

Sen. Kohl's Follow-Up Questions for the Record for Hearing on

"The Verizon/Cable Deals: Harmless Collaboration or A Threat to Competition and Consumers?"

For Tim Wu

1. At the hearing, Randy Milch of Verizon argued that the commercial agreements would not mean that Verizon would lessen its competition with the cable companies with respect to FiOS, because all Verizon would realize if the cable companies sold their services was a portion of a one-time commission in the hundreds of dollars. Mr. Milch argued that he would not sacrifice a potential revenue stream in the thousands of dollars per customer for such a relatively small one-time payment. What is your response to this argument?

In most competitive markets, companies realize zero revenue when a competitor makes a sale. The more competitors share revenue, the more their incentives align and the less they compete. By offsetting the lost revenue from each customer that chooses cable over FiOS, the agreements will dampen Verizon's incentive to compete aggressively with the cable companies.

However, the real issue is not relative revenue but relative profit. The revenues realized from a commission versus a FiOS sale do not necessarily determine Verizon's incentives. Because Verizon incurs none of the cable companies' costs, the return on investment from these commissions could potentially exceed the return on investment from FiOS subscriptions.

Finally, reduced FiOS competition with cable will not be the only harm to consumers. As I stressed in my testimony, by giving Verizon a financial interest in the future of cable sales, the agreements disincentive Verizon from developing or promoting *any* products that compete with cable. For example, Verizon will have less incentive to promote its 4G LTE network as a "cord cutting" alternative. The greatest threat from an alliance between Verizon and the cable companies is the loss of such disruptive innovation.

2. It has been widely reported in the press that the commercial agreements have no fixed term. The joint FTC/Justice Department Competitor Collaboration Guidelines state that "the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger." If these agreements indeed have no fixed term, what are the implications for the antitrust analysis of these agreements?

Under the Competitor Collaboration Guidelines, one of four factors in determining whether to evaluate competitor collaboration under the Horizontal Merger Guidelines is whether "the collaboration does not terminate within a sufficiently limited period¹⁰ by its own specific and express terms." Footnote 10 provides: "In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger. The length of this term may vary, however, depending on industry-specific circumstances, such as technology life cycles."

Under this factor, to escape merger scrutiny, a collaboration agreement must *both* contain a “specific and express” term limit *and* that term must be a “sufficiently limited period.” Ten years is simply a rule of thumb for the latter. A collaboration agreement with no fixed term, by definition, does not “terminate within a sufficiently limited period by its own specific and express terms.” Therefore, this factor would be satisfied.