

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 6002(b) of the)	
Omnibus Reconciliation Act of 1993)	WT Docket No. 15-125
)	
Annual Report and Analysis of Competitive)	
Market Conditions with Respect to Mobile)	
Wireless, Including Commercial Mobile Services)	

**COMMENTS OF
THE FREE STATE FOUNDATION¹**

I. Introduction and Summary

These comments are submitted in response to the Commission’s request for comments regarding the Communications Act Section 332(c)(1)(C)'s requirement that “[t]he Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions.” The focus of these comments is on the requirement that the Commission’s analysis include “an analysis of whether or not there is effective competition” in the wireless market.

The purpose of the Wireless Report’s analytical requirement is to keep the Commission’s regulatory policies regarding wireless services in line with marketplace realities. Regulatory policy for monopolistic markets should differ dramatically from policy for vibrant competitive markets. Congress intended for the Commission’s report to supply the factual foundation and

¹ These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow of the Free State Foundation. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

analytical basis for proper regulatory policy – which, in this instance, means light-touch regulation that matches the demonstrably competitive conditions of the market.

Abundant evidence points to the dynamic state of today’s wireless marketplace. For example, as of January 2014, 93.4% of the population was served by 3 or more wireless broadband providers and 82.1% of the population was served by 4 or more. As of that same date, 98.5% of the U.S. population lived in census blocks covered by a next-generation LTE wireless network, compared to just 67.5% two years before. In September 2014, 72% of all wireless subscribers had smartphones compared to just 5% two years earlier. And in 2013, per month data usage increased 50% from the year prior. These measures of advances in the wireless marketplace are unambiguous signs of effective competition.

In light of the strong evidence of wireless market competition and dynamism, the Commission’s next wireless competition report should expressly affirm there is effective competition in the wireless market. Section 332(c)(1)(C) is best understood to require a yes-or-no conclusion as to “whether or not there is effective competition” for wireless services. And prior Commission reports, up to and including the *Thirteenth Wireless Competition Report* (2009), made such a finding of effective competition in the wireless market.

The Commission’s *Effective Competition Order* (2015) regarding local cable markets offers an approach that should be applied in the wireless context. The next wireless competition report’s analysis of whether or not there is effective competition in the market should be informed by a competing provider standard similar to that applied in the *Effective Competition Order*.

By analogous application of the competing provider test to the wireless market, effective competition exists where an 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; and (2) the number of subscribers to other than the largest wireless provider in the area exceeds 15 percent of households. Needless to say, on a nationwide basis, competing wireless services far exceed the competing provider test thresholds for effective competition.

Application of the Commission's analytical approach in its *Effective Competition Order* to the wireless market would offer a consistent, objective basis for evaluating the market and thereby ensuring that regulatory policy matches actual market conditions. Application of that approach would also provide perspective on the strong competition that characterizes today's wireless market. Indeed the Commission's *Ninth, Tenth and Eleventh Wireless Competition Reports* pointed to population percentages living in counties with access to multiple providers as a key indicator of "effective competition" in the wireless market.

The Commission's analysis need not be limited to the competing provider test. To be sure, the Commission should also take a more rigorous approach to intermodal competition as part of its analysis of the wireless market. Substitute services and alternative platforms are indicators of dynamic markets. And the proper policy response to availability of substitute products and services and to intermodal competition in markets should be reductions in regulatory burdens and greater reliance on dynamic market forces to enhance consumer welfare.

Prima facie evidence of substitutability and cross-platform competition is demonstrated by consumer trends like cord-cutting for voice services and cord-shaving for video services. Over 45% of households are wireless-only. A majority of digital media consumption is now mobile-based rather than desktop-based. Yet, disturbingly, there is no evidence that the Commission's communications policy – whether involving wireless, wireline, or satellite platforms – is actually informed by wireless substitutability or cross-platform competition. The

next wireless competition report should incorporate these developments into its assessment of effective competition in the wireless market and conduct future communications policymaking accordingly.

Publically available data offers strong supports for the conclusion that there is “effective competition” in the wireless market. In its *Eighteenth Wireless Competition Report*, the Commission should expressly affirm the existence of this effective competition for wireless services. The forthcoming report offers the Commission the opportunity to lay the groundwork for realignment of agency policy with marketplace realities.

II. Overwhelming Evidence Supplies a Basis for the Commission to Conclude That There is Effective Competition in the Wireless Market

In just the last decade, the wireless market has transitioned from an analog, voice-centric service to a digital, broadband-centric multimedia service of increasing sophistication and variety. 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.

Publicly available information suggests a multi-faceted dynamic wireless marketplace, characterized by investment and innovation. All told, available evidence strongly supports the conclusion that there is effective competition in the wireless market. Consider the following indicators of wireless marketplace innovation and competition, all taken from the *Seventeenth Wireless Competition Report* (2014)²:

- Consumers have real choices among wireless service providers. As of January

² Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services (“*Seventeenth Report*”), WT Docket No. 13-135 (released Dec. 18, 2014), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1862A1.pdf.

2014, 96.38% of the U.S. population was served by 3 or more mobile voice providers, and 91.4% was served by 4 or more providers. 93.4% of the population was served by 3 or more wireless mobile broadband providers and 82.1% was served by 4 or more.

- 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.

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.”³

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.”⁴

Market trends regarding the substitutability of wireless for rival platforms and the substitutability of such services also point to the effective competition characterizing today’s wireless market. For example, the number of wireless-only subscribers continues to rise, suggesting wireless substitutability with landline service offered by traditional telephone or cable VoIP providers. Preliminary results from the latest National Health Interview survey on wireless substitution indicates that “[m]ore than two in every five American homes (45.4%) had only wireless telephones (also known as cellular telephones, cell phones, or mobile phones) during the second half of 2014—an increase of 4.4 percentage points since the second half of 2013.”⁵

Significantly, next-generation wireless network upgrades continue to increase speeds and capacity of wireless networks, making wireless an increasingly viable competitive alternative – indeed, in many instances a potential substitute for – wireline broadband. For most major wireless broadband providers, average LTE speeds range between 30 and 40 MBps, enabling a wide range of video viewing functionalities.⁶ Increasingly, consumers have gained access to high-capacity wireless broadband services capable of streaming HD and other video content.

³ *In re* Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services (“*Sixteenth Report*”), WT Docket No. 11-186 (released March 21, 2013), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-34A1.pdf.

⁴ *Id.*

⁵ Stephen J. Blumberg and Julian V. Lake, “Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2014,” Division of Health Interview Statistics, National Center for Health Statistics (released June, 2015), available at: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201506.pdf>.

⁶ *See, e.g.*, Lynn La, “4G LTE Showdown: How Fast is Your Carrier?” *CNet* (Aug. 5, 2014), available at: <http://www.cnet.com/news/4g-lte-showdown-how-fast-is-your-carrier/>.

Mobile consumption of digital media through apps and mobile web browsing has already surpassed desktop-based digital media consumption, 60% to 40%, according to comScore.⁷ And wireless broadband providers are unveiling new technologies that will enhance wireless video viewing capabilities. Future developments in next-generation technology will enable continued growth, with increasing choices and sources of value for consumers in the wireless market.

III. Wireless Policy Should Align with Realistic Conclusions by the Commission About the Existence of Effective Competition in the Wireless Market

Getting a clear picture of the truly competitive state of the wireless market is critical to ensuring that policy matches reality. Unfortunately, the Commission has taken a confused approach to the explosive growth and complexity of the wireless marketplace. As the Commission is aware, its last four wireless competition reports have refused to answer whether or not the wireless market is effectively competitive. This despite the pro-competitive market trends discussed in the prior sections, and also despite the fact that prior reports, up to and including the *Thirteenth Wireless Competition Report* (2009), concluded that the wireless market *is* effectively competitive.⁸

In the *Seventeenth Report*, the Commission repeated its shallow claim any conclusion it might reach about whether or not there is effective competition in the wireless market would be misleading.⁹ 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

⁷ See <http://techcrunch.com/2014/08/21/majority-of-digital-media-consumption-now-takes-place-in-mobile-apps/>

⁸ See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services (“*Thirteenth Report*”), WT Docket 08-27, at ¶¶ 1, 224 (released January 16, 2009), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf. See also *Ninth Report*, 19 F.C.C.R. 20597, ¶¶ 2, 204 (2004); *Tenth Report*, 20 F.C.C.R. 15908, ¶¶ 2, 191 (2005); *Eleventh Report*, 21 F.C.C.R. 10947, ¶¶ 2, 195 (2006); *Twelfth Report*, 23 F.C.C.R. 2241, ¶¶ 290, 293 (2008).

⁹ See *Seventeenth Report*, at ¶ 6.

competition. Perceived lack of effective competition offers the basis – or at least the pretense – for intrusive government regulatory controls over the market.

Further, it makes no sense for the Commission to avoid reaching a conclusion about whether or not there is effective competition in the wireless market on the grounds that it doesn't know what the term “effective competition” means.¹⁰ If the Commission truly had no idea of what “effective competition” means, how could it even conduct the analysis?

Fortunately, the Commission can discipline its wireless analytic and policy by considering wireless competition in a similar manner to how it recently considered video competition.

IV. The Commission Should Incorporate the Analytical Approach of the Effective Competition Order Regarding Cable Markets into its Analysis of the Wireless Market

The next wireless competition report's analysis of whether or not there is effective competition in the market should be informed by a competing provider standard similar to Communications Act Section 623. That section and the Commission's *Effective Competition Order* (2015) deserve close attention in this regard.¹¹ Application of the Commission's analytical approach in the *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 provide perspective on the strong competition that characterizes today's wireless market.

Under Section 623(l)(1)(B), the Commission grants relief to incumbent cable operators from rate regulations when the petitioning cable operator presents evidence that effective competition is present within its particular franchise area. Pursuant to the Commission's

¹⁰ See *Seventeenth Report*, at ¶ 6.

¹¹ Amendment to the Commission's Rules (“*Effective Competition Order*”), MB Docket No. 15-135 (released June 3, 2015), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0610/FCC-15-62A1.pdf.

“competing provider test,” a franchise area is deemed effectively competitive if it is served by at least two unaffiliated multi-video programming distributors (MVPDs) offering comparable video services to half of the households *and* the number of households subscribing to services other than that of the largest MVPD exceeds fifteen percent.¹²

The *Effective Competition Order* readjusted outdated cable regulations in light of today’s effectively competitive video market conditions. The Commission should build on that 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 Commission’s analysis of the wireless market could include a similar approach to the one it employed in the *Effective Competition Order*. By analogous application of the Section 623(l)(1)(B) competing provider test to the wireless market, effective competition is present if the given 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 to 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 previously cited data in the *Seventeenth Report*, as of January 2014, 96.38% of the U.S. population was served by 3 or more mobile voice providers

¹² 47 U.S.C. § 543(l)(1)(B).

and 91.4% was served by 4 or more providers.¹³ Additionally, 93.4% of the population was served by 3 or more wireless mobile broadband providers and 82.1% was 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%.¹⁴

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."¹⁵ The non-dominant status of wireless broadband providers is even more evident today.

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.¹⁶ Additionally, the *Tenth* and *Eleventh Reports* pointed to the absence of any one provider having a dominant share of the market.¹⁷

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 the Commission's wireless policy with its prior wireless report practices.

¹³ *Seventeenth Report*, at ¶

¹⁴ *See id.* at ¶ 30 (Table II.C.2. Market Shares for Facilities-Based Wireless Providers Based on Service Revenues 2011-2013).

¹⁵ Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order ("*Mobile Services Order*"), 9 F.C.C.R. 1411 (1994).

¹⁶ 19 F.C.C.R. 20597, ¶ 2; 20 F.C.C.R. 15908, ¶ 2; 21 F.C.C.R. 10947, ¶ 2.

¹⁷ *See* 20 F.C.C.R. 15908, ¶ 2; 21 F.C.C.R. 10947, ¶ 2.

V. Wireless Substitution and Intermodal Competition Should Be Factored into the Commission's Analysis of the Wireless Market

As part of its analysis of the wireless market, the Commission needs to account for wireless substitution and intermodal competition.

Substitute services and alternative platforms are indicators of dynamic competition. Their availability is consumer welfare-enhancing. As a matter of public policy, evidence of cross-platform or intermodal competition renders many types of regulation unnecessary and potentially harmful. As a general matter, the proper policy response to availability of substitute products and services and to intermodal competition in markets should be reductions in regulatory burdens and greater reliance on dynamic market forces to enhance consumer welfare.

In this digital age of all-IP broadband networks, digital services are increasingly characterized by cross-platform convergence and competition. Consumer behavior is increasingly dispersed across services and platforms. Understanding the competitive effects of wireless substitution and rivalry with wireline and satellite alternatives through cord-cutting or cord-shaving is critical to an informed digital age communications policy. *Prima facie* evidence of substitutability and cross-platform competition exists in the form of consumer trends like cord-cutting for voice services and cord-shaving for video services. As cited earlier, over 45% of households are wireless-only and a majority of digital media consumption is now mobile-based.

Regrettably, the *Seventeenth Report* followed the course of prior reports by offering no analysis of wireless substitution or intermodal competition involving wireless and other platforms.¹⁸ In a lone paragraph, the *Seventeenth Report* made passing reference to wireless only

¹⁸ For background on the lack of Commission analysis or interest in wireless substitution and intermodal competition, see Seth L. Cooper, "Convergent Market Calls for Serious Intermodal Competition Assessments," *Perspectives from FSF Scholars*, Vol. 8, No. 12 (May 22, 2013), available at:

household and cord-cutting trends.¹⁹ But it offered no analysis of how those trends relate to consumer welfare or wireless competition.

To date, there is no evidence that the Commission's communications policy is in any way informed by wireless or online substitutability or competition. The next wireless competition report offers opportunity to lay the groundwork for future realignment of Commission policy with market realities. Wireless substitutability and competition between platforms should factor into the Commission's analysis of effective competition in the wireless market.

VI. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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http://www.freestatefoundation.org/images/Convergent_Market_Calls_for_Serious_Intermodal_Competition_Assessments_043013.pdf.

¹⁹ *Seventeenth Report*, at ¶ 86.