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The FCC's Flawed Understanding of Competition

by

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As Federal Communications Commission Chairman Tom Wheeler said a few months ago: "Since my first day as Chairman of the FCC my mantra has been consistent and concise: "Competition, Competition, Competition."

Indeed, this has been Chairman Wheeler's constant refrain. For me, it calls to mind what Abraham Lincoln once said: "We all declare for liberty, but in using the same word we do not mean the same thing."

We may all declare for "competition" – but Mr. Wheeler's understanding of what "competition" means is flawed because, under his leadership, the FCC's competition analyses often narrow the scope of markets by excluding existing competitors, as well as potential competitors, from the assessments.

When competition assessments are skewed by narrowing market definitions, it's easier for the Commission to argue that it must retain its traditional grip on regulatory power – even as, in reality, communications markets become more competitive, right before of our very eyes.

Here are two examples of key matters currently before the FCC that illustrate the agency's generally flawed regulatory approach.

First example: The agency has just proposed new regulations which are intended to mandate the use of a new "open standard" set-top TV box – a "navigation device" – that would be designed, over two or three years, by a government advisory committee. This new navigation device supposedly would be used by subscribers to access video programming provided by their multichannel video provider, regardless whether such provider is a cable operator, satellite provider, or telephone company.

The Commission asserts that "today consumers have few alternatives to leasing set-top boxes from their MVPDs [Multichannel Video Programming Distributors]." In light of actual marketplace developments, this claim rings hollow. On several counts, it exemplifies a narrow, backward-looking market view.

With competition among cable, satellite, and telephone companies, the FCC itself recently declared that the multichannel video programming market is presumptively competitive. Each of the MVPDs offers its own proprietary set-top box with certain unique features and functions, so consumers can switch among the providers if they prefer one over the other.

Moreover, video consumers now have many choices for accessing their favorite programming through various independent online streaming services and devices, with more choices on the way all the time. Think Netflix, Roku, Amazon Fire TV, Fire TV Stick, AppleTV, Hulu, Google Chromecast, PlayStation 4, Xbox One, and so on.

And, perhaps most important of all, as a result of technological and marketplace developments, the traditional set-top box navigation device is on the verge of being replaced entirely by apps that will sit on your smartphones, tablets, laptops – and right on the new Smart TVs. Indeed, cable operators Charter and Time Warner Cable have developed apps that completely eliminate the need for a set-top box. And now along comes the FCC, locked in yesterday's world, to decree that the government must engage in a costly process to design a new "open standards" device with uniform specifications.

Second Example: For over a decade now, the FCC has been mired in a murky proceeding whose supposed objective is to determine whether what it calls the incumbent telephone companies' "special access" services – really just business broadband services – should be re-regulated. The agency relaxed its regulation of these services in the 1990s after determining the markets already were becoming competitive. Here again, the agency needs only to observe marketplace developments. Many firms compete to provide business broadband services, especially by operating fiber networks, including Google Fiber.

Comments submitted to the FCC on February 19 by the National Cable & Telecommunications Association are very telling. NCTA explained that the current deregulatory regime for special access services "has enabled cable operators to enter the marketplace and expand the footprint of their offerings." Not wishing to see the FCC, by regulatory fiat, force the incumbent telephone

companies to reduce their rates, and thus make it more difficult for cable operator rivals to expand their own market share, NCTA stated: "From a presence that was virtually non-existent when the Commission first started this proceeding back in 2005, cable operators offer business customers a wide variety of high-capacity services...."

Instead of acknowledging the actual competition that already exists, and the potential competition likely to emerge if the agency refrains from trying to micro-manage the market, the Commission continues, Don Quixote-like, on its fanciful quest to determine whether the "special access" market is competitive. And, incredibly, it has defined the relevant market on a building-by-building basis across the U.S. At most, the agency should direct its regulatory efforts to the increasingly few, less dense rural areas that truly lack any service providers.

These two examples of improper competition assessments certainly are not exhaustive. But they do show there is a difference between simply proclaiming "Competition, Competition, Competition" as a mantra and understanding what competition really means and how to evaluate it.

You may be forgiven if you begin to think the FCC's competitive assessments are driven by a desire to maintain its long-standing grip on regulatory power, not to benefit consumers.

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