

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of	)	
Applications of Cellco Partnership c/b/a	)	
	)	
Verizon Wireless and SpectrumCo LLC	)	
For Consent to Assign Licenses	)	
	)	WT Docket No.12-4
Application of Cellco Partnership d/b/a	)	
Verizon Wireless and Cox TMI Wireless,	)	
LLC for consent to Assign Licenses	)	

**Comment of
The Consumer Federation of America**

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I. THE CONSUMER FEDERATION OF AMERICA

The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in the federation and govern it through their representatives on the organization's Board of Directors and the annual Consumer Assembly.

CFA was one of the first consumer groups to examine the impact of the Internet on consumers, concluding in a January 1990 paper that it would be a very consumer-friendly and citizen friendly space.¹ Since then, CFA has participated in virtually every major federal regulatory, legislative and judicial proceeding in the U.S. that would significantly impact the ability of the Internet and the digital revolution to promote the consumer interest and has advanced the consumer view in policy and academic publications.²

II. THE PURPOSE OF THE COMMENTS

The Commission recently established a new comment period in its consideration of the proposed spectrum license transfers and collaborative agreements between Verizon and the major cable companies³ to take comment on the proposed resale of spectrum assets that will be acquired

¹ Expanding the Information Age for the 1990s: A Pragmatic Consumer Analysis, January 11, 1990.

² Mark Cooper, "Structured Viral Communications: The Political Economy and Social Organization of Digital Disintermediation," Journal of Telecommunications and High Technology Law, 9 (2011); The Central Role of Wireless in the 21st Century Communications Ecology: Adapting Spectrum and Universal Service Policy to the New Reality," Telecommunications Policy Research Conference, September 2011; "Round #1 in the Digital Intellectual Property Wars: Economic Fundamentals, Not Piracy, Explain How Consumers and Artists Won in the Music Sector," Telecommunications Policy Research Conference, September 2008; "Governing the Spectrum Commons," September 2006. Telecommunications Policy Research Conference, October 2006; "Accessing the Knowledge Commons in the Digital Information Age," Consumer Policy Review, May/June 2006; "From Wifi to Wikis and Open Source: The Political Economy of Collaborative Production in the Digital Information Age," Journal on Telecommunications and High Technology Law, 5:1, 2006; "The Economics of Collaborative Production in the Spectrum Commons," IEEE Symposium on New Frontiers in Dynamic Spectrum Access Networks, November 2005; "Independent Noncommercial Television: Technological, Economic and Social Bases of A New Model of Video Production," Telecommunications Policy Research Conference, October 2005; "Hope And Hype Vs. Reality: The Role Of The Commercial Internet In Democratic Discourse And Prospects For Institutional Change," Telecommunication Policy Research Conference, September 21, 2003; "Inequality In The Digital Society: Why The Digital Divide Deserves All The Attention It Gets," Cardozo Arts and Entertainment Law Journal, 2002; "Open Access To The Broadband Internet: Technical And Economic Discrimination In Closed, Proprietary Networks," University of Colorado Law Review, Vol. 69, Fall 2000; "Antitrust As Consumer Protection In The New Economy: Lessons From The Microsoft Case, Hastings Law Journal, 52: 4, April 2001, first presented at Conference On Antitrust Law In The 21st Century Hastings Law School, February 10, 2000; "Evolving Concepts of Universal Service," The Federalist Society, October 18, 1996; "Delivering the Information Age Now," Telecom Infrastructure: 1993, Telecommunications Reports, 1993.

³ In the Matter of Applications of Cellco Partnership c/b/a Verizon Wireless and SpectrumCo LLC For Consent to Assign Licenses; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for consent to Assign Licenses, WT Docket No.12-4

by Verizon as part of the transaction.⁴ The FCC states that “such comments should focus on the impact of those newly field applications on the spectrum aggregation issues raised in the context of this docket, and not repeat arguments made earlier.”

These comments present a wholly new approach to the spectrum aggregation and related issues, a rigorous analysis that views the transaction through the lens of the comprehensive framework for assessing the impact of collaborations among competitors developed by the Department of Justice and the Federal Trade Commission. We have search the record thoroughly and find only fleeting references to the approach that these agencies have articulate and applied for decades. We also observe that empirical evidence is lacking in the record on market characteristics that are vital to the Commission’s evaluation of the impact the spectrum aggregation and related transactions.

Since promoting competition is one of the primary goals of the Communications Act and this well-articulated framework for evaluating the impact of collaborative agreement on competition is time tested, we have chosen to add it to the record here. The proposed spectrum sale from that is the that has caused the docket to be reopened seems like part of a “clean up” operation intended to address one of the potentially anticompetitive impacts of the transaction (the excessive concentration of spectrum in the hands of a dominant carrier) in some markets. This rigorous competition analysis shows that this transaction poses such a systemic threat to competition that these types of minor adjustments cannot come close to addressing the fundamental harm to competition.

The review of the impact of the proposed transaction on consumers and competition from an antitrust point of view serves as a more than adequate foundation on which the FCC review can stand as well. The FCC’s charge under the Communications Act is broader than DOJ charge under the Sherman Act in the sense that it is to promote the broad public interest, not only protect

⁴ DA 12-9898, June 26, 2012.

competition. The FCC is charged with affirmatively promoting, not just protecting and preserving it. Because communications plays such a vital role in society and the economy various advantages were afforded to firms in providing telecommunications, video and wireless services (such as exclusive franchises, monopoly licenses). In light of the history and structure of the industry, the Communications Act banned certain potentially anticompetitive transactions – like the joint venture proposed in these collaborative agreements. Because communication is so important the FCC is charged with pursuing policy goals beyond competition, policy goals that could be significantly impacted by the proposed collaborative agreement.

Because the joint venture has been intertwined with a transfer of spectrum, all of the agreements connected to the transaction are subject to the full public interest review. One might hypothesize that if the joint venture had not been coupled with the transfer of licenses there might have been a different kind of review, but it is clear that the FCC has the legal authority and obligation to review a transaction that can have such a profound impact on the communications and video services governed by the Communications Act.

The attached White Paper lays out the framework and presents the empirical analysis.

III. THE VERIZON-SPECTRUMCO. TRANSACTION RAISES SEVERE COMPETITIVE CONCERNS UNDER THE ANTITRUST LAWS AND FAILS THE PUBLIC INTEREST TEST OF THE COMMUNICATIONS ACT

Applying the framework for analyzing collaborative agreements in the *Antitrust Guidelines for Collaborations Among Competitors* and the *Horizontal Merger Guidelines* published by the Department of Justice (DOJ) and the Federal Trade Commission, these comments show that the proposed collaborative agreement between Verizon and the major cable operators (Spectrum Co. composed of Comcast, Time Warner cable and Brighthouse Cable, as well as Cox, hereafter Spectrum Co.) will dramatically lessen competition and is contrary to the public interest. As shown in Table S-1, the *Collaborations Among Competitors Guidelines* combined with the *Horizontal Merger Guidelines* identify a dozen types of factors that are used to evaluate a proposed collaborative agreement, spread between general market factors and collaborative agreement details.

TABLE SI-1: A DOZEN REASONS WHY ANTITRUST AND COMMUNICATIONS LAW REQUIRE THE DOJ AND THE FCC TO OPPOSE THE VERIZON-CABLE TV SPECTRUM SALE & COLLABORATIVE AGREEMENTS

	<u>General conditions that favor allowing</u>	<u>Characteristics of the Verizon-SpectrumCo agreements that dictate opposition</u>
<u>Market Structure Conditions</u>		
1. Market Structure	Unconcentrated	Highly concentrated (wireless), Very highly concentrated (Cable, Broadband)
2. Collaborator Market Shares	Small	Very large
3. Thresholds: Safety Zone	Safe Harbors: Market :20% combined share Research: 3 or more not in collaborative	Far outside safe harbor Cable 75%, Broadband 90%, Voice 90%, Wireless 35% Lack of competitors
4. Entry	Easy	Extremely difficult, compounded by sale of spectrum
<u>Collaborative Agreement Details</u>		
5. Actual/potential competition between collaborators	Little	Substantial head-to-head competition (video, broadband, WiFi, private line)
6. Impact on competition	Procompetitive Strengthens weak competitors	Replaces existing 3 rd party competition Strengthens dominant firms, concentrates spectrum holdings
7. Assets devoted to venture	Insignificant	Cross marketing crown Jewels (wireless, video)
8. Control of assets	Independent	Most Favored Nation clauses Exclusives, Sharing crown jewel assets
9. Duration	Short	Very Long
10. Incentives	Neutral	Reduced competitive intensity Mutual Retail Price Maintenance diminishes price competition Cross marketing of highly profitable Products Other restrictive conditions Strategic assets favor, collaborators, disadvantages 3 rd parties Back haul, private line, special access, data roaming Sharing super sensitive information
11. Facilitation of Collusion	No	
<u>Potential Mitigating Factors</u>		
12. Efficiency gains	Procompetitive, Cognizable Unique (transaction specific) Variable cost	Anticompetitive, Doubtful Less harmful alternatives available Fixed Cost

Sources: The market structural conditions are discussed in the attached white paper at pp. 18-19; The collaborative Agreement details are documented in comments filed In the Matter of Applications of Cellco Partnership c/b/a Verizon Wireless and SpectrumCo LLC For Consent to Assign Licenses; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for consent to Assign Licenses, WT Docket No.12-4, by the Communications Workers of America, the American Antitrust Institute, Spring, and the Computer and Communications Industry Association.

IV. Critical Product and Geographic Markets: Local, Digital Connectivity is Highly Concentrated

The market analysis starts with the definition of the products affected by the transaction and the geographic areas in which they are sold. Here the critical products are access services used to obtain broadband access, multichannel video, and wireline and wireless voice. The present and future of communications is digital. In important ways, all communications starts as local communications. In order to communicate with a neighbor or reach a national network, a consumer must have a local means of connecting to the larger network. The services most deeply

affected would be communications connectivity services, like connectivity for video, voice, broadband and wireless including “first mile” and “middle mile” connectivity. We refer to this as local digital connectivity.

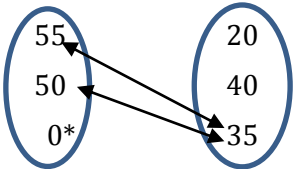
Entry into the market for local connectivity is extremely difficult and the incumbent cable and telecommunications companies who provide that service have maintained their dominant positions, in spite of the hope that the Telecommunications Act of 1996 would introduce competition into these markets.

In a large part of the U.S., Verizon and the collaborating cable companies are the number one and number two dominant providers of local digital connectivity. In areas where their franchise service territories overlap, their combined market share is above 75% (see Table III-2). Even at the national level, the collaborators’ market shares are well beyond the safety zone. Even where they do not overlap, Verizon (through its wireless service) and the cable companies are likely to both be in the top three local connectivity suppliers.

The high level of concentration in the markets for local digital connectivity makes any transaction between these parties a source of great concern. That they have been actual competitors in video and broadband connectivity and could be in wireless is a major competitive losses associated with the transaction. The collaborative agreement between actual and potential competitors magnifies that concern because the parties are contracting to become the marketing agents for the competitive crown jewel products on which they have built their dominant market positions. By doing so, each of the parties gives up the best source of leverage that it possesses in their rivalry with one of the biggest competitors.

TABLE III-2: MARKET SHARES OF COLLABORATING ENTITIES LOCAL DIGITAL CONNECTIVITY PROVIDERS

	Cable	Verizon*	Transaction Shares	Zone of Safety
National				
Video	41	6	47	20
Broadband	32	9	41	20
Wireless	**	34	34**	
In Region				
Video	55	20	75	20
Broadband	50	40	90	20
Wireless	0*	35	35+	20



Sources and Notes: Author estimates based on national trends in Federal Communications Commission reports on, High Speed Internet and Wireless applied to local market shares data in International Strategy and Investment Group, *Media and Cable*, October 24, 2011, Yankee Group, ATT-T-Mobile Merger: More Market Concentration, Less choice, Higher Prices, August 2011.

* Verizon market shares of video and broadband are higher in FIOS areas and lower in non-FIOS areas, but the cable shares would be the obverse, suggesting that the market shares impacted by the transaction shares would be about the same.

**To the extent cable has joint marketing agreement with non-Verizon wireless providers it can be considered to have some market share. The likely termination of those agreement and/or neglect of marketing those agreement that would likely result from the collaboration constitutes competitive harm of the collaborative agreement.

V. Review of Past Oversight Over Collaborative Agreements

Reviewing both the antitrust Guides and actual reviews of proposed collaboration agreements, we find a clear road map to distinguishing between those agreements that are procompetitive and in the public interest and those that are not. Particularly informative is the different conclusions that were reach in the Google-Yahoo/Microsoft transactions. There are others as well, including the FCC's ATT/BT analysis.

Harm to markets:

- Mark Leaders are important, agreement between lesser market participants against a common competitor less problematic than collaborative agreement that includes the market leader, More effective competitors:
- Immediate effect on competition: Collaborators vs. Competitors – the making of *less* effective competitors:
- Innovation already taking place: Decreased Innovation/Investment:

Misaligned Incentives:

- Incentive to harm third party competitors of the collaborators, thereby reducing market-wide innovation and investment:

- Harm to Third Party Competitors: Harm to disruptive Technology/innovation/alternative markets:
- Raising Rivals Costs:
- Collusion between the partners

Harm to consumers:

- Higher Prices:
- Limited Choices:

Collaborative agreements are unlikely to raise competitive concerns when:

- the markets into which the fruits of the collaboration are sold are unconcentrated; the collaborators are small; entry is easy; and the collaboration introduces a new competitor or strengthens weak competitors;
- the agreements are short; preserve independent control of assets and are structured in a way to not diminish the incentive to compete;
- or, when they do raise competitive concerns, these might be offset by procompetitive, unique cognizable efficiency gains based on variable cost savings.

In every way, the Verizon collaborative agreement possesses characteristics that raise serious concerns about harm to competition.

- The markets into which the fruits of the collaboration are sold are highly or very highly concentrated and the collaborators are large.
- The market shares of the collaborators are way beyond the safe harbors defined by the *Collaboration Guidelines* – two to four times higher.
- Entry is extremely difficult in each of these markets.

Collaboration between dominant firms in highly concentrated markets where entry is extremely difficult sets off the antitrust alarm bells, particularly where the collaborators are were actual and potential competitors. Any lessening of competition in such a market is a major competitive concern.

This collaborative agreement is likely to reduce competition in a number of significant ways.

- The collaborators compete head-to-head in a number of markets including video, broadband access service, Wi-Fi and private line.

- Some collaborators provide consumer services to third parties who compete with other collaborators.
- Their incentive to compete is diminished by cross marketing of crown jewel products.
- Important assets that are needed by non-collaborators can be used by collaborators to gain a competitive advantage.

The details of the collaborative agreements and their structure not only fail to mitigate these threats to competition, they exacerbate them. The agreements are long lived and appear to have a number of provisions that promote anticompetitive behavior.

The claim that there are efficiencies that can balance the competitive harms are speculative and could be achieved in other ways that would do less damage to the fabric of the industry.

Given the clear guidance from the antitrust authorities and the past practices of the Department of Justice, we believe this is a case it could easily win if it went to court to block the collaborative agreement.

VI. CONCLUSION

The proposed sale of Comcast spectrum to Verizon and the collaborative agreement between Verizon and the major cable companies mark the end of the competitive promise of the 1996 Act. The last two competitors standing, cable companies and telecommunications service providers, with any hope of building a serious competitive challenge by offering a bundle of services anchored in a product in which it has a clear advantage, have decided to collaborate, rather than compete.

After a decade and a half of failing to prevent the demise of competition by narrowly focusing on the individual impact of each merger and allowing the failure of competition to be an excuse for allowing mergers, it is difficult for those with antitrust and Communications Act responsibility to admit that competition policy has failed and to take the action necessary to address the problem. We believe that this case provides an ideal opportunity to do so for several reasons

- It represents the first time that dominant, cable and telecom companies who have been involved in head-to-head competition have proposed to collaborate and exchange assets.
- The claim that jointly marketing each other's marquee service and jointly developing and sharing new functionalities or services will not diminish the competitive intensity of these markets is absurd. The advantage that the joint efforts will confer on the dominant incumbents will certainly place the remaining independent competitors at a disadvantage.
- The harm to competition is most severe in those areas that the joint venturers both call home, but the impact of the joint venture will be felt everywhere because essential assets that are necessary for competition have been removed from the marketplace.

Creating a joint venture wireless-cable bundle excuses cable from entering wireless and creates an advantage for both cable and Verizon that is difficult if not impossible to match for firms that are not party to the joint venture.