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United States Senate

WASHINGTON, DC 20510-2309

July 31, 2012

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Eric Holder
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Chairman Genachowski and Attorney General Holder:

I am writing regarding your review of the marketing agreements, joint operating agreements, and spectrum license transfers between Verizon Wireless and four of the nation's largest cable companies, Comcast, Time Warner Cable, Cox, and Bright House Networks, as well as your review of the spectrum swap between Verizon and T-Mobile. As a member of the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, I have been following this deal with great interest since its announcement and have previously stated that it will greatly impact how much consumers pay for their wireless phone, high-speed Internet, and cable television service. I remain very concerned that this Verizon/cable partnership presents serious competition concerns and is likely not in the public interest. I urge your agencies to carefully consider the overall impact this integrated transaction will have on consumers and on competition in the wireless, broadband, and cable markets.

Verizon's plan to acquire spectrum from the cable companies will allow Verizon to further dominate and control the nation's airwaves. As the nation's largest wireless provider, Verizon already has a 33 percent share of the wireless market. Verizon contends that this spectrum acquisition is necessary to meet the exponential demand for wireless data service that has occurred with the growth of smartphones and tablets. While I recognize that the wireless marketplace is changing rapidly and is placing increasing demands on wireless carriers, I am skeptical that this acquisition is necessary, especially given the tremendous advantage Verizon already has over other carriers in terms of its spectrum holdings. Although Verizon has voluntarily agreed to transfer spectrum to T-Mobile in a handful of markets, I am unconvinced that this voluntary divestiture of spectrum sufficiently ameliorates the public interest harms of the Verizon/cable transaction. This divestiture is a step in the right direction, but I remain concerned that the competitive carriers will have almost no ability to obtain spectrum of this type in the foreseeable future, especially since the Commission will likely not auction additional spectrum for several years. Spectrum is a very scarce resource, and I respectfully urge the FCC

to consider the arguments raised by competitive carriers who contend that access to this spectrum is essential for them to compete with Verizon and AT&T in the wireless marketplace.

The Commission's annual report on competition in the mobile wireless industry found that the wireless market has been highly concentrated since 2005 and continues to become more concentrated each year.[1] Commissioner Copps noted in his statement accompanying the report that the Herfindahl-Hirschman Index (HHI) for the wireless market "remains above the threshold for a 'highly concentrated' market," and he noted that "consumers are no longer enjoying falling prices, according to the CPI [consumer price index] for cellular services."[2] I am concerned that any transaction that will give Verizon a substantial advantage over the competitive carriers will only continue this disturbing trend and make it even harder for consumers to obtain affordable wireless phone and Internet access. If your agencies approve this spectrum sale, you should do so only if you require appropriate additional divestitures to prevent Verizon from gaining a dominant position in the wireless marketplace.

The most troubling aspects of this integrated transaction are Verizon's agreements with the major cable companies to jointly promote, market, and sell each other's products and services, as well as their agreement to form a joint venture to develop proprietary technology. These are very complicated transactions, and at present, only a very limited amount of information about these agreements has been made public. I have been frustrated by the companies' failure to provide more public information about this transaction, especially given the concerns that have been raised by a wide array of companies, public interest organizations, consumer groups, labor unions, and state elected officials. Without access to a more complete set of documents, I cannot reach a legal conclusion about whether this transaction should proceed. However, based on the limited available information, I remain very concerned that these agreements would carve up the marketplace for cable, broadband, and wireless phone service to the detriment of consumers and would have a substantial impact on competition.

As you review this transaction, it is essential that you consider both the joint marketing agreement and joint operating venture in tandem with the parties' proposed spectrum transfers. I understand that the Commission has received numerous filings arguing that this is an integrated transaction that must be reviewed as a single unit (rather than bifurcating the spectrum transaction from the rest of the proceeding). I share those views. Comcast's Executive Vice President, David Cohen, stated in an interview with Politico that "[t]he transaction is an integrated transaction. There was never any discussion about selling the spectrum without having the commercial agreements."[3] In fact, when asked about this during the Judiciary Subcommittee hearing on this transaction by Chairman Kohl, Mr. Cohen acknowledged that it is "basically correct" to state that Comcast would not have done the spectrum sale with Verizon

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[1] *See Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 15 FCC CMRS COMPETITION REP. 1, 16-17 (June 27, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1.pdf.

[2] Michael J. Copps, Statement, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 15 FCC CMRS COMPETITION REP. 1, 305 (June 27, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A2.pdf.

[3] Eliza Krigman, *Comcast Executive Defends Spectrum Deal*, POLITICO PRO, Mar. 8, 2012, *available at* https://www.politicopro.com/story/tech/?id=9814.

without the commercial agreements.[4] Comcast's statements indicate that the commercial agreements are at the heart of this transaction.

It is likely that the cable companies will derive substantial financial benefit from the formation of a partnership and joint venture that will be able to stifle competition from companies outside of this arrangement for many, many years to come. Comcast, Time Warner Cable, Cox, and Bright House Networks represent 73 percent of all cable customers nationwide.[5] These cable companies are currently fierce competitors of Verizon. This is especially true in the markets where Verizon offers FiOS service. In those areas, the cable companies directly compete with Verizon for video, broadband Internet, and landline phone services, and in every other area in the Verizon footprint, the cable companies compete with Verizon for Internet and phone service. At present, FiOS is the only real competitor to the cable companies when it comes to high-speed Internet. If you are a customer in the 85% of the country that is not covered by FiOS and you need a high speed connection to run your business or upload large data files, you are already hostage to whatever the cable companies demand for that Internet connection.[6]

When Congress chose to deregulate the telecommunications industry more than fifteen years ago, it did so with the hope that consumers would benefit from cross-platform competition between cable and telephone companies. The joint marketing and joint operating agreements between Verizon and the cable companies upend this promise of cross-platform competition. These agreements will turn fierce competitors into business partners. This is never good for competition, and I fear it may mean that the parties will engage in information sharing or collusive activity that will make it even harder for their competitors to keep up. At a minimum, this arrangement seems to undermine the companies' incentive to compete independently and to continue their fierce comparative advertising battle, which should be relevant to your agencies' analysis of the competitive harms of this deal.

I also worry that this deal will reduce Verizon's incentive to maintain or expand its existing wired infrastructure. Press reports indicate Verizon plans to reduce its support of its copper infrastructure, which will further reduce consumers' ability to obtain lower-cost broadband service through Verizon's DSL service.[7] Verizon's CEO has also made a number of statements that seem to imply that it will be shifting all of its resources to its wireless network

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[4] *The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers? Hearing before the Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 112th Cong. (2011) (statement of David L. Cohen, Executive Vice President, Comcast Corp.), *available at* http://www.cq.com/doc/congressionaltranscripts-4052287.

[5] *See, e.g.,* Letter from Genevieve Morelli, President, Independent Telephone & Telecommunications Alliance, to Marlene H. Dortch, Secretary, *FCC*, WT Docket No. 12-4 at 1 (July 18, 2012), *available at* http://apps.fcc.gov/ecfs/document/ view;jsessionid=pnGYQH0LlLqJkLfmQw25Jk56Cc9y1nxsRTx1Q3hzJHJ10qTmvhnR!-1221852939!NONE?id=7021990250.

[6] *See* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 42 (2010), *available at* http://www.broadband.gov/download-plan/.

[7] *See, e.g.,* Karl Bode, Op-Ed., *Verizon Willfully Driving DSL Users into the Arms of Cable*, ARS TECHNICA, July 25, 2012, *available at* http://arstechnica.com/tech-policy/2012/07/op-ed-verizon-willfully-driving-dsl-users-into-the-arms-of-cable/.

and will "cut the copper off" in more rural and sparsely populated areas.[8] These statements, in combination with Verizon's recent announcement that it will no longer sell stand-alone DSL service, are terrible news for consumers. Many low-income, elderly, and rural customers rely on DSL for their Internet service. If DSL service is cut-back further, these consumers will have even fewer options to stay connected and may not be able to afford a higher-priced plan from their cable provider. These customers and communities are part of an ever-growing digital divide in this country that I fear will only become worse if this deal is approved.

Consumers are already paying too much for their cable subscriptions. The Commission found in its 2011 report on Cable Industry Prices that over a 14-year period, cable prices have increased by 134 percent.[9] The Commission also recently noted in its 2012 report on the status of competition in the market for video programming that despite losses in cable subscribers, cable companies continue to show significant increases in revenue per subscriber. The Commission concluded that "[c]able MVPD's per-subscriber monthly revenue has risen steadily over [2006-2010] due to a combination of growth in the number of subscribers to cable bundles, growth in the number of subscribers to advanced services, and price rate increases."[10] Although the cable industry continues to offer more channels in each package, the reality is few consumers want or need hundreds of channels. I am concerned that this deal will only further exacerbate this trend, and cable companies will be incentivized to price their services in a way that drives consumers to more expensive bundles of services. This wouldn't be problematic if consumers had sufficient choice for other standalone services. But if, for example, high-speed Internet service is only offered by a single cable company, that company will have every incentive to artificially elevate the cost for Internet service—or to stop offering it as a standalone service altogether. The Commission noted in a footnote in its recent report on video competition that "[b]y bundling traditional MVPD services with Internet delivery of content, vertically integrated MVPDs leverage their dominant market position at the expense of competitive online offerings."[11] These cable companies are already able to leverage their dominant market position to drive consumers to purchase packages they do not want or need. If this deal is approved, I fear it will ultimately mean that consumers are driven to purchase even more expensive bundled "quadruple play" services (i.e. cable, Internet, phone, and wireless services) from their cable provider.

The Commission recently noted that consumers are increasingly "cutting the cord" or eliminating their subscription to premium channels in favor of online video services. It found that "according to one estimate, 13 percent of consumers with a broadband connection 'cord-

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[8] Lowell McAdam, Chairman and CEO, Verizon Commc'n Inc., Remarks at the Guggenheim Securities Symposium (June 21, 2012), *available at* http://www.phillipdampier.com/documents/vz-guggen_6_21_12.pdf ("[W]e are going into the copper plant areas and every place we have FiOS, we are going to kill the copper. . . . And then in other areas that are more rural and more sparsely populated, we have got LTE built that will handle all of those services and so we are going to cut the copper off there.").

[9] *Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 2011 FCC REP. ON CABLE INDUSTRY PRICES 1, 2 (Feb. 14, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-284A1.pdf.

[10] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 14 FCC VIDEO COMPETITION REP. 1, 67 (July 20, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0723/FCC-12-81A1.pdf.

[11] *Id.* at 129, n. 922.

shaved' in the past year."[12] I am pleased to see that the online video market is growing and that consumers are increasingly using it to supplement or supplant their cable subscriptions, but that will only continue if consumers are able to obtain standalone high speed Internet service at a reasonable rate. Your agencies must remain vigilant about protecting this nascent market from anticompetitive conduct that could halt the development of online video alternatives.

When your agencies approved the Comcast-NBCUniversal merger, you recognized that online video distributors (OVDs) hold the greatest promise for becoming future competitors to the cable companies. The Department of Justice found in its Competitive Impact Statement that "[b]ecause Comcast is the country's largest ISP, an inherent conflict exists between Comcast's provision of broadband services to its customers, who may use this service to view video programming provided by OVDs, and its desire to continue to sell them MVPD services."[13] The Commission also noted that "[i]f an OVD is to fully compete against a traditional MVPD, it must have a similar array of programming. Comcast has strong incentives not to let this occur."[14] Since the merger was approved in January 2011, we have seen all of your concerns about Comcast's incentives to stifle competition borne out. First, Comcast failed to provide comparable programming to an OVD under the benchmark condition of its deal, and it forced the company to engage in arbitration that was likely very expensive for the OVD.[15] The OVD ultimately prevailed on all counts, but I fear that other OVDs who aren't able to take on the risk or expense of arbitration will not be able to avail themselves of the same programming. Second, Comcast announced its plan to exempt its own Xfinity on demand service for the Xbox 360 from its data cap for broadband service. This discriminatory behavior was exactly the type of conduct the Department aimed to curtail when it imposed a condition on that deal that states: "If Comcast offers consumers Internet Access Service under a package that includes caps, tiers, metering, or other usage-based pricing, it shall not measure, count, or otherwise treat Defendants' affiliated network traffic differently from unaffiliated network traffic."[16]

Independent programmers and online video start-ups are generally not equipped to engage in protracted and costly litigation, nor do they wish to risk retaliation by Comcast if they complain to the FCC. I was very pleased that the Commission finally resolved the complaint that was filed by Tennis Channel against Comcast and found that Comcast "deliberately discriminated against the Tennis Channel."[17] The Commission went on to find that "[t]he record contains significant circumstantial evidence that Comcast engaged in a general practice of favoring affiliates over nonaffiliates."[18] Although the outcome in that case was ultimately a positive one, I am very disappointed that it took more than two years for this case to be resolved

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[12] *Id.* at 149.

[13] Competitive Impact Statement, *United States v. Comcast Corp.*, No. 1:11-cv-00106 at 11 (D.D.C. Jan. 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266158.pdf.

[14] *In re Applications of Comcast Corporation, General Electric Company, and NBCUniversal, Inc. for Consent Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd 4238, 4273 (2011).

[15] *See* Post-Award Order re Redacted Version of Arbitration Award (As Amended), *Project Concord, Inc., v. NBCUniversal Media, LLC, FCC*, MB Docket No. 10-56 (filed July 11, 2012).

[16] Final Judgment, *United States v. Comcast Corp.*, No. 1:11-cv-00106-28 at 23 (D.D.C. Sept. 1, 2011), *available at* http://www.justice.gov/atr/cases/f274700/274713.pdf.

[17] Memorandum Opinion and Order, *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, MB Docket No. 10-204 at 17 (July 24, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0724/FCC-12-78A1.pdf.

[18] *Id.*

by the Commission. This type of delay is unacceptable and will always inure to the benefit of a company like Comcast that is capable of absorbing the costs of litigation, if they are challenged for discriminatory conduct. This is particularly true if a company recognizes that the Commission takes years to resolve these disputes, and the penalties for discrimination amount to little more than a slap on the wrist. In this case, Comcast was ordered to pay the maximum fine that is permitted under existing regulations of $375,000,[19] but I would venture to guess that the litigation costs alone in this case far exceeded that fine.

The potential competitive harms to online video that you outlined in the Comcast transaction are more true today than they were in January 2011. Unlike the Comcast deal, this transaction will create a partnership between the largest wireless company and four of the biggest cable companies. These five companies will have every incentive to prioritize or advantage their partners' products and services to the detriment of their competitors, particularly OVDs. If your agencies approve this transaction, you must create a framework to prevent discriminatory conduct by Verizon and the cable companies, and create a mechanism where this conduct can be challenged and resolved in an expedited time frame. I urge you to, at a minimum, impose conditions on this deal to ensure that the parties to this joint venture cannot treat unaffiliated over-the-top content and services in a discriminatory manner. Specifically, I urge you to prohibit the parties from adopting data caps, tiers, or otherwise prioritize network traffic in a manner that discriminates against content providers or other entities that are not a part of the joint venture. The Commission should similarly require Verizon to stipulate that the C-block conditions it agreed to in 2007 apply to Verizon's entire network, including any spectrum acquired as part of this transaction, and it should consider applying similar restrictions on any spectrum acquired by T-Mobile as part of this transaction. I also urge you to consider imposing automatic attorneys' fees and costs on any of the parties who are found to have engaged in discriminatory conduct or to have violated any other condition that your agencies impose on this transaction. Similarly, if there is a violation, you should mandate that the condition is automatically extended for the length of time that the company was not in compliance. As I have said before, your agencies should structure consent decrees in a manner that incentivizes the parties to immediately comply, rather than delay and challenge the implementation of the terms of your conditions. In addition, if you approve this deal, your agencies should require all of the parties to offer affordable standalone broadband services to customers for the duration of this partnership deal.

The joint operating agreement will also create a structure that will enable the companies to develop proprietary technology to seamlessly connect their wired and wireless platforms, and it is unclear whether this technology and any intellectual property coming out of this joint venture will be available to competitors. If this technology is available exclusively in this partnership and is not licensed on reasonable and non-discriminatory terms, the parties will have an incredible ability to stifle competition from online competitors. If your agencies do approve this deal, I urge you to require the parties to this agreement to license the technology coming out of this joint venture on reasonable and non-discriminatory terms.

In closing, I want to reiterate that I was very pleased that your agencies decided to block the AT&T/T-Mobile merger last year. Your agencies should be commended for your courageous efforts to protect competition in the wireless space. Although this transaction is

[19] *See* 47 C.F.R. § 1.80 (b)(1).

more complicated, it creates a partnership of some of the largest players in the cable and wireless markets that will fundamentally alter video and telecommunications services in this country for decades to come.

I am concerned that this transaction poses a serious threat to consumers and to competition that will ultimately result in higher prices and less choice for consumers. If your agencies do approve this deal, I urge you to only do so if you are able to adopt stringent conditions to protect competition and the public interest. Finally, I have focused the majority of my comments on my concerns about the threat this deal may pose to online video, but I hope your agencies will strongly consider the very useful and valid comments that have been submitted by the mid-sized carriers, consumer groups, labor unions, and public interest groups about other conditions that may mitigate the public interest harms of this transaction.

Thank you for your prompt and careful consideration of my views on this matter. I look forward to your response.

Sincerely,

Al Franken
United States Senator