"Competition Policy and the Communications Marketplace"

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Thank you. I am delighted to be here at the Media Institute once again. Two years ago I was invited to speak here, and chose as my topic the intersection of our Constitution's First and Fifth Amendments and communications policy. At that time, I spoke against the backdrop of what turned out to be a two year effort in Congress to rewrite the communications laws.

That effort died in the final days of the last Congress. And I want to commend the leaders of the House Energy and Commerce and Senate Commerce Committees who tried, on a bipartisan basis, to fashion legislation more appropriate to the communications marketplace of today.

But with a new Congress, we have a fresh opportunity to think about what makes sense for the future of communications policy.

And, just to get to the bottom line, I think we are at a time and place where the level and intensity of competition in the communications marketplace demands that "reform" be something dramatically different . . . something that reflects the fundamental change that has and continues to occur in the marketplace.

That fundamental change has swept through every industry and created new ones. But of course, I am most familiar with what that has meant for the cable industry.

This is not your father's cable industry.

Since 1996, the cable industry has spent well over 100 billion dollars on system upgrades to build a fiber optic, interactive network. We've invested tens of billions more in creating exciting new content, more than doubling the number of nationally-delivered cable networks in less than a decade. And, we've created tens of thousands of jobs around the country.

Cable operators were the first to introduce broadband services to the American home and we fundamentally changed the Internet experience for residential users. Cable's broadband service is already available to 94% of all American households, and more than 30 million households subscribe to the high speed service provided by their local cable operator.

What about voice service? Well, here too, cable operators promised to give consumers a meaningful alternative to their local telephone company, and we delivered. Using our broadband network, the cable industry now markets telephone service to more than 90 million homes and serves 10 million residential customers.

Our deployment of broadband, I would like to underscore, was done with private risk capital in a competitive market, and without the benefit of a government regulator to guarantee a return on investment or to provide other special protections.

The industry's investment in programming continues to change the face of video. Cable is increasingly recognized as the source for diverse and compelling programming by critics and the viewing public. Thanks to cable, millions of television viewers across the country have access to programming that satisfies their personal preferences, whether it is foreign language programming or coverage of local news and sports. In each of the last five years, ad-supported cable networks led the seven broadcast networks in primetime viewership.

Meanwhile, more than 33 million customers – more than half of all cable subscribers – currently purchase "digital tiers" of video, which include hundreds of additional channels of video programming and CD-quality music. And the cable industry is leading the way in the deployment of high definition television. Today, there are already 30 cable networks transmitting in HD, with many more to come.

Video on demand has exploded; thousands of hours of on-demand programming in digital and increasingly in HD are available, often at no additional charge . . . and now we are moving into an exciting era where first run movies are available on cable at just about the same time they are available on DVD.

Finally, as attractive as these offerings are individually, cable companies now also package video, voice, and data services, providing consumers extraordinary value.

We face considerable competition in each of these markets. Twenty years ago, cable and broadcast television held nearly 100 percent of the market for in-home distribution of video. Today, direct broadcast satellite has 29 million subscribers and the telephone companies are aggressively entering the business. In addition, the increasing ubiquity of broadband is giving consumers ever more ways to watch video through platforms like the Xbox 360 and Apple TV.

In the voice market, despite our considerable inroads, we are still the new entrant offering the first sustainable facilities-based competition to the telephone companies.

In the broadband market, we clearly compete toe to toe with the telephone companies every day. But the truth is, a growing number of consumers can also choose from not only DSL but also broadband wireless services and emerging technologies like broadband over power line.

Competition and extraordinary advances in technology have increased choice and value for the consumer across the board. That is the reality that defines the communications marketplace today.

Much has been written about the rise of Internet Protocol, and its impact has truly been profound. IP has changed the competitive landscape for all communications services. From now on, every network will likely be a multipurpose platform offering video, voice, and data in competition with every other network. Intermodal competition will be the rule, not the ideal that has always been just beyond reach.

IP may be the most important game-changing technology, but it is not the only one. The transition from analog to digital video, while not yet complete, is already providing consumers with a more robust array of services and the ability to customize what they watch and when. Satellite and terrestrial wireless networks offer services with the quality and range that rival their landline counterparts. Other technological developments will offer consumers the ability to access content and information anywhere, anytime and on a variety of platforms.

Given the scope and pace of these advances, it is appropriate to take a fresh look at the regulatory framework that governs communications. When we do – or at least when I do – I see a framework that may be of historical interest but that is increasingly irrelevant. It is long past time to consider a fundamental shift in how we take into account today's competitive and diverse communications environment.

How long? Well, consider that today's Communications Act is basically a cut-and-paste of the Interstate Commerce Act of 1887 and the Radio Act of 1927 – combined age, 200 years –with the Cable Acts of 1984 and 1992 of somewhat more recent vintage. All of these statutes generally presumed that service providers were single-product monopolies whose anticompetitive tendencies could only be controlled by significant and ongoing government oversight.

It is certainly true that the FCC has tried over the years to accommodate the growth of competition – one thinks of former Chairman Wiley and his "open skies" policy, or former Chairman Ferris deregulating the radio industry in the late 1970s, or the deregulation of "competitive" carriers in the 1980s. And the Telecommunications Act of 1996 represented a bipartisan embrace of competition and deregulation, promoting investment by the cable industry and new choices in voice, data, and video. However, the basic statutory framework remains unchanged. Thus, today's regulatory regime is a curious, if entirely understandable, amalgam of sector-specific rules born of a particular time and place.

Now, I should hasten to add that I am not arguing that our current regime is a disaster. Far from it. In fact, I would argue that competition is now flourishing, investment is taking place, and innovation is exploding all around us. But imagine a world in which litigation was rare, rather than routine. Imagine if communications industries could take the resources and manpower currently captured by regulatory arbitrage and devote them to more innovation and investment in the future. To some extent, we can't even know what opportunities we are missing under the current regulatory framework.

So, what is the right framework to consider?

At the outset, let me say that I haven't invented the suggestions I'm about to discuss. Instead I have borrowed heavily from and want to give due credit to others. I want to acknowledge Verizon's Tom Tauke who injected the concept of "new wires, new rules" into the policy debates. And I want to commend the Progress and Freedom Foundation (PFF) for pulling together a large and *bipartisan* group of people with diverse views to develop what they called a "Digital Age Communications Act (DACA)." And, finally, I want to commend Senator Jim DeMint who introduced a bill that mirrors this approach.

NCTA has for many years taken the position that we should dramatically reduce if not eliminate economic regulation as facilities-based competition succeeds, while retaining carefully targeted social goals such as USF, CALEA, and E-911. We have a proud tradition of embracing economic deregulation . . . for us and for our competitors. We supported the ability of the Bells to get into video under the same rules in the 1996 Telecommunications Act. We supported the Satellite Home Viewer Improvement Act of 1999, which unleashed our fiercest competitors in video. And we supported the deregulation of all other wireline and wireless broadband services after we won our case before the Supreme Court in Brand X.

And, in the last Congress, like Members of Congress and other industries, we struggled to address technology changes that were clearly well advanced, particularly with respect to Internet Protocol technology.

However, we should not confuse technology definitions with policy goals. It may be true that IP-based networks promote competition, but that does not mean IP-based networks should be the sole beneficiaries of deregulation, or that those networks should get the benefits of deregulation solely because they use IP. Such a technology-specific policy misses the point that the introduction of IP subjects *all* providers, regardless of technology, to competition.

So, here's the key point: Rather than tie favorable regulatory treatment to a particular technology, government policy should make regulation the exception rather than the rule for all communications services.

In some ways, this is hardly revolutionary. It is, after all, the way we approach just about every other sector of the economy. And it is the approach embodied in PFF's "Digital Age Communications Act."

That proposal envisions a role for the FCC more like that of the Federal Trade Commission. The FCC would have authority to intervene in the marketplace only if it determines that marketplace competition would not adequately protect consumers against unfair methods of competition or unfair and deceptive practices. There would be a presumption *against* regulation, and in fact all FCC regulations would sunset in five years. As the PFF Working Group noted, the "regulator would act principally through adjudication, responding as antitrust authorities do, to correct abuses as they occur, largely eliminating the elaborate web of rules and regulations that has grown up under the existing statute."

Trusting markets to serve consumers is absolutely central to real reform. Shifting the burden of proof might sound like a very radical step, but I think it is a necessary step. Beyond protecting consumers against collusion or the wrongful attainment or abuses of monopoly power, any other regulatory regime should have to meet a very high burden showing why it is necessary. And I would note that President Bush just signed an executive order – building on orders issued by Presidents Reagan and Clinton – directing agencies wishing to enact new regulations to specifically identify the market failure the regulation is designed to correct. The opposite approach, the current approach, gives us what we have today, where the trivial metastasizes into the burdensome.

Such an approach, implemented appropriately, would sweep away much of the accumulated regulatory baggage that burdens the communications industries. Rate and entry regulation, detailed oversight of service quality, prior regulatory approval to construct new facilities, government-mandated access to distribution platforms, intrusive content regulation – all of these can and should be replaced by a more limited regime that relies to the maximum extent on market forces to determine the price, availability, and quality of service offerings. Of course, the government would be empowered to take appropriate corrective action in the event of demonstrated anti-competitive or anti-consumer conduct.

It is important to think of this as a systemic reform, without reference to parties or personalities. In the case of the cable industry, it is hard to overstate how important it was to have former Chairman Bill Kennard hold the line against non-facilities-based Internet Service Providers (ISPs) demanding government-mandated access to the broadband pipe, or to have former Chairman Michael Powell lead the way to ensure cable's broadband service was left largely unregulated, a decision Chairman Martin extended to other broadband providers. Those decisions to resist the impulse to regulate helped unleash enormous investment. But those decisions were made within a regulatory framework that easily could have sustained the opposite result.

There are a lot of hard issues that remain. I've not touched on the relationship between states and the federal government, or important policy debates like those concerning the Universal Service Fund. Those need attention too. But we need to begin with the fundamentals of competition policy, and there are a couple of other aspects to this I want to highlight.

First, is the issue of interconnection of networks.

The PFF Working Group concluded that there is something unique about the interconnection of networks. And, of course, there is something especially unique about the public switched telephone network, a network built with a government grant of monopoly to the original AT&T and funded through rate of return regulation. There simply is nothing like it in the rest of America's communications universe. No matter how many facilities-based providers of voice service use fiber, the Internet, coax, or copper, every one of them will need to be able to exchange traffic with the public switched network for the foreseeable future.

The PFF Working Group addressed this by allowing the FCC to order the interconnection of "public" networks. In my view, a clear interconnection requirement up front would more likely avoid years of litigation and uncertainty. But I do not believe this is a remedy that needs to go beyond voice services.

I do acknowledge that at some point the level of competition should grow to such an extent that the incumbent phone companies could no longer dictate interconnection terms, making it feasible to rely on market-based interconnection. And I do also recognize that the Internet backbone accomplishes interconnection and peering largely through marketplace solutions. Taking all that into account, perhaps the best way to address voice interconnection might be to provide certainty with clear rules up front, minimize the burdens, and establish a reasonable test for when specific voice interconnection requirements could sunset.

Second, regulators should be prohibited from establishing regulatory classifications or assigning different regulatory burdens based primarily on a provider's choice of technology. A provider's obligations should not turn on whether the provider is IP, circuit-switched, analog, or digital. Rather, they should be a function of the level of competition in the market and the provider's own market power or lack thereof. Markets defined by substitutability and real and potential entrants should be the touchstone, not choices in technology.

Third, regulators should be barred from dictating business plans or mandating technologies to any provider absent extraordinary circumstances, such as the need to ensure a basic level of an essential service or public safety interoperability. I note that the Senate Commerce Committee just took a significant, bipartisan step in this direction when it adopted the Cantwell-Sununu amendment to the VOIP E-911 bill, which bars such technology mandates in the context of E-911 service.

And, finally, refocusing the FCC is as important as reform of the rules. Former FCC Chairman Bill Kennard correctly predicted in 1999 the changes that would take place in the telecommunications marketplace, and stated that the "FCC must wisely manage the transition from an industry regulator to market facilitator." That was a great vision. It is not even close to where we are today, eight years later.

Instead, we see an agency whose budget keeps increasing . . . primarily paid for by fees on the industries it regulates even as markets within its jurisdiction become more competitive. We have an agency that seeks more regulatory authority rather than less. And, instead of focusing on how to unleash new technologies that would benefit consumers, we find the FCC asking and answering the same questions over and over again, often in cable's case, involving the provisions found in one statute passed in 1992.

Now, no treatment of communications regulation is complete without the obligatory reference to "convergence" and "silos," so let me close with mine. It is often said that the convergence of voice, video, and data on a single platform – or more accurately, on every platform – means we cannot impose discrete regulation on these services. After all, if "bits are bits" in a digital, IP world, how can we even figure out what we're regulating?

Yet, regardless of the delivery mechanism or platform, there are some basic social obligations that communications service providers should meet. While some of these – such as accessibility for people with disabilities – should be applicable to all providers, others are most appropriate for just voice, or video, or data. And, I might note, we in the cable industry are proud of our role in promoting localism and diversity, particularly through our video offerings. At any rate, in addressing social obligations, some acknowledgment that consumers still differentiate the experiences among services is going to be necessary.

However, there are several reasons to break down regulatory silos. First, and most obvious, technology has increasingly, though not completely, rendered arbitrary and counterproductive what used to be bright line distinctions. Silos don't just regulate differently. They deregulate differently. Why, for example, should those labeled as "telecommunications carriers" enjoy the right to obtain forbearance from regulation in Title II, while those service providers subject to other Titles of the Communications Act have nothing similar?

Second, regulatory silos help contribute to a certain amount of intellectual confusion. My friend Randy May describes silos as "metaphysical distinctions" and has said that the great communications debate really is between those who are convinced competitive markets exist and free markets work, and those who believe in unbundling by government fiat.

What do I mean by unbundling? The forced sale, resale, lease, or use of networks or devices attached to those networks. Those who advocate a la carte, must-carry regimes, so-called "open" or forced network access, or net neutrality fall in the unbundling camp. One can certainly make the case that the level and intensity of competition in the marketplace has already rendered those theories irrelevant.

And I'm not really certain why – in 2007 – we have to re-learn the lesson that regulatory regimes that socialize all the benefits while putting all the risk on private investors, are regimes that lead to less innovation and investment. But the point here is that many don't even realize that we are essentially re-litigating the same issue over and over again . . . and as far as I am concerned, the free market and facilities-based competition won intellectually a long time ago.

Now, if we are honest about it, every industry has a favorite regulation and a certain comfort level with what is familiar. Probably everyone in this room has heard Senator Sununu say that we all want a level playing field, as long as it is ever so slightly tilted in our direction . . . or Chairman John Dingell say that he knows we all just want a "fair advantage." That's undoubtedly true. And the only real antidote to that is to encourage all industries to put everything on the table. No one is likely to cede ground on any issue today so long as we have to work within the current regime.

And for those of you who support the Media Institute and its good work on the First Amendment, I believe you have a stake here too. I mentioned at the outset that I spoke about the importance of the First and Fifth Amendments to communications policy nearly two years ago. Since then, I have been struck by how much communications policy implicates those freedoms. A regulatory regime that focuses primarily on harms to consumer welfare and carefully delineated core social goals is, I submit, a regime that is far more likely to respect the protections of freedom of speech, property rights, and due process consistent with the Constitution.

I also fully understand that such an effort to rethink the statutory and regulatory structure of the communications landscape takes time. I have enormous respect for the experience and knowledge of the leadership and membership of the House Energy and Commerce Committee and the Senate Commerce Committee. They may choose another course, and, if so, we at NCTA will work constructively to help in their task. But I hope, as they examine the marketplace this year and next, they will consider whether the time has come to base competition policy on the realities of the competitive marketplace we have today.

Thank you.

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