

The True Believers:
Some Thoughts on Competition, Regulation, the FTC and the FCC

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The excellent principal papers for this session describe in detail significant facets of the Federal Trade Commission's (FTC) long-standing and vitally important efforts to extend the areas within the U.S. economy that are regulated by the forces of open competition. In this more modest brief commentary, I want to raise some questions about the context in which FTC competition advocacy takes place, using the Federal Communications Commission (FCC) as a counterpoint.² I note that Government officials³ who enforce the nation's antitrust laws have come to believe that competition is the best way to organize the various sectors of the U.S. economy. Yet when these officials sit down with their counterparts in other agencies they typically confront people whose task is to stamp out competition or eradicate its effects. Should this make antitrust officials call into question their commitment to antitrust? What might it take to make other agencies listen more receptively to the case for regulation by competition?

I. Competition vs. Other Forms of Marketplace Regulation

What is the biggest difference between the FTC and all the other alphabet agencies in Washington? One answer, with which I would not quarrel, is that the Federal Trade Commission has the best headquarters location and the most public-spirited staff. But for purposes of this Symposium, I submit that there is a better response: The FTC, unlike virtually every other alphabet agency in this town, professes to believe in competition as the best device to regulate business behavior so that private markets serve public, as well as private, interests.

Today, lawyers and economists at the Federal Trade Commission believe that Adam

¹ Attorney, Bureau of Competition, Federal Trade Commission. The positions advanced in this article do not reflect the views of the FTC, the FCC, or any Commissioner of either agency.

² I use the FCC for illustrative purposes because it is the regulatory agency I know best. My sense is that the arguments and examples I give here – both those concerning where the agency has been and those concerning where it is going – could be replicated for most federal agencies.

³ Although this paper treats of the FTC as an oracle of the values of competition, a fuller account would include the Department of Justice's Antitrust Division in this role, too.

Smith's invisible hand – when aided by the law of antitrust and consumer protection – is the best market regulator, in theory and in practice.⁴ In theory, the invisible hand, as protected and nourished by FTC oversight, brings us consumer sovereignty, maximum output for the least and most efficient input, low prices, innovation, and freedom of entrepreneurial opportunity for everyone. In practice, of course, the results might not always be perfectly optimal, but we frequently get pretty close to those targets. And the system works for free; the invisible hand commands no salary and never takes a day off. The invisible hand is also remarkably free of virulent bias – do you know the age, gender, race or religion of the person who made the shoes you are wearing? – but admittedly, in this regard, is subject to the garbage in/garbage out rule.⁵

I could go on. But I think I don't need to. This is, after all, a celebration of the FTC. However, reflect for a minute on the virtues I just listed. The other alphabet agencies do not believe in this paradigm of public regulation, but reject it. In fact, many – such as the EPA, OSHA, FERC, NLRB, ITC, and CPSC – were created because Congress did not like the results that competitive markets were producing and wanted to substitute some form of public regulation for the regulation of competition. These agencies appear to owe their existence to the view that competition – at least in one sector or for one issue – is bad and someone needs to do something about that.

II.. The FCC's Historical Preference for Regulation Over Competition

So it is with the Federal Communications Commission. Congress created the FCC in 1934 by attaching to the charter of the old Federal Radio Commission a few sections of the Interstate Commerce Commission's statute that Congress wanted the new agency to apply to telephony. The FCC's organic statute, the Communications Act of 1934, created by this cobbling together of preexisting statutes, directs the agency to regulate “in the public interest, convenience, and necessity” and says not a word about competition. Congress, rightly or wrongly (probably wrongly), believed that competition in radio was impossible because it was impossible to have competitive markets in spectrum and that competition in telephony was impossible because there was only one phone company.

Unsurprisingly, then, the Federal Communications Commission has a long (and, some would say, not very distinguished) history of rejecting competition as a regulator of telecommunications markets. Look at what the Commission did during the period of approximately the end of World War II through 1985.

⁴ I am not sure the FTC always believed in competition. See, e.g., *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966), which seems to be an attempt to rescue inefficient competitors from competition. But as the principal papers for this session prove, the Commission actively and fully promotes competition everywhere today.

⁵ So if the buyers and sellers in a market are avowedly racial or religious bigots, then those markets will, sadly, reflect and usually even worsen such bigotry.

In telephony,⁶ the Commission did help lead the way in introducing competition in customer premises equipment (handsets and so forth), but had to be dragged most reluctantly into permitting competition in long distance and into dismantling the Bell monopoly. The FCC also largely left it to Congress and some state regulatory commissions to devise a legal regime for fostering competition in local service. Outside the traditional wireline telephone system, when the FCC finally got around to authorizing wireless (cellular) phone service, the agency first decided to rely on local duopolies rather than competition to provide that service.⁷

Initially, at least, FCC regulation of television was virtually at war with competition. Simple market economics⁸ dictate that most television competition takes place between networks. In 1952, the agency organized the distribution of television stations in a manner that virtually guaranteed that no more than three commercial (and one noncommercial) television network could arise.⁹ When, in the early 1960s, cable television threatened to make it feasible to provide dozens of networks into most American homes, the FCC resisted, claiming that unfettered cable growth would disrupt the Commission's 1952 station allocation "plan."¹⁰ That station allocation plan, coupled with the war on cable tv, guaranteed us at least at quarter century of three me-too networks, competing as little as possible, but easily watched over by the vigilant Commission.

So, the Commission then told these sheltered networked stations how to compete with each other in non-network time; for example, the FCC prescribed in detail particular rituals that each licensee had to go through to ascertain the needs and interests of its community of service.¹¹ And the Commission busied itself preventing competition in programming from getting out of hand, preventing licensees from offering programs the public wanted but that a majority of Commissioners thought were too hot or too cool.¹² The Commission reached a regulatory high

⁶ The story of the rise of competition as regulator of telephony is told in Krattenmaker, *Telecommunications Law and Policy* 341-480 (2d ed. 1998) (hereafter *TLP*).

⁷ *TLP*, supra, at 137.

⁸ Most importantly, the fact that once a tv show is produced for telecast over one station, there is very little incremental cost in broadcasting the same show over many other stations.

⁹ Besen, et al., *Misregulating Television: Network Dominance and the FCC* 12-16 (1984) (hereafter *MTV*).

¹⁰ *Id.* at 11-12.

¹¹ *TLP* at 262-63.

¹² Krattenmaker & Powe, *Regulating Broadcast Programming* 103-42, 237-76 (1994) (hereafter *RBP*).

water mark in 1972 when it adopted a Rube Goldberg-type device known as the Prime Time Access Rule.¹³ PTAR, an acronym that virtually trips off the tongue, banned every network affiliate in the country from exhibiting network programming from the 7-8 p.m. time slot without regard to whether viewers wanted to watch the programming and without regard to its content (unless the network programming was particularly valuable, such as the Rose Bowl or a half-hour – but no more than 30 minutes! – news program). Even programming that once had been, but was no longer, on a network was forbidden by this “unclean production” rule.

III. Just What Does the True Believer Believe?

If one believes that competition is the best regulator, in large measure because competition respects consumer sovereignty and production efficiency and increases total wealth, then it is very hard to accept any of those FCC actions, which in fact epitomize most of the Commission’s work for at least the first five decades of its existence. These regulations not only displaced competition, but they also overrode consumer sovereignty, created inefficiencies, and restricted output.

Of course, even the “true believer” knows that competition fails sometimes. Two of the leading examples are when the market is a natural monopoly or a particular product is such that unrestrained competition produces negative externalities. Perhaps the FCC’s telephone regulations could be defended on the grounds that telephony is a natural monopoly, but the evidence is that it is not.¹⁴ Whether one believes in monopoly or competition as the best way to cater to diverse consumer preferences in tv markets, one cannot defend the FCC’s old actions with respect to station allocation and cable television.¹⁵ And programming censorship that flies in the face of consumer sovereignty might be defended on externality grounds – for example, that television violence generates real-world violence -- but the evidence won’t support that claim either.¹⁶

So, does this mean that what the FCC did was indefensible, at least from the standpoint of one who believes in competition? Not necessarily in all matters. Suppose there is a larger purpose – call it a mega-efficiency, if you will – to the anti-competition regulation we seem to

¹³ The rule is described fully in Krattenmaker, *The Prime Time Access Rule*, 7 *Hastings Comm. & Ent. L. J.* 19 (1985).

¹⁴ See *TLP*, supra, at 411-80.

¹⁵ See *TLP*, supra, at 85-92.

¹⁶ See *RBP*, supra, at 103-134. There just is no evidence that sex on television or radio leads to illicit (or licit) sex by those who watch or listen. The evidence on violence is more mixed, but cannot support any plausible regulatory scheme that is both administrable and constitutional. One combs the history of the Prime Time Access Rule in vain for even a hint of a plausible assertion of market failure that might explain PTAR. See *MTV* at 141-46.

see all around us. Perhaps regulation, often dismissed as simple rent-seeking, has claims to legitimacy in a pluralistic democratic society that justifies rules that go beyond protecting against natural monopoly or externalities or some other form of technical market failure.

Regulation in some sectors or for some issues might be useful – perhaps even necessary – for us to indulge our preferences for competition elsewhere. Regulation may protect against the harshest realities that competition would otherwise create, even where the harm does not stem from a recognized market failure such as externalities or natural monopoly. To continue with examples from the FCC, many years ago, that agency used to check telephone company mergers to make sure that jobs were not lost in the process. In this fashion, the agency might have smoothed over how one class of industry actors felt the effects of the transition to more efficient methods of organization.

Regulation might also be one way in which a stable, pluralist republic works at income distribution.¹⁷ The Communications Commission's fondness for monopoly in telephony traced in large measure back to its desire to create a stable pot of money with which to subsidize certain phone subscribers (laudably, low income subscribers; not so laudably folks who lived in rural areas, regardless of their wealth) and certain phone uses (especially local as opposed to long distance, because of an unproved assumption that low income people had less need for long distance). No true believer would cheer for such actions. They appear both to retard efficiency in delivering the service and to be inefficient in delivering a subsidy. Why not cost-based telephony rates and phone stamps for the poor? Why not tax-funded subsidies to build out phone networks into less densely populated areas? These arguments themselves, however, may reflect an incomplete view of what the political system can or should support. Would it clearly be preferable to have all wealth distribution issues visibly decided in a single political forum or would this pose too great a risk of polarizing politics around economic class?

IV. Just What Does the Committed Regulator Believe?

While trustbusters come to understand that others may not share their tastes for unrestrained competitive market forces, and the results those forces produce, regulators might also come to appreciate the value of competition – even to a regulator. Clearly, this has occurred in some significant measure at the FCC, as well as at other regulatory agencies.

For examples confined to the FCC, that agency no longer believes that it must protect its 1952 station allocation plan against the havoc wreaked upon the plan by cable and satellite tv. Rather, the Commission now seems to understand that maximizing the number of signals to the home is probably the best way to protect consumer sovereignty in television program production

¹⁷ Antitrust's true believers should be careful before they reject the arguments sketched in this paragraph. One dilemma within antitrust, not yet fully resolved, is whether harm to consumers can trump benefits to productive efficiency. I believe that an argument something like that in this paragraph helps to explain why the answer might be in the affirmative.

and distribution markets.¹⁸ Similarly, the FCC seems now quite committed to fostering competition throughout all telephony markets.¹⁹ Simply put, the anti-competitive regulatory measures of the early period that were sketched above have not stood the test of time and most have been repealed.

For another and somewhat different type of example, the Commission recently embraced the value of competition within a highly regulated structure. Discussing the issues raised by the then-proposed merger of two of the countries' largest phone companies, SBC and Ameritech, the Commission held that the merger was not "in the public interest," absent corrective conditions, in part because combining the two firms would significantly impair the regulators' ability to carry out their mandate to control interconnection costs and methods by robbing those regulators of the ability to compare methods and procedures within the industry – i.e., to use competition and free markets to help resolve some of the FCC's inescapably regulatory tasks.²⁰ Similarly, partly because of FTC advocacy to the FCC, the Communications Commission receded during the late 1980s from regulations imposed on network television production that in fact did little if anything to promote competition and that did in fact handicap conventional television networks in competing with then-emerging cable networks.²¹

Finally, in a case of regulation being utterly confused with – or overwhelmed by -- competition, the FCC, in ruling on a proposed merger within the direct broadcast satellite service, specifically – and with the kind of zeal usually reserved for converts -- held that merger up to the precise standards of the DoJ-FTC merger guidelines, guidelines that were written to enforce the antitrust Clayton Act, section 7, not the "public interest" standard of the Communications Act.²² This complete about-face from a regulatory approach, if it is enduring, is astonishing. Does the FCC now believe that the only law relevant to telecommunications mergers is antitrust merger law and, if so, why is the FCC in the business of reviewing telecommunications mergers that are also scrutinized by the antitrust agencies?

V. Conclusion: Two Cheers for Ecumenicism

¹⁸ See *TLP*, supra, at 507-37; 637-687.

¹⁹ See *TLP*, supra, at 360-73; 411-63.

²⁰ In re Applications of Ameritech Corp., Transferor, and SBS Communications, Inc., Transferee, 14 FCC Rcd. 14712 (1999). A disclosure: I was the FCC staff member who was chiefly responsible for preparing the merger review documents for Commission action.

²¹ See *TLP*, supra, at 306.

²² In the Matter of Application of EchoStar Communications Corp. and Hughes Electronics Corp. (DirecTV), Hearing Designation Order, Part V, FCC, CS Docket No. 01-348 (October, 2002).

A modest paper can support or argue for only modest points. Perhaps competition advocates should take some comfort in knowing that, while we fight the righteous battle for efficiency, plenty, open entry, and consumer sovereignty, when we lose it may be because somewhat higher values are at stake. Not often, I think, but perhaps sometimes.

Meanwhile, the value of competition advocacy is, I think, born out at least as well at the FCC as anyplace else. The Commission of course continues to battle against consumer sovereignty when it comes to sex on the radio and may someday go after sex and violence on television (but not on cable). The same agency continues to treat broadcast stations as wards of the state, to be shielded from competition at all costs. And it remains to be seen whether the Commission is willing to subject traditional wireline phone companies to unimpeded competitive forces. But, within those large boundaries, the FCC – partly because of prodding from the FTC – apparently has turned to competition as its favored mode of regulation.

The FTC (and the Department of Justice Antitrust Division) may have been the first true believers, but they seem to be gaining adherents lately. Perhaps some accommodation of competition and regulation across the economy is what we seek. Two cheers for that – especially if ties go to competition.

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