DEPARTMENT OF JUSTICE

TELECOMMUNICATIONS COMPETITION

Address by

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Let me begin by thanking Dick Wiley for the opportunity to talk with this impressive audience about the state of competition in the telecommunications sector of our economy. This conference is an important entry on the yearly calendar of everyone involved in the exciting and chaotic world of telecom competition. It is a privilege to take part in today's program.[1]

In my job as an antitrust enforcer, I very often have the opportunity to hear from folks who are unhappy about some aspect of competition in the telecom sector. Our work in the § 271 process has been one example. RBOCs frequently told us what an outrage it was that we were being so picky in enforcing the § 271 checklist, that we were flyspecking applications, that we ought to be deferring to state commissions instead of "duplicating" their work, and that we were depriving consumers of the benefits of long distance entry. CLECs frequently told us what an outrage it was that we were laying down on the job and being too lenient on applications. I can think of other numerous examples of complaining constituencies in the cable industry and elsewhere.

It is only natural that when individual players speak out, they tend to point out what they promise to be wrong in the industry and how it should be changed in ways they favor. Legislators naturally focus on areas where change is needed. Individual companies or industry segments naturally clamor for government action that benefits them individually. But my theme today, from the viewpoint of someone charged with protecting competition and consumers, is that the glass is at least half full, and rising.

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[1] References to various public sources of information on the state of competition in the telecom sector throughout this presentation are not meant to represent endorsement by or acceptance of the accuracy of those sources by the Antitrust Division.

This does not mean that there are not areas for improvement. This does not mean that every competitor is happy, or that investors in the sector are necessarily happy. The introduction of competition into telecom markets has not come as quickly as some predicted or would want. But many telecom sectors have seen significant changes since the passage of the 1996 Act. New competitors have emerged to challenge incumbents, and convergence is occurring among services and providers. These changes have benefitted consumers by providing a wider variety of services and bundles of services at lower prices. Let me mention some aspects of this in several sectors.

The Mobile Wireless Sector

Nowhere is this trend more evident than in the mobile wireless sector, a major success story for consumers. Initially there were only two licensed providers of cellular service in each geographic area, but the FCC promoted competition, first by increasing the amount of available spectrum and allocating much of it to new providers, and then by eliminating price regulation and loosening conditions on spectrum use. Through careful management of this sector, competition has flourished. Today, there are six companies providing service on a nationwide basis and several regional players.

Mobile wireless providers compete by lowering prices and offering pricing plans that include large quantities of minutes that can be used over broad geographic areas without incurring extra fees.[2] Providers have improved the quality of equipment by designing smaller handsets and extending battery life, and have increased the reliability of their networks resulting in fewer dropped calls and better sound quality. In short, wireless has moved very dramatically from a

[2] FCC, *Annual Report on Competitive Market Conditions with Respect to Commercial Mobile Services*, Eighth Annual Report at D-11 Table 9 (July 14, 2003).

service for extraordinary communications to a routine part of everyday life for a very broad range of consumers.

The wireless industry has also produced a stream of new services available to subscribers including wireless Internet, digital photography, and interactive games. The FCC will soon begin licensing more spectrum for use in 3G or more advanced systems that will offer the possibility of sophisticated wireless-data and video services. In addition, a number of mobile wireless providers have begun offering, or announced plans to offer, push-to-talk type options, which allow one-touch communication with individuals or with a group of individuals. These offerings are designed to compete with the one firm, Nextel, that offers this feature on a nationwide basis.

Local and Long Distance

For long distance services, competition was originally fueled by the entry of the Modified Final Judgment ("MFJ"), which ended the Antitrust Division's case against AT&T. Competition has been boosted recently by the entry of the RBOCs into the provision of these services in their local areas. Consumers have enjoyed a steady decline in prices over time.[3] According to FCC data, average revenue per minute fell from 32 cents at the time of the MFJ to about 10 cents in 2001,[4] even before widespread RBOC entry. While investors worry about the profitability of the long distance services sector, consumers have continued to benefit.

Competition has intensified since 2001 with the pace of § 271 activity. With the approval this week of Qwest's § 271 application for Arizona, the RBOCs have received authority to provide long distance service in 46 states and the District of Columbia since January of 2001.

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[3] FCC, *Trends in Telephone Service*, Report at 13-6 Table 13.4 (August 7, 2003).

[4] *Id.*

(Authority in New York and Texas was granted earlier.) The Department of Justice has played a major role in the § 271 process. First, the Department provided extensive comments to assist the FCC in developing appropriate standards to use in reviewing applications. The Department also interacted with state PUCs, CLECs, RBOCs, and the FCC to discuss and resolve issues raised in applications, and filed evaluations with the FCC that analyzed the potential for competition by examining whether the local market was fully and irreversibly open to competition. Under the 1996 Act, the FCC was required to give substantial weight to the Department's evaluations.

Since gaining § 271 authority, the RBOCs have captured significant numbers of customers from long distance providers, especially residential customers.[5] For example, FCC data shows that from 2000 until 2002, Verizon's share of households for long distance services increased from 13 to 28% in the northeast region.[6] SBC's shares in the Southwest region increased from 3% to 24% over the same period.[7] These regions include the states in which these RBOCs respectively first gained § 271 authority. Other RBOCs appear to be making similar gains in their regions.[8] The RBOC entry has also stimulated changes in marketing tactics, including the proliferation of bundled offerings by both RBOCs and IXCs. Consumers in many areas can now buy local, long distance, and in some cases, high-speed Internet and wireless services from one provider at a discounted, flat rate.

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[5] FCC, *Statistics of the Long Distance Telecommunications Industry*, Report at 29 Table 15 (May 2003).

[6] *Id*.

[7] *Id*.

[8] Griff Witte, *An Evolutionary Edge; Local Phone Firms Pass Long-Distance Companies*, Wash. Post, Dec. 3, 2003, at E1.

At the time of the 1996 Act, the RBOCs provided virtually all local telecommunications services. The advent of competition in this sector has been slow but steady.[9] FCC figures suggest that by 2002, CLECs served over 13% of local lines nationwide.[10] This represents all modes of entry allowed by the Act, including resale, use of unbundled network elements ("UNEs"), and facilities-based. In many areas and for some customers, the numbers are significantly higher. In some states, CLECs serve over 33% of business customers using their own facilities.[11]

Multi-Channel Video Program Distribution

In multichannel video programming distribution markets, significant competitors have entered over the past decade. As a result, consumers have gained as cable television systems have been upgraded to allow for additional channels and features, and for better picture and sound quality. The jury is still out on whether competition has had a significant impact on prices. In most areas of the country, cable television systems still retain a large percentage of subscribers. In a few areas, landline cable systems have been constructed to compete directly with incumbents. The principal competitive alternative to cable providers, however, is direct broadcast satellite ("DBS") service, where providers offer nationwide service and which has, since its inception,

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[9] FCC, *Local Telephone Competition: Status as of December 31, 2002*, at Table 1 (June 2003) (for 1999-2002, CLECs shares calculated as percentage of total ILEC and CLEC end users switched access lines); FCC, *Local Competition: August 1999*, at 23; and FCC, *Local Competition*, at 6 (December 1998).

[10] *Id*.

[11] *See, e.g.*, U.S. Department of Justice Section 271 Evaluation for New Mexico, Oregon, and South Dakota, Feb. 20, 2003; U.S. Department of Justice Section 271 Evaluation for Minnesota, May 2, 2003.

made steady gains—primarily by winning customers from incumbent cable systems.[12]

DBS firms who from the beginning were able to provide higher quality digital services than cable have had a major impact in speeding up the pace of upgrades of incumbents' cable TV systems. More cable customers, therefore, have the ability to purchase large numbers of digital channels, video-on-demand, high-definition channels, and interactive services. Cable systems have become major suppliers of high-speed Internet services and in some places, cable telephony.

I am not aware of any definitive, empirical study demonstrating that DBS entry has lowered cable prices. But anecdotal evidence suggests that cable companies are responding to competition by lowering prices in areas where both DBS firms offer local channels.[13] Many recent articles and public interest groups have expressed concerns about the sharp increases in rates and how cable price increases have outpaced inflation, although cable price increases are not as high when viewed on a per-channel basis, given the expansion in channel offerings.[14] Cable firms and programmers are feuding over who is to blame for the price increases.

The Department of Justice has played a key role in preserving competition in the multichannel video marketplace by challenging in 1998 the plan by Primestar, a joint venture of cable companies, to acquire a significant portion of the limited spectrum then available to provide

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[12] FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report at 75 App. B Table B-1 (Dec. 31, 2002).

[13] Geraldine Fabrikant, *In Fight Between Cable and Satellite, Customers Gain an Edge*, N.Y. Times, Dec. 1, 2003, at C22.

[14] *Id.*; *INBRIEF/Entertainment Rates for Cable TV Outpace Inflation*, L.A. Times, Apr. 5, 2003, at C4; *see also* FCC, *Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices (July 8, 2003).

DBS services.[15] The Department and the FCC last year challenged the proposed merger between Echostar and DirecTV, resulting in its abandonment.[16]

Broadband

Broadband penetration rates in the United States continue to grow, although we still lag behind many foreign countries in penetration rates. The United States has seen a seven-fold increase in customers subscribing to a high-speed Internet services since 1999.[17] The two most significant providers are cable modem services and DSL provided by the local incumbent or competitive provider. Recent press reports indicate that competition between these providers is lowering prices for some customers.[18]

The FCC has already addressed and continues to struggle with difficult issues related to the appropriate regulatory policies needed to speed the deployment of broadband facilities and how to regulate existing and new providers of these services. The FCC's approach generally has been that of attempting to permit both major players, the cable and telephone companies, to construct broadband infrastructure without requirements to open the networks to competitors. For instance, in March 2002 the Commission decided to regulate the cable companies as providers of "information services," a definition that subjects companies to regulation less stringent than that

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[15] *United States v. Primestar Inc.*, No. 01-193 (D.D.C. filed May 12, 1998) (transaction abandoned).

[16] *United States, et. al. v. Echostar Communications Corp.*, No. 02-138 (D.D.C. filed Oct. 31, 2002) (transaction abandoned).

[17] FCC, *High-Speed Services for Internet Access: Status as of December 31, 2002*, at Table 1 (June 2003) (high-speed lines defined as lines over 200 kbps in at least one direction).

[18] Almar Latour, *BellSouth Unveils DSL Lite Service*, Wall St. J., July 8, 2003, at D5; Almar Latour and Peter Grant, *Verizon May Set Off Price War*, Wall St. J., May 5, 2003, at B2.

imposed on "common carriers" pursuant to federal law.[19] As for the telephone companies, in its Triennial Review Order issued earlier this year, the FCC eliminated unbundling obligations pertaining to certain new high-capacity loops in order to stimulate their deployment by incumbent local exchange providers.[20] Because both of these rules relevant to broadband regulation are currently under review by the courts, and because other related issues are subject to additional rule-making proceedings, the nature and structure of the ultimate regulatory scheme remains unclear.

New Technologies

Despite the downturn in the economy that has hit telecommunications firms quite hard, new technology is being developed, tested, and deployed that would, if successful, substantially increase competition in segments that have been slow to show advancement. The advent of Voice over Internet Protocol ("VOIP") has been anticipated for some time, but recent press reports now tout it as "ready for prime time" and the "greatest risk to local telephone companies."[21] Although this technology has been used for a number of years and offers a low-cost alternative to traditional local and long distance services, most companies and individuals have shied away from wide-spread deployment due to concerns about the quality of calls. The systems also lack certain 911 capabilities and an independent source of power, rendering handsets useless during black outs.

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[19] 17 FCC Rcd 4798, 4802 (2002), *aff'd in part, vacated in part, and remanded*, *Brand X v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[20] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et. al*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 ¶¶ 272-97 (Aug. 21, 2003) (appeal pending) ("*FCC Triennial Review Order*").

[21] Marcelo Prince, *Dialing for Dollars*, Wall St. J., May 19, 2003, at R8.

VOIP services are being slowly rolled out as reports of greatly improved sound and reliability emerge. Companies have also reported progress in addressing the lack of an independent power source.[22]

Some cable companies have delayed providing telephone services to their subscribers in the hopes of taking advantage of the lower cost of VOIP when this technology is perfected. The technology also offers customers new features, including the ability to select your area code and to take your number anywhere in the world the Internet is accessible. Furthermore, according to press reports, some cable companies are running tests and hope to offer VOIP service to their customers within the next few years.[23] Industry sources estimate that there are about 100,000 residential VOIP subscribers, but most use it as a second line as opposed to a replacement for traditional landline phones.[24] Forrester Research in Cambridge, Massachusetts estimated that cable will provide VOIP to more than 4 million homes by 2006.[25] SBC's chief technology officer was quoted in the *Wall Street Journal*, in May 2003, as saying that "it could take a decade or 20 years" for VOIP to replace circuit switching in the consumer market.[26] The FCC has recently held a hearing and announced plans to open a rule-making to address regulatory issues associated with VOIP.

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[22] *Id.*

[23] *Top MSOs Wait Till Next Year for VOIP Launches*, Communications Daily, Mar. 13, 2003, *available at* 2003 WL 5754340.

[24] Marcelo Prince, *Dialing for Dollars: Internet Phone Calls Haven't Made Much of a Dent in the Baby Bells' Business; Yet*, Wall St. J., May 19, 2003, at R8.

[25] *Id.*

[26] *Id.*

Although many residential customers are able to chose between cable modem services and DSL for broadband services, there are concerns about whether a strong third provider will emerge and whether these services will be widely available outside of urban areas. Recent articles have reported progress in delivering high-speed Internet using utilities' power-line facilities.[27] According to press reports, a small number of companies are testing the viability of power-line broadband communications, but wide-scale roll out is at least a year away.[28] Many companies considering this technology have not done business case studies to assess the possible profitability of offering this service.

Another new technology that is being discussed is next-generation fixed wireless services, such as WI-FI. At present these are used primarily within a small area given the technical limitations of the systems, and significant issues have been raised about the security of these networks. Newer wide-area broadband systems have a more extensive range that may allow multiple residents to be connected to a centrally located interface.

Satellite companies continue to try to provide high-speed access but are still struggling with cost and quality issues, such as delays in transmission, that arguably make satellite less attractive than cable or DSL for Internet access. It is difficult to predict which technology will provide the third "line" (wireless or wireline) into customer premises or whether different technology will be used to serve some types of customers in some areas. Past experience suggests that the impact of new technology has been neither as fast nor as easy as their

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[27] Wailin Wong, *A New Outlet: The Internet Through Your Electric Wires? It's Almost Here*, Wall St. J., Oct. 13, 2003, at R6.

[28] *Id.*

proponents predict, and significant capital investment and technical research is needed before these advances become competitive realities.

The Role of Industry Regulation

A factor that obviously may influence the growth of competition is regulatory action. The FCC's recent order mandating wireline-to-wireless local number portability is, along with its prior orders regarding wireless number portability, predicted to spur further competition among mobile wireless providers and between incumbent local providers and mobile wireless providers.[29] This change facilitates the ability of consumers to switch providers by eliminating the inconvenience associated with a change of phone number. Industry surveys indicate that 21% of people plan to switch providers and that is likely to raise pressure on firms to increase incentives to attract new customers and retain existing subscribers.[30]

The FCC also eliminated entirely the spectrum caps that had limited the amount of spectrum that one mobile wireless company could own in any geographic area.[31] The removal of the spectrum cap means that, instead of the static approach mandated by the caps, the agencies must perform a case-by-case merger evaluation to examine the nature and extent of competition in markets, in addition to looking at how much spectrum each company owns. Other relevant issues may include whether license areas are the appropriate geographic area to examine, the potential for other technologies (such as other wireless services) to compete with the merging

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[29] *Telephone Number Portability*, *CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 03-284 (Nov. 10, 2003).

[30] Matt Richtel, *Opening Pandora's Flip Phone*, N.Y. Times, Nov. 24, 2003, at C1.

[31] *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, Report and Order, 16 FCC Rcd. 22,668 (2001).

providers, the relative strength of other competitors in the market, and potential efficiencies that may be achieved by the merger.

In its Triennial Review Order, the FCC also eliminated unbundling obligations of incumbent local providers for certain newly deployed, high-capacity loops.[32] As noted earlier, the decision was based upon the expectation that it would stimulate facilities-based deployment of these types of loops by giving the incumbent local exchange carrier a greater incentive to invest in such facilities and by encouraging competitors to look for other options to compete with incumbents. The deployment of such loops by the incumbent providers may give them the ability to compete in offering video and other services to their customers, thus stimulating competition in other telecom sectors. The decision is currently under review by the courts and its impact remains to be seen.

The Role of Antitrust Enforcement

Questions are often raised about whether the antitrust laws are flexible enough to work in an industry such as telecom that is constantly evolving through the introduction of new technology that alters the products and services available to consumers and the identity of present and likely future competitors. In fact, the antitrust laws, with the exception of *per se* violations such as price fixing, require the agencies to evaluate conduct and proposed mergers by taking into account the characteristics of the industry involved and the nature of competition. Because of the extensive fact-based analysis undertaken by applying recognized economic principles, the antitrust agencies are able to deal with industries that are experiencing fast-paced changes, and therefore serve the underlying goal of preserving and protecting competition in high-tech

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[32] *FCC Triennial Review Order* ¶¶ 272-97.

industries.

Telecom markets have particular characteristics that make them dynamic and create challenges in evaluating conduct and mergers under the antitrust laws. But the Department has developed extensive expertise during our long history of working on telecom issues, including administering the MFJ, conducting numerous merger investigations, and filing many merger challenges. One factor that needs to be taken into account in performing antitrust analyses is the role of regulation. All segments of the industry are subject to some regulation but it can vary from minimal to extensive, including some form of price regulation. The goal of the 1996 Act was to introduce competition into all segments of the industry for the benefit of consumers with the result that invasive regulation could be reduced; however, where meaningful, sustainable competition has not emerged some form of regulation will remain. In assessing conduct and mergers, antitrust regulators need to consider the impact that regulation is having on the nature of competition and the potential for new entry to occur. The industry is undergoing constant technological changes. These changes can impact the nature of how companies compete to win customers, suggest that past market definitions may need to be reassessed, or create new players in a market. Most of these markets are also very capital intensive, a factor that can raise entry barriers. The need to continuously invest in new technology also suggests that a firm's financial condition may affect its ability to upgrade facilities to compete in the future.

In addition, many telecom markets are dominated by incumbent players. In these markets, new companies need to win customers from the incumbent to enter successfully, thereby creating barriers that may deter companies and investors from funding entry. Network effects and first-mover advantages may also exacerbate the problems facing entrants. The existence of dominant

players also means that the Department receives and evaluates allegations of monopolization. We take these complaints seriously. We also are frequently called upon to explain the difference between good, hard competition that may nonetheless be upsetting to competitors, and predatory conduct that actually rises to the level of an antitrust violation.

***Antitrust and Industry Regulation Compared* – Trinko**

The *Trinko* case now pending before the Supreme Court provides an opportunity to compare the roles of antitrust and industry regulation. The case arises at the intersection of the 1996 Act and the antitrust laws. The Second Circuit held in *Trinko* that a customer of AT&T's local phone service may have stated an antitrust claim for monopolization under § 2 of the Sherman Act by alleging that Verizon had not fulfilled its contractual duties to AT&T, Verizon's competitor, as derived from the 1996 Act. In upholding the plaintiff's claim, the Second Circuit relied on so-called "essential facilities" and "monopoly leveraging" doctrines. The court held that a monopolist has a general duty to provide rivals with reasonable access to facilities that the monopolist controls without which the rivals cannot compete.

The United States and the FTC jointly filed an amicus brief urging reversal. In our view, the court of appeals's decision dramatically and inappropriately expanded the antitrust duties of incumbents to provide assistance to their rivals. It did so in a way that appeared to conflate the extensive duties of assistance to rivals imposed by the 1996 Act with the obligations of the general laws of competition embodied in the Sherman Act.

The 1996 Act, of course, imposes significant obligations that "incumbent local-exchange carriers [ ] share their own facilities and services on terms agreed upon with new entrants . . . ."[33]

[33] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002).

As a leading legislator in support of the 1996 Act noted, the statute "is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out . . . ."[34] Under the Sherman Act, in contrast, monopoly in itself is not a violation, and not even a monopolist has the general obligation to dismantle itself for the benefit of its competitors. Rather, violation of § 2 of the Sherman Act depends upon a showing of anticompetitive or predatory *conduct*.

A key point in our *Trinko* argument is that essential facilities and monopoly leveraging are not a stand-alone basis for § 2 obligations of assistance to rivals apart from a showing that the challenged firm's conduct is exclusionary or predatory—that is, that the refusal to assist competitors does not make economic sense except as an effort to diminish competition. The 1996 Act plainly does impose such stand-alone obligations. The 1996 Act's savings clause makes very clear that the Act does not displace or preempt the antitrust laws. It makes equally clear that the Act does not "modify" those laws. Our consistent position has been that the 1996 Act does not preempt or displace valid antitrust claims, but neither does it modify the law to create new antitrust duties.

In our view, it would be particularly unwise to impose dramatic new duties to assist rivals under the general antitrust laws in a context where Congress has provided for such duties under a legislatively calibrated system. It must be kept in mind that the imposition of forced cooperation is among the most difficult areas for antitrust. It not only raises judicially difficult problems of setting prices and terms for cooperation, but also presents the potential for conflict with the basic

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[34] *Verizon Communications*, 535 U.S. at 488 (quoting 141 Cong. Rec. 15572 (1995) (Remarks of Sen. Breaux (La.) on Pub. L. 104-104 (1995)).

antitrust goal that firms compete against each other rather than share monopolies. We do not mean to suggest that our approach in *Trinko* necessarily encompasses every type of conduct that may violate § 2 of the Sherman Act. A universal, all-purpose test for § 2 liability may never be precisely articulated. We do believe, however, that our position in *Trinko* sets forth important distinctions between antitrust and regulation, and that it offers a more objective, transparent, and economically-based framework for assessing alleged antitrust duties to assist rivals.

DOJ Merger Review

Speculation continues to run high that there will be a wave of telecom mergers. Without knowledge of what mergers are likely or an investigation of actual market conditions, it is not possible to predict how the Department will view consolidation in any telecom market. But I can offer some observations about what issues are likely to be raised by certain types of transactions—in particular, mergers among mobile wireless providers and combinations between RBOCs and IXCs, which have received the most attention from industry analysts and the trade press.

The implementation of local number portability has generated a number of press reports stating that consolidation among mobile wireless firms is "inevitable" and that "the market cannot sustain six companies."[35] Analysts have also predicted that once one deal is announced others will quickly follow. In the past, because of the FCC's spectrum cap, mergers between mobile wireless providers were primarily aimed at allowing a firm to add geographic coverage to its network or small amounts of spectrum to improve performance. The Department and the FCC

[35] Matt Richtel, *Opening Pandora's Flip Phone*, N.Y. Times, Nov. 24, 2003, at C1.

would look at small local areas of overlap and require divestitures where appropriate.[36]

Although we may consider broader markets, it is not necessarily true that we will view the first merger between nationwide wireless providers as a "6 to 5" in a U.S. market. Although all six companies provide coverage over much of the country, there are areas that are not served by all six. In addition, smaller markets may need to be defined to account for geographic variations in the competitive significance of providers. For example, Verizon, because of its status as an incumbent landline provider and the fact that it has offered wireless services for a long time, may play a more significant role on the East Coast than in other areas.

Over the past few years, providers in all segments of the industry have stepped up the level of competition by offering their subscribers plans that allow usage of larger amounts of minutes over wider geographic areas without incurring roaming or long distance charges. In some cases, what is offered is a nationwide service. In future mergers, the Department will have to consider whether the availability of these types of plans requires us to look at broader geographic markets or whether we need to consider classes of customers who need different calling plans, such as business customers who travel frequently versus subscribers who use their phones locally and primarily for emergencies. Finally, providers are now differentiating themselves based upon the advanced services they offer. Especially after 3G or other advanced services are introduced in the wireless segment, we would have to evaluate whether it is proper to define a market that includes only providers who sell these special features for those customers who would not consider less sophisticated services to be substitutes.

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[36] *In re: Applications of Northcoast Communications, LLC & Cellco Partnership d/b/a Verizon Wireless for Consent to Assignment of Licenses*, WT Docket No. 03-19, Memorandum Opinion and Order, 18 FCC Rcd. 6490 (Apr. 8, 2003).

Potential RBOC/IXC combinations seem to engender a lot of concern from those individuals who view this as a recreation of the Bell System that was dismantled by the MFJ. I cannot say whether these mergers will pass muster under the antitrust laws, but it is clear that times have changed and reviewing any such merger must entail a much more comprehensive analysis. For instance, whereas in the past a merger between an RBOC and an IXC raised primarily vertical issues, today RBOCs and IXCs are direct competitors in the local and long distance segments. RBOCs have or are likely to become significant long distance providers in their own regions, often being second only to AT&T. Some IXCs are significant local providers in many cities, and although their market share is small they may provide the most substantial competition to the RBOC.[37]

In analyzing the WorldCom/MCI proposed acquisition of Sprint, the Department defined one market of concern as "domestic long distance services for mass market customers." At the time, the parties alleged that there was an "all-distance" market. The Department disagreed, based in part upon the difference in how local and long distance services were regulated, priced, and sold, and the limited overlap of providers. The Department ultimately sued to block the transaction, alleging a substantial likelihood of harm in the domestic long distance market as well as in eight other markets, and the parties abandoned the deal.[38] Given the changes that have occurred since, including the completion of the § 271 process and the availability of bundled local and long distance services, the Department would have to evaluate whether conditions dictate that

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[37] Griff Witte, *An Evolutionary Edge; Local Phone Firms Pass Long-Distance Companies*, Wash. Post, Dec. 3, 2003, at E1.

[38] *United States v. Worldcom Inc.*, No. 01-526 (D.D.C. filed June 27, 2000) (transaction abandoned).

alternative or additional markets need to be considered.

In addition, the Department will have to consider what competitors to include in any relevant market, and whether it is a local, long distance, or "all-distance" market. In the past, mobile wireless providers were excluded from landline markets in part because of differences in the way services were priced and sold as well as quality and feature differences. For example, the sound quality of wireless calls was considered inferior to that of landline calls, wireless phones lacked 911 capability, and their short battery life raised other reliability issues. In its recent Triennial Review Order, the FCC discussed some of the evidence related to substitution of mobile wireless for wireline services—including the fact that less than two million U.S. households had replaced their traditional landline voice service with other technologies—and concluded that wireless has not blossomed as a full substitute for wireline telephony.[39] Although surveys quoted in recent press reports indicate that a greater percentage of users are considering terminating landline phone service,[40] it remains to be seen how many will "cut the cord" and whether reliance on wireless communications is limited to certain demographics. Of course, the Department would conduct its own assessment in response to a merger proposal. Given that some of the RBOCs are also major owners of mobile wireless providers, this issue may not be important to evaluate some combinations.

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[39] *FCC Triennial Review Order* ¶¶ 228-32.

[40] Yuki Noguchi, *Study: 21% of Cell Phone Users Weigh Ending Home Service*, Wash. Post, Nov. 24, 2003, at E5.

In any proposed merger, the IXCs and RBOCs are likely to point to recent evidence suggesting that they are experiencing significant loss of lines (in the case of RBOCs)[41] and minutes of usage (in the case of IXCs) to mobile wireless providers and the Internet. While such evidence is relevant and needs to be carefully evaluated, it alone is not determinative in answering the ultimate question of whether consumers, or a segment of consumers, will be subject to increased prices or decreased quality as a result of the proposed merger.

Conclusion

Having given a "glass half full and filling" assessment of telecom competition, I would be remiss if I did not recognize the future challenge of keeping the telecom industry on a competitive path. The antitrust laws and the Antitrust Division will play an important role in meeting this challenge. Markets that have been opened – as in the case of the § 271 process – must remain open. We will be alert for allegations of predatory conduct in this area. We also recognize that large incumbents are not necessarily the firms with the best incentives and business models to promote innovation. While we are not in the business of picking winners or punishing winners, we will be alert to allegations of predatory conduct that hampers innovation and competition. And of course we will perform our function of merger review in a way that allows consumers to benefit from appropriate transactions, but that prevents hard won gains in competition from being lost though anticompetitive consolidation. Antitrust enforcement will remain an important part of the complex task of promoting telecommunications competition.

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[41] Seth Schiesel, *The Bells Struggle to Survive a Changing Telephony Game*, N.Y. Times, Nov. 24, 2003, at C1.