Perspectives from FSF Scholars
February 20, 2025
Vol. 20, No. 10

Reprise: A Modest Plea for FCC Modesty Regarding the Public Interest Standard

by

Randolph J. May *

Back in 2008, I published a law article in the Administrative Law Review titled, "A Modest Plea for FCC Modesty Regarding the Public Interest Standard." Given all the dramatic changes that had occurred already in the twenty-first century communications marketplace, even then, the marketplace bore little resemblance to the more monopolistic environment that had prevailed throughout much of the last century. Of course, since 2008, marketplace developments, driven by ongoing technological advances, have been even more dramatic, invariably in the direction of increasing consumer choice and competition.

There is no doubt that, since the enactment of the Communications Act of 1934, the statute's ubiquitous but indeterminate public interest standard has been invoked to support many of the FCC's regulatory overreaches and power grabs. Indeed, by its very nature, the authority delegated to the FCC to act in the "public interest" in key sections of the Communications Act, by virtue of its open-ended vagueness, lends itself to the instinctive bureaucratic imperative to maintain and expand agency power.

Thus, in my 2008 article, I urged that, "in an exercise of regulatory self-restraint, going forward the agency should narrow the exercise of its public interest authority." I recommended that, "[t]hrough either the issuance of policy statements or case-by-case adjudication, or both, the agency should demonstrate its understanding that it no longer serves the public's interest for the FCC to exercise unbridled public interest regulatory authority."

With all due modesty, upon rereading, I think my "Plea for FCC Modesty" in 2008 still has considerable relevance and is worth considering by the Trump FCC.

There are other regulatory reform ideas worth pursuing to be sure. But in my article, with the limitations of time and space, I addressed four areas in which the agency, through self-restraint, could assume a less interventionist regulatory posture by narrowing the exercise of its public interest authority. They are: (1) transaction reviews involving the transfer or assignment of licenses or authorizations; (2) periodic regulatory review proceedings; (3) forbearance relief; and (4) universal service. There is no doubt that a less interventionist regulatory posture, in the main, is a spur to economic growth, investment, and innovation, all to the ultimate benefit of the consumer.

Now just a brief word about each suggestion. For a more complete discussion, please refer to the article.

1. **Transaction Reviews**

As my article states, aside from duplicating a lot of the competition analysis of the Department of Justice or the FTC in particular proceedings, "in conducting its review under the public interest standard, the FCC often ranges far beyond just analyzing the specific impact of the proposed merger." Problematically, the inherent vagueness of the public interest standard leaves the Commission largely free to seek to impose so-called "voluntary" conditions that are unrelated to alleged competitive impacts specific to the merger. I first wrote about this phenomenon in March 2000 in an essay titled – you guessed it! - "Any Volunteers?"

In the past, this phenomenon of using the transaction review process to achieve policy objectives better suited, if at all, to generic rulemaking proceedings or proceedings before other agencies, has been especially pronounced when Democrats have controlled the Commission. I suggested that:

> The FCC should reform the merger review process by announcing a policy that, absent extraordinary circumstances, it will largely defer to the DOJ's and FTC's expertise regarding any competitive concerns raised by the merger. And the agency should announce that it will refrain from imposing 'voluntary' conditions on merger proponents that are unrelated to compliance with existing statutory or regulatory requirements. In this way, in the context of merger reviews, the agency would narrow substantially the application of the public interest standard.

This deregulatory reform should have been adopted years ago. It should be done now.

2. Regulatory Reviews

Pursuant to the provisions contained in the Telecommunications Act of 1996, the Commission is directed to conduct periodic reviews of all regulations relating to telecommunications service providers and media ownership. So, for example, Section 11 of the Communications Act now requires the agency to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." Similarly, regarding the required periodic review of media ownership regulations, the Commission is required to "determine whether any of such rules are necessary in the public interest as the result of competition." In both instances, significantly, the Commission is further directed to "repeal or modify any regulation it determines to be no longer in the public interest."

As I explain in some detail in my 2008 article, there is a strong argument that "these rather unique agency-specific periodic review provisions were intended by Congress in 1996 to alter the regulatory *status quo* by mandating that the Commission affirmatively consider whether new competition has displaced the need for legacy regulations." But the Commission thus far has failed aggressively to avail itself of the deregulatory authority which Congress granted it by virtue of the periodic review revisions, or to the extent it has, it has met setbacks in the courts.

There is a sound argument that, when Congress refers specifically to "competition" in conjunction with a determination as to whether regulations are still "necessary" in the public interest, it means to establish a stricter standard than if it had said simply "in the public interest." Whether through issuance of a rulemaking, policy statement, or adjudication, the Commission should assert that it possesses the discretion to narrow the scope of its public interest determination in the regulatory review proceedings to effectuate their obvious deregulatory intent to eliminate outdated legacy regulations.

3. Forbearance Relief

In addition to the required periodic regulatory review provisions, the Telecommunications Act contains another deregulatory reform provision. Section 10 of the Communications Act requires the agency to forbear from applying any Communications Act provision or agency regulation to a telecommunications carrier or service if the Commission determines that enforcement of the regulation or provision (1) is not necessary to ensure that the providers' rates or practices are just and reasonable and not unjustly or unreasonably discriminatory; (2) is not necessary for the protection of consumers; (3) and "is consistent with the public interest." As far as I have been able to determine, this forbearance requirement is extremely rare, if not wholly unique, among the multitude of regulatory statutes throughout the administrative state. Its deregulatory intent is indisputable.

Nonetheless, the forbearance provision has not been interpreted by the Commission in a way that has allowed it to be effectively utilized as a deregulatory measure. The add-on indeterminate "public interest" prong has been construed too expansively. It should be sufficient for the agency to ensure that telecommunications providers' rates and practices are reasonable and not unjustly discriminatory and unnecessary for the protection of consumers.

Therefore, considering the public interest standard's indeterminateness, the Commission should announce as a matter of policy that, absent a demonstrable compelling reason, it will construe the public interest prong as imposing no additional requirement not already encompassed by the first two prongs of the forbearance test. There is a sound argument that the Commission possesses the discretion to adopt this narrowing construction to effectuate the forbearance provision's obvious deregulatory intent. Then, the forbearance provision could be used, as Congress intended, to eliminate many of the legacy regulations which remain on the Commission's books.

4. Universal Service

In "A Modest Plea," I highlighted the Communications Act's Universal Service provision as yet another example of a problematic "public interest" catch-all. After listing six principles that at least may be susceptible of some meaning, Section 254(b)(7) declares the Commission may consider "such other principles" as it and the Joint Board "determine are necessary and appropriate for the protection of the public interest, convenience, and necessity." Of course, this invitation is essentially open-ended and without bounds.

With the lawfulness of the Commission's universal service regime now before the Supreme Court in the Consumers' Research case, based primarily on a claimed violation of the nondelegation doctrine, there is no reason for the Commission necessarily to act now to propose a narrowing construction of Section 254. It is possible that the Court will hold the current universal service program unlawful or that Congress finally will reform it. If not, aside from any other changes, it would be worthwhile for the Commission to announce it will base its decisions on the six principles specified in Section 254(b)(1)-(6) of the statute.

* * *

As I said above, to be sure, there are many other regulatory reform ideas worthy of consideration by the FCC under its new leadership. But these, originally offered in 2008, are reprised here for consideration because, if adopted in one way or the other, they would constitute an admirable exercise in self-restraint by the Commission in the cause of meaningful regulatory reform that is a spur to economic growth, investment, and innovation.

* Randolph J. May is President of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.