

Today, the Federal Communications Commission [approved with conditions](#) Verizon's purchase of currently unused spectrum from cable companies, along with Verizon's sale of other spectrum to T-Mobile as a "voluntary" concession made to allay concerns about spectrum concentration. The order was approved on a 5-0 vote but with separate statements from Commissioners Robert McDowell and Ajit Pai. Last week, the Department of Justice [approved](#)

a series of commercial agreements accompanying the license transfer, subject to conditions. The following statement may be attributed to

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This deal is great news for consumers facing a dire spectrum crunch. Yet the decision sets a dangerous precedent. The FCC has authority to review license transfers but not other "related" transactions. Nevertheless, it devotes fourteen pages of its order to just such a review of the commercial agreements.

The fact that the FCC ultimately approved the agreements is no defense of its lengthy and misplaced critique of them. By not leaving review of such provisions to the DOJ under its more rigorous antitrust analysis, the FCC may ensure that future transfers and mergers aren't even contemplated, even if they would benefit consumers. This effectively grants the FCC the unchecked power to stop transactions it doesn't even have the authority to review.

All of this leaves companies playing a drawn-out game of "Mother, May I?", rearranging their businesses in ways the agency could neither require by regulation nor extract as concessions without exceeding the proper scope of its transaction review. Most troublingly, the Commission need not even make its extra-legal demands explicit.

That's almost certainly what happened here with Verizon's nominally voluntary concession on data roaming. This leaves Verizon (but not its competitors) subject, for five years, to obligations the D.C. Circuit may soon rule the FCC has no authority to to

impose—much as Comcast “voluntarily” agreed to net neutrality conditions in its merger with NBCUniversal even stricter than those the D.C. Circuit seems likely to strike down for everyone else.

And one has to wonder: Did Verizon eventually agree to sell spectrum to T-Mobile because the agency made it clear, if not explicit, that it preferred T-Mobile over Verizon to buy cable's spectrum? In its order, the FCC notes that, while mollified by Verizon's buildout and roaming commitments, “other providers” might have used some of the acquired spectrum in ways the agency preferred. That's a comparison explicitly barred by Section 310(d), but also one explicitly demanded by T-Mobile, regulatory advocates, and leading Members of Congress. It's far from clear the agency would have been so mollified if Verizon hadn't also entered into the deal with T-Mobile.

Congress needs to rein in the FCC. The FCC Process Reform Act passed by the House in March is a good start, requiring that conditions be narrowly tailored to real harms the FCC has authority to regulate. But until Congress makes clear that the DOJ alone has authority to analyze a transaction's competitive effects and re-asserts the limits it explicitly imposed on the scope of the Commission's reviewing authority, the FCC will continue playing games with our high tech economy.

ICLE and TechFreedom previously submitted [joint comments](#) to the FCC on the SpectrumCo deal.

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