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***Perspectives from FSF Scholars
February 15, 2012
Vol. 7, No. 5***

Spectrum Auctions and Communications Policy Reform

by

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The current debate concerning the extent to which Congress, in authorizing the Federal Communications Commission to conduct new spectrum incentive auctions, should prevent the FCC from encumbering such auctions in various ways is instructive. And the debate is instructive beyond the immediate implications it has for the proposed auctions. More broadly, the debate has important implications for the future direction of communications law and policy reform. Frankly, I hope the current controversy spurs such a broader conversation.

Here's why.

The auctioned spectrum would be reclaimed from television broadcasters who would be paid for the spectrum they give up. The debate involves, among other things, provisions in a House bill that would prevent the FCC from limiting participation in the auction and from imposing extraneous conditions, such as net neutrality mandates, on use of the auctioned spectrum.

In two previous blog posts, "[Spectrum Auctions: Who's Managing Who,](#)" and "[Implementing Spectrum Auctions.](#)" I have explained why I think it is proper for Congress to establish policy regarding issues relating to entry encumbrances and use

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conditions. I don't want to plow that particular ground again. In short, my view turns on the notion that it is perfectly appropriate for Congress, politically accountable as it is, to set policy parameters regarding such matters if it wishes, while leaving the nitty-gritty details of auction design to the FCC.

Or as I put it at the end of the "Who's Managing Who" blog:

"Given this risk [of subsidizing competition], and the FCC's pro-regulatory disposition as evidenced by its recent actions, it is entirely appropriate...for Congress to establish broad policy restricting the FCC's authority to limit auction participation or otherwise encumber auctions by imposing extraneous conditions. If you wish, you might call this policy-setting "macro-managing" the auctions. But it is not micro-managing them.

Properly understood, Congress would be constraining the FCC from exercising its unbounded discretion under the indeterminate 'public interest' standard to try to micro-manage the auction rules, or, for that matter, the license transfer process, on the theory that it is somehow creating 'more' competition. This manipulative approach, as the FCC has yet to learn but should have, rarely works to the benefit of consumers in markets as dynamic and already workably competitive as the current wireless marketplace."

The reason why the current spectrum auction debate has important implications for communications law reform is, as suggested above, tied to the Communications Act's broad delegation of authority to the agency to act in the "public interest." The FCC's spectrum policy decisions, and much of the FCC's other regulatory activity, are carried out under the indeterminate public interest standard. At best, this standard leaves the FCC largely at sea. At worst, it is so subjective in its vagueness that it leaves this supposedly independent agency susceptible to charges that its decisions are politically motivated or otherwise based on factors other than its expert judgment.

Put simply, the fact that so much of the FCC's activity presently occurs under the public interest standard, rather than pursuant to a congressional delegation explicitly directing the agency to focus on marketplace competition and demonstrable consumer harm, is the principal reason a new communications law is needed. As I have advocated for many years, this new paradigm would require the FCC to ground its decisions in an antitrust-like jurisprudence. This would mean the agency's decisions necessarily would employ, in order to survive judicial review, rigorous economic analysis of the type that presently is so often missing.

I understand many of those who oppose limitations on the FCC's discretion with regard to conduct of spectrum auctions, or other agency matters as well, invoke the FCC's status as an independent agency imbued with special expertise. Former FCC Chairman Reed Hundt, for one, recently entered the current spectrum debate with just such an invocation. According to a report in the *Hillicon Valley* [blog](#), the former chairman says Congress should allow the FCC to rely on "its technical expertise to set the conditions of the auction."

But as Mr. Hundt freely admits, even touts, in his book ["You Say You Want A Revolution,"](#) recounting his chairmanship, he saw his role, to a significant extent, as doing the bidding of the White House, certainly not acting independently. Read Mr. Hundt's whole book and judge for yourself. But here are some illustrative excerpts to my point:

- In seeking the FCC chairmanship, "I explained that as Al's [Vice President Al Gore] lieutenant at the most important communications agency, I could effectively implement his agenda." [P. 5]
- "If I ran my agency independent of this Congress and synchronized with the White House's politics, then Al Gore's policies would shape the communications revolution." [P. 101]
- "I had become part of the Administration's political agenda – perhaps the first time in history that FCC issues were in the center ring of the political circus." [P. 123]
- Regarding implementation of the Children's Television Act: "I still did not have the votes at the Commission to pass such a rule. But my efforts plainly supported the President's political goal, as crafted by Dick Morris, of enumerating specific differences between his views and those of the Republican Congress." [P. 125]
- "We intended to fulfill the President's promise that all classrooms would be connected to the Net by the next century – not a bad fact to remind people of in the presidential election of 2000." [P. 167]
- "We orchestrated with Al's staff a summit on kids' television at the White House for Monday, July 30." [P. 190]

Now, none of this is to say that Mr. Hundt's own views, based on whatever communications policy expertise he possessed, did not coincide with those of Vice President Gore, Dick Morris, or others in the Administration with whom he was orchestrating and synchronizing. But he makes crystal clear in his book that, in any event, he intended his FCC actions to be aligned with the White House's political goals.

And why was it so easy for Chairman Hundt to synchronize important aspects of the FCC's agenda with the White House's political electioneering agenda? The answer is right in Mr. Hundt's book: "Vague standards for the 'public interest' condition *could* permit government officials to exercise lawless discretion." [P. 124]. Now, Mr. Hundt does not say the discretion he exercised was "lawless." But he surely hits the nail on the head in identifying the problematic nature of the public interest standard.

My interest here, of course, is not to pick a fight with Reed Hundt, or any others who on particular occasions wax eloquent about the FCC's supposed expertise as an independent agency. And my interest is not to denigrate the considerable expertise that

agency personnel do possess, nor is it to question their good faith in carrying out their responsibilities.

My interest is much more fundamental: It is to emphasize that, under the vague public interest standard, the FCC is, at best, left completely at sea with unbounded discretion. At worst, it is in a position, if it so chooses, to exercise what Mr. Hundt called "lawless discretion." This is why I said above the standard "leaves this supposedly independent agency susceptible to charges that its decisions are somehow politically motivated or otherwise based on factors other than its independent expert judgment."

So, I hope that in the not-too-distant future we will get a new Communications Act that replaces the existing public interest regulatory paradigm with a competition-based paradigm grounded in antitrust-like jurisprudence. I hope the current debate surrounding the spectrum auction provisions will help spur the communications law reform conversation.

For my part, I remain skeptical of simply delegating the FCC broad public interest authority to conduct new auctions in whatever way it pleases, absent any constraints. I respect Congress's prerogative to provide policy guidance. This does not mean that concerns about concentration of too much spectrum in too few hands are frivolous, or not worth considering. They may be, although my own view is, at present, the wireless marketplace remains dynamic and competitive. But until communications law and policy is reformed so that the FCC is required to act more like an antitrust agency in its decisionmaking, I prefer to leave any such putative competitive concerns to the antitrust agencies themselves, and to the courts which review their decisions.

Whether or not you read Mr. Hundt's book, if you are interested in communications law and policy reform, you might want to read my most recent book, *"A Call for a Radical New Communications Policy: Proposals for Free Market Reform."* The book contains eight of my articles, spanning the last decade, which, collectively, and along with the Foreword, explain why we need a new communications law and what it should look like. You may order the book from Amazon [here](#), and from Barnes and Noble [here](#).

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