Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC and Cox TMI Wireless, LLC Seek FCC Consent to the Assignment of AWS-1 Licenses*, WT Docket No. 12-4, DA 12-67 (Jan. 19, 2012) (“**Submissions after the pleading cycle has closed that seek to raise new issues based on new facts or newly discovered facts should be filed within 15 days after such facts are discovered. Absent such a showing of good cause, any issues not timely raised may be disregarded by the Commission.**”) (emphasis in original).

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for the licensing of video programming, and (2) negatively impact the development of over-the-top Internet video services are without merit and should be disregarded.

**A. The Commercial Agreements Will Promote Competition and Not Adversely Impact the Video Programming Marketplace.**

Some commenters recently claimed that the commercial agreements will cause Applicants to license their affiliated video programming on an exclusive basis or to otherwise discriminate against competing programming distributors.<sup>4</sup> The commercial agreements will have no such effect. Indeed, commenters have not pointed to any provision in the commercial agreements that supports their claim that the agreements will harm the video programming marketplace – nor could they because no such provision exists. And, at any rate, the Commission’s existing program access rules and the conditions adopted in the *Comcast/NBCUniversal Order* render any conditions in this area entirely unnecessary.

The commercial agreements in no way address or affect the MSOs’ licensing of affiliated programming to any distributor, regardless of whether the distributor is a traditional multichannel video programming distributor (“MVPD”), online video distributor (“OVD”), or wireless provider. As David Cohen, Executive Vice President of Comcast, stated to Congress, “Nothing about these transactions will in any way affect the ability of Comcast’s video competitors to obtain must-have programming. Nor will anything in these transactions affect Comcast’s incentive to license programming to its competitors.”<sup>5</sup> Similarly, the commercial agreements contain no provisions regarding the licensing of the MSOs’ affiliated programming by Verizon Wireless (or Verizon’s wireline companies). Mr. Cohen’s responses to Congress made this perfectly clear: “I can say categorically that no term of any of the Commercial Agreements provides for the licensing of NBCUniversal content to Verizon Wireless (or, of course, Verizon, which is not even a party to these agreements).”<sup>6</sup>

FairPoint and Frontier (together, “FairPoint”) argue that the compensation provisions of the commercial agreements, which require Comcast to pay a commission to Verizon Wireless if it signs up

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<sup>4</sup> See, e.g., Letter from Eric Branfman, Bingham McCutchen, Counsel for RCN, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 5 (July 31, 2012) (“RCN Letter”); Letter from Genevieve Morelli, President, ITTA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 6 (July 10, 2012); Letter from Ellen Stutzman, Director of Research & Public Policy, WGAW, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 4 (July 13, 2012) (“WGAW Letter”); Letter from Jodie Griffin, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2 (Aug. 2, 2012) (“PK August 2 Letter”); Letter from Karen Brinkman, Counsel for FairPoint and Frontier, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 5-7 (Aug. 2, 2012) (“FairPoint Letter”).

<sup>5</sup> David L. Cohen, Responses to Questions for the Record, U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Hearing on “The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumer?,” Response to Question 1 from Sen. Schumer, Mar. 21, 2012, available at <http://www.judiciary.senate.gov/resources/transcripts/upload/032112QFRs-Cohen.pdf> (“Cohen Responses”).

<sup>6</sup> See *id.*

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a Comcast subscriber, will cause Comcast to deny programming to FairPoint.<sup>7</sup> FairPoint's argument makes no sense at all and is, frankly, confusing. The compensation provisions have nothing to do with Comcast's sale of programming to any distributor. The fact is that the commission – a small, one-time payment for each Comcast subscriber Verizon Wireless signs up – is not significant enough to have any impact on Comcast's incentive to sell affiliated programming to competing distributors. And, to the extent FairPoint argues that the compensation provision which requires Verizon Wireless to pay a commission to Comcast when Comcast signs up a Verizon Wireless customer has any impact on video programming, FairPoint is equally misguided. FairPoint offers no evidence or theory to explain how Comcast's denial of video programming to FairPoint would increase Comcast's ability to sell Verizon Wireless' wireless services. And the likelihood that Comcast would engage in such a strategy in order to capture the small commission involved is extremely remote. FairPoint's arguments are both counter-intuitive and far-fetched, and its effort to create a problem where none exists should be given no weight.<sup>8</sup>

In asserting that Comcast will make its affiliated content available only to Verizon Wireless subscribers, commenters also ignore the fact that the majority of Comcast's subscribers are *not* subscribers to Verizon Wireless. It would make no sense for Comcast to deny programming to its non-Verizon Wireless customers, thus cutting them off from the anytime, anywhere access that they have come to expect. Comcast has led the industry in introducing mobile video applications, available on a variety of devices and available regardless of wireless provider, and nothing about these transactions will change that.

There is likewise no validity to commenters' allegation that the agreements give Applicants the power to jointly negotiate for rights to video programming that is owned by third parties.<sup>9</sup> No provision in the commercial agreements even remotely addresses the companies' acquisition of video programming controlled by any other source or gives the companies the right to jointly negotiate to acquire content. As Mr. Cohen explained to Congress, "There are no provisions in the Commercial Agreements addressing Verizon Wireless' and the cable companies' acquisition of programming."<sup>10</sup>

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<sup>7</sup> FairPoint Letter at 6.

<sup>8</sup> FairPoint also quotes §2.4.1 of the Comcast Agent Agreement and §2.2.2(c) of the VZW Agent Agreement, but it does not even attempt to explain how these provisions will harm the video programming marketplace. *See* FairPoint Letter at 6. Likewise, FairPoint's claim that the transactions are effectively a merger of MVPDs that increases market concentration is plainly without merit. *Id.* at 6-7. As noted, Verizon's wireline companies are not a party to the agreements and is not bound by their provisions. Neither the MSOs nor Verizon are acquiring any MVPD systems or MVPD subscribers as a result of the transactions, so there is no increase in market concentration. Although the agency agreements permit Verizon Wireless to sign up subscribers to the MSOs' services, such marketing arrangements are common in the industry and in no way constitute anything that remotely resembles a "merger." *See* Commercial Agreements Addendum at 5-6 & n.19 (describing prevalence of sales agency agreements in the communications industry).

<sup>9</sup> *See, e.g.*, Comments of CWA & IBEW, WT Docket No. 12-4, at 13-14 (Feb. 21, 2012); Reply Comments of CWA & IBEW, WT Docket No. 12-4, at 14-15 (Mar. 26, 2012); WGAW Letter at 2.

<sup>10</sup> Cohen Responses, Response to Question 9 from Sen. Kohl.

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Likewise, Randy Milch, Executive Vice President and General Counsel of Verizon Communications, plainly stated to Congress that “[n]one of the commercial agreements has provisions relating to the joint negotiation of programming or the acquisition of content.”<sup>11</sup>

Besides the compelling fact that the commercial agreements contain no provisions about licensing of or access to video programming, claims regarding Applicants’ withholding of programming are meritless for another reason: The Commission’s program access rules,<sup>12</sup> along with the *Comcast/NBCUniversal Order*,<sup>13</sup> already address the conduct about which the commenters warn. The program access rules forbid Comcast from discriminating in the terms on which it makes affiliated video programming available to other MVPDs, withholding such programming from other MVPDs (including NBCUniversal programming), or engaging in anticompetitive conduct generally.<sup>14</sup> In addition, the *Comcast/NBCUniversal Order* generally precludes limitations on online distribution and imposed conditions that give MVPDs and OVDs specific rights to access NBCUniversal programming, including a right to arbitration.<sup>15</sup> Thus, even if the commenters’ alleged harms were not speculative and were not unrelated to the commercial agreements, the relief they seek would still be unnecessary.

**B. The ITJV Agreement Will Promote Competition and Not Impede the Development of Online Video.**

Free Press claims that the commercial agreements prohibit Verizon Wireless from selling any over-the-top video service except FiOS and prohibit Verizon from selling or promoting any over-the-top service.<sup>16</sup> Both claims are false. First, the commercial agreements expressly provide that **[BEGIN HIGHLY CONFIDENTIAL]**

<sup>17</sup> **[END HIGHLY CONFIDENTIAL]**

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<sup>11</sup> Randy Milch, Responses to Questions for the Record, U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Hearing on “The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumer?,” Response to Question 1 from Sen. Schumer, Mar. 21, 2012, *available at* <http://www.judiciary.senate.gov/resources/transcripts/upload/032112QFRs-Milch.pdf>.

<sup>12</sup> See 47 C.F.R. §§ 76.1000-1003.

<sup>13</sup> See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, App. A (2011) (“*Comcast/NBCUniversal Order*”).

<sup>14</sup> Pursuant to Section 628(c)(5) of the Act, 47 U.S.C. § 548(c)(5), the Commission is considering in an industry-wide proceeding whether the exclusivity prohibition in the program access rule should be allowed to sunset based on the current state of the video programming market. *Revision of the Commission’s Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (2012). The commercial agreements have no impact on that proceeding.

<sup>15</sup> See *Comcast/NBCUniversal Order*, App. A, §§ II, IV.A, & VII.

<sup>16</sup> Free Press Petition to Deny, WT Docket No. 12-4, at 45 (Feb. 21, 2012).

<sup>17</sup> See e.g., Comcast Agent Agreement 2.4.2(i). **[BEGIN HIGHLY CONFIDENTIAL]**

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And Verizon Wireless' subscribers are free to independently download over-the-top applications and stream any over-the-top video service.<sup>18</sup> Second, the commercial agreements in no way restrict Verizon's sales or promotion activities. The provisions of the agreements apply only to the parties to those agreements – the MSOs and Verizon Wireless, not Verizon. In fact, Verizon recently announced an agreement for just such an over-the-top service with Redbox, and nothing in the commercial agreements would preclude Verizon Wireless customers from accessing that service on their Verizon Wireless devices. There is simply no provision in the agreements that Free Press can cite to support the harms it alleges.

Similarly, Netflix claims that the Innovation Technology Joint Venture (“ITJV”) will enable Comcast to discriminate against unaffiliated Internet traffic and that Comcast's treatment of its Xfinity TV on Xbox 360 service (the “Xfinity Xbox Service”) is evidence that Comcast will pursue such a strategy.<sup>19</sup> This argument has nothing to do with the ITJV and is rank speculation. In fact, no part of this transaction deals with Comcast's treatment of online video or, as discussed above, interferes in any way with Verizon Wireless' customers' access to online video. And, at any rate, Netflix's claim about the Xfinity Xbox Service is wrong and out of date. It is wrong because, as Comcast has explained in detail, the Xfinity Xbox Service is a cable service, not an over-the-top Internet service. Comcast's cable services have never been subject to the byte cap, and Comcast treats all over-the-top Internet services – affiliated or unaffiliated – alike.<sup>20</sup> It is out of date because Comcast has suspended its prior data cap and is now conducting a trial of a new usage threshold of 300 GB<sup>21</sup> – even higher than the previous 250 GB cap that Netflix, the largest online video provider, has conceded presented no problem.<sup>22</sup>

DirecTV claims that proprietary technology the Applicants may develop through the ITJV will put DirecTV at a competitive disadvantage because the Applicants will serve as “gatekeepers for

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<sup>18</sup> See *id.*

<sup>19</sup> See Letter from Christopher D. Libertelli, Netflix, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (Aug. 13, 2012).

<sup>20</sup> See Tony Werner, “The Facts about Xfinity TV and Xbox 360: Comcast Is Not Prioritizing,” Comcast Voices, May 15, 2012, at <http://blog.comcast.com/2012/05/the-facts-about-xfinity-tv-and-xbox-360-comcast-is-not-prioritizing.html>.

<sup>21</sup> See Cathy Avgiris, “Comcast to Replace Usage Cap with Improved Data Usage Management Approaches,” Comcast Voices, May 17, 2012, at <http://blog.comcast.com/2012/05/comcast-to-replace-usage-cap-with-improved-data-usage-management-approaches.html>.

<sup>22</sup> Netflix Inc., Quarterly Report (Form 8-K), at 8 (Apr. 25, 2011), available at <http://files.shareholder.com/downloads/NFLX/1872575600x0xS1193125-11-107751/1065280/filing.pdf> (“Comcast has had 250 gigabytes caps for years without overage charges and that hasn't been a problem for Comcast customers or for [Netflix].”).

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digital content.”<sup>23</sup> This claim is meritless. DirecTV offers no basis whatsoever for the suggestion that any technology the ITJV eventually develops would affect DirecTV’s access to any of the underlying programming. DirecTV’s programming licenses are not dependent on any yet-to-be developed technology from the ITJV. And nothing in the agreements affects DirecTV’s ability to develop – by itself or working with one of the many wireless and/or technology companies in the marketplace – its own technological enhancements. DirecTV will be free to offer innovative products to its customers – just as it has done in the past – without complaint from competitors and without government-imposed mandatory technology-sharing conditions.<sup>24</sup>

DirecTV also completely ignores the realities of the marketplace, in which firms like Apple, Google, and Microsoft have been developing wireless/wireline integration technology for years.<sup>25</sup> The ITJV will not have a monopoly on creativity and innovation; to the contrary, established technology companies have a substantial head-start in this area and offer formidable competition to anything the ITJV may do.<sup>26</sup> The addition of the ITJV to this field cannot reasonably be seen as harming DirecTV. To be sure, the ITJV may develop great new products for consumers, but this is not anticompetitive. To the contrary, as Congress has recognized, research and development collaborations like the ITJV are generally procompetitive.<sup>27</sup> The Department of Justice and Federal Trade Commission likewise

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<sup>23</sup> Letter from William Wiltshire, Wiltshire Grannis, Counsel for DirecTV, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2 (Aug. 1, 2012).

<sup>24</sup> DirecTV previously has developed proprietary technology that it made available only to its customers. For example, DirecTV recently introduced its Home Media Center HD DVR, which has enhanced functionalities, and told consumers that “You won’t find anything like it with cable or DISH Network. It’s available only with DIRECTV.” See “DIRECTV Home Media Center HD DVR,” at [http://www.directv.com/DTVAPP/content/technology/hmc\\_receiver](http://www.directv.com/DTVAPP/content/technology/hmc_receiver) (site visited Aug. 3, 2012). The fact that DirecTV introduced proprietary technology does not mean that DirecTV’s competitors have been denied access to programming or limited in developing innovative ways to deliver it. To the contrary, those competitors still have the programming and are free to develop technology enhancements of their own.

<sup>25</sup> See, e.g., Press Release, Google Inc., Industry Leaders Announce Open Platform for Mobile Devices (Nov. 5, 2007), [http://www.google.com/intl/en/press/pressrel/20071105\\_mobile\\_open.html](http://www.google.com/intl/en/press/pressrel/20071105_mobile_open.html) (discussing Open Handset Alliance, Android, and the intersection of wireless and Internet technologies); Press Release, Google Inc., Sprint and Google Expand Relationship to Enable Richer Mobile Experience and More Choices for Sprint Customers (May 7, 2008), [http://www.google.com/intl/en/press/pressrel/20080507\\_sprint\\_mobile.html](http://www.google.com/intl/en/press/pressrel/20080507_sprint_mobile.html) (discussing improvement of “mobile Internet experience” on Sprint devices); Press Release, Apple Inc., Apple Launches iPad (Jan. 27, 2010), <http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html> (discussing “a revolutionary device for browsing the web, reading and sending email, enjoying photos, watching videos, listening to music, playing games, reading e-books and much more”).

<sup>26</sup> See Commercial Agreements Addendum at 16-18. Public Knowledge’s assertion that companies like Apple provide no competitive check on Applicants and any technologies they develop is laughable. See PK August 2 Letter at 2. Apple’s success in the marketplace for integrated technologies has been extraordinary, and, with a market capitalization of nearly \$600 billion, Apple (like Google, Microsoft, and others) will compete fiercely with the ITJV.

<sup>27</sup> To ensure that the antitrust laws do not inappropriately deter procompetitive R&D joint ventures, Congress adopted the National Cooperative Research Act of 1984 (as amended), which provides that such ventures are not illegal *per se*, and are subject to only single damages (rather than the usual treble damages) in antitrust lawsuits. See 15 U.S.C. §

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have recognized that research and development joint ventures are typically good for consumers.<sup>28</sup> For these reasons, DirecTV's speculative claims should be given no weight.

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None of this is to say that the companies, working together, will not explore ways to enhance their customers' experiences – whether by enabling the viewing of their personal content on their television sets (*e.g.*, photographs and videos) or their cable content on their wireless devices, or any other variation – but many companies are racing to do these same things, and some are further down the road toward these goals. The bottom line is that such collaboration will *enhance* consumer welfare without raising any anticompetitive concerns.

Please contact the undersigned should you have any questions regarding this matter.

Respectfully submitted,

Michael H. Hammer  
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4301, et seq. The parties have made the required filing with the DOJ and FTC so as to benefit from the provisions of this Act.

<sup>28</sup> In the *Competitor Collaboration Guidelines*, they explain that “[t]hrough the combination of complementary assets, technology, or know-how . . . [joint ventures] enable participants more quickly or more efficiently to research and develop new or improved goods, services, or production processes.” See Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for Collaborations Among Competitors* § 3.31(a) (2000), *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.