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# SEEING COMPETITION, EYEING REGULATION: FCC WIRELESS POLICY FOLLOWING THE FIFTEENTH REPORT

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## I. INTRODUCTION

Section 332(c) of the Communications Act charges the Federal Communications Commission (“FCC”) with the duty to annually prepare a report on the state of competition in the commercial mobile radio services (“CMRS”) marketplace.<sup>1</sup> In June 2011, the FCC issued its *Fifteenth Report* on the competitiveness of the CMRS market and the “mobile wireless ecosystem.”<sup>2</sup> Like its predecessors, the *Fifteenth Report* contains an abundance of useful data points regarding the innovative and competitive dynamics of today’s wireless market. The FCC often relies upon this data, as well as its own conclusions regarding that data, to determine “whether or not there is effective competition”<sup>3</sup> in the wireless market. While most of the FCC’s recent reports answered that question in the affirmative, the *Fifteenth Report* offered no answer.<sup>4</sup>

Unfortunately, the *Fifteenth Report* suffers from two glaring analytical shortcomings that are symptomatic of the FCC’s pro-regulatory perspective

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<sup>1</sup> 47 U.S.C. § 332(c)(1)(C) (2006).

<sup>2</sup> *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, *Fifteenth Report*, 26 F.C.C.R. 9664, ¶ 2 (June 24, 2011) [hereinafter *Fifteenth Report*].

<sup>3</sup> 47 U.S.C. § 332(c)(1)(C) (2006).

<sup>4</sup> See *Fifteenth Report*, *supra* note 2, ¶¶ 1-2.

toward advanced communications services, including wireless. First, the *Report* failed to fully satisfy Section 332(c)'s requirement that the FCC include an analysis of whether the CMRS market is "effectively competitive" by refusing to make any determination on that point.<sup>5</sup> Second, the *Report* failed to make a close examination of the potentialities of wireless substitution and the dynamics of wireless-wireline intermodal competition.

This Article argues that today's wireless market is effectively competitive and that wireless-wireline not only exists, but that it should be taken into account in setting FCC wireless de-regulatory policy. It contends that the *Fifteenth Report's* ambivalence about effective competition in the wireless market and its lack of analysis of wireless substitution for wireline services is shaped by the FCC's pro-regulatory perspective. More importantly, this Article also warns that the *Report's* shortcomings regarding wireless marketplace competition analysis will likely form the rationale for prolonging certain outdated telecommunications regulation and imposing future regulations regarding wireless services that are unwarranted by competitive market conditions. Finally, in light of the FCC's pro-regulatory perspective, this Article suggests that the agency's review of AT&T/T-Mobile might be occasion for imposing new regulatory restrictions on wireless services that are unwarranted in light of competitive conditions in the wireless market.

Section II provides a concise background of the FCC's statutory duties regarding its preparation of the annual reports on the competitiveness of the CMRS market, as well as an overview of their procedural and structural aspects. Section III provides a snapshot of the data compiled in the FCC's *Fifteenth Report*, highlighting the innovative and competitive nature of today's wireless market. Section IV focuses on the two significant analytical shortcomings of the *Report*; namely, the FCC's unwillingness to declare the CMRS market "effectively competitive," and its failure to closely examine intermodal competition between wireless and wireline services and incorporate those competitive insights into its wireless regulatory policymaking. Finally, Section V briefly considers the proposed AT&T/T-Mobile merger, analyzing how the antitrust lawsuit by the U.S. Department of Justice ("DOJ") might impact the FCC's review of the merger and how the litigation might affect FCC wireless policy. Drawing on insights and critical analysis of the FCC's wireless competition reports, Section V also contains a brief critique of the reasoning contained in DOJ's complaint.

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<sup>5</sup> *Id.*

## II. BACKGROUND

### A. 1993 Act's Federal Regulatory Framework for Wireless

In the 1993 Omnibus Budget Reconciliation Act, Congress established a federal regulatory framework for all commercial mobile services.<sup>6</sup> Among its key provisions regarding wireless, the 1993 Act mandated yearly FCC reports on the state of competition in the commercial mobile services market.<sup>7</sup> According to the 1993 Act:

The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition.<sup>8</sup>

The legislation reaffirmed the FCC's principal regulatory authority over wireless service and expressly preempted most state regulation of wireless service.<sup>9</sup>

### B. FCC's Wireless Competition Reports

#### 1. FCC Wireless Competition Report Process

The FCC has released fifteen Wireless Competition Reports, beginning with its *First Report* on CMRS competition in 1995.<sup>10</sup> The FCC's Wireless Telecommunications Bureau prepares the reports, which are then submitted for a vote of approval and public release by the full Commission.<sup>11</sup> These reports include data about CMRS services, as well as services and products in the broader wireless marketplace. In its first six reports, the FCC "based its analysis of competition in the CMRS industry solely on numerous publicly-available sources of data on the industry."<sup>12</sup> For its *Seventh Report*, the FCC

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<sup>6</sup> See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(c), 107 Stat. 312 (1993) (codified at 47 U.S.C. § 332).

<sup>7</sup> *Id.* § 6002(c)(1)(C).

<sup>8</sup> *Id.*

<sup>9</sup> See *id.* § 6002(c)(3).

<sup>10</sup> See *Fifteenth Report*, *supra* note 2, at n.28 (citing all fourteen prior reports). All of the FCC's CMRS reports are available at: <http://commcns.org/rSW9Qu>. The FCC did not release reports in 1996 and 2007.

<sup>11</sup> *Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, FCC ENCYCLOPEDIA*, <http://commcns.org/vxuz0H> (last visited Dec. 15, 2011).

<sup>12</sup> *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to

“held a Public Forum in February 2002 to examine ways in which to better gather and analyze data” and “integrated into [the Seventh] report the data submitted at the forum.”<sup>13</sup>

In December 2002, the FCC for the first time issued a notice of inquiry to gather additional information in preparation for its *Eighth Report*.<sup>14</sup> The amount of information both relied on by the FCC in compiling its reports, and transmitted by the FCC to the public through its publishing the reports, has therefore increased over the years. The *Twelfth Report*, for instance, began tracking wireless service coverage by census block.<sup>15</sup> In many instances, new sources of information contained in the reports have coincided with the gradual addition of new sections, as will be discussed below with regard to report structure. Those informational increases also correspond to continuous growth in the size of the reports. Excluding appendices, the FCC’s published version of the *Second Report* is 61 pages in length, the *Ninth Report* is 94 pages, the *Twelfth Report* is 124 pages, and the *Fourteenth Report* is 199 pages.<sup>16</sup>

## 2. *FCC Wireless Competition Report Structure: Basic Framework*

The organizational structure of the FCC’s wireless competition reports has

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Commercial Mobile Services, *Eighth Report*, 18 F.C.C.R. 14783, ¶ 8 (June 26, 2003) [hereinafter *Eighth Report*].

<sup>13</sup> *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Seventh Report*, 17 F.C.C.R. 12985, 12988 (June 13, 2002) [hereinafter *Seventh Report*].

<sup>14</sup> The *Eighth Report* was the first to be assigned a Wireless Telecommunications Bureau docket number. All subsequent reports have been prepared following the process initiated with the *Eighth Report*. Compare *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Notice of Inquiry*, 17 F.C.C.R. 24923 (Dec. 11, 2002) (issuing a Notice of Inquiry) with *Seventh Report*, *supra* note 13 (issuing a Report without a Notice of Inquiry).

<sup>15</sup> See *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Twelfth Report*, 23 F.C.C.R. 2241, 2245-46 (Jan. 28, 2008) [hereinafter *Twelfth Report*].

<sup>16</sup> See *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Second Report*, 12 F.C.C.R. 11266 (Mar. 6, 1997) [hereinafter *Second Report*]; *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Ninth Report*, 19 F.C.C.R. 20597 (Sept. 9, 2004) [hereinafter *Ninth Report*]; *Twelfth Report*, *supra* note 15; *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, *Fourteenth Report*, 25 F.C.C.R. 11407 (May 20, 2010) [hereinafter *Fourteenth Report*].

also changed over time, reflecting to some degree the growth of new and competing services in the wireless market. The FCC's earliest reports included separate sections analyzing the state of competition for mobile telephony, mobile data and messaging, traditional dispatch, and wireless data services, respectively.<sup>17</sup> Its *Fifth Report* merged the analysis of dispatch services into the section on mobile telephony, in part due to "an increasing convergence of services provided by dispatch and other mobile telephony providers."<sup>18</sup>

Starting with its *Ninth Report*, the FCC "reorganized the presentation of the various indicators to conform to a framework that groups such indicators into four distinct categories."<sup>19</sup> Each of those four categories corresponds to the four statutory requirements set out in Section 332(c).<sup>20</sup> The *Fourteenth Report* re-labeled the four primary mobile wireless service sections as: Industry Structure (Section III), Provider Conduct (Section IV), Performance (Section V), and Consumer Behavior (Section VI).<sup>21</sup> This basic four-fold framework has been carried over to the most recent report.<sup>22</sup>

Following the four-fold framework, Section III "identifies the number of competitors in various commercial mobile services, and it also uses subscriber market shares to measure concentration in mobile telephone markets."<sup>23</sup> A "Horizontal Concentration" subsection includes a Herfindahl-Hirschman Index (HHI) analysis of concentration in the nationwide facilities-based CMRS market.<sup>24</sup> The FCC first began calculating HHIs in 2003,<sup>25</sup> and first included them in the *Ninth Report*.<sup>26</sup> Additionally, a "Recent Entry and Exit" subsection typically references mergers, divestitures, and other major transactions involving wireless service providers.<sup>27</sup> The FCC maintains that its reports "do[

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<sup>17</sup> See, e.g., *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fourth Report*, 14 F.C.C.R. 10145 (June 10, 1999) [hereinafter *Fourth Report*].

<sup>18</sup> *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixth Report*, 16 F.C.C.R. 13350, 13352-53 (June 20, 2001) [hereinafter *Sixth Report*].

<sup>19</sup> *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Tenth Report*, 20 F.C.C.R. 15908, ¶ 8 (Sept. 26, 2005) [hereinafter *Tenth Report*].

<sup>20</sup> *Id.*

<sup>21</sup> See *Fourteenth Report*, *supra* note 16, ¶¶ 20, 85, 153, 228.

<sup>22</sup> See *Fifteenth Report*, *supra* note 2.

<sup>23</sup> *Tenth Report*, *supra* note 19, ¶ 8.

<sup>24</sup> See U.S. DEP'T OF JUSTICE & THE FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 18-19 (2010).

<sup>25</sup> See *Fifteenth Report*, *supra* note 2, ¶ 51.

<sup>26</sup> See *Ninth Report*, *supra* note 16, ¶ 14.

<sup>27</sup> See *Fifteenth Report*, *supra* note 2, ¶¶ 67-79.

]not address the merits of any license transfer applications that are currently pending before the Commission or that may be filed in the future . . . .”<sup>28</sup>

Section IV references carrier conduct, which typically includes data and analysis regarding price rivalry in prepaid and postpaid services for mobile voice as well as mobile data.<sup>29</sup> It also covers non-price rivalry such as technology deployment and upgrades, along with capital expenditures, roaming, advertising, quality of service, mobile data services and apps, and differentiation in handsets and other wireless devices.<sup>30</sup> The most recent iterations of Section V detailing market performance have examined subscribership numbers, geographical penetration rates, usage amounts, and pricing dynamics.<sup>31</sup> Additionally, this Section looks at carrier revenue, investment, and profitability, as well as the overall impact of mobile wireless services on the U.S. economy.<sup>32</sup> Finally, consumer behavior is highlighted in Section VI, which includes data and analysis of ability and cost for consumers to switch wireless service or churn.<sup>33</sup> For instance, Section VI discusses issues such as number portability, early termination fees (ETFs), and lock-in resulting from handset exclusivity arrangements between carriers and manufacturers.<sup>34</sup>

### 3. *CMRS and Wireless Marketplace Competition Analysis*

Most of the wireless competition reports contain the FCC’s overall assessment of CMRS marketplace competitiveness, either in the introduction or in the section on market structure.<sup>35</sup> The *First Report* concluded “although the mobile telephone segment of CMRS was not fully competitive, entry by additional CMRS providers was very likely to take place in the near future.”<sup>36</sup> Similarly, the *Second* and *Third Reports* determined that “competition in the mobile marketplace is emerging” and “the signs of competition are clear,” respectively.<sup>37</sup> Moreover, the *Fourth* through *Sixth Reports* concluded there was “increased competition” in the CMRS market,<sup>38</sup> while the *Seventh Report*

<sup>28</sup> See *id.* ¶ 1 n.4 (citing *Fourteenth Report*, *supra* note 16, ¶ 6 n.14).

<sup>29</sup> See *id.* ¶¶ 80, 83-84, 94.

<sup>30</sup> See *id.* ¶ 103.

<sup>31</sup> See *id.* ¶ 156.

<sup>32</sup> See *id.* ¶ 157.

<sup>33</sup> See *Fifteenth Report*, *supra* note 2, ¶¶ 239-66.

<sup>34</sup> See *id.* ¶ 240.

<sup>35</sup> See *e.g.*, discussion, *infra* notes 36-47.

<sup>36</sup> See *Second Report*, *supra* note 16, at 11269.

<sup>37</sup> *Id.*; *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Third Report*, 13 F.C.C.R. 19746, 19749 (May 14, 1998) [hereinafter *Third Report*].

<sup>38</sup> *Fourth Report*, *supra* note 17, at 10148-49; *In re* Implementation of Section 6002(b) of

determined that “the CMRS industry continued to experience increased competition, innovation, lower prices for consumers, and increased diversity of service offerings.”<sup>39</sup>

Beginning with the *Eighth Report*, however, the FCC expressly invoked Section 332(c)(2)’s language with its conclusion that “there is effective competition in the CMRS marketplace.”<sup>40</sup> The next five reports similarly made “effective competition” determinations as stated in those terms, and all five of those reports reached the same conclusion that the CMRS market was “effectively competitive.”<sup>41</sup>

Conversely, the FCC took a different approach to “effective competition” determinations in its *Fourteenth Report*. The *Report* acknowledged that it “does not contain a summary estimate of market power” that would identify any kind of CMRS market failure,<sup>42</sup> but was purported to “analyz[e] competition across the entire mobile wireless ecosystem.”<sup>43</sup> This expanded scope of analysis prevented the FCC from “reaching an overarching, industry-wide determination with respect to whether there is ‘effective competition,’”<sup>44</sup> or what Chairman Julius Genachowski described as “an overly-simplistic yes-or-no conclusion about the overall level of competition in this complex and dynamic [wireless] ecosystem, comprised of multiple markets.”<sup>45</sup> Instead, the *Report* asserted it would comply with Section 332(c)(2) by identifying “areas where market conditions appear to be producing substantial consumer benefits” and with “data that can form the basis for inquiries into whether policy levers could produce superior outcomes.”<sup>46</sup> The *Fifteenth Report* followed this same approach regarding its analysis of wireless marketplace

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the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fifth Report*, 15 F.C.C.R. 17660, 17663-64 (Aug. 3, 2000) [hereinafter *Fifth Report*]; *Sixth Report*, *supra* note 18, at 13353-54.

<sup>39</sup> See *Seventh Report*, *supra* note 13, at 12988.

<sup>40</sup> See *Eighth Report*, *supra* note 12, ¶ 12.

<sup>41</sup> *Ninth Report*, *supra* note 16, ¶¶ 2, 225; *Tenth Report*, *supra* note 19, ¶¶ 2, 207; *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, *Eleventh Report*, 21 F.C.C.R. 10947, ¶¶ 2, 216 (Sept. 26, 2006) [hereinafter *Eleventh Report*]; *Twelfth Report*, *supra* note 15, ¶¶ 1, 293; *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, *Thirteenth Report*, 24 F.C.C.R. 6185, ¶¶ 1, 277 (Jan. 15, 2009) [hereinafter *Thirteenth Report*].

<sup>42</sup> *Fourteenth Report*, *supra* note 16, ¶ 55.

<sup>43</sup> *Id.* ¶ 2.

<sup>44</sup> *Id.* ¶ 3.

<sup>45</sup> *Id.* at 11701 (Statement of Julius Genachowski, Chairman).

<sup>46</sup> *Id.* ¶ 3.

competitiveness, as will be discussed below.<sup>47</sup>

#### 4. *Additional Wireless Competition Report Sections*

The Reports have also included additional sections supplementing the four basic wireless services categories. In some cases, the FCC adds new sections to the report covering topics that were more succinctly analyzed in smaller subsections in prior reports. In other cases, the FCC merges certain sections contained in prior reports into other sections for its newer reports. For example, the *Seventh* and *Eighth Reports* contained subsections on satellite mobile services.<sup>48</sup> In addition, the *Twelfth* and *Thirteenth Reports* contained separate sections on mobile satellite services (“MSS”),<sup>49</sup> but data and analysis regarding MSS was merged back into the other sections starting with the *Fourteenth Report*.<sup>50</sup>

Moreover, while the FCC included data and analysis regarding wireless-wireline competition as early as the *Second Report*,<sup>51</sup> the *Ninth Report* was the first to include a separate section on intermodal issues, including competition between wireless and wireline.<sup>52</sup> The FCC also added three sections to its *Fourteenth Report* to reflect its measurement of the entire ecosystem.<sup>53</sup> In addition to brief sections on “Urban-Rural Comparisons”<sup>54</sup> and “International Comparisons,”<sup>55</sup> the *Report* included a detailed section on “Input and Downstream Segments of the Mobile Wireless Ecosystem.”<sup>56</sup> Included in the input category were spectrum (covered separately in prior reports), infrastructure (*i.e.* cell towers), and backhaul facilities, while the downstream category encompassed wireless handsets and devices, mobile operating

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<sup>47</sup> See *Fifteenth Report*, *supra* note 2, ¶ 7. See also discussion, *infra* Part IV.A.

<sup>48</sup> *Seventh Report*, *supra* note 13, at 13026-28; *Eighth Report*, *supra* note 12, ¶¶ 189-91.

<sup>49</sup> *Twelfth Report*, *supra* note 15, ¶¶ 259-88; *Thirteenth Report*, *supra* note 41, ¶¶ 240-73.

<sup>50</sup> *Fourteenth Report*, *supra* note 16, ¶¶ 36-38.

<sup>51</sup> See, e.g., *Second Report*, *supra* note 16, at 11323-26; *Third Report*, *supra* note 37, at 19776-78; *Fourth Report*, *supra* note 17, at 10156-59; *Seventh Report*, *supra* note 13, at 13016; *Eighth Report*, *supra* note 12, ¶¶ 101-04.

<sup>52</sup> *Ninth Report*, *supra* note 16, ¶¶ 211-21. The FCC continues to include an intermodal competition section in its reports. See *Fourteenth Report*, *supra* note 16, ¶¶ 339-50; *Fifteenth Report*, *supra* note 2, ¶ 363-77.

<sup>53</sup> See *Fourteenth Report*, *supra* note 16, ¶¶ 249-338, 351-67.

<sup>54</sup> See *id.* ¶¶ 351-58. For examination of rural markets in prior reports, see, e.g., *Tenth Report*, *supra* note 19, ¶ 93.

<sup>55</sup> See *Fourteenth Report*, *supra* note 16, ¶¶ 359-67. For international comparisons contained in prior reports, see, e.g., *Tenth Report*, *supra* note 19, ¶¶ 50-54; *Ninth Report*, *supra* note 16, ¶¶ 58-61; *Eighth Report*, *supra* note 12, ¶¶ 192-96; *Seventh Report*, *supra* note 13, at 13028-37.

<sup>56</sup> *Fourteenth Report*, *supra* note 16, ¶¶ 249-338.



systems, applications, and mobile commerce.<sup>57</sup>

### III. FCC'S FIFTEENTH REPORT ON WIRELESS COMPETITION

The best executive summary of data contained in the *Fifteenth Report* is the one provided in the *Report* itself.<sup>58</sup> What follows is a shorter highlight of information provided by the *Report*, the purpose of which is to offer a snapshot look at the current state of competition in the wireless marketplace.

On June 27, the FCC released the *Fifteenth Report*, which focused on “conditions prevailing in the mobile wireless industry during 2009 and much of 2010.”<sup>59</sup> Excluding appendices, the FCC’s published version of the *Report* runs 227 pages in length.<sup>60</sup> Like its immediate predecessor, the *Fifteenth Report* describes its scope as “the wireless ecosystem,” comprising everything from wireless carriers to prepaid calling services, mobile app stores, smartphone devices, and cell towers.<sup>61</sup> The body of the *Report* packs in plenty of positive data when it comes to wireless marketplace innovation, investment, competition, as well as choice of service and price options.<sup>62</sup> Data compiled in the *Report* describes how consumers continue to enjoy an increasing number of innovative wireless products, with a myriad of services and price options available.<sup>63</sup>

According to a 2010 estimate contained in the *Report* concerning voice service coverage, 99.2% of the population is served by two or more wireless voice providers; 97.2% is served by three or more providers; and 94.3% is served by four or more providers.<sup>64</sup> Numbers for wireless broadband coverage and competition also stack up well. An estimate in the *Report* indicates that two or more wireless broadband service providers serve 91.9% of the population; 81.7% is served by three or more providers; and 67.8% is served by four or more providers.<sup>65</sup>

The wireless market is characterized by heavy investment, especially in light of overall economic conditions. Although the *Report* acknowledges some declines in wireless capital expenditures in recent years, with expenditures varying by wireless operator,<sup>66</sup> it nonetheless concludes that “[o]ver the past

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<sup>57</sup> See *id.* ¶¶ 249, 299.

<sup>58</sup> See *Fifteenth Report*, *supra* note 2, ¶¶ 1-2.

<sup>59</sup> *Id.* ¶ 17.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* ¶¶ 1-2.

<sup>62</sup> See generally *id.*

<sup>63</sup> See generally *id.*

<sup>64</sup> *Fifteenth Report*, *supra* note 2, ¶ 45 tbl.5.

<sup>65</sup> *Id.* ¶ 46 tbl.7.

<sup>66</sup> *Id.* ¶¶ 210-11 chart 29.

decade, mobile wireless service providers have invested significantly in wireless network structures and equipment.”<sup>67</sup> The *Report* cites from an industry report that “capital investment increased slightly from \$20.2 billion in 2008 to \$20.4 billion in 2009,”<sup>68</sup> and a “Census Bureau estimate of wireless industry capital expenditures in 2009 was similar at \$20.65 billion.”<sup>69</sup>

Heavy capital expenditures are primarily directed to coverage expansion and network upgrades that both embody innovation and provide a platform that enables other wireless innovation. The *Report* points out, for instance, that 3G and 4G network build-out by wireless carriers continues.<sup>70</sup> With regard to deployment of 4G technologies LTE and WiMax, as of December 2010, Verizon Wireless is reported to have “launched LTE in 38 cities covering 110 million people” and expects to “expand LTE to its entire EV-DO footprint (289 million people) by the end of 2013.”<sup>71</sup> AT&T Wireless plans to launch LTE “in areas covering around 75 million people by mid-2011 and to complete its LTE buildout by year-end 2013.”<sup>72</sup> Sprint Nextel resells Clearwire’s WiMax service, which as of the end of 2010 “covered approximately 120 million people.”<sup>73</sup> While T-Mobile is described as having “[n]o U.S.-specific plans,”<sup>74</sup> MetroPCS “launched LTE in 13 cities” as of January 2011.<sup>75</sup>

As the *Report* states, “[d]uring 2009 and much of 2010, service providers and device manufacturers launched several new devices – including smartphones, tablets, wireless modem cards, and mobile Wi-Fi hotspots – that enable consumers to use data services more quickly and easily while mobile.”<sup>76</sup> Many of these devices run on operating systems that are themselves the source of intense competition, with RIM, Google, and Apple leading the market.<sup>77</sup> In terms of market share, as of August 2010, RIM’s operating system had a 37.6% share of smartphones in use, Apple had a 24.2% share, and Microsoft had a 10.8% share.<sup>78</sup> But numbers for all three companies were down from December 2009.<sup>79</sup> By contrast, Google rose from only a 5.2% share

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<sup>67</sup> *Id.* ¶ 207.

<sup>68</sup> *Id.* ¶ 2.

<sup>69</sup> *Id.*

<sup>70</sup> *Fifteenth Report, supra* note 2, at 9671 (explaining 3G and 4G deployment by selected mobile wireless service providers).

<sup>71</sup> *Id.* (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

<sup>72</sup> *Id.* (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

<sup>73</sup> *Id.* (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

<sup>74</sup> *Id.* (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

<sup>75</sup> *Id.* (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

<sup>76</sup> *Fifteenth Report, supra* note 2, at 9682.

<sup>77</sup> *Id.* at 9683.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

of smartphones in use in December 2009 to a 19.6% share in August 2010.<sup>80</sup>

Wireless innovation is also characterized by an exploding market in mobile applications. According to the *Report*, the number of applications downloaded from Apple's App Store rose from 100,000 in 2008 to over 6.5 billion by September 2010, while the Android Market has surpassed one billion total downloads.<sup>81</sup> Additionally, "social networking ranked as the fastest-growing mobile content category between April 2009 and April 2010, with the number of mobile consumers using an application to access a social networking website increasing 240 percent to 14.5 million users."<sup>82</sup>

As consumer behavior continues to evolve, adoption of mobile data services increases. Based on Numbering Report/Utilization Forecast ("NRUF") data, "the number of mobile wireless connections grew four percent from 279.6 million at the end of 2008 to 290.7 million at the end of 2009."<sup>83</sup> Moreover, the *Report* notes that "as of May 2010, an estimated 40 percent of American adults used their cell phone to go online," up eight percentage points from April 2009 and sixteen percentage points from December 2007.<sup>84</sup> Interestingly, however, average monthly usage declined, while text and multimedia messaging increased.<sup>85</sup> As of December 2009, the average voice minutes of use ("MOU") per subscriber per month was down to 696 from a peak of 769 MOUs per subscriber per month in December 2007.<sup>86</sup> For the sixth month period ending December 2009, the average text messages per user per month was 488, up from 388 during that same period one year earlier and up from 50 for the sixth month period ending December 2005.<sup>87</sup>

The number of wireless-only consumers is also on the rise. The *Report* cites a National Health Interview Survey indicating that a growing number of households – approximately 26.6% – are now wireless-only.<sup>88</sup> Additionally, it points out that "[a] Nielsen Company survey shows a similar rising trend in households who have 'cut the cord.'"<sup>89</sup> Playing an important role in this shift, however, is the general downward trend in prices for wireless services. The *Report* notes the decline in average revenue per voice minute, which has decreased from \$0.112 per minute in 2002 to \$0.049 per minute in 2009.<sup>90</sup> It

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 9684 (Apple App Store – Available Apps and App Downloads Table).

<sup>82</sup> *Fifteenth Report, supra* note 2, at 9684.

<sup>83</sup> *Id.* at 9671.

<sup>84</sup> *Id.* ¶ 164.

<sup>85</sup> *Id.* at 9675 (Average Voice MOUs Per Subscriber Per Month and Average Text and MMS Per Subscriber Per Month Tables).

<sup>86</sup> *Id.* (Average Voice MOUs Per Subscriber Per Month Table).

<sup>87</sup> *Id.* (Average Text and MMS Messages Per Subscriber Per Month Table).

<sup>88</sup> *Fifteenth Report, supra* note 2, ¶ 365.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* ¶ 191 tbl.20.

also cites estimates that “the unit price for text messages continued to fall in 2009” as “price per text yields dropped for the fifth consecutive year in 2009 to \$0.009, a 25 percent decline from the previous year.”<sup>91</sup> Finally, the *Report* identified one analyst’s estimate that “as of mid-2010, typical price-per-MB for unlimited data plans on smartphones ranged from \$0.02 to \$0.15 and the typical price-per-MB for data plans for laptops and wireless data cards ranged from \$0.01 to \$0.08.”<sup>92</sup>

Regarding market concentration, “the weighted average of HHIs (weighted by population across the 172 economic areas in the United States) was 2811 at the end of 2009, compared to 2842 at the end of 2008.”<sup>93</sup> The *Report* observes that “[a]s of mid-2010, the weighted average of HHIs increased to 2848, slightly higher than the year-end 2008 level.”<sup>94</sup> However, it also notes that Bank of America Merrill Lynch estimated the U.S. mobile market concentration at an HHI of 2350.<sup>95</sup>

As far as spectrum holdings, the *Report* explained that AT&T and Verizon hold “[m]ost of the spectrum below 1 GHz suitable for the provision of mobile broadband.”<sup>96</sup> Specifically, “Verizon Wireless holds 45 percent of the MHz-POPs of Cellular and 700 MHz spectrum combined, while AT&T holds approximately 33 percent.”<sup>97</sup> Furthermore, “Sprint Nextel and Clearwire combined hold 47 percent of the MHz-POPs of the above-1 GHz spectrum bands (PCS, AWS, BRS, and EBS).”<sup>98</sup>

In terms of international comparisons, the *Report* observes that “[t]he average monthly subscriber bill (ARPU) in the United States, at \$49.91, is much higher than the Western European average of \$35.09.”<sup>99</sup> This difference can be explained in part by estimates that “U.S. mobile subscribers talked an average of 824 minutes per month on their mobile phones in the fourth quarter of 2009,” compared with “137 MOUs in Japan and an average across Western Europe of 160 MOUs.”<sup>100</sup> Significantly, revenue per minute (RPM) for voice “in Western Europe averaged about \$0.16 in the fourth quarter of 2009,”

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<sup>91</sup> *Id.* ¶ 193.

<sup>92</sup> *Id.* at 9676.

<sup>93</sup> *Id.* at 9679.

<sup>94</sup> *Fifteenth Report, supra* note 2, at 9679 (explaining that “[a]ntitrust authorities in the United States generally classify markets into three types: Unconcentrated (HHI < 1500), Moderately Concentrated (1500 < HHI < 2500), and Highly Concentrated (HHI > 2500).”).

<sup>95</sup> *Id.* ¶ 395.

<sup>96</sup> *Id.* at 9682.

<sup>97</sup> *Id.* (“MHz-POPs’ refers to the amount of spectrum in a given license or set of frequencies multiplied by the population covered by the geographic area of the spectrum license.”).

<sup>98</sup> *Id.* at 9682 n.19.

<sup>99</sup> *Id.* ¶ 390.

<sup>100</sup> *Fifteenth Report, supra* note 2, ¶ 392.

compared with “an estimated U.S. RPM of \$0.04, a quarter of the European average.”<sup>101</sup>

Comparing mobile market concentration internationally, the *Report* noted Bank of America Merrill Lynch’s finding that “the United Kingdom had the least concentrated mobile market at the end of 2009, with an estimated HHI of 2220.”<sup>102</sup> The U.S. mobile market had the second lowest level with an HHI of 2350, but would have held onto the second position even if the FCC substituted its own, higher estimate.<sup>103</sup> Additionally “[a]mong countries of comparable income levels in Western Europe and the Asia Pacific region, those with the highest levels of mobile market concentration at the end of 2009 were Switzerland, where the HHI was 4580, and New Zealand, at 4620.”<sup>104</sup>

#### IV. CRITICISMS OF THE FCC’S FIFTEENTH COMPETITION REPORT

This Article suggests that two serious shortcomings are manifest in the FCC’s *Fifteenth Report*. First, the *Report*’s refusal to make a determination as to whether or not the CMRS market is effectively competitive is contrary to the statute, and makes little sense given all the evidence that points to an effectively competitive market. Agencies have an obligation to fulfill their statutory obligations, even when they are difficult. There is reason to believe that the lack of effective competition finding lays the groundwork for continuing existing regulation and perhaps even the imposition of new regulations otherwise inappropriate or more difficult to justify in a competitive market.

Second, the *Report*’s intermodal competition analysis is too cursory and fails to take seriously the reality of such competition in today’s advanced telecommunications marketplace. There is *prima facie* evidence of intermodal competition, which even the FCC itself has recognized. Furthermore, where intermodal competition exists, deregulation should follow. Unfortunately, the FCC has not internalized this information, but instead has taken a pro-regulatory perspective and thrown up roadblocks that preserve the outdated *status quo*. In its next competition report, the FCC should undertake more serious analysis and let that guide its regulatory policies regarding wireless and wireline.

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<sup>101</sup> *Id.* ¶ 391.

<sup>102</sup> *Id.* ¶ 395.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

### A. FCC Fails to Fulfill its “Effective Competition” Analysis Obligations

The FCC’s refusal to make any determination in the *Fifteenth Report* as to whether or not the CMRS market is effectively competitive is contrary to the agency’s statutory mandate. Section 332(c)(1)(C) provides that the FCC’s annual report “shall include . . . an analysis of whether or not there is effective competition” in the CMRS market.<sup>105</sup> By its terms, Congress mandated the FCC do more than merely provide an analysis of competitive conditions in the market. In particular, the provision’s pointedness in directing the FCC to analyze “whether or not” effective competition exists suggests a yes-or-no conclusory component to the Congressional requirement.<sup>106</sup>

To read Section 332(c)(1)(C) as requiring only an analysis and not any accompanying conclusion means interpreting the words of the statute in an unnatural and wooden sense. In its everyday, ordinary meaning, a command to analyze whether or not certain conditions exist or whether or not a certain standard is satisfied suggests that the required analysis include at least a tentative conclusion or recommendation based upon that analysis. Like any other statute, Section 332(c)(1)(C) should be understood in its ordinary sense. Thus, the best commonsense reading of Section 332(c)(1)(C) calls for an overall determination by the FCC in its annual report of whether or not there is effective competition in the wireless market.

The FCC’s rationales for refusing to determine whether or not there is effective competition in the CMRS market also are unconvincing. The FCC grouped video, voice, and data services into the more general category of “mobile wireless services” in the *Report* and placed those services in “the middle part of the mobile wireless ecosystem.”<sup>107</sup> Further, the FCC asserts that the *Report* “complies with the statutory requirements for analyzing competitive market conditions with respect to commercial mobile services by employing an analysis founded upon an expanded view of the mobile wireless services marketplace and an examination of competition across the entire mobile wireless ecosystem.”<sup>108</sup>

However, the agency subsequently noted that the complexity of the mobile wireless ecosystem made is difficult “to make a single, all-inclusive finding regarding effective competition that adequately encompasses the level of competition in the various interrelated segments, types of services, and vast geographic areas of the mobile wireless industry.”<sup>109</sup> As a result, the FCC

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<sup>105</sup> 47 U.S.C. § 332(c)(1)(C) (2006).

<sup>106</sup> *Id.*

<sup>107</sup> *Fifteenth Report*, *supra* note 2, ¶ 7.

<sup>108</sup> *Id.* ¶ 13.

<sup>109</sup> *Id.* ¶ 14.

“refrain[ed] from providing any single conclusion because such an assessment would be incomplete and possibly misleading in light of the variations and complexities . . . .”<sup>110</sup> Thus, the Commission recast its statutorily mandated analysis of whether or not there is effective competition in the CMRS market as an analysis of competitive conditions across the entire wireless ecosystem.

The FCC also insisted that the concept of “effective competition” was equally meaningless, at least for the agency’s purposes. The *Report* noted the lack of a “definition of ‘effective competition’ widely accepted by economists or competition policy authorities such as the U.S. Department of Justice (“DOJ”).”<sup>111</sup> Moreover, it quoted a DOJ *ex parte* filing explaining that “[t]he operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition.”<sup>112</sup> According to the FCC, the DOJ’s position is “in agreement with the approach taken in this *Report*.”<sup>113</sup> In short, the FCC seems to have interpreted (or reinterpreted) Section 332(c)(1)(C) as a mandate to prepare an analysis of the wireless ecosystem and determine whether policy levers will produce better competitive outcomes.

In this respect, the *Fifteenth Report* repeated the approach that the FCC took in its prior report. In the *Fourteenth Report*, the FCC declined to make any declaration as to whether there was effective competition in the CMRS market, stating that its purpose was to identify “areas where it would be fruitful to inquire whether policy levers could produce superior outcomes.”<sup>114</sup> As Commissioner Robert McDowell wrote in his dissenting statement, “this point in particular is outside the scope of our statutory mandate to produce the report.”<sup>115</sup> Similarly, the *Fifteenth Report*’s repetition of this revisionist approach strays from the agency’s statutory mandate.

By its own description, the FCC’s latest interpretation of Section 332(c)(1)(C) appears conceptually confusing. While maintaining there is no accepted definition of “effective competition” and that its focus is on ostensible policymaking outcomes, the FCC nonetheless claims that it provides such an analysis of whether there is effective mobile wireless competition. It is unclear how the FCC is able to analyze whether or not there is “effective competition” when it claims to not know what “effective competition” means. Moreover, linking its recent non-conclusions about effective competition in the CMRS market with its earliest reports is neither persuasive nor helpful. The

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<sup>110</sup> *Id.* ¶ 15.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Fifteenth Report*, *supra* note 2, ¶ 15.

<sup>114</sup> *Fourteenth Report*, *supra* note 16, ¶ 3.

<sup>115</sup> *Id.* at 11704 (McDowell, Comm’r, concurring).

FCC maintained that its approach is consistent with the agency's first seven reports "which did not reach an overall conclusion regarding whether or not the CMRS marketplace was effectively competitive, but provided an analysis and description of the CMRS industry's competitive metrics and trends."<sup>116</sup>

It goes without saying that an agency's disregard of its regulatory duty on one or more prior occasions does not provide precedent justifying future departures from agency obligations. The FCC's failure to provide wireless competition reports in 1996 and 2007 should offer no excuse for the agency to issue no report in 2012. Additionally, a reading of the statute as outlined earlier suggests the FCC would have better fulfilled its duties under Section 332(c)(1)(C) by including a clear determination of whether or not the CMRS market was effectively competitive, beginning with its *First Report*. For the same reason, the FCC's reports that include effective competition determinations offer the better approach to satisfying Section 332(c)(1)(C).

Arguably, where an agency has gained experience in carrying out its specific statutory duties, reasonable expectations should be raised with regards to the agency's present and future performance of those same duties. Particularly where the subject for study and analysis is multi-faceted and rapidly changing, keeping up with the currents and covering all bases in its analysis may be especially challenging when working from the ground up. With repetition, however, an agency can tap its storehouse of accumulated knowledge and experience. It can compare its recent undertakings against the terms of its statutory mandate and thereby gain improved understanding of its duties. In its *First Report*, the FCC declared its goal to have its future reports "build on" its initial effort, recognizing that "[r]eports in future years may be able to reach more definitive conclusions about markets and degrees of competition, both within CMRS and between CMRS and other services."<sup>117</sup>

By including neither a declaration nor any discussion of "effective competition" in the CMRS market, the FCC's first seven reports hardly amount to a close reading and vigorous implementation of Section 332(c)(1)(C). To the credit of the early and mid-1990s FCC, however, its earliest reports did express some sentiments regarding competition in the CMRS markets.<sup>118</sup> The FCC also expanded both its sources of information and the scope of its analysis of the growing CMRS and wireless market in successive iterations of its report. That the *Eighth* through *Thirteenth Reports*

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<sup>116</sup> *Fifteenth Report*, *supra* note 2, ¶ 15.

<sup>117</sup> *In re* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *First Report*, 10 F.C.C.R. 8844, ¶ 69 (July 28, 1995) [hereinafter *First Report*].

<sup>118</sup> See discussion, *infra* Part II.B.



make “effective competition” declarations suggests that repetition bred further improvements by the FCC in its understanding of statutory responsibilities and in the correspondence between those responsibilities and its published reports. The inclusion of “effective competition” declarations fits with an overall pattern of incremental advancement in FCC reports.

But if the FCC considered the CMRS market pre-competitive but potentially highly competitive in its earliest days, then increasingly competitive, and subsequently “effectively competitive,” the FCC now seems to suggest the CMRS market has somehow turned post-competitive. Rather than mark a return to earlier and more reliable precedent, the FCC’s treatment of “effective competition” declarations as useless and something to be avoided in its *Fourteenth* and *Fifteenth Reports* suggests a kind of backsliding when it comes to the issue of effective competition.

These considerations regarding the Congressional requirements set out in Section 332(c)(1)(C) point to an important principle: agencies have an obligation to fulfill their statutory obligations, even when they are difficult. The FCC insists in the *Fifteenth Report*, “[i]t would be overly simplistic to apply a binary conclusion or blanket label to this complex and multi-dimensional industry” and “such an assessment would be incomplete and possibly misleading in light of the variations and complexities we observe.”<sup>119</sup> But as Commissioner Robert McDowell responded in his concurring statement, “[n]onetheless, this is what Congress asked us to do.”<sup>120</sup> It is not unheard of for Congress to delegate difficult decision-making duties to administrative agencies. Just because an agency believes it’s saddled with a difficult duty doesn’t mean the agency is absolved from its responsibility to carry out that duty. Where circumstances render agency decision-making difficult but not impossible, the agency has an implied obligation to undertake reasonable, extra effort to carry out its responsibilities.

However, in considering the existence of “effective competition,” the FCC was not faced with a difficult a mission. Even assuming the FCC’s characterization of its delegated duty as “overly simplistic,” the agency could still, for instance, supplement a “binary conclusion” about the wireless market with an explanation of the conclusion’s limitations.<sup>121</sup> The FCC could extend its analysis to various segments of the wireless market and, based on the available data, also opine on whether particular segments are more or less competitive with a series of secondary conclusions. In so doing the FCC could provide a fuller picture of the wireless market that exceeds the “blanket label” that the FCC eschewed in the *Fifteenth Report*.

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<sup>119</sup> *Fifteenth Report*, *supra* note 2, ¶¶ 14-15.

<sup>120</sup> *Id.* at 9969 (McDowell, Comm’r, concurring).

<sup>121</sup> *Id.* ¶ 14.

Rather than avoid making a conclusion by contending that there is no single, settled definition of “effective competition,” the FCC could instead offer its own definition. Alternatively, it could offer two or three plausible definitions, measure the state of the CMRS market according to each respective standard, and make its best overall decision as to whether or not the CMRS market is effectively competitive on that basis. In fact, the FCC previously has taken such an approach. For example, the FCC has established and applied an agency definition of “effective competition” in the context of cable and other multi-video programming distributor (“MVPD”) services. Under Section 623(l)(1)(B), the FCC grants relief to incumbent cable operators from rate regulations when the petitioning cable operator presents evidence that effective competition is present within its particular franchise area.<sup>122</sup> The FCC applies a “competing provider test,” whereby the franchise area is deemed effectively competitive if it is served by at least two unaffiliated MVPDs offering comparable video services to half of the households and the number of households subscribing to services other than that of the largest MVPD exceeds fifteen percent.<sup>123</sup>

The FCC could apply a standard similar to the one it uses for Section 623(l)(1)(B) to the CMRS market in order to gain some perspective as to whether the CMRS market is effectively competitive. For example, it could offer a nationwide percentage of the population covered by multiple CMRS providers. Under this metric, the CMRS market performs exceedingly well; as the *Fifteenth Report* notes, 99.2% of the U.S. population is served by two or more wireless voice providers, 97.2% is served by three or more providers, and 94.3% are served by four or more providers.<sup>124</sup> Furthermore, two or more wireless broadband service providers serve 91.9% of the population; 81.7% is served by three or more providers; and 67.8% is served by four or more providers.<sup>125</sup>

The FCC in fact has taken a similar approach to Section 623(l)(1)(B) in prior reports. For example, the *Ninth*, *Tenth*, and *Eleventh Reports* pointed to the percentage of the total U.S. population living in counties with access to multiple providers as one indicator of “effective competition” in the CMRS market.<sup>126</sup> Additionally, the *Tenth* and *Eleventh Reports* pointed to the absence of any one provider having a dominant share of the market.<sup>127</sup> Despite this,

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<sup>122</sup> See 47 U.S.C. § 543(a)(2)-(5) (2006).

<sup>123</sup> See *id.* §543(l)(1)(B). 47 C.F.R. § 76.905(b)(2) (2010).

<sup>124</sup> *Fifteenth Report*, *supra* note 2, at 9669 (Estimated Mobile Wireless Voice Coverage by Census Block, 2010 Table).

<sup>125</sup> *Id.* (Estimated Mobile Wireless Voice Coverage by Census Block, 2010 Table).

<sup>126</sup> *Ninth Report*, *supra* note 16, ¶ 2; *Tenth Report*, *supra* note 19, ¶ 2; *Eleventh Report*, *supra* note 41, ¶ 2.

<sup>127</sup> See *Tenth Report*, *supra* note 19, ¶ 2; *Eleventh Report*, *supra* note 41, ¶ 2.

snapshots of market share should not be the end-all, be-all of any competition analysis. Dynamic markets are characterized by rapid innovation, including technological convergence and cross-platform competition, as well as potential or future competition, whereas mere market share offers only static look at markets.

To its credit, the Commission acknowledges that HHI measures of industry concentration do not by themselves dictate whether or not a market is competitive.<sup>128</sup> It also admits that its own HHI calculations do not take into account the competitive effects of the resale market that has attracted growing numbers of customers to prepaid wireless services.<sup>129</sup> Unfortunately, at least one FCC Commissioner has bemoaned what he perceives to be a concentrated industry<sup>130</sup> and the agency's record in considering potential competition has been decidedly mixed in other areas.<sup>131</sup> A better assessment of competition should consider not the particular technology used to deliver the service, but the service itself, regardless of platform. However, as discussed below, the FCC has been hesitant to actively consider intermodal competition between wireless and wireline.

Leaving aside FCC analytical frameworks and formal definitions, suppose one takes "effective competition" in a simple and everyday sense to mean that the market offers consumers a variety of service and price options from competing providers. If so, given all the evidence contained in the *Fifteenth Report* pointing to innovation and competition in wireless services and prices, there is strong reason to conclude the CMRS market is effectively competitive. As noted, consumers enjoy price and service options from multiple national, regional, and local CMRS providers. The wireless industry also remains the

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<sup>128</sup> *Fifteenth Report*, *supra* note 2, ¶ 54:

Shares of subscribers and measures of concentration are not synonymous with a non-competitive market or with market power – the ability to charge prices above the competitive level for a sustained period of time. High market concentration may indicate that a firm or firms potentially may be able to exercise market power, but market concentration measures alone are insufficient to draw such a conclusion...[O]ther factors that may influence the state of competition in the mobile wireless services market...include entry and exit conditions, the degree of price and non-price rivalry, innovation, and the influence of the upstream and downstream markets.

<sup>129</sup> *Id.* ¶¶ 34-36.

<sup>130</sup> *Id.* at 9968 (Copps, Comm'r, concurring).

<sup>131</sup> *See, e.g., Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) (holding that the FCC acted arbitrarily and capriciously in denying the "Verizon 6" forbearance petition by departing from precedent without adequate explanation in applying a *per se* market share test that considered only actual, and not potential, competition in the market place). *See also* Randolph J. May, *Assessing the FCC's Competition-Assessing Competence*, THE FREE STATE FOUND., at 3 (June 24, 2009) (critiquing the FCC's disregard of potential competition in its policymaking, particularly with regards to the special access market).

subject of strong financial investment, with 2009 CapEx at over \$20 billion.<sup>132</sup> Much of that investment has been poured into network upgrades, with expanding 3G coverage and early 4G deployments enabling a variety of innovative new wireless products and services, such as smartphones, tablets, e-readers, and wireless modem cards.<sup>133</sup> Moreover, consumers are increasingly adopting mobile data services such as e-mail, wireless Internet access, instant messaging, and text messaging.<sup>134</sup>

From an everyday, commonsense perspective, these numbers describe a wireless ecosystem and a CMRS market that is “effectively competitive.” Significantly, the *Report* does not point to any kind of market failure that otherwise would upset such a commonsense view of the market’s competitiveness. There also is a strongly counterintuitive aspect to the *Report*’s non-conclusions about the CMRS market’s competitiveness. Dynamism and increasing complexity are signs of an innovative and competitive market. However, the FCC makes a liability out of an asset by treating wireless dynamism and increasing complexity as triggers for future wireless regulation.

The FCC’s apparent ambivalence in the face of the data cited in the *Fifteenth Report* owes to the agency’s pro-regulatory perspective. Recall the FCC’s characterization of its analytical emphasis in the *Fifteenth Report*: “[t]he operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes.”<sup>135</sup> When the FCC first expressed its “policy lever” approach in the *Fourteenth Report*, Commissioner Robert McDowell stated that the FCC “appears to lay the foundation for more regulation.”<sup>136</sup> Indeed, the FCC’s non-conclusions about the competitiveness of the CMRS market better enable a pro-regulatory or policy lever approach to wireless.

The presence of effective market competition provides the primary justification for deregulation, not new regulation. Where market forces are at work, wireless provider behavior is constrained by the competitive threat of rivals and potential rivals, increasing incentives for providers to better meet consumer demands and curb anticompetitive conduct. In an effectively competitive market, the conditions most conducive to continuing old regulation and imposing new regulation are absent, rendering regulation increasingly suspect and difficult to justify. The lack of an effective competition finding provides the FCC with a convenient source of authority

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<sup>132</sup> *Fifteenth Report*, supra note 2, ¶ 208.

<sup>133</sup> *Id.* ¶¶ 207-11.

<sup>134</sup> Anna Johnson, *U.S. Consumers Embrace Mobile Internet and Email Services*, KIKABINK NEWS (Dec. 8, 2009), <http://commcns.org/t4C2nN>.

<sup>135</sup> *Fifteenth Report*, supra note 2, ¶ 15.

<sup>136</sup> *Fourteenth Report*, supra note 16, at 11704 (McDowell, Comm’r, concurring).

and rationale for continuing existing regulation and perhaps imposing new regulation otherwise inappropriate in a competitive market. Moreover, courts are more likely to subject regulation to less exacting scrutiny, giving greater deference to agency regulatory intervention in the absence of any recognition of robust market competition.

Over the last few years, Congress and the Commission have proposed or considered wireless-related restrictions and mandates that include: next generation wireless disclosure regulation;<sup>137</sup> ETF regulation;<sup>138</sup> handset exclusivity regulation;<sup>139</sup> bill shock regulation;<sup>140</sup> text messaging and common short code regulation;<sup>141</sup> smartphone app and design regulation;<sup>142</sup> cell phone shutdown regulation;<sup>143</sup> and voice mail password regulation.<sup>144</sup> Moreover, the FCC has recently instituted “open access” requirements for 700 MHz C block spectrum license usage,<sup>145</sup> net neutrality regulations,<sup>146</sup> and data roaming

<sup>137</sup> Next Generation Wireless Disclosure Act, H.R. 2281, 112th Cong. § 1 (2011).

<sup>138</sup> Cell Phone Early Termination Fee, Transparency, and Fairness Act, S. 2825, 111th Cong. (2009).

<sup>139</sup> Cecilia Kang, *FCC to Scrutinize Exclusive Wireless Contracts*, WASH. POST (June 19, 2009), <http://commons.org/vEccsm>; Phil Goldstein, *FCC Will Investigate Handset Exclusivity Deals*, FIERCEWIRELESS.COM, (June 19, 2009), <http://commons.org/tmDKyh>.

<sup>140</sup> *In re* Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure, *Notice of Proposed Rulemaking*, 25 F.C.C.R. 14625 (Oct. 14, 2010). In response to this action, CTIA joined with the FCC and Consumers Union to announce the “Wireless Consumer Usage Notification Guidelines,” as an addition to CTIA’s “Consumer Code for Wireless Service.” These new guidelines compel wireless providers to send free alerts to subscribers in order to help them manage usage and avoid unexpected overage charges for data, voice, messaging and international roaming. *See CTIA, FCC, and Consumers Unions Announce Free Alerts to Help Consumers Avoid Unexpected Overage Charges*, CTIA – THE WIRELESS ASS’N BLOG (Oct. 17, 2011), <http://commons.org/vfOcnL>.

<sup>141</sup> *In re* Petition of Public Knowledge *et al.* for Declaratory Ruling Stating that Text Messaging and Short Codes Are Title II Services or Are Title I Services Subject to Section 202 Nondiscrimination Rules, *Petition for Declaratory Ruling of Public Knowledge*, *Free Press, Consumer Federation of America, Consumers Union, Educause, Media Access Project, New America Foundation, US PIRG*, WT Docket No. 08-7 (Dec. 11, 2007).

<sup>142</sup> *See, e.g.*, Location Privacy Protection Act of 2011, S. 1223, 112th Cong. §3(b) (2011) (regulating smart phone applications that use GPS tracking features); Performance Rights Act, H.R. 848 and S.379, 111th Cong. (2010). NAB initially sought an amendment to the Performance Rights Act that would include imposing an FM chipset mandate on wireless manufacturers. Later, however, it indicated that it opposed a mandate and instead supported voluntary activation of radio chips. *See* Press Release, Nat’l Ass’n of Broadcasters, NAB Statement Regarding CTIA Blog Post on Radio Enabled Devices (Sept. 12, 2011).

<sup>143</sup> Brendan Sasso, *Schumer Urges Wireless Providers to Disable Stolen Phones*, THE HILL (Aug. 22, 2011), <http://commons.org/rKMsdL>.

<sup>144</sup> Gautham Nagesh, *Senator Boxer Urges Sprint, T-Mobile to Beef Up Voicemail Security*, THE HILL (Sept. 1, 2011), <http://commons.org/uwHcLD>.

<sup>145</sup> *In re* Service Rules for the 698-746, 747-762, and 777-792 MHz Bands; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to

regulations,<sup>147</sup> of which the latter two will likely require able analytical defenses to withstand court challenges. Many, or perhaps most, of these regulatory proposals and regulations are justified in the context of anticompetitive conduct or generally uncompetitive market conditions. But in a market declared to be effectively competitive by the FCC, the justifiability of many such regulatory proposals becomes far less plausible.

Thus, the FCC's agnosticism toward the existence of an effectively competitive wireless market gives existing regulation a better chance of being continued and proposals for new wireless regulation a better chance of being implemented. At minimum, the effective competition non-conclusions in the *Fourteenth* and *Fifteenth Reports* keeps the FCC's regulatory options open and makes any future regulatory initiatives more administratively feasible. The agency's current modus operandi appears to be book-ending a plethora of positive data points regarding wireless innovation and competition with non-conclusions about the state of CMRS competition that double as a pretext for future wireless regulations.

#### B. FCC's Disinterest in Intermodal Competition and Cord Cutting

While the FCC's competition reports have expanded to account for the changing landscape of the wireless ecosystem, the most recent reports fail to adequately consider the impact of intermodal or cross-platform competition with regards to wireless services. While the FCC claims that its *Fifteenth Report* "regularly assess[es] whether services provided using other technologies, such as wireline, fixed wireless, and satellites, can or will place competitive pressure on mobile wireless service providers," its assessment of intermodal competition is only cursory and suggests no meaningful implications for FCC regulatory policy regarding such competing services.<sup>148</sup>

The FCC acknowledges in the *Fifteenth Report* that "[t]he number of adults

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Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, *Second Report and Order*, 22 F.C.C.R. 15289, ¶ 205 (July 31, 2007); 47 C.F.R. § 27.16 (2010).

<sup>146</sup> See *In re Preserving the Open Internet; Broadband Industry Practices, Report and Order*, 25 F.C.C.R. 17905, ¶¶ 93-106 (Dec. 21, 2010) [hereinafter *Open Internet Order*].

<sup>147</sup> See *In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order*, 26 F.C.C.R. 5411 (Apr. 7, 2011). See also 47 C.F.R. § 20.12-.13 (2009).

<sup>148</sup> *Fifteenth Report*, *supra* note 2, ¶ 8.

who rely exclusively on mobile wireless for voice service has increased significantly in recent years.”<sup>149</sup> Based on data gathered and made publicly available, there is strong *prima facie* evidence of intermodal competition between wireless and wireline. The *Report* cites a National Health Interview survey indicating that a growing number of households – approximately 26.6% – are now wireless-only.<sup>150</sup> This number is up from prior iterations of the NIH survey, which indicated that only 12.8% of household were wireless-only in the second half of 2006.<sup>151</sup>

There also are clear indicators that this wireless-only trend will continue to grow, due to the fact that wireless-only usage is even stronger among younger consumers than the general adult population. As the NIH survey notes, “[f]or adults aged 25-29, more than half (51.3 percent) lived in households with wireless-only telephones . . . the first time that wireless-only households have exceeded landline households in any of the age ranges examined.”<sup>152</sup> Moreover, a survey by the Nielsen Company noted a similar trend dealing with households who have ‘cut the cord.’”<sup>153</sup> Specifically, it found that 21% of households reported being wireless-only in 2009, a rise of six percentage points from two years earlier.<sup>154</sup> This increase was attributed to “the two-thirds of households who have dropped their landlines as well as from young adults who started new households with just a wireless phone service.”<sup>155</sup>

This information is consistent with data that the FCC has released regarding the increasing numbers of wireless subscribers and decreasing numbers of switched access lines. Its recent *Local Telephone Competition Report* stated that as of the end of June 2010, the number of wireless voice subscribers nationwide had increased to almost 279 million – up almost 14 million from a year before and more than 61 million from four years prior.<sup>156</sup> In contrast, the

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<sup>149</sup> *Id.* ¶ 363.

<sup>150</sup> *Id.* ¶ 365 n.1062 (citing STEPHEN J. BLUMBERG AND JULIAN V. LUKE, NAT’L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY – JUNE 2010 (2010)).

<sup>151</sup> *Id.* (citing STEPHEN J. BLUMBERG AND JULIAN V. LUKE, NAT’L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY – JUNE 2010 (2010)).

<sup>152</sup> *Id.* ¶ 364.

<sup>153</sup> *Id.* ¶ 365 n.1066 (citing *Study: More Cellular-only Homes as Americans Expand Mobile Media Usage*, NIELSEN WIRE, (Dec. 21, 2009), <http://commcns.org/v92OpJ>).

<sup>154</sup> *Id.* (citing *Study: More Cellular-only Homes as Americans Expand Mobile Media Usage*, NIELSEN WIRE, (Dec. 21, 2009), <http://commcns.org/v92OpJ>).

<sup>155</sup> *Id.* (citing *Study: More Cellular-only Homes as Americans Expand Mobile Media Usage*, NIELSEN WIRE, (Dec. 21, 2009), <http://commcns.org/v92OpJ>).

<sup>156</sup> FCC, INDUS. ANALYSIS & TECH. DIV., WIRELINE COMPETITION BUREAU, LOCAL TELEPHONE COMPETITION: STATUS AS OF JUNE 30, 2010, at 28 (2011).

*Report* indicated that the number of switched access lines for both ILECs and non-ILEC telecommunications providers totals approximately 122 million, down from approximately 133 million the year before and down from over 172 million from June 2006.<sup>157</sup>

If the *Fifteenth Report* is any indication, however, the FCC has little interest in intermodal competition and even less interest in how that competition should shape its regulatory policy. The FCC all but dismissed the competitive impact and potential of wireless substitutability, even in light of the numbers it cited regarding the growing numbers of wireless-only and cutting the cord households. In fact, the *Report* stated, “it is still not yet clear whether mobile wireless Internet access services can substitute completely for fixed wireline Internet access technologies.”<sup>158</sup> Furthermore, the Commission noted that “[t]he extent to which mobile wireless services can impose some competitive discipline . . . will depend on how technology, costs, and consumer preferences evolve, and on the business strategies of providers that offer both wireless and wireline Internet access services.”<sup>159</sup>

For its part, the FCC made no attempt to more sufficiently answer whether or not wireless is a substitute for wireline. The *Fifteenth Report* offered no assessment or new insights when it comes to the substitutability and competitive impact of wireless in the broadband services market. Its subsection on intermodal competition in voice services does not provide analysis, conclusions, or substantive insights regarding competitive pressures in the voice services market resulting from wireless and cross-platform competition. If the FCC is correct that alone, the numbers cited in the *Fifteenth Report* do not establish substitutability, it should more rigorously examine the issue, perhaps with its own study and evaluation. An agency adhering to a forward-looking perspective, one that takes seriously the dynamism of today’s advanced telecommunications marketplace, should answer these questions in the affirmative. The FCC’s apparent lack of interest in pursuing these answers, however, is again consistent with the pro-regulatory perspective that the agency brings to questions regarding effective competition.

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<sup>157</sup> *Id.* at 4-5, 15; *FCC’s Wireless Competition Report Should Take Wireless Substitution Seriously*, THE FREE STATE FOUND. (May 11, 2011), <http://commcns.org/t1ioJJ>.

<sup>158</sup> *Fifteenth Report*, *supra* note 2, ¶ 367 (citing *Fourteenth Report*, *supra* note 16, ¶ 342; FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 42-44 (2010); *In re Economic Issues in Broadband Competition; A National Broadband Plan for Our Future*, *Ex Parte Submission of the United States Department of Justice*, GN Docket No. 09-51, at 8, 10, 11 (Jan. 4, 2010)).

<sup>159</sup> *Id.* (citing FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 42-44 (2010); *In re Economic Issues in Broadband Competition; A National Broadband Plan for Our Future*, *Ex Parte Submission of the United States Department of Justice*, GN Docket No. 09-51, at 8, 10, 11 (Jan. 4, 2010)).



As a result, the hands-off approach to intermodal competition issues has decidedly pro-regulatory effects. For example, the continued enforcement of many Title II legacy wireline regulations against incumbent local exchange providers (“ILECs”) depends on the FCC’s continuing policy of refusing to consider the impact of wireless substitution. Wireline telecommunications providers are, in many instances, still subject to legacy regulatory burdens premised on monopoly-era assumptions about competition in the market. Arguably, those assumptions are already unwarranted in light of voice competition from cable and other wireline competitors. Those assumptions appear to be particularly unwarranted when one considers the additional choices offered by facilities-based wireless providers and MVNOs.

Interestingly, within the existing subsidy system, the FCC appears to acknowledge the reality and impact of wireless-wireline competition. Recently, it issued an order imposing certain near-term universal service reforms for its Lifeline and Link-Up program in which it noted that “[t]he telecommunications marketplace has changed significantly over the last fifteen years, with a wide array of wireline and wireless services that compete with traditional incumbent telephone companies.”<sup>160</sup> Similarly, the FCC has recognized that one of the “four fundamental problems” with the intercarrier compensation system is that “technological advances, including the rise of new modes of communications such as texting, e-mail, and wireless substitution have caused local exchange carriers’ compensable minutes to decline, resulting in additional pressures on the system and uncertainty for carriers.”<sup>161</sup>

Nevertheless, the FCC has not internalized that competition when it comes to the legacy regulatory system it oversees.<sup>162</sup> Take for example the Section

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<sup>160</sup> *In re Lifeline and Link Up Reform and Modernization*; Federal-State Joint Board on Universal Service; Lifeline and Link Up, *Report and Order*, 26 F.C.C.R. 9022, ¶ 4 (June 21, 2011).

<sup>161</sup> *In re Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime*; Federal-State Joint Board on Universal Service; Lifeline and Link-Up, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, 26 F.C.C.R. 4554, ¶ 495 (Feb. 8, 2011). *See also In re Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime*; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund, *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, ¶ 9 (Nov. 18, 2011) (concluding that the intercarrier compensation system is “eroding rapidly as consumers increasingly shift from traditional telephone service to substitutes including Voice over Internet Protocol (VoIP), wireless, texting, and email.”).

<sup>162</sup> *In re Lifeline and Link Up Reform and Modernization*; Federal-State Joint Board on Universal Service; Lifeline and Link Up, *Report and Order*, 26 F.C.C.R. 9022, ¶ 4 (June 21,

251(c)(3) unbundled network element (“UNE”) rules that were recently at issue in the *Qwest Phoenix MSA Order*.<sup>163</sup> Contrary to its pronouncement in the *Lifeline and Link-Up* order, the FCC rejected Qwest’s forbearance petition for regulatory relief by insisting there was “nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today.”<sup>164</sup> In reaching this result, the *Order* refused to consider wireless voice services as a substitute for wireline voice services. Instead, the FCC insisted that “[k]nowing the percentage of households that rely exclusively upon mobile wireless is insufficient to determine whether mobile wireless services have a price-constraining effect on wireline access services.”<sup>165</sup>

However, there is good reason to conclude that the FCC’s demand for evidence of price-constraining effects is misguided in this context. As an initial matter, the abundance of wireless voice and data service plans make a comparison difficult, particularly since many of those services are offered as part of bundled packages. The wide variety of wireless price options, including all-you-can-eat plans, bucket plans, and prepaid plans, also renders analysis of price-constraining effects of wireless on wireline an undertaking that is difficult, and possibly impossible, in today’s voice and data market.

Furthermore, the FCC’s reliance on price-constraining effects in the forbearance market power analysis in the *Order* has been criticized because it fails to account for the basics of telecommunications economics. George S. Ford and Lawrence J. Spiwack maintain that:

The production of telecommunications services requires large (and often sunk) capital expenditures, and these fixed costs render declining average costs (i.e., scale economies), or what is often called “increasing returns” (which is acknowledged in the *Phoenix Order*). With increasing returns, average cost, and possibly marginal cost, is falling as output expands. As a result, average cost exceeds marginal costs so that a price equal to short-run marginal cost fails to generate sufficient revenue to cover total cost, so the firm faces financial losses. This fact is well established in literature of telecommunications regulation.<sup>166</sup>

As a result, Ford and Spiwack conclude that evidence of marginal cost pricing “will never be present, since marginal cost pricing is not feasible in almost all telecommunications markets given the prevalence of fixed and sunk

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2011).

<sup>163</sup> *In re* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Memorandum Opinion and Order*, 25 F.C.C.R. 8622 (June 15, 2010).

<sup>164</sup> *Id.* ¶ 84.

<sup>165</sup> *Id.* ¶¶ 58-59.

<sup>166</sup> George S. Ford and Lawrence J. Spiwack, *The Impossible Dream: Forbearance After the Phoenix Order*, PHOENIX CTR. FOR ADVANCED LEGAL & ECON. PUB. POLICY STUDIES, at 3 (Dec. 16, 2010).

costs.”<sup>167</sup> By refusing to consider intermodal competition, in both the *Qwest Phoenix MSA Order* and the *Fifteenth Report*, because of the lack of evidence pointing to wireless’ price-constraining effects, the FCC may be imposing an unreasonable standard by setting up a pro-regulatory standard that is difficult to overcome.

All this is in spite of the fact that the 1993 Act and the 1996 Act were adopted with a pro-competition and deregulatory emphasis. The forbearance authority delegated to the FCC in Section 332(c) and Section 10, as well as the FCC’s regulatory review process under Section 11, are key deregulatory tools designed to further a free market approach.<sup>168</sup> The existence of wireless-wireline competition therefore should have important deregulatory policy implications regarding legacy wireline regulation under Section 10 and wireless under Section 332. However, by declining to factor wireless-wireline competition into its marketplace competition assessments, the FCC is prolonging the regulatory *status quo*. Furthermore, the *Fifteenth Report*, would have provided an opportune moment for the Commission to assess intermodal competition and wireless substitutability for voice services in light of the rising number of wireless-only and “cut the cord” households. By issuing a *Report* devoid of such analysis, the FCC prolongs the life of increasingly anachronistic legacy wireline regulation.

One can only hope that a future *Sixteenth Report* will undertake more serious intermodal competition analysis that will guide the FCC’s regulatory policies regarding wireless and wireline.<sup>169</sup> At a minimum, the FCC could examine the effects of such competition for voice services. Regulations should be reduced or eliminated where premised on monopoly conditions that no longer exist, allowing new and potential competitive market conditions to flourish and competitors to deliver goods and services to consumers.

## V. AT&T/T-MOBILE MERGER AND ITS IMPACT ON FUTURE FCC WIRELESS REGULATORY POLICY

While the *Fifteenth Report* does not take into account the proposed AT&T/T-Mobile merger, the deal has the potential to alter the landscape of the wireless marketplace by the time of a prospective *Sixteenth Report*. And should the FCC seek to further a pro-regulatory course in wireless policy, the merger could factor into the agency’s rationale behind future regulatory endeavors. Therefore, this Section includes a short discussion of how the U.S.

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<sup>167</sup> *Id.* at 5.

<sup>168</sup> 47 U.S.C. § 332(c) (2006); 47 U.S.C. §160 (2006); 47 U.S.C § 161 (2006).

<sup>169</sup> See Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, *Public Notice*, DA 11-1856, WT Docket No. 11-186 (Nov. 3, 2011).

Department of Justice's antitrust lawsuit might impact the FCC's review of the merger and how the litigation might affect FCC wireless regulatory policy. Curiously, DOJ's analytical approach to wireless competition appears beset by shortcomings similar to those contained in recent FCC reports. Accordingly, drawing on insights about the wireless market reflected in the FCC's wireless competition reports, as well as analysis developed in Section III, this section concludes with a brief critique of the reasoning contained in the complaint filed in *U.S. v. AT&T*.

#### A. Background

On March 20, 2011, AT&T Inc. announced its plans to acquire T-Mobile USA, Inc., a subsidiary of Deutsche Telekom AG.<sup>170</sup> Under the terms of the deal, AT&T agreed to acquire from Deutsche Telekom all of T-Mobile's stock for \$39 billion in total consideration.<sup>171</sup> The merged entity would service approximately 132 million customer connections to mobile wireless devices by combining AT&T's approximately 98.6 million connections with T-Mobile's approximately 33.6 million connections.<sup>172</sup>

##### 1. FCC Merger Review of AT&T/T-Mobile

A month after public announcement of the proposed merger, AT&T and T-Mobile filed their public interest statement and applications seeking the FCC's consent to the transfer of control of T-mobiles spectrum licenses to AT&T.<sup>173</sup> On April 28, the FCC established a pleading cycle for public comments on the proposed merger and commenced its 180-day informal shot clock for reviewing the proposed merger and license transfer applications.<sup>174</sup>

At the time its review process for AT&T/T-Mobile began, the FCC already was reviewing a proposed transfer of spectrum licenses from Qualcomm Inc. to AT&T Mobility Spectrum LLC, arising out of a sale in which AT&T agreed to purchase the rights to spectrum in the Lower 700 MHz frequency band for

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<sup>170</sup> See Press Release, AT&T to Acquire T-Mobile USA From Deutsche Telekom (Mar. 20, 2011), available at <http://commens.org/udt00I>.

<sup>171</sup> See ACQUISITION OF T-MOBILE USA, INC. BY AT&T INC.: DESCRIPTION OF TRANSACTION, PUBLIC INTEREST SHOWING AND RELATED DEMONSTRATIONS 9, 16-17 (Apr. 21, 2011).

<sup>172</sup> See Complaint ¶ 10, *U.S. v. AT&T Inc.*, No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011). *Id.* ¶ 2.

<sup>173</sup> See generally ACQUISITION OF T-MOBILE USA, INC. BY AT&T INC.: DESCRIPTION OF TRANSACTION, PUBLIC INTEREST SHOWING AND RELATED DEMONSTRATIONS (Apr. 21, 2011).

<sup>174</sup> See *In re AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, *Pleading Cycle Established*, 26 F.C.C.R. 6424 (Apr. 28, 2011).

\$1.925 billion.<sup>175</sup> On August 8, the FCC determined that both proposed transactions “raise a number of related issues, including, but not limited to, questions regarding AT&T’s aggregation of spectrum throughout the nation, particularly in overlapping areas.”<sup>176</sup> The FCC concluded that it would “consider them in a coordinated manner at this time, without prejudice to independent treatment at a later date.”<sup>177</sup> On August 26, the FCC restarted the merger clock, making December 1 the 180<sup>th</sup> day of its review.<sup>178</sup>

On November 22, Chairman Genachowski circulated an order approving AT&T’s purchase of spectrum licenses from Qualcomm.<sup>179</sup> On the same day, the Chairman circulated a separate order on AT&T/T-Mobile calling for a review hearing in front of an administrative law judge (“ALJ”).<sup>180</sup>

If the circulated order to send AT&T/T-Mobile to an ALJ had received the concurrence of two additional Commissioners, the ALJ would have considered any factual issues raised by the FCC relating to its public interest inquiry.<sup>181</sup> However, AT&T promptly withdrew their applications at the FCC, apparently before any vote was taken on the circulated order.<sup>182</sup> The withdrawal, accepted by the FCC on November 29, will allow AT&T and T-Mobile to focus on their lawsuit against DOJ and then, if they win the lawsuit, reapply for FCC approval on better footing.<sup>183</sup> Despite the dismissal of AT&T and T-Mobile’s

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<sup>175</sup> See Press Release, AT&T Agrees to Acquire Wireless Spectrum from Qualcomm (Dec. 20, 2010), available at <http://commcns.org/vdqeRG>; *In re* AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses, *Pleading Cycle Established*, 26 F.C.C.R. 1336 (Feb. 9, 2011).

<sup>176</sup> Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, to Michael P. Goggin, AT&T Mobility Spectrum LLC, and Dean Brenner, QUALCOMM Incorporated, Re: Applications of AT&T Mobility Spectrum LLC and QUALCOMM Incorporated for Consent To Assign Lower 700 MHz Band Licenses (WT Docket No. 11-18) (Aug. 8, 2011), available at <http://commcns.org/uGEwon>.

<sup>177</sup> *Id.*

<sup>178</sup> See Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, to Richard L. Rosen, Counsel for AT&T, Inc., Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations (WT Docket No. 11-65) (Aug. 26, 2011), available at <http://commcns.org/s0pIDB>.

<sup>179</sup> See, e.g., Amy Schatz, *AT&T Faces New Hurdle*, WALL ST. J. (Nov. 23, 2011), <http://commcns.org/vibJCI>.

<sup>180</sup> *See id.*

<sup>181</sup> *See id.*

<sup>182</sup> See Letter from Patrick J. Grant, Counsel for AT&T, Inc., and Nancy J. Victory, Counsel for Deutsche Telekom AG, to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations (WT Docket No. 11-65) (Nov. 23, 2011), available at <http://commcns.org/tYotAa>; Statement from Wayne Watts, AT&T Senior Executive VP and General Counsel (Nov. 24, 2011), <http://commcns.org/uHdPM0>.

<sup>183</sup> See *In re* Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations, *Order*, WT Docket No. 11-65, ¶

applications without prejudice,<sup>184</sup> the Commission released a staff analysis and findings that AT&T/T-Mobile was not in the public interest and “would likely lead to a substantial lessening of competition in violation of the Clayton Act.”<sup>185</sup> This staff analysis formed the basis of the Chairman’s circulated order regarding AT&T/T-Mobile.<sup>186</sup>

## 2. *United States v. AT&T and Sprint v. AT&T*

Following the announcement of AT&T/T-Mobile, DOJ undertook its own review of the merger pursuant to the Hart-Scott-Rodino Act.<sup>187</sup> However, on August 31 DOJ filed a complaint with the U.S. District Court for the District of Columbia, requesting that the court block the merger because its effect “likely will be to lessen competition substantially in interstate trade and commerce in the relevant geographic markets for mobile wireless telecommunications services, and enterprise and government mobile wireless telecommunications services, in violation of Section 7 of the Clayton Act.”<sup>188</sup>

Wireless rival Sprint filed a separate complaint in the same court on September 6, likewise seeking to block the merger’s completion due to an alleged violation of the Clayton Act.<sup>189</sup> On September 16, seven states – California, Illinois, Massachusetts, New York, Ohio, Pennsylvania, and Washington – joined DOJ’s lawsuit.<sup>190</sup> The same month, another competing wireless provider, Cellular South, joined DOJ’s lawsuit by filing its own complaint.<sup>191</sup>

U.S. District Court Judge Ellen S. Huvelle set a February 13 trial date for

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7 (Nov. 29, 2011), <http://commcns.org/us5GkL>. See also Cecilia Kang, *FCC to Accept Withdrawal of AT&T, T-Mobile Merger*, WASH. POST (Nov. 29, 2011), <http://commcns.org/tsPK3z>.

<sup>184</sup> See *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations*, Order, WT Docket No. 11-65, ¶ 10 (Nov. 29, 2011), <http://commcns.org/us5GkL>.

<sup>185</sup> See *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations*, *Staff Analysis and Findings*, WT Docket No. 11-65, ¶ 5 (Nov. 29, 2011), <http://commcns.org/taErj1>; Cecilia Kang, *FCC Report Challenges AT&T’s Claims on T-Mobile Deal*, WASH. POST (Nov. 29, 2011), <http://commcns.org/rP5vP1>.

<sup>186</sup> See *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations*, Order, WT Docket No. 11-65, ¶ 2 (Nov. 29, 2011), <http://commcns.org/us5GkL>.

<sup>187</sup> 15 U.S.C. § 15a (2006).

<sup>188</sup> Complaint ¶ 47, *U.S. v. AT&T Inc.*, No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011).

<sup>189</sup> See Complaint at 11, 18, *Sprint Nextel Corp. v. AT&T, Inc.*, No. 1:11-cv-01600 (D.D.C. Sept. 6, 2011).

<sup>190</sup> See Complaint at 15, *Cellular South, Inc. v. AT&T Inc.*, No. 1:11-cv-01690 (D.D.C. Sept. 19, 2011).

<sup>191</sup> See *id.* ¶ 19.

*U.S. v. AT&T*.<sup>192</sup> While Judge Huvelle “does not anticipate consolidating the pending suits against AT&T,”<sup>193</sup> some press reports and analysts have discussed the possibility of AT&T negotiating a settlement with DOJ, perhaps by divesting assets that were part of the proposed merger deal.<sup>194</sup> Moreover, some reports speculate that AT&T will be particularly aggressive in pursuing a settlement with DOJ because the proposed merger includes an agreement that AT&T must give T-Mobile billions in consideration if the deal is blocked.<sup>195</sup> Nonetheless, on November 8, Attorney General Eric Holder stated before a Senate Judiciary Committee panel on antitrust issues that DOJ has a trial team that is “ready and eager to go to court.”<sup>196</sup>

In a November 2 ruling on AT&T’s motion to dismiss claims brought by Sprint and Cellular South, Judge Huvelle dismissed several of the plaintiff carriers’ claims for failure to establish an antitrust injury sufficient to give them standing.<sup>197</sup> In particular, Judge Huvelle, dismissed the competing carriers’ claims that the proposed merger would result in an illegal concentration of market power in the retail wireless services market and lead to higher monthly fees that consumers pay for postpaid wireless services and higher bulk fees for corporate and government entities.<sup>198</sup> Among other claims dismissed by Judge Huvelle were Sprint’s antitrust claims regarding the market for backhaul services, Sprint’s antitrust claims regarding the market for wireless spectrum and network development, and both competing carriers’ claims regarding the market for roaming—although Cellular South’s roaming claims remain with respect to the three percent of its network that uses Global System for Mobile Communications (“GSM”) as its transmission protocol.<sup>199</sup> Judge Huvelle also denied AT&T’s motion to dismiss the competing carriers “merger to monopsony” antitrust claims that, post-merger, increased market concentration would give AT&T and Verizon market power sufficient to

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<sup>192</sup> See, e.g., Mike Scarcella, *DOJ v. AT&T Antitrust Suit Set for February Trial*, THE BLT: THE BLOG OF LEGALTIMES (Sept. 21, 2011), <http://commcns.org/uaE63K>.

<sup>193</sup> See, e.g., *id.*

<sup>194</sup> See, e.g., Nadia Damouni and Diane Bartz, *AT&T Prepares Two-Track Plan to Save T-Mobile Deal*, REUTERS (Sept. 2, 2011), <http://commcns.org/ubjrad>.

<sup>195</sup> Juliana Gruenwald, *Justice Department Gives AT&T Merger Plan Zero Bars*, NAT’L J. (Aug. 31, 2011), <http://commcns.org/sKTiym> (“The firm has reportedly promised to give T-Mobile USA parent Deutsche Telekom \$3 billion in cash, \$2 billion worth of spectrum, plus roaming privileges valued at \$1 billion if the deal is blocked.”).

<sup>196</sup> Thomas Catan, *Holder Says Justice Is ‘Eager’ For Trial In AT&T Case*, WALL ST. J. (Nov. 8, 2011), <http://commcns.org/s6Vci0>.

<sup>197</sup> See *Sprint Nextel Corp. v. AT&T, Inc.*, No. 1:11-cv-01600, *Cellular South, Inc. v. AT&T Inc.*, No. 1:11-cv-01690 (D.D.C. Nov. 2, 2011) (order denying motions to dismiss lawsuit).

<sup>198</sup> *Id.* at 13-14.

<sup>199</sup> *Id.* at 27-30, 33-38, 39-42.

coerce exclusionary deals with wireless handset manufacturers.<sup>200</sup>

While Judge Huvelle's ruling significantly narrowed the scope of the competing carriers' legal challenge to the proposed merger, because the ruling was based on antitrust standing and not the merits, the ruling will have no impact on DOJ's claims. As Judge Huvelle explained, "established precedent forecloses competitors' claims that challenge a proposed transaction's effect on competition without sufficiently alleging the threat of an injury-in-fact that they face and that is 'of the type the antitrust laws were designed to prevent' . . . [s]uch claims belong to the government."<sup>201</sup>

#### B. Impact of *U.S. v. AT&T* on FCC's Re-review of AT&T/T-Mobile Merger

Significantly, the last merger to be delegated to an ALJ was the proposed EchoStar/DirectTV merger, which likewise was accompanied by an FCC finding that the merging parties did not meet their burden of proving that the merger was in the public interest.<sup>202</sup> This action also resulted in the prompt withdrawal of the proposed merger by the parties.<sup>203</sup> However, AT&T and T-Mobile's withdrawal at the FCC further heightens the significance of *U.S. v. AT&T*, as the merging parties appear to be counting on courtroom vindication or a settlement with DOJ to have favorable implications for an eventual renewed FCC review of the merger.

Of course, even if AT&T and T-Mobile succeed at trial, the FCC could repeat the staff analysis and findings it released on November 29 and vote to designate the proposed merger for an ALJ hearing. In fact, the release of the staff analysis and findings could reasonably be viewed as the agency's attempt to influence the outcome of *U.S. v. AT&T*. Regardless, an FCC order placing the merger before an ALJ would add an additional and likely painstaking procedural layer to the merger review process, with any eventual ALJ ruling subject to appeal before the full Commission. Conversely, a trial verdict and findings of fact made in favor of AT&T and T-Mobile could undermine the factual and analytical bases for another FCC designation order for an ALJ

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<sup>200</sup> *Id.* at 15-26.

<sup>201</sup> *Id.* at 43 (citations omitted). Regardless of the legal merits of Sprint and Cellular South's remaining legal claims, the litigation could shed additional light on handset exclusivity and other arrangements between wireless carriers and handset manufacturers. For instance, the FCC could factor information arising out of *Sprint v. AT&T* in the course of future wireless policymaking touching on wireless handsets, including exclusivity arrangements or early termination fees.

<sup>202</sup> See *In re Application of EchoStar Communications et al., Hearing Designation Order*, 17 F.C.C.R. 20559, ¶ 3 (Oct. 18, 2002).

<sup>203</sup> See Amy Schatz, *AT&T Faces New Hurdle*, WALL ST. J. (Nov. 23, 2011), <http://commens.org/vibJci>.



hearing. Instead, this could make FCC approval of the deal upon reapplication more likely.

Even if AT&T and T-Mobile are successful in fending off legal challenges to their proposed merger, the Commission already has signaled its disfavor toward the deal through the Chairman's circulated order and the released staff analysis.<sup>204</sup> Thus, it appears likely that the FCC will seek to impose considerable conditions on any prospective approval of AT&T/T-Mobile. Even DOJ-imposed conditions for settlement would probably constitute a floor, with the FCC assuming discretion to establish the ceiling by attaching additional regulatory conditions to its approval of the merger.

It also is possible that the types of conditions the FCC will place on the proposed AT&T/T-Mobile merger will be novel to wireless services. Since wireless services have not been subject to the same regulatory burdens as other technologies, such as wireline telecommunications, the FCC's review presents the possibility of at least one major wireless services becoming subject to new regulatory burdens.

Under the relevant sections of the Communications Act,<sup>205</sup> the FCC review of proposed telecommunications and media mergers includes a determination of whether the proposed transfer of licenses "will serve the public interest, convenience, and necessity."<sup>206</sup> The FCC maintains that it has authority "to impose and enforce narrowly tailored, transaction-specific conditions to ensure that the public interest is served."<sup>207</sup> On this basis the FCC has approved several major mergers and other transactions subject to a host of conditions.<sup>208</sup>

Criticisms of the FCC's merger review process have been raised in recent years, along with calls for reform. Critics have charged that the FCC has imposed conditions unrelated to any specific anticompetitive harms arising from the merger.<sup>209</sup> And thus it appears that the agency has used the merger to

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<sup>204</sup> See Cecilia Kang, *AT&T CEO's Surprise Call from FCC Chairman*, WASH. POST (Nov. 28, 2011), <http://commcns.org/ruXa96>; *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations*, *Staff Analysis and Findings*, WT Docket No. 11-65 (Nov. 29, 2011), <http://commcns.org/taErj1>.

<sup>205</sup> See 47 U.S.C. 214(a), 310(d). See also *In re Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, *Memorandum Opinion and Order*, 26 F.C.C.R. 4194, ¶ 7 n.26 (Mar. 18, 2011) (noting that Section 310(d) requires the FCC to "consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under section 308.").

<sup>206</sup> *In re Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, *Memorandum Opinion and Order*, 26 F.C.C.R. 4194, ¶ 7 (Mar. 18, 2011).

<sup>207</sup> *Id.* ¶ 10.

<sup>208</sup> See, e.g., *id.* at 4218-19.

<sup>209</sup> See, e.g., Commissioner Meredith Atwell Baker, Remarks at the IPI Third Annual

test-balloon novel regulatory policies as merger conditions as a prelude to future industry-wide regulation.

In the *AT&T/BellSouth Merger Review Order*, for instance, the FCC imposed a network neutrality condition on its approval of the merger long before the FCC imposed network neutrality regulations on all broadband and wireless broadband ISPs.<sup>210</sup> Additionally, in the *Comcast-NBCU Merger Review Order*, the FCC conditioned its approval on Comcast-NBCU adhering to the agency's network neutrality regulations adopted in its *Open Internet Order*, "and, in the event of any judicial challenge affecting the latter, Comcast-NBCU's voluntary commitments concerning adherence to those rules will be in effect."<sup>211</sup> While the FCC has at other times shown restraint in merger reviews, such as its rejection of handset exclusivity conditions in approving AT&T/Centennial,<sup>212</sup> AT&T/T-Mobile could become an occasion for the FCC to impose handset exclusivity conditions, ETF conditions, bill shock conditions, or any other number of novel regulatory conditions involving wireless services. The FCC could also condition approval on AT&T's commitment to adhere to the agency's recently adopted network neutrality regulations or its data roaming rules, regardless of any alternation to those industry-wide requirements through judicial challenges.

Additional criticisms have been leveled against the FCC for imposing conditions on its approval of mergers that are more fit for industry-wide rulemakings, as well as imposing conditions it would otherwise lack the power to impose as an industry-wide rulemaking.<sup>213</sup> In this regard, a jobs-related condition might be included as a stipulation for the FCC's approval of AT&T/T-Mobile. The companies have pledged to locate call center jobs in various locations if the proposed merger is approved,<sup>214</sup> and the FCC staff

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Communications Summit: Towards a More Targeted and Predictable Merger Review Process (Mar. 2, 2011), available at <http://commcns.org/w50TQ2>; Randolph J. May, *A Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 ADMIN. L. REV. 895, 904 (2008).

<sup>210</sup> *In re AT&T and Bell South Application for Transfer of Control*, *Memorandum Opinion and Order*, 22 F.C.C.R. 5662, 5814, 5831 (Dec. 29, 2006) [hereinafter *Bell South Order*]; *Open Internet Order*, *supra* note 146, ¶¶ 1, 49-50.

<sup>211</sup> *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licenses*, *Memorandum Opinion and Order*, 26 F.C.C.R. 4238, ¶ 94 (Jan. 20, 2011).

<sup>212</sup> *In re Applications of AT&T Inc. and Centennial Communications Corp.; For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, *Memorandum Opinion and Order*, 24 F.C.C.R. 13915, ¶¶ 139, 141 (Nov. 5, 2009); Seth L. Cooper, *FCC Keeps Its Hands Off Handset Exclusivity, For Now...*, THE FREE STATE FOUND. (Nov. 9, 2009), <http://commcns.org/sgo7de>.

<sup>213</sup> Phillip J. Weiser, *FCC Reform and the Future of Telecommunications Policy*, at 23-26 (Jan. 5, 2009), available at <http://commcns.org/tlSkBo>.

<sup>214</sup> Matt Egan, *AT&T Pledges to Return 5K Jobs if T-Mobile Deal is Approved*, FOX BUS.

analysis and findings on AT&T/T-Mobile indicated a willingness to consider job creation as part of the agency's public interest standard.<sup>215</sup> The FCC's *AT&T/BellSouth Merger Review Order*, for instance, provides precedent for the agency imposing a jobs repatriation condition for merger approval.<sup>216</sup> Moreover, a recent statement by one DOJ official noted that AT&T/T-Mobile would result in a loss of jobs—despite the fact that DOJ's complaint does not mention anything about jobs.<sup>217</sup>

### C. Impact of AT&T/T-Mobile Merger on FCC Wireless Policy

An FCC order regarding re-filed applications by AT&T and T-Mobile could indirectly impact FCC wireless regulatory policy. To the extent that future agency policy focuses on static market share and HHI estimates of market concentration, increased mobile wireless HHI scores resulting from AT&T/T-Mobile may provide the FCC with the rationale to pull “policy levers” and enact any number of industry-wide wireless-related regulatory initiatives, including those mentioned above.

The FCC's order approving Harbinger/SkyTerra evidences the FCC's willingness to impose merger conditions on non-parties to the transaction. Post-merger, larger providers could find themselves subject to additional restrictions of that kind in future merger reviews involving smaller providers. More likely, however, the FCC may take wireless provider spectrum holdings into account when conducting future spectrum auctions by applying an “HHI screen” that will restrict the ability of major carriers to acquire new spectrum in some way.<sup>218</sup> Furthermore, the FCC could encumber newly auctioned spectrum with “open access” conditions, or with other mandates to be imposed on all or just the largest wireless providers.

### D. A Brief Critique of DOJ's Complaint in *U.S. v. AT&T*

Without taking sides on *U.S. v. AT&T* or pre-judging the merits of DOJ's case, a reading of DOJ's complaint reveals at least a few significant

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(Aug. 31, 2011), <http://commcns.org/tZjoMh>.

<sup>215</sup> *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations*, *Staff Analysis and Findings*, WT Docket No. 11-65, ¶¶ 259-266 (Nov. 29, 2011), <http://commcns.org/taErj1>.

<sup>216</sup> *Bell South Order*, *supra* note 210, at 5807.

<sup>217</sup> Edward Wyatt, *U.S. Moves to Block Merger Between AT&T and T-Mobile*, N.Y. TIMES (Aug. 31, 2011), <http://commcns.org/sYYmAK>; Hance Haney, *Blocking AT&T + T-Mobile Merger Will Not Create Jobs*, DISCOVERY INST. (Sept. 6, 2011), <http://commcns.org/tRDK5A>.

<sup>218</sup> See *Fifteenth Report*, *supra* note 2, ¶ 48 n.121.

shortcomings in its initial attempt to show that AT&T/T-Mobile would substantially harm innovation, investment and competition in the wireless market. The common thread between those shortcomings is the primarily static market approach to wireless services suggested by DOJ. Those shortcomings are also reflective of the FCC's approach to wireless competition discussed above. But in reality, as market data contained in the *Fifteenth Report* indicates,<sup>219</sup> wireless is one of our nation's most dynamic markets, characterized by innovation, variety of service and product choices, and competitive price options. Aside from whether AT&T/T-Mobile would likely lessen competition or result in consumer harm, DOJ should only prevail if it can present evidence clearly and convincingly demonstrating the merger's likely anticompetitive effects in a way that factors in forward-looking considerations about the wireless and the advanced telecommunications market.

*1. DOJ's Complaint Over-Emphasizes Market Concentration and Downplays Dynamism*

DOJ's static outlook includes an over-emphasis on HHI numbers about market concentration. By DOJ's estimates, post-merger, 96 of the largest 100 Competitive Market Areas (CMA) will have HHI scores exceeding 2,500.<sup>220</sup> And in 91 CMAs the merger "would increase the HHI by more than 200 points. Such an increase is presumed to be likely to enhance market power."<sup>221</sup> Additionally, in at least 15 of the CMAs "the combined firm would have a greater than 50 percent share - i.e., more customers than all other firms combined." DOJ further premises its antitrust claims on HHI estimates for the nationwide market, asserting that "the proposed merger would result in an HHI of more than 3,100 for mobile wireless telecommunications services, an increase of nearly 700 points . . . substantially exceed[ing] the thresholds at which mergers are presumed to be likely to enhance market power."<sup>222</sup>

It is worth observing that DOJ's HHI estimates contain some notable limitations. First, as the FCC acknowledges in its *Fifteenth Report*, "[c]alculating the HHI at the level of a CMA . . . would generally result in an

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<sup>219</sup> See discussion, *supra* Part III.

<sup>220</sup> Complaint ¶ 22, U.S. v. AT&T Inc., No. 1:11-cv-01560 (D.C.C. Aug. 31, 2011).

<sup>221</sup> *Id.* ¶ 23.

<sup>222</sup> *Id.* ¶ 25. DOJ likewise argues that national market for mobile wireless telecom services provided to enterprise and government customers, AT&T/T-Mobile "would result in an HHI of at least 3,400, an increase of at least 300 points," which similarly "exceed[s] the thresholds at which mergers are presumed to be likely to enhance market power." *Id.* ¶ 26.

average market HHI that is higher than for one based on EAs.”<sup>223</sup> Moreover, nationwide HHI numbers do not reflect the reality of competing alternatives available to real consumers. As the FCC pointed out in its *Fourteenth Report*:

Because mobile wireless consumers are generally not willing to search for competitive alternatives that do not serve their local areas, the relevant geographic area is a local area. Accordingly, assessing competition in mobile wireless services at the national level could overstate the level of competition and industry concentration because the total number of providers in the entire United States exceeds the number of providers that compete with each other in any single region in which a consumer searches for a wireless provider.<sup>224</sup>

The DOJ’s complaint also fails to note that its HHI estimates include consumer welfare-enhancing benefits brought about by the prepaid wireless resale market. While the FCC admittedly skips over the prepaid wireless resale market in its own HHI estimates, it acknowledges that “HHIs and other market concentration metrics that use subscriber connections or sales of facilities-based providers only may not fully reflect the effect of [prepaid wireless resellers] on competition and consumer welfare.”<sup>225</sup>

Most importantly, HHI does *not* by itself indicate whether markets, in particular dynamic markets, are ultimately competitive. As Professor Dennis L. Weisman has articulated,

it is widely recognized in the economics literature that dynamic efficiency (the introduction of innovative new services and production methods) is more important than static efficiency (the alignment of prices with economic costs) in terms of conferring benefits on consumers. This is particularly likely to be the case in technologically dynamic industries, such as telecommunications.<sup>226</sup>

The FCC explained in its *Fifteenth Report* that “[s]hares of subscribers and measures of concentration are not synonymous with a non-competitive market or with market power . . . High market concentration may indicate that a firm or firms potentially may be able to exercise market power, but market concentration measures alone are insufficient to draw such a conclusion.”<sup>227</sup> Instead, factors such as “entry and exit conditions, the degree of price and non-price rivalry, innovation, and the influence of the upstream and downstream markets” may influence the degree of competition in the mobile wireless services market.<sup>228</sup> Therefore, what matters in dynamic markets is not a particular snapshot of market share, but whether overall market conditions are

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<sup>223</sup> *Fifteenth Report*, *supra* note 2, ¶ 50. Economic Areas or “EAs” are “geographic units defined by the U.S. Department of Commerce that define geographic economic markets using data on commuting patterns.” *See id.* ¶ 25 n.44.

<sup>224</sup> *Fourteenth Report*, *supra* note 16, ¶ 24.

<sup>225</sup> *Fifteenth Report*, *supra* note 2, ¶ 49.

<sup>226</sup> Dennis L. Weisman, *On Market Power and the Power of Markets: A Schumpeterian View of Dynamic Industries*, THE FREE STATE FOUND., at 2 (Feb. 26, 2008).

<sup>227</sup> *Fifteenth Report*, *supra* note 2, ¶ 54.

<sup>228</sup> *Id.*

conducive to the continued innovation and competition that brings about new and disruptive services.

## 2. DOJ's Complaint Dismisses Substitutability in a Technologically Converging Market

DOJ's static outlook also is embodied in its dismissal of potential substitutes for intermodal competition, despite the broad advanced telecommunications market characterized by convergence in voice, video, and data services. The complaint argues that the lack of mobility offered by fixed wireless and wireline service makes them, in the mind of consumers, unsuitable alternatives to mobile wireless service.<sup>229</sup> Moreover, the complaint notes that even with a significant price increase "by a hypothetical monopolist it is unlikely that a sufficient number of customers would switch some or all of their usage from mobile wireless telecommunications services to fixed wireless or wireline services such that the price increase or reduction in innovation would be unprofitable."<sup>230</sup>

However, there is good reason to conclude that DOJ's "hypothetical monopolist" argument goes too far in denying that a sufficient number of consumers would switch at least *some* of their voice or data usage in the face of significant price increases. DOJ's formalistic rejection of wireless-wireline substitution is at odds with the convergence actually taking place in today's advanced telecommunications market. As explained earlier, wireless and wireline platform both offer voice and data services.<sup>231</sup> The 25%-plus-and-growing wireless-only households recognized by the FCC in its *Fifteenth Report* constitute obvious and unmistakable evidence that consumers have, in many cases, substituted wireless for wireline.<sup>232</sup>

The special benefits of mobility also are tempered by bandwidth and other technological limitations equally unique to mobile wireless services. As the FCC has acknowledged, "existing mobile networks present operational constraints that fixed broadband networks do not typically encounter," such as network speeds, capacity, and latency characteristics.<sup>233</sup> Fixed broadband networks generally offer faster speeds, greater capacity to carry high-definition and other data-rich traffic, and lesser latency limits than mobile broadband. Further, wireline capabilities are not limited to desktop PCs, as laptop computers are able to plug into wireline networks at hotels or Wi-Fi hotspots.

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<sup>229</sup> Complaint ¶¶ 12-13, *U.S. v. AT&T Inc.*, No. 1:11-cv-01560 (D.C.C. Aug. 31, 2011).

<sup>230</sup> *Id.* ¶ 12.

<sup>231</sup> See discussion, *supra* Part IV.B.

<sup>232</sup> *Fifteenth Report*, *supra* note 2, ¶ 365.

<sup>233</sup> See *Open Internet Order*, *supra* note 146, ¶ 95.

Moreover, emerging technologies such as femtocells offer consumers fixed wireless capabilities that rely principally on wireline connections, but offer many of the benefits of mobile wireless. Consequently, there are service and price trade-offs for consumers to weigh when considering wireline versus wireless usage.

Certain aspects of today's advanced telecommunications market decrease the likelihood of unearthing any conclusive set of evidence regarding wireless-wireline substitution. In its *Fourteenth Report*, the FCC described the difficulty of generating numerical estimates of price mark-up over cost "due to the complexities of estimating market power in an industry with high fixed costs that are recovered gradually over time, difficulties with analyzing pricing plans for bundles of services, and the difficulties in obtaining accurate and suitable cost data."<sup>234</sup> In other words, the abundance of wireless voice and data service plans makes intermodal comparison difficult, particularly since many of those services are offered as part of bundled packages. Given the dynamism of today's advanced telecommunications market, DOJ's apparent refusal to consider intermodal competition suggests an unreasonable and pro-regulatory standard. DOJ's demands for demonstrable evidence of price-constraining effects of intermodal competition likely fail to take into account the basics of telecommunications economics, as explained by Ford and Spiwack.<sup>235</sup>

### 3. DOJ's Complaint Essentially Ignores 4G, the Driver of Tomorrow's Wireless Market

In its complaint, DOJ again adopts a static outlook regarding 4G wireless network technologies. A forward-looking view of the wireless market would put significant emphasis on the ongoing migration of competing wireless networks to 4G standards. However, the DOJ's complaint takes a backward-looking view, mentioning 4G only in its description of T-Mobile as "the first company to roll out and market a nationwide network based on advanced HSPA+ technology and marketed as 4G."<sup>236</sup> Emphasis is added on "marketed as 4G" since, under the International Telecommunications Union (ITU) definition, only WiMAX 2 and LTE-advanced networks meet 4G standards.<sup>237</sup>

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<sup>234</sup> *Fourteenth Report*, *supra* note 16, ¶ 55.

<sup>235</sup> See discussion, *supra* Part IV.B.

<sup>236</sup> Complaint ¶ 29, *U.S. v. AT&T Inc.*, No. 1:11-cv-01560 (D.C.C. Aug. 31, 2011) (emphasis added).

<sup>237</sup> See Press Release, International Telecommunications Union, ITU World Radiocommunication Seminar Highlights Future Communication Technologies (Dec. 6, 2010), available at <http://commcns.org/vHC20h>. See also Chris Ziegler, *ITU Lays Down Law: WiMAX 2, LTE-Advanced Aare 4G, Everyone Else Is a Buster*, ENGADGET (Oct. 21, 2010), <http://commcns.org/vvq7wX>.

While no American wireless carriers have yet deployed 4G networks that operate at ITU-endorsed thresholds, the *Fifteenth Report* recognized that many carriers have put themselves on the path to 4G through existing and near-term LTE and WiMAX deployments.<sup>238</sup>

While the *Fifteenth Report* acknowledges T-Mobile's HSPA+ deployment, it is significant that it notes that T-Mobile has "[n]o U.S.-specific plans" regarding LTE and WiMAX deployments.<sup>239</sup> Kim Larsen, a senior executive at Deutsche Telekom, ably described the importance of LTE in a declaration submitted to the FCC:

T-Mobile USA requires a clear path to LTE because LTE offers long-term spectrum efficiencies over HSPA+. Given the burgeoning demand for mobile broadband data, there is a need for greater spectrum bandwidths to meet the capacity and data speed requirements. LTE is up to 40% more spectrally efficient than HSPA+ in larger effective bandwidths, even with a dual carrier HSPA+ configuration.<sup>240</sup>

As Larsen concludes, "[d]ue to spectrum exhaustion, difficulty in aggressive re-farming of existing spectrum holdings and a lack of other viable spectrum options, T-Mobile USA has no clear path to an effective, economical deployment of LTE."<sup>241</sup> Similarly, Deutsche Telekom senior executive Thorsten Langheim has declared that "[w]hile other competitors are quickly moving to build out and develop their LTE networks, T-Mobile USA lacks a clear path to deployment of LTE that is necessary for it to compete robustly in the U.S."<sup>242</sup>

Given their enhanced performance capabilities, 4G networks will undoubtedly provide the backbone of future wireless innovation and growth. One recent analyst report concluded that "[f]rom a technical standpoint, 4G promises three benefits over 3G: increased throughput, lower latency, and stronger security. One result is a reduced cost per megabit."<sup>243</sup> Furthermore, it estimated that "U.S. investment in 4G networks could fall in the range of \$25-\$53 billion during 2012-2016," and "could account for \$73-\$151 billion in GDP growth and 371,000-771,000 new jobs."<sup>244</sup>

As a result, while DOJ countenances the competitive potential of T-Mobile to overcome its "period of disappointing results" by focusing on "new

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<sup>238</sup> *Fifteenth Report*, *supra* note 2, at 9671 (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

<sup>239</sup> *Id.* (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

<sup>240</sup> Declaration of Dr. Kim Kylesbech Larsen, WT Docket No. 11-65, DA 11-799, ¶ 27 (Apr. 19, 2011).

<sup>241</sup> *Id.* ¶ 23.

<sup>242</sup> Declaration of Thorsten Langheim, WT Docket No. 11-65, DA 11-799, ¶ 11 (Apr. 19, 2011).

<sup>243</sup> DELOITTE, THE IMPACT OF 4G TECHNOLOGY ON COMMERCIAL INTERACTIONS, ECONOMIC GROWTH AND U.S. COMPETITIVENESS 9 (2011).

<sup>244</sup> *Id.* at 7.



aggressive and innovating pricing plans, low-priced smartphones, and superior customer service,”<sup>245</sup> it ignores the crucial 4G context in which future wireless competition will be taking place. Similarly, DOJ’s claim that the elimination of T-Mobile as an independent competitor “likely will reduce the competitive incentive to invest in wireless networks to attract and retain customers,”<sup>246</sup> misses the next-generation context in which innovative wireless investment will need to be directed to provide the platform for innovative new services.

## VI. CONCLUSION

The *Fifteenth Report* contains ample data showing, from an everyday commonsense perspective, that today’s wireless market is characterized by “effective competitive.” By failing to make any kind of effective competition finding, the FCC fails to live up to its statutory requirements under Section 332(C). Additionally, the data regarding innovative and competitive service and price offerings available to consumers renders the FCC’s effective competition agnosticism unjustifiable and only explainable in light of a pro-regulatory perspective.

Unfortunately, the FCC’s pro-regulatory approach also is evidenced by its refusal in the *Fifteenth Report* to finally take intermodal competition seriously despite the growing numbers of wireless-only households and cut-the-cord customers. Both of the *Report*’s analytical shortcomings point to the FCC’s unwillingness to fully recognize the dynamic nature of today’s advanced telecommunications market, in which rapid change and convergence break down old technological barriers and cross-platform rivals seek to meet consumer demands with new services and price options.

The *Report* does not itself impose or even propose any particular kind of new regulation. However, the FCC characterizes the goal of its reports as identifying where competitive outcomes may be improved through policy levers and forming the basis of future inquiries into how those levers can be pulled. Through the FCC’s refusal to recognize the wireless marketplace as “effectively competitive” and ignoring its intermodal competitive aspects, the *Report* will likely serve as a source of agency authority in favor of prolonging of certain outdated telecommunications regulation and for imposing future regulations regarding wireless services that are unwarranted by competitive market conditions. Moreover, given the FCC’s pro-regulatory leanings, a prospective AT&T/T-Mobile merger order may include onerous new conditions might in turn lead to further industry-wide regulations.

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<sup>245</sup> Complaint ¶ 31, 36, U.S. v. AT&T Inc., No. 1:11-cv-01560 (D.C.C. Aug. 31, 2011).

<sup>246</sup> *Id.* ¶ 39.

