Public Knowledge

August 21, 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 17, 2012, Harold Feld, Senior Vice President, Jodie Griffin, Staff Attorney, and John Bergmayer, Senior Staff Attorney, of Public Knowledge (PK) spoke by phone with Jim Bird, Virginia Metallo, and Bill Richardson, from the Commission's Office of the General Counsel, and Bob Ratcliffe and Martha Heller from the Commission's Media Bureau.

PK urged the Commission to resolve the issues that the Applicants' commercial agreements raise under the Commission's attribution rules. PK noted that the proposed agreements create an attributable interest under the Commission's rules.[1] If the Commission does not address and resolve this issue, this could undermine the important role of the attribution rules in both the cable and broadcasting industries.[2]

For example, if the members of the JOE were to discuss the creation of a video distribution service that would use the JOE's technologies, the parties would therefore discuss or review plans for tier placements, pricing, on demand services, and other media-related information. This hypothetical scenario is all too plausible: although the Applicants protest that "the focus" of the JOE "is on technologies related to the delivery" of video, voice, and data services,[3] they have not stated that they will not use the JOE as a vehicle to discuss media-related activities.

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[1] *See* 47 C.F.R. § 76.501 n.2(f)(1) ("An interest in a Limited Liability Company ("LLC") . . . shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the relevant entity so certifies."); 47 C.F.R. § 76.503 n.2(b)(1) ("An interest in a Limited Liability Company ("LLC") . . . shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership and the relevant entity so certifies."). *See also* Petition to Deny of Public Knowledge et al., WT Docket No. 12-4, Conf. App. A-8-A-9 (Feb. 21, 2012); Reply Comments of Public Knowledge et al., WT Docket No. 12-4, 20-22 (Mar. 26, 2012).

[2] *See* 47 U.S.C. §§ 533, 572.

[3] *See* Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC (Aug. 17, 2012); Letter from Michael H. Hammer, Counsel, SpectrumCo, to Marlene H. Dortch, Secretary, FCC (Aug. 20, 2012).

PK noted that the Applicants can solve this problem by certifying that they will properly insulate their discussions of programming and other media-related activities from the other matters of the joint marketing agreements and the JOE, but have failed to do so. The rules require that parties certify the entity in which they have a shared interest will not engage in programming or program distribution, or they must certify the directors and members participating will not discuss programming and program distribution.

The Applicants' recent ex partes fall short of actually certifying that they will not discuss or manage media-related activities with each other in the JOE. The Applicants assert that they will not use the JOE to *focus* on "acquisition, ownership or control of video or other programming content," but they do not actually certify that they *will not* engage in such conduct.[4] The Applicants add that the commercial agreements do not specifically address Verizon and the cable companies' acquisition of video programming,[5] but the attribution rules are concerned with much more than simply the purchase of programming content. Similarly, the Applicants' statements that the commercial agreements do not license NBCUniversal video content to Verizon or require joint negotiation or acquisition of programming are only very limited promises. These statements only address three specific activities, and moreover only address whether the commercial agreements explicitly provide for prohibited conduct. The Applicants fail to assure that they will not *actually engage* in prohibited conduct, whether specifically called for in the agreements or merely enabled by them.

Unless the Commission's Order directly addresses the question of insulation with regard to programming insulation, the Order has the potential to create a new loophole in the attribution rules that will undermine the critical function of the attribution rules in maintaining viewpoint diversity in traditional media. This is true not merely for cable, but for broadcasting as well.

If companies could skirt the Commission's attribution rules by creating a research entity in a related field where the disclosure of media-related information is potentially part of the ordinary course of business but the entity does not directly own media facilities, these entities could undermine the entire point of the attribution rules. For example, assume that News Corp. and Belo wished to coordinate their coverage of national events to advance their legislative agenda and/or financial interests. The attribution rules generally prevent these companies from entering into a business partnership so as to prevent this outcome by attributing the media outlets of the companies to each other if they are able to exercise influence over each other's programing. But under the precedent established here, News Corp. and Belo could establish a Joint Operating Entity to develop "new, more spectrum efficient technologies for delivery of news and entertainment." As part of this News Corp./Belo JOE, the companies could disclose to each other

[4] Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC (Aug. 17, 2012) (stating that "the focus [of the JOE] is on technologies related to the delivery" of video, voice, and data services).

[5] *Id.* (quoting 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 9 from Sen. Kohl, Mar. 21, 2012).

information on their news covering techniques, content, and issues they intend to cover without triggering the attribution rules. This would provide an easy way for media companies to circumvent the attribution rules and compromise the independence the ownership rules generally and the attribution rules specifically are designed to address.

In the absence of a clear certification that the Applicants will not discuss pricing, tier placement, and other matters related to programming decisions in the course of implementing the commercial agreements, the Commission should clarify that the paragraphs of the DOJ Proposed Final Judgment that prohibit exchange of information with regard to programming other than what is necessary to develop the technology of the JOE[6] satisfy the insulation requirements for the ownership rules for purposes of Section 613(f). The Commission should also require that the cable operators may not share programming information with each other in a way that would violate the insulation criteria. For example, Time Warner Cable and Comcast would not be permitted to share information on program pricing and tier placement of video programming, other than what is necessary to develop the technologies that form the primary purpose of the JOE. Even then, such information must not be used in an anticompetitive manner. The Commission could also confirm that Applicants interpret the Proposed Final Judgment's requirement that they seek permission for any modification of the agreements[7] to include the requirement to seek advance permission to discuss programming information.

By making this clarification, the Commission will not only protect competition in the programming market and preserve viewpoint diversity in the manner directed by Congress in Section 613(f). Such a clarification will protect the attribution rules from erosion and preserve diversity of views in broadcast media as well. By contrast, failure to emphasize the Commission's long standing policy that competing media outlets cannot coordinate through joint ventures will open the door to a proliferation of "Joint Operating Entities" to circumvent the attribution rules and compromise viewpoint diversity.

Respectfully submitted,

/s/
Jodie Griffin
Staff Attorney
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[6] United States Department of Justice, [Proposed] Final Judgment, §§ V.I-V.K (Aug. 16, 2012).

[7] *Id.* § V.G.