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FCC Should Stop Refusing to Acknowledge Wireless Competition

by

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On June 27, the FCC issued its annual [Wireless Competition Report for 2011](#).ⁱ The Report contains plenty of positive data when it comes to wireless innovation, competition, and choice of service and price options. But once again the Commission passed up an opportunity to look more closely at the impact of intermodal competition and wireless substitution in the advanced telecommunications marketplace. And for the second straight time, the Commission disregarded Congress's directive in Section 332(c)(1)(C) of the Communications Act that its Report "shall include...an analysis of whether or not there is effective competition" in the market by declining to say whether or not the wireless market is effectively competitive.

The Commission's Report suggests the agency has little interest in intermodal competition and the competitive impact of wireless as a substitute for wireline services. This means another lost opportunity for the Commission to lay the groundwork for removing outdated, monopoly-era legacy wireline regulations. And the agency's agnosticism when it comes to effective competition gives it cover for a slate of proposals for imposing new wireless regulations that have been circulated in Congress and by the Commission itself.

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But from both a data-driven analytical perspective, as well as an everyday commonsense perspective, the data collected in the Report show that the wireless market is dynamic and highly competitive. Consumers continue to enjoy an increasing number of innovative wireless products services, with a myriad of services and price options now available.

The Report's Positive Numbers Reveal Wireless Market's Dynamism and Competitiveness Continues

Positive numbers from the Report show expanded coverage of the population by competing providers. According to a 2010 estimate contained in the Report concerning voice service coverage, 99.2% of the population is served by two or more wireless voice providers, 97.2% is served by three or more providers, and 94.3% are served by four or more providers.ⁱⁱ Numbers for wireless broadband coverage and competition also stack up well. An estimate in the Report indicates that 91.9% of the population is served by two or more wireless broadband service providers, 81.7% is served by three or more providers, and 67.8% is served by four or more providers.ⁱⁱⁱ

Wireless is characterized by heavy investment, especially in light of overall economic conditions. Although the Report acknowledges some declines in wireless capital expenditures in recent years, with expenditures varying by wireless operator,^{iv} it nonetheless concludes that "[o]ver the past decade, mobile wireless service providers have invested significantly in wireless network structures and equipment."^v The Report cites from an industry report that "capital investment increased slightly from \$20.2 billion in 2008 to \$20.4 billion in 2009," and a "Census Bureau estimate of wireless industry capital expenditures in 2009 was similar at \$20.65 billion."^{vi}

Heavy capital expenditures are primarily directed to coverage expansion and network upgrades that both embody innovation and provide a platform that enables other wireless innovation. As the Report states, "during 2009 and much of 2010, service providers and device manufacturers launched several new devices – including smartphones, tablets, wireless modem cards, and mobile Wi-Fi hotspots – that enable consumers to use data services more quickly and easily while mobile."^{vii} Many such devices run on operating systems that are themselves the source of intense competition, with RIM, Google, and Apple leading the market.^{viii} And wireless innovation is also characterized by an exploding market in mobile applications. According to the Report:

[T]he total number of applications downloaded from Apple's App Store grew from 100,000 in 2008 to over 2 billion in 2009, and surpassed 6.5 billion by September 2010... As of September 2010, the more recently created, but rapidly growing Android Market had over 80,000 available applications and had passed one billion total downloads... In addition, thousands of niche applications have been designed for specific uses, hobbies, interests, and industries by various third-party application developers... social networking ranked as the fastest-growing mobile content category between April 2009

and April 2010, with the number of mobile consumers using an application to access a social networking website increasing 240 percent to 14.5 million users.^{ix}

Consumer behavior continues to evolve, with increasing adoption of mobile data services. The Report cites recent estimates that "as of May 2010, an estimated 40 percent of American adults had used their cell phone to go online (for e-mail, Internet access, or instant messaging), up from 32 percent in April 2009 and 24 percent in December 2007."^x As discussed further below, the number of wireless-only consumers is also on the rise.

Perhaps most importantly, the Report also indicates downward trends in prices for wireless services. The Report states that average revenue per voice minute has continued to decline, lowering to \$0.049 per minute in 2009, from \$0.054 per minute in 2008 and \$0.112 per minute in 2002.^{xi} It cites estimates that "the unit price for text messages continued to fall in 2009" as "price per text yields dropped for the fifth consecutive year in 2009 to \$0.009, a 25 percent decline from the previous year."^{xii}

"Cut the Cord" Households Increase, But Report Avoids Serious Intermodal Competition Assessment

Even though the numbers contained in the Report suggest a highly competitive market, the Commission declined to undertake any actual assessment of wireless substitution on wireline services in the Report's section on intermodal competition. This also despite the Report's statement that "we regularly assess whether services provided using other technologies, such as wireline, fixed wireless, and satellites, can or will place competitive pressure on mobile wireless service providers."^{xiii}

The Report states:

For reasons first elaborated in the Fourteenth Report [*i.e.*, the 2010 Report] it is still not yet clear whether mobile wireless Internet access services can substitute completely for fixed wireline Internet access technologies such as cable modem, DSL, or fiber. The extent to which mobile wireless services can impose some competitive discipline on wireline providers will depend on how technology, costs, and consumer preferences evolve, and on the business strategies of providers that offer both wireless and wireline Internet access services.^{xiv}

Thus, the Report offered no assessment or new insights when it comes to the substitutability and competitive impact of wireless in the broadband services market.

The Report does cite a National Health Interview Survey indicating that a growing number of households – approximately 26.6% – are now wireless-only.^{xv} And it also points out that "[a] Nielsen Company survey shows a similar rising trend in households who have 'cut the cord.'"^{xvi} But the Report provides no follow-up to this information, as

its subsection on intermodal competition in voice services provides no analysis, no conclusions, nor any substantive insights regarding competitive pressures in the voice services market resulting from wireless and cross-platform competition.

In a blog post this spring, I urged that the "[FCC's Wireless Competition Report Should Take Wireless Substitution Seriously](#)."^{xvii} Wireline telecommunications providers are, in many instances, still subject to legacy regulatory burdens premised on monopoly-era assumptions about competition in the market. On their face, those assumptions now appear unwarranted in light of competition from wireless and other competitors. So it makes sense for the Commission to now examine the effects of intermodal competition and consider whether legacy regulation still provides necessary restraints on the exercise of market power or imposes an unnecessary drag on market competition.

As I pointed out in my prior blog post, the Report would have provided an opportune moment for the Commission to assess intermodal competition and wireless substitutability for voice services in light of the rising number of wireless-only and "cut the cord" households. But the lack of any such assessment in the Report suggests the Commission isn't much interested in better understanding what kind of competitive pressures wireless creates in the voice services market. The result is another missed opportunity for the Commission to reconsider the competitive underpinnings of its monopoly-era legacy regulation for wireline.

Given the Commission's goals for universal broadband access, shouldn't it be an agency imperative to gain better insight into the substitutability and competitive effects of wireless in delivering broadband services? A rigorous analysis could have helped provide that insight. Such an analysis could also shed light on the efficacy of many of the proposals for new regulation floated by Congress and the Commission that would directly impact and restrict wireless broadband service practices. (Incidentally, rather than focusing on whether wireless could "substitute completely" for wireline, as the Report suggests, the more crucial inquiry for consumer welfare should be whether wireless provides substitutability sufficient to constrain wireline prices and make wireline service options more competitive.)

The Report Sidesteps an "Effective Competition" Conclusion Regarding the Wireless Market, Again

In an [FSF Perspectives paper](#) analyzing the FCC's 2010 Wireless Competition Report, I questioned the Commission's refusal to make a determination of whether or not there is "effective competition" in the wireless marketplace.^{xviii} The FCC's non-conclusions marked a sudden course change for the Commission after several prior reports concluded the wireless market was "effectively competitive." And data contained in the 2010 Report suggested that, from an everyday commonsense approach, the wireless market was (and is) highly competitive. Moreover, the Commission appears obligated to include a yes-or-no conclusion about the existence of "effective competition" because Section 332(c)(1)(C) of the Communications Act states that the report "shall include...an analysis of whether or not there is effective competition."

Now in its 2011 Report, the Commission backs away once more from its statutory obligation to make an effective competition determination. The Commission again adopts an "effective competition" agnosticism regarding the wireless market, meaning no amount of positive data could satisfy the Commission that an "effective competition" finding is warranted. According to the Report, "[i]t would be overly simplistic to apply a binary conclusion or blanket label to this complex and multi-dimensional industry" and "such an assessment would be incomplete and possibly misleading in light of the variations and complexities we observe."^{xix} But as Commissioner Robert McDowell responded in his [concurring statement](#): "Nonetheless, this is what Congress asked us to do."^{xx}

In the Report the Commission also bases its avoidance of any conclusion on its statement that "there is no definition of "effective competition" widely accepted by economists or competition policy authorities such as the U.S. Department of Justice (DOJ)." But if the Commission lacks conceptual clarity to answer such question, on what basis can the Report be taken seriously when it claims "We provide an analysis of whether or not there is effective mobile wireless competition, but 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"?"^{xxi} In other words, even without offering any conclusions, how can the Commission even assess whether or not there is "effective competition" when it claims to not know what that "effective competition" means?

It's not unheard of for Congress to delegate difficult decision-making duties to administrative agencies. But just because an agency believes it's saddled with an overly simplistic and therefore difficult duty doesn't mean the agency is absolved from its responsibility to carry out that duty. Where circumstances render agency decision-making difficult but not impossible, the agency has an implied obligation to undertake reasonable, extra effort to carry out its responsibilities.

In considering the existence of "effective competition," the FCC was not faced with a difficult mission. Even assuming, for the sake of argument, the Commission's characterization of its delegated duty as "overly simplistic," the agency could still, for instance, supplement a "binary conclusion" about the wireless market with an explanation of the conclusion's limitations. The Commission could extend its analysis to various segments of the wireless market and based on the available data also opine on whether particular segments are more or less competitive. In so doing the Commission could provide a fuller picture of the wireless market that goes beyond the "blanket label" that the Commission eschews. And rather than avoid making an "effective competition" conclusion by contending there is no single, settled definition of "effective competition," the Commission could instead take two or three of the existing definitions it cites in the Report and offer multiple conclusions by employing each of those respective definitions.^{xxii} But in deciding to forego any such effort to carry out its obligations regarding the effective competition determination, the FCC effectively disregarded its statutory duty under Section 332(c)(1)(C).

As to why this matters, I pointed out in my *FSF Perspectives* paper on the FCC's 2010 Report that, for a regulatory agency like the FCC, the upshot to avoiding a finding of "effective competition" in the wireless market is that it renders new regulation more tenable. After all, the presence of effective market competition provides the primary justification for *deregulation*, not new regulation. And in the absence of any recognition of robust market competition, courts are more likely to subject regulation to less exacting scrutiny and to give greater deference to agency regulatory intervention.

Over the last year, Congress and the Commission have proposed or considered wireless-related restrictions and mandates that includes: next generation wireless disclosure regulation, early-termination fee regulation, handset exclusivity regulation, bill shock regulation, text messaging and common short code regulation, smartphone app regulation and smartphone design regulation (such as FM chipset mandates). Not to mention the FCC's net neutrality regulation of wireless, adopted late last year. So the Commission's agnosticism toward the existence of an "effectively competitive" wireless market gives such proposals for new wireless regulation a better chance of being implemented.

Conclusion

By issuing a Report that avoids analyzing wireless substitution for wireline voice services, the Commission prolongs the life of increasingly anachronistic legacy wireline regulation. The Report's lack of analysis of wireless substitution for broadband services as well as its reasserted ambivalence about effective competition in the wireless market provides the Commission with a better set-up for new wireless regulation of wirelessly-delivered broadband services.

Nonetheless, the data in this year's Wireless Competition Report suggests a dynamic wireless market that continues to be characterized by investment, innovation, and competition. The data suggests that consumers of wireless voice and broadband services benefit from a wireless market that is effectively competitive. So while the Report's official glosses on that data might be pro-regulation, the data itself is strongly pro-consumer.

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- ⁱ Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services ("Fifteenth Report" or "Report"), WT Docket No. 09-66 (Released June 27, 2011).
- ⁱⁱ *Id.*, at 6.
- ⁱⁱⁱ *Id.*, at 7.
- ^{iv} See *id.*, at 131, para. 211.
- ^v *Id.*, at 128, para. 207.
- ^{vi} *Id.*, at 17.
- ^{vii} *Id.*, at 19-20.
- ^{viii} *Id.*, at 20.
- ^{ix} *Id.*, at 20-21.
- ^x *Id.*, at 101, para. 164.
- ^{xi} See *id.*, at 119-120, para. 191 (including Table 20).
- ^{xii} *Id.*, at 13.
- ^{xiii} *Id.*, at 27, para. 8.
- ^{xiv} Report, at 208, para. 367.
- ^{xv} *Id.*, at 207, para. 365.
- ^{xvi} *Id.*
- ^{xvii} Seth L. Cooper, "FCC's Wireless Competition Report Should Take Wireless Substitution Seriously," *FSF blog* (May 11, 2011).
- ^{xviii} See Seth L. Cooper, "FCC Won't Face Up to Wireless Competition: Misreading the Writing on the Wall," *Perspectives from FSF Scholars*, Vol. 5, No. 15 (June 4, 2010).
- ^{xix} Report, at 28, para. 14.
- ^{xx} Concurring Statement of Commissioner Robert M. McDowell, WT Docket No. 10-133 (June 27, 2011).
- ^{xxi} Report, at 28, para. 15.
- ^{xxii} See Report, at 28, para. 15.