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FCC Won't Face Up to Wireless Competition: Misreading the Writing on the Wall

by

Seth L. Cooper*

In the early 1990s Saturday Night Live's Dana Carvey elicited plenty of laughter for his portrayal of President George Bush #41, including the former President's hesitation in saying the word "recession" in the face of an economic downturn. While we now find ourselves facing a newer recession, one of the bright spots of our economy has been the dynamic wireless marketplace. Data contained in the FCC's recently released fourteenth annual wireless competition report points to continuing wireless innovation and competition.¹

Unfortunately, the FCC broke with several prior wireless competition reports by declining to say whether or not there is "effective competition" in the wireless marketplace. Like the former President who couldn't bring himself to speak about the "recession" that was obvious to anyone connected to the economy, the FCC can't seem to bring itself to speak about "competition" in the wireless marketplace that is obvious to any consumer of wireless. Instead, the agency conclusions — or non-conclusions — contained in the report may be intended to lay the groundwork for unnecessary, heavy-handed future regulation of wireless.

In light of mobile broadband and smartphone breakthroughs, this latest wireless competition report widens its scope to encompass what it calls "the wireless ecosystem," taking in everything from wireless carriers to prepaid calling services, to mobile app stores, to smartphone devices, to cell towers. And the body of the report packs in plenty of positives for wireless consumer choice.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

For starters, wireless consumers are benefitting from competition and choice among wireless carriers. As the report indicates: "[t]he percentage of the population served by at least two mobile broadband providers increased from 73 percent in May 2008 to nearly 90 percent in November 2009," "the percentage of the population served by three or more providers increased from 51 percent in May 2008 to 76 percent in November 2009," and "approximately 58 percent of the population is served by at least four mobile broadband providers."² What's more, deployments of newer wireless technologies will better serve consumers now and in the future. The report points out, for instance, that 3G network build-out by wireless carriers continues. Meanwhile, WiMax is now being rolled out by Clearwire, and wireless providers are ramping up LTE efforts to bring 4G services to consumers.

Smartphone adoption continues its sharp rise, as "smartphones accounted for 44 percent of total handset sales in the third quarter of 2009, up from 27 percent in the second quarter of 2008."³ Also, "[f]rom 2006 to 2009 the number of mobile wireless handset manufacturers that distribute in the U.S. market has increased from eight to sixteen."⁴ "[T]he average number of handset models offered by the eight largest facilities-based mobile wireless service providers increased from 28 in November 2006 to 43 in December 2009," and "[t]he average number of handset models offered by non-top eight service providers increased from 10 in November to 23 in December 2009."⁵

The report asserts that "[t]he emergence of a handful of smartphone operating systems – Apple, Android, BlackBerry, Palm, and Windows Mobile – represents a shift in the mobile wireless ecosystem and one that is affecting the ability of mobile wireless service providers to differentiate themselves based on handsets and devices."⁶ In fact, "the emergence of mobile web browsers and a handful of mobile operating systems in recent years has brought greater efficiency and standardization to the mobile application segment, to the benefit of both third-party developers and consumers."⁷ As a result, "[t]housands of different mobile applications – software programs that can be used on a mobile device – are now available to consumers through various channels."⁸ "Both the number of mobile applications launched and the number of applications downloaded by consumers has grown significantly over the past two years."⁹

Furthermore, "[t]he price of mobile wireless services, as measure by the CPI for mobile services, decreased."¹⁰ Although voice revenue per minute "increased slightly in 2008,"¹¹ "the average price per text messages has been declining as more subscribers have shifted to unlimited or bucket messaging plans."¹² The report also points to the pricing differentiation and competition in the wireless ecosystem, stating that "[t]he focus of price competition now appears to be shifting to unlimited service offerings."¹³ In particular, "[t]oday, all of the nationwide service providers, and many smaller operators, offer some version of a national flat-rate pricing plan in which customers can purchase a 'bucket' of minutes to use on a nationwide or nearly nationwide network without incurring roaming or long-distance charges. All the nationwide service providers also offer some version of a family plan."¹⁴ More specifically, "[i]n 2008, unlimited national flat-rate calling plans were launched by all the nationwide operators, and then spread from postpaid service to the prepaid and reseller segment of the market."¹⁵ Likewise, "a number of smaller, regional, and multi-metro providers, like Leap and MetroPCS, also have been offering unlimited local calling plans."¹⁶

These trends set out in the latest wireless competition report — consumer choice among carriers, deployment of 3G and 4G technologies, increased variety of wireless devices, innovation in mobile apps, and price competition in the market — all suggest a wireless ecosystem characterized by dynamism, innovation, and "effective competition." Indeed, the FCC's report admits that "the industry is dynamic and that the marketplace is evolving."¹⁷ And the report is diffused with descriptions of innovation taking place throughout the wireless value chain.

But when it comes to characterizing the competitive state of the wireless marketplace, the report points toward a new course in wireless regulatory policy. Unlike the past six wireless competition reports issued by the FCC, in this report the FCC declined to say whether or not there is effective competition in the wireless marketplace. Instead, the FCC signaled its inclination to infuse the wireless ecosystem with new regulation on the theory that this would improve its performance.

As an initial matter, the report's competition non-conclusions were premised on a strained and less-than-convincing reading of the FCC's statutory requirements concerning its issuance of the report. 47 U.S.C. Sec. 332(c)(1)(C) provides:

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.¹⁸

However, the report contended that because "the mobile wireless ecosystem is sufficiently complex" that "rather than reaching an overarching, industry-wide determination with respect to whether there is 'effective competition,'" the report would instead seek to satisfy the statute by "providing a detailed analysis of the state of competition that seeks to identify areas where market conditions appear to be producing substantial consumer benefits and provides data that can form the basis for inquiries into whether policy levers could produce superior outcomes."¹⁹ As Chairman Genachowski put it in his statement, "[t]his Report does not seek to reach an overly-simplistic yes-or-no conclusion about the overall level of competition in this complex and dynamic wireless ecosystem, comprised of multiple markets."²⁰

Overly simplistic or not, a yes-or-no conclusion about the overall existence of "effective competition" in the wireless marketplace is the most straightforward reading of the statute's specific requirement that wireless competition reports include "an analysis of whether or not there is effective competition." The FCC had good reason for making "effective competition" conclusions in the prior six wireless competition reports.²¹

Far more disconcerting is the FCC's reading of its statutory report-making responsibility as set-up for new wireless regulation. The report stated its purpose to identify "areas where it would be fruitful to inquire whether policy levers could produce superior outcomes." As Commissioner Robert McDowell wrote in his statement, "[t]his point in particular is outside the scope of our statutory mandate to produce the report, and appears to lay the foundation for more regulation."²²

And the FCC's rationale for discarding "effective competition" conclusions about the wireless marketplace is hardly convincing. Keep in mind that the report's acknowledgement that it "does not contain a summary estimate of market power."²³ So the report nowhere points to any kind of market failure to justify new regulation. Rather, the report, in essence, claims that because the wireless ecosystem is too complex to explicitly say whether it is effectively competitive, the report will therefore implicitly treat the wireless ecosystem as if it's not effectively competitive and analyze aspects of it in an effort to create the groundwork and inertia for future regulatory proceedings.

If anything, there is a strongly counterintuitive aspect to the report's conclusions about the wireless ecosystem. Dynamism and increasing complexity are signs of an innovative and competitive market. But the report makes a liability out of an asset by treating wireless dynamism and increasing complexity as triggers for future wireless regulation. Unfortunately, that counterintuitive rationale fits with the counterintuitive overall result—a wireless competition report that serves as a roadmap for wireless regulation.

The report signals a potentially significant shift in FCC wireless policy. It looks to replace the FCC's light-touch emphasis with something much more hands-on: using "policy levers" [read: regulation] to produce outcomes the FCC believes will be better than what the dynamic and complex wireless market will provide. Just what policy levers will the FCC choose to put its hands on to alter the course of the wireless marketplace? Candidates include early termination fee (ETF) regulation, bill shock regulation, handset exclusivity regulation, spectrum auction condition regulation, as well as wireless net neutrality regulation that extends to data traffic, mobile operating systems, and mobile applications.

In sum, although the body of the wireless competition report contains plenty of positive data points about the wireless market, the report is book-ended by FCC non-conclusions about the state of wireless competition that double as FCC conclusions about its ambitions for wireless regulation. Although the dynamic wireless ecosystem is characterized by innovation and effective competition, the FCC refuses to read the writing on the wall.

* Seth L. Cooper is an Adjunct Fellow at the Free State Foundation, a free market-oriented think tank located in Rockville, Maryland.

¹ See Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services ("*Fourteenth Report*"), WT Docket No. 09-66 (May 20, 2010), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf.

² *Id.* at 39-40, para. 47.

³ *Id.* at 80, para. 137.

⁴ *Id.* at 162, para 300.

⁵ *Id.* at 166-167, para. 308.

⁶ *Id.* at 79, para. 135.

⁷ *Id.* at 176, para. 331.

⁸ *Id.* at 173, para. 319.

⁹ *Id.* at 173, para. 320.

¹⁰ *Id.* at 109, para. 185.

¹¹ *Id.*

¹² *Id.* at 112, para. 192.

¹³ *Id.* at 58, para. 91.

¹⁴ *Id.* at 57, para. 87.

¹⁵ *Id.* at 57, para. 88.

¹⁶ *Id.* at 102, para. 175.

¹⁷ *Id.* at 26, para. 18.

¹⁸ (Emphasis added.)

¹⁹ *Fourteenth Report*, at 5, para. 3.

²⁰ Statement of Chairman Julius Genachowski, WT Docket No. 09-66 (May 20, 2010), at 1, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298299A2.pdf.

²¹ See, e.g., Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services ("*Thirteenth Report*"), 24 FCC Rcd 6185 (2009).

²² Statement of Commissioner Robert M. McDowell, Concurring, WT Docket No. 09-66 (May 20, 2010), at 1, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298299A4.pdf.

²³ *Fourteenth Report*, at 44, para. 55.