Public Knowledge

August 16, 2012

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

Re: WT Docket No. 12-4, Proposed Assignment of Licenses to Verizon Wireless from SpectrumCo and Cox TMI Wireless

Dear Ms. Dortch:

Yesterday, Public Knowledge Senior Staff Attorney John Bergmayer spoke with Louis Peraertz, Wireless Legal Advisor to Commissioner Clyburn, by phone.

PK explained that the Commission should impose a requirement that any technology developed by the Joint Operating Entity (JOE) be made available on reasonable and non-discriminatory (RAND) terms. Such a requirement is necessary under 47 U.S.C. 310(d), to assure that this transaction (where license transfers and other commercial agreements are inextricably linked) serves the public interest.

In a competitive communications market different companies have the incentive to cooperate via standard-setting organizations (SSOs) to develop new kinds of technology standards. This cooperation may be necessary to achieve economies of scale, network effects, or simply because many different market actors may hold necessary patents. Different companies may own patents that are essential to implement any given standard, and to participate in the SSO each party agrees to license such patents on RAND terms.

In a concentrated market, single firms or small groups of firms may develop technologies outside of an SSO framework. They may control enough patents, or be able to achieve network effects or economies of scale, without working through an SSO.

It is often said that one job of a regulator is to "simulate competition." *See, e.g.*, ROBERT A. LEVETOWN, REGULATORY REFORM IN THE NEW ADMINISTRATION: TELECOMMUNICATIONS AND REGULATORY REFORM IN THE NEW ADMINISTRATION, 58 Antitrust L.J. 481 (1989). This can take a number of forms. Recently, in the Comcast/NBC merger, the Commission required the merged company to license its video programming to online video distributors on terms similar to the terms offered by non-vertically-integrated rivals. *See* Applications of Comcast Corporation, General Electric Company and NBC Universal, *Order*, 26 FCC Rcd. 4238, ¶ 4 (2011). This condition sought to recreate the behavior that an unmerged firm would have engaged in. Having identified a negative consequence of the merger—a reduced incentive to license content to online distributors—the Commission fashioned a remedy specifically designed to overcome it.

Similarly, in its data roaming proceeding, the Commission noted that only Verizon and AT&T opposed its adoption of a data-roaming rule. Reexamination of Roaming Obligations of CMRS Providers of Mobile Data Servs., *Second Report & Order*, 26 FCC Rcd 5411, ¶ 12 (2011). It is no coincidence that the largest providers, with the most spectrum, do not see the advantages of industry cooperation. Competitive carriers have an incentive to negotiate roaming

agreements with each other to achieve nationwide, gapless coverage. Dominant carriers lack such an incentive, and have more to lose by working with their smaller rivals, than to gain from filling in gaps in their coverage. By adopting a data roaming rule, the Commission has moved toward creating conditions that are broadly similar to how the market would look in the absence of two disproportionately large providers—one where roaming agreements are available on "commercially reasonable terms."

It would thus be in keeping with FCC precedent for the Commission, in this proceeding, to require that the JOE license technology under the terms that would apply, were that same technology developed in a more competitive marketplace, via SSOs. These terms are RAND, and a well-established body of law describes what they are, and how they should apply. This condition would directly address a negative consequence of the transaction—the reduced incentive of the parties to widely license any technologies they jointly develop. As the Supreme Court has explained, "reasonable-royalty licensing" is a "well-established form[] of relief when necessary to an effective remedy, particularly where patents have provided the leverage for or have contributed to" anticompetitive conduct. *United States v. Glaxo Group Ltd*., 410 US 52 (1973).

Additionally, PK noted that the Commission has long sought to bring about the benefits of interoperability. Interoperable markets—where customers can roam from one provider to another, and where common hardware platforms are deployed nationwide— are more likely to develop under competitive conditions, and the Commission has recognized that interoperability is a public interest objective in itself that can carry with it many benefits—for example, "greater affordability and availability of ... equipment, increasing consumer choice in equipment, promoting the widespread deployment of broadband services, providing greater options in selecting a service provider, and facilitating greater roaming opportunities." Promoting Interoperability in the 700 MHz Commer. Spectrum, *Notice of Proposed Rulemaking*, 27 FCC Rcd 3521, ¶ 53 (2012). RAND licensing would directly bring about the benefits of interoperability—for instance, by assuring that any new technology about the handoff of communications from one network to another, or any new hardware platforms—are widely adopted by the industry, and not just by JOE members.

For these reasons, adopting a RAND requirement would be in keeping with FCC precedent, would promote longstanding FCC goals, and is necessary to overcome some of the negative consequences of the JOE.

Respectfully submitted,

/s John Bergmayer
Senior Staff Attorney
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