

## **Response of WTA – Advocates for Rural Broadband to the House Energy and Commerce Committee’s White Paper on Competition Policy and the Role of the Federal Communications Commission**

June 13, 2014

In its White Paper on Competition Policy and the Role of the Federal Communications Commission, the House Energy and Commerce Committee (Committee) requests public comment on several issues regarding competition in the communications market and the role of the Federal Communications Commission (FCC) in light of such competition.

WTA – Advocates for Rural Broadband (WTA) welcomes the opportunity to comment on these matters. WTA is a trade association representing more than 250 rural telecommunications providers that serve some of the most remote, difficult and expensive-to-reach areas of the country and are providers of last resort to those residing there. Whereas WTA members were predominately providers of traditional voice services over copper networks during the early 1990’s when the Telecommunications Act of 1996 was being debated and enacted, they have more recently been evolving into providers of increasingly higher-capacity broadband data, video and voice services over hybrid fiber/copper networks, and are also in the midst of converting from Time Division Multiplexing (TDM) to Internet Protocol (IP) technology.

In its response to the Committee’s initial White Paper on Modernizing the Communications Act, WTA emphasized that the Committee should keep in mind the following three key points: (1) the communications industry and technology have changed over the decades, yet many of the principles underlying current law remain sound; (2) rural areas of our

country served by WTA's members have different market dynamics than more suburban and urban areas and continue to need regulatory structures tailored to these unique circumstances; and (3) federal universal service policies for areas served by rural local exchange carriers (RLECs) have helped to ensure that consumers living in high-cost rural areas receive services reasonably comparable in quality and price to those in more densely populated areas. WTA reiterates the validity and importance of these three principles and emphasizes that nothing it states herein with respect to the Committee's competition and FCC questions is intended to modify or reduce the primacy of these principles.

### **Competition and the Basis of Competition Policy**

Whereas competition is one of those conditions of which people often say that "they know it when they see it," it is very difficult to define for statutory purposes, particularly in a time of rapid technological and economic change. Among other things, one has to look at: (a) the geographic scope of the market involved; (b) the consumer needs that are being addressed; (c) the relative prices and qualities of the products and services that are being compared; and (d) the relative sizes, ages and financial resources of the purported competitors.

Before proceeding to these factors and their complexities, WTA notes that the principle that should form the basis of national competition policy is access – that is, the ability of all residential and business end-users to contact and communicate with all other residential and business end users via reasonably comparable connections at reasonably comparable prices. This principle recognizes the fact (known as the network effect) that a network becomes more and more valuable to everyone that uses it as more and more people are connected with it. It builds upon the success of existing universal service mechanisms that have enabled about 95 percent of Americans to obtain traditional voice telephone services, and should guide the development of the future universal service mechanisms that will be needed to achieve similar levels of adoption and usage of evolving broadband services. From a competition standpoint, the key access issue is likely to be IP interconnection, as the Congress, the FCC and other agencies increasingly are going to be called upon to make sure that the Internet does not become the exclusive or near-exclusive domain of large peering entities, and that smaller broadband service providers and their customers are

able to obtain sufficient and affordable access to all of the information, services and people available over the public network of networks.

WTA also observes that the best legislative treatment of competition to date may be the definition of “effective competition” with respect to multichannel video distribution services in Section 623(l)(1) of the Communications Act, and the mechanism established by Section 623(a)(2) of the Communications Act to eliminate the regulation of basic tier cable television service rates where such “effective competition” is demonstrated to exist. Although this construct is not perfect and is likely to have resulted in some unnecessary expenses and delays, it is also flexible enough to have remained reasonably relevant over a 22-year period (it was enacted as part of the 1992 Cable Act] during which video distribution technologies and services have changed. It is sufficiently comprehensive to take into consideration the specific geographic market involved, the nature and relative equivalence of the services involved, and the relative sizes of the alleged competitors.

*Geographic scope of the market.* Evaluating the success of the nation’s telecommunications policies must take into account the differences between the more rural areas typically served by smaller telephone companies and the more urban and suburban areas typically served by larger companies. The objective of fostering competition in urban and suburban areas has worked well. Competition among multiple wireline carriers and multiple wireless carriers in urban/suburban markets should continue to ensure that fiber optic and wireless broadband facilities are extended, that broadband speeds and bandwidths are increased, and that broadband services continue to be deployed in response to customer requests and preferences.

However, competition has not had the same effect in rural areas as in urban and suburban areas, largely because of issues associated with geography and demographics. In the first place, rural areas lack the population densities and profit opportunities that encourage multiple communications providers to build expensive competing networks and vie for the business of rural consumers. Second, even where some potential rural competition does exist, it is virtually always limited to local population centers such as small cities and large

towns, and virtually never extends into the extensive farming, ranching, forest, mountain and desert areas surrounding them.

The prime case in point is cable television (CATV). Notwithstanding claims by some that CATV competes with wireline telephone service throughout most of the United States, WTA members can attest that in a large number of such instances, their “cable competitor” is in fact their own CATV or IPTV (Internet Protocol television) affiliate. Where the larger national and regional CATV operators compete in rural areas, their service areas are virtually always limited to the boundaries of substantial population centers. Likewise, to the extent that wireless services are deemed to “compete” with wireline services in rural areas, reliable wireless service is frequently limited to population centers and major highways, and generally becomes more and more sporadic as one moves into more sparsely populated and less heavily trafficked areas.

A major issue is how to define markets geographically for competitive purposes. In addition to international, national and regional market boundary issues, there is the “donut and hole” issue in rural areas. Should regulatory consequences follow where an RLEC and a CATV operator compete in a town (the donut hole), but where the RLEC network also serves a substantial surrounding farming area (the donut) that the CATV operator does not serve? Or should competition be deemed not to exist unless the CATV operator serves the same area as the RLEC, or unless both the CATV operator and the RLEC serve the same areas (an impracticable alternative if the CATV operator is a multiple system operator that serves hundreds or thousands of franchise areas throughout the nation)?

*Consumer needs addressed.* In its initial White Paper on Modernizing the Communications Act, the Committee correctly noted that service convergence and intermodal competition have increased since the 1996 Act. As indicated above, WTA members are prime examples of this convergence as they have evolved since the early 1990s from providers of analog voice telephone services into providers of an increasing array of digital broadband data, video and voice services. These technological changes are not slowing down, as computers and telephones are merging toward a common instrument, as sensors and other devices

increasingly connect things as well as people to the public network, and as the array of available information and social networking services continues to expand rapidly.

Defining competition in a rapidly changing environment is a very difficult task that can have unforeseen adverse consequences if assumptions turn out to be wrong and/or criteria are not sufficiently flexible to accommodate change. For example, despite the potshots and posturing between certain advocates of each sector, wireline and wireless services are actually far more complementary [as opposed to competitive] services. Notwithstanding stories about “cutting the cord,” the substantial majority of American businesses and households currently subscribe to both wireline and wireless services. More than 60% of American households subscribe to wireline voice service despite the benefits of mobility provided by cellular phones.<sup>1</sup> In addition, most cellular phone users transfer to a local WiFi network, which is typically a wireline network with a wireless router attached, whenever possible. Wireline and wireless broadband services presently utilize different equipment and technologies and are used by customers for different purposes and at different times and places. For example, a businessman may use wireline broadband service at work and at home, and wireless broadband service while traveling and commuting. These differences, as well as the trade-offs that end-users are willing to make regarding matters such as speed, capacity, file size, screen size and mobility, mean that wireline and wireless facilities and services should continue to play separate but complementary roles in the future of the public network.

WTA is well aware that iPhones and other portable wireless devices are particularly popular among young adults living with their parents, on campuses, ingroup housing, and/or in transient situations where they are likely to move frequently. This makes perfect sense, as it avoids establishing and re-establishing wireline service and changing telephone numbers. Whether this “wireless only” service is a passing phase or a long-term trend is

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<sup>1</sup> CDC, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013*, December 2013. <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf>

not likely to become clear until economic conditions improve, and more and more young adults are able to settle down and establish long-term households. In the meantime, the Committee needs to keep in mind that wireless service will not work at all without an underlying wireline network that transports wireless calls to and from cell towers and the network backbone, and that it will become overly congested without wireline networks to carry high volume and high capacity traffic.

*Relative prices and qualities of compared products and services.* Competition requires that the vying products or services be relatively equivalent. Whereas they all constitute alternatives for enabling a person to get from one place to another, bicycles, automobiles, speedboats and airplanes are not considered to compete in the same markets. This is equally true in the telecommunications industry where a 1.5 Megabits per second (Mbps) downstream/768 Kilobits per second (kbps) upstream broadband service should not be deemed to compete with a 10 Mbps downstream/1 Mbps upstream broadband service. Likewise, voice services characterized by dropped calls, dead spots and broken or static-filled transmissions should not be deemed to compete with quality voice services.

A major concern of WTA has long been that the use of reverse auctions to minimize federal high-cost support in rural areas will result in a “race to the bottom” wherein competing bidders will game auctions by offering to accept wholly insufficient and inadequate amounts of support. This is a lose-lose situation wherein either (a) the under-bidder will defeat *bona fide* service providers that made realistic bids and then come back later to request a significantly increased amount of support; or (b) the under-bidder will deploy and maintain a low quality network with the inadequate support it requested [assuming it does not go out of business].

*Relative sizes, ages and financial resources.* Most small carriers lack the financial and staff resources to compete or negotiate on an even basis over the long term with large carriers. Whereas some RLEC affiliates have conducted successful competitive local exchange carrier (CLEC) businesses in rural price cap exchanges, this has been more the exception than the rule. Where larger entities have vigorously sought to protect or expand their

businesses, they have had the resources to undercut the pricing of smaller carriers or to tie them up in lengthy and expensive litigation or negotiations.

It is unrealistic for the Committee to expect RLECs and other small carriers to negotiate on a level playing field with the large national and international telecommunications carriers, cable operators, and content providers. Put simply, the amount of business that a large entity might do with small carriers is normally not sufficient to constitute a line item on the large entity's financial statements. Consequently, it is very difficult to get a large entity even to respond to RLEC and other small company proposals and requests.

This will become an increasing problem as the telecommunications industry completes its transition from a TDM to an IP world. The current Title II (Sections 251 and 252 of the Communications Act) interconnection provisions and the currently transitioning access charge – reciprocal compensation regime have enabled RLECs and their rural customers to obtain reasonable and affordable access to the public network. Whereas WTA and many other interested parties believe that Sections 251 and 252 remain applicable in an IP world, other entities assert the contrary. It is equally clear that large backbone providers have little or no interest in establishing peering relationships with small carriers, that demands will be made in the future by larger carriers for increased compensation to carry RLEC traffic to the Internet, and that these larger carriers may require RLECs to have their traffic hauled to and from distant hubs in major cities rather than to closer nodes. The end result will be much more expensive access by rural residents to the Internet and second class citizenship for those who will be unable to afford to participate in what is increasingly becoming the nation's central meeting place for business, educational, health, government and social purposes.

*Conclusion.* Whereas promotion of competition has long been an established Congressional and FCC policy, the design of a detailed statutory competition structure in a rapidly changing industry is much more difficult and complex and is likely to result in unforeseen consequences. WTA has listed some of the factors and considerations that should be incorporated into such a framework, but is not at this point proposing a detailed statutory

definition of “competition” or “effective competition.” However, whether incorporated into a comprehensive competition policy or considered separately, reasonable and affordable access by all service providers and their customers to the public network is essential in an IP world. The Committee needs to make sure that the rapidly developing IP broadband network, like its predecessor TDM telephone network, remains “available, so far as possible, to all of the people of the United States, without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . .” as has been long and ably required by Section 1 of the Communications Act.

### **Role of the FCC**

The telecommunications industry is currently in the midst of a landmark transition from a TDM world to an IP world that will affect the nation for decades to come. This is not the time to drastically change the FCC’s mission or jurisdiction. And it is particularly not the time to transform or transition the FCC into an enforcement agency along the lines of the Federal Trade Commission (FTC).

In the first place, the two agencies have wholly different missions and jurisdictions, and operate under wholly different conditions and circumstances. The FTC has jurisdiction over antitrust enforcement and consumer protection with respect to most of the nation’s industries. It simply does not have the time or resources to study hundreds of industries in detail and develop specific rules to govern the antitrust and consumer protection practices of each particular industry. Rather, the FTC waits for complaints to be brought to it, and then determines which complaints merit the initiation of investigations and enforcement actions. In contrast, the FCC’s mission and jurisdiction are focused upon the telecommunications industry, and it consequently has the time and resources to develop substantial knowledge and expertise in telecommunications matters.

Second, reliance solely upon enforcement activities is not an efficient or effective way of regulating a rapidly changing industry. Even where very clear rules and policies exist, it can take several years to investigate certain activities, prepare a complaint, litigate pre-



hearing motions, conduct discovery, prepare for trial, conduct a trial, prepare proposed findings and conclusions, await a decision, litigate appeals and obtain a final ruling. During that time, the technologies, services or practices subject to the enforcement action are likely to have become outmoded and to have been superseded by one or two succeeding generations. Moreover, in an enforcement-only environment, the assumption that rules and policies will be clear is unlikely to be true. Rather, the propriety or impropriety of practices is likely to be resolved on an individual case basis, such that industry participants will not know until an enforcement action is completed whether a particular practice is lawful, and even then matters may remain uncertain because different entities can claim different circumstances.

The FCC presently has the ability to consider and adopt general rules and policies, to issue orders interpreting and clarifying these rules and policies, and to conduct enforcement actions to determine whether particular entities have complied with them. This range of approaches gives the FCC important flexibility to get out in front of certain issues and to wait to see how others develop before taking a variety of potential actions. This is precisely the type of flexibility an agency needs to deal with a rapidly changing industry.

The Committee is well situated to monitor the FCC's exercise of its jurisdiction and discretion and to take appropriate oversight, budgetary or legislative actions when course adjustments are required. There is no need, at this time, for Congress to engage in periodic reauthorizations of the Communications Act. Given the possibility for substantial changes and unforeseen consequences, periodic reauthorizations would be very likely to result in uncertainty and instability that would discourage the substantial and long-term infrastructure investments that must be made to respond to technological changes and consumer demands.

Finally, WTA understands the FCC's proposed *Open Internet* rules to be directed at regulating service provider blocking and pricing of services to edge providers and not to constitute regulation of the edge providers themselves. At some time, it may become

necessary for Congress to consider giving the FCC authority to regulate large edge providers such as Google, Yahoo and Netflix. However, such time has not yet arrived.

### **Conclusion**

The Internet and IP technology, which were not mentioned in the 1996 Act, have quickly become not only a dominant force in the telecommunications industry, but also an increasingly critical resource enabling Americans to participate in the economic, political, cultural and social life of the nation. Along the way, dotcoms that were expected to become world beaters have plunged to earth and disappeared, while others of which little was expected have survived and prospered. The one persistent truth, to date, is that most expert predictions regarding the future of the IP world have been wrong.

In addition to emphasizing the need for humility, this recent history provides a persuasive advertisement for proceeding with caution and in limited steps until the current technological revolution slows and the future of the Internet and the rest of the telecommunications industry become more discernible. The Committee stands in an excellent position to monitor and address both continuing technical and industry developments and the FCC's regulatory handling of them. WTA urges the Committee to focus more at present upon specific industry sectors or geographic areas where the FCC's competition policies are either working or producing unforeseen adverse consequences rather than trying to develop new comprehensive competition definitions and policies in a rapidly changing industry. Likewise, the Committee should review and evaluate the impacts of specific FCC rules and decisions rather than looking to modify the FCC's basic mission at this time.