

ADDRESS OF FCC COMMISSIONER BRENDAN CARR
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“MEETING THE GRETZKY TEST”
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It's great to be back at the Federalist Society's National Lawyers Convention. I have to confess, though, that I was a bit worried on the way into the meeting room this afternoon. You see, it's been two years since I last spoke at this event, and I was afraid I had forgotten the secret handshake to get in the door. But thankfully I recalled it's the same handshake I use to get into another locus of liberal ire: Chick-fil-A. So it's a pretty easy one for me to remember.

In all seriousness, though, it's an honor to be with you all to discuss some of our shared principles: that the state exists to preserve freedom, that the separation of powers is central to our Constitution, and that it is the province and duty of the judiciary to say what the law is, not what it should be. I will leave the commentary on the judiciary to Judge Sutton. For my part, what I would like to discuss today is that first principle, preserving freedom, and how those of us in government might think about that as regulators of industries as dynamic as the tech sector.

The FCC where I work has jurisdiction over one-sixth of our country's economy. Our core jurisdiction is over communications “by wire and radio,” as our organic statute puts it. Telegraphs and telephones in the beginning, radio and broadcast television later, and now cable, wireless, and satellites all added to the mix. And today over many of those technologies, we get the Internet. The Internet has transformed the way we all live, work, and connect. Not since the invention of the printing press has a technology more fundamentally advanced the principles of freedom and liberty. It has been a tremendous source of prosperity for Americans. Think back just a decade ago, before high-speed Internet services were as widespread as they are today. Back then, the largest companies by market cap were Big Banks and Big Oil. Today, the top five companies are Apple, Microsoft, Google, Amazon, and Facebook. Every one is American, and every one is built on America's world-leading communications platforms.

This kind of dynamism often leads regulators and competition authorities to make two errors. First, as more inventions are built and value is created on these networks, the importance of those platforms grows—as does the temptation for some regulators to exercise greater governmental power, to embrace an ethos of unlimited government rather than the limited one envisioned by our Founders. And these power grabs present more than just theoretical problems. We know that heavy-handed regulation—even of the well-meaning variety—is not costless. Proscription has a price, and it is one everyday Americans pay economically in higher costs for services and in barriers to creating the next Apple or Google or Facebook.

At the FCC, we observed this problem at work in the Title II or “net neutrality” debate. In 2014, President Obama instructed the FCC, an independent agency, to break from decades of successful, light-touch, and bipartisan regulation and pull broadband Internet services under Title II—a heavy-handed regime that Congress designed for the Ma Bell telephone monopoly of the 1930s. The Commission quickly obeyed. Predictably, those Depression-era rules did not encourage risk-taking, and Internet

infrastructure investment declined for the first time outside of a recession. Internet providers pulled back on their broadband builds.

When the Commission's leadership changed two years ago, we did something very rare in Washington. We reversed the agency's prior power grab and secured the FCC's appropriate and more limited jurisdiction over Internet services. Predictably, investment increased, broadband builds accelerated, the digital divide narrowed by nearly 20 percent, Internet speeds jumped by 56 percent, and the United States is a leader once again with the strongest and most vibrant communications platform in the world.

Now, spotting and correcting this first error—this instinct that some in government have to expand their own power—is relatively easy. Or to borrow a phrase from Justice Scalia, “this wolf comes as a wolf.”

But there is a more subtle or, to belabor the analogy, wolf-in-sheep's-clothing error that I want to focus on today. And it's an error that competition authorities often make when regulating dynamic and expanding industries. Put simply, they fail to keep pace with those industries. And in failing to do so they convince themselves, whether consciously or not, that their own lack of vision can only benefit consumers. They fail to see how their thinking—their failure—operates as a restraint on competition and how it denies Americans the benefits that free markets can deliver.

Part of this comes from a very human limitation on our thinking. We tend to underestimate the pace and nature of technological change. We often assume that the next big thing will just be a faster version of what we have today. And when technology creates and destroys on shorter and shorter cycles, regulators can be caught reading from a chapter of history that long ago passed us by.

This is not a new phenomenon or something unique to regulators. We all do it. Henry Ford reportedly said that if he had asked people what they wanted, they would have said “faster horses.” Indeed, we called the first cars “horseless carriages.” In a 1908 op-ed in the *New York Times*, Henry Billings Brown, then a retired Supreme Court justice, argued “time can alone determine” if automobiles will be a “mere whim of fashion” or meet “a real need of the community.” Among his cited reasons for skepticism: he said a horse makes a better companion than a car, and that “little more than a perfunctory view of the scenery . . . can thoroughly [be] ‘taken in’ when running at a rate of over twelve miles an hour.” Justice Brown happened to be the author of *Plessy v. Ferguson*, so he was wrong about a few things.

Predicting the future is difficult, especially when trying to foresee fast-moving technology. That's reason enough for tech and telecom regulators to exercise humility when limiting Americans' freedoms. Yet attempting to see around the corner is a mandate of competition authorities, including the FCC when we must apply our statutory public interest standard. If we regulate based on the competition that exists today, we sacrifice what could be to preserve what is.

And this brings me to The Great One, Wayne Gretzky, a Canadian by birth but an American at heart, who warned us against this status quo bias. The secret to his legendary success on the ice was to “skate to where the puck is going, not where it has been.” The Gretzky Test is popular in sports and in business now, and I think competition authorities—and especially those of us in tech and telecom regulation—should hold ourselves to it, too.

The FCC has not always met that test. Take our media regulations. For decades, the FCC has prohibited someone from owning a newspaper and a broadcast station in the same market. This restriction was born in an era when newspapers and broadcasters were the only games in town for local

news and information. So the FCC sought to preserve competition in those markets. But over time, the FCC failed to acknowledge the titanic changes taking place in the news business, particularly with the rise of the Internet. Our prohibition on newspaper-broadcast cross-ownership—while first designed to preserve those outlets—only made it harder for them to gain the scale needed to compete with the Internet giants. When we finally eliminated the prohibition in 2017, it was too late for much of the industry. 1,800 newspapers have gone out of business since 2004 alone. They were facing competition from market segments that the FCC refused even to recognize. The result? Communities across the country lost access to local news and information at least in part because the FCC failed to react quickly enough to changes in the marketplace. For too long, too many at the FCC sought to preserve the status quo, thinking that doing so could only benefit the Americans we serve. The FCC was wrong.

There may be no more important iteration of the Gretzky Test for telecom regulators today than understanding the impact of 5G. You may have heard of 5G. It's a wireless technology that promises 10 times more responsive networks, at 100 times current speeds, that are able to serve 1,000 times more devices. All of the life-changing technologies we hear about—from autonomous cars to smart cities, from remote surgery to virtual reality—won't work or won't work well without 5G.

5G can't really be understood as just another wireless network, as an upgraded version of 4G that you might have on your phones today. 5G's performance characteristics and how it is built blur the distinctions between wired and wireless industries. 5G means that wireless Internet starts looking more and more like a substitute for wired Internet. Think about what that will mean for consumers and competition. 5G will enable more choice as previously siloed industries compete, which we know will decrease prices and improve quality.

Right at this moment of immense transition and convergence comes to the FCC the merger of T-Mobile and Sprint, our smallest nationwide wireless providers. Part of the companies' argument for the merger is that it will allow them finally to have the scale and assets to compete against the wireless market leaders, Verizon and AT&T. The big two have built the leading national networks, they have dominant coverage and capacity, and they generate almost all of the industry's profits. This version of T-Mobile and Sprint's argument, in my view, shows that the merger is more than sufficiently pro-competitive to merit approval.

But looking backwards at a wireless industry as if it were stuck in time, with the same old competitors and well-worn services, doesn't pass the Gretzky Test. Fundamentally, our job at the FCC is to see clearly the generational upgrade in communications that is taking place before us. We have to grasp how 5G will reshape competition. It would be unwise for the expert telecom agency to blinker itself to the coming 5G convergence and what that means for everyday Americans. Analysis that looks backwards to the age of talk-and-text may prolong those dying use cases, but it lacks relevance to how consumers use high-speed connections today and, certainly, tomorrow.

From this perspective, the Commission didn't get the merger completely right. It was a missed opportunity. Because while we formally approved it two weeks ago, our analysis too often looked backwards to where the puck was, not where it's going.

We made this error when we refused to update the relevant market definition in our competition analysis. We defined the market as one for "mobile telephony/broadband services." That's a market definition that the Commission created way back in 2008. That was more than two years before any of the nationwide wireless providers had deployed 4G LTE, and before most had their iPhones. And yet even in 2008, the Commission saw how faster wireless service would combine what were then separate markets: phones for talk, text, and low-data uses; and computers for high-data uses. To quote the 2008 order, the FCC "concluded that there are risks associated with defining product markets too narrowly,

since doing so may thwart . . . future pro-competitive deals that take place in the context of rapidly evolving markets and services.”

I wish we had followed that advice, because, 11 years later, telecom is again on the cusp of a fundamental change. Despite this, the FCC chose to look back to the 11-year-old market definition that pre-dated 4G LTE. That’s a shame, because it forced us to understate the benefits of this transaction to the Americans we serve.

You can see the effects of this error most clearly in our treatment of in-home broadband. The new T-Mobile would have lots of new capacity, and it would use some of that capacity to provide home Internet access to 28 million households. Many Americans feel like they have only one choice for home Internet access, and so providing them an additional choice wirelessly with new T-Mobile is undoubtedly a significant public interest benefit. But the FCC treated that as a benefit outside of our main competition analysis, and that is because we were myopically focused on the wireless industry as it existed in 2008, and not the high-speed Internet industry that 5G creates. We are trying to fit the round peg of 5G competition into the square hole of a 2008 market definition.

Re-orienting our view of the market wouldn’t have been difficult. We didn’t have to rely on the Commission’s predictive judgment about 5G, because we see 5G convergence already. 5G is already being deployed in more than three dozen communities. Verizon’s first 5G offering is for in-home broadband, taking on cable. Cable, in turn, is offering wireless service and building wireless infrastructure in the process. Wireless, cable, and satellite companies are offering next-gen smart city and IoT applications. If we don’t see this, we risk turning the government into a restraint on competition.

Tech and telecom are increasingly important to our lives—how we provide for our families, help our kids learn, and connect to one another. It’s a dynamic sector, and if you spend enough time around it, you can’t help but be optimistic about the new opportunities that exist around the corner and the future of our country. As regulators we need to help drive that competition, not inadvertently restrain it.

In closing, I think it is incumbent on those of us in government to meet the Gretzky Test. Our competition policy—how we define relevant markets, in particular—needs fresh thinking. We need to regulate based on where these dynamic markets are going. And that is the best way to preserve freedom and the benefits that free markets bring to Americans.

Thank you for the opportunity to speak with you, and I look forward to hearing the panel’s views on some of these same topics.