MIKE LEE
UTAH

United States Senate
WASHINGTON, DC 20510

May 24, 2012

The Honorable Eric Holder
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Attorney General Holder and Chairman Genachowski:

I write concerning the proposed spectrum purchase and commercial agreements between Verizon Wireless ("Verizon") and several cable companies (Comcast, Time Warner, Bright House, and Cox), which are currently under review at the Federal Communications Commission ("FCC") and the Department of Justice, Antitrust Division ("DOJ"). On March 21, 2012, the Subcommittee on Antitrust, Competition Policy and Consumer Rights, of which I am the Ranking Member, held a hearing on these transactions. This letter represents a brief statement of my views on the transactions based on testimony given at our hearing, the subsequent written record, publicly available documents and filings, and numerous meetings with a wide range of interested parties.

Vigorous competition is essential to consumer welfare in the wireless and cable markets, and the concerns expressed by critics of the agreements highlight important issues facing these industries. I am confident your agencies will carefully review the arguments made by opponents of these transactions and determine whether they are supported in fact. Based on available evidence, I do not believe the spectrum purchase or commercial agreements will restrict competition or otherwise harm consumers. To the contrary, the evidence suggests that these agreements are primarily procompetitive and will benefit consumers by putting previously fallow spectrum to efficient use, expanding consumer choice through the introduction of a new bundled offering, and spurring innovation in the development of new technologies and products.

Spectrum Purchase

Verizon's purchase of spectrum licenses from the cable companies must be analyzed in light of the increasingly severe spectrum crunch facing the wireless industry and consumers of wireless services. As consumption of data-intensive smartphones and tablets has grown, demand

for data has exploded and continues to increase at exponential rates. Numerous sources estimate that data traffic will surge to many times the current levels in the next few years alone.[1] A robust secondary market for spectrum is essential to the public interest in efficient spectrum allocation and to continuing competition in the wireless industry. The spectrum Verizon seeks to purchase has not been in use since it was last transferred in 2006, and it is undisputed that Verizon employs spectrum productively and efficiently.[2] The proposed transaction thus creates an obvious efficiency and is, at its most fundamental level, procompetitive.

Verizon's spectrum purchase does not include the transfer of any customers, facilities, or operations. The transfer would therefore seem to implicate antitrust concerns only insofar as it might foreclose rivals from a necessary input and furnish Verizon with sufficient market power to bring about a unilateral (and profitable) price increase.[3] Verizon's market share for wireless services (approximately 33 percent), as well as its share of available spectrum after the contemplated transfer (approximately 26 percent),[4] fall substantially short of the levels traditionally found to raise legitimate concerns of monopolization or foreclosure.[5]

Because spectrum is a limited resource overseen by the federal government, the FCC has developed a spectrum screen to ensure with even greater care that no single entity is able to foreclose rivals from sufficient spectrum to compete effectively in the wireless market. It is my understanding that in all but a few localities Verizon's acquisition will not result in spectrum holdings that exceed the FCC's screen,[6] and I am confident the FCC will prescribe any necessary remedies for those localities where the screen is exceeded.[7]

---

[1] Press Release, Cisco, Cisco Visual Networking Index Forecast Projects 18-Fold Growth in Global Mobile Internet Data Traffic from 2011 to 2016 (Feb. 14, 2012) ("By 2016 worldwide mobile data traffic will increase 18-fold, mobile cloud traffic will increase 28-fold, and tablet traffic will grow 62-fold."); Written Testimony of Randal S. Milch, Senate Antitrust Subcommittee Hearing on the Verizon/Cable Deal, at 4 ("FCC estimates the demand for mobile data by 2015 will be 25-50 times greater than 2010"); Comments of the GSM Association to the FCC, *In re: Fostering Innovation and Investment in the Wireless Communications Market*, at 8 (Sep. 30, 2009) ("In the next twelve years, national markets will require three times more spectrum to accommodate data traffic demand and enable universal mobile broadband access.").

[2] *See* Joel Kelsey Responses to Questions for Record from Sen. Mike Lee, Senate Antitrust Subcommittee Hearing on the Verizon/Cable Deal ("Kelsey Responses"), Response to Question 3 ("No one is disputing . . . that Verizon would put the licenses in question to use."); Written Testimony of Randal S. Milch at 6 ("Verizon Wireless is the most efficient user of spectrum in the U.S., serving more customers per megahertz of spectrum than any other carrier, despite the explosion of data traffic from smartphone usage. . . . As an example: Verizon Wireless is almost twice as efficient in its use of spectrum as T-Mobile: Verizon Wireless serves over 1.2 million customers per MHz of spectrum, while T-Mobile serves 660 thousand customers per MHz of spectrum.").

[3] *See* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 671 (2005) ("A firm engaging in successful [input foreclosure] raises its rivals' input costs and gives the firm the market power to raise or maintain a supracompetitive price in the output market. . . . [T]here is no consumer injury unless prices in the output market are increased relative to the proper competitive benchmark.").

[4] Joint Opposition to Petitions to Deny and Comments at 26, *In re Application of Verizon and SpectrumCo for Consent to Assign Licenses* (FCC WT Docket No. 12-4) (Mar. 2, 2012).

[5] *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) ("[I]t is doubtful whether sixty or sixty-four percent would be enough [for a § 2 claim]; and certainly thirty-three per cent is not."); *cf. Virginia Vermiculite Ltd. V. WR Grace & Co.*, 156 F.3d 535 (4th Cir. 1998) (plausible antitrust violation where entity is foreclosed from 80% of available inputs).

[6] *See* Spectrum Aggregation, FCC Form 603, Exhibit 5.

[7] *See* Written Testimony of Randal S. Milch at 7 ("Verizon Wireless would remain below [the FCC's screen] in 2,230 of the 2,276 of the counties covered by the SpectrumCo licenses—or nearly 98 percent of the covered

Critics of the acquisition nonetheless contend that the FCC's spectrum screen should be considered advisory or that the applicable standard should be changed in order to bar this transaction. Although guidance issued by an agency is not always formally binding on that agency, companies and investors rely on such pronouncements in making business decisions. Particularly where an agency has tailored guidelines to a specific issue—such as the amount of spectrum a company may hold before attracting additional regulatory scrutiny—the application of those guidelines to a proposed transaction must be given serious weight. With respect to this transaction, I am not aware of any extraordinary circumstances that would justify treating the established spectrum screen as merely advisory in this instance. Absent such evidence, where a party has complied with applicable guidelines of which it had notice, I do not believe it proper for a regulatory agency to conclude—on the basis of an issue fairly covered by the guidance in question—that the party may not proceed with its contemplated transaction. Moreover, changing regulatory guidelines in the midst of reviewing a particular transaction—after companies have relied upon those guidelines in arranging their businesses and in making strategic decisions—would raise serious concerns regarding the evenhanded application of agency criteria, respect for due process, and bedrock rule-of-law principles such as notice and the prospective application of legal directives.[8]

Any significant revision of the FCC's spectrum screen would also be contentious, as there appears to be little consensus on alternative criteria that could be used in properly determining spectrum shares. Critics of Verizon's acquisition emphasize the relative economic values of spectrum holdings among wireless providers.[9] Determining the economic value of spectrum, however, is a complicated and often uncertain task. The value of spectrum may vary greatly over time and may be affected by any number of endogenous factors including the type of technology used and investments made by the spectrum license holder. Certain spectrum licenses, which have particular propagation characteristics or are uniquely compatible with particular networks or technologies, may be of great value to some providers but of less value to others.[10] Whatever the proper metric for determining spectrum holdings, the controversy and complication inherent in making material changes to the FCC's spectrum screen militate strongly against an ad hoc alteration of that screen in the middle of a significant transaction.

In light of the well-documented explosion in the need for spectrum and Verizon's compliance with the FCC's screen, accusations that Verizon is simply seeking to keep spectrum from its competitors appear to lack credibility. Verizon has stated plainly that without additional

---

counties. In the few areas where the screen would be exceeded, it is typically only by a few MHz and there are multiple other providers with spectrum in each.").

[8] *See, e.g.*, Lon Fuller, *The Morality of Law* (1964) (citing a failure to make known applicable rules, retroactive standards, and unstable legislation as failures of a legal system).

[9] *See* Kelsey Responses to Sen. Herb Kohl, Response to Question 4 (arguing that "the screen is inadequate to measure the advantage that valuable spectrum gives to the nation's largest wireless carriers").

[10] Altering the screen would also implicate disputes regarding the proper calculation of available spectrum to be used as the denominator in determining an individual company's spectrum share. For example, Verizon asserts that the spectrum screen currently overstates its holdings since some available spectrum owned by others is not considered in the calculation. *See* Randal S. Milch Responses to Questions for Record from Sen. Mike Lee, Senate Antitrust Subcommittee Hearing on the Verizon/Cable Deal ("Milch Responses"), Response to Questions 5-6 ("In a future proceeding, if the Commission relooks at the spectrum available for mobile use, we'll advocate for including new spectrum in the screen.").

spectrum it "will begin to experience congestion in a number of major markets as early as 2013."[11] Verizon represented to our Subcommittee that it has "provided extensive documentation to the FCC explaining why [its] existing spectrum assets are insufficient to meet the exploding growth for data."[12] I am confident your review of the parties' documents will reveal whether Verizon has in fact purchased this spectrum because of legitimate needs and with plans to put it to productive use.

Remaining criticisms of the spectrum transfer ignore economic realities and improperly assume that the government should be in the business of picking winners and losers in the marketplace. For example, critics note that Verizon and the cable companies consummated this transaction at a time when T-Mobile was unable to bid on the spectrum because of its then-pending merger with AT&T. The cable companies had an obvious economic incentive to sell their spectrum to the highest bidder and best wireless partner, and I am unaware of any credible reason that the cable companies would have denied any wireless company a fair opportunity to acquire the spectrum. In fact, Comcast has stated directly that "SpectrumCo reached out to virtually every major party in the wireless industry,"[13] and the company has confirmed that it entered into discussions regarding the spectrum with T-Mobile in particular.[14]

Critics also improperly seek to discount the plainly procompetitive nature of the Mobile Virtual Network Operator ("MVNO") provision of the agreements pursuant to which the cable companies have the option to use Verizon's inputs for their own wireless offering. Critics argue that because the option does not vest until 2016 and because it might be preferable if the cable companies offered their own facilities-based wireless competitor, the MVNO should not be viewed as enhancing competition. Such counterfactual criticism, even if it were relevant to the antitrust analysis, does not take account of relevant business considerations best known to the parties. The cable companies have explained that reseller arrangements such as the MVNO are complicated and will take time to develop.[15] It is not clear that the cable companies would desire to enter the wireless market as a reseller or would be capable of doing so before 2016, even if the contracts so allowed. The cable companies have further made clear that, at a time prior to engaging in negotiations to sell their spectrum, they had decided definitively not to enter the wireless market as a facilities-based operator.[16] It is against the baseline of the wireless market

---

[11] Milch Responses to Sen. Herb Kohl, Response to Question 10.
[12] *Id.*, Response to Question 1.
[13] David L. Cohen Responses to Questions for Record from Sen. Herb Kohl, Senate Antitrust Subcommittee Hearing on the Verizon/Cable Deal ("Cohen Responses"), Response to Questions 1.
[14] Cohen Responses to Questions for Record from Sen. Al Franken, Response to Question 1 (stating that although non-disclosure agreements restrict what can be divulged, "I was comfortable confirming that we spoke to T-Mobile in 2010 because I was merely confirming the representation of Robert Dotson, then-President of T-Mobile, that he was in discussions with us about this spectrum.").
[15] *Id.*, Response to Question 1 ("Reseller arrangements, such as Mobile Virtual Network Operator agreements, are . . . complicated and require the reseller to dedicate significant resources to developing and marketing its own branded offerings. As a business matter, it made little sense to invest significant resources in diving into the highly-competitive wireless marketplace as a reseller when the agency agreements provided Comcast with the ability to offer wireless services almost immediately with minimal investment.").
[16] Written Testimony of David L. Cohen, Senate Antitrust Subcommittee Hearing on the Verizon/Cable Deal, at 9 ("SpectrumCo found that the substantial costs associated with construction of a wireless network, the lack of a reasonable guarantee of a return on the investment, and the risks associated with becoming an additional facilities-

as it is presently constituted, and not against a baseline that assumes unrealistic scenarios, that the competitive effects of the MVNO must be measured.

Critics have also suggested impropriety in Verizon's acquisition of this spectrum based on the availability of other options, like cell-splitting, to mitigate the increasing demand for spectrum.[17] Regardless of whether Verizon has alternatives in seeking to meet its customers' burgeoning data needs, it is for Verizon—not government regulators—to decide how best to serve consumer demand. There is no justification for government intervention in the private market absent evidence of actual anticompetitive activities or effects.

Joint Marketing Agreements

Collaboration among competitors is essential to a vibrant economy. As the Federal Trade Commission has explained, "[i]n order to compete in modern markets, competitors sometimes need to collaborate," and "[s]uch collaborations often are not only benign but procompetitive."[18] Firms only enter agreements with competitors when the outcome is mutually beneficial. These benefits are usually realized through efficiencies and decreased costs for the contracting firms. Absent evidence of illegal collusion such as price fixing, when one firm collaborates with another firm, the agreement is typically part of a profit-maximizing strategy on the part of firms seeking efficiencies. Those efficiencies benefit consumers and, consequently, collaboration may often be welfare maximizing.[19]

At issue in this transaction is an agreement between Verizon Wireless and the cable companies to sell each others' products in their retail stores as part of a new bundled package. For each new Verizon Wireless subscriber that a cable company secures through its marketing, Verizon agrees to pay the cable company a modest, one-time commission, and vice versa. The parties to this agreement are not competitors for cable customers: Verizon Wireless primarily sells wireless services and the cable companies sell landline telephony, cable, and broadband internet services. The parties have agreed to collaborate to create a new product—a quadruple play not previously available to consumers—and, accordingly, are creating a clear efficiency without any meaningful anticompetitive effect.

In about 14 percent of the country, Verizon's parent company, Verizon Communications Inc. ("Verizon Telecom"), which owns 55 percent of its shares, competes with the cable companies by virtue of its FiOS offering.[20] However, Verizon Telecom's overwhelming

---

based competitor in the highly competitive wireless marketplace did not make business sense and could not be justified.").

[17] *See, e.g.*, Written Testimony of Joel Kelsey, Senate Antitrust Subcommittee Hearing on the Verizon/Cable Deal, at 10 (suggesting impropriety in Verizon's acquisition of spectrum because "Verizon could do all of the routine things that carriers do to increase capacity to meet predictable increases in demand").

[18] Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for Collaboration Among Competitors, Preamble at p. 1 (April 2000).

[19] Written Testimony of Charles. F. Rule, Senate Antitrust Subcommittee Hearing on the Verizon/Cable Deal, at 3-4 ("[C]ollaboration among firms, even those that compete, can increase consumer welfare. . . . [W]hen collaboration increases efficiency, generates new technology, improves quality, or lowers input costs, the collaborators *and* consumers are rewarded.").

[20] Written Testimony of Randal S. Milch, at 8 ("More than 85% of households served by the SpectrumCo companies and Cox are not in an area currently served by FiOS."); Craig Moffet, Bernstein Research, *Quick Take – Verizon*

economic incentives obviate any realistic possibility of a collusive agreement between FiOS and the cable companies to stand down. I am not aware of any credible evidence contradicting the veracity of Verizon's statement that "[t]he potential to earn [55 percent of] a few hundred dollars in a one-time commission cannot possibly offset the incentive to market FiOS aggressively in order to earn potentially thousands of dollars in recurring revenues."[21]

That FiOS revenues now represent 61 percent of Verizon Telecom's landline consumer revenues only confirms the point: it would be to Verizon Telecom's severe economic disadvantage to slacken its hand or scale back its marketing of FiOS.[22] In those relatively few retail stores where Verizon Wireless may choose to continue marketing FiOS, it will be obligated under these agreements to treat cable companies' offerings on equal terms.[23] But whatever concession this represents in terms of a benefit offered by Verizon to the cable companies as part of the negotiations inherent in an arms-length agreement, Verizon Telecom remains fully incentivized to continue to compete with cable companies for every possible FiOS contract. Likewise, there is no reason to believe that these companies will engage in any illegal information sharing or collusion—conduct that would rightfully be the subject of a separate investigation. Verizon FiOS and cable will remain fierce competitors that each have much to lose by divulging information that might jeopardize success in acquiring and retaining customers.

Speculative concerns that the joint marketing agreement could potentially reduce Verizon Telecom's incentive to expand its FiOS build-out in the future likewise overstate the effect of the agreement on those incentives. Even under the joint marketing agreements,[24] the marginal financial impact of a modest, one-time commission for selling a cable contract would almost certainly be immaterial to Verizon Telecom's cost and benefit calculations regarding the enormous capital investments required to expand its fiber optic network and the significant net present value of additional FiOS customer contracts.[25]

Buys Spectrum From Cable... The End of the World as We Know It, at 2 ("FiOS reaches just 14% of U.S. households.").

[21] Milch Responses to Sen. Herb Kohl, Response to Question 9; *see also* Cohen Responses to Sen. Herb Kohl, Response to Question 7 ("[T]he commission Comcast will pay Verizon Wireless for selling Comcast services is a one-time payment that is worth at most only a few percentage points of the net present value of a FiOS customer, which is many thousands of dollars per customer."); Milch Responses to Sen. Mike Lee, Response to Question 1 ("[A]ny commissions received by Verizon Wireless for sales of MSO services represent a fraction of the net present value of a Verizon Telecom FiOS subscriber.").

[22] Written Testimony of Randal S. Milch, at 10 ("FiOS now makes up 61% of Verizon landline consumer revenues. FiOS revenues grew 18.2% year over year. In just two years, we've grown video penetration in existing FiOS areas from 25.4% to 31.5%, and our Internet penetration from 29% to 35.5%.").

[23] *See* March 22, 2012 letter of Randal S. Milch to Sens. Kohl and Lee ("No decision has been made as to maintaining [FiOS] kiosks [in Verizon Wireless stores] once the cross-marketing agreements are implemented in the FiOS footprint. I remain confident, however, that FiOS will compete effectively should there be a side by side comparison between FiOS and its cable competitor in the Verizon Wireless stores.").

[24] *See* Cohen Responses to Sen. Herb Kohl, Response to Question 5 ("The terms of the Commercial Agreements are commercially reasonably, and neither Comcast nor Verizon Wireless is locked into any of these agreements for unreasonably long periods of time."); Milch Responses to Sen. Herb Kohl, Response to Question 6 ("We have said publicly that after four years, the cable companies may elect to become resellers of Verizon Wireless service.").

[25] Milch Responses to Sen. Herb Kohl, Response to Question 4 ("A future decision to reverse the current course and invest substantial new capital in FiOS won't be governed by the possibility of gaining small, one-time commissions from any customers [Verizon Wireless] can sign up for cable companies.").

Critics who oppose this transaction based on concerns about the future of FiOS ignore business realities and seek government intervention beyond the legitimate purpose of antitrust laws. Particularly where a transaction will not produce meaningful anticompetitive effects, government regulators have no basis on which to mandate that a private entity take action to bring about some conceptual vision of ideal market competition rather than simply to advance its own business interest. In 2009, Verizon Telecom announced that it would not further expand the FiOS footprint—a strategic decision based on economic realities related to cash flow and returns on capital investments. Nothing obligates Verizon Telecom to compete in additional cable markets. Nor should regulators prevent Verizon Wireless from pursuing profit-maximizing collaboration on the basis of disappointment with a legitimate business judgment made by Verizon's parent company. As disappointing as Verizon Telecom's announcement regarding FiOS may have been for some cable industry observers, available evidence does not indicate that the agreements under consideration here materially affect the business incentives that led to that decision.

Joint Operating Entity

Joint ventures often produce procompetitive effects.[26] I believe that the parties' joint operating entity, which seeks to develop new and innovative technologies, is procompetitive on its face. Critics worry that the joint operating entity may develop an attractive new technology and refuse to license this innovation to third parties on reasonable terms. Such criticism seems oblivious to the plain (and unchanged) economic incentives at play. Nothing in the agreement makes the parties less likely to license their technologies than any other developer that plans to use its own proprietary technology. Absent the possession and abuse of monopoly power, of which there is no evidence here, it would seem improper for regulators to mandate that parties to a joint venture must license any product resulting from their collaborative investment. Given the absence of such a requirement for other similarly situated innovators, such a mandate would also seem inequitable.

Critics further assert that the deal may affect the cable companies' incentives to offer competitive backhaul services to wireless providers other than Verizon; that it will allow the parties to engage in joint negotiation for programming content and thus negatively affect the competitive state of that market; and that it will provide Verizon an undue advantage as wireless competitors negotiate with Comcast for WiFi data offloading contracts. These critics have failed either to identify any contractual provision that addresses these issues or to provide any evidence that confidential provisions of the agreements might implicate these concerns. The cable companies have an obvious incentive to provide backhaul services and WiFi offloading services to the highest bidders, and any kind of agreement among the cable companies with respect to programming would, with good reason, receive separate scrutiny from the FCC. In addition,

---

[26] Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 Ind. L.J. 345, 374-75 (2007) ("Unlike mergers, which eliminate all competition between the parties, joint ventures are formed to accomplish specific objectives, and they allow their partners to compete in areas outside the narrow scope of the venture. . . . Competitors, for example, often form joint ventures to develop or produce new products that they could not have developed on their own. If the purpose of the venture is to allow the partners to enter new markets from which they would have been individually foreclosed, the venture will not restrict competition in any manner.").

Comcast and Verizon have categorically stated that the agreements do not address these issues.[27] Critics appear to have introduced such concerns in an attempt to frame Verizon's straightforward collaborative agreement with the cable companies as an agreement to collude or an implicit merger. I am not aware of any evidence to support such accusations.

Conclusion

In considering the effect of this transaction on competition, it is important to remember that the purpose of our antitrust laws is to maximize consumer welfare, not protect competitors. Although antitrust law is by its very nature forward looking, unmoored speculation must not be allowed to overtake rational economic analysis. Government may sometimes have a proper role in ensuring that businesses compete fairly and do not collude. But it is improper for government agencies to pick winners and losers in the marketplace or to interfere with private enterprise where robust market forces are in operation.

Thank you for your attention to this matter.

Sincerely,

MIKE LEE
Ranking Member, Subcommittee on
Antitrust, Competition Policy and
Consumer Rights

[27] Cohen Responses to Sen. Herb Kohl, Response to Question 4 ("Nothing in the Commercial Agreements restricts our ability to sell (or gives incentive not to sell) backhaul at competitive rates to anyone who wants it. There are no exclusives with respect to backhaul arrangements."); *id.*, Response to Question 9 ("There are no provisions in the Commercial Agreements addressing Verizon Wireless' and the cable companies' acquisition of programming."); *id.*, Response to Question 11 ("There is nothing in these agreements that grants any rights to Verizon Wireless to offload its traffic onto Comcast's Wi-Fi network. . . . Any efforts we may undertake to reach commercial arrangements with wireless carriers in connection with Wi-Fi offloads would be independent of and unrelated to the spectrum assignment and the Commercial Agreements."); Milch Responses to Sen. Herb Kohl, Response to Question 16 ("None of the commercial agreements has provisions relating to the joint negotiation of programming or the acquisition of content.").