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A New Year's Wish for the FCC for 2016: Exhibit More Regulatory Modesty!

by

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Here's my New Year's wish, or perhaps, to be candid, plea, for the FCC: Exhibit more regulatory modesty!

In 2008, I published an article in the *Administrative Law Review* titled, [*A Modest Plea for FCC Modesty Regarding the Public Interest Standard*](#). At the outset I stated:

What I want to do in this short Essay is at bottom, fairly modest. I want to suggest – in light of all the changes that have occurred in the communications marketplace in the forty years since *Red Lion* – that the FCC itself should act more modestly. In an exercise of regulatory self-restraint, going forward the agency should narrow the exercise of its public interest authority.

Almost eight years later, at the beginning of this New Year, I want to renew my plea for regulatory modesty by offering some concrete suggestions for reform. And I want truly to keep the suggestions modest in the hope that – though they are offered from my own free market and rule of law-oriented perspective – they will be seriously considered by all those interested in sound communications policy, regardless of their own regulatory philosophy or proclivities. For example, although I believe that last year's adoption of the FCC's *Open Internet Order* was wrong as a matter of policy and law, I have no intention of rehashing that matter here. For present purposes, I accept that the order is “on the books” and that this Commission is not going to rescind it. Asking the Commission to do so would not qualify as a “modest” suggestion.

So, I intend to look ahead. I'll just list the suggestions below, not necessarily in any rank order, with a few sentences about each.

- **In order to conform to widely accepted rule of law and due process norms, the Commission should only exercise its enforcement authority and impose sanctions on regulated parties if it first has in place knowable, predictable rules.**

Several times last year, the FCC, or its Enforcement Bureau, imposed substantial fines on regulated parties in cases in which the parties could not reasonably have known in advance that the sanctioned conduct violated any existing statutory provision or regulation. I provided examples of this misuse of the agency's enforcement authority in this recent piece in *The Hill* titled, "[The FCC, Still Lawless.](#)" I am not advocating that the Commission stop enforcing its rules if it engages in proper process. Rather, I am urging the agency to focus on enforcing only on regulatory requirements that are knowable in advance and that it do so in ways that are predictable.

- **In order to continue to allow the broadband Internet marketplace to develop in a way that meets evolving consumer demands, the Commission should rebuff suggestions and its own impulses to regulate zero-rating and usage-based pricing plans.**

Many of the same advocates and interests which urged the Commission to adopt rigid net neutrality mandates, including Title II regulation, continue to press the agency to prohibit Internet provider experimentation with so-called "zero-rating" and usage-based pricing plans. In the *Open Internet Order*, the FCC wisely refused to ban such plans. And just over a month ago, when T-Mobile introduced its zero-rated BingeOn video streaming plan exempting 24 services such as Netflix and HBO from its data limits, FCC Chairman Tom Wheeler [commented](#) that the plan is "highly innovative and highly competitive." Nevertheless, the Commission is now seeking further information regarding that T-Mobile plan, along with AT&T's Sponsored Data and Data Perks and Comcast's Stream TV plans.

The Commission should step back and allow the experimentation in new "zero-rating," sponsored data, and similar programs to continue. These new offerings provide consumers with additional choices, offer less costly alternatives for low income or budget conscious consumers, and stimulate further competition among service and content providers throughout the Internet ecosystem. For a full exposition, please see this just-published Free State Foundation *Perspectives*, "[Usage Based-Pricing, Zero Rating, and the Future of Broadband Innovation,](#)" by Daniel Lyons.

- **On its own, in order to promote marketplace efficiency and innovation, while conforming to rule of law principles, the Commission should reform its merger review process.**

The Commission's merger review process should be reformed in some fundamental ways. While it may turn out that Congress needs to act to accomplish all that should be done, on its own initiative the Commission should take some modest steps to improve the review process. First,

the Commission should commit that it will refrain from imposing extraneous conditions that are not related closely to specific competitive concerns raised by the transaction before it – even when these extraneous conditions supposedly are “volunteered” by the applicants. Because the applicants are looking to have the Commission act on their merger proposal on a timely basis – not looking for a drawn-out lawsuit – the Commission certainly has the applicants “under its thumb” or more. Nevertheless, to conform to rule of law norms, and as a matter of equity, the agency should refrain from imposing conditions, “volunteered” or otherwise, uniquely on merger applicants and not similarly situated market participants. If the Commission thinks that the policies embodied by such conditions have merit, they should be proposed on an industry-wide basis in a generic proceeding.

In another act of regulatory modesty, the Commission should commit to processing proposed transactions in a timelier fashion. Of course, more significant transactions take longer to review than less significant ones. But the Commission routinely takes over a year – sometimes well over – to review transactions. In today’s fast-changing communications and Internet marketplace environment, with new technologies and new business models impacting market participants and competitive dynamics, more than a year is simply too long for applicants to be in a stand-still waiting mode.

- **In a long overdue act, the FCC should refrain from any action to regulate the set-top video device market, whether under the rubric of the “AllVid” or “DSTAC” proceedings or any other label, and instead should “sunset” TV device regulation.**

The long and short of it is that the marketplace for set-top video devices is undoubtedly competitive. And this is true as well for the multichannel video provider distribution market and the “over the top” (“OTT”) video streaming market. In other words, the entire video services ecosystem – services and devices – is rife with competition.

But if the Commission wants to take just a modest step rather than the broader marketplace deregulation justified, it should announce that because consumer choice prevails, the agency will “sunset” video device regulation. This would be fully consistent with Congress’s intent when it passed the Telecommunications Act of 1996 with explicit “sunset” authority for video device regulation. In the December 21, 2015, edition of *Broadcasting & Cable*, an article titled, “OTT Devices to Stream in the Sales,” put the current market dynamic this way: “While those seeking ‘basic content streaming’ will eye products such as Google Chromecast and FireTV Stick, players such as Roku 4, Nvidia Shield and new Apple TV will represent the premium market without the higher costs of smart TVs and connected game consoles.” The report added that “about two-thirds of U.S. broadband households connect at least one streaming device to the Internet,” with Microsoft’s Xbox the most popular, followed by the Sony PlayStation and Roku. None of these companies are affiliates of the leading cable or satellite operators. For one of many recent Free State Foundation *Perspectives* papers extensively documenting the competitiveness of the video services market, including the video device market, see Seth L. Cooper, [“FCC Should Finally Sunset Its VCR-Era Video Device Regulations.”](#) August 28, 2015.

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There are many other worthy candidates for reform that I might suggest, and I am sure others have suggestions of their own. Of course, it is just the first week of the year, with plenty of time ahead to offer other ideas. And no doubt the D.C. Circuit's decision on review of the FCC's *Open Internet Order* might well present further opportunities for reform either at the agency or on the Hill, or both. But, for now, I said I wanted to offer a *modest* plea for *modest* reforms – and that's what I've tried to do.

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