

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
Notice of *Ex Parte* Meeting

Dear Ms. Dortch:

On August 14, 2012, Gigi B. Sohn, President and CEO, Jodie Griffin, Staff Attorney, and John Bergmayer, Senior Staff Attorney, of Public Knowledge (PK) met with Commissioner Clyburn, Dave Grimaldi, and Louis Peraertz from Commissioner Clyburn's office. Ms. Sohn exited the room at one point in the meeting when confidential information was discussed.

PK discussed the competitive harms that would result from approval of the Verizon Wireless, SpectrumCo, and Cox applications, previously detailed in both our *Petition to Deny*¹ and *Reply Comments*.² The harms that would stem from the agency, reseller, and Joint Operating Entity (JOE) agreements necessarily mean that the applications cannot be in the public interest, and so the applications should only be approved upon agreement that the Applicants will rescind the commercial agreements. However, should the Commission permit the agreements to stand, certain conditions would be necessary to reduce the extent to which the agreements would harm the public interest.

PK expressed concern that the proposed agreements effectively embody the end of the facilities-based competition policies that lie at the heart of the Telecommunications Act of 1996. Although conditions on the deals may alleviate specific harms flowing from the agreements, the deals nevertheless spell the end of facilities-based competition between telephone and cable companies. The current structure of rules and laws implemented by Congress and the FCC assumed that those rules would exist in a world where telephone and cable companies competed head-to-head, which is now certainly not the case. As a result, the FCC would have no choice but to recognize the lack of intermodal competition and pursue new policies that will stimulate new competition in wireline internet access service.

¹ See *Petition to Deny of Public Knowledge et al.*, WT Docket No. 12-4 (Feb. 21, 2012).

² See *Reply Comments of Public Knowledge et al.*, WT Docket No. 12-4 (Mar. 26, 2012).

Public Knowledge has previously explained in detail how the commercial agreements will stunt the development and use of technologies like WiFi offload, online video, and wireless backhaul.³ If the Commission nevertheless permits the agreements to move forward the following conditions could take steps to alleviate some of the competitive harms inflicted by the agreements, even if they do not entirely solve the problems raised by the deals.

I. Rescinding the Joint Marketing Agreements Where Verizon Offers DSL or FiOS Service

PK urged the Commission require the Applicants to rescind their joint marketing agreements in all areas where Verizon has a DSL or FiOS wireline plant. PK noted that the joint marketing agreements are a prime example of how Verizon and the cable companies have decided to stop competing with each other, resulting in fewer options and higher prices for consumers. In order to preserve Verizon's incentive to maintain or invest in its wireline broadband service, the Commission should not permit Verizon to instead sell the cable companies' broadband service.

II. Implementing a Term Limit and RAND Licensing for the JOE

If the JOE Agreement is allowed to stand, the JOE should be limited to a term of three or four years. This would prevent the JOE's members from engaging in long-term anticompetitive behavior, and would give the JOE's members the long-term incentive to invest in innovative new initiatives outside the JOE. A finite term for the JOE would also realign the Applicants' incentive to earnestly develop new technologies without the temptation to anticompetitively leverage those technologies to dominate the communications landscape. In addition, the Commission should require the JOE to license its technology on reasonable and nondiscriminatory terms.

Alternatively, after the term of the JOE ends, its intellectual property should be licensed on reasonable and nondiscriminatory terms.

The JOE Members must not be allowed to anticompetitively leverage the JOE's patents and other intellectual property against competitors. Particularly considering the market share of the JOE's Members, the technology that results from the JOE's operations will likely become a *de facto* standard in an area of increasing importance in the next generation of communications infrastructure: seamlessly integrating wireline and wireless services. It is crucial that the

³ See Comments of Public Knowledge, WT Docket No. 12-4 (July 10, 2012), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017090909>; Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (June 22, 2012), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017090909>; Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (June 19, 2012), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017039460>; Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (May 18, 2012), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017036172>; Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (Apr. 30, 2012), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017033654>; .

Applicants are prevented from leveraging this technology to shut out competitors or would-be competitors that are outside of the JOE's club.

Accordingly, PK urged the Commission to impose conditions that would diminish the anticompetitive effects of the JOE's control of must-have patents and other intellectual property. A RAND condition would not deprive the JOE and its Members of the legitimate fruits of their labors. The JOE would still receive reasonable payment for licenses to use its technology. The RAND condition would simply ensure that the JOE's technology is not used as a bottleneck to thwart competition in the market.

Any condition that requires licensing on RAND terms must include a clear definition as to what the standard requires. In order to ensure that such a condition is effective, the Commission should specify what is necessary for compliance by incorporating a well-understood and existing definition for what meets the RAND standard. Existing definitions have been recently discussed by both the Department of Justice⁴ and the Federal Trade Commission⁵ and should be considered by the Commission when implementing any condition on licensing.

As part of the RAND condition, the JOE must be required to license its technology on terms that are not anticompetitive and would not be considered unlawful if imposed by the dominant firm in a market. The JOE must not charge more than the marginal value of its technology over the next-best alternative for the licensee, and the fees for the JOE's licenses must be relative to the proportion of the licensed technology to the total patented technology necessary for the licensee's service.⁶ The JOE may not raise its rates after its technology becomes a *de facto* standard, or after the market for that technology has grown to maturity and the licensees are effectively locked-in to that technology. The JOE may, however, include reasonable and customary terms relating to the operation and maintenance of the licensor/licensee relationship, including audits, choice of law, and dispute resolution.

The JOE must make a cash-only payment option available to prospective licensees. The JOE could not "bundle" licenses for technology that the prospective licensee wants or needs with licenses for technology that the licensee does not want.

⁴ Regarding "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standards-Essential Patents" before the S. Comm. on the Judiciary, 112th Cong. (2012) (statement of Joseph F. Wayland, Acting Assistant Attorney General, Antitrust Division), *available at* <http://www.justice.gov/atr/public/testimony/284982.pdf>.

⁵ Regarding "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standards-Essential Patents" before the S. Comm. on the Judiciary, 112th Cong. (2012) (statement of Edith Ramirez, Commissioner, Federal Trade Commission), *available at* <http://www.judiciary.senate.gov/pdf/12-7-11RamirezTestimony.pdf>.

⁶ See David Salant, *Formulas for Fair, Reasonable, and Non-Discriminatory Royalty Determination*, Munich Personal RePEc Archives (2007), <http://mpra.ub.uni-muenchen.de/8569/>.

If the JOE fails to agree on licensing terms with a prospective licensee, the JOE should be prohibited from seeking injunctive relief in an action against the prospective licensee. Even when no licensing agreement can be reached, injunctive relief should be exclusively reserved for when monetary damages cannot compensate for the injury of continued use.⁷ This condition would not prohibit the JOE from seeking damages for infringement, but would simply require that the JOE be made whole monetarily after proving its case without being permitted to entirely stop the activities of the alleged infringer.

Under a nondiscriminatory requirement, the JOE must be required to treat all licensees similarly in order to maintain a level playing field between incumbent firms and new competing entrants. To ensure the effective operation of this condition, the JOE should be prohibited from entering any contract that ensures confidentiality over license provisions that pertain to the RAND conditions of the license.

III. Non-Exclusivity in the Commercial Agreements

If the transaction between Verizon Wireless and SpectrumCo is approved, the transfer should only be permitted on the condition that the parties' obligations to each other under the joint marketing, reseller, and JOE agreements are not exclusive. This will permit the parties to continue to enjoy the benefits of their partnerships while maintaining the parties' ability and incentive to partner with third parties to offer competing services to consumers.

IV. Spectrum Conditions

If the Commission approves the spectrum transfers, the Commission should require a data roaming condition and a "use it or share it" condition, which would require any spectrum left unused by Verizon to be included in the white spaces database for use by white spaces devices. Such a condition would be a boon to technology by encouraging developers to invest in white spaces technology. The spectrum would continue to be available for use on an unlicensed basis until Verizon builds out. Implementing this as a purely mechanical system would be easy because the condition would work with the existing white spaces databases, and would have the additional benefit of preventing the need for enforcement: Verizon would send notification when they turn on the new system, and if they fail to do so, the spectrum would automatically be put into the database and made available for use.

V. Enforcement of Conditions

If these or any other conditions are to be effective, the Commission must ensure that sufficient enforcement mechanisms are in place to monitor for violations and to efficiently remedy any violations that occur. As part of its conditions on the proposed transactions, the Commission should create an open process in which parties may complain of violations of the Commission's

⁷ *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Order. The Commission should ensure such complaints are handled expeditiously and conditions are strongly enforced to prevent any anti-consumer, anticompetitive behavior by the Applicants.

Finally, PK noted the Commission that the proposed agreements create an attributable interest under a straight reading of Section 652 and the Commission's traditional tests.⁸ The JOE and the resale agreements create a management interest. Such a management interest is prohibited under Section 652(a) and (b). Additionally, Section 652(c) prohibits joint ventures to provide video programming or telecommunications services; the JOE Agreement creates such a prohibited joint venture. PK noted that the Applicants have not certified that they will properly insulate their discussions of programming and other media-related activities from the other matters of the joint marketing agreements and JOE.

Respectfully submitted,

/s/

Jodie Griffin

Staff Attorney

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⁸ See Petition to Deny of Public Knowledge et al., WT Docket No. 12-4, Conf. App. A-8-A-9 (Feb. 21, 2012).