



## **Consumer Federation of America**

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### **FOCUS ON THE PUBLIC INTEREST AND RESTORE THE PRAGMATIC, PROGRESSIVE PRINCIPLES OF THE COMMUNICATIONS ACT OF 1934**

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#### **WHAT'S WRONG WITH THE AGENCY?**

The administrative record of the Federal Communications Commission is simply horrendous. Decision-making is opaque, procedures are inconsistent, companies are not held to account, and the public interest in many of the outcomes is obscure, to say the least. Other agencies do it better today and the FCC has done it better in the past – but not always, and certainly there is no clear difference between which political party has been in charge. Before we decide to throw out the agency and replace it with a new one, however, we should reflect on the causes of the poor performance. The problems are legion, but abolishing the agency will not solve most of them.

- The agency is highly political because of what it does, but what it does is extremely important so there is no chance of simply abolishing its function or the politics that will inevitably surround it.
- The statute governing the administrative process in America is inadequate to ensure proper policing of agency misbehavior.
- The FCC's organic statute is absurdly ambiguous.
- The institutional structure of the FCC is flawed.

- The agency has suffered through a series of chairman who have swung between the ideological, ego maniacal, dictatorial, and inept.

While some of these problems might be amenable to a simple legislative fix, most are not, and there is no such thing as a simple legislative fix when it comes to media and communications in the U.S. Congress is incapable of addressing agency inefficiency because any legislative changes will alter the balance of power among industries, which tends to prevent Congress from acting.

### **Important Functions, Attract Political Interests**

The FCC is inherently political, in a sense more political than any other agency, because it regulates the electronic media. Broadcast regulation has its origin in the licensing of broadcasters, which has been justified because of the nature of broadcasting. Politicians fuss with broadcasting much more than with print journalism for two reasons. They have the constitutionally approved power to do so under the licensing regime and broadcasting determines their political fate. Obama did not spend hundreds of millions of dollars on TV advertising for nothing. Thus, broadcasting is still a powerful electronic voice conferred by license on a select few and therefore should continue to be subject to public interest obligations and oversight.

Responsibility for the openness of the communications network is also a political function of considerable importance. Regulation of the industry was born out of a refusal to interconnect with independent companies who generally served less dense areas. The growth of the Internet was supported by two critical decisions in 1968 that enforced the principle that the communications network should be a neutral platform (Carterphone and the Computer Inquiries). Anyone who believes that network owners would voluntarily provide such an environment probably believes that the deregulatory legislation of the past decade, which gave us Enron, Worldcom, the commodity bubble and the current financial meltdown, was a good idea. It may sound great in theory, but it does not work in reality. Nondiscrimination in access to the communications network is a more vital function today than ever, as communications and commerce converge. Impeding that function for profit is probably more inviting today than ever to communications network owners for exactly the same reason that abuse and irresponsibility are so attractive in the financial sector. The flow of huge volumes of transactions that are vitally important to the economy (and, in the case of information, democracy) creates a huge potential payoff to those who shape the flow of traffic to the network owner's advantage and profit at the expense of consumers and competition. Thus, public interest obligation and oversight of communications are still necessary.

Any new agency that provides these vital functions would be just as susceptible to political influence as the old.

### **Weak Administrative Procedures**

The Administrative Procedures Act (APA), as implemented under the Chevron Doctrine, is fundamentally flawed. If the FCC can get away with all the crap it does and not be subject to certain and immediate reversal in court on procedural grounds, then administrative law and practice is as much the problem as the agency itself. We allow agencies far too much discretion

and do not impose rules to ensure genuine procedural fairness. The chances that we can fix the APA in a manner that addresses this deficiency anytime soon are somewhere between slim and none.

### **Ambiguous Policy**

The Congress has abdicated its fundamental responsibility in amending the Communications Act of 1934 (the FCC's organic statute) without offering a more precise vision of fundamental policy goals. The important decisions that affect democratic discourse should be made by the elected representative of the people, not appointed bureaucrats. Congress could not reach consensus on the most important issues, so it punted them to the FCC. The agency is now making decisions that are way above its pay grade, which angers everyone. Make no mistake about it, however; the industry wanted it this way. Unable to get a clear win in the Congress, the industry pressed to shift the decisions to the agency where it has a home field advantage. The chances that we can fix the Communications Act are not much better than fixing the APA. The first time I testified on the Telecommunications Act of 1996 was 1984. It took Congress a dozen years to write an awful statute, so I am not holding my breath to wait for it to do better in the future.

### **Flawed Structure**

The agency is ridiculously top heavy, with a chair that controls everything. Commissioners have no access to agency resources. Bureaus are not independent enough to do credible work. This master/slave relationship does not promote collegiality and professionalism and, while the personality (whim) of the chair takes on excessive importance. We could legislate a better institutional structure, but the character of the Chairmen is dependent on the judgment of the President and the advise and consent role of the Senate. Neither of those can be readily addressed through legislation.

Given this reality, I think we should press the process of change of administration as far as we can to fix the agency. We were told we were voting for "change we can believe in." Now we have to turn the change of administrations into "regime change" at the FCC. We ought to demand that the President-elect appoint the right people, people who know what needs to be done and how to do it, and then we should hold their feet to the fire. Having worked five transitions, I believe that we can do a lot by getting the right people appointed and remaining vigilant.

### **WHAT IS TO BE DONE?**

I suggest four areas of action. Working from the "how" to the "what" we need procedural fairness, administrative effectiveness, substantive efficacy, and public interest. The first three are tactical, the fourth is strategic, so I will devote particular attention to it.

### **Procedural fairness**

We need to solve three problems that afflict the agency – transparency, consistency and accountability. The agency must open up the rulemaking process, putting actual rules out for

public comment and engaging the public fully in the process. Under current practice, the details of rules in most Notices of Proposed Rulemaking barely rise to the level of a decent Notice of Inquiry. The *ex parte* process needs to be reformed. Peer review and public hearings conducted in an open and proper manner need to become a routine part of the administrative process and be subject to clear rules to ensure objectivity.

### **Administrative effectiveness**

The duty of the Commission is to uphold the law. If a commissioner does not like the law, he should have run for Congress and proposed changes to it. The duty of the Commission also includes telling the Congress where the law is inadequate to accomplish the goals set forth in the statute. Those recommendations should come after careful study and be subject to public input.

It is critical for a new Commission to get something done, quickly and efficiently. This will send a message that the Commission must be taken seriously. As a general matter, the agency needs to set reasonable time lines and adhere to them. Strategic plans to identify the important issues and launch proceedings that engage those issues early are critical to resolving them in an orderly manner.

It is helpful for the Commission to occasionally confound conventional wisdom, i.e. to reach a decision that surprises the party of the majority and one that surprises the party of the minority. Such surprises, early on in an administration, mean that the Commission cannot be taken for granted.

Having sent the signal that the Commission must be taken seriously and cannot be taken for granted, it is critical to listen carefully to the pleadings before it and maintain an objective stance. Having induced commenters to invest in the process, the agency must act in a manner that conveys a sense of fairness.

### **Substantive efficacy**

In order to move the huge agenda of the agency forward, the new administration should pursue a mix of actions that blends the immediate, the important and the symbolic. Immediate and symbolic gratifications create a reservoir of support, but ultimately it is by tackling the important issues that success will be defined. Immediate and symbolic actions provide a cocoon for important action. The immediate actions provide near term sustenance and the symbolic actions provide patience and confidence that things are headed in the right direction.

## **DEFINING THE PUBLIC INTEREST**

### **The Broad Debate that must be Engaged**

Defining the public interest is the most important thing a new Commission can do, but also generally the most challenging. At this moment in time it is extremely important, but also more manageable because the contrasts that need to be made are quite stark.

Michael Powell defined the Bush Administration's view of the public interest with a quintessentially free market ideology. He gleefully belittled the concept of the public interest (in his Angel of the Public Interest speech), embraced trickle down economics in his declaration that the digital divide was really a "Mercedes Benz divide," and repeatedly offered the market fundamentalist solution to all problems, just get the government out of the way and let the market do its things. More than any FCC Chairman since Mark Fowler, who declared that "television is just a toaster with pictures," Powell repeatedly argued that the pursuit of private interest is synonymous with the public good. He was the perfect spokesman for the Bush Administration and he was John McCain's lead person on telecommunications policy.

Powell was dead wrong on every count. Market fundamentalism has failed and is collapsing across a broad range of economic sectors. That must be the foundation on which the new FCC sets its policy.

It has long been an article of faith in the public interest community that the pursuit of private profit is not synonymous with the public good, but recently, Alan Greenspan, the leading apostle of free market ideology, went one step farther. In language more clear than his practice, he admitted in congressional testimony that the pursuit of private profit is not even synonymous with the private good. "Those of us who looked to the self-interest of lending institutions to protect shareholders' equity, myself included, are in a state of shocked disbelief." He went on to admit that he "made a mistake in presuming that the self-interests of organizations, specifically banks and others, were such that they were best capable of protecting their own shareholders and their equity in the firms." If the banks cannot even protect their own shareholders, you can well imagine the public interest does not fare very well when market fundamentalism lets unregulated firms run wild.

At this moment, when we are implementing "change we can believe in," we must locate the debate over communications and media policy within the broader debate over the failure of market fundamentalism. The Communications Act of 1934, which was butchered by the faulty implementation of the Telecommunications Act of 1996, was not a relic of the New Deal. Nor was the Federal Power Act of 1935, which was undermined by the Energy Policy Act of 1992, the Glass-Steagall Act of 1933, which was repealed by the Graham Leach Bliley Act of 1999, or the Commodity Exchange Act of 1936, which was hacked to pieces by the Commodity Futures Modernization Act of 2000. These were not antiquated relics of a bygone age; they are pillars of a stable, progressive economy. It has now become quite clear that abandoning the New Deal's pragmatic, progressive principles, which had successfully governed the economy for well over half a century, was a huge mistake.

**The efficient market hypothesis is wrong.** Unregulated markets do not automatically create a stable, growing economy. In each of the sectors, there is a critical market failure that prevents the sector from doing what it is supposed to do, efficiently allocate resource to uses. Because the nature of the economic activity varies from sector to sector, the precise form of the market failure will vary, but there are repeated patterns. Pre-deregulation telecommunications policy recognized this in its commitment to just and reasonable rates and nondiscriminatory interconnection and carriage.

**The income inequality hypothesis is wrong.** Trickle down economics does not produce a stable growing economy. Inequality is not a necessary condition for economic progress. To the contrary, inequality is a sufficient condition for economic meltdown. Inequality created by regressive tax cuts for corporations and the wealthy does not provide savings and investment to fuel economic expansion. A narrow distribution of wealth does not create a stable base for economic growth because wealth is not sufficiently spread to support demand. Household budgets are crushed with rising costs for basic needs like housing, healthcare, education and energy. They plunge into debt to maintain their living standard. Savings are too low and concentrated wealth creates rampant speculation rather than productive investment in the real economy. The tide may rise, but it does not lift all boats because the cross current of inequality is so strong that the middle class is capsized and drowns in an ocean of debt. Pre-deregulation telecommunications policy recognized this in its commitment to reasonable rates and universal service.

**The “less government the better” hypothesis is wrong.** The public sector is not inherently inept and the private sector is not inherently skilful. The claim of public sector ineptitude pales in comparison to the ineptitude, fraudulent accounting, irrational lending, and conflict of interest driven abuse in the unregulated markets created by market fundamentalism. Stable economic growth is not the outcome of small government for two reasons. First, it undermines effective oversight of the economy, which plays a key role in establishing the conditions for meltdown. Second, when the other two fallacies start to push the economy off the tracks, the “less government fallacy” prevents the government from taking the vigorous measures necessary to prevent the wreck or put the economy back on track quickly.

Misled by the effectiveness of the New Deal legislation, market fundamentalists undervalued consumer and investor protections as well as the importance of smoothing out boom and bust cycles in key sectors like finance and utilities. Deregulators assumed that the correlation between the sharp increase in public interest obligations codified by the New Deal legislation and the subsequent growth in these industries was just a coincidence. There is now a great deal of evidence that they were wrong. We need to restore the effective oversight across the infrastructure of the economy (finance, telecommunications, electricity, commodity markets) that was foolishly abandoned in the past couple of decades.

## Utilities

Finance and utilities are infrastructure in the sense that the firms in this sector have “very great influence, as suppliers of essential inputs to other industries, on the size and growth of the entire economy... [and are] uniquely prerequisite to economic development... [T]hey condition the possibilities of growth.”<sup>1</sup> Utilities have the added feature that they are still “characterized by great economies of scale” and a tendency toward natural monopoly or small numbers of providers. In utility sectors, the elasticities of supply and demand are so weak that price signals do not work well. Entry is difficult and there is a tendency to (at best) a small number of dominant firms for the basic service. Market power is pervasive and abuse is inevitable, unless checked by regulation. Unfettered private interests impose scarcity, keep prices high and limit the scope of

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<sup>1</sup> Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (Cambridge: MIT Press) p. 11.

availability. The public goods elements of these industries are underprovided and mismanaged. No one builds reserve margins and infrastructure goes begging, and coordination is undercut.

The telecommunications network features an additional challenge. One of the great challenges in the high technology sector where platforms play a key role is the problem of vertical leverage. The telecommunications network is a platform that supports a vast array of information services and products. The information that flows over the communications network creates large positive externalities that do not enter into private accounting because they are too diffuse to be captured by private actors. Unimpeded information flow is an essential ingredient for both innovation in the economy and democracy in the polity. Public policy had recognized this with an explicit commitment to public support and nondiscrimination in access to the communications network.

During the past two decades stodgy “old economy” industries, with their slow growing but secure, dividend-paying stocks, were reviled on Wall Street in comparison to the “sexy” paper returns of the dot-coms and financialized, securitized special investment vehicles. Utility became a four-letter word. Utility stocks reflected the economic environment that public policy had created for them, one founded on the sound principle that the infrastructure building blocks for the rest of the economy need ubiquity, stability and long-term commitments. It turns out that the dot-coms, shadow banks and grey commodity markets lacked value and their managers, auditors, and regulators lacked values. We forgot the critical importance and value of ubiquitous, stable, basic service at affordable prices.

**CHANGE WE CAN BELIEVE IN:  
BACK TO THE FUTURE OF PRAGMATIC, PROGRESSIVE PRINCIPLES**

Regulators need clear authority and adequate resources to exercise oversight over behavior, prevent conflicts of interest and ensure transparency and accountability. Regulation should apply to what people do, not who they are. Regulation will frustrate incumbents who would like to maximize profits by abusing their market power and some innovators, who would like to use the infrastructure in ways that regulation would not allow. Regulators should be sensitive to the needs of innovators, but they should not sacrifice ubiquitous, affordable, nondiscriminatory basic service in the name of innovation; regulated products beat the heck out of toxic assets from the consumer/taxpayer point of view. Ubiquity, affordability and nondiscrimination are valuable as ends themselves and they provide an important platform that is the basis for broadly useful innovation, as the first three decades of Internet development demonstrate.

The first sentence of Title I of the Communications Act of 1934 established the correct principle “to make available, so far as possible, to all people of the United States a rapid, efficient, nation-wide and world-wide wired and radio communications service with adequate facilities at reasonable charges.” The *laissez faire*, trickle down approach of the Bush administration has failed on both accounts. We have neither an adequate communications network, nor reasonable charges.

The first two paragraphs of Title II of the Communications Act establish the principle that the communications network should be based on mandatory interconnection and carriage.

They add that charges, practices, classifications and regulations that are unjust or unreasonable or make any unjust or unreasonable discrimination are illegal. The decision to abandon these principles under Title II and try to rebuild them under Title I has been a nightmare, a ten-year battle that admits we need nondiscrimination, hopes that the marketplace will provide it, but is constantly cleaning up the mess when it does not. A return to these new deal values is a good place to start in reforming the FCC.

For many, reform of the FCC is a cover for having it do less (if not eliminating it altogether), but the failure of market fundamentalism and the experience with deregulation in the telecommunications space demonstrates that what we need to do is to get back to the traditional values that guided the sector for most of the last century. The most important thing we can do to reform the FCC is to force it to take seriously its obligation to protect and promote the public interest as defined by the Communications Act and restore the pragmatic, progressive principles of the New Deal that served us so well for so long.

A strong leader running the FCC supported by Commissioners committed to implementing the Act based on facts and not ideology or theory will:

- Reinvigorate the commitment to diversity and localism in the broadcast media;
- Reinstate nondiscrimination rules for the fundamental networks essential to our democracy and the Internet commerce critical to our economic and social fabric as a nation;
- Update universal service to ensure affordable broadband for all consumers without enriching telecom companies or favoring one technology over another;
- Reinstate a spectrum and equipment policy that prevents dominant firms from blocking any form of potential competition through either infrastructure (including the airwaves), devices or applications; and
- Ensure that stimulus does not deteriorate into corporate welfare, as the financial bailout did. A progressive stimulus package should direct funding to the distinguishing features of 21<sup>st</sup> century infrastructure – human capital and social networks. Human capital and social networks are the unique inputs of the digital economy that create collaborative production. These can be supported by directing funds to people and communities, rather than corporations.