

Summary

It has been said that sometimes the best way to know the weather, is to step outside. For the FCC, it is time to take that first step outside into the reality of competition in the mobile marketplace. The mobile market stands as one of the few bright spots in the economy, limited primarily by severe constraints on its chief asset: spectrum. Verizon has decided to undertake what any prudent business would do—obtain those inputs necessary for its continued growth.

Critics of the proposed transaction lament the concentration of more spectrum in the hands of one of the industry's biggest players. But this implicit equation of concentration with harm to consumers is unsupported and misplaced. Concentration of resources in the hands of the largest wireless providers has not slowed the growth of the market; the problem is that growth in demand has dramatically outpaced capacity. Meanwhile, whatever the claimed merits may be of other, smaller companies holding this spectrum (as the deal's opponents seem to want), that theoretical deal is not before the Agency, and the Commission is precluded from evaluating this deal in light of that hypothetical alternative.

While the FCC undeniably has authority to review the license transfers under the Federal Communications Act, its purview to review transactions is intentionally limited in substantive scope, and the Commercial Agreements that the deal's opponents want to bootstrap into the FCC's review are outside of it. Whether those agreements have anticompetitive effect is properly the province of the Department of Justice and their effect on competition is best measured under the antitrust laws, not by the FCC under its vague "public interest" standard. Indeed, if the FCC can assert jurisdiction over the Commercial Agreements as part of its public interest review, its authority over license transfers will become a license to regulate all aspects of business—duplicating merger review by the DOJ, but under a standard of review that lacks any clear limiting principles and analytical rigor. This is a recipe for certain mischief.

In the final analysis, the mobile wireless telecommunications services market is not concentrated to the extent that anticompetitive effects would result from this transaction. At the same time, the need for all competitors, including Verizon, to obtain sufficient spectrum to meet increasing demand is so large that the transfer this deal contemplates of unused spectrum from companies with no means to deploy it to a company that has demonstrated itself to be one of the most significant in the industry is plainly in the public interest and should be approved.