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Antitrust Enforcement And Sectoral Regulation: The Competition Policy Benefits Of Concurrent Enforcement In The Communications Sector

By Jonathan Baker

Antitrust Enforcement And Sectoral Regulation: The Competition Policy Benefits Of Concurrent Enforcement In The Communications Sector

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The US competition agencies – the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) – often share jurisdiction with sectoral regulators also charged with fostering competition, including the Federal Communications Commission (FCC), the Federal Energy Regulatory Commission (FERC), and several agencies that regulate financial institutions. This article highlights how this institutional structure – concurrent jurisdiction – helps protect competition through the lens of recent US experiences involving the communications industry.

I. THE ROLE OF POLITICS

In my experience, the FCC pays more attention than the antitrust agencies to political considerations². One window into why this occurs comes from comparing the FCC and FTC. These agencies have a similar formal structure: each is an independent agency with Commissioners from both political parties, and each has both rulemaking and adjudicative powers. Despite these similarities, the agencies have different internal atmospheres, with politics mattering more at the FCC. My sense is that there are two main reasons.

First, the FCC focuses on a single sector of the economy: communications. This focus puts the FCC in “repeated play” with providers of wireless, wireline, video distribution, and satellite services. In consequence, large communications firms like AT&T and Comcast devote substantial “Washington office” resources to monitoring FCC activities and interacting with agency officials, as well as engaging with other governmental actors in Congress and the Executive Branch that influence communications policy. By contrast, the antitrust agencies’ jurisdiction is economy-wide and, most firms, even large ones, tend to view their interactions with the competition agencies as episodic not routine.³ This difference means that, on average, the FCC confronts more concentrated interest groups, which tend to be able to organize politically (by solving collective action problems) more effectively than “diffuse” groups.⁴

The second reason that the FCC seems more political than the FTC comes from differences in the nature of each agency’s work. The typical FTC matter is adjudicative, whether on the competition side of the house or the consumer protection side.⁵ Accordingly, the FTC is guided by judicial norms. Agency decisions are based on law and policy, not politics, and the agency describes itself as performing a law enforcement function.⁶ By contrast, the typical FCC matter is a rulemaking, which

is often a quasi-legislative activity. As a result, legislative norms guide at the FCC: the agency pays attention to the views of interested parties and groups (not just the arguments those parties proffer), and at times aims, at least in part, to work out an interest group bargain.⁷ These broad generalizations brush over much of the fine detail by which individual matters are decided at the two agencies, but they capture an important difference.

II. CAPTURE

The greater role of politics at the FCC does not necessarily mean that the agency's performance is better or worse than that of the FTC. It may be sensible use of governmental resources, for example, for Congress in effect to delegate to an agency the identification and ratification of interest group bargains⁸; under such circumstances, the agency itself would be performing as intended, and any concerns about agency outcomes would properly be attributable to the legislature, not the agency.⁹ As with legislation itself, though, there is no guarantee that outcomes based on interest group bargains will serve the public good – most obviously if some affected groups are systematically underrepresented in political processes, but even if all groups are at the table.¹⁰

Still, single sector agencies like the FCC are often considered more prone to “capture” by regulated industries than generalist agencies with a broad cross-industry purview like the competition agencies. Agencies are described as “captured” when they appear to favor the interests of the regulated industries over public interest concerns like promoting competition.¹¹ This charge has at times been leveled at the FCC.¹² By contrast, when the FTC is criticized, it is generally not for capture but for other occasional failings, like lethargy,¹³ taking “cheap consents”¹⁴ or its general approach to antitrust.¹⁵

Agency capture is largely not about direct political influence.¹⁶ If an agency makes a bad decision because it has little insulation when the affected industry complains to Congress, the problem is the capture of the legislature, not the capture of the agency. Capture is also not mainly the product of the “revolving door” (the movement of personnel between regulatory agencies and regulated firms, in both directions). In my experience, industry jobs go to agency veterans largely because they are seen as effective and have developed expertise, not because of the positions they took as agency officials.¹⁷ Moreover, the revolving door helps bring good people into agencies, both at the start of their careers, when they may value the option of leaving later, and later in their careers, when they can use skills and experience developed outside on behalf of the public interest.

IF AN AGENCY MAKES A BAD DECISION BECAUSE IT HAS LITTLE INSULATION WHEN THE AFFECTED INDUSTRY COMPLAINS TO CONGRESS, THE PROBLEM IS THE CAPTURE OF THE LEGISLATURE, NOT THE CAPTURE OF THE AGENCY.

My sense is that capture is a threat at the FCC mainly when the regulated industry can manage the agency's information.¹⁸ When an industry speaks with one voice, and has privileged access to the relevant information, it can shape how the agency sees an issue. The FCC's engineering and economic expertise in critically reviewing the information submitted by industry only goes so far without data. Moreover, the competition agencies typically obtain more infor-

mation using compulsory processes than the FCC obtains through voluntary submissions and routine data collection from regulated firms, particularly in a political environment in which the latter activity may be questioned as imposing unnecessary burdens on industry.

Many FCC decisions are not subject to biases resulting from information asymmetry. In 2011, when the FCC reviewed AT&T's proposed acquisition of T-Mobile, it was in a strong position to avoid regulatory capture notwithstanding AT&T's extensive lobbying effort:¹⁹ the concurrent DOJ review gave it access to the type of information that the antitrust agencies obtain through use of compulsory process, and the industry did not speak with one voice (as one major wireless provider expressed concerns about the acquisition). To the extent capture is nevertheless a concern with the FCC today, it could be addressed in part by expanding the range of information the FCC requires regulated firms to submit on a routine basis.

III. TAKING A LONG TERM PERSPECTIVE

In the U.S. system, sectoral regulators have an advantage over the competition agencies in protecting potential competition, particularly when dealing with fast-moving markets. It is difficult for the competition agencies to take a long term focus in their enforcement actions because the generalist district court judges they must convince rarely have prior industry expertise and may in consequence tend to view predictions about industry evolution as speculative. By contrast, the FCC is the fact-finder in its decisions and can bring more expertise and sustained attention to understanding industry evolution.

As a practical consequence, the FCC can take a longer view than the competition agencies. It has used that power to stop or impose conditions of some mergers that the Justice Department could not easily challenge because the firms involved were potential rivals rather than current competitors. The FCC stopped the 1997 merger talks between AT&T, then a long distance company, and SBC, a large local telephone service provider and regional Bell operating company.²⁰ The FCC also imposed competition-related conditions on the 1997 merger between Bell Atlantic and NYNEX, two local telephone service providers in adjoining territories, when the Justice Department declined to sue.²¹ The Justice Department's position on that matter was likely colored by the difficulty it would have faced in proving a potential competition case to a federal judge.²² Similarly, it likely would have been more difficult for the Justice Department to address potential competition issues involving online video distribution raised by the recent Comcast/NBCU transaction had the FCC not also been involved.²³ Moreover, the FCC was better situated than an antitrust agency to address the long-term potential competition issues that were the subject of the FCC's Open Internet (net neutrality) rules.²⁴ The FCC rejected the alternative of relying solely on ex-post competition review, the approach that competition agencies would have taken,²⁵ on the view that review after problems arise would be ineffective and too late.²⁶

IN THE U.S. SYSTEM, SECTORAL REGULATORS HAVE AN ADVANTAGE OVER THE COMPETITION AGENCIES IN PROTECTING POTENTIAL COMPETITION, PARTICULARLY WHEN DEALING WITH FAST-MOVING MARKETS.

I am not arguing that sectoral regulators are either more or less likely to make good

decisions than competition agencies. Rather, my point is that in the US system, the sectoral regulator is better able to act consistent with a long-term view of industry evolution. The two examples from 1997 involving telephone sector mergers show that doing so can be important when policy-makers seek to develop competitive markets in formerly regulated sectors. The Open Internet example distinguishes sectoral and competition agencies only if the latter decline to use rulemaking on competition matters.²⁷ In short, as the FCC explained in a recent order, the FCC's competitive analysis under its public interest standard is "somewhat broader" than competition review under the antitrust laws in that the FCC "considers whether a transaction will enhance, rather than merely preserve, existing competition," and the FCC "often takes a more expansive view of potential and future competition" than the antitrust agencies in analyzing that issue.²⁸

IV. PURSUING MULTIPLE GOALS

The close cooperation between the FCC and DOJ in reviewing the Comcast/NBCU transaction, and the similarity in the remedies the two agencies adopted, points to another benefit of concurrent merger review by a competition enforcement agency alongside a sector-specific regulator: a type of "production efficiency" in generating governmental outcomes. Concurrent review can improve overall outcomes by allowing the two agencies to exploit their complementary strengths.

The FCC and the antitrust agencies approach merger review in different ways.²⁹ One difference is in the allocation of the burden of proof: at the FCC, the merging firms must show that their deal is in the public interest, while the antitrust agencies must show harm to competition in federal court. Another is in how evidence is collected and tested: the FCC relies mainly on submissions from the parties and interested third parties in a rule-making record, while the antitrust agencies contact potential witnesses and use discovery tools like depositions to test evidence. Concurrent enforcement can enhance competition enforcement as a whole by drawing on the strengths of each agency.

One advantage of the FTC and DOJ lies in their focus: the Antitrust Division concentrates on competition issues only, and the FTC addresses only competition and consumer protection. Focus is beneficial because it is easier to make decisions when pursuing a single goal. But government is about pursuing multiple goals. Congress has asked the FCC to promote communications industry competition, but also to pursue non-competition public interest goals. These may include, for example, protecting consumers when the communications industry contains natural monopoly sectors, where competition will not succeed; preventing interference when allocating spectrum;³⁰ assuring a diversity of information sources and voices; and subsidizing broadband access to customers that are very costly to serve.³¹

THE RECENT TREND AT THE SUPREME COURT TO AWARD JURISDICTION OVER COMPETITION ISSUES TO SECTOR REGULATORS, RATHER THAN EMBRACING CONCURRENT JURISDICTION, IS TROUBLING.

Some critics of the FCC's merger reviews find it unseemly that the FCC's orders frequently address public interest issues that go beyond competition.³² Yet so long as sector regulators are instructed by Congress to pursue a broader range

of concerns, their merger orders will properly and necessarily include conditions related to non-competition goals. Under such circumstances, concurrent review ensures that competition concerns are not downplayed. For that reason, it is important to protect the antitrust focus of the competition agencies, either by housing that function in a separate agency (as with the FTC) or a separate division with practical independence (as with the Antitrust Division at DOJ). From this institutional perspective, the recent trend at the Supreme Court to award primary jurisdiction over competition issues to sector regulators, rather than embracing concurrent jurisdiction, is troubling.³³

Concurrent jurisdiction requires cross-agency coordination. If coordination is much easier within agencies than across them, then a single agency pursuing multiple goals can achieve significant scope economies unavailable to multiple agencies. I do not believe that to be the case: in my experience, coordination across agencies can work well, and coordination within agencies can be difficult. During the first term of the Obama Administration, the FCC and DOJ worked together closely on a number of transaction reviews, including two high-profile ones: Comcast/NBCU and AT&T/T-Mobile. One reason for the cooperative relationship is that the FCC's Chairman and the Assistant Attorney General for Antitrust selected senior staff who in many cases knew each other, and knew how the other agency worked. Another is that these merger reviews occurred close in time, so the agencies had recent experience working together on a complex transaction when the second merger came along. This anecdote shows that coordination can succeed, not that it invariably will. But the same is true about coordination within agencies, where different components may jockey for the ear of decision-makers, the lion's share of the budget, and control of shared matters.

V. CONCLUSION

The recent US experience in the communications arena shows how the nation's system of awarding concurrent jurisdiction on antitrust questions to sectoral regulators and competition agencies works to protect competition. That system is likely most effective when the communications regulatory has independent access to industry information to limit capture, when the communications regulator can take a long-term perspective, when the antitrust agency can focus on competition as its sole goal, and when senior appointments at the two agencies are made with coordination between them in mind. ◀

1. Professor of Law, American University Washington College of Law. This article is informed by my government service in economic policy-making positions at the FCC, FTC, DOJ and the Council of Economic Advisers. At all of these agencies, I worked, at least in part, on communications industry issues, including some of the matters discussed here. None of my views are necessarily those of any government agency.

2. Cf. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965) (recognizing that the FCC will change its views as its membership changes); STUART MINOR BENJAMIN ET. AL, TELECOMMUNICATIONS LAW AND POLICY 412 (3d ed. 2012) (describing the politics of the FCC's 2003 Triennial Review Order and the "bluntness" of statements by two Commissioners in revealing that they had to compromise on some matters to obtain the results they desired on others). I cannot recall comparable statements by the FTC or its Commissioners, or by senior officials at the Antitrust Division.

3. Some large firms, including Cisco, General Electric, and Microsoft, employ senior competition counsel

in-house. But those positions are not always in Washington, and they typically involve antitrust counseling and litigation supervision (as well as working with the competition agencies).

4. Cf. James Q. Wilson, *BUREAUCRACY* 79 (1989) (“A client agency will have to struggle mightily to avoid having its work influenced by the single, organized group with which it must deal on a daily basis. Many do not succeed, a few do not even try.”) The FCC can be understood as a “client agency” in Wilson’s four part typology, though it might better be viewed as what Wilson terms a “interest group agency” with respect to issues that pit one sector of the communications industry against another. *Id.* at 75-83.

5. This broad generalization does not capture every FTC activity. The FTC also occasionally issues consumer protection rules, and makes competition advocacy filings before other government agencies, for example.

6. Ideological perspectives do matter in antitrust enforcement. See generally Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 *FORDHAM L. REV.* 2175 (2013); cf. Steven C. Salop, *What Consensus? Ideology, Politics and Elections Still Matter* (April 2013) (unpublished manuscript) (arguing that politics is less of a driving force in antitrust today than ideology). While ideology might be thought of as politics at a distance, the discussion of issues and cases at the FTC is largely about ideas and arguments, not the positions of interest groups.

7. See, e.g., *Schurz Comm’n., Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (Posner, J.) (describing an FCC rule as creating an impression “of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring supplicants who have somehow to be conciliated” and observing that “[t]he possibility of resolving a conflict in favor of the party with the stronger case, as distinct from throwing up one’s hands and splitting the difference, was overlooked”). Cf. *Preserving the Open Internet, Broadband Industry Practices*, 25 *F.C.C. Rcd.* 17,905 (2010) (statements of Chairman Genachowski and Commissioners Copps, Clyburn and Baker) (in statements accompanying the release of the FCC’s Open Internet order, the Commission’s Chairman cited the support key groups gave to its framework, one concurring Commissioner noted that he had spent three weeks in intensive discussions with all interested parties, another concurring Commissioner thanked the stakeholders that had engaged with the FCC in crafting a framework, and a dissenting Commissioner argued that the FCC had acted improperly as a quasi-legislative body by adopting as its rules the provisions in a draft bill under consideration in Congress).

8. This role is explicit when the agency engages in “negotiated rulemaking,” though it also may be implicit. See Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 *S. Texas L. Rev.* 987 (2008).

9. Congress has multiple levers for influencing agency outcomes. It can, for example, hold oversight hearings, overrule specific decisions, force an agency to take into account certain considerations, extract promises from nominees before confirmation, and shape an agency’s budget.

10. See generally Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment and Politics*, 31 *J. COMP. ECON.* 620 (2003).

11. The term “agency capture” refers to settings in which regulatory decisions favor the interests of regulated firms relative to the public interest. See generally Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 *OXFORD REV. ECON. POLY* 203 (2006); Theodore E. Keeler & Stephen E. Foreman, *Regulation and Deregulation*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 213 (Peter Newman, ed. 1998); cf. Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 *WAKE FOREST L. REV.* 569 (2012) (discussing differences between harmful capture of agencies by regulated firms and beneficial collaboration between agencies and regulated firms).

12. See, e.g., Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 *L. & CONTEMP. PROBS.* 77 (1981) (during the 1960s and 1970s, the FCC regulated cable television in order to protect the broadcasting industry).

13. E.g. EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULTZ, 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION 37-95 (1969) (Nader report).
14. See William J. Baer, Director, Bureau of Competition, Fed. Trade Comm'n, Report from the Bureau of Competition: Looking Forward and Going Forward (Mar. 28, 1996), available at <http://www.ftc.gov/speeches/other/ababaer.shtm> (criticizing past practice of accepting quick and limited consent settlements of mergers before the FTC's investigation was complete).
15. Eleanor Fox & Robert Pitofsky, Antitrust Policy, in CHANGING AMERICA: BLUEPRINTS FOR THE NEW ADMINISTRATION 319 (Mark Green ed. 1992).
16. Lobbying may help improve legislative and agency outcomes to the extent it operates as a means of informing government decision-makers about the costs and benefits of their actions when the decision-makers would not have obtained that information inexpensively in other ways. Cf. Dorit Rubinstein Reiss, The Benefits of Capture, 47 Wake Forest L. Rev. 569, 595 (2012) (discussing benefits of collaboration between agencies and regulated firms). But other lobbying activity is undoubtedly wasteful rent-seeking.
17. See Ed de Haan, Simi Kedia, Kevin Koh & Shivara Rajgopal, Does the Revolving Door Affect the SEC's Enforcement Outcomes? (July 2012), available at <http://ssrn.com/abstract=2125560> (revolving door induces agency lawyers to exert more enforcement effort to showcase their expertise). In both the antitrust and communications fields, moreover, the professional culture generally does not encourage lawyers to "take sides" for their entire career; the culture in some other legal fields, like labor law, appears to differ.
18. See generally Mark Armstrong & David E.M. Sappington, Recent Developments in the Theory of Regulation, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1557 (Mark Armstrong & Robert Porter, eds. 2007) (analyzing the consequences for regulatory outcomes when regulators have limited knowledge of the firms they regulate); Ernesto Dal Bó, Regulatory Capture: A Review, 22 OXFORD REV. ECON. POL'Y 203, 220 (2006) (the "main lesson[]" of prevailing theories is that "capture is possible because firms have private information that is hard for citizens or their political representatives to obtain"). Cf. Dorit Rubinstein Reiss, The Benefits of Capture, 47 WAKE FOREST L. REV. 569, 599-601 (2012) (discussing problems that arise when regulatory agencies rely on regulated firms for information).
19. See, e.g., Tony Romm, Lobbying a Bust in AT&T T-Mobile Bid, POLITICO, Dec. 20, 2011, <http://www.politico.com/news/stories/1211/70701.html>; Todd Shields & Jonathan Salant, AT&T Dealt Deal Defeat After \$12M in Lobbying, BLOOMBERG, Sept. 1, 2011, <http://www.bloomberg.com/news/2011-09-01/at-t-s-12-million-lobbying-sprees-fails-to-prevent-rare-antitrust-setback.html>.
20. I recount this story in Jonathan B. Baker, Sector-Specific Competition Enforcement at the FCC, 66 N.Y.U. ANN. SURV. AM. L. 413, 417-18 (2011).
21. See id. at 418-20.
22. Id. at 420
23. Compare Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd. 4238 ¶¶ 78-86 (2011), available at transition.fcc.gov/FCC-11-4.pdf (describing online video distribution as mainly offering potential competition for multichannel video distribution (cable television), while also noting current competition between the two types of firms) with Competitive Impact Statement, United States v. Comcast Corp., No. 1:11-cv-00106 18-18 (D.D.C. Jan. 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.pdf> (highlighting existing competition, while also recognizing the potential for online video distributors to have greater competitive significance in the future).
24. Preserving the Open Internet, Broadband Industry Practices, 25 F.C.C. Rcd. 17,905 (2010).

25. See Fed. Trade Comm'n, *Broadband Connectivity Competition Policy* (FTC Staff Report 2007), <http://www.ftc.gov/reports/broadband/v070000report.pdf>.
26. *Preserving the Open Internet, Broadband Industry Practices*, 25 F.C.C. Rcd. 17,905 ¶41 (2010).
27. The FTC has competition rule-making power but has rarely used it. Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 AN-TITRUST BULL. 143, 207-19 (1993); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking To Preserve Drug Competition*, 109 COLUM. L. REV. 629, 673-82 (2009). Under some circumstances, competition agencies can successfully address nascent problems without rulemaking, using adjudication. See *United States v. Microsoft Corp.*, 253 F.3d 34, 54, 79 (D.C. Cir. 2001).
28. *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238 ¶24 (2011), available at transition.fcc.gov/FCC-11-4.pdf.
29. The differences noted below and others are discussed in Jonathan B. Baker, *Sector-Specific Competition Enforcement at the FCC*, 66 N.Y.U. ANN. SURV. AM. L. 413, 414-16 (2011).
30. Market-based alternatives for addressing interference, such as relying on bargaining among spectrum users in the shadow of nuisance litigation, may often have higher transaction costs.
31. Nearly two-thirds of the pages devoted to conditions in the FCC's Comcast/NBCU order addressed competition issues. Yet the FCC's order also included a number of non-competition conditions, including requirements to increase local news coverage, expand children's programming, broadcast public service announcements, enhance the diversity of programming available to Spanish-speaking viewers, offer discount broadband services to low-income Americans, and provide high-speed broadband to schools, libraries and underserved communities. *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238 at Appendix A (2011), available at transition.fcc.gov/FCC-11-4.pdf.
32. E.g. Joint Concurring Statement of Commissioners Robert M. McDowell and Meredith Attwell Baker, *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238 (2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304134A4.pdf ("License transfer approvals should not serve as vehicles to extract from petitioners far-reaching and non-merger specific policy concessions that are best left to broader rulemaking or legislative processes.")
33. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007). See Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683 (2011).