

Competition Policy and the Role of the Federal Communications Commission

This is the third in a series of white papers intended to facilitate a robust dialogue regarding modernizing the laws governing the communications and technology sectors. This discussion, informed in part by responses to previous white papers, seeks comment on U.S. competition policy and the role of the Federal Communications Commission (“FCC” or “Commission”). As discussed in the first white paper, changes in technology and the rate at which they are occurring warrant an examination of whether, and how, communications law can be rationalized to address the 21st century communications landscape.

Background

The industries and markets the Commission oversees have changed dramatically and will continue to evolve at a rapid pace. The evolution of technology from analog to digital and narrowband to broadband has brought about the integration of voice, video, and data services across multiple platforms employing various technologies. The ongoing shift away from single-purpose technologies toward Internet Protocol packet-switching has rapidly called into question the adequacy of the current Communications Act and the monopolistic assumptions on which it is based.

With the technological and competitive changes in the marketplace, consumer preferences in the consumption of communications products and services have also changed significantly. The rise of mobility and wireless communications as both a complement and a substitute to traditional communications tools has made communications and technology an integral part of our daily lives. The FCC’s data reveal these changing consumption patterns. According to the FCC’s *Local Telephone Competition Report*, as of December 2012, the number of wireless subscriptions – 305 million – is more than three times the number of switched access lines – 96 million. From 2009 to 2012, interconnected Voice over Internet Protocol (VoIP) subscriptions increased at 17 percent, whereas switched access lines decreased by nine percent annually.

The FCC’s *15th Report On The Status Of Competition In The Market For The Delivery Of Video Programming* provides further evidence of the changes in the communications ecosystem. The FCC summarizes the most significant trends as “the continuing development, and consumer usage, of time and location shifted viewing of video programming, the expansion of digital and high definition programming, and the progress of the online video industry.” According to the report, the number of multichannel video programming distributor (MVPD) subscribers grew from 100.8 million to 101 million households between year-end 2010 and June 2012. Despite the relatively small increase in overall subscribers, the distribution of subscribers among the different types of MVPDs changed substantially during this period. Cable’s share of MVPD subscribers fell from 59.3 percent of all MVPD video subscribers at the end of 2011 to 55.7 percent at the end of June 2012, while Direct Broadcast Satellite (DBS) MVPDs (DirecTV and DISH Network) and telephone MVPDs (i.e. Verizon FiOS, AT&T U-verse, and CenturyLink Prism TV) gained both video subscribers and market share. Among market trends, the report recognizes that MVPDs continue to expand their “TV Everywhere” offerings, which allow subscribers to access video programming on stationary and mobile Internet-connected

devices including televisions, computers, tablets, and smartphones. The report notes that the online video distributor (OVD) industry continues to evolve, particularly as OVDs expand the amount of video content available to consumers through original programming and new licensing agreements with traditional content creators. Some OVDs have also invested in their own servers, content delivery mechanisms, and other infrastructure to expedite the delivery of programming.

Traditional radio broadcasting has also seen significant changes due to changing technology and consumer habits. Broadcast radio is changing dramatically and reaching a new audience of listeners through apps like ClearChannel's iHeartRadio – which amassed 135 million downloads in its first 13 months – and from NextRadio, which utilizes FM receivers built into smartphones. New technology is bringing not only new ways to reach listeners, but also new competition. While broadcasts from traditional radio stations may be accessed through mobile apps, new entrants like Pandora, Spotify, and others offer consumers the opportunity to listen to streaming music on their wireless devices without maintaining terrestrial broadcast facilities.

Regulatory policy should reflect the competitive conditions of the market it is addressing. As discussed in the first [white paper](#), in its current form, the Communications Act consists of seven titles: general provisions, common carriers, provisions related to radio, procedural and administrative provisions, penal provisions and forfeitures, cable communications, and miscellaneous provisions. Each of the titles governs a specific sector of the communications economy with inconsistent approaches to definition and regulation. The practical result is that sometimes providers of functionally equivalent services – whether technologically or from the consumer perspective – are regulated in drastically different ways. The platform-specific reports issued by the Commission annually on the competitive states of wireless, video, and satellite industries echo the “siloed” approach of the current regulatory framework. By dividing the overall regulatory scheme into separate titles based on specific network technologies and services, the Communications Act fails to contemplate or address the convergence and evolution of services in the modern digital era and the impact on the state of competition in the communications ecosystem.

Against the backdrop of the existing regulatory scheme and in recognition of ongoing market changes, an examination of competition policy and the Communications Act is warranted as part of ongoing update efforts. What are the implications of the continued dynamic evolution of technologies, the intermodal competition it facilitates, and the changing patterns of consumer consumption of communications products and services?

Questions for Stakeholder Comment

1. How should Congress define competition in the modern communications marketplace? How can we ensure that this definition is flexible enough to accommodate this rapidly changing industry?
2. What principles should form the basis of competition policy in the oversight of the modern communications ecosystem?

3. How should intermodal competition factor into an analysis of competition in the communications market?
4. Some have suggested that the FCC be transitioned to an enforcement agency, along the lines of the operation of the Federal Trade Commission, rather than use broad rulemaking authority to set rules *a priori*. What role should the FCC play in competition policy?
5. What, if any, are the implications of ongoing intermodal competition at the service level on the Commission's authority? Should the scope of the Commission's jurisdiction be changed as a result?
6. What, if any, are the implications of ongoing intermodal competition on the role of the FCC in spectrum policy?
7. What, if any, are the implications of ongoing intermodal competition at the service level on the FCC's role in mergers analysis and approval?
8. Competition at the network level has been a focus of FCC regulation in the past. As networks are increasingly substitutes for one another, competition between services has become even more important. Following the *Verizon* decision, the reach of the Commission to regulate "edge providers" on the Internet is the subject of some disagreement. How should we define competition among edge providers? What role, if any, should the Commission have to regulate edge providers – providers of services that are network agnostic?
9. What regulatory construct would best address the changing face of competition in the modern communications ecosystem and remain flexible to address future change?
10. Given the rapid change in the competitive market for communications networks and services, should the Communications Act require periodic reauthorization by Congress to provide opportunity to reevaluate the effectiveness of and necessity for its provisions?

While these questions address competition policy and the FCC's role in its formulation and application, the committee encourages comment on any aspect of competition policy and updating the Communications Act. Please respond by June 13, 2014, to commactupdate@mail.house.gov. For additional information, please contact David Redl at (202) 225-2927.