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**FCC Should Be Clear and Consistent on Effective Competition
in the Wireless Market**

by

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The FCC is now taking public comments on its next wireless competition report. Section 332(c) of the Communications Act requires that the Commission annually prepare a report that includes analysis of “whether or not there is effective competition” in the wireless market.

Today’s dynamic wireless ecosystem features a dizzying array of new wireless service and product options, including choices among four nationwide and regional providers, next-generation network capabilities, smartphone and countless wireless app features, and a variety of mobile data and voice pricing options. But the Commission has taken a confused analytical approach to the explosive growth and complexity of the wireless marketplace. Oddly enough, in its last four wireless competition reports the FCC has refused to answer whether or not the wireless market is effectively competitive. It has claimed any conclusion it might reach about whether or not there is effective competition in the wireless market would be misleading.

But what’s truly misleading is treating tremendous innovation and rapid adoption of new wireless products as the basis for refusing to acknowledge the competitive state of the market. The transformative advancements in wireless are an unambiguous signs of strong competition. Perceived lack of effective competition offers the basis – or at least the pretense – for intrusive

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government regulatory controls over the market. So getting a clear picture on the truly competitive state of the wireless market is critical to ensuring that current and future FCC policy matches reality. The Commission can help sort out its wireless analytic and policy approach by considering wireless competition in a similar manner to how it recently considered video competition.

In April the FCC released its *Effective Competition Order (2015)*. The order readjusted outdated cable regulations in light of today's effectively competitive video market conditions. The Commission should build on its order by taking a consistent policy approach to other markets where there is effective competition, including the wireless market. The next wireless competition report constitutes a prime opportunity for doing so.

The next report's analysis of whether or not there is effective competition in the wireless market should include the same type of competing provider analysis that the Commission uses for local cable markets under Section 623. Under that test, a video franchise area is effectively competitive where competing video service providers serve more than 50% of households and maintain at least 15% market share. Applying that same test to wireless broadband services nationwide – where 93.4% of the population is served by 3 or more wireless mobile broadband providers and 82.1% is served by 4 or more – reveals the reality of competition in that market.

Following the most natural reading of Section 332(c), the next wireless competition report should also include an express conclusion on whether or not the market is effectively competitive. Its conclusions regarding wireless competition should be informed by the same competitive provider test that it applies in the video context. Prior wireless competition reports made use of a similar analysis.

There is no good reason for subjecting wireless competition to greater analytical or regulatory scrutiny than video competition. The FCC's application of the same approach it took to effective competition in the video services market to the wireless market offers a consistent, objective basis for evaluating the state of both markets.

Unfortunately, avoidance of effective competition findings in wireless is conducive to new regulatory intrusions into wireless. This surely includes the FCC's decision to subject wireless broadband to Title II public utility regulation for the first time. In future reports, the Commission should stop playing down the state of wireless competition. Otherwise, its report analysis reduces to mere rationalizing for the agency's predetermined preferences for exercising regulatory control over wireless services.

The FCC Makes Effective Competition in Video Markets the Basis for Reducing Regulatory Burdens

On June 3 the Commission released its *Effective Competition Order (2015)* regarding local markets for video services offered by multi-channel video programming distributors (MVPDs). In its order, the Commission established a rebuttable presumption that local cable markets are subject to effective competition.

Section 623 of the Communications Act contains the “competing provider test” for determining whether effective competition exists in a local cable market. Under that test, effective competition is present if the franchise area is: (i) served by at least two unaffiliated MVPDs each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.

In essence, the *Effective Competition Order* recognized that nearly the entire country enjoys effective competition in the video services market. The order cited the pervasive presence of two nationwide direct broadcast satellite providers (DBS) that compete with incumbent cable operators. Also, the order recognized that DBS held a nationwide market share of 34% of MVPD subscribers. As a result, the Commission reversed the pro-regulatory presumption that local cable markets can be rate regulated for lack of effective competition. It shifted to a deregulatory presumption. Under the new rebuttable presumption of effective competition, local franchising authorities are prohibited from regulating basic cable tier and equipment rates unless they demonstrate a lack of effective competition in their area. The burden is now on would-be regulating local franchises to marshal actual evidence of ineffective competition according to the competing provider test.

The *Effective Competition Order*’s modest regulatory relief for local cable services was a long time coming. But it is a welcome example of outdated FCC policy being readjusted to existing competitive market conditions. (FSF President Randolph May further described the Order and commended the Commission in his June 8 blog post, “[Dealing Effectively With Effective Competition.](#)”)

Regulations should reflect real-life conditions in competitive markets, regardless of the technology platform. And regulatory policy for markets where there is effective competition should be consistent, except where unique and compelling circumstances suggest otherwise. The FCC should build on its *Effective Competition Order* by taking a consistent policy approach to other markets where there is effective competition, including the wireless market.

The FCC Should Consider Effective Competition in the Wireless Market in Light of Competing Provider Standards for Video Markets

The FCC has prime opportunity to take effective competition seriously in its upcoming report on the wireless market.

Section 332(c)(1)(C) of the Communications Act requires that the Commission annually report on the state of wireless competition:

The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors

have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition.

For the Commission's next wireless competition report, the analysis of whether or not there is effective competition in the wireless market should include a competing provider analysis similar to the one used for local cable markets.

By analogous application of the Section 623 competing provider test to wireless, effective competition is present if the metropolitan statistical area is: (1) served by at least two competing wireless providers, each of which offers wireless voice and broadband services to at least 50% of all households in the area; and (2) the number of subscribers other than the largest wireless voice and broadband provider in the area exceeds 15 percent of the households in the area.

Similar to its approach to video services in its *Effective Competition Order*, the Commission should consider nationwide population percentages covered by multiple wireless providers in light of competing provider test thresholds. Under this metric the wireless market performs exceedingly well. According to data cited in the *Seventeenth Report*, as of January 2014, 96.38% of the U.S. population is served by 3 or more mobile voice providers and 91.4% is served by 4 or more providers. Additionally, 93.4% of the population is served by 3 or more wireless mobile broadband providers and 82.1% is served by 4 or more. Meanwhile, data cited in the report based on service revenues indicates 2013 nationwide market shares as follows: Verizon Wireless, 36.5%; AT&T, 32.5%; Sprint, 15.5%; T-Mobile, 10.9%; and various regional service providers, 4.7%.

Thus, even a cursory glance at market data leads to the conclusion that the wireless market is effectively competitive. That conclusion should hardly be a surprise. Over two decades ago, the Commission's *Mobile Services Order* (1994) deemed wireless voice services non-dominant "[b]ecause non-dominant carriers lacked market power to control prices." The non-dominant status of wireless broadband providers is even more evident than was once the case for wireless voice providers.

There is also agency precedent for using a standard similar to the competing provider test as the primary basis for effective competition determinations in the wireless market. The *Ninth*, *Tenth*, and *Eleventh Wireless Competition Reports* pointed to the percentage of the total U.S. population living in counties with access to multiple providers as one indicator of "effective competition" in the wireless market. Additionally, the *Tenth* and *Eleventh Reports* pointed to the absence of any one provider having a dominant share of the market. Bringing the *Effective Competition Order's* approach to bear on wireless would not only make for a more consistent approach across technology platforms, it would also realign FCC wireless policy with its prior wireless report practices.

The FCC Should Acknowledge the Reality of Effective Competition in the Wireless Market

Federal law requires the FCC to analyze whether or not the wireless market is effectively competitive. The wording of Section 332(c)(1)(C)'s mandate creates a strong inference that such

analysis includes a conclusion by the Commission as to “whether or not there is effective competition” in the wireless market. Early agency precedents took that approach. The *Eighth* through *Thirteenth Wireless Competition Reports* concluded there was effective competition in the wireless market. The next wireless competition report should also include an express conclusion on that point.

A mountain of data regarding wireless product, service, and consumer trends demonstrates that the wireless market is, on its face, “effectively competitive.” For starters, consider the following several indicators of wireless innovation and competition summarized in the Commission’s *Seventeenth Wireless Competition Report* (2014):

- Wireless connections continue to climb. Wireless connections grew by 3%, from 326.5 million at the end of 2012, to 335.7 million at the end of 2013.
- Smartphone consumers now a growing majority. 72% of all mobile subscribers had a smartphone in September 2014, compared to 5% in September 2012. And 85% of subscribers purchasing a new phone in September 2014 were smartphone users, up from 67% two years earlier. By August 2014, 174 million people in the U.S. owned smartphones.
- Data usage by consumers rises higher. Average monthly data usage per subscriber in 2013 averaged 1.2 GB per month, a 50% increase from the year before. Total wireless data traffic amounted to 3.23 trillion MB for 2013, up 120% from 1.47 trillion MB in 2012.
- Consumer wireless habits continue to change and increase in variety. 81% of cellphone users use their cellphone to send or receive text messages; 60% access the Internet; 52% send or receive email; 50% download apps; 49% get directions, recommendations, or other location-based information; 48% listen to music; 21% participate in a video call or video chat; and 8% check-in or share location.
- Private investment is sizeable and has increased. Wireless providers in the U.S. spent more than \$134 billion in capital investments during the past 5 years. Incremental capital investment by wireless providers rose to \$33.1 billion in 2013, a 10.1% increase from the \$30.1 billion spent the year before. Further, Verizon Wireless, AT&T, Sprint, and T-Mobile spent a combined \$16 billion in the first half of 2014.
- Next-generation wireless networks coverage expands. As of January 2014, 98.5% of the U.S. population lived in census blocks that were covered by an LTE network, compared to 67.5% in January 2012. WCDMA/HSPA/HSPA+ networks covered 97.7% as of January 2014, up from 93.1% just two years before.
- Wireless apps continue to surge. As of July 2014, Android users were able to choose between 1.3 million apps, and Apple's App Store made 1.2 million

available. Total worth of the global mobile apps marketplace ranged from \$60 billion to \$70 billion in 2013.

- M-commerce services are growing. As of November 2013, nearly 36% of U.S. bank account holders had used mobile banking services more than once in the past month. And as of February 2014, approximately 87% of smartphone and tablet owners used their devices for shopping.

Also, while the *Seventeenth Report* offered little by way of estimates about consumer prices, evidence points to significant decreases in prices over the last several years. According to data contained in the *Sixteenth Wireless Competition Report* (2013), for instance, voice revenue per minute “has declined over the past 18 years, from more than \$0.40 to the current \$0.05.” Moreover, “the effective price per megabyte of data declined from \$0.47 per megabyte in the third quarter of 2008 to about \$0.05 per megabyte in the fourth quarter of 2010, which is roughly an 89 percent decrease.”

Unfortunately, the last four reports issued by the Commission have ducked this statutory obligation. The *Seventeenth Report* said:

Given the complexity of the various inter-related segments and services within the mobile wireless ecosystem, we refrain from providing any single conclusion because such an assessment would be incomplete and possibly misleading in light of the variations and complexities we observe.

What’s really misleading is treating the forces of continuous and transformative innovation in wireless products and services as the basis for refusing to acknowledge the competitive state of the wireless market. In only a decade, the wireless market has transformed from an analog, voice-centric service into a digital, broadband-centric multimedia service of sophistication and variety. Emergent device, software, and network infrastructure market segments, technologies, and choices have generated tremendous new sources of value for wireless consumers. Smartphones containing unique mobile operating systems and featuring an abundance of applications now run on high-speed, high-capacity next-generation networks.

The FCC’s dodge has the effect of treating revolutionary wireless market advancements like liabilities rather than assets. In reality, variations and complexity of inter-related segments and services are telltale signs of growth and dynamism in a market. Today’s dynamic wireless market is surely effectively competitive. More than that, it’s strongly competitive.

Conclusion

Regulations should consistently reflect real-life market conditions. Generally, the presence of effective market competition avoids the need for regulation. In effectively competitive markets, compelling evidence of need is required before narrowly targeted regulatory intervention can be justified. And wherever possible, regulatory policy for markets where there is effective competition should be consistent.

The *Effective Competition Order* offers a precedent for the Commission to build on. In its next wireless competition report the Commission's analysis of whether or not there is effective competition in the market should be informed by a competing provider standard similar to Section 623. Application of the Commission's analytical approach in its *Effective Competition Order* to the wireless market offers a consistent, objective basis for evaluating the market and thereby ensuring that its regulatory policy matches actual market conditions. A broader application of that approach would also provide perspective on the strong competition that characterizes today's wireless market.

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Further Readings

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