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FCC Chairman Tilts the Seesaw Toward Regulation

by

Randolph J. May *

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Early in his tenure, in his maiden speech at Ohio State University in December 2013, Tom Wheeler, the Obama administration's Federal Communications Commission (FCC) chairman, articulated what he called his "seesaw" rule: "When competition is high, regulation can be low." Since then, Wheeler also has regularly touted what quickly became a monotonous incantation: "Competition, competition, competition."

When I hear Wheeler's "competition, competition, competition" mantra, or think of his seesaw rule, a favorite Abraham Lincoln quote comes to mind. In April 1864, Lincoln said: "We all declare for liberty; but in using the same word we do not all mean the same thing."

It is now abundantly clear that in declaring for "competition," Wheeler intends the word to have a particularly narrow meaning, one that doesn't comport with the understanding of many respected regulatory economists and experts. And Wheeler has a seductive purpose in mind as well: By employing an unrealistically narrow view of market competition, his seesaw construct almost invariably tilts toward more regulation.

We have seen this phenomenon play out over and over again during Wheeler's tenure. A few significant examples:

• In adopting the FCC order to enforce "net neutrality" mandates, the agency did not perform any meaningful analysis of the Internet access market. For example, by determining the number of competitors, their market shares, market trends, and the prospects for additional competition.

In other words, the agency did not conclude a real market failure existed. Instead, it claimed Internet service providers possess market power based on a flimsy "gatekeeper" theory premised only on the asserted difficulty subscribers confront in switching from one service provider to another. Note that this theory necessarily rests on the assumption that there is more than one competitor in the market.

• In proposing to regulate Business Data Services (BDS), even those of new entrants, the FCC suggests the relevant market for assessing competition may be as narrow as a single building, even though, as former FCC Chief Economist Tim Brennan explained in a recent Free State Foundation paper, defining a geographic market as a single building location makes no sense. Moreover, the FCC continues to downplay cable operators' expanding BDS offerings in its competition assessments.

• The FCC's radical proposal to adopt a new regulatory mandate governing the design functions of video navigation devices ignores the plethora of choices consumers now have for receiving video programming from new video distribution services, devices and apps. While the FCC considers imposing a new government-designed technical mandate, and a new government-imposed compulsory license that almost certainly threatens copyrights, additional choices for distributing and viewing video programming become available almost weekly.

• Departing from past practice, the FCC continues to engage in an ongoing charade when it (almost always on an untimely basis) releases congressionally mandated reports assessing the competitiveness of the mobile services and video services markets, and assessing the reasonableness of broadband deployment. Under Wheeler's tenure, the FCC consistently declines to determine the relevant markets are competitive. Among other devices, it does this by refusing to acknowledge the substitutability of wireless and wireline services.

And it continually redefines "broadband" to require higher and higher bandwidths as a way of narrowing the extent of broadband's market reach. This ploy, completely divorced from the reality of actual consumer demand and expectations, allows the agency to claim a justification for further regulation.

These examples show how the Obama administration FCC frequently misconstrues — you might say abuses — data to constrict a relevant geographic or product market in order to portray a lack of competition — and thereby to suggest, wrongly, the need for maintaining or increasing regulation.

Here's an idea for a fix: With a modest change to the Communications Act, Congress could prevent the invocation of meaningless incantations such as "competition, competition,

competition" from substituting for rigorous economic analysis that fairly accounts for the dramatic changes that have taken place in most segments of the communications marketplace. Five years ago, I suggested, in recognition of the increased consumer choice that has occurred in the last two decades, that Congress should require the FCC to presume, absent clear and convincing evidence to the contrary, that effective competition exists in most communications market segments.

This simple rebuttable evidentiary presumption would not in itself determine the outcome of any particular proceeding. But it would make it more difficult to avoid evidence-based findings of effective competition by employing ill-founded stratagems designed to tilt the FCC's seesaw towards more regulatory power grabs.

* Randolph J. May is President of the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland. *FCC Chairman Tilts the Seesaw Toward Regulation* was published in *The Hill* on September 22, 2016.