

Why an FCC 25 MBs Broadband Threshold Standard is Decompetition & Arbitrary and Capricious

NetCompetition Comments on FCC Proceeding 14-126

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The FCC's Redefinition of Broadband Competition

Submitted by Scott Cleland on Thu, 2014-09-04 21:26

What is the FCC's definition of "competition?" That is the defining question and take-away from FCC Chairman Wheeler's latest broadband [speech](#), *"The Facts and Future of Broadband Competition."*

Tellingly the Chairman said: *"Since my first day as Chairman of the FCC my mantra has been consistent and concise: Competition, Competition, Competition."* Well then, it seems especially important to understand *exactly* what the FCC Chairman means when he says the FCC is singularly focused on "Competition."

While the definition of "competition" should be obvious – "the act of competing, rivalry" -- in the FCC broadband context the definition or meaning of "competition" is not obvious at all. It totally depends on: 1) **what** the definition of the "market" is; 2) **who** the FCC considers "competitors" or "choices," and 3) **how** these competitors are allowed or required to "compete."

1) The **"what:"** In the FCC's last 706 Broadband Competition [Report](#) to Congress in August of 2012, the FCC reviewed fiber, xDSL, cable, fixed wireless, mobile wireless, and satellite in their broadband deployment market report ([paras 31, 32, 42](#)).

In this speech the Chairman said:

About wireless broadband: *"...today it seems clear that mobile broadband is just not a full substitute for fixed broadband, especially given mobile pricing levels and limited data allowances."*

About wireless competition: *"... where competition exists, the Commission will protect it. Our effort opposing shrinking the number of nationwide wireless providers from four to three is an example."*

About fixed broadband: *"at this moment, only fiber gives the local cable company a competitive run for its money. Once fiber is in place, its beauty is that throughput increases are largely a matter of upgrading the electronics at both ends, something that costs much less than laying new connections. While LTE and LTE-A offer new potential, consumers have yet to see how these technologies will be used to offer fixed wireless service."... At the low end of throughput, 4 Mbps and 10 Mbps, the majority of Americans have a choice of only two providers. That is what economists call a "duopoly", a marketplace that is typically characterized by less than vibrant competition."*

It appears the Chairman views wireless and fixed broadband as separate markets for FCC competition purposes.

This new “fixed first” FCC policy is antithetical to the “mobile first” mantra of the edge tech and wireless companies who are responding to overwhelming consumer demand and high consumer expectation, that their devices, apps, services and content work with mobility -- first. Broadband consumers also all expect that most all of their devices should, and can, operate interchangeably between mobile and fixed broadband connections.

Apparently the FCC is choosing to ignore the technological fact that broadband can be transmitted: electrically over most any type of wire, optically over fiber, and wirelessly via most any spectrum via: mobile, fixed, or satellite technology. Technologically, broadband is technology-agnostic.

Apparently the FCC can't understand the concept that consumers could want two things at the same time – mobility *and* speed.

Market-based competition has long been responding to that dualistic demand by converging different technologies that optimize differently together, wireless for mobility and fixed for speed, by each becoming more like the other. Hence market demand has forced mobile providers to invest in spectrum and innovative technology like LTE to offer much faster speeds to compete with fixed broadband capabilities.

Cable has also strongly adapted competitively by creating hundreds of thousands of free WiFi hotspots to provide the mobility consumers demand that they don't get from fixed broadband.

How does this obvious strong consumer market demand and relentless technological convergence innovation to offer fast broadband with mobility not constitute one broadband market in reality?

Why is the FCC trying to separate what technology and consumers know is a converged and substitutable broadband market that is technology-agnostic and consumer-driven?

The answer for this new nonsensical FCC position is that the FCC has a serious conflict of interest with consumers' interests. For the FCC to maintain relevant and have what it considers to be meaningful regulatory authority, it now has a powerful incentive to not see competition and substitutability where it obviously exists, but to see a non-competitive market that then triggers their 706 authority that only gives power when the FCC sees a broadband deployment (competition) problem.

The FCC now has a perverse incentive to declare that competition can never succeed to an extent where the FCC is not needed. In this speech the Chairman said: *“The work of the Commission to implement this Agenda [for Broadband Competition] will never be done. New technologies, innovation, and market developments will continually redefine the reality of broadband service. Our goal is that whatever the new realities may be, competition is the North Star.”*

Simply, the FCC has perverse regulatory incentives to pursue an “FCC-first” policy and to define the market in such a way that serves the FCC's search for relevance in a competitive market – and not the

way technology and consumers do in reality. This “silo-first” mentality conveniently chooses to disregard the evident convergence realities in the broadband market.

2) The **“who:”** In this speech the Chairman said: *“where meaningful competition is not available, the Commission will work to create it. For instance, our efforts to expand the amount of unlicensed spectrum creates alternative competitive pathways. And we understand the petitions from two communities asking us to pre-empt state laws against citizen-driven broadband expansion to be in the same category, which is why we are looking at that question so closely.”*

It appears that the Chairman remains intent on preempting State law prohibitions on muni-broadband deployment to provide consumers another broadband “choice.”

The problem with this position, besides it not being able to pass legal and constitutional [musters](#), is that the FCC somehow imagines that muni-governments are just another “competitor.”

Governments do not “compete” with companies; Governments tax, limit, police and judge companies.

Everyone knows the old adage, “you can’t fight city hall.” Well a private company certainly cannot compete with their regulator who controls their business’ livelihood -- access to public rights of way underground, on poles, or on wireless towers. Moreover a company can’t compete with their tax assessor, permit-grantor, police force, etc. -- no more than a citizen can “compete” with the powers of a policeman, prosecutor, and judge.

3) The **how:** In this speech the Chairman said: *“Some of you are old enough – like me – to remember the long-distance telephone wars of the 1990s. Sign up with Sprint in April, switch to MCI in May, and then to AT&T in June. Choose any one of them, or others, in July. That is what a truly competitive telecommunications marketplace looks like. That is not the reality – even for “competitive broadband” – today.”*

It appears as if the Chairman somehow sees an aggressive antitrust break-up and heavy regulation as the model for a “truly competitive ... marketplace.”

How soon the FCC forgets the relevant FCC historical facts in a speech about “The Facts and Future of Broadband Competition.”

The FCC’s prized “truly competitive” long distance market no longer exists because what used to be a multi-ten-billion dollar industry no longer exists because “long distance” voice is now essentially a free feature of communications.

This same aggressive Title II micro-management regulation of the 1990s led to every FCC-aided-CLEC, every single one, to go bankrupt after the tech bubble burst, because the FCC was focused on creating “competitive choices” with no interest in economic reality or sustainability.

And the FCC's mega-hype of fiber backbones in the 1990s led to a trillion-dollar fiber market bubble and investor losses where fraudulent companies like Enron Broadband, WorldCom, and Global Crossing, went bankrupt also harming many.

If the FCC's Agenda for Broadband Competition is anything like the FCC's heavy-handed Title II approach to the long distance and CLECs markets it will be bad for consumers, investment, and real market competition that is predicated on real market economics not FCC regulatory favors and hidden subsidies.

In sum, the big problem here is an FCC that defines competition, not as what technology enables or what consumer demand drives, but as what the FCC wants it to be -- where government picks winners and losers, not consumers.

The Daily Caller <http://dailycaller.com/2014/09/12/decompetition-decompetition-decompetition/>

Decompetition Decompetition Decompetition

Posted By Scott Cleland On 5:27 PM 09/12/2014

The FCC's new professed mantra is "competition competition competition."

However, the FCC appears to be pursuing a de facto policy of decompetition rather than competition.

Decompetition is regulation that undermines competition in order to justify more regulation.

How could this perverse outcome happen?

It's what one gets when one combines an obsolete communications law and regulators nostalgic for the regulatory power of a bygone era.

The FCC is increasingly acting like a 20th century regulator searching for relevance in a 21st century marketplace.

The 1934 Communications Act created the FCC. The 1996 Telecom Act changed national communications policy from monopoly utility regulation to competition policy.

Communications competition policy has been wildly successful in the U.S., resulting in the most robust facilities-based broadband competition in the world and \$1.2 trillion in private Internet infrastructure investment.

Earlier this year, an appeals court ruled that the FCC did not have the authority to regulate broadband "information services" like a monopoly, common-carrier utility. However the court did recognize that

the FCC does have some general regulatory authority under Section 706 of the 1996 Telecom Act to promote advanced telecommunications capability.

Ironically, for many years the FCC legally assumed that this same Section 706 provision did not confer the regulatory authority that they have now been granted by the appeals court.

The perverse problem with the FCC's current complete dependency on the 1996 Telecom Act's Section 706 provision for its broadband authority is that it now always must find broadband deployment and competition insufficient in order for the authority to remain usable by the FCC to regulate.

The FCC now needs competition to fail for the FCC to succeed.

This outcome also directly contravenes Congress' stated purpose of the 1996 Act: "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

Consider the evidence of this perverse outcome.

To effectively extend its regulatory authority for years, the FCC is proposing to redefine broadband from a baseline speed threshold of 4 Mbps to 10 Mbps and potentially as much as 25 Mbps, which would have the result of ruling that there is dramatically less broadband competition than today, simply by deeming it so by unilaterally "moving the goalpost."

This is the regulatory equivalent of changing the rules of a football game so that after competitors have marched 97 yards down the field quickly without any penalties, the referee mid-game moves the goal-line 150 yards further, or even potentially 525 yards further, before the referee may rule it a touchdown.

The FCC also has signaled that as competition referee it will not recognize America's four national LTE wireless broadband providers — Verizon, AT&T, Sprint and T-Mobile — as real broadband competitors, because the FCC believes wireless broadband is not a "full substitute" to fixed broadband service.

To reach this self-serving and almost comical conclusion, the FCC has to ignore how 200 million Americans routinely use smartphones and tablets on the move to do essentially most every function that they can do on their fixed broadband at home.

This is the regulatory equivalent of the FCC referee of a football game arbitrarily ruling mid-game that the team that has fielded a smaller more mobile team doesn't belong on the field competing with a larger less mobile team — even when 200 million consumer fans have long paid to watch this game.

What a perverse definition of competition when the FCC expects competitors to field the exact same type of players and strategy as their opponents. Isn't the essence of being a competitor finding a different way, strategy or team with which to compete?

The FCC may be professing a mantra of “competition, competition, competition,” but their signaled decisions suggest a de facto FCC policy of “decompetition, decompetition, decompetition” — regulation that undermines competition in order to justify more regulation.

The best evidence that the Communications Act is obsolete, and in urgent need of modernization, is that the FCC has lost sight of Congress’ competition purpose in the 1996 Telecom Act — “to promote competition and reduce regulation” — and effectively reversed it to promote regulation and reduce competition.

American consumers deserve a competition policy aligned with their interests, not the FCC’s.

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