

“The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?”

Questions for the Record Responses of Steven K. Berry

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Questions for the Record from Senator Kohl

1. Before assuming your position at RCA, you served as head of governmental affairs at NCTA, the cable industry's trade association. While you were there, and since then, wasn't it a strategy of the cable industry during the last decade to vigorously compete with phone companies in offering wireline phone and internet connections to consumers? Do you worry about this alliance between cable and one of the two largest phone companies – Verizon – as harming that competitive battle?

During the time that I was fortunate enough to work for the cable industry, a major aspect of industry strategy was competing with the phone companies in digital phone service and high-speed internet, with wireless service emerging as the next competitor. In fact, during that time we had a slogan: "Competition Works. Consumers Win!"

The competition between cable and the phone companies truly provided significant benefits to consumers. Through digital phone service, cable was able to offer a full suite of features, including unlimited calling plans, with studies finding that consumers and small businesses could save \$100 billion over five years as a result of that voice competition. In providing competition for high-speed internet service, cable offered connections with significantly faster speeds than the digital subscriber line (DSL) service provided by the phone companies. In addition to giving consumers a choice of their service provider, these superior speeds for internet access through cable drove the phone companies to increase their own internet offerings and begin to deploy fiber, like Verizon's FiOS offering.

Cable looked forward to competing in providing wireless service. With the growth of mobile services, integration of a wireless platform into the existing "triple play" would allow cable to enter a new market and provide a new alternative for consumers – and again, consumers would win.

I have serious reservations about the degradation of competition in these markets. If competition works and consumers win, then it follows that when competition is eliminated, consumers lose.

As I stated during my testimony, these deals amount to a non-compete agreement. If approved, Verizon would not need to worry about new competitive entry from the cable companies encroaching on its duopolistic control over the wireless industry, and in return Verizon will resell cable wireline service instead of looking at ways to expand its own fiber offering.

These deals not only wipe out the threat of competition from the cable providers, but also eliminate four potential partners, and providers of critical competitive inputs, for all other competitive wireless carriers, such as RCA members.

2. One thing that competitive wireless companies require is what is known as "special access" or "backhaul" – access over wired phone lines from cell phone towers to long distance phone and Internet networks. For years, the competitive wireless companies have complained about what they see as very high prices for special access from incumbent phone companies such as Verizon and AT&T. One way

around the incumbents is to contract with the cable companies for special access. Do you have any concerns that this deal will change the incentives of cable companies to provide special access?

The Verizon-cable company deals will reduce the number of backhaul partners, thereby increasing the artificially high rates that competitive carriers pay to get access to special access facilities. Because cell towers need to be connected to a network, wireless carriers are dependent on “backhauling” traffic through wired or wireless connections. Oftentimes these connections are made through “special access” services provided by the ILEC phone companies, who, as descendents of the Bell monopoly system, have sole control and access to a network of wires funded through decades of government-sanctioned monopoly control. In much of the country, these facilities are controlled by Verizon or AT&T. In turn, wireless companies are often forced to pay the equivalent of monopoly rents to Verizon or AT&T while directly competing with their wireless affiliates.

As I testified during the hearing, one bright spot in the backhaul market has been the emergence of cable increasingly providing backhaul services for wireless operators. This alternative option helped to provide competition in the provision of backhaul services, which may eventually force Verizon and AT&T to provide market-driven prices for special access. The increase in cable backhaul has also been lucrative for the cable companies, with Time Warner Cable noting an increase in backhaul revenues of nearly 70% from 2010 – 2011. Further, in purchasing backhaul services from one of the cable companies rather than Verizon or AT&T, a wireless competitor is not contributing to increased revenues of their direct competition.

These deals create grave concerns regarding the incentives of the cable companies to provide special access to competitive wireless carriers. With a direct financial interest in the traffic carried on Verizon Wireless’ network, at first as agents and later as mobile virtual network operators, the cable companies have strong incentives to favor the backhaul of Verizon Wireless traffic. In turn, this could raise the costs for backhaul for competitors. Additionally, as Verizon Wireless increasingly relies on the cable networks for its own backhaul, the incentives for Verizon to deploy fiber offerings to backhaul its own traffic are diminished, and overall capacity for backhaul is decreased. What has begun to develop as the choice of a second wired network for these services will be collapsed back into one monopoly choice for wireline services.

With the deployment of 4G LTE mobile broadband networks by wireless operators and the continued explosion of demand for wireless service, the reliance on backhaul is increased. The sooner traffic can be moved from wireless to wireline, the more capacity can be provided to consumers while increasing the efficiency of spectrum holdings. That is why the development of new methods and processes to alleviate increased traffic are critical to continued growth in the wireless industry.

Cable companies are seen as partners to help increase wireless capacity not only through backhaul on wired networks, but as key partners for the provision of WiFi connections and WiFi offload of mobile traffic. Through exponential increases in the number of WiFi hotspots, including many provided by the cable companies, carriers can efficiently use a mix of their exclusively licensed spectrum as well as unlicensed spectrum. WiFi hotspot growth has been particularly focused on urban areas, where

exclusive spectrum holdings by wireless providers are most taxed for capacity based on customer density and where in-building penetration can be difficult for wireless frequencies above 1 GHz; for example, Comcast has over 20,000 WiFi hotspots from Philadelphia to New York alone.

As the incentives to provide competitive access for backhaul through the cable companies' wired networks are changed through these deals, so too are the incentives to offer equal access to WiFi services. Again, the cable companies may have incentives to favor Verizon Wireless traffic. The impacts on WiFi services are particularly alarming due to Time Warner Cable's recent move to patent a method for seamless roaming between WiFi and cellular networks for smartphones and other devices.

Wireless carriers need to offload traffic through backhaul and other means, and these deals raise serious concerns regarding economically feasible access to these services that must be addressed by regulators if approved.

3. In his March 8 Politico interview, David Cohen said that one of the reasons Comcast decided not to enter the wireless business was the presence of insurmountable hurdles like roaming – which he described as “next to impossible” to secure. If roaming is next to impossible for a company like Comcast to secure, what does that say about the ability of smaller carriers to effectively compete with Verizon?

Mr. Cohen is correct; achieving commercially reasonable roaming arrangements with Verizon and AT&T remains a challenge despite the FCC's Data Roaming Order. Reaching roaming agreements for the latest generation technologies at economically feasible and commercially reasonable rates and terms is critical to effectively competing with Verizon (as well as AT&T). In recent years, RCA has urged policymakers to support a commercially feasible voice and data roaming ecosystem within the industry, and, due to the fact that roaming remains “next to impossible” to secure, it should not come as a surprise that the FCC has not been able to certify the industry as “effectively competitive” for over two years.

Problems in securing roaming agreements have grown as the industry has consolidated. In earlier, competitive times, no one carrier could provide nationwide service to its customers through its network alone, and in turn carriers of all sizes were properly incented to negotiate and enter into roaming agreements. Through the wireless industry's march to consolidation, competition has decreased, and Verizon and AT&T have emerged as the only 3G roaming options for their given technology paths for some carriers to provide nationwide service. As Mr. Cohen described, they are largely unwilling to discuss 4G roaming, and have little incentive to do so.

Verizon's assault on roaming extends beyond stonewalling competitive carriers seeking equitable roaming agreements. In fact, Verizon is currently in the process of appealing the FCC's 2011 Data Roaming Order, which would require negotiations for data roaming services where technologically feasible.

As you noted, Comcast has described access to roaming agreements as “next to impossible.” Cox stated that it takes eight months to get Verizon to the table to discuss roaming. Bright House filed an affidavit stating that roaming was needed to unleash significant investment in wireless services. It is resoundingly clear that issues relating to roaming played a critical role in foreclosing these cable operators from entering the

facilities-based wireless market. Had these cable companies built out their spectrum holdings, there potentially would be four additional carriers in need of roaming, with incentives to foster additional roaming for all competitive carriers. Their exit only removes potential roaming partners for other competitive carriers, continuing an anticompetitive cycle of limited potential for roaming agreements. This circumstance does not bode well for smaller carriers or new entrants who wish to compete with Verizon. Strict roaming conditions must appropriately be applied to these transactions to ease the competitive harms related to roaming that are exacerbated by these deals.

4. One very interesting facet of this deal is its timing. Verizon's deals with the cable companies were announced last December, just days before AT&T and T-Mobile announced that they abandoned their proposed merger. Some industry observers suspect that these deals were deliberately reached at a time when T-Mobile was not free to bid on this spectrum. T-Mobile's FCC filing states "it is likely no coincidence that Verizon Wireless signed this deal while the AT&T/T-Mobile transaction was still pending, so that T-Mobile was unable to compete to purchase this spectrum." What is your view? Do you believe that the timing of the deal had anything to do with Verizon Wireless's desire to keep this spectrum out of the hands of competitors such as T-Mobile?

While the timing of the deal is clearly suspect, as T-Mobile was not in a position to purchase the spectrum due to the since abandoned transaction with AT&T, Verizon was also able to offer something that no other wireless provider could – a pathway into the wireless market and a non-compete agreement for significant portions of cable's footprint. Otherwise, the cable companies could have returned the spectrum to the FCC for an incentive auction based on their demanded reserve price or commanded a higher price on the secondary market. As part of an "integrated transaction," as Mr. Cohen has stated, the deal was not about price for the cable companies, and for Verizon the deal has everything to do with eliminating competition – potential competition by the cable companies and decreased competition from other carriers.

Verizon was able to use that offer to satisfy its desire to keep the spectrum out of the hands of spectrum-starved competitors, such as T-Mobile. Indeed, Verizon has demonstrated how manipulation of spectrum holdings can impact not only its offerings but the ability of other would-be competitors from providing service on similar spectrum holdings by withholding an ecosystem for commercially feasible devices and services to develop. This can be seen in Verizon's departure from interoperability, as well as its newly-seen desire to sell its Lower 700 MHz spectrum rather than deploy services.

It is clear that Verizon plans to deploy 4G LTE services in spectrum blocks where only it controls nearly all of the spectrum nationwide – a pattern that fits the AWS licenses held by the cable companies but not Verizon's lower 700 MHz holdings. In doing this, Verizon has complete control over the ecosystem, creating technical barriers to roaming and *de facto* exclusivity for all devices that operate within their "walled garden" network.

As I stated at the hearing, this deal is indeed “elegantly contrived” and “superbly clever.” Verizon has seized an opportunity to gobble up LTE-ready spectrum while competitors were unable to negotiate for the spectrum and with an offer that no other suitors for the spectrum could provide.

5. *The FCC has a test for evaluating acquisitions of spectrum, what they call the “spectrum screen.” Verizon Wireless points out that this deal falls under the FCC’s thresholds in 121 of the 136 markets in the transaction. Should that settle the question for those markets? Do you believe the spectrum screen – first developed in 2001 – is adequate to evaluate spectrum acquisitions today? Why or why not?*

In light of the competitive challenges in the wireless market, including consolidation of numerous prior competitors into the largest two carriers, the spectrum screen is broken. Regardless, the spectrum screen was developed as a tool to aid the FCC in evaluation spectrum transactions, and was not designed to serve as an up or down test to determine if a transaction is in the public interest. Where the spectrum screen does not properly account for potential competitive harms in a transaction, it must be adjusted or other forms of competitive analyses must be conducted in reviewing the transaction.

The spectrum screen is not adequate to evaluate its competitive harms. The FCC should adjust the screen to reflect today’s market realities. Indeed, other adjustments to the spectrum screen since 2004 – including raising the thresholds at Verizon’s request – have taken place in the context of a pending transaction review. The Commission has always reviewed the spectrum screen on a case-by-case basis in the context of transactions before it, and should continue to do so in this instance.

In adjusting the screen to reflect today’s market realities, the FCC must take into account the recent views of the Department of Justice and its own recent affirmations that a competitive market has four competitors at a national level as well as additional rural and regional competitors. The screen also should be reduced to eliminate spectrum that will not be available in the immediate future for commercial mobile broadband use, such as the 700 MHz Upper D block, which has been reallocated for public safety use, and additional SMR spectrum, which the FCC has admitted is not immediately useable for mobile broadband. Further, all spectrum is not created equal, and different spectrum frequencies should be weighted differently to appropriately account for spectrum value. For example, as the FCC has noted, “beachfront” spectrum below 1 GHz is of higher value for mobile broadband and should be weighted accordingly.

The inadequacy of the current spectrum screen to evaluate these acquisitions is demonstrated by the few markets triggered in the face of significant potential competitive harms, despite the fact that this transaction is the largest spectrum-only transfer the FCC has ever reviewed. Accordingly, the FCC must use all tools at its disposal to evaluate these transactions and/or the screen should be revised for this transaction to reflect the current market realities.

Questions for the Record from Senator Lee

1. *In your testimony, you state that Verizon does not need spectrum but rather “holds as much as 44 MHz of unused spectrum in many markets.”*

- *Could you comment on the nature of the markets where you believe Verizon Wireless has an excess supply of spectrum, whether these are limited to rural areas, and if so, what you believe should be done to protect against unused spectrum while allowing Verizon Wireless to obtain spectrum where it needs it?*

As I stated at the hearing, Verizon maintains a warehouse of spectrum in excess to its needs. Since the hearing, a new development – Verizon’s announcement of intent to sell its 700 MHz lower A and B block licenses, which have been in its warehouse since auction in 2008 – confirms that Verizon currently holds spectrum that it does not use and may not have any plans to use. As Verizon noted in a press release, this spectrum is located in the following markets, representing a mix of rural, suburban, and urban markets:

A Block Licenses (Economic Areas)

New York, Philadelphia, Washington-Baltimore, Orlando, Miami, Tampa, Atlanta, Cincinnati, Cleveland, Detroit, Grand Rapids, Indianapolis, Kansas City, Minneapolis, Oklahoma City, Dallas, Austin, Houston, San Antonio (CMA area only), Denver, Los Angeles, Fresno, San Francisco and Sacramento

B Block (Cellular Market Areas)

Los Angeles, Chicago, Miami, Cincinnati, Rochester, Memphis, Oklahoma City, Greensboro-Winston Salem, Charlotte, Youngstown, Raleigh-Durham, West Palm Beach, Fort Collins, Pueblo and Colorado 4 – Park; Bradenton and Florida 3- Hardee; Athens, GA; Idaho 5 – Butte; Lake Charles, Alexandria, Louisiana 1- Claiborne, Louisiana 2 – Morehouse and Louisiana 3 – De Soto; Maryland 3 – Frederick; Billings, Great Falls, Montana 8 – Beaverhead, and Montana 9 – Carbon; Nevada 3 – Storey; New Mexico 5 – Grant and New Mexico 6 – Lincoln; Rapid City and South Dakota 1 – Harding; Lubbock, Amarillo, Waco, Longview-Marshall, Tyler, Texarkana, Odessa, Laredo, Midland, Texas 2 – Hansford, Texas 6 – Jack and Texas 18 – Edwards; Utah 1 – Box Elder, Utah 4 – Beaver, Utah 5 – Daggett and Utah 6 – Piute; Virginia 10 – Frederick; Washington 2 - Okanogan; Casper and Wyoming 2 - Sheridan

Additionally, Verizon holds almost 65% of the AWS-1 Band F Block, which it is currently not using, covering the eastern half of the nation. Again, this covers markets that are urban, rural, and suburban.

The sale of its unused 700 MHz licenses alone is not sufficient to resolve competitive concerns in the industry, and the FCC must work to resolve the concerns of spectrum aggregation as well as the integrated agreements involved with the transaction at hand. Further, withholding the sale of the 700 MHz licenses until after the integrated transactions with the cable companies are closed makes any guesses at who will buy the 700 MHz licenses, and at what price, pure speculation. In the most recent Verizon earnings call, Verizon further noted that if it cannot get the price it desires, it will not sell the 700 MHz licenses, at its discretion.

The FCC has the authority in reviewing the transaction to take a close look at Verizon’s spectrum holdings, both pre- and post-transaction, and the Commission can use

this authority to ensure Verizon has sufficient access to the spectrum it needs while also requiring significant divestitures to spectrum-starved competitive operators.

2. *Testimony at the hearing strongly suggested that many, if not most, potential buyers of the spectrum at issue in this transaction were approached by the cable companies.*

- *Do you dispute that to be the case, and if not, how would that affect your analysis with respect to the government’s intervention in the spectrum transfer?***

I take Mr. Cohen at his word from the testimony that SpectrumCo had several discussions with potential buyers of this near nation-wide swath of 4G LTE ready AWS spectrum, however it is clear from discussion with my members that all potential buyers were not at the table. Differences of opinion about whether many or most potential buyers for the AWS spectrum were approached may be attributed to the characteristics of a potential buyer from the cable companies’ point-of-view.

Demonstrated through the marketing and operating agreements that make up part of these integrated deals, it becomes clear that the cable companies’ definition of a potential buyer has the characteristics of:

- An advanced technology nationwide network with access to the latest devices and excess capacity to allow for eventual wholesale access for the cable companies;
- A willingness to market the cable companies’ core wired operations in addition to, or more likely instead of, the potential buyer’s own wire or nascent fiber operations – essentially a non-compete agreement; and,
- An absence of regulatory scrutiny over other transactions to attempt to deflect attention from potential competitive impacts of such a deal.

Accordingly, there was only one potential buyer who met these characteristics: Verizon Wireless. In this suitor alone could the cable companies essentially reach a non-compete pact while still gaining access to offering a quad play through adding wireless service to their existing triple play package.

3. *In your written testimony, you stated that “[t]his transaction will only increase Verizon’s dominance over the roaming market by eliminating four potential*

roaming partners.” Other testimony at the hearing suggested that the cable companies had at some point prior to this transaction definitely determined not to enter into the wireless market using this spectrum.

- ***Is it your view that this transaction is the cause of the cable companies not entering into the wireless market?***
- ***Do you believe the cable companies would use this spectrum to enter into the wireless market if this transaction were not allowed?***

Through the integrated marketing and operating agreements that make up part of these deals, the cable companies will indeed be entering the wireless market. However, rather than entering the market as facilities-based competitors, they will enter the market first as agents to and later as mobile virtual network operators (MVNOs) of Verizon Wireless. This is an important distinction, particularly as it relates to Verizon’s dominance over the roaming market.

Were the cable companies to enter the market through facilities-based competition, they would be important roaming partners for other competitive carriers. As not one of the cable companies would have the scope to provide nationwide service on their own, they would actively work to develop a healthy roaming market. Indeed, several of the cable companies were among the leading advocates for the 2011 data roaming order, based on the importance of adequate voice and data roaming to facilitate their entry into wireless. Upon adoption of the data roaming order, NCTA, the cable trade association, unequivocally stated that, “adopting enforceable data-roaming rights will enable new entrants to compete on a nationwide basis and give consumers more choice and flexibility in wireless services.” More recently, each of the companies has stated the difficulty in reaching these agreements as a primary reason for their decision not to enter through deploying their own network.

As things would stand based on the proposed deals, these cable companies’ entries into wireless will further increase Verizon’s dominance over the roaming market as four would-be roaming partners are now essentially an extension of Verizon’s network. A competitive carrier cannot reach roaming agreements with MVNOs to roam on the host network; the negotiations would have to be with an even more dominant Verizon, who owns and controls the network.

It would be speculation to say whether or not these companies would enter the facilities-based wireless market were this transaction not allowed; however their entry is unlikely if policymakers do not take steps to support a more competitive market. The cable companies provided a blueprint for the successful entry of a competitive carrier into the facilities-based wireless marketplace through their justification in abandoning that path. These same policies that competitive carriers have clamored for – commercially feasible roaming, affordable access to backhaul, special access, and WiFi networks, interoperable standards, and access to useable 4G LTE-ready spectrum – are the reasons stated by the cable companies that their own wireless deployment could not go forward. These policies should be conditioned on these transactions and the ends of wireless policy if the goal is competitive markets.