Insight

20 Years Later, The FCC Still Needs to Align with Competition

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Summary

The nation recently marked the 20th anniversary of the passage of the 1996 Telecommunications Act. This monumental piece of legislation was intended to spark competition within the communication marketplace. But in those 20 years since passage, much has changed, both in the industry and at the Federal Communications Commission (FCC). While the agency nominally favors competition and wants "any communications business [to] compete in any market against any other," in practice it chooses technocratic mandates over competition.[1] By micromanaging markets and impairing dynamism, it harms consumers. To catch up with the 21st century, the agency needs to align itself with competition. The quickest route to doing so is to clarify the "public interest" mandate and incorporate economic analysis into the very core of the agency.

The 1996 Act and the FCC

The Telecommunications Act of 1996 was signed into law on February 8, 1996. It supplemented the outdated Communications Act of 1934 and was intended to bring a modern, pro-competitive framework to the communications industry. In recent years, however, it has become clear that the FCC has extensive discretion, allowing it to impose a technocratic philosophy on markets. In the 1934 Communications Act, the FCC was pressed to serve "the public interest, convenience, and necessity," but after 82 years, an explicit articulation of that standard is still lacking. As Jonathan Sallet, the current General Counsel of the FCC, noted,

"But, the 'public interest' standard is not limited to purely economic outcomes. It necessarily encompasses the 'broad aims of the Communications Act,' which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest."[2],[3]

While Sallet claims these goals are outside of the scope of "economic outcomes," they could be operationalized if the agency wanted to provide guidance, much as they did in the 1960 Program Policy Statement[4] and the Federal Trade Commission has done since the 1980s.[5] But in doing so, the FCC would curtail the most important power that they have, which is the uncertainty that comes with the vague public interest mandate. This discretion grants the agency enormous soft power over the industries it regulates.

In the past, this amorphous mandate allowed the agency to slow the development of cable television and layer on content regulation.[6] Today, the FCC often relies on the public interest to limit which companies are allowed a seat at spectrum auctions[7] and which conditions will allow two firms to merge,[8] in addition to nearly 100 other grants of authority made in the public interest.[9]

The most worrying feature of the public interest mandate is that it has likely slowed the incorporation of empirical analysis at the FCC. Indeed, the FCC doesn't have a bureau of economic analysis even though

incorporation of one into the organization is a feature of a modern regulatory authority.[10] A survey of the regulatory agencies of advanced economies supports this conclusion in finding that the FCC was staffed by far more lawyers than other regulators; economists especially went seriously underrepresented.[11] As one former FCC chief economist offhandedly remarked, it was the public interest mandate that puts the break on any full fledged unit for economic analysis. The Open Internet Order made abundantly clear where this leads. In denying calls for an economic analysis and forgoing the advice of its Chief Economist, the agency failed to take into account the empirical impact of the regulation.[12]

One way to open the door for empirical analyses at the agency would be to articulate what constitutes a failure to meet the public interest, thus requiring some agency action. This would be consistent with the three step test for regulation that AAF has advocated for in the past.

In short, the three step test requires the agency to:[13]

1. Prove the existence of market abuse or failure by documenting actual consumer harm, following the approach set by the Federal Trade Commission;

2. Explain how current law or rules are inadequate, and show that no alternatives exist including market correctives, deregulatory efforts, or public/private partnerships to solve the market failure; and

3. Demonstrate how the benefits of regulation will outweigh the potential countervailing benefits, implementation costs, and other associated regulatory burdens.

While it would not completely solve the problems at the agency, if the FCC adopted this standard as a means of enacting the public interest mandate, it would help to realign the Commission towards a modern viewpoint of competition.

In the twenty years since the Telecommunications Act of 1996, the nature of competition has in this space has changed dramatically. However, the agency continues to push a technocratic philosophy antithetical to both the spirit of 1996 and the reality of the market. The FCC needs to reorient itself and the best place to start would be a clearer definition of the public interest.