MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
1025 connecticut ave. nw, suite 1110
washington, dc 20036
tel 202.265.1490
fax 202.265.1489

freepress
www.freepress.net

March 31, 2014

Thank you again for the opportunity to testify on behalf of Free Press for the Subcommittee on Antitrust, Competition Policy and Consumer Rights hearing entitled "An Examination of Competition in the Wireless Market," which took place on February 26, 2014.

Below, please find our answers to questions for the record that were submitted to Free Press by Subcommittee Chairman Klobuchar and by Senator Franken.

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Senator Klobuchar's Questions for the Record

1. Critics say the Justice Department's FCC filing about spectrum was all about picking winners and losers by favoring smaller carriers. They say that limiting auction participation in any way would result in spectrum being sold for much less, which could mean less money for the first responder network and for paying down the deficit. Should we be concerned about this?

Response: The Justice Department's filing in the FCC's spectrum aggregation proceeding[1] was not about favoring any class of carriers, but rather promoting competition by preventing excessive concentration of licenses. That filing noted simply that competition drives innovation in wireless services,[2] and that spectrum is a key input for such competition.[3] It also explained that spectrum might not be put to its highest and best use in an already concentrated market – such as this one – because incumbents with market power could realize a "foreclosure value" from acquiring spectrum not just to use it themselves, but to maintain their market power and incumbency advantages. In other words, "[i]n a highly concentrated industry with large margins between the price and incremental cost of existing wireless broadband services, the value of keeping spectrum out of competitors' hands could be very high."[4]

The Justice Department's filing therefore recognizes the realities of today's wireless market, and suggests that the FCC take care to ensure that all competitors have a legitimate chance to obtain spectrum. This is not just sound advice from our nation's antitrust authorities: it is also the law.

Congress charged the FCC with the duty to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants." 47 U.S.C. § 309(j)(3)(B). Despite this mandate, the two most dominant

[1] *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269 (filed Apr. 11, 2013).
[2] *See id.* at 5-8.
[3] *See id.* at 9.
[4] *Id.* at 11.

carriers today control more than two-thirds of the critical low-frequency spectrum nationwide,[5] and an even higher percentage of it in many markets.[6] Free Press has advocated comprehensive reform of FCC spectrum aggregation policies to address this imbalance, rather than auction-specific policies for the upcoming incentive auction or other competitive bidding situations.[7]

As Free Press demonstrated in its written testimony for this hearing, there are consequences to allowing such imbalances to persist. For instance, the lack of effective competition has led to wireless consumers paying *more* today for less robust service than they had at the dawn of the smartphone era. In 2008, an AT&T iPhone customer could purchase a plan with 450 voice minutes, 200 text messages and *unlimited* mobile data for $60 per month. Today that AT&T user must pay a base rate of $95 per month for unlimited voice and texts, but with just 2 gigabytes of data included in the monthly allotment, which equates to a 58 percent rate-hike.

2. Consumers deserve to keep and use cell phones they have already bought—it's just common sense. That is why I introduced the Wireless Consumer Choice Act with Senators Lee and Blumenthal. This bipartisan legislation directs the Federal Communications Commission (FCC) to take action to ensure consumers can "unlock" and keep their phones when they switch carriers. If they are deterred from switching carriers because they would have to buy a new phone, it is not true competition. Competition can lead to lower prices, new innovations and improved service. In December, the FCC came to a voluntary agreement with the wireless carriers to improve policies for unlocking prepaid and postpaid devices for current and former customers. Do you agree that this was a positive step for consumers? What should we continue to watch for as this voluntary agreement is implemented to make sure consumers are getting the benefits?

Response: The Free Press Action Fund supported the Wireless Consumer Choice Act (WCCA), and continues to support legislative efforts to change copyright and communications laws governing wireless device locking. The FCC's voluntary agreement with CTIA and five major carriers was a positive step, but it did not go far enough towards providing consumers with real freedom to use their devices. Those principles do not compare favorably to WCCA provisions. The bill would require the FCC to direct wireless providers to "permit . . . subscribers . . . or the agent of such subscribers, to unlock any type of wireless device," although the bill would not alter the terms any valid wireless service contract.

By contrast, the voluntary principles agreed to in December 2013 suggest that *only* the wireless providers themselves can unlock devices; and they stipulate that customers are only eligible for such unlocking by the carrier *after* the fulfillment of any postpaid contract, the payment of an early termination fee, or after some unspecified length of time as long as a full year for prepaid wireless customers. (The other four voluntary principles deal mainly with publicizing these unlocking policies and notifying customers of their eligibility for such actions.)

[5] *See* Letter from T-Mobile, Sprint, C Spire, CCIA, DISH, CCA, WGAW, Free Press, RWA, NTCA, Public Knowledge, WT Docket No. 12-269, GN Docket No. 12-268, at 1 (filed Mar. 25, 2014).
[6] *See* Comments of Free Press, WT Docket No. 12-269, at 17 n.41 (filed Nov. 28, 2012).
[7] *See id.* at 14-19.

In other words, the WCCA would allow users themselves or third party software providers to unlock devices, rather than relying on carrier permission and carrier action. And the WCCA would allow consumers to unlock devices at any time during the service contract, so long as those customers still honor their contracts. (While the principles suggest instead that devices should remain locked during the term of the contract, it would be hard to imagine laptops, tablets, or other devices being "locked" to a particular cable modem, DSL, or other home broadband wired network option during the first two years after purchase of that computer.)

As Free Press has suggested, the deeper policy question is not how to let consumers unlock their devices more easily but why those devices are locked in the first place. Merely using the full capabilities of a device that you've purchased should not be a copyright violation, and it should not give rise to any claim against you if you do not breach your contract with the carrier from which you purchased the device.

Senator Franken's Questions for the Record

1. The aftermath of the failed AT&T/T-Mobile merger is an important lesson in why we need antitrust enforcement. However, just as consumers are beginning to reap the benefits of that merger's collapse, there is talk of another merger: Sprint is reportedly considering a bid to acquire T-Mobile. I'm very concerned this deal would stifle competition and reverse the competitive dynamic of the past year. How would a Sprint/T-Mobile impact consumers?

Response: Free Press is likewise concerned about increased concentration in an already highly concentrated market, and as always we remain skeptical of counter-intuitive claims that *reducing* the number of competitors will somehow improve competition. However, because this acquisition has not been formally proposed yet, it is difficult to arrive at any final conclusion about its potential harms or merits. As I indicated in response to a question during the hearing, not only is the jury still out on this deal – that jury hasn't even been called yet.

There is indeed reason for concern about it at this stage nonetheless. Sprint's new ownership has argued that effective competition against the entrenched wireless duopoly will occur only if the third and fourth largest carriers combine and acquire the scale to compete.[8] But there could be other ways to facilitate scale and sharing of resources that would not remove T-Mobile from the market, along with its penchant for "maverick" behavior that disrupts and challenges the business models of its larger rivals.[9]

T-Mobile's maverick behavior has continued, and arguably intensified, in the time since the Justice Department and the FCC properly denied AT&T's acquisition of its smaller rival.

[8] *See, e.g.*, Edward Wyatt, "Sprint Owner's New Appeal for Merger With T-Mobile," *N.Y. Times*, Mar. 11, 2014.
[9] *See* Joint Petition to Deny of Center for Media Justice, Consumers Union, Media Access Project, New America Foundation, and Writers Guild of America, West, WT Docket No. 11-65, at 19-28 (filed May 31, 2011).

Analysts and reporters disagree, however, about whether T-Mobile's recent maneuvers and contract buyout efforts have resulted in lower monthly prices for wireless consumers.[10]

In sum, a combination of the third and fourth largest carriers would increase the concentration of a wireless market that Justice Department guidelines already categorize as "highly concentrated." It would extend a trend that has seen a precipitous drop in the number of national and regional wireless choices available to consumers over the last decade. Yet, it bears noting that Free Press did not base its opposition to AT&T's acquisition of T-Mobile solely on the sheer increase in concentration. We also demonstrated that the proposed transaction would have greatly increased the market share and strengthened the position of the AT&T/Verizon duopoly – all without any merger-specific efficiencies in terms of mobile broadband deployment or spectrum usage.

2. The Justice Department and the FCC are currently considering AT&T's bid to acquire Leap Wireless, a small pre-paid carrier that does business under the brand name Cricket. Do you think they should approve the deal? If so, what sorts of conditions should be attached to ensure that consumers are protected?

Response: After the conclusion of this hearing, and just after the delivery to witnesses of these questions for the record, AT&T and Leap closed their transaction on March 13th upon receiving FCC approval. *See Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent To Transfer Control of Authorizations*, Memorandum Opinion and Order, WT Docket No. 13-193, DA 14-349 (rel. Mar. 13, 2014).

Free Press did not petition to deny this acquisition at the FCC, nor register any formal opposition to it, after voicing initial concerns about continued concentration of spectrum, customers, and revenues in the hands of two dominant carriers. There is cause for concern especially about ongoing erosion of alternatives to expensive postpaid wireless service, as the four large national carriers continue to acquire and eliminate their prepaid service rivals such as Leap and MetroPCS. The FCC has adopted time-limited merger remedies – purportedly to address such concerns – such as the continuation of certain discounted rate plans for existing Leap customers during a transitional period of 12 to 18 months. *See id.* ¶¶ 168-171.

3. Comcast recently announced its plans to acquire Time Warner Cable. What are your views of this proposed deal?

Response: Comcast's acquisition of Time Warner Cable would be, in a word, disastrous. It would give Comcast unprecedented and dangerous levels of control of high-speed broadband *and* multichannel video programming distribution platforms. Free Press plans to oppose this transaction vigorously, and in fact began to do so with public statements and a campaign launched on the very same day that the deal was announced.

Free Press will develop its formal opposition to the transaction upon review of the merger applicants' filings with the FCC and antitrust authorities, which have yet to be submitted some

[10] *See, e.g.*, Thomas Gryta, "Wireless Bills Go Up, and Stay Up," *Wall St. Journal*, Mar. 9, 2014; Kevin Fitchard, "Has T-Mobile really kicked off a mobile price war, or is it all just an illusion?" *GigaOm*, Mar. 25, 2014.

six weeks after the announcement. As we have detailed already, however, this combination of the nation's two largest cable companies would make the combined colossus the *only* available provider of truly high-speed Internet access for almost 3 out of 8 households in the United States.[11] It would make the merged entity the largest pay-TV provider in 104 markets, encompassing 65 percent of the U.S. population.[12] It would give Comcast control of the 11 largest markets in the United States, and 17 of the top 20 – along with control of the NBC affiliate *and* the dominant wired distribution platform in the nation's 5 largest cities.

Looking beyond the reach of the merged entity and at its current customer base, the dominance of the combined Comcast and Time Warner Cable would be even more impressive. It would control 33 percent of pay-TV subscribers, 36 percent of home Internet subscribers, and 47 percent of subscribers to truly high-speed broadband (excluding slow DSL offerings not capable of delivering multichannel video).[13] The post-merger company would control 49 percent of "triple play" (video, data and voice) subscribers in the market for the "bundled" services, as well as 55 percent of the "double play" (video plus data) subscribers.[14]

What is this level of gatekeeper power and control good for? Well, Comcast's shareholders for one; but certainly not its customers. Comcast executives are already on the record conceding that the merger would *not* be likely to reduce consumers' prices.[15] The claim, therefore, that increased size and scale would allow Comcast to reduce its own costs for acquiring video programming should be seen for what it is: an attempt to increase Comcast's profit margins without passing *any* savings along to its long-suffering subscribers.

It's clear that Comcast's current scale does nothing to help its own customers. Despite the fact that Comcast already receives substantial volume discounts on programming, it has increased basic and premium cable TV prices *faster* than rivals like Time Warner Cable, AT&T or DISH.[16] As Free Press has documented, cable rates have increased at three times the rate of inflation for the last two decades straight, and much of that increase in price can indeed be traced to increased passed-through programming costs.[17] Yet, despite declining video margins, cable operators like Comcast have been able to maintain their overall margins by cross-subsidizing their video business with broadband – a hugely profitable service that is subject to little competition.[18]

Comcast's dominance, were this deal allowed, would give it the power to control the flow of speech, news, and other content on both cable TV and broadband platforms, simultaneously harming its own programming suppliers and online alternatives; its pay-TV and broadband rivals; and its own customers. That's not the kind of "triple play" anyone needs.

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[11] *See* Josh Stearns, Free Press, "Four Infographics Reveal Why the Comcast Merger is Bad for You" (Mar. 26, 2014), http://www.freepress.net/blog/2014/03/26/four-infographics-reveal-why-comcast-merger-bad-you.
[12] *See id.*
[13] *See id.*
[14] *See id.*
[15] *See* Jon Brodkin, "Comcast: No promise that prices 'will go down or even increase less rapidly,'" *Ars Technia*, Feb. 13, 2014.
[16] *See* Free Press, "Four Infographics," *supra* note 11.
[17] *See generally* S. Derek Turner, Free Press, "Combating the Cable Cabal: How to Fix America's Broken Video Market," (May 2013), http://www.freepress.net/sites/default/files/resources/Combating_The_Cable_Cabal_0.pdf.
[18] *See id.* at 2.

Turning briefly to the impact of the proposed cable merger on the wireless competition that was the subject of this hearing, some have claimed that a Comcast-Time Warner Cable merger would increase the likelihood of cable competition against entrenched wireless companies such as Verizon and AT&T. Yet cable companies today have already built out their own wi-fi footprints, and they already allow customers of other cable companies to use these wi-fi networks.[19] Once again, a supposed benefit of the merger is not in fact dependent on the transaction – and cannot be used to justify it.

Respectfully submitted,

/s/ Matthew F. Wood

Policy Director
Free Press
mwood@freepress.net

[19] *See* Time Warner Cable, "What is CableWiFi?" http://www.timewarnercable.com/en/residential-home/support/faqs/faqs-internet/twcwifihot/cablewifi/what-is-cablewifi.html (last visited Mar. 27, 2014).