

**TESTIMONY OF  
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**BEFORE THE  
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 CONSUMERS?”**

**MARCH 21, 2012**

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify today. I welcome the opportunity to discuss the intensely competitive marketplace for communications and media services and how SpectrumCo, LLC’s (“SpectrumCo”) proposed sale of spectrum to Verizon Wireless and the commercial agreements entered into between Verizon Wireless and Comcast, Bright House Networks, LLC, Cox Communications, Inc., and Time Warner Cable Inc. (collectively, the “Cable Companies”) will promote competition, bring more convenience and choice to consumers, increase investment, and drive innovation in next-generation technologies.

At the outset, it is important to recognize that the video, high-speed Internet, and telephone marketplace in which Comcast operates and the wireless marketplace in which Verizon Wireless operates are intensely competitive. American consumers enjoy access to a greater abundance and diversity of video programming, delivered in more ways, on more devices, by more competitors, than at any point in history. The story of broadband competition is one of dramatic increases in capacity and speeds, coupled with consistently declining prices per megabit of service. And, for the first time in history, the cable industry offers a meaningful facilities-based alternative to historical incumbents in providing wireline voice service. The same is true of competition in the wireless business: consumers have an abundance of options for obtaining wireless services and devices, and their appetite for broadband mobility is accelerating rapidly.

Nothing about these transactions will reduce this robust competition in any way. The spectrum sale is just that – an assignment of licenses only (the “License Assignment”). It involves no transfer of customers, assets, or operating businesses. And, the series of commercial agreements the parties have entered into (collectively, the “Commercial Agreements”) are the same sorts of agreements that have stimulated competition and innovation in the marketplace for decades: reseller agreements that allow the Cable Companies to elect to sell individually-branded wireless services using the Verizon Wireless network (the “Reseller Agreements”); a research and development (“R&D”)

joint venture agreement to develop innovative new technologies (the “Innovation Technology Joint Venture Agreement”); and, finally, agency agreements that authorize the companies to act as sales agents for each others’ services (the “Agency Agreements”). All the companies that previously provided voice, video, broadband, and wireless services will continue to do so. These transactions will only increase consumers’ options, not limit them, and will allow us to answer consumers’ calls for “anytime, anywhere” communications by bringing amazing new devices and services into a marketplace already crowded with innovators. The simple fact is that these transactions are entirely additive for consumers – more choice, more competition, more investment, and more innovation.

I want to make three main points about the License Assignment and Commercial Agreements.

First, the proposed License Assignment will benefit consumers and further the spectrum policy goals of Congress, the Administration, and the National Broadband Plan. The President has recognized that our country’s “new era in global technology leadership will only happen if there is adequate spectrum available to support the forthcoming myriad of wireless devices.”<sup>1</sup> Approval of the sale is the best and quickest way to put spectrum not currently being used to provide services to consumers in the hands of a company that will use it to meet consumers’ rapidly escalating demand for broadband mobility.

Second, the Commercial Agreements will provide short- and long-term benefits to consumers. They give the Cable Companies a path to quickly and efficiently offer wireless services in competition with the multiproduct bundles being offered by AT&T, DIRECTV, and other competitors. These bundles provide consumers with more choice and convenience and increased competition. They also enable Verizon Wireless to offer its customers new options for subscribing to wired video, voice, and high-speed Internet services. And, through the technology joint venture, the companies expect to develop technologies that offer seamless connectivity and enhanced features and services across multiple platforms. By enhancing the Cable Companies’ and Verizon Wireless’s own products and services, the Joint Venture will compete with similar solutions that AT&T, Dish Network, Google, Apple, Microsoft, and others already have introduced into the marketplace. This, in turn, will spur other companies to respond, perpetuating a cycle of competitive investment and innovation.

Third, the License Assignment and Commercial Agreements are consistent with the Communications Act, FCC rules, and the antitrust laws, and will promote the Subcommittee’s competition policies as well. What should not be lost in all the rhetoric is the fact that neither the License Assignment nor the Commercial Agreements will reduce or harm competition in any product or geographic market. Contrary to the claims of certain parties, the License Assignment and Commercial Agreements will not reduce Verizon Telecom’s or the Cable Companies’ incentives to compete vigorously against

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<sup>1</sup> President Barack Obama, *Unleashing the Wireless Broadband Revolution* (June 28, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

each other, will not facilitate collusion, and will not otherwise blunt or impede competition. The harms that have been alleged are hypothetical and speculative, and opponents of the transactions – several of which are competitors that simply fear increased competition – ignore the benefits the transactions will bring to consumers. Similarly, criticisms that without these agreements, the Cable Companies would build a wireless network and Verizon would further expand its FiOS footprint beyond its current plans ignore the reality that the companies involved here made the decisions not to do so well before this transaction. The antitrust laws are not designed to force companies with fiduciary obligations to their shareholders to undertake business decisions that they have concluded do not make sound business sense.

## **I. THE LICENSE ASSIGNMENT IS AN EFFICIENT WAY TO TRANSFER SPECTRUM TO A COMPANY THAT WILL USE IT TO PROVIDE SERVICES TO CONSUMERS.**

For many years, Comcast has believed that it needed a comprehensive wireless strategy. In 2005, the Cable Companies partnered with Sprint Nextel to form Pivot Wireless, a \$200 million joint venture to develop a wireless strategy for delivering advanced wireless services to the companies' customers.<sup>2</sup> The following year, the joint venture partners created SpectrumCo in order "to obtain greater flexibility in developing options for more advanced wireless services," including exploring the possibility of building new networks.<sup>3</sup> As has been the case with many business plans, however, subsequent developments in the marketplace significantly altered the technological and economic landscape. Like everyone else, SpectrumCo has had to adapt to this new marketplace.

### **A. SpectrumCo's Wireless Strategy.**

For nearly two decades, the concept of technological "convergence" has held out promise that traditional single-service networks – such as the telephone and cable networks – could be upgraded and re-engineered to deliver multiple communications services to residential customers. With convergence, providers could offer consumers a one-stop-shop for discounted bundles of video, voice, and Internet services, and the convenience of one integrated bill. Convergence and its benefits, however, would not happen overnight.

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<sup>2</sup> Press Release, Comcast Corp., *Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture* (Nov. 2, 2005).

<sup>3</sup> Press Release, Comcast Corp., *Cable Consortium Acquires Spectrum Licenses Covering National Footprint* (Oct. 5, 2006). The original SpectrumCo partners included Comcast, Time Warner Cable Inc., Cox Communications, Inc., Bright House Networks, LLC, and Sprint Nextel Corporation. In 2007, Sprint withdrew from SpectrumCo, and the SpectrumCo members purchased Sprint's interest for an amount equal to Sprint's capital contribution to the joint venture. In 2009, Cox withdrew from SpectrumCo, taking with it the share of AWS spectrum to which it was entitled under the SpectrumCo LLC agreement. Today, SpectrumCo is owned by Comcast (63.6 percent), Time Warner Cable (31.2 percent), and Bright House (5.3 percent).

Cable companies played a leading role in driving convergence when we were the first to deploy a reasonably-priced residential broadband Internet service back in 1996.<sup>4</sup> Since then, cable companies invested more than \$185 billion to upgrade their networks to offer consumers broadband Internet service along with a host of other advanced services, such as high-definition television, video-on-demand, digital video recorders, and a residential voice-over-IP telephone service.<sup>5</sup> Cable companies made these investments despite the high risks associated with the venture and negative predictions about the cable companies' success espoused by industry leaders, market analysts, and technology experts.<sup>6</sup> In the late 1990s, cable operators began to offer discounted "double play" bundles of video and broadband Internet services, and in the early 2000s, we began to offer discounted "triple play" bundles of video, Internet, and wireline voice services in certain markets.<sup>7</sup>

Not wanting to be left behind, the telephone companies began to deploy their own broadband Internet offerings bundled with their traditional voice services. Satellite providers, working with the telephone companies through agency agreements – the very same types of agency agreements the Cable Companies have entered into with Verizon Wireless – followed with their own bundles of video, voice, and broadband Internet service.<sup>8</sup> In 2004, telephone companies and satellite video providers, began offering

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<sup>4</sup> In the mid-1990s, dial-up was the primary means by which consumers could access the Internet. Although ISDN and T-1 services were potential alternatives at the time, they were far too costly to be a realistic option for most consumers. See Intelligent Network News, *Citizens Group Breaks ISDN Catch*, Apr. 15, 1992, available at LEXIS, News Library (noting that, in addition to service fees, "subscribers will have to shell out between \$500 and \$1,000 for the ISDN board that will go into their personal computers"); FCC, Cable Servs. Bureau, *Broadband Today: A Staff Report to William E Kennard, Chairman, Federal Communications Commission, on Industry Monitoring Sessions Convened by the Cable Services Bureau* 27 & n.73 (Oct. 13, 1999), available at <http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf> ("With a price range of \$300 to \$3000 per month, the T1 business generated high profit margins for the telephone companies. Since the price point of DSL was lower, ranging from \$50 to \$1000 per month (depending on the type of DSL), the deployment of DSL service would undercut the T1 business.").

<sup>5</sup> See National Cable & Telecomm. Ass'n, *Cable Industry Capital Expenditures 1996-2011*, <http://www.ncta.com/Stats/InfrastructureExpense.aspx> (last visited Feb. 27, 2012). As a result of this significant investment, millions of consumers have access to affordable residential broadband service.

<sup>6</sup> See, e.g., Brahm Eiley, *Can Cable Companies Afford to Believe Their Own Internet Hype?*, Digital Media, May 31, 1996, available at LEXIS, News Library ("The facts at hand would seem to indicate that it's not possible to recoup the investment, much less make money on cable-based two-way Internet access. . . . Right now, it appears as if cable companies may run out of money before they hit the Internet jackpot.").

<sup>7</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 1605 ¶ 49 (2001) ("Virtually all the major MSOs offer Internet access via cable modems in portions of their nationwide service areas."); *id.* ¶ 55 ("MSOs, such as Cox and AT&T, continue to deploy circuit-switched cable telephony. Others, like Cablevision and Comcast, are offering cable telephony on a limited basis, waiting instead for IP technology to become widely available before accelerating rollout of telephone services to customers."). Not until the widespread deployment of cable digital voice service in 2005 and 2006 were cable companies able to replicate competitors' triple-play bundle of video, Internet, and wireline voice in most markets.

<sup>8</sup> See *id.* ¶¶ 77-79, 121 (highlighting DBS broadband Internet services and noting that telephone companies were marketing DBS video services); see also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 118

“quadruple-play” packages of video, Internet, residential voice, and wireless services by entering into joint-marketing agreements to sell each others’ services in a discounted bundle.<sup>9</sup> At the time, the Cable Companies had not developed a strategy for how we could compete in a marketplace where consumers might want bundled options that included wireless services. The Cable Companies’ joint venture with Sprint was created to explore how we could change that.<sup>10</sup>

The hope was that the joint venture would enable Comcast and its partners to “offer consumers access to the expanded four element bundle . . . or any combination of services including video, wireless voice and data services, high-speed Internet and cable phone service” and develop and offer new services “to customers through a combination of 1,600 Sprint retail stores, cable retail outlets and other third-party distributors.”<sup>11</sup> Although the joint venture originally contemplated that these services would be delivered using Sprint’s network, the FCC’s AWS auction offered the opportunity to explore the use of this spectrum as a means to provide wireless services and, thus, SpectrumCo was created.

In September 2006, SpectrumCo was the successful bidder for 137 Advanced Wireless Services (“AWS”) licenses, 122 of which it holds today and 30 (because the licenses were partitioned) of which Cox holds. SpectrumCo purchased the AWS licenses as a first step in developing the capability to provide its owners’ customers with new and advanced wireless services. The scale, type, and business cases for such services were not yet determined at the time of the auction. SpectrumCo did not acquire the licenses with the goal of simply launching the company into a capital-intensive and competitive marketplace without a sound business plan, and it proceeded over the next several years to develop and explore potential uses of the spectrum, including:

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(2004) (“BellSouth, SBC, and Qwest have all recently announced agreements to sell DBS service as part of a telecommunications bundle.”).

<sup>9</sup> See, e.g., *SBC Communications Adds New “Dish” to the Menu, Launches “Quadruple Play” Bundle with Satellite TV*, Business Wire, Mar. 3, 2004, available at [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2004\\_March\\_3/ai\\_113829987/](http://findarticles.com/p/articles/mi_m0EIN/is_2004_March_3/ai_113829987/).

<sup>10</sup> Press Release, Comcast Corp., *supra* note 2.

<sup>11</sup> *Id.*

- ***Clearing Incumbent Microwave Links from the AWS Spectrum.*** SpectrumCo identified more than 500 incumbent microwave links that would need to be cleared in order to deploy services using the spectrum.<sup>12</sup> SpectrumCo spent more than \$20 million to clear or confirm the clearance of these microwave links.<sup>13</sup>
- ***Testing 4G Technologies and Equipment for Use with the AWS Spectrum.*** At the time of the AWS auction, there was no AWS equipment available to auction winners. Between 2007 and 2009, SpectrumCo created and operated an AWS 4G technology test bed in King of Prussia, Pennsylvania to evaluate the three leading 4G technology candidates at that time: WiMAX, Ultra Mobile Broadband, and Long Term Evolution (“LTE”).<sup>14</sup> SpectrumCo subjected each 4G technology to a set of live, operational tests that included installing transmission equipment at several outdoor cell sites and testing prototype handsets with each 4G technology at three fixed locations and on a 12-mile drive route.<sup>15</sup> After the King of Prussia tests, SpectrumCo collaborated with Nortel on LTE testing in the AWS band and obtained performance data from the multi-site LTE system at Nortel’s Ottawa, Canada research and development facility. The Nortel data reinforced SpectrumCo’s conclusion that LTE was the optimal technology for use in the AWS band.<sup>16</sup>
- ***Facilitating the Testing of Equipment for Use with the AWS Spectrum.*** SpectrumCo also leased spectrum to original equipment manufacturers, including

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<sup>12</sup> See Verizon Wireless-SpectrumCo Application Form 603, WT Docket No. 12-4, Ex. 4 ¶ 3 (Dec. 16, 2011) (Declaration of Robert Pick) (“Pick Decl.”), available at <http://transition.fcc.gov/transaction/verizonwireless-spectrumcocox.html>; see also *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report & Order, 18 FCC Rcd. 25,162 ¶ 70 (2003). The Commission established an initial license term of 15 years for licensees in the AWS-1 band, agreeing with commenters that argued that the need to clear the band and relocate incumbents warranted a longer-than-usual initial license term:

AT&T Wireless, Cingular, CTIA, Ericsson, RCA, and Verizon Wireless argue that given the relocation and band clearance issues associated with these bands, it makes sense to adjust our usual ten-year license term. We agree with these commenters that the circumstances surrounding the future development and deployment of services in these bands warrant an initial license term longer than 10 years in order to encourage the investment necessary to develop these bands.

*Id.*; see also Letter from James A. Assey, Executive Vice President, NCTA, to The Honorable Jay Rockefeller, et al. (Mar. 3, 2011) (“With respect to the AWS spectrum held by several cable companies, it is well-understood that it will take years to clear that spectrum of incumbent licensees and build out an advanced broadband wireless network.”).

<sup>13</sup> See Pick Decl. ¶ 3.

<sup>14</sup> Leading wireless equipment manufacturers, including Alcatel Lucent, Qualcomm, and Huawei participated with SpectrumCo in the King of Prussia tests.

<sup>15</sup> See Pick Decl. ¶ 5.

<sup>16</sup> See *id.* ¶ 8.

Qualcomm, Nokia, and Samsung, to test devices for use in the AWS band.<sup>17</sup> These leasing activities further facilitated the development of the AWS spectrum.

- ***Exploring Alternative Scenarios for Use of the AWS Spectrum.*** Even while these technical efforts were underway, SpectrumCo investigated alternative ways that its owners might use the AWS spectrum to provide their customers with advanced wireless services. For example, SpectrumCo entered into business arrangements with two nationwide wireless companies, Sprint and Clearwire; for a variety of reasons, those arrangements ultimately were not successful. SpectrumCo also considered other acquisitions, joint ventures, and network sharing arrangements with other wireless companies,<sup>18</sup> but concluded, for a variety of reasons, that each had significant limitations and would not provide a comprehensive and viable long-term wireless solution.

SpectrumCo expended substantial resources investigating these options and “did everything a reasonably diligent new entrant AWS licensee might be expected to do within the first third of its license term and took meaningful steps to develop, use, and identify long-term business plans for the spectrum.”<sup>19</sup> SpectrumCo concluded that the costs and risks of building a wireless network were substantial and had increased greatly since it had acquired the licenses; depending upon how such a network was deployed, the cost would be at least \$10-11 billion with a very uncertain business outcome.<sup>20</sup>

SpectrumCo also concluded that, although 20 MHz of AWS spectrum might be sufficient to initially deploy a wireless network, if it were successful in attracting a significant number of customers, it ultimately would have to incur further costs to acquire additional spectrum to serve those customers and meet their increasing demand for mobile services.<sup>21</sup> Since SpectrumCo acquired the AWS spectrum, consumer demand for wireless broadband services has exploded. In June 2007, just seven months after SpectrumCo acquired the AWS licenses, the first iPhone became available to consumers,

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<sup>17</sup> See *id.* ¶ 9.

<sup>18</sup> See *id.* ¶ 16.

<sup>19</sup> See Verizon Wireless, et al. Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, Ex. 3, at 17 ¶ 35 (Mar. 2, 2012) (Declaration of David E. Borth) (“Borth Decl.”).

<sup>20</sup> See Pick Decl. ¶ 11.

<sup>21</sup> See Verizon Wireless-SpectrumCo Application Form 603, WT Docket No. 12-4, Ex. 1, at 21-22 (Dec. 16, 2011) (“Public Interest Statement”), available at <http://transition.fcc.gov/transaction/verizonwireless-spectrumcocox.html>; see also Pick Decl. ¶ 12 (“SpectrumCo recognized that consumers’ appetite for data rich and spectrum intensive services is growing rapidly and believed that this dynamic would continue for the foreseeable future.”); Borth Decl. at 24 ¶ 48 (“SpectrumCo reasonably determined that 20 MHz of AWS spectrum was not enough to fulfill the long-term business plans of its owners . . .”). As the FCC has acknowledged, other industry players have reached the same conclusion: “operators, regulators and others have attempted to forecast the amount of spectrum that will be needed. Given current trends and future uncertainty, virtually all the major players in the wireless industry have stated on the record that more spectrum is needed. Estimates range from 40 to 150 megahertz *per operator*.” FCC, *Connecting America: The National Broadband Plan* 84 (2010) (“National Broadband Plan”) (citations omitted; emphasis in original), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

with the iPad following in 2010.<sup>22</sup> The first Android-powered phone became commercially available in late 2008.<sup>23</sup> As the President’s Council of Economic Advisors reported just last month, “Thanks to the proliferation of mobile devices with wireless internet access, along with the growth of media-rich consumer applications, the volume of data traffic traveling over the wireless networks has been exploding.”<sup>24</sup> And this growth is expected to increase significantly more in the years to come.<sup>25</sup> In short, “[t]he surge in wireless data traffic has caused a ‘spectrum crunch’” that all wireless providers, regardless of their current spectrum assets, are experiencing.<sup>26</sup>

Moreover, as wireless broadband usage has expanded, speed has become an increasingly important end-user consideration, as well as a differentiator among wireless competitors, as is reflected in the frequent advertising touting mobile providers’ speeds.<sup>27</sup> As one analyst recently noted about the release of the new 4G-equipped iPad, “This is the device people want. They want the fastest speed.”<sup>28</sup> Speed and spectrum capacity are directly related, and high-speed services demand substantial bandwidth. To meet this increasing demand, SpectrumCo would have had to acquire significantly more spectrum – and incur substantial costs to provision and build the network.<sup>29</sup> Acquiring more spectrum, however, would have increased the cost of deploying the service; but just as importantly, it was unclear when additional spectrum licenses would be available.<sup>30</sup>

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<sup>22</sup> See Press Release, Apple, *iPhone Premieres This Friday Night at Apple Retail Stores* (June 28, 2007), available at <http://www.apple.com/pr/library/2007/06/28iPhone-Premieres-This-Friday-Night-at-Apple-Retail-Stores.html>; Press Release, Apple, *Apple Launches iPad* (Jan. 27, 2010), available at <http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html>.

<sup>23</sup> See Google, *The First Android-Powered Phone* (Sept. 23, 2008), <http://googleblog.blogspot.com/2008/09/first-android-powered-phone.html>.

<sup>24</sup> Council of Economic Advisers, Executive Office of the President, *The Economic Benefits of New Spectrum for Wireless Broadband 1* (Feb. 2012) (“*President’s Council of Economic Advisers Report*”), available at [http://www.whitehouse.gov/sites/default/files/cea\\_spectrum\\_report\\_2-21-2012.pdf](http://www.whitehouse.gov/sites/default/files/cea_spectrum_report_2-21-2012.pdf). In fact, the “number of mobile wireless connections in the U.S. (with speeds over 200 kilobits per second) grew by over 160% from the end of 2008 through June 2010, while the average data used per line increased almost fivefold from the first quarter of 2009 through the second quarter of 2010.” *Id.* at 3.

<sup>25</sup> See *National Broadband Plan* at 85 (“As smartphones, laptops, and other devices become increasingly integral to consumers’ mobile experiences, mobile data demand is expected to grow between 25 and 50 times current levels within 5 years.”). “Cisco projects that mobile data traffic in the U.S. will increase by a factor of 20 between 2010 and 2015.” *President’s Council of Economic Advisers Report* at 5.

<sup>26</sup> *President’s Council of Economic Advisers Report* Executive Summary.

<sup>27</sup> High-speed network access is critical for applications that require high responsiveness, like two-way video communications.

<sup>28</sup> Poornima Gupta & Sinead Carew, *Apple’s Next iPad May be a 4G Game Changer*, Reuters, Mar. 6, 2012, available at <http://www.reuters.com/article/2012/03/07/us-apple-ipad-idUSTRE8250WJ20120307> (quoting UBS analyst John Hodulik).

<sup>29</sup> See Borth Decl. ¶¶ 37-47.

<sup>30</sup> Historically, it has taken the FCC 6-13 years to make new spectrum available. Omnibus Broadband Initiative, FCC, *Mobile Broadband: The Benefits of Additional Spectrum*, FCC Staff Technical Paper No. 6, at 26 (Oct. 2010), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1021/DOC-302324A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1021/DOC-302324A1.pdf); see also *National Broadband Plan* at 79 & Exhibit 5-C.

In the end, 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-based competitor in the highly competitive wireless marketplace did not make business sense and could not be justified.<sup>31</sup> Accordingly, SpectrumCo explored other options with almost every participant in the wireless industry, including the sale of the spectrum to other companies and acquisitions, joint ventures, and network sharing arrangements with other wireless companies. Ultimately, SpectrumCo was not able to reach agreements or find solutions – sometimes because SpectrumCo decided not to pursue the transaction, and other times because the other party decided not to pursue it – that made as much sense as selling the spectrum to Verizon Wireless.<sup>32</sup>

### **B. SpectrumCo’s Decision to Sell the AWS Spectrum to Verizon Wireless.**

After many months of negotiations, on December 16, 2011, Verizon Wireless and the Cable Companies filed with the FCC applications to assign the SpectrumCo AWS licenses to Verizon Wireless.<sup>33</sup> The applications included a detailed Public Interest Statement and declarations explaining the specifics of the transaction and why approval would benefit consumers, enhance competition, and promote the public interest. The FCC put the applications on public notice on January 19, 2012, and set a pleading cycle for petitions to deny, oppositions, and replies that (as recently extended) will be completed on March 26, 2012. Although there were a number of comments and petitions to deny filed in response, none of the parties opposing the assignment of the licenses offered a convincing or rational reason, let alone any evidence, why the applications should be denied. In addition to filing the applications at the FCC, Verizon Wireless and the Cable Companies submitted the License Assignment and the Commercial Agreements to the DoJ for it to review.<sup>34</sup> The companies subsequently submitted the Commercial Agreements to the FCC for review in the license assignment proceeding as well, subject to protective orders to protect confidential commercial information. The License Assignment and Commercial Agreements, therefore, are being thoroughly reviewed by the responsible agencies.

Selling the AWS licenses to Verizon Wireless is the most efficient and expeditious way to put the spectrum to use for the benefit of consumers. Verizon Wireless is rapidly deploying the first national 4G LTE wireless network. Yet, despite the spectral

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<sup>31</sup> See Pick Decl. ¶¶ 11-15. Cox actually constructed a facilities-based network in two markets, but decommissioned its network after it became clear that it would be unable to deploy its services “without sustaining unacceptably large losses.” Verizon Wireless, et al. Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, Ex. 6, at 13 (Mar. 2, 2012) (“Commercial Agreements Addendum”).

<sup>32</sup> See Pick Decl. ¶ 16.

<sup>33</sup> Verizon Wireless and Cox Communications filed the application to assign Cox’s licenses on December 21, 2011.

<sup>34</sup> The parties have filed and produced hundreds of thousands of documents with the DoJ and have had cooperative discussions with the DoJ economists and staff to explain the pro-competitive and pro-consumer effects of the Commercial Agreements.

efficiencies and enhanced throughput provided by 4G LTE technology, accelerating demand for wireless broadband services will outpace the company's available spectrum capacity. The AWS spectrum will allow Verizon Wireless to supplement the spectrum it currently uses to provide 4G LTE service, and by doing so will alleviate spectrum constraints that otherwise could affect service; Verizon Wireless predicts that service could be affected in some areas as early as 2013 and in many others by 2015.<sup>35</sup>

The License Assignment will promote the government's objective of putting more spectrum to use delivering wireless broadband. As the President and other policymakers have explained, "[e]xpanded wireless broadband access will trigger the creation of innovative new businesses, provide cost-effective connections in rural areas, increase productivity, improve public safety, and allow for the development of mobile telemedicine, telework, distance learning, and other new applications that will transform American lives."<sup>36</sup> "[I]f wireless data traffic is constrained by shortages of available spectrum, the potential for wireless broadband to generate substantial economic benefits by serving as a platform for innovation will be severely limited."<sup>37</sup>

The FCC has recognized that the most efficient way to put more spectrum to use delivering wireless broadband is to "permit spectrum to flow more freely among users and uses in response to economic demand."<sup>38</sup> Verizon Wireless is in a position where it can make efficient and effective use of the AWS spectrum in the very near future, whereas the Cable Companies are not in the same position and cannot make a business case for using the spectrum to build a new wireless network. The assignment of the licenses will ensure that Verizon Wireless will continue to offer innovative, fast, and high-capacity data and voice services – services that are very highly valued and increasingly demanded by consumers. And, as explained in detail below, selling the AWS licenses to Verizon Wireless to efficiently deploy services to consumers does not raise any competitive concerns.<sup>39</sup>

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<sup>35</sup> Verizon Wireless, et al. Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, Ex. 2 ¶ 3 (Mar. 2, 2012).

<sup>36</sup> President Barack Obama, *Unleashing the Wireless Broadband Revolution* (June 28, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>; see *President's Council of Economic Advisors Report* at 7 ("With access to sufficient spectrum, wireless broadband has the potential to transform many different areas of the American economy, as new wireless technologies give new capabilities to consumers, businesses, and the public sector."); *id.* at Executive Summary ("Like other information and communication technologies that have transformed the economy in the past, the spread of wireless broadband is likely to increase the rate of growth in per capita income; spur economic activity through new business investment; and support many new high-quality jobs.").

<sup>37</sup> *President's Council of Economic Advisors Report* at 7.

<sup>38</sup> *Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd. 11322 ¶ 33 n.27 (2009); see also *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report & Order, Order on Reconsideration, & Second FNPRM, 19 FCC Rcd. 17503, 17505 ¶ 1 (Sept. 2, 2004); Public Interest Statement at 16-19.

<sup>39</sup> See *infra* Section III.B.; see also Public Interest Statement at 19-33.

At the same time, the Cable Companies' need for a wireless solution remained a priority so that we could compete and deliver the services our customers wanted. As described in the next section, we have found that solution in the form of a series of Commercial Agreements with Verizon Wireless that will produce significant benefits for consumers without diminishing competition.

## **II. THE COMMERCIAL AGREEMENTS WILL BENEFIT CONSUMERS, PROMOTE COMPETITION, AND ACCELERATE INNOVATION IN THE BROADBAND MARKETPLACE.**

The Reseller Agreements provided the Cable Companies with a long-term wireless strategy for developing and marketing their own branded wireless services, one that may provide more flexibility and potential upside for the Cable Companies, consumers, and competition. The Innovation Technology Joint Venture Agreement offered the opportunity to combine the wired expertise of the Cable Companies with the wireless expertise of Verizon Wireless to research and develop technology and intellectual property that would integrate wired video, voice, and high-speed data services with wireless technologies and would compete with integrated marketplace solutions being offered by others. Finally, the Agency Agreements gave the Cable Companies a short-term solution that provides them a path to quickly and efficiently offer wireless services and to compete with other marketplace providers' multiproduct bundles. These Commercial Agreements will benefit consumers and competition and lead to expanded choice; improved quality; technological innovation and integration; and increased efficiency for consumers.<sup>40</sup>

### **A. The Commercial Agreements Offer Significant Consumer Benefits.**

#### **1. The Reseller Agreements**

The Reseller Agreements allow the Cable Companies to elect, beginning in 2016, to sell individually-branded wireless services using the Verizon Wireless network, marketed at prices and in packages determined by each Cable Company. Customers who purchase these services would be the customers of the Cable Company that sold them the services and not Verizon Wireless. These types of agreements, called Mobile Virtual Network Operator ("MVNO") agreements, enable companies that do not have their own wireless networks to develop and market their own branded wireless service offerings to attract customers and are common in the industry (at last count, there were over 50 according to the FCC).<sup>41</sup>

For example, in exchange for a per unit fee (e.g., per minute of use or gigabyte of use), the Reseller Agreements would allow Comcast to combine its existing infrastructure,

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<sup>40</sup> See Commercial Agreements Addendum at 1-4, 16-19.

<sup>41</sup> *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*, Fifteenth Report, 26 FCC Rcd. 9664, app. C, Table C-6 (2011) ("*Fifteenth Wireless Report*").

cutting-edge intellectual property and technology, branding and marketing expertise, and back-office support with Verizon Wireless's sophisticated, high-speed wireless network to create a highly desirable, differentiated Comcast wireless service offering. Under these mutually-beneficial, marketplace-negotiated agreements, consumers would be the clear winners from this additional competition in the wireless marketplace.

The Reseller Agreements also would equip each Cable Company with the ability to offer an even more attractive suite of four compelling products than we can offer under the Agency Agreements. Comcast, for example, would be able to sell its own Comcast-branded wireless service as part of a bundle of services with at least one of its video, voice, or high-speed Internet products.<sup>42</sup>

The FCC has observed that "MVNOs often increase the range of services offered . . . by targeting certain market segments, including segments previously not served by the hosting facilities-based provider," and that MVNOs often offer industry-leading pricing packages.<sup>43</sup> Not only do they tend to serve underserved consumer segments, but they also expand consumer choice over wireless bundles, and more fully and efficiently employ spectrum and other network infrastructure. In addition, MVNOs increasingly have the ability to provide their subscribers access to feature-laden and heavily-demanded devices.<sup>44</sup>

A growing number of consumers perceive real value in MVNO offerings and view MVNOs as substitutes for facilities-based carriers. For example:

- Although the third quarter of 2011 was a difficult period for many wireless carriers, TracFone, a subsidiary of América Móvil that operates as an MVNO in the United States, added 515,000 subscribers, an increase of 15.7 percent over the previous year, bringing the company's total subscribers to 19.3 million.<sup>45</sup>

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<sup>42</sup> See Commercial Agreements Addendum at 4.

<sup>43</sup> *Fifteenth Wireless Report* ¶ 33; see *id.* ¶ 96 (noting that TracFone is "generally regarded as the leader in the low-end prepaid niche"). "In particular, independent resellers and MVNOs may be able to undercut the market leaders and thereby provide an additional constraint on coordinated interaction in markets which have the potential to be dominated by the two or three largest carriers." *Applications of Cellco P'ship d/b/a Verizon Wireless and AT&T, Inc.*, Memorandum Op. & Order and Declaratory Ruling, 25 FCC Rcd. 10985 ¶ 36 (2010); *Applications of AT&T Inc. and Centennial Communications Corp.*, Memorandum Opinion & Order, 24 FCC Rcd. 13915 ¶ 45 (2009); *Applications of Nextel Communications, Inc. and Sprint Corp.*, Memorandum Op. & Order, 20 FCC Rcd. 13967 ¶ 88 (2005).

<sup>44</sup> For example, TracFone recently released its first Android-based smartphone through its Straight Talk brand. See Chris Burns, *Samsung Galaxy Precedent Makes Off-Contract Android Ultra Cheap*, SlashGear, Aug. 20, 2011, available at <http://www.slashgear.com/samsung-galaxy-precedent-makes-off-contract-android-ultra-cheap-20173260/>. News reports also have indicated that Sprint's "flagship smartphones" may soon become available through its prepaid and wholesale partners. See Roger Cheng, *Could Sprint's Galaxy S II become a prepaid phone?*, CNET News, Nov. 2, 2011, available at [http://news.cnet.com/8301-1035\\_3-20129115-94/could-sprints-galaxy-s-ii-become-a-prepaid-phone/](http://news.cnet.com/8301-1035_3-20129115-94/could-sprints-galaxy-s-ii-become-a-prepaid-phone/).

<sup>45</sup> América Móvil, S.A.B. De C.V., SEC Form 6-K, at 15 (Nov. 7, 2011).

- Another MVNO, Virgin Mobile USA (“Virgin Mobile”), became so popular reselling Sprint Nextel’s service that Sprint Nextel acquired the MVNO in 2009.<sup>46</sup> Virgin Mobile continues to be a successful player in the pre-paid mobile wireless marketplace and has had particular success attracting younger subscribers.<sup>47</sup>

The government consistently has acknowledged the benefits that resellers can provide to consumers and has never insisted on pre-approving such agreements. In fact, it has encouraged – and even compelled – them. And the FCC has reported the existence of more than 50 reseller agreements in the wireless space.<sup>48</sup>

The Reseller Agreements offer the possibility for even greater benefits for consumers. Unlike prior MVNO providers (which offered solely wireless products), the Cable Companies have the ability to combine wireless services with wired services to create attractive bundles on a large scale for consumers.

In short, the Reseller Agreements will enable the Cable Companies to create and offer their own branded wireless services to their customers in direct competition with all other existing wireless providers. The result will be that over 30 million current cable customers and tens of millions of other consumers will have another option for how they get their wireless services. More significantly, Comcast and the other Cable Companies will be able to develop their own sophisticated suite of wireless products and services that, like their other products and services, will be at the vanguard of technology, convenience, and functionality and of a quality and reliability that the Cable Companies’ customers have come to expect. And the Reseller Agreements will enable Comcast to provide its own, unique competitive wireless and multiproduct alternatives.

## **2. The Innovation Technology Joint Venture Agreement**

The Innovation Technology Joint Venture Agreement formed a new limited liability company (the “Innovation Technology Joint Venture” or “Joint Venture”) for the purpose of developing technology and intellectual property to create innovative and compelling new products that compete with the integrated wired and wireless solutions developed by AT&T, Dish Network, Google, Microsoft, Apple, and others.<sup>49</sup> The Joint Venture will increase competition and benefit consumers by allowing Verizon Wireless and the Cable Companies to develop next-generation technologies that will enhance consumers’ communications and media services.<sup>50</sup>

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<sup>46</sup> See *Sprint Acquires Virgin Mobile USA*, Seeking Alpha, Nov. 25, 2009, available at <http://seekingalpha.com/article/175378-sprint-acquires-virgin-mobile-usa>. Virgin Mobile had 5.2 million subscribers at the time of its acquisition by Sprint Nextel.

<sup>47</sup> See Peter Svensson, *Sprint Overhauls Virgin Mobile, Includes Data*, Associated Press, May 6, 2010, available at [http://www.msnbc.msn.com/id/36998575/ns/technology\\_and\\_science-wireless/t/sprint-overhauls-virgin-mobile-includes-data/](http://www.msnbc.msn.com/id/36998575/ns/technology_and_science-wireless/t/sprint-overhauls-virgin-mobile-includes-data/).

<sup>48</sup> See *Fifteenth Wireless Report* app. C, Table C-6.

<sup>49</sup> See Commercial Agreements Addendum at 4.

<sup>50</sup> See *id.*

The Joint Venture will allow Verizon Wireless to use its wireless expertise and the Cable Companies to use their wired network expertise to collaborate in developing next-generation technologies that will significantly enhance consumers' communications and media experiences.<sup>51</sup> For example, the Joint Venture will explore technology developments that allow consumers' devices to seamlessly transition between WiFi and mobile wireless networks. This would allow consumers to experience optimal data transfer speeds and enhanced mobility, while also reducing demands on heavily stressed mobile wireless networks. The Joint Venture also will explore ways to provide feature-rich video content on consumers' mobile devices. And the companies will work to integrate services like voice mail, caller ID, and contact lists across home and wireless phones, while also enabling seamless access to content like photos, videos, and music, on both home televisions and mobile devices.

By enabling this cross fertilization, the Joint Venture will spur innovation and new technology, increase consumer choice and competition, and reduce transaction costs. Congress and the federal antitrust agencies have long recognized that research and development collaborations like the Joint Venture are procompetitive.<sup>52</sup> As the DoJ and FTC have explained: "an R&D collaboration may enable participants more quickly or more efficiently to research and develop new or improved goods, services, or product processes."<sup>53</sup> In fact, the DOJ has repeatedly endorsed the procompetitive benefits of R&D joint ventures in multiple industries, including the communications and media industries.<sup>54</sup> And we are not aware of any government challenge to an R&D joint venture in the wireline or wireless space. Thousands of R&D joint ventures have filed notifications with the Justice Department and FTC under the National Cooperative

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<sup>51</sup> See Tech. Policy Inst. Comments, WT Docket No. 12-4, at 18 (Feb. 21, 2012) ("[W]ireless and wireline operators working together may be more likely to make breakthroughs in creating technological complementarities across the two technologies . . . . It is plausible that working together the companies will make advances they would not have made otherwise.").

<sup>52</sup> For example, to ensure that the antitrust laws do not inappropriately deter procompetitive R&D joint ventures, Congress adopted the National Cooperative Research Act of 1984, which provides that such ventures are not illegal *per se* and are subject to only single damages (rather than the usual treble damages) in antitrust lawsuits. See Pub. L. No. 98-462, 98 Stat. 1815 (1984). The goals of the Act are even more pertinent today, where "[t]he single most vibrant part of [the] economy is the communications sector" which has "generate[d] almost a half million jobs, while the rest of the economy has stagnated." Progressive Policy Inst. Comments, WT Docket No. 12-4, at 1 (Feb. 21, 2012) (citing Michael Mandel, *Where the Jobs Are: The App Economy*, TechNet, Feb. 7, 2012, available at <http://www.technet.org/wp-content/uploads/2012/02/TechNet-App-Economy-Jobs-Study.pdf>).

<sup>53</sup> Dep't of Justice & FTC, *Antitrust Guidelines for Collaboration Among Competitors* 14, § 3.31(a) (2000). Although the *Guidelines* also note that such collaborations can increase market power or facilitate its exercise by limiting independent decisionmaking or combining control over competitively significant assets or a participant's individual competitive R&D efforts, the Innovation Technology Joint Venture does not limit decisionmaking or combine control over assets or R&D efforts.

<sup>54</sup> See Commercial Agreements Addendum at 19.

Research and Production Act of 1993 (“NCRPA”),<sup>55</sup> including a number researching and developing wireless technologies.

Those procompetitive benefits will be present here as well. By enhancing the Cable Companies’ and Verizon Wireless’s own products and services, the Joint Venture will likely spur other companies – satellite providers, telcos, cable operators, wireless providers, and technology companies – to develop their own competing technologies. In the end, consumers will benefit from this sort of investment and innovation, as they will be able to enjoy more and better products that work across wired and wireless platforms.

### 3. The Agency Agreements

The Agency Agreements authorize Verizon Wireless and each of the Cable Companies to act as sales agents for the other company’s services. The Cable Companies are authorized to sell Verizon Wireless services to consumers within their cable network footprints through various sales channels (e.g., websites and telesales) but under service and rate plans established by Verizon Wireless. Each Cable Company receives a one-time commission for each Verizon Wireless sale it makes, but all customers that subscribe to Verizon Wireless service through one of the Cable Companies will become wireless customers of Verizon Wireless (not the Cable Company that signed up the customer).

Similarly, Verizon Wireless is authorized to sell each of the Cable Companies’ video, digital voice, and high-speed Internet services to customers within the companies’ respective footprints through Verizon Wireless’s sales channels (e.g., retail stores, websites, and telesales), but under service and rate plans established by each Cable Company. Verizon Wireless receives a one-time commission for the sale, but all customers who sign up for a Cable Company’s service through Verizon Wireless become customers of the Cable Company (not Verizon Wireless).

The Agency Agreements provide the Cable Companies and Verizon Wireless with a quick and efficient path to offer wireless and wired services individually and in multiproduct bundles that compete against the offerings of companies such as AT&T, DIRECTV, Dish Network, CenturyLink, and others, which already offer bundles of wireless and wired services to consumers.<sup>56</sup> The FCC has acknowledged the consumer benefits of multiproduct bundles,<sup>57</sup> and the Agency Agreements will enable the Cable

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<sup>55</sup> Joint ventures that file notifications under the NCRPA, 15 U.S.C. §§ 4301-4306, are entitled to certain protections under the Act. Notifications are filed with the Justice Department and FTC and then published in the Federal Register. See Dep’t of Justice, *Filing a Notification Under the NCRPA*, <http://www.justice.gov/atr/public/guidelines/ncrpa.html> (last visited Mar. 16, 2012).

<sup>56</sup> See Commercial Agreements Addendum at 3 (“Today, AT&T, DIRECTV, Dish Network, CenturyLink, and others offer multi-product bundles. The Commercial Agreements allow the MSOs and Verizon Wireless to respond to this competition with a top-notch suite of products of their own.”).

<sup>57</sup> See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd. 542 ¶ 70 (2009) (“Cable companies are combining video, high-speed Internet, and telephone services into bundles of two or three products and offering them

Companies and Verizon Wireless each to offer the benefits of these bundles to tens of millions of consumers.<sup>58</sup> Consumers will continue to have the same number of choices among video, broadband, wired voice, and wireless service providers as they do now, but they will have additional options for how, where, and when they subscribe to multiproduct bundles.

These Agency Agreements are market standard agreements, comparable to the literally thousands of agency agreements already in place in the wireless marketplace.

Comcast and Verizon Wireless already have initiated the Agency Agreements in several markets and are providing these benefits to consumers in those markets today.<sup>59</sup> In their initial implementation, Comcast and Verizon Wireless are offering qualifying customers who subscribe to both companies' services up to \$300 on a prepaid debit card, which can be used for anything they want, including to cover the price of a new smart phone or tablet.<sup>60</sup> We expect that the Agency Agreements will result in other financial benefits and product offers going forward.

Importantly, as explained in more detail below, these benefits are being achieved without any *loss* of competition – all the parties that previously provided voice, video, broadband, and wireless services continue to do so. In fact, consumers in the markets where the Agency Agreements have been initiated now have *new* options – to order Verizon Wireless's services from Comcast and to order Comcast's services from Verizon Wireless. And, by enabling Verizon Wireless and each Cable Company to offer more attractive packages and pricing incentives to their subscribers, the Agency Agreements, in turn, will likely incent competitors to respond with their own pro-consumer offerings.<sup>61</sup>

## **B. The Commercial Agreements Will Not Reduce or Harm Competition.**

The Commercial Agreements do not involve the acquisition of any competitor or any merger with a rival. There is no acquisition of customers or of ongoing business operations. Rather, the Commercial Agreements are commonplace, industry-standard reseller, technology development, and agency agreements that provide substantial consumer benefits and are prevalent throughout the communications marketplace. Claims to the contrary – including by some competitors – appear to be motivated in part by certain parties' desire to have the AWS licenses for themselves or their concern that the License Assignment and Commercial Agreements will *increase* competition in the

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at discounted introductory prices and/or savings on long-term prices, when compared with the price of buying each service separately.”).

<sup>58</sup> See Commercial Agreements Addendum at 3.

<sup>59</sup> See, e.g., Press Release, Comcast Corp., *Verizon Wireless and Comcast Team Up in Seattle to Deliver to Consumers the Best Video Entertainment, Communications and Internet Experiences at Home and Away* (Jan. 17, 2012), available at <http://www.comcast.com/about/pressrelease/pressreleasedetail.ashx?SCRedirect=true&PRID=1144>.

<sup>60</sup> See *id.*

<sup>61</sup> See Commercial Agreements Addendum at 3 (“This, in turn, will prompt competitive responses from other providers, all of which advances consumer welfare.”).

marketplace and require them to respond accordingly. The antitrust laws and competition policy, however, are designed to *protect competition*, not to insulate competitors from having to respond to competition.<sup>62</sup>

### **1. The Commercial Agreements Are Similar to Other Marketplace Arrangements.**

As noted above, Comcast and Verizon Wireless already have initiated certain of the Commercial Agreements in some markets. The launch of these agreements already has demonstrated that the benefits to consumers are achieved with no detrimental change to the marketplace – all the parties that previously provided voice, video, broadband, and wireless services continue to do so. No outlets for buying these services were eliminated. All that happened was that consumers now have *new options* – to order Verizon Wireless’s services from Comcast, and to order Comcast’s services through Verizon Wireless – for purchasing their services individually or as part of a new discounted bundle of services (with additional sign-up incentives) that gives consumers an alternative to existing multiproduct options already offered in those markets.

There are no barriers to entry here. Other providers of communications services can enter into similar arrangements – and have done so. For example, with respect to MVNOs, in its most recent Wireless Competition Report, the FCC identified more than 50 MVNOs in the marketplace today.<sup>63</sup> And just last week, Clearwire and Leap Wireless signed a new reseller agreement for Leap to offer its Cricket service over Clearwire’s LTE network.<sup>64</sup>

With respect to agency agreements, there are thousands of agency agreements in the wireless marketplace. In fact, just in the last year, several of our competitors have signed similar agreements:

- Frontier Communications and AT&T Mobility announced a three-year agency agreement on November 15, 2011 that enables Frontier to offer customers access to AT&T smartphones and the AT&T mobile broadband network bundled with Frontier’s broadband Internet, voice, and satellite TV services, all on a single bill from Frontier.<sup>65</sup>

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<sup>62</sup> See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986); *Applications of OTI Corp., and Its Shareholders, Transferors, and MCI Communications Corp., and MCI/OTI Corp., Transferees*, Order, 6 FCC Rcd. 1611 ¶ 13 (Common Carrier Bureau 1991) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

<sup>63</sup> *Fifteenth Wireless Report* app. C, Table C-6.

<sup>64</sup> See Scott Moritz, *Clearwire Wins “Milestone” Wireless Contract with Leap*, Bloomberg Businessweek, Mar. 14, 2012, available at <http://www.businessweek.com/news/2012-03-14/clearwire-wins-contract-to-provide-network-for-leap-s-4g-service>.

<sup>65</sup> See Press Release, Frontier Communications Corp., *Frontier Communications Teams with AT&T to Offer Wireless Voice and Data Products* (Nov. 15, 2011), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=66508&p=irol-newsArticle&ID=1630726&highlight=>.

- AT&T and DIRECTV signed a three-year commercial agreement on November 3, 2011 through which both companies are able to offer customers a quadruple-play bundle of AT&T/DIRECTV video service and AT&T broadband, home phone, and wireless voice services, as well as bundled discounts.<sup>66</sup>
- CenturyLink and Verizon Wireless announced an agreement on February 15, 2011, under which CenturyLink became an authorized agent of Verizon Wireless and can offer customers Verizon Wireless service with CenturyLink's High-Speed Internet, unlimited local and long distance, and television services.<sup>67</sup> (Qwest, which CenturyLink acquired in 2011, entered into a similar agreement with Verizon Wireless in 2008.)<sup>68</sup>

Reseller and agency agreements have been routine in the marketplace throughout the past decade. For example, the FCC has identified MVNOs as competitors in the wireless marketplace since 2002.<sup>69</sup> And with respect to agency agreements, our competitors entered into their own agency agreements to offer multiproduct bundles of services nearly ten years ago:

- In 2003, SBC (now AT&T) announced plans to offer a co-branded service with EchoStar Communications, called the "SBC Dish Network," to homes in its footprint as part of a package of local, long-distance, wireless, and DSL services. The agreement allowed SBC to manage customer relationships, and SBC invested

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<sup>66</sup> See Press Release, DIRECTV, Inc., *AT&T and DIRECTV Sign Three-Year Extension Agreement to Deliver AT&T / DIRECTV to AT&T Customers* (Nov. 3, 2011), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=620738>. Through a separate agreement, DIRECTV also sells AT&T broadband Internet services, including AT&T U-verse High Speed Internet, through its sales distribution channels and to existing DIRECTV customers. *Id.*

<sup>67</sup> See Press Release, CenturyLink, Inc., *CenturyLink to Offer Verizon Wireless Equipment, Service Plans* (Feb. 15, 2011), available at <http://news.centurylink.com/index.php?s=43&item=101>.

<sup>68</sup> See Press Release, Verizon Wireless, *Qwest to Deliver Verizon Wireless Products and Services to Its Customers* (May 5, 2008), available at <http://news.verizonwireless.com/news/2008/05/pr2008-05-05a.html>. Many retailers sell the wireless services of unaffiliated providers to consumers. For example, Best Buy is a sales agent for Verizon Wireless, AT&T Mobility, Sprint, and T-Mobile, and RadioShack is a sales agent for Verizon Wireless, AT&T Mobility, and Sprint. See Best Buy, *Mobile Phones*, <http://www.bestbuy.com/site/Electronics/Mobile-Cell-Phones/abcat0800000.c?id=abcat0800000> (last visited Mar. 19, 2012); Radio Shack, *Cell Phones & Plans*, [http://radioshackwireless.com/mobile/?r=radioshack&refcode1=RSK\\_0000\\_000\\_CELLTOP](http://radioshackwireless.com/mobile/?r=radioshack&refcode1=RSK_0000_000_CELLTOP) (last visited Mar. 19, 2012).

<sup>69</sup> *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*, Seventh Report, 17 FCC Rcd. 12985, 13025-26 (2002) ("Recently, a new version of reseller, referred to as a 'mobile virtual network operator,' or 'MVNO,' has begun to appear in this country after experiencing some success in Europe and Asia.").

\$500 million in EchoStar as part of the deal.<sup>70</sup> The agreement was extended in 2005.<sup>71</sup>

- In 2003, Qwest and EchoStar entered into an agreement that allowed Qwest to sell Dish Network service to Qwest subscribers.<sup>72</sup>
- In 2002, SBC and Dish Network entered into an agreement that allowed both parties to offer video and DSL services to their customers.<sup>73</sup>

The government has never publicly raised concerns about, questioned the benefits of, or challenged any of our competitors' agency agreements that enable them to do exactly what the Agency Agreements at issue here allow the Cable Companies and Verizon Wireless to do. Importantly, as the multiple examples of agency and reseller agreements set forth in this testimony demonstrate, the Agency and Reseller Agreements at issue in this transaction are industry standard and commonplace.

So too is the Innovation Technology Joint Venture. As noted above, thousands of R&D joint ventures have filed notifications with the Justice Department and FTC under the NCRPA,<sup>74</sup> including a number researching and developing wireless technologies. For example, Bellcore and RIM created a joint venture "to engage in cooperative research related to wireless paging, data, protocols, and other services and networks to better understand the feasibility and application of such technologies for leading edge wireless and messaging services."<sup>75</sup> More recently, Citrix created a joint venture with Intel and others to "promote the use, sale and adoption of mobile computing and communications technologies, architectures, methodologies, services and solutions."<sup>76</sup>

Many companies, such as AT&T, Dish Network, Apple, Microsoft, Google, and others have been developing wireless/wired integration technology for years.<sup>77</sup> The Joint

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<sup>70</sup> See Press Release, EchoStar Communications Corp., *SBC Communications, EchoStar Forge Strategic Partnership, Will Offer 'SBC Dish Network' Television Service* (July 21, 2003), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=243629>.

<sup>71</sup> See Press Release, EchoStar Communications Corp., *SBC Communications, EchoStar Reach New Strategic Pact* (Sept. 20, 2005), available at <http://press.dishnetwork.com/Press-Center/News-from-DISH/page/SBC-Communications,-EchoStar-Reach-New-Strategic-P>.

<sup>72</sup> See Press Release, Qwest Communications Int'l Inc., *Qwest Forges Agreement with EchoStar to Offer Satellite Services as Part of Communications Bundle* (July 21, 2003), available at <http://news.centurylink.com/index.php?s=43&item=1003>.

<sup>73</sup> See Ray Wilkins, Group President, SBC Marketing & Sales, *SBC/Dish Network Changes Everything* 3 (Spring 2004), available at [www.att.com/Common/files/pdf/sbc\\_dish\\_mailer.pdf](http://www.att.com/Common/files/pdf/sbc_dish_mailer.pdf).

<sup>74</sup> See *supra* note 55 and accompanying text.

<sup>75</sup> *Notice Pursuant to the Nat'l Coop. Research & Prod. Act of 1993; Bell Communications Research, Inc.*, 62 Fed. Reg. 26554, 26555 (1997).

<sup>76</sup> *Notice Pursuant to the Nat'l Coop. Research & Prod. Act of 1993; Mobile Enterprise Alliance, Inc.*, 69 Fed. Reg. 44062, 44062 (2004).

<sup>77</sup> See Press Release, Google Inc., *Industry Leaders Announce Open Platform for Mobile Devices* (Nov. 5, 2007), available at [http://ww.google.com/intl/en/press/pressrel/20071105\\_mobile\\_open.html](http://ww.google.com/intl/en/press/pressrel/20071105_mobile_open.html);

Venture is not different in concept from joint R&D activities undertaken by other communications companies.<sup>78</sup> For example, Sprint already offers “integrated wireless and wireline solutions,” and it has been able to do so in part because of its collaboration with companies such as BroadSoft.<sup>79</sup>

The Innovative Technology Joint Venture simply will enable Verizon Wireless and the Cable Companies to compete more effectively against other companies’ communications technology solutions in the rapidly changing technology marketplace. R&D joint ventures such as this one rarely raise anticompetitive concerns.<sup>80</sup> Comcast is not aware of any R&D joint venture in the wireline or wireless space ever having been questioned or challenged by the government.

In sum, the Commercial Agreements will not harm competition. Instead, just like other similar agreements that have been in existence for decades, the Commercial Agreements will enhance consumer welfare by offering more choices and attractive pricing incentives; they will enhance competition by allowing the companies to respond more effectively to competitors’ offerings; and they will foster innovation and creativity.

## **2. The License Assignment and Commercial Agreements Do Not Eliminate Any Actual or Potential Competitors.**

The License Assignment and Commercial Agreements do not result in the elimination of any present (or foreseeable) wireless competitor. Following the License Assignment, Verizon Wireless will continue to compete with every wireless provider with which it competes today. AT&T, Sprint, T-Mobile, Leap Wireless, MetroPCS, US Cellular, and dozens of regional wireless companies will continue fighting for customers with each

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Press Release, Google Inc., *Sprint and Google Expand Relationship to Enable Richer Mobile Experience and More Choices for Sprint Customers* (May 7, 2008), available at [http://www.google.com/intl/en/press/pressrel/20080507\\_sprint\\_mobile.html](http://www.google.com/intl/en/press/pressrel/20080507_sprint_mobile.html); Press Release, Apple Inc., *Apple Launches iPad* (Jan. 27, 2010), available at <http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html>. Several of these firms recently agreed to acquire large portfolios of intellectual property that pertain to wireless technology. Press Release, Google Inc., *Google to Acquire Motorola Mobility* (Aug. 5, 2011), available at <http://investor.google.com/releases/2011/0815.html>; Press Release, Dep’t of Justice, *Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigations of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd.* (Feb. 3, 2012), available at <http://www.justice.gov/opa/pr/2012/February/12-at-210.html>.

<sup>78</sup> See Commercial Agreements Addendum at 19.

<sup>79</sup> Press Release, BroadSoft, Inc., *Sprint Introduces Wholesale Mobile Integration* (Sept. 13, 2010), available at <http://www.broadsoft.com/news/2010/sprint-introduces-wholesale-mobile-integration/>.

<sup>80</sup> See *Princo Corp. v. Int’l Trade Commission*, 616 F.3d 1318, 1334-35 (Fed. Cir. 2010) (“Although joint ventures can be used to facilitate collusion among competitors and are therefore subject to antitrust scrutiny, research joint ventures . . . can have significant pro-competitive features, and it is now well settled that an agreement among joint venturers to pool their research efforts is analyzed under the rule of reason.”); *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1<sup>st</sup> Cir. 1998) (“Where the venture is producing a new product . . . there is patently a potential for a productive contribution to the economy, and conduct that is strictly ancillary to this productive effort . . . is evaluated under the rule of reason.”).

other and with Verizon Wireless, offering a wide range of different services, including discounted bundles of services through their own agency agreements.

As explained above, the Cable Companies do not currently operate any meaningful wireless network and have concluded that building such a network would not be economically viable.<sup>81</sup> In fact, Cox constructed a facilities-based network in two markets, but decommissioned its network after it became clear that it would be unable to deploy its services “without sustaining unacceptably large losses.”<sup>82</sup> There is no basis in the antitrust laws to compel companies to make investments in businesses when they independently have concluded that such investments would not be profitable.<sup>83</sup>

Similarly, the License Assignment and Commercial Agreements do not result in the elimination of any present (or foreseeable) video, broadband Internet, or voice competitor. Comcast will continue to compete for video customers with satellite providers, telephone companies (including Verizon FiOS), smaller cable overbuilders, SMATV operators, and various emerging online competitors. It will continue to compete against telephone companies, smaller cable overbuilders, satellite broadband ISPs, and wireless broadband ISPs (both fixed and mobile) for broadband Internet customers. And, it will continue to compete for voice customers against telephone companies, wireless companies, and over-the-top voice providers such as Vonage, Google Voice, and Skype.

### **3. The Commercial Agreements Will Not Blunt Competition Between Verizon FiOS and the Cable Companies.**

Contrary to the suggestions of some critics, the Commercial Agreements will not diminish Verizon Telecom’s incentive to compete with the Cable Companies within the FiOS footprint. As a preliminary matter, this argument does not even make sense for most of the country; FiOS is not even available in more than 85 percent of the areas where the Cable Companies offer services.<sup>84</sup> But in all events, the notion that FiOS and the Cable Companies will no longer compete with one another is just not plausible in the face of the plain economic and business realities.

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<sup>81</sup> See *supra* Section I.A.

<sup>82</sup> Commercial Agreements Addendum Ex. 6, at 13.

<sup>83</sup> See *7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.)*, 191 F.3d 1090, 1101 (9th Cir. 1999) (“Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute.”); Deborah Platt Majoras, Chairman, FTC, Remarks as Prepared for Opening Session Hearings on Section 2 of the Sherman Act Sponsored by the FTC and the Antitrust Division, U.S. Dep’t of Justice (June 20, 2006), available at [http://www.justice.gov/atr/public/hearings/single\\_firm/docs/219108.htm](http://www.justice.gov/atr/public/hearings/single_firm/docs/219108.htm) (“[A]ny legal framework needs to avoid second-guessing business judgments that were objectively reasonable at the time that they were made. An *ex post facto* examination of the hypothetical effects of alternative courses of conduct is likely to chill legitimate business behavior.”).

<sup>84</sup> See Commercial Agreements Addendum at 7-8.

Verizon Communications has invested more than \$23 billion in its FiOS network, and it is not simply going to walk away from that investment. Indeed, FiOS revenues now represent 61 percent of Verizon Telecom's (which operates Verizon FiOS and Verizon's wired broadband Internet services) wireline customer revenues, and grew 18.2 percent over the last year alone.<sup>85</sup> And FiOS is taking market share from its competitors – FiOS increased its penetration in both the video and Internet marketplaces by roughly 4 percent over the last year. Verizon's publicly stated strategy is to continue increasing FiOS's penetration, since having more customers over the same shared plant increases FiOS's – and thus Verizon's – profitability. With the substantial initial investments in FiOS now largely complete, this product has become an ever-growing source of positive cash flow for the company.

Verizon Telecom will continue to have every incentive it had before the Commercial Agreements to compete vigorously against the Cable Companies. The one-time commission Verizon Wireless would receive for signing up a customer with Comcast would not come close to the ongoing revenue Verizon Communications would receive if that customer signed up for Verizon FiOS.

Basic economics confirms that Verizon would only injure itself if it “pulled its punches” in competition with the Cable Companies. Each FiOS subscriber provides Verizon an ongoing revenue stream that translates into a net present value of many thousands of dollars per customer. By contrast, Verizon stands to earn only a small fraction of that – at most an amount equal to a few percentage points of the value of a FiOS customer – in a one-time commission if a subscriber signs up for service with an MVPD other than FiOS, and then only if (1) the subscriber signs up for service with the Cable Companies, rather than another MVPD, and (2) does so through Verizon Wireless, as opposed to signing up with the Cable Companies directly or through other sales agents. Moreover, Verizon Communications owns only 55 percent of Verizon Wireless and would therefore receive only the benefit of that fraction of any commissions Verizon Wireless earns.

In sum, Verizon Communications would never sacrifice 100 percent of the many thousands of dollars associated with a FiOS subscriber in order to earn a fraction of a fraction of a one-time commission paid to Verizon Wireless. It would be economically irrational for Verizon to forego further increased FiOS market share gains, with resulting recurring revenue and margin hits to FiOS, in return for little more than half of some small, one-time commission payments to Verizon Wireless. The Commercial Agreements simply do not and will not create any incentives for Verizon Telecom to increase the prices or otherwise reduce competition in the sale and marketing of its wireline services.

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<sup>85</sup> See Press Release, Verizon Communications, *Verizon Generates Strong Cash Flow, 18.2 Percent Shareholder Returns in 2011* (Jan. 24, 2012), available at [http://www22.verizon.com/investor/news\\_verizon\\_reports\\_record\\_revenue\\_growth\\_in\\_4q\\_fueled\\_by\\_strong\\_demand\\_for\\_wireless\\_fios\\_and\\_strategic\\_.htm](http://www22.verizon.com/investor/news_verizon_reports_record_revenue_growth_in_4q_fueled_by_strong_demand_for_wireless_fios_and_strategic_.htm); *Verizon Provides Generous Dividends and Stock Appreciation*, Seeking Alpha, Mar. 9, 2012, available at <http://seekingalpha.com/article/423581-verizon-provides-generous-dividends-and-stock-appreciation>.

#### 4. The Commercial Agreements Will Not Affect Verizon Telecom's Plans to Build Out the FiOS Network.

Nor will the Commercial Agreements have any impact on Verizon Telecom's plans to build out the FiOS network, either in local franchise areas ("LFAs") where FiOS is already present or into LFAs where FiOS has no presence or regulatory approval to operate.

As an initial matter, Verizon Telecom has existing legal commitments to build out FiOS in the LFAs where it is already present; the Commercial Agreements have no impact on these legal obligations of Verizon Telecom.

The Commercial Agreements will also have no impact on Verizon's plans regarding LFAs where FiOS has no presence, because Verizon decided to end substantial new capital investment in these LFAs over two years ago – well before Verizon Wireless entered into the Commercial Agreements. In particular, beginning in mid-2009, Verizon announced that it had no plans to expand the FiOS footprint:

- On a July 27, 2009 earnings call, for example, Verizon CFO John Killian stated that Verizon was "on track to be substantially finished with [FiOS] deployment by the end of 2010, which has positive implications for both capital spending and free cash flow."<sup>86</sup>
- On September 10, 2009, Mr. Killian reiterated that Verizon would "be substantially done with [its FiOS build out] at the end of 2010."<sup>87</sup>
- On October 26, 2009, Mr. Killian again stated that Verizon would "substantially complete [its] FiOS build program by the end of 2010, which alone should result in about \$2 billion of capital savings each year."<sup>88</sup>

As Mr. Killian noted, Verizon chose to generate free cash flow by slowing capital spending and focusing instead on market share gains in areas where capital had been

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<sup>86</sup> John Killian, Executive Vice President & Chief Financial Officer, Verizon, Q2 2009 Verizon Earnings Conference Call at 5 (July 27, 2009), *available at* [http://www22.verizon.com/idc/groups/public/documents/adacct/event\\_895\\_trans.pdf](http://www22.verizon.com/idc/groups/public/documents/adacct/event_895_trans.pdf).

<sup>87</sup> John Killian, Executive Vice President & Chief Financial Officer, Verizon, Verizon at Bank of America Securities Media, Communications & Entertainment Conference at 6 (Sept. 10, 2009), *available at* [http://www22.verizon.com/idc/groups/public/documents/adacct/event\\_905\\_trans.pdf](http://www22.verizon.com/idc/groups/public/documents/adacct/event_905_trans.pdf).

<sup>88</sup> John Killian, Executive Vice President & Chief Financial Officer, Verizon, Q3 2009 Verizon Earnings Conference Call at 6 (Oct. 26, 2009), *available at* [http://www22.verizon.com/idc/groups/public/documents/adacct/event\\_917\\_trans.pdf](http://www22.verizon.com/idc/groups/public/documents/adacct/event_917_trans.pdf); Marguerite Reardon, CNET News, *Verizon Nears FiOS Network Completion* (Mar. 29, 2010), [http://news.cnet.com/8301-30686\\_3-20001377-266.html](http://news.cnet.com/8301-30686_3-20001377-266.html) ("Verizon Communications is nearly finished building its FiOS fiber-to-the-home network."); Peter Svensson, *Verizon Winds Down Expensive FiOS Expansion*, USA Today, Mar. 26, 2010, [http://www.usatoday.com/money/industries/telecom/2010-03-26-verizon-fios\\_N.htm](http://www.usatoday.com/money/industries/telecom/2010-03-26-verizon-fios_N.htm) ("Verizon is nearing the end of its program to replace copper phone lines with optical fibers that provide much higher Internet speeds and TV service.").

spent.<sup>89</sup> Speculation that at some point Verizon, absent the Commercial Agreements, would reverse its current plan of record and spend billions more in scarce capital to further expand the FiOS footprint – beyond the expansion it is already undertaking – is completely speculative. Again, as explained above, the antitrust laws are not intended to compel companies to engage in hypothetical commercial ventures that they have already rejected based on marketplace realities.

## **5. Other Competitors Can Continue to Offer Multi-Product Bundles Regardless of the Agency and Reseller Agreements.**

Contrary to the suggestions of some critics, the Agency and Reseller Agreements will not harm competition by precluding other competitors from offering multi-product bundles. As noted above, the relevant marketplaces are highly competitive, and consumers typically enjoy a choice among several wireless, broadband Internet, and voice providers, as well as MVPDs, including two direct broadcast satellite providers. Wireless service providers and other service providers therefore can create – and indeed have created – their own exclusive multiproduct bundles by combining their offerings.<sup>90</sup>

In addition, the exclusivity provisions contained in the Agency and Reseller Agreements are necessary to ensure the pro-competitive benefits of those agreements. The antitrust laws recognize that exclusivity commitments are common in agency agreements and frequently enhance the procompetitive benefits of such agreements.<sup>91</sup> These agreements cannot be successful unless the parties remain committed to their success; the exclusivity provisions are needed to ensure this commitment.<sup>92</sup> Indeed, other sales partnerships in the relevant markets – including partnerships that DIRECTV has entered into with AT&T and Verizon Telecom – have incorporated exclusivity provisions, without any objection from the DoJ, FTC, or FCC.

Moreover, while some providers offer multiproduct bundles that include wireless and wireline services, such offerings are not a prerequisite for participation in the communications marketplace. For example, while Sprint and the Cable Companies have offered bundles that feature wireless and wireline services, those bundles have historically not accounted for a material percentage of Sprint's or the Cable Companies'

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<sup>89</sup> See John Killian, Executive Vice President & Chief Financial Officer, Verizon, Q3 2009 Verizon Earnings Conference Call at 5–6 (Oct. 26, 2009), available at [http://www22.verizon.com/idc/groups/public/documents/adacct/event\\_917\\_trans.pdf](http://www22.verizon.com/idc/groups/public/documents/adacct/event_917_trans.pdf).

<sup>90</sup> E.g., Press Release, DIRECTV, *AT&T and DIRECTV Sign Three-Year Extension Agreement to Deliver AT&T / DIRECTV Service to AT&T Customers* (Nov. 3, 2011), <http://news.directv.com/2011/11/03/att-and-directv-sign-three-year-extension-agreement-to-deliver-att-directv-service-to-att-customers/>.

<sup>91</sup> See, e.g., Sheila F. Anthony, Commissioner, FTC, *Vertical Issues in Federal Antitrust Law* (Mar. 19, 1998) (explaining that an exclusivity commitment “may be procompetitive when it encourages retailers to invest in promoting the manufacturer’s line, thereby enhancing *interbrand* competition at the retail level”), available at <http://www.ftc.gov/speeches/anthony/aliabaps.shtml>.

<sup>92</sup> See *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) (Posner, J.) (explaining that exclusive arrangements often prevent free riding).

subscribers.<sup>93</sup> And other providers, such as Cricket Wireless, continue to focus on offering services that consumers can purchase on a stand-alone basis.<sup>94</sup> Stand-alone-service providers will remain vital competitors because consumers can and do create their own bundles of wireless and wireline services by selecting services from different providers.<sup>95</sup> These consumer-created bundles compete against providers' own multi-product bundles, and the Commercial Agreements in no way alter this dynamic.

Finally, to the extent some critics have complained that the Agency and Reseller Agreements will adversely affect other competitors by forcing them to offer lower prices or improved services in order to compete with Verizon Wireless's and the Cable Companies' improved product offerings (such as by offering discounts or other benefits as Comcast and Verizon Wireless have already done in Seattle, Portland, and San Francisco), these effects promote competition, benefit consumers, and further the public interest. To proscribe the Commercial Agreements because they promote competition and generate tangible consumer benefits would turn the antitrust laws on their heads.<sup>96</sup>

## **6. The Commercial Agreements Will Not Facilitate Illegal Collusion.**

The Commercial Agreements do not and will not facilitate illegal collusion between the Cable Companies and Verizon Telecom. The Commercial Agreements are between the Cable Companies and Verizon Wireless, not Verizon Communications or Verizon Telecom. The Commercial Agreements require Verizon Wireless to establish comprehensive firewalls to prevent Verizon Telecom from getting access to any of the Cable Companies' competitively-sensitive information, or vice versa, which effectively will prevent any collusion. Nor will the Innovation Technology Joint Venture facilitate collusion; the Joint Venture's scope is limited to developing technologies and includes protections against the sharing of competitively-sensitive information.

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<sup>93</sup> See, e.g., Erica Ogg, *Comcast Walks Away from Pivot*, CNET News, Apr. 23, 2008, [http://news.cnet.com/8301-10784\\_3-9927428-7.html](http://news.cnet.com/8301-10784_3-9927428-7.html) (explaining that “[b]y the end of [2007], demand was so low for Pivot [a partnership between Sprint and the MSOs] that they stopped marketing it”).

<sup>94</sup> Cricket Wireless, *Company Information*, <http://www.mycricket.com/learn/cricket-wireless>; Alex Pham, *Cricket Wireless Has the Music Industry Feeling Chirpy*, Los Angeles Times, Feb. 7, 2012, <http://www.latimes.com/business/la-fi-ct-cricket-20120207.0,2200481.story> (explaining how Cricket Wireless customers appeal to individuals whose cell phones, not computers, “are the center of their digital lives”).

<sup>95</sup> See Ogg, *supra* note 93 (explaining that “[p]art of [Pivot’s] problem [was] that nearly 80 percent of U.S. residents already subscribe to a cell phone service”).

<sup>96</sup> See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977) (noting that every transaction “has the potential for producing economic readjustments that adversely affect some persons,” but “Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects”); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986) (“To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for [it] is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.” (internal quotation marks omitted)).

To the extent any collusion occurs, the antitrust laws provide ample authority to investigate and challenge such collusion. The Commercial Agreements each require implementation of firewalls and other safeguards to prevent the sharing of commercially-sensitive information. The DOJ has recognized that these safeguards mitigate the likelihood of collusion and, to Comcast's knowledge, the DoJ has never challenged collaborative ventures incorporating such safeguards based on speculation that they might nonetheless facilitate collusion.

### **III. THE LICENSE ASSIGNMENT AND COMMERCIAL AGREEMENTS ARE CONSISTENT WITH THE COMMUNICATIONS ACT, FCC RULES, ANTITRUST LAW, AND THE OBJECTIVES OF CONGRESS, THE ADMINISTRATION, THE FCC, AND THE NATIONAL BROADBAND PLAN.**

The License Assignment and Commercial Agreements currently are being reviewed by both the FCC and the DoJ to determine what, if any, policy and competition concerns these transactions raise and whether they are consistent with the Communications Act, FCC rules, and antitrust law. As detailed above, the License Assignment will yield substantial and verifiable public interest benefits – and align with the objectives of Congress, the Administration, the FCC, and the National Broadband Plan – by shifting spectrum not currently being used to provide service to consumers to a provider that will use that spectrum to deliver wireless broadband services to consumers. Although the Commercial Agreements are separate from, and not contingent on, the License Assignment, they too will yield substantial and verifiable public interest benefits and are consistent with long-standing industry practice that the FCC has openly embraced. Moreover, the DoJ already is reviewing the Commercial Agreements and, based on the documents and economic analysis we have submitted, should find that those agreements are consistent with competition law and policy and do not raise any concerns.

The FCC has stated that secondary market transactions are important to ensure that existing spectrum can get into the hands of providers that can use it efficiently to serve customers.<sup>97</sup> Just this past January, FCC Chairman Genachowski cited secondary markets as one of the key measures necessary “to meet th[e] demand” for more spectrum dedicated to mobile broadband use.<sup>98</sup> And in its December 2011 order (literally issued in the shadow of the withdrawal of the AT&T/T-Mobile applications) approving AT&T's acquisition of 6 MHz of nationwide spectrum and an additional 6 MHz of spectrum in five major metropolitan markets from Qualcomm, the Commission found that the transfer of “underutilized” 700 MHz spectrum would “facilitate [that spectrum's] transition . . .

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<sup>97</sup> See *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd. 24178 ¶¶ 1, 18 (2000) (The FCC has sought to “promote the operation of competitive markets for the sale and lease of spectrum usage rights . . . , and thereby facilitate both the transfer of the right to use spectrum for existing services to new, higher valued uses, and the availability of unused and underutilized spectrum to those who would use it for providing services.”).

<sup>98</sup> Julius Genachowski, Chairman, FCC, Remarks at Consumer Electronics Show 5 (Jan. 11, 2012), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-311974A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311974A1.pdf).

towards mobile broadband, thereby supporting [the FCC's] goal of expanding mobile broadband deployment throughout the country.”<sup>99</sup> The FCC stressed that “to compete effectively and innovate, a wireless provider must have access to adequate spectrum.”<sup>100</sup>

As explained in further detail in our filings at the FCC, this License Assignment will further that important goal.<sup>101</sup> No party opposing the applications has challenged that goal as illegitimate or explained why the License Assignment would be in conflict with it. To the contrary, Verizon Wireless and the Cable Companies have shown that the License Assignment would precisely track those goals by moving spectrum not being used to serve customers to productive use.

Similarly, the License Assignment furthers the goals of Congress, the Administration, and the National Broadband Plan. As the President explained, “America’s future competitiveness and global technology leadership” is contingent on the availability of “adequate spectrum,” “finding ways to use spectrum more efficiently,” and “unlock[ing] the value of otherwise underutilized spectrum.”<sup>102</sup> The National Broadband Plan also had as a core objective the transition of spectrum to more valuable and efficient uses in order to meet the “growing demand for wireless broadband services and ensure that America keeps pace with the global wireless revolution.”<sup>103</sup> The National Broadband Plan recommended that the FCC “promote access to unused and underutilized spectrum,” and “permit a variety of secondary market transactions,”<sup>104</sup> transactions precisely like the ones Verizon Wireless and the Cable Companies have proposed. The National Broadband Plan ultimately concluded that failing to address the spectrum crunch “could mean higher prices, poor service quality, an inability for the U.S. to compete internationally, depressed demand, and ultimately a drag on innovation.”<sup>105</sup> Of course, Congress just recently passed legislation (on a bipartisan basis) to address this spectrum crunch by authorizing the FCC to make additional spectrum available for commercial use to serve the growing and evolving demand of consumers.

In addition to furthering important government goals, the License Assignment is consistent with FCC rules. Parties routinely transfer spectrum to each other and these

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<sup>99</sup> *Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd. 17589 ¶ 95 (2011) (“*AT&T-Qualcomm Order*”).

<sup>100</sup> *AT&T-Qualcomm Order* ¶ 30.

<sup>101</sup> See Public Interest Statement at 16-19; Verizon Wireless, et al. Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, at 8-12 (Mar. 2, 2012) (“Verizon Wireless, et al. Joint Opposition”).

<sup>102</sup> President Barack Obama, *Unleashing the Wireless Broadband Revolution* (June 28, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

<sup>103</sup> *National Broadband Plan* at 76-77, 84.

<sup>104</sup> *Id.* at 83.

<sup>105</sup> *Id.* at 77.

transfers are reviewed and routinely approved by the FCC.<sup>106</sup> According to press reports, “The FCC has approved more than 150 commercial wireless transaction applications in the past year and more than 300 in the past two years.”<sup>107</sup> In fact, every two years, the FCC approves spectrum transfers between licensees totaling as much as the 17.4 billion MHz-POPs of spectrum sold by the FCC in its last major auction in 2008. And, between 1998 and 2009, the FCC approved 38 major spectrum transfers covering *PCS spectrum alone* in which a total of approximately 30.4 billion MHz-POPs of PCS spectrum changed hands.<sup>108</sup> The FCC has routinely consented to the transfer where the transfers do not trigger the FCC’s “spectrum screen” – a tool to assess wireless concentration in a geographic market – and “there is clearly no competitive harm relative to today’s generally competitive marketplace.”<sup>109</sup> That is the case here.

The total amount of spectrum Verizon Wireless will hold after the assignments in more than 98 percent of the covered counties will be at a level that the FCC has determined does not raise competitive concerns, and thus, is not subject to further competitive review.<sup>110</sup> Even in the remaining areas, multiple competitors are operating, and many more hold unused spectrum.<sup>111</sup> At a national level, Verizon Wireless would hold barely more than one-quarter of the spectrum currently counted as available – and even less if other spectrum that is in fact being used is counted. In similar circumstances where licensees tried to develop their spectrum but the business case ultimately did not materialize, the FCC found that assignment to a party able to put the spectrum to use would serve the public interest and would not harm competition.<sup>112</sup> And in none of those

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<sup>106</sup> The FCC processes hundreds of wireless assignments each year. In fact, Verizon Wireless itself has assigned spectrum to other licensees nearly 25 times over the past 4 years. *See* Verizon Wireless, et al., Joint Opposition Ex. 1.

<sup>107</sup> *AT&T CEO Slams FCC; Carrier Posts Loss in Q4 Due to Breakup Fee, Charges*, Communications Daily, Jan. 27, 2012 (citing an FCC spokesperson).

<sup>108</sup> *See* John W. Mayo & Scott Wallsten, *Enabling Efficient Wireless Communications: The Role of Secondary Spectrum Markets* 22 Info. Econ. & Policy 61, 70 Table 8 (2010).

<sup>109</sup> *Sprint Nextel Corp. & Clearwire Corp., Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Op. & Order, 23 FCC Rcd. 17570 ¶ 76 (2008); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd. 21522 ¶ 109 (2004) (“[T]he function of [the screen] was simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of th[e] transaction.”).

<sup>110</sup> *See* Public Interest Statement at 25; Verizon Wireless, et al. Joint Opposition at 44.

<sup>111</sup> *See* Public Interest Statement at 26; Verizon Wireless, et al. Joint Opposition at 45.

<sup>112</sup> *See, e.g., AT&T-Qualcomm Order* ¶¶ 94, 96 (approving in December 2011 the transfer of spectrum previously used to provide a mobile video service that proved not to be viable from Qualcomm to AT&T and concluding it “would facilitate the transition of underutilized unpaired 700 MHz spectrum towards mobile broadband use, thereby supporting [the Commission’s] goal of expanding mobile broadband deployment through the country”); *Aloha Spectrum Holdings Co. (Assignor) and AT&T Mobility II LLC (Assignee) Seeking FCC Consent for Assignment of Licenses and Authorizations*, Memorandum Op. & Order, 23 FCC Rcd. 2234 ¶¶ 13-14 (2008) (approving the transfer of spectrum from Aloha Partners to AT&T after Aloha conducted two trials and determined that it would need to partner with a “national wireless carrier or other companies . . . to ensure the roll out of a 700 MHz network and associated services as an economically valuable enterprise” and could not find such a partner, *see*

cases did the FCC give weight to claims that the FCC should deny its approval because the spectrum would be put to better use by a different purchaser, as some opponents (primarily other competitors) urge the FCC to do in this transaction. As the FCC has explained, its review is limited “to the buyer proposed in an assignment application, and [it] cannot consider whether some other proposal might comparatively better serve the public interest.”<sup>113</sup>

Finally, with respect to the Commercial Agreements, those agreements are fully consistent with FCC rules and antitrust law. These types of agreements have been commonplace in the communications industry for decades and have been found to be pro-competitive. Contrary to some parties’ claims, the Commercial Agreements are not the “end of the world” or even a “market-division” conspiracy among leading market participants; they are just the same sort of ordinary agency, reseller, and technology joint venture agreements that appropriately passed with little notice when entered into by numerous other entities. The DoJ is assessing whether the Commercial Agreements raise potential competition concerns and are consistent with antitrust law; we are confident that they are.

#### **IV. CONCLUSION.**

Competition in the communications and media marketplaces is driving innovation in all areas of the industry. The constant pressure to respond to competition has compelled Comcast to upgrade its networks, enhance its existing services, research and develop new services, improve customer service, and even rebrand its products and marketing approach. Yet at least one missing piece has eluded us: a wireless strategy to offer wireless services as part of our multiproduct bundles. The Commercial Agreements supply that missing piece to the benefit of our current and future customers.

The sale of the spectrum to Verizon Wireless cannot come at a better time for Americans; it will inject much-needed spectrum into the wireless broadband marketplace to meet consumer demand and drive innovation. At the same time, the Commercial Agreements will provide consumers one-stop shopping for their home and mobile needs; will offer the Cable Companies the ability to enhance competition in the wireless marketplace by becoming resellers; and will accelerate innovation in the broadband marketplace,

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Application to Assign Licenses Held by Aloha Spectrum Holdings Company LLC to AT&T Mobility II LLC, File No. 0003205282, Declaration of Charles C. Townsend, President and CEO, Townsend Enterprises II ¶ 8 (Oct. 23, 2007)); *NextWave Personal Communications, Inc. and Cingular Wireless LLC*, Memorandum Opinion & Order, 19 FCC Rcd. 2570 ¶ 31 (2004) (approving the transfer of additional spectrum to Cingular even in areas where it already operated because the spectrum acquisition would not “affect the number of currently active competitors in any of the markets involved given the fact that NextWave currently ha[d] limited operations and trial (non-paying) customers in [those] markets” (quoting the parties’ application at 11-12)).

<sup>113</sup> *Citadel Communications Co. & Act III Broad. of Buffalo, Inc.*, Memorandum Op. & Order, 5 FCC Rcd. 3842 ¶ 16 (1990). The FCC has explained that this is necessary to “avoid ‘an unwise invasion by a governmental agency into private business practice . . . and undue delay in passing upon transfers of licenses.’” *MMM Holdings, Inc. & LIN Broad. Corp.*, Memorandum Op. & Order, 4 FCC Rcd. 6838 ¶ 8 (Mass Media Bureau 1989) (quoting S. Rep. No. 82-44, at 8 (1951)), *aff’d*, 4 FCC Rcd. 8243 ¶¶ 8-9 (1989).

allowing consumers simple, seamless access to content and applications from any location on any device and leveraging the best available network, whether it be wired, licensed wireless, or WiFi.

We have begun what clearly will be a very thorough review process with the DoJ and look forward to satisfying them that the License Assignment and Commercial Agreements are pro-competitive and pro-consumer. The FCC is currently conducting its own thorough review of the spectrum license assignments to determine whether the assignment of the AWS licenses to Verizon Wireless is consistent with Commission rules and would be in the public interest, which is precisely what the FCC is supposed to (and has authority to) review. As explained above, the proposed License Assignment and Commercial Agreements will not reduce or harm competition in any product or geographic market but, rather, will provide consumers with more choice, increased competition, and new services and technologies. From Comcast's perspective, the License Assignment and Commercial Agreements will provide new areas where we can continue to invest and innovate to bring new services to our customers.

Thank you for the opportunity to testify today.