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Assessing the FCC's Competition-Assessing Competence

by

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Most informed observers agree that going-forward the FCC needs to become an agency that is better at assessing the competitiveness of markets than it has been in the past. This is because competition has developed, and is continuing to develop, so rapidly across so many of the market segments under the FCC's regulatory jurisdiction. When there is sufficient marketplace competition, the costs of economic regulation almost always exceed the benefits.

Most informed observers also agree that there have been many times in the past when the agency, whether deliberately or not, has seemed more interested in protecting competitors rather than the competitive process. The problem with protecting competitors – rather than focusing on encouraging the continued development of competition – is that consumers suffer the ultimate harm, including the discouragement of investment and innovation that attend competitor-focused policies. For a good primer on this competition and consumer perspective, see the paper by economist Dennis Weisman, a member of FSF's Board of Academic Advisors, entitled "[On Market Power and the Power of Markets: A Schumpeterian View of Dynamic Industries.](#)"ⁱ

But how do we assess the FCC's competition-assessing competence at a time when such competence is of such importance? Here are two not unrelated points that, for me, call to mind that question.

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First, in a June 19 decision, the D.C. Circuit remanded a case to the FCC for the agency's failure to explain why, in evaluating a Verizon forbearance request, it refused to consider the marketplace impact of *potential* competition.ⁱⁱ In a couple of prior forbearance cases, the FCC has acknowledged that potential competition should be considered in assessing whether continued regulation was necessary. In the *Verizon* case, the FCC has focused single-mindedly on present market share, ignoring the fact that potential entrants constrain whatever market power the existing providers may possess. So, the FCC's competition-assessing capabilities fell short in that case. The Commission must keep in mind that in a technologically-dynamic industry such as communications, a focus on current market share, given that it is backward-looking in nature, biases any assessment of competition against the incumbent provider.

Second, the seemingly never-ending brouhaha over so-called "special access" circuits – typically wideband facilities used by businesses and carriers – raises concerns about the FCC's competition-assessing capabilities. Almost two years ago to the day, I published a paper, [*"Special Access and Sound Regulatory Principles: The Market-Oriented Case Against Going Backwards."*](#) which recounts the pertinent history of special access regulation and explains why it would be a mistake for the agency to backslide on its decision to reduce special access regulation. Indeed, the paper explains why, at this point in time and in light of marketplace developments, such regulation would be competition-diminishing rather than competition enhancing. In my humble opinion, the paper is worth reading because not much has changed since then, except that the case for reduced regulation has grown stronger as competition has continued to develop.

But here is specifically what is on my mind now. In response to arguments made by the incumbent carriers – and the GAO as well – that it is certainly difficult, if not impossible, for the FCC to assess the competitiveness of the special access market if the new entrants refuse to provide information concerning their own facilities and locations, the FCC apparently is, finally, considering requiring them to do so. But the competitors are crying loudly: If we are required to provide such information, it will greatly injure our competitive position.

Note the irony here. The competitors claim that there is little or no competition in the special access market *at the same time* they assert that disclosure of the locations of their market presence will injure competition. So, in a [June 18 filing](#), tw telecom – the lack of initial caps is apparently a marketing device – "emphasized the importance of preventing public disclosure of information regarding the location of competitive carriers' networks." Likewise, in a [June 22 submission](#), Sprint claims information on specific business locations served by competitors constitutes "highly sensitive proprietary information." There are filings by others making the same non-disclosure arguments.

Some observations:

The mere fact that more than a few "competitors" are making the argument that disclosure of the location of their network facilities and customer locations is competitively sensitive demonstrates, *ipso facto*, the existence of some measure of competition.

To the extent that the argument is that the new entrants do not have the same market share as the incumbents, and that they, therefore, need protective regulation, I say this: Remember that the FCC should take into account potential competition, not just existing market share. It should do this not just because the court last week told it to do so, but rather because this the proper way to assess whether there are sufficient market constraints to protect consumers.

And it should be noted that the competitors nowhere attempt to explain exactly why disclosure of competitors' facilities locations is so competitively-sensitive. Over the years, the mere assertion that this is so has become somewhat of a bromide that goes unquestioned. I understand why price information is competitively sensitive. And I can understand why plans regarding the future deployment of facilities perhaps might be competitively sensitive. But the location of existing network facilities and customer locations seems less so. I suppose the competitors might say – if they ever stated the rationale at all – that if the locations of their facilities were known, then the incumbents, or any other competitor, would know where to target their marketing efforts. Perhaps. But think about this: The claimed harm is to the competitor, not to competition. Indeed, under this scenario, competition may be enhanced to the benefit of consumers of special access services as competitors fight for customers.

And think about this too. Sprint says "there is little reason for the public to want to know precise building-by-building information about competitive special access providers' networks." Unless Sprint is making some mysterious distinction between "the public" and potential customers, I am not sure that potential customers would not like to know, or benefit from knowing, where competitors' facilities are available. Such information might be useful in stimulating competition as potential customers seek competitive solicitations and back-and-forth responses.

I have no interest in arguing for the public disclosure of truly proprietary, competitive-sensitive information.ⁱⁱⁱ But I do have an interest in pointing out that the longer I witness this fight in which the non-incumbents devote significant resources to resisting disclosure of any information about their facilities or customer locations, the more convinced I am that significant competition already exists, with the potential for more entry.

And that conviction leads me to a continuing interest in urging the FCC to focus not on protecting competitors, but on protecting the integrity of the competitive process for the benefit of consumers.

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ⁱ For a discussion of why the protection of competition can morph into the protection of competitors, see Glen O. Robinson and Dennis L. Weisman, "Designing Competition Policy for Telecommunications," *Review of Network Economics*, Volume 7, No. 4, December 2008, pp. 509-546 (Available at <http://www.rnejournal.com/artman2/publish/vol7/index.shtml>).

ⁱⁱ See *Verizon Telephone Companies v. FCC*, No. 08-1012 (D.C. Cir., June 19, 2009).

ⁱⁱⁱ In any event, assuming the competitive-sensitivity of the competitors' network facility and customer location information, their non-disclosure claims strain credulity. Regulatory commissions have since time *in memoriam* collected proprietary information and, if need be, used redacted versions of testimony and exhibits in reaching decisions that require the production of sensitive competitive information.