Quick Thoughts on the FCC's Order Approving T-Mobile / Sprint

November 5, 2019 by Blair Levin

As expected, the FCC has issued an Order that approved the T-Mobile / Sprint deal (LINK). In this note, we run through a few quick thoughts on the Order, and why it may not help the companies much in the state AG lawsuit.

Competition analysis unlikely to help the companies much in court

The FCC found that the "unconditioned transaction will create upward pricing pressure" based on detailed staff analysis of the deal, and based on the companies' own model; the FCC then pointed towards the Boost divestiture, pricing commitments, and other "quality and dynamic competitive benefits" as outweighing that concern, but provided little analysis to support this conclusion. Overall, the analysis on the impact to wireless prices, though largely redacted, suggests that the deal is anti-competitive absent conditions, and therefore the companies will have to "litigate the fix" (i.e. argue that the proposed conditions are sufficient, timely, and likely; see more detail on this HERE). We don't think the court is likely to accept the FCC competition analysis. First, it is at odds with the competitive analysis of the DOJ and all the states, which agreed that the deal as initially accepted by the FCC violated the Clayton Act. Second, portraying the FCC order as a product of an expert agency is undercut by the two dissenting opinions, as well as Congressional testimony by DOJ antitrust head Makan Delrahim that the FCC uses a different standard than the one relevant to Clayton Act. Third, there are various arguments, such as the value of MVNOs to competition, that seem to be in tension with previous FCC findings.[1]

FCC find porting ratios more compelling, which is likely to help states' economic argument

As we discussed at the beginning of the year, the ex partes revealed a significant argument between the deal proponents and opponents over the use of porting data (LINK). T-Mobile argued vociferously against

the use of porting data. Interestingly, in its order the FCC relied on porting data for its competition analysis, noting that "porting data, while not perfect, is the most reliable diversion proxy available in this record." It further noted that the T-Mobile economists' sources for diversion ratios "do not appear as reliable." The reason this is important is that, apparently, the porting data suggested a greater intensity of competition between T-Mobile and Sprint than T-Mobile's preferred data. While the exact figures are redacted, the Order also notes that the porting data indicates diversion ratios that are 39-1142% higher than the porting ratios from the companies' economists, suggesting that the porting data is less favorable to the companies' economic arguments than alternative data sources. T-Mobile may argue that the Boost divestiture preserves a lot of the competition but the FCC's acceptance of the porting data suggests to us that the states' economists will have an easier time demonstrating the likelihood of a price increase.

DISH back on the clock if the deal breaks?

The FCC Order notes that if the T-Mobile / Sprint does not close, the Wireless Bureau would deny the current DISH requests for extension of the AWS-4, 700MHz, and H-Block buildout deadline. The Order does confirm the tolling between the today's decision and potential deal break (likely February 2020, assuming the deal breaks upon a loss in the state AG litigation), so DISH will get at least a ~4-month reprieve from their prior March 2020 buildout deadline, but any further extension is uncertain based on the Order.

Democratic dissents point to APA problems.

In addition to substantive problems, the Democratic dissents pointed to Administrative Procedure Act problems in terms of the notice and public comment afforded during the process. The majority disagrees and in a very long footnote answers the APA arguments, a footnote that can be read as either a strong answer or evidence that the majority recognizes its vulnerability.

As we have noted before, these raise a timing risk, in that a court could overturn and remand the order to the FCC, slowing down the closing process. We think, however, that that scenario is unlikely to occur before the trial. If the trial court blocks the merger, the APA issues become moot. If the court approves the merger we expect the motive for continuing the litigation will be significantly undercut.

[1] Commissioner Rosenworcel had an interesting two sentences, which read, "Sunlight is the best disinfectant. That is why I think the FCC should make public the initial draft of this decision that was prepared by our expert staff and circulated for review in the agency in addition to the decision we release today." We don't think that draft will be released but we don't think she would have written that if that draft did not have some significant problems for the majority and the companies. If it is released, and Commerce Committee Chair Pallone appeared in his statement to suggest he would like to see it, the

release would add to the litany of reasons the FCC order would be unlikely to help the companies at trial.
