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Rolling Back Regulation at the FCC: How Congress Can Let Competition Flourish

by

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Though competition and consumer choice now pervade almost all segments of the communications market, the Federal Communications Commission has done little to eliminate regulations that were adopted in the days when Ma Bell and three television networks dominated the landscape.

In fact, not only has the FCC failed to eliminate many regulations that are no longer necessary, it continues to add burdensome new ones. As a prime example, witness its adoption last December of new “net neutrality” regulations that govern the practices of Internet-service providers, even though the agency made no findings of present market failure or consumer harm.

Congress should force the FCC to get rid of unneeded regulations. There is a way it can do so rather surgically.

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In 1996, Congress amended the Communications Act, which was originally adopted in 1934, to take account of the developing marketplace competition as telephone companies, cable and satellite operators, and mobile-phone firms began to invade each other's turf. Anticipating that this trend would continue, Congress stated right in the new statute's preamble that it intended for the FCC to "promote competition and reduce regulation." And, in the principal legislative report accompanying the 1996 act, Congress stated its intent to provide for a "de-regulatory national policy framework." It could have been more specific, but there is no mistaking that Congress thought it was adopting a statute — the most significant change to the Communications Act since its enactment in 1934 — with a deregulatory thrust.

In other words, Congress concluded, correctly, that the development of more competition and more consumer choice should lead to reduced regulation.

In the 15 years since, as anticipated, marketplace competition has continued to develop dramatically. But the FCC has not done nearly enough to "reduce regulation" and provide a "de-regulatory" policy framework. There may be various explanations, including bureaucratic inertia and regulatory capture, as to why this is so. Whatever the reason, the point is that a deregulatory fix is needed.

A simple regulatory reform measure could be adopted now to better effectuate what Congress intended to be the 1996 act's deregulatory tilt.

The 1996 act introduced into the Communications Act two related deregulatory tools, tools that are generally not found in other statutes governing regulatory agencies. The first provision states the commission "shall forbear" from enforcing any regulation if the agency determines it is not necessary to ensure that telecommunications providers' charges and practices are reasonable, or necessary to protect consumers or the public interest.

The second requires periodic reviews of regulations so that the commission may determine "whether any such regulation is no longer in the public interest as a result of meaningful economic competition between providers of such service." The agency is required to repeal or modify any regulation it determines to be no longer in the public interest.

These provisions obviously were added to the Communications Act as ways to reduce regulation. Nevertheless, the FCC has utilized them only sparingly and fitfully. In its forbearance and regulatory-review rulings, the agency generally takes a very cramped view of evidence submitted concerning marketplace competition — for example, refusing to acknowledge that wireless operators compete with wireline companies, or that potential entrants exert market discipline on existing competitors.

Congress should amend the Communications Act to make the forbearance and periodic-review provisions effective deregulatory tools. It can do this by adjusting the burden of proof: The FCC should be required to presume, absent clear and convincing

evidence to the contrary, that the consumer-protection and public-interest criteria have been satisfied. Those seeking to retain regulations would be required to make a case. The FCC might seek to ignore or skew evidence in order to make this change irrelevant, but its decisions are subject to review by the courts.

This past January, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are “outmoded, ineffective, insufficient, or excessively burdensome.” Adoption of the proposal offered here is not only consistent with this order, the record shows that, with respect to the FCC, it is required if the injunction is to have any real meaning.

This proposal would not lessen the need for comprehensive reform of our communications laws. But it would go a long way toward eliminating, to use President Obama’s words, “outmoded, ineffective, insufficient, or excessively burdensome” FCC regulations.

And, after all: Isn’t that the very same reason that Congress added the forbearance and periodic-review provisions to the Communications Act in 1996?

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