

**Questions for the Record for Verizon-Spectrum Co. Hearing
Wednesday, March 21, 2012 (2 p.m.)**

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1. **In your testimony, you have stated that this transaction “forces us to confront exactly the same problem” that was faced in the AT&T/T-Mobile transaction. However, the spectrum transaction at issue here seems fundamentally different to me as no customers, facilities, or other assets beyond spectrum are being transferred, and the spectrum being transferred was not previously in use. These differences seem significant because the transaction does not eliminate a viable competitor and also entails efficiencies such as putting to use spectrum that was not previously being put to any use.**
 - **How do you account for these differences and do you dispute that this transaction entails what antitrust law generally views as an important efficiency—that is, moving assets from a low value use to a high value use?**

The problem to which I referred was the problem of creeping duopoly in the wireless industry—in other words, a return to the market conditions that predated the Telecommunications Act of 1996, only without the consumer-protective regulations from that period. Measured by book value, Verizon already controls more spectrum than the proposed AT&T–T-Mobile combination would have. If the proposed transaction were approved, Verizon would control more spectrum than its three closest competitors—AT&T, Sprint, and T-Mobile—combined.

The fact that the cable companies, with their enormous revenue streams, and ability to leverage their current product lines to offer a “quadruple play,” did not view themselves as a “viable competitor” further underscores the current levels of market power and barriers to entry in this industry.

The proposed efficiencies of the transaction are minimal and outweighed by the harms to competition and innovation. There is no indication that Verizon will utilize this spectrum faster or more efficiently than any of its smaller competitors—such as Sprint or T-Mobile. In fact, by denying its competitors scale in the 4G LTE market, Verizon will substantially lessen the competitive pressures that it faces to improve the quality and efficiency of its network. Further, the harms to competition and innovation will fall not just in the wireless market. By securing détente between Verizon and the cable companies, the transaction will substantially reduce the possibility that wireless broadband will become a replacement for cable and a source of disruptive innovation.

2. **The primary consideration of our antitrust laws is consumer welfare, and several factors in the wireless market indicate that consumers are benefitting from robust competition. Wireless prices are falling, consumers have competitive choices with about a third of all U.S. consumers having switched wireless carriers at some point, vibrant innovation is occurring with new devices and services being announced on a regular basis, and companies are investing heavily in 4G and 4G LTE deployment.**
 - **Much of your testimony depends on the premise that the wireless industry is not in fact competitive. How do you reconcile this view with the benefits to consumers we are seeing in this industry?**

Current levels of competition in the wireless industry are far from robust. The FCC's most recent Mobile Wireless Competition Report placed the national weighted average Herfindahl-Hirschman Index (HHI) for the industry at 2848, as of mid-2010—far exceeding the threshold of 2500 that the DOJ and FTC regard as “Highly Concentrated.”¹ While mobile wireless prices have “declined dramatically over the past 17 years,” they have remained virtually unchanged in recent years.² According to the Report, the “most significant development” in pricing was the elimination of unlimited data plans, and “another significant development” was higher early termination fees.³ And, the percentage of customers that switch carriers over a given time period—known as “churn”—has been decreasing for years.⁴

But, even modest levels of competition can yield some benefits to consumers. The danger of the proposed Verizon spectrum acquisition is that it will reduce wireless competition even further. As the prospect of a de facto duopoly in wireless becomes ever more real, we face a policy choice between further concentration and continued competition.

3. **At the hearing, I understand you to have suggested that that the agreements might diminish competition between Verizon Wireless's 4G internet service and the cable companies.**
 - **Can you elaborate on how this deal affects competition between the wireless and wire-line internet products?**

¹ FCC, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, 26 F.C.C.R. 9664, 9679 (2011).

² Id. at 9675, 9781.

³ Id. at 9725.

⁴ Id. at 9817.

Wireless broadband has the potential to be the “third pipe” that disrupts the broadband duopoly between local-monopoly cable and telephone providers (which itself is already showing signs of shifting towards a cable monopoly). The joint marketing and R&D agreements between Verizon and the cable companies dramatically reduce Verizon’s incentive to aggressively promote its 4G LTE network as a substitute for wire-line broadband. Combined with the substantial increase in Verizon’s market power—and the attendant creep towards an AT&T/Verizon duopoly—in the mobile wireless market, the deal makes it less likely that *any* wireless provider will mount a substantial challenge to wire-line broadband. In contrast, the acquisition of the spectrum by another provider, especially one that is not a substantial provider of wire-line services, would increase the likelihood of such a challenge.

- **Do you believe that wireless and wire-line internet services are substitutes?**

Yes. Most obviously, wireless broadband is a direct substitute for wire-line broadband. According to *PC Magazine*, “[t]he mobile broadband service that has the best chance of being a true cable replacement is Verizon’s new 4G LTE service.” Further, wire-line internet, combined with WiFi, is a potential substitute for wireless internet service (as well as a potential complement, as we have seen with WiFi offloading).

4. **During the hearing, you said that “the consumer is served by destructive innovation, not by bundling.”**

- **Can you please elaborate on this point?**

With “bundling,” a single wire delivers telephone, television, and internet services into the home, but the owner of the wire controls all three services.

With disruptive innovation, each transportation infrastructure—whether wire-line or wireless—would compete head-to-head, and each service—whether telephone, television, internet, or any other—could be offered in individually competitive, “over-the-top” markets.

- **In your view, under what circumstances is bundling a good thing for consumers?**

“Pure bundling” of distinct products—where the consumer may purchase either the entire bundle or nothing—may offer some conveniences, but is rarely good for consumers. If the seller exploits its power in one market to force consumers to buy a second product that they either do not desire or would prefer to purchase on different terms, such bundling is per se illegal under the Sherman Act. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 9–29 (1984).

“Mixed bundling”—where the consumer may choose either to bundle or not bundle—is sometimes good for consumers. For example, some consumers may value the convenience of a single purchase. But even mixed bundling may harm consumers by harming competition. *See, e.g., LePage’s Inc. v. 3M*, 324 F.3d 141, 154–57 (3d Cir. 2003).

- **Why is the bundling in this circumstance not welfare enhancing since consumers still have the choice not to bundle their purchase?**

The marginal benefits to consumers of being offered a “quadruple play” in Verizon Wireless stores are miniscule in comparison to the harms to competition and innovation posed by the proposed transaction. Even my co-witness, Charles Rule, who testified in favor of this transaction, admitted that the efficiencies of the cross-marketing deals did not “knock [his] socks off.”