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FCC Reform: Today's Agency and the Ghost of Commissioners Past

By: Senior Fellow John Wohlstetter

It seems almost churlish to suggest reforms for an agency whose current commissioners have shown signs of a welcome shift away from harmful policies of the past. It amounts to penalizing those doing pretty well now for acts of predecessors who did great damage. But there is no assurance that some future constellation of commissioners will retain good judgment, and there is ever the problem of attitudes among longtime staff. Thus, certain reforms are appropriate notwithstanding today's solid cast at the agency.

The Danger: A Return to Regulatory Caesarism

The agency has been expanding enormously for a decade, with nearly thrice the budget, at $278 million for FY2003, of pre-Clinton years. During the Clinton administration it exercised unprecedented powers, guided initially by a chief whose ambition was that of a regulatory Caesar. In his FCC memoirs, former Chairman Reed Hundt has this to say regarding efforts of the Bell companies to preserve a state role in setting rules for local competition:

> In other words, [the Bells] thought that I would give up the chance to be the master builder of the information sector's competition rules.
>
> To this day I cannot imagine that the Bells thought I would abandon voluntarily the chance of a lifetime.[1]

Nor was Hundt deterred by possible opposition from within his agency:

> The impossible deadlines [of the Telecom Act of 1996], in fact, were a stroke of luck. They permitted my team to rush the items past the other commissioners to votes, insisting on our interpretations of the law, and brooking no delays.[2]

Hundt noted that he could marshal over 100 people, compared to three each for the other commissioners.[3] In other words, he saw the agency's career staff as a mere adjunct to his own personal staff. And he saw his mission in messianic terms:

> The more my team studied the law, the more we realized our decision could determine the winners and losers of the new economy. We did not want to confer advantage on particular companies; that seemed inequitable. But inevitably a decision that promoted entry into the local market would benefit a company that followed such a strategy.[4]

Hundt asserted that "[n]o truly neutral option existed" in explaining his decision to tilt policy against established telephone companies,[5] but this assessment is beside the point. His actions were indefensible if one believes that the power of a regulatory agency should neither be open-ended nor made the personal fiefdom of a single ruler.

It is true that Hundt was hardly typical of FCC commissioners—he stands first, in this author's 24 years of observing the breed, in his determination to impose his vision on those he regulated and the larger society as well. The roots of his messianism run deep. Recalling his participation in that favored pastime of elite boomers in the 1960s, social protest, he writes of Woodstock:

> Then Jimi Hendrix started into his jangled, jumping "Star Spangled Banner." His rendition of "the dawn's early light" awoke the distinctive patriotism of my youth: the country belonged to us, not our parents. If he could play the national anthem his way, we could change the world our way. We could rewrite the rules.
>
> I forgive our arrogance, our unwillingness to seek compromise. After all, in those days everyone was emotional—families, friends, national leaders. No debate was civil. Violent language filled the newspapers and violent imagery filled nightly television news. Even those of us headed for law school rejected lawyerly logic; we believed in a higher, natural law that dictated various acts of revolution.[6]

Hundt's excesses, if not surpassed, were nearly equaled by his successor, William Kennard. He imposed broad conditions—well beyond anything codified in statute—on Bell companies who applied for merger approval and approval (under section 271 of the 1996 Telecom Act) to enter interstate long distance.

Kennard extorted extraordinary conditions on Bell mergers. SBC's acquisition of Ameritech and Bell Atlantic's purchase of GTE (to form Verizon Communications) were both subject to numerous concessions imposed by the FCC. Especially egregious were requirements that the new companies enter local markets outside their regions, and accept penalties for early exit from those same markets. The most expansive construction of the 1996 Act would not support such measures.

Section 271 applicants have fared no better. Bells have been forced to accept a standard of perfection in their hardware and software provisioning for competitive access to central offices. They must share all-network derived scale economies with rivals, forego all scope economies between competitive and regulated services, and make all facilities available to rivals at absolute parity. This effectively converts their local networks into community property for the industry. Notions of what facilities are truly essential and what functionality is equivalent were simply pushed aside.

It may seem unfair to premise FCC reform on the excesses of two FCC chiefs who clearly are not the norm. But we should be chastened by Lord Acton's famous warning that power corrupts, and absolute power corrupts absolutely. Thus, removing the chance for a future reign of regulatory terror alone justifies curbing certain FCC powers.

The Remedy: Curb Regulatory Caesarism; Restore Representative Rule

Begin with a given: forget about abolishing the FCC. The collapse of the Gingrich "Leave Us Alone" coalition largely eliminated the constituency for zeroing out agencies. President Bush's "compassionate conservatism" aims to make government work better, not less. And in the post-9/11 atmosphere, downsizing government is simply off the radar screen. That said, the FCC's gross excess of the Clinton era makes it a fair target for serious reform.

Ending major efforts to shrink government does not preclude erecting safeguards against the kind of Caesarist agency chairmanship personified by Hundt. The Bush administration, as Enron found out, does not believe it is government's role to "determine the winners and

losers of the new economy"—or of the old economy, for that matter. Good regulators see themselves not as suzerains, but as umpires.

First: make the FCC an executive branch agency. The FCC's historic status as an "independent" regulatory agency is a historical artifact of the 1930s faith in regulatory competence and wisdom. Its independence not only insulates the FCC from pressures that executive branch agencies feel, but from control of elected officials.

If those running the war on terrorism can be made subject to presidential control, surely the FCC has no compelling reason to operate largely free of it.

Second: strip the FCC of antitrust powers it shares with other agencies. The FCC could still make its views known to other agencies without gumming up the works. Nowhere is this more imperative than with regard to authority over mergers, where the FCC only adds a superfluous layer to the Justice Department's well-established review process. The agency can file comments as part of Justice's antitrust review. The authority that the FCC should exercise in connection with mergers is over license and facilities transfer, which should be confined to ascertaining whether the applicant is qualified from a technical, operational and financial standpoint. Such a determination should take no more than 90 days, and would be straightforward for licensees who have already demonstrated solid management of existing licenses. This would confine the FCC to reviewing mergers only as to areas of its special administrative expertise. (The Clayton Act, which prohibits unfair competition, falls within the primary jurisdiction of yet a third body: the Federal Trade Commission. Reducing antitrust reviews to two would hardly seem to endanger consumers or competition.)

Worse yet is that the case for the FCC having broad merger review authority is thin, to say the least. Former Commissioner Harold Furchtgott-Roth identified three areas of statutory FCC merger review authority in congressional testimony: (1) radio license transfer under section 310 of the Communications Act of 1934; (2) facilities transfer under section 214 of the 1934 Act; (3) Clayton Act "restraint of trade" review (this last one is rarely exercised). Furchtgott-Roth noted that the agency supplies no comprehensible yardsticks to guide the applicant, conducting an essentially ad hoc, secret review that is opaque and unpredictable even to experienced applicant counsel. The "voluntary" conditions accepted by merging parties are "rarely those that companies come in with," he continued, but that after a negotiation with the FCC staff, they "see the light"; further, "public interest" standards vary from applicant to applicant.[7]

A second critical view of FCC merger authority was provided by Paula Stern, co-chair of the International Competition Policy Advisory Committee, which advises the Justice Department on antitrust matters. A committee report on merger policy released in 2000 had this to say on FCC merger review:

> The FCC's competition policy review also derives distinctive power from the nature of its procedures and the time-sensitive quality of many mergers. *Because there is no time limit on its review of transactions, parties to mergers under FCC review have stronger incentives to make concessions to the FCC than they do to make concessions to the federal antitrust agencies. This is true even when the FCC relies on analytical concepts of doubtful validity.* Mergers often are time-sensitive transaction, and long delays in achieving approval are costly. Among

> other adverse effects, delay limits the parties' ability to implement new strategies and increases the risk that employees who are uncertain about their future position with the new entity will seek other jobs.
>
> In theory, the parties could elicit an unfavorable FCC decision and challenge questionable enforcement theories before the court of appeals. In practice, the prospect of spending a year or more to gain an appellate decision is unacceptable. *Consequently, the FCC can rely on debatable competition policy enforcement theories (such as expansive notions of potential competition) safe in the knowledge that such theories are unlikely to be tested before an appellate tribunal*.[8]

Furchtgott-Roth's views capture the arbitrary and capricious nature of FCC merger review: ad hoc, secretive, coercive. Stern's remarks highlight two issues that call for further reform: waiver of judicial review and the lack of time limits on the conduct of FCC proceedings.

The FCC recently adopted rules streamlining transfer of facilities control for certain small and non-facilities-based carriers.[9] But those will not cure the broader defects that the above recommendations would address.

Third: confine the FCC's "public interest" authority to proceedings subject to judicial review, with no one permitted to waive such rights. One of the worst abuses of the Clinton FCC was its penchant for practicing backroom extortion. For this to be effective, parties had to be pressured to waive their rights. A cardinal principle of regulation must be that the broader a regulatory power is, the more imperative it is that such power be subject to checks and balances.

This is not asking very much. Judicial review would continue to follow the so-called Chevron standard, which gives substantial deference to agency discretion. The fact that review proceedings generally favor the agency, coupled with the hardship an agency can impose by delaying review of a merger, combine to make waiver of appeal rights almost irresistible to affected parties. Mergers that drag on for more than a year—in Verizon's case the process took 23 months—find applicants faced with the prospect of a further year or two delay while appeals progress, or at least an end to the process by accepting agency conditions that escape meaningful review. But shouldn't the parties be allowed to waive protracted review if so desired, in the interest of expediting the matter?

Fourth: establish time limits for all agency actions. Agencies can simply put matters on the back burner to extract concessions and frustrate meaningful review of their decisions. To prevent this, time limits should be set: one year to issue a decision in rulemakings or adjudicative hearings; 90 days for actions pertaining to license transfer. So long as the agency uses the merger review powers it claims—which go unchallenged by applicants due to time constraints—it should be required to complete that broader review in one year.

The basic facts about the telecommunications industry are well known to the FCC already. The reason it hoards so much time is to impose detailed conditions on the applications. Mergers should not be delayed for such reasons. Rules can be adopted after license transfer. The agency should never be allowed to use the merger process to bypass the rulemaking process, with its attendant safeguards.

And what if the agency needs just a little more time to get the rules right? The best is the enemy of the good. Adopt rules within the

appointed time, and seek to revise them later if they do not work. There should be a cooling off period between institution of a follow-up proceeding—at least 6 months—to prevent the agency from circumventing the time limit rules. To be sure, any specified time limit will be in some measure arbitrary, but this is a small price to pay for regulatory dispatch.

Conclusion

The Clinton-era FCC wielded powers in excess of any reasonable construction of the agency's authority. It did so arbitrarily, with the guidance of two over-reaching commissioners. Regulatory Caesarism should be interred with (apologies to the Bard) Caesar's bones. If presidents are not supposed to be Caesars, there is no case for FCC chieftains achieving such status. The current FCC chairman understands this, but reforms are needed to guard against successors who, like Oscar Wilde, can resist anything but temptation.

[ET CETERA]

Fighting for bandwidth. Demand for bandwidth is not just civilian. The US military anticipates a severe shortage of bandwidth over the next decade. In the Gulf War the entire military bandwidth usage was 100 megabits per second; a single Global Hawk remotely piloted vehicle needs 500 megabits per second today. In 2000 the Defense Science Board estimated that in 2010 the military would need 16 gigabits per second of bandwidth. But the three satellites planned for launch by the Defense Department in 2004 to 2006 will provide only 6 to 7.5 gigabits of bandwidth per second. During the Kosovo air campaign in 1999 the military's communication needs exceeded all available commercial and military satellite bandwidth combined. The military's plans in the 1990s assumed that almost 1,000 new birds would reach orbit. But between 1998 and 2002 only 275 of 675 planned satellites were launched. Inadequate bandwidth means that images had to be degraded during the Afghanistan campaign; this could make identifying specific personnel for targeting in real-time practically impossible.[10]

Cyberwar on the home front. The federal government has just awarded a $6.5 million grant to George Mason University and James Madison University for the study of counter-measures to cyber-terrorism. GM will focus on legal strategies while JMU addresses technical issues. A prime concern is China, which has an ambitious cyberwar program.[11]

Internet milestone. Internet2, a new research network, announced the successful transfer for an entire CD's data over 12,272 kilometers in 13 seconds, a data rate of 401 megabits/second.[12]

[1] Hundt, Reed E., You Say You Want a Revolution: A Story of Information Age Politics, p. 153 (Yale University Press 1999).
[2] Id., p. 157.
[3] Id., P. 182.
[4] Id., p. 155.
[5] Id., p. 177.
[6] Id., p. 88.
[7] Testimony of Federal Communications Commissioner Harold W. Furchtgott-Roth before the House Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer, Mar. 14, 2000.
[8] International Competition Policy Advisory Committee to the Attorney-General and Assistant Attorney-General for Antitrust, Final Report, Appendix 3-B, p. v. (Emphasis added.). It should be noted that the Assistant A-G for Antitrust at the time, Joel Klein, dissented from this part of the committee report.
[9] Federal Communications Commission Updates Merger Review Process, *FCC News*, Mar. 14, 2002.
< http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2002/nrcc0206.html >
[10] "Military Feels Bandwidth Squeeze As the Satellite Industry Sputters," wsj.com, 11:51 EST, Apr. 9, 2002.
< http://online.wsj.com/article/0,,SB1018389902229614520-militaryfeelsbandwidthsqueeze,00.html?collection=wsjie/30day&vql-string=%28military+feels+bandwidth+squeeze%29%3Cin%3E%28main%2Dhed%29 >
[11] "Va. Colleges Get Funding To Help Fight Cyber-Terror," *Washington Post*, p. A12, May 15, 2002.
[12] < http://www.smh.au.com/articles/2002/05/23/1022038451171.html >

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Discovery Institute's mailing address is:
1402 Third Avenue
Suite 400
Seattle, WA 98101

Questions and comments may be emailed to:
mailto:wohlstetter@discovery.org