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Re-Reforming Telecom Regulation: Power-Grabbing Bureaucracy Undermined 1996 Effort

by

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Now that Congress is back at work, or at least in town, it should be able to form a bipartisan agreement on at least one piece of a regulatory reform agenda: comprehensive overhaul of the Communications Act. The government's own figures show the information and communications technology (ICT) sector presently contributes around 20 percent to 30 percent of real gross domestic product growth each year. Yet continued investment and job growth in the ICT sector, much of which is subject to the Federal Communications Commission's regulatory purview, is put at risk by excessive regulation either directed or permitted by the existing communications laws.

When Congress passed the Telecommunications Act of 1996, the most significant change to the Communications Act since its adoption in 1934, it was thought that the new statute meant there would be a meaningful deregulatory shift in communications policymaking in light of the developing marketplace competition. Unfortunately, there has been no such shift, which explains why, more than 15 years after adoption of the 1996 act, our communications laws are in such need of radical reform.

For most of the 20th century, the "public interest" model of regulation, which grew out of Progressive Era thinking, dominated communications policymaking. Under this model, much of the FCC's regulatory activity was carried out under a hundred provisions of the Communications Act that simply delegate authority to the agency to act in the "public interest."

The public-interest standard, of course, is inherently indeterminate. Not surprisingly, this vague standard provides no meaningful check on the bureaucratic imperative to regulate excessively.

When the 1996 act was adopted, more than a decade after the 1984 breakup of the monopolistic Bell System, competition already was emerging in most segments of the communications services marketplace. To a large extent, the steady development of competition in the post-Ma Bell and post-1996 Act environment was attributable to technological advances, especially the transition from analog to digital communications networks, and from narrowband to broadband services. As early as December 2000, FCC Commissioner Michael Powell referred to this transition as the "Great Digital Broadband Migration."

This quickening digital migration made it easier for traditional telephone companies, cable and satellite operators, and wireless firms to compete with each other in the provision of voice, video and data services. For example, employing new broadband networks, traditional "telephone" companies began offering multichannel video services, and "cable television" operators began offering voice services. Both telephone companies and cable operators, along with cellphone providers, offered data services over increasingly higher-speed broadband networks.

Before too many years, wireless subscribers began to view videos on what are now known as smartphones. Thus, in the digital world, "convergence," long a futuristic mantra, became a reality as broadband competitors offered bundled packages of various digitally delivered services in ever-evolving combinations.

The further reality - a very important one - is as each year passed, the power of competition and consumer choice steadily supplanted market power in most communications markets.

There was some hope after adoption of the 1996 act that the FCC might exercise its delegated authority in a way that recognized competition lessens the need for regulation, especially the public utility-style variety of regulation traditionally favored by the agency. After all, Congress stated in the 1996 act's preamble that the statute was intended "to promote competition and reduce regulation," and the principal legislative report declared the congressional intent "to provide for a pro-competitive, deregulatory national policy framework."

Alas, any such hopes have been largely dashed. The FCC simply has been too slow to eliminate outdated legacy regulations developed during the earlier monopolistic analog era. Indeed, despite marketplace competition, the commission now has even extended public-utility-style regulation to broadband Internet providers by adopting "net neutrality" mandates.

Congress should consider a radical overhaul of the Communications Act by adopting a new free-market-oriented paradigm that breaks thoroughly with the past. The new paradigm, unlike the current public-interest model, would tie the FCC's regulatory activity closely to a competition standard akin to that found in antitrust jurisprudence.

The FCC then would be required, much more than today, to engage in rigorous economic analysis. It would determine whether individual service providers subject to complaints possess demonstrated market power that should be constrained by some form of sanction. Furthermore, the FCC generally would be required to favor narrowly tailored remedial orders developed in adjudicatory proceedings over broad proscriptions developed in rulemakings.

This new competition-based, market-oriented model would force the FCC to focus on consumer welfare. The agency no longer would focus on outdated distinctions grounded in particular technology platforms or functional characteristics. Most significantly, the commission no longer would be able to invoke the elastic public-interest standard to devise new regulations that have little or nothing to do with existing marketplace realities.

Radical reform of our nation's communications laws will lead to more competition-driven investment and innovation in the ICT sector to the benefit of our nation's consumers and our economy. Congress shouldn't wait any longer to get the job done.

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