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The FCC's Sometimes Wayward Course

by

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According to an April 11 [AP story](#), FCC Chairman Martin is quoted as saying: “It is important we do everything we can to maximize consumer choice and reduce rates. In today’s competitive telecommunications market we must make sure that there is a level playing field for all companies to compete.” Contained within this brief statement, offered by Chairman Martin in the wake of the agency’s staff recommendation regarding the handling of complaints relating to “customer retention marketing practices” of various service providers, is the essence of a view that, at times, has led the Republican-majority commission on a wayward course. The marketing practices dispute has to do with whether the customer retention practices of telephone companies and cable companies are lawful in the context of service providers receiving information that a customer wants to switch from one provider to another.

The fact that “customer retention practices” disputes are heating up between the “telephone” and “cable” companies in their increasingly fierce fight to provide customers with a bundle of voice, Internet, and video services is a sure sign that competition in the broadband market is present. Indeed, if it weren’t, we wouldn’t hear much from the market participants about practices they claim are unreasonable and which are designed to persuade customers not to switch service providers. The Chairman’s statement referring to the competitive telecommunications market echoes the [FCC staff decision](#) that elicited his reaction. The decision refers, for example, to “today’s competitive marketplace for bundled services, and intermodal competition of providers of services within the bundles.” [Para. 29].

My main concern here is with the import of the Chairman’s statement, not the specifics of the marketing practices disputes. If a market is competitive, as Chairman Martin says the

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broadband services market is, and as the Commission itself has found over and over again, there is no need – indeed, it is costly and counterproductive – for FCC commissioners to attempt to do “everything we can” to maximize consumer choice and reduce rates. Competitive markets maximize consumer choice and reduce rates far better than Commission tinkering with adding more regulation here and there. Such regulatory tinkering is often prodded by one or the other competitors trying to gain a marketplace advantage, seeking simply to “level the playing field” in Chairman Martin’s words.

Despite Chairman Martin’s recognition that the broadband services market is competitive, his professed desire to give consumers more “choice” and “reduced rates” at times has led the Commission on a wayward course, one which has veered away from free market-oriented policies that this Republican-majority Commission should have followed more consistently. In a market which is concededly competitive, especially one as technologically dynamic as communications, the ultimate costs on consumers of regulatory tinkering almost always outweigh the benefits.

Take, for example, the Chairman’s long-standing campaign to require cable companies to offer video programming on an *a la carte* basis. The supposed basis of this campaign to require that consumers be allowed to pick and pay only for selected individual channels is to offer consumers more “choice.” But if this is a sound policy rationale, why not require the operators to offer programming on an individual episode basis? This would give consumers more “choice” than even the Chairman proposes.

It is possible that the marketplace will drive video service providers in the direction of offering programming on an individual program or episode basis before Chairman Martin gets around to doing so. After all, the Internet, already a platform for much video programming and becoming increasingly so every day, essentially works on an *a la carte* basis. And the satellite and telephone company video providers that compete with cable operators are, as you would expect, working hard to find ways to take customers from cable operators. If they can gain a competitive advantage by offering programming on an *a la carte* basis using a model that makes economic sense –assuming consumers want programming offered this way -- the satellite and telephone companies will do so.

In most competitive markets, the sale of goods and services in bundles, whether cable television packages, entrée and side dishes combined on a platter, or already-assembled refrigerators, is the rule, not the exception. And, most importantly for our purposes here, the nature and scope of the bundles are most efficiently determined by consumers’ desires in the marketplace. As Professors Stan Liebowitz and Stephen Margolis emphasize in their excellent [*Bundles of Joy*](#) paper published earlier this year by the Free State Foundation, bundling “is pervasive in our economy and is the dominant form of sales, for reasons that have to do with efficiencies of a simple and obvious nature: most goods are bundles.” Professors Liebowitz and Margolis recognize, of course, that, by definition, bundling always restricts the choice of those persons who might prefer to purchase only individual components, say, the entrée without any sides, or individual french fries rather than a whole bag. But as Professors Liebowitz and Margolis remind us, “the ideal is the enemy of the efficient.”

The economic efficiencies derived from bundles responsive to consumer marketplace demands are well-known to economists, of course. So, the real puzzle, given that Chairman Martin acknowledges the existence of a competitive marketplace, is why he persists in devoting so much of the Commission's time and energy to proposals that would increase regulation through mandatory unbundling. As he did at a recent Hill hearing, Chairman Martin often suggests that he is motivated by the "high prices" charged by cable operators. In similar vein, in the statement quoted at the outset of this piece, recall Chairman Martin said it is important for the Commission to do everything possible to "reduce rates." Given a choice, most consumers surely would prefer prices be lower rather than higher. But so what? I would prefer that I be able to choose a few individual french fries rather than a whole bag as long as the price of a bag at McDonald's remains, *in my opinion*, "high," and I would like to purchase the entrée without any sides as long as the combination price remains, *in my opinion*, too "high."

The point, of course, is that in a competitive marketplace, it is far more efficient to allow the price to be set by the market than by regulatory fiat. Almost always the market does a much better job of getting it right. In an *a la carte* cable television regime, like the one envisioned by Chairman Martin, the government surely would be driven to an ill-conceived and harmful regime of rate regulation for individual channels (or individual programs, if the unbundling regime is carried to its logical conclusion). There would be endless complaints that individual channels (or programs) are not priced "reasonably." And as Professors Liebowitz and Margolis explain, "although consumers who watch fewer stations than average might pay less, consumers who watch more are likely to pay more." In the individual channel rate proceedings that surely would follow, on what basis is the government going to determine the "right" price, or, in Chairman Martin's words, a price that is not too "high"? If such a regime ever were to be implemented, the truly high price to be paid would be in the costs, direct and indirect, imposed by the regulatory regime. And in the lost economic efficiencies that benefit, on the whole, all consumers -- not each idealized consumer -- in a bundling regime responsive to marketplace demands.

Another instance when the Chairman's proclivity for regulatory tinkering in competitive markets took the Commission on a wayward course is the 700 MHz auction proceeding. (He was joined in this particular course by his fellow Republican commissioner, Deborah Tate, and the two Democrats, Michael Capps and Jonathan Adelstein.) Here the Commission imposed net neutrality regulations on the C block wireless services spectrum that will require unbundling of transmission services, applications, and content. The Commission did this without any determination in its decision that the wireless services market is not competitive. The failure to link the net neutrality requirement to marketplace competitiveness is not surprising, given that all the agency's own reports for many years had concluded the wireless market is competitive. With the burden of the net neutrality mandate, it is also not surprising that the unencumbered spectrum of the A and B blocks fetched more than 50% and 250% in dollars per MHz than the encumbered C block, with the resulting diminishment of auction proceeds revenue lost to the government.

What is surprising, again, is that the imposition of new wireless regulations would come in the face of determinations of marketplace competitiveness.

And the extent to which this Commission appears to be drifting towards imposing a common carrier regime for broadband providers under the rubric of securing compliance with the agency's [Internet "freedom" principles](#) is surprising, and discouraging. This is especially so in that a Commission majority has not repudiated the 2002 Commission determination that broadband Internet services should exist in a "minimal regulatory environment." And, again, the regulatory drift is occurring without consideration of market competitiveness.

Frankly, the extent to which the major broadband providers, including Comcast, Verizon, and AT&T, willingly are acquiescing in such imposition of a common carrier regime is surprising, and discouraging, as well. I understand they – especially Comcast most immediately – are in the Chairman's sights. I understand being under threat of the regulatory gun makes resistance much more difficult. But I don't understand how the oft-repeated willingness on the part of the major broadband providers to abide by the four Internet principles will allow the providers, ultimately, to resist common carrier-type regulation. After all, common carrier regulation has at its very core the non-discrimination and access obligations contained in the FCC's Internet principles. I fear the Internet policy statement's footnote excepting "reasonable network management" from the pervasive non-discrimination obligations will prove to be a very thin reed for the broadband providers to mount a stand against net neutrality mandates.

Back to the customer retention marketing disputes between the telephone and cable companies. I haven't studied the intricacies in any detail. I am sure without doing so that each side, quite naturally, seeks to use the regulatory process to "level the playing field" to its own advantage. Why wouldn't they? I suspect that, if not now, ultimately these customer marketing disputes will be better settled by considerably less rather than more regulation. Resort to more general consumer protection laws is likely to be the preferable course.

But I am more interested for present purposes in what Chairman Martin's statement says about his inclination to regulate when there is no need to do so. In the competitive communications environment he acknowledges, the default position should be that the market will do a better job of providing more choice and lower prices than will additional government regulation. This should be the default position because competitive markets capture economic efficiencies that enhance consumer welfare in a way that regulation cannot duplicate. This default position should guide more of the Commission's actions.

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