

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.<sup>2</sup> I note that Government officials<sup>3</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.



In telephony,<sup>6</sup> 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.<sup>7</sup>

Initially, at least, FCC regulation of television was virtually at war with competition. Simple market economics<sup>8</sup> 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.<sup>9</sup> 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."<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> The Commission reached a regulatory high

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<sup>6</sup> 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*).

<sup>7</sup> *TLP*, supra, at 137.

<sup>8</sup> 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.

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

<sup>10</sup> *Id.* at 11-12.

<sup>11</sup> *TLP* at 262-63.

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

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

<sup>14</sup> See *TLP*, *supra*, at 411-80.

<sup>15</sup> See *TLP*, *supra*, at 85-92.

<sup>16</sup> 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

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.

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<sup>17</sup> 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.

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<sup>18</sup> See *TLP*, supra, at 507-37; 637-687.

<sup>19</sup> See *TLP*, supra, at 360-73; 411-63.

<sup>20</sup> 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

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