

COMPTEL's Response to Questions in House Energy and Commerce White Paper
"Competition Policy and the Role of the Federal Communications Commission"

COMPTEL, the leading industry association for competitive communications service providers, submits its response to the questions in the Committee on Energy and Commerce's third white paper, which focuses on "Competition Policy and the Role of the Federal Communications Commission." COMPTEL appreciates the Committee's commitment to pro-competition policies and the opportunity to respond to its white paper on competition. For more than 30 years, COMPTEL and its members have advocated for competition-based policies that will ensure *all* consumers benefit from the innovation and investment that competitors bring to the communications marketplace.

Question 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?

Competition in the modern communications marketplace should be defined as it is in any other industry. The Horizontal Merger Guidelines, which are utilized by the antitrust agencies, provide a reliable framework for measuring the extent of competition in any given industry or marketplace. The FCC has and should use a market power framework consistent with the Horizontal Merger Guidelines to evaluate the state of competition in telecommunications markets. Under this framework, the FCC defines relevant product and geographic markets, identifies market participants and examines market share data. This method of analyzing the state of competition is more than flexible enough to accommodate changes in the dynamic communications marketplace.

When Congress enacted the Telecommunications Act of 1996, it set the stage for new entrants to compete in the local telephone market by removing legal barriers to entry, imposing interconnection requirements and requiring the incumbent telephone companies to lease access to their last-mile facilities so

that customers could have a choice of providers. The availability of wholesale inputs enables competitors to serve customers where it would otherwise require substantial uneconomic investment to duplicate the ubiquitous networks of the incumbents and to introduce new products and services, including DSL broadband and IP-based services. Indeed, the competitive industry has been leading the IP evolution. The development of competition made possible by the Act spurred the network investments and upgraded service offerings that consumers enjoy today.

As the FCC found in the National Broadband Plan, a well-functioning wholesale market is a critical component of retail competition and customer choice, because “it is not economically or practically feasible for competitors to build facilities in all geographic areas.” (Plan at 47). Federal policy that facilitates the availability of wholesale inputs and the development of a competitive retail market is necessary to ensure that consumers continue to enjoy the benefits of innovation in both products and services in the future.

Question 2: What principles should form the basis of competition policy in the oversight of the modern communications ecosystem?

Consistent with the Horizontal Merger Guidelines and the FCC’s market power framework, appropriate geographic and product markets must be identified and analyzed to determine the existence and extent of competition. Such an analysis must review the alternatives that are available to purchasers and sellers in any given retail or wholesale market, whether particular products or providers are substitutes for one another in any given retail or wholesale market, and whether there is a sufficient choice among providers so as to insulate and protect against predatory pricing and other anticompetitive behavior. Finally, communications competition policy must recognize and reflect the differences between residential and business service markets and retail and wholesale markets. Businesses, government entities, schools, libraries, and hospitals purchase different communications products, such as special access, than do residential consumers and retail customers have different needs than wholesale customers.

Question 3: How should intermodal competition factor into an analysis of competition in the communications market?

To determine whether particular intermodal services or products compete with one another, a determination must first be made that the products or services are in the same product market category. Again looking at residential, business, retail and wholesale markets separately, do customers consider particular intermodal products or services to be substitutes for one another? If so, to what extent are those replacement products or services available to be purchased at individual customer locations and do the products and services constrain another intermodal providers' pricing?

For instance, an Over-The-Top (OTT) voice or mobile service may not be substitutable for the managed, wireline voice and data services that many business customers require for a number of reasons, including reliability and security. As such, the product market must be carefully defined and substitutability examined among comparable products not generic "replacement" products or services.

Moreover, in examining intermodal competition, it is important to take into account the underlying infrastructure or inputs that support that service or product. For instance, next-generation broadband and wireless networks rely on wired networks—networks that are largely owned by the largest of the incumbent telephone companies. Where those companies exercise market power over competitive inputs, they are dominant and should be treated as such.

In addition, intermodal competition in the business and wholesale markets remains limited. A large number of businesses continue to be addressed by only one or two last-mile connections, and absent Congressional and FCC oversight and action to ensure competitive access, businesses would be subject to monopoly or duopoly pricing. Competitors usually can't make a viable business case to replicate the incumbent providers' last-mile connections, except to serve the very largest customers. This is due to a variety of factors, including high sunk costs of constructing last-mile facilities (i.e., costs that once incurred cannot be readily

recovered), local government regulations that delay and raise costs for new deployments, and building owners' refusing access to new carriers or seeking to charge competitors extending networks into their buildings.

Question 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?

The FCC has been, and continues to be, the expert agency on the communications marketplace. The agency should continue to gather the information and data about the marketplace so that competition can be properly measured and monitored. While the FCC could improve its data collection and analysis of the business and wholesale marketplace, it should maintain its authority to administer the Communications Act, including through rulemaking. Moreover, the agency should continue to vigorously enforce the Communications Act, and the Commission's rulemaking authority must be preserved to protect consumers, advance competition, and promote the public interest.

Question 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?

The FCC has the appropriate jurisdiction to address new services and innovations in the communications marketplace. The majority of the provisions of the Communications Act are technologically neutral. For example, the definitions of telecommunications and information services do not depend upon the mode of technology a provider uses to offer these services—it can be wired or wireless. While the FCC has not approached some rulings in a technologically neutral manner, the Commission's jurisdiction should remain unchanged regardless of any changes in technology.

Question 6: What, if any, are the implications of ongoing intermodal competition on the role of the FCC in spectrum policy?

The capability of one technology to compete with others and provide intermodal competition is necessarily impacted by the access to the inputs needed to offer service. For mobile providers, one such input is spectrum. It is necessary and appropriate for Congress to consider whether any competitor (no matter the technological platform) has the necessary inputs to compete.

Question 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?

The FCC judges mergers using a public interest standard, as well as a market power analysis based on the principles of the Horizontal Merger Guidelines that are utilized by the Department of Justice and the Federal Trade Commission. The existence of intermodal competition does not, in of itself, change the need to examine whether a particular transaction increases market power, lessens competition overall, or harms the public interest.

Question 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?

As discussed in Question 1, competition in the modern communications marketplace, including competition among "edge providers," should not be defined any differently than competition is defined in any other industry. While "edge providers" may be network agnostic, they need access to a provider's last mile network to reach their customers. The framework of the 1996 Telecommunications Act provides the flexibility

for the FCC to address last-mile network access. Many of the provisions in the Act are technology agnostic, so the focus should not be on "regulating edge providers." Instead, the Commission should continue to focus on whether market power, and the potential for its abuse remains in gaining last mile access to the end-user.

Also consistent with remarks above, in the business and wholesale markets, the issue of "network substitutability" is less apparent. Services to business customers are generally delivered over traditional wireline telephone networks, which are comprised of both fiber and copper. While incumbent cable providers have begun to enter the business market, most businesses still only have one wireline network connection at their premises. Most competitors offering business services require wholesale access to the last mile from the incumbent providers, because it is economically impractical for competitors to replicate those bottleneck facilities in most cases, particularly to serve small and medium businesses.

Question 9: What regulatory construct would best address the changing face of competition in the modern communications ecosystem and remain flexible to address future change?

As discussed in Questions 1 and 8, the existing framework of the 1996 Telecommunications Act, and the FCC's process for evaluating market power and dominance best address changes in the marketplace. In particular, an agency charged with overseeing those markets that are not effectively competitive is necessary to ensure that consumers are protected.

Question 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?

Congress is well within its constitutional authority to evaluate, review, and amend particular provisions of the Communications Act without subjecting the entire Communications Act to a reauthorization process on a periodic basis.

Thank you for the opportunity to comment.

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