

**“Consumer Protection in the Broadband Era: The Role of the FCC”  
4th Annual Professor Anthony J. Santoro Business Law Lecture Series  
Remarks of Gigi B. Sohn, Counselor to the Chairman  
Office of Chairman Tom Wheeler  
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Good evening. Thank you Dean Yelnosky for inviting me to speak. I’m honored to be here and to meet Professor Santoro, who I understand is not only the founding dean at Roger Williams University School of Law, but also Widener University School of Law in Harrisburg. So I know who to ask if I ever want to start a law school!

I want to thank you all for being here too. If I’m not mistaken, the Bristol Oyster Bar has a great happy hour going on about now, so I know I’m going up against some tough competition.

I appreciate the opportunity to talk about a topic that is near and dear to my heart, but more importantly is near and dear to the heart of my boss, FCC Chairman Tom Wheeler. That topic is consumer protection, and the FCC’s vital role in this endeavor.

Let’s be honest, when most people think of the FCC, the first thing that probably comes to mind is indecency. If you’re a policy nerd, you might think net neutrality. Or maybe you’ve noticed the FCC logo on the back of your cell phone, and know that we manage the spectrum that powers our wireless gadgets.

The first goal of this talk is to demonstrate the breadth, importance and impact of the FCC’s consumer protection activities. The agency’s role is akin to that of the Federal Trade Commission, the Consumer Product Safety Commission, and the Consumer Financial Protection Bureau or CFPB, that new agency Elizabeth Warren stood up after the financial crisis. Like those agencies, the actions the FCC takes affect the everyday lives of ordinary Americans.

The second goal of this talk is to discuss how our role and responsibilities complement other agencies, and debunk some common arguments that the FCC should be less active in the consumer protection game.

Let’s start with the big picture.

The FCC is the nation's communications agency, and we are in the midst of a communications revolution.

Broadband Internet – wired and wireless – is transforming our economy and changing the way we live. By some estimates, the communications and technology sector accounts for one-seventh of GDP. And it's hard for many of us to imagine how we would do our jobs or get through the day without Internet connectivity. Access to the broadband Internet is inarguably critical to full participation in our society and our economy.

As my boss has said repeatedly, he sees the FCC as the public's representative to the ongoing communications revolution.

In this role, he sees two core dual responsibilities for the agency.

The first is to facilitate dynamic technological change and world-class networks that drive innovation, economic growth and improvements in the lives of the American people.

The second is to ensure that our networks reflect core values like universal access, public safety, and, yes, consumer protection.

We believe that competition is often the most effective way to advance the public interest. But here's the rub. Even where competition exists, there may be a need for rules that protect consumers from, for example, robocalls or unauthorized charges on their telephone bills. And competition is uneven, particularly for high-speed wired broadband. Consider this: at 25 megabits per second - which Chairman Wheeler considers "table stakes" for broadband speeds - just under 75 percent of U.S. homes can choose from only one or fewer fixed wired providers – and that includes almost 20 percent who have no option at all at that speed.

I'm proud to say that no FCC has been as committed to consumer protection as the Wheeler FCC. This is largely because the Chairman believes deeply in the agency's statutory duty to protect the public interest.

So what are some real-world examples of how the FCC has stood up for consumers?

Look at an example you are likely familiar with: Comcast's proposed \$45 billion acquisition of Time Warner Cable.

The proposed transaction would have created a company with the most broadband and video subscribers in the nation alongside the ownership of significant programming interests.

Although the full Commission was never presented with nor made a final decision on the transaction, FCC staff informed the companies of our serious concerns that the merger risks outweighed the benefits to the public interest, and Comcast abandoned its bid.

### **The Wheeler FCC and Consumer Protection**

The Commission's power to review large media and telecommunications mergers is central to its consumer protection mission. But it is just one of the areas where the FCC is standing up for the interest of consumers.

Two of the most well-known anti-consumer practices we police are what we call "slamming" and "cramming". Slamming is the practice of changing a subscriber's telephone service provider without the subscriber's knowledge or permission. Cramming is when a carrier charges its customers for services that they didn't want or need, also without the subscriber's knowledge or permission, and then buries the cost in long and complicated bills.

In the first seven months of 2015, the FCC's Enforcement Bureau has either fined or settled with nine companies for nearly 18 million dollars for slamming violations.

Our anti-cramming enforcement has been even more robust. From January to July of this year alone, the Enforcement Bureau has fined or settled with eleven companies in the amount of \$176 million dollars.

The Wheeler FCC has also increased enforcement of its privacy and data breach rules, open internet transparency rules, rules against Wi-Fi blocking and robocalls, and public safety rules. Here are just some examples:

- In May 2014, the FCC entered into a \$7.5 million settlement with Sprint to resolve an investigation of violations of the Do Not Call List.
- In September 2014, the FCC entered into a \$7.4 million settlement with Verizon to resolve an investigation into the company's use of personal consumer information for marketing purposes.

- In October 2014, Marriott International paid \$600,000 to resolve an FCC investigation into whether the company intentionally interfered with and disabled Wi-Fi hotspots established by consumers in their hotels. The company Smart City was fined \$750,000 last month for doing the same in various convention centers around the country.
- In April 2015, the agency fined Century Link and Intrado \$17.4 million for not making the proper notifications during a multistate 911 outage that impacted over 11 million people. In July, the Commission settled with T-Mobile for \$17.5 million on similar allegations with respect to a different nationwide 911 outage.
- In July 2015, the FCC entered into a \$3.5 million settlement in a case against the wireless phone companies TerraCom and YourTel for a data breach that occurred when the company stored low-income customers' Social Security numbers, names, addresses, driver's licenses and other sensitive information on unprotected Internet servers that anyone could access through a web search.
- That same month, the FCC proposed a \$100 million fine against AT&T Mobility alleging repeated violations of the FCC's 2010 Open Internet Transparency Rule, including: 1) using the misleading term "unlimited" to label a data plan that was subject to prolonged speed reductions once a certain data threshold was reached; and 2) failing to disclose the speed reductions.

That's quite a record. But that's not all.

Chairman Wheeler has used his "bully pulpit" to forge an agreement with the wireless phone industry to unlock their handsets at a consumer's request and to convince one of the nation's biggest wireless providers to cease its throttling of customers with unlimited data.

Our Consumer and Governmental Affairs Bureau processes thousands of consumer complaints monthly on a wide variety of issues concerning the media and telecommunications sectors, delivering those complaints to service providers, who are required to respond to both the FCC and the consumer within 30 days.

The Commission decided over 20 requests for declaratory ruling under our anti-robocalling statute to clarify, for example, that telephone service providers can use robocall-blocking technologies; that text messages are considered calls under the law and that robocallers are liable after making the first call to a reassigned phone number.

Finally, the FCC has used its regulatory authority to, among other things, require text messaging providers to enable consumers to text to 911 during an emergency and to ensure that disabled Americans have access to high quality closed captioning on broadcasting, cable and now on any internet-protocol delivered video.

### **Other Agencies that Oversee the Communications Industries**

Of course the FCC is not the only federal agency that oversees consumer-related activities in the communications industry sector. The Federal Trade Commission (or FTC) and the Department of Justice (or DOJ) do, and to a lesser extent, the CFPB does as well. I'd like to focus on the first two agencies, since it is their authority over the communications industries that is most often cited as adequate to protect consumers.

The FTC has consumer protection and competition jurisdiction over broad sectors of the economy. Section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce". The FTC has used Section 5 not only to sanction companies for activities like deceptive advertising and misrepresenting services, but also for privacy violations and data security breaches.

The FCC has worked hand-in-hand with the Federal Trade Commission for years to address many consumer protection issues, including privacy. Among other things, the agencies share consumer complaints, refer cases to each other and engage in joint enforcement actions. We expect this fruitful relationship will continue to ensure consumers are protected.

In addition, the FTC has authority to enforce federal antitrust laws, although it shares that jurisdiction with the Department of Justice, and it has been 15 years since the FTC has overseen a merger involving FCC regulatees.

The Department of Justice's role in overseeing the communications industries is limited to enforcing the antitrust laws. As a practical matter, this has meant reviewing media and telecommunications mergers alongside the FCC. Congress clarified this dual jurisdiction when it amended section 7 of the Clayton Act as part of the Telecommunications Act of 1996 to reaffirm that telecommunications mergers fall within the scope of the DOJ's enforcement authority.

### **Different Competencies and Different Roles**

That the Federal Trade Commission and DOJ have some overlapping jurisdiction with the FCC has long been at the core of an effort by some in the industry to strip the FCC of

most of its consumer protection and all of its merger authority. They argue that having more than one agency regulate a sector is redundant, confusing and leads to inconsistent results that lead to uncertainty and chill investment. They also argue that the Federal Trade Commission Act's prohibition against "unfair or deceptive acts and practices" is adequate to protect consumers from the kind of harms they typically suffer from communications service providers, and that the antitrust laws are adequate to protect consumers from the harms of industry consolidation.

For the reasons I'll discuss, these arguments don't hold much water. Not only are the core competencies and areas of expertise very different in the FCC and their sister agencies, their authority to act to protect consumers is also very different. These complementary competencies and authorities are why Congress vested all three agencies with the power to protect consumers and competition, and why the agencies regularly work together to protect consumers.

If the industry were to prevail in stripping the FCC of its consumer protection and merger oversight roles, the agency might be poorer for it, but so would its sister agencies. And of course the biggest losers would be the American people.

So let me address how the agencies differ in expertise and legal authority.

### *Expert Agency*

First, the FCC plays a vital role as the agency with the greatest expertise about the communications industries and the technologies they use to serve the American people. It employs lawyers, economists, technologists and researchers who are steeped in the knowledge of how the industries work and how their services affect consumers. The FCC also has a fundamental understanding of how industry behavior will play into the long-term growth of the industry. The Federal Trade Commission, as discussed previously, enforces consumer protection and antitrust laws across a broad swath of the economy, including the automobile, retail, pharmaceutical, and credit card industries.

The Department of Justice is similarly situated. Their expertise is not in the industry or the technology; it is in antitrust law and competition policy. As the expert agency for the communications industry, the FCC is best situated to determine whether consumers are being harmed and how to best mitigate that harm.

The DoJ may actually say it best on their website: joint oversight "allows us better to share our respective expertise-the [Antitrust] Division with competition issues and the FCC with the regulatory framework and technical knowledge of the telecommunications

industry as a whole.” Each agency brings a different set of requirements, principles, and expertise to these matters and as such, the agencies can both complement each other and make sure that there are no gaps in oversight of the companies operating in this space.

#### *Ex Ante Regulator v. Post Hoc Enforcer*

Second, the FCC serves a far different regulatory role than either the Federal Trade Commission or the Department of Justice. The FCC is, as they say in the legal biz, an “*ex ante*” regulator – that is, it has the authority and indeed the responsibility, to adopt regulations to protect consumers before they are harmed. The FTC, on the other hand, acts principally as an enforcer of the Federal Trade Commission Act and antitrust laws, *post hoc*, or after the fact. The Department of Justice similarly has no power to adopt *ex ante* regulations that protect consumers from harm.

But why do consumers of telecommunications services need *ex ante* regulations? Isn’t *post hoc* enforcement authority enough? The answer to the last question is a resounding NO. Clear and enforceable rules provide regulatory certainty to industry and also give consumers clarity as to what their rights are. Clear rules backed by strong enforcement moderate and deter bad behavior and as a result, protect consumers from all but the worst actors. In the communications sector, where free speech, privacy, economic wellbeing, civic participation and sometimes even life or death (in the public safety context) are at stake, the American people can’t wait for *post hoc* enforcement.

#### *Antitrust Law v. the Public Interest Standard*

Third, the FCC’s legal authority to review media and telecommunications mergers is broader and more flexible than that given to the Department of Justice under the antitrust laws. Section 7 of Clayton Act vests the Department of Justice with the ability to file suit to block any acquisition that may “substantially lessen competition, or tend to create a monopoly.” Thus, the agency looks to whether a merger would harm competition in the marketplace, and the burden is on the agencies to prove a violation of the antitrust laws in court. While the DoJ can order structural and behavioral remedies, those remedies are limited to those necessary to preserve competition.

When reviewing transactions, the FCC typically relies on its responsibility under the Communications Act of 1934 to assign licenses in “the public interest convenience and necessity.” The FCC must make such a determination every time a license changes hands, and every merger involving cable systems, broadcasters and telecommunications companies implicates license transfers.

The Supreme Court has described the public interest standard as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." Over 80 years of agency precedent has given that term meaning. Therefore, the FCC considers, among other things, the impact of a combination not just on competition but on consumers, including the price and quality of services, the possibility for new services in the future, free speech, diversity of ownership and the free flow of information. Like the Department of Justice, the FCC can order divestitures and behavioral conditions, but the FCC has the power to remedy potential harms that the DOJ might have difficulty addressing, such as harm to consumers.

That being said, in judging transactions, the FCC is careful to move along both efficiently and in close cooperation with the DOJ and other antitrust agencies. And we are careful to emphasize the particular expertise that the FCC brings to the table and that can have - indeed that has had - concrete impact on merger reviews such as the AT&T-T-Mobile and the aforementioned Comcast-Time Warner Cable transactions.

### **Overlapping Jurisdiction is Beneficial and Common**

The differences in the FCC's expertise and authority compared to that of its sister agencies also demonstrates perhaps the greatest benefit of overlapping jurisdiction – that the different types of legal authority and technical expertise of each agency makes for better policymaking and enforcement. Clearly Congress, in granting overlapping jurisdiction over the communications industries, agreed.

Our media and telecommunications networks have always been critical to the free flow of information, civic participation and a vibrant economy. But I would daresay that access to the broadband Internet is more essential to our society and economy than any communications network in history. Access to the Internet impacts, among other things, education, health care, commerce and governance like never before. While Congress may not have foreseen the massive technological changes of the recent past, its determination that no one agency should be tasked with overseeing such a huge sector of our economy ensures that consumers will be protected now and in the future.

When an industry sector is so vital to the wellbeing of Americans, overlapping authority is the rule, not the exception. Take the banking industry. According to a Congressional Research Service report, there are no less than 11 different bodies that have some regulatory oversight of the banking industry, including the Federal Reserve, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the



aforementioned Consumer Financial Protection Bureau. The same report highlighted several areas of differentiation among these bodies' oversight responsibilities. Some of you might find this banking oversight excessive, but don't forget the major role the sector played in the financial crisis just 7 years ago. This just shows that even with a lot of oversight, there is still work that can be done to protect consumers. This is no different than the vast responsibilities in the telecommunications sector. It's worth noting that the same report on the banking sector suggested that countries with centralized oversight might have fared worse during the financial crisis.

The aviation sector is another example. I know a little bit about this industry. I started out as an aviation administrative lawyer nearly 30 years ago. So I can tell you that when it comes to putting a bunch of people in a flying metal tube, the government has a big interest in making sure that companies are not taking short cuts. The Federal Aviation Administration under the Department of Transportation has the majority of responsibilities in this sector, including maintenance and safety requirements and pilot certifications. But the National Transportation Safety Board steps in to conduct independent investigations of aviation accidents. And the Transportation Security Administration, which is part of the Department of Homeland Security is tasked with ensuring the safety of airline passengers and freight.

Think also about the health care sector, which like the communications industry is vast and immensely important to the public. And take as just one example the formidable chronic disease of asthma. Citizens can look to the Department of Health and Human Services, the Department of Transportation and the Environmental Protection Agency to regulate the care and prevention of this disease (as well as many others). The Center for Disease Control under the Department of Health and Human Services provides data around asthma prevalence in communities and guidelines for treatment, while the Food and Drug Administration, which is also under HHS, approves and monitors the safety of asthma medications. At the same time, the Department of Transportation and Environmental Protection Agency create rules that dictate emission standards for air quality to, among other things, protect those with the disease.

These are just a few examples of multiple agency oversight of vital industry sectors. As our economy and society become more interconnected, rarely will the issues we face now and in the future be addressed adequately by just one agency.

## **Conclusion**

I'll close with two thoughts. The first is that in a country where access to the broadband Internet is inarguably critical to full participation in our society and our economy,

oversight of the industry by more than one entity is not only prudent, but also necessary.

The second is that the FCC is the preeminent expert on broadband and how consumers can best benefit from it. Through its regulatory and enforcement authorities, as well as its merger reviews, the FCC under Chairman Tom Wheeler has become critical to consumer protection in the broadband era.

Thank you.