

June 13, 2014

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
2125 Rayburn HOB
Washington, D.C. 20515

The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
2322A Rayburn HOB
Washington, D.C. 20515

The Honorable Greg Walden
Chairman
Subcommittee on Communications,
Technology & the Internet
2125 Rayburn HOB
Washington, D.C. 20515

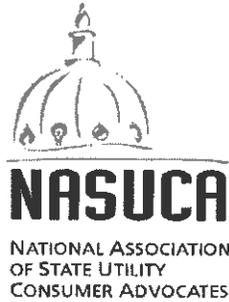
The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications,
Technology & the Internet
2322A Rayburn HOB
Washington, D.C. 20515

Dear Chairmen Upton, Walden and Ranking Members Waxman, Eshoo:

Enclosed are National Association State Utility Consumer Advocates ("NASUCA") comments on Modernizing the Communication Act. These were e-mailed on June 13, 2014 and we are now sending a hard copy to the committee.

Sincerely,

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June 13, 2014

RESPONSE TO HOUSE COMMITTEE ON ENERGY AND COMMERCE
“THIRD” WHITE PAPER”

NASUCA¹ submits these comments to the House Committee on Energy and Commerce (“Committee”) in response to the Committee’s request.² NASUCA comments on each of the ten “Questions for Stakeholder Comment.” NASUCA very much appreciates the opportunity to comment.

As a general overview, market power analysis is still needed and should be done by the FCC for services subject to its jurisdiction. Regulation must remain when market power or market failures exist. Whether intermodal services are substitutes for one another requires economic analysis and the application of the law relative to substitutes.

Although the nature of the telecommunications industry does not always permit a precise demarcation, the Communications Act generally limits FCC to regulating interstate telecommunication services and gives the states exclusive jurisdiction over intrastate telecommunications services and provides for dual jurisdiction over cable, the Internet, and wireless. See 47 U.S.C. §§ 157 nt, and 201, 301, and 601 et. seq.; *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986)

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?

¹ NASUCA is a voluntary, national association of consumer advocates in more than forty states and the District of Columbia, organized in 1979. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

²<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140519WhitePaper-Competition.pdf>.

Congress has never defined what competition is under the Communications Act of 1934. The Communications Act defines the purpose of the Act in Section 1 (47 U.S.C. 151) as “regulating interstate and foreign commerce in communications by wire and radio so that all people have rapid efficient, Nation-wide and world-wide wire and communication services with adequate facilities at reasonable charges and without discrimination (collectively “Communication Goals”). Section 3 of the Act (47 U.S.C. 153) contains various definitions but no definition of competition. Elsewhere, Congress has spoken about competition through various laws dealing with antitrust and competition such as the Sherman Antitrust Act and the Federal Trade Commission Act. Congress need not define competition but rely upon 80 plus years of experience with the Communications Act.

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

As quoted above, Section 1 of the Act sets forth the policies that underlie the Act: that all people have rapid efficient, Nation-wide and world-wide wire and communication services with adequate facilities at reasonable charges and without discrimination. In furtherance of such policies, the Communications Act focuses on regulating companies and entities that have a significant interest in communications activities. See Section 4 (b)(3) (47 U.S.C. 154).

Regulation is needed where market power exists and/or market failures exist that frustrate or inhibit the Communications Act Goals.³ The presence of more than one provider at one location, for example, says nothing about the presence or absence of more than one provider at another. In 2010, the FCC returned to a traditional market power analysis, focusing on basic principles of competition policy, including the FTC/DOJ Horizontal Merger Guidelines.⁴ The Committee cites to intermodal alternatives as the predicate for this and other questions. Intermodal alternatives have not been shown to compete with traditional telecom services.

³ / See Chairman Wheeler’s Remarks at Mountain View California on January 9, 2014 at Computer History Museum where Chairman Wheeler state: That’s why the best way to speed technology transitions is to incent network innovation while preserving the enduring values that consumers and businesses have come to expect. Those values are all familiar: public safety, interconnection, competition, consumer protection and, of course, universal access.

⁴ / See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket 09-135, Memorandum Opinion and Order, 25 FCC Rcd. 8622 (2010) (*FCC Qwest Phoenix Forbearance Order and/or Phoenix Order*), affirmed by the United State Court of Appeals for the Tenth Circuit, 689 F.3d 1214 (10 Cir. 2012); See *In the Matter of Application of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Order (November 29, 2011 (DA 11-1955) (the FCC permitted the withdrawal of the applications but noted the serious competition concerns identified in its Staff Analysis and Findings and subsequently released a redacted version of the Staff Analysis and Findings).

While there are intermodal alternatives today, it does not mean that those intermodal alternatives are substitutes for one another. The term “intermodal” is a bit misleading here: Competition today consists mostly of duopoly wires and the services that can be supplied over those wires (if and where there are two). The major wireless carriers have substantial market power, and their services are still only complements to, not substitutes for, wireline telecom and information services. To determine what is a substitute requires econometric quantitative analyses as to reasonable interchangeability. Reasonable interchangeability is dependent on cross-elasticity analyses. In 2002, the 10th Circuit Court of Appeals reaffirmed that a determination of a relevant market rests on a determination of available substitutes.⁵

In the *Phoenix Order* the FCC concluded:

[N]either Qwest nor any other commenter has submitted evidence that would support a conclusion that mobile wireless service constrains the price of wireline service. For example, Qwest has produced no econometric analysis that estimate the cross-elasticity of demand between mobile wireless and wireline access services. Nor has it produced any evidence that it has reduced prices for its wireline services or otherwise adjusted its marketing for wireline service in response to changes in the price of mobile wireless service. Nor has it produced any marketing studies that show the extent to which consumers view wireless and wireline access services as close substitutes.⁶

Similarly, the FCC reaffirmed its position that wireless service does not effectively constrain ILEC market power for residential wireline services:

Although the leading mobile providers have ubiquitous networks, as described above, we cannot conclude on the basis of this record that residential mobile voice services fall within the same relevant product markets as wireline services. Nor is there any evidence that mobile wireless carriers are likely to alter their pricing strategies dramatically to offer a closer substitute to Qwest’s local service offerings in response to a small but significant and non-transitory increase in the price of fixed mass market services, particularly given that the majority of consumers already purchase mobile wireless services at current price levels.⁷

⁵/ *Telecor Communications, Inc. et. al., v. Southwestern Bell Telephone Company*, 305 F.3d 1124, 1130 (10th Cir. 2002) (*Telecor*); accord *Eichorn, et. al. v. AT&T Corp., et. al.*, 248 F.3d 131 (3rd Cir. 2001).

⁶/ *Phoenix Order* at 8651, ¶ 55.

⁷/ *Phoenix Order*, at para. 83.

The public interest requires continuation of the enduring values during and after the current IP transition. Those enduring values must also be supported by market power analysis.

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

Intermodal competition may not be in the same relevant product or geographic markets. In the days of the AT&T monopoly, network reliability and the quality of voice transmission was generally high. In the current environment, by contrast, with many carriers participating in the carriage of calls, network reliability has degraded, with many calls failing to complete, especially to rural areas, and the quality of voice transmission has often deteriorated. Good network reliability and good quality voice transmission should be added as explicit statutory goals. See response to 2 above, discussing what is necessary to show a product is a substitute.

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 should play a role in both aspects of competition policy. Post-facto enforcement requires consumers to be harmed before the enforcement can occur. Setting rules *a priori* protects consumers before the fraudulent, abuse or otherwise harmful behavior can occur. Vigorous enforcement of the rules is also necessary. Further, the FCC has licensing obligations related to wire, radio and broadcasters and a host of other responsibilities which require oversight and rulemaking. These functions should continue.

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?

At the service level, there will always be consumer protections needed for telecom and information services. And the limited competition described above (see 2 above) should not be used to constrain the Commission's authority.

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

No implication. Spectrum should be managed for the public good.

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?

See 2 and 4 above.

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?

The questions here (last three sentences) do not follow from their premise (first two sentences). Nonetheless, edge providers should at least be subject to the non-discrimination and anti-blocking provisions of Open Internet rules. Again, competition (or the lack thereof) should not direct the level of basic consumer protections.

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

The changes in competition – much more limited than asserted by many – are adequately addressed, and remain adequately flexible, under the current statutory regulatory construct. So NASUCA’s advice would be, “Keep what we have.”

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?

No. Telecom and information firms often complain about how uncertainty upsets investment plans. Requiring periodic reauthorization would exponentially increase uncertainty in these industries, and for their customers. Fundamentally, the work of the FCC is too important to risk Congressional deadlock on re-authorization.

Conclusion

NASUCA again appreciates the opportunity to provide these comments to the Committee. As NASUCA has stated in many previous contexts, the public interest is best served when policy-makers are not swayed by the business plans and pecuniary interests of particular companies - or indeed, particular industries. A balanced approach that considers the interests of consumers is best.

Respectfully,

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