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The Great Digital Broadband Migration – and Communications Policy Today

by

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In December 2000, at a conference I helped organize, Michael Powell, then FCC Commissioner but not yet FCC Chairman, delivered his now well-known address, [“The Great Digital Broadband Migration.”](#) A slightly edited version of Mr. Powell’s prescient speech was included in a book, [Communications Deregulation and FCC Reform](#), which I co-edited with my then-colleague, Jeff Eisenach.

Mr. Powell’s address has enduring value, which is why I return to it from time to time as I reflect on the state of communications policy, especially broadband policy. Consider the current FCC’s policies, under the leadership of FCC Chairman Tom Wheeler, relating to broadband in two high-profile proceedings: (1) the application of Title II public utility-like regulation to today’s Internet service providers, and (2) the continued maintenance of outdated legacy regulation in the so-called *Tech Transitions* proceeding.

It is remarkable – and remarkably disturbing – how far the current Commission has strayed from the deregulatory, pro-market vision for digital broadband policy set forth by Mr. Powell in 2000.

First of all, it is important to observe that “the great digital broadband migration” was already getting underway in 2000. Commissioner Powell referred to the migration as a “fundamental shift of technology – the arrival of ‘disrupting technologies.’”

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Elaborating, Mr. Powell declared the digital migration:

[T]he unleashing of the power of "creative destruction," the phrase coined by the late great economist Joseph A. Schumpeter, who is celebrated more and more as the father-figure of the New Economy. Schumpeter saw that technological change "incessantly revolutionizes the economic structure from within." Rather than talk of "reform," a relatively pedestrian, incremental notion, we need to consider the Schumpeterian effect on policy and regulation. That is, what are the implications of "creative destruction" economics on economic-regulatory policy.

Commissioner Powell concluded his address by offering a reform agenda consisting of the following six points, which I simply list here with a couple of his explanatory sentences about each:

- **A Pointed Focus on Innovation Incentives.** "Conventional economics holds that price competition makes markets efficient. Antitrust policy is largely designed to promote such competition."
- **Greater Reliance on Deregulation and Competitive Markets.** "We have to be careful to see speculative fear and uncertainty in this innovation-driven space for what it is, and not prematurely conclude we are seeing a market failure that justifies regulatory intervention. Moreover, consumer protection is important, but it should be just that and not a straw man for engaging in industrial policy."
- **Rationalizing the Regulatory Structure ("A bit is a bit.").** "Additionally, we must recognize that the Digital Migration involves every segment of the communications industry (*i.e.*, telephone, cable, broadcast, wireless, and satellite) and none should be examined in isolation. We must drive our learning and experience across all the sectors of our regulatory authority and try to maintain a consistent and principled approach."
- **Doctrine Development.** "We need a greater understanding of innovation theory and economic incentives. This includes a deeper understanding of capital markets and capital formation."
- **Accelerated and Efficient Regulatory Procedures.** "Our bureaucratic process is too slow to respond to the challenges of Internet time. One way to do so is to clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market."
- **Unbending Independence.** "Finally, in this period of incessant change, and even carnage, many will seek the shelter of regulation to protect themselves in the fierce storm of the market. Others (often the same people) will seek to affirmatively use regulation to harm or burden a competitor. The FCC will have to be judicious in its judgments, untainted by favoritism and staunchly above the political fray, if it has any hope of being an honest, respected and meaningful actor in this new era."

These six points bear close reading and thoughtful reflection. You need not subscribe to every one of them to understand that they represented a clarion call for a new way of thinking about the FCC's role and proper regulatory policy at the beginning of the digital broadband migration.

Now, flash forward fifteen years. The extent to which the Wheeler Commission has opted for a much different vision – in effect, a pro-regulatory, anti-market-oriented vision – is striking.

Consider the FCC's action in the net neutrality proceeding. By opting for imposition of the Title II public utility-like regulatory regime on Internet providers, the Commission's action is directly at odds with Mr. Powell's plea for greater reliance on competitive markets. And the Commission majority brushed aside his warning that: "We have to be careful to see speculative fear and uncertainty in this innovation-driven space for what it is, and not prematurely conclude we are seeing a market failure that justifies regulatory intervention."

No doubt, in the face of the Commission's regulatory action, and early, if still tentative, indications of a capital investment slow-down by Internet providers, many would agree with Mr. Powell's admonition that "[w]e need a greater understanding of innovation theory and economic incentives. This includes a deeper understanding of capital markets and capital formation."

Consider the Tech Transitions proceeding. My colleague, Free State Foundation Senior Fellow Seth Cooper, has just published an informative piece, ["The FCC Must Transition Away from Roadblocks to All-IP Networks,"](#) which I commend to you for more extensive commentary. Here, in the context of drawing on Mr. Powell's "Digital Migration" address, I will only add a few words. Under the heading "Accelerated and Efficient Regulatory Procedures," Mr. Powell declared: "Our bureaucratic process is too slow to respond to the challenges of Internet time. One way to do so is to clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market." The conduct of the [Tech Transitions proceeding](#) is a paradigmatic example of the FCC's bureaucratic processes lagging behind "Internet time" imperatives. The proceeding finally was initiated in January 2014, and, perhaps not surprisingly, there is no end in sight. This is at odds with repeated assertions by the Commission, almost to the point of *ad nauseam*, that it intended to "speed the technology transitions" [Paragraph 7] and "speed technological advances." [Paragraph 23].

As for substance, rather than clearing away the regulatory underbrush in order to provide the simplicity that would spur further investment in broadband deployment and associated digital technologies, the current Commission remains firmly in the grasp of an analog-era mindset that is overly responsive to special interest pleading. Much of the special pleading is from "competitors," quite naturally seeking competitive advantage. These competitors plead for continued maintenance of rate regulation and unbundling mandates for legacy facilities that should be allowed to be retired according to market, not government, dictates.

It is one thing for the Commission to take measures intended to protect residential users from marketplace changes for which they are not yet prepared. It is quite another for the Commission to use the *Tech Transitions* proceeding to protect favored competitors at the expense of

consumers and at the expense of the nation’s interest in spurring broadband investment. As Mr. Powell admonished fifteen years ago, “consumer protection is important, but it should be just that and not a straw man for engaging in industrial policy.”

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A few concluding thoughts. Under the heading “Unbending Independence,” Mr. Powell reminded us: “[M]any will seek the shelter of regulation to protect themselves in the fierce storm of the market. Others (often the same people) will seek to affirmatively use regulation to harm or burden a competitor.” Of course, as public choice theory predicts, and the history of regulation proves, this undoubtedly is true. And make no mistake: “incumbents” and “competitors” alike engage in special pleading, or what economists call rent-seeking. Large companies and small companies do. And so do “edge providers” and “non-edge providers.” Indeed, so does most every firm that sees an opportunity to gain an advantageous position by virtue of Commission regulatory action.

Thus, I am under no illusions that those that come before the Commission to plead their cases are not self-interested. I don’t expect otherwise. But the problem lies not so much with the special pleaders as with the Commission itself. For it is the Commission that willingly provides – oftentimes seemingly eagerly – so many opportunities (or “availabilities”) for special pleading long after the agency should have acted decisively to shrink the scope of regulation, and thus shrink the scope of such opportunities.

As the marketplace undeniably has become increasingly competitive as a result of the digital revolution’s technological advances facilitating increased consumer choice in almost all market segments, rather than reducing regulation, the current FCC has maintained – and even expanded – its regulatory authority. And thereby expanded the opportunities for continued special pleading. Certainly, in the most important proceeding decided by the current Commission, the agency vastly expanded its authority over Internet service providers, and, most likely, over the Internet itself, including those that presently run under the “edge provider” moniker.

Absent compelling evidence to the contrary, I have never thought it useful or right to ascribe ill motives or bad faith to Commissioners or the Commission’s staff, and I certainly do not intend to do so here. I simply think the current Commission is misguided in its predisposition that the agency, in the absence of market failure, should micro-manage today’s increasingly competitive communications marketplace as if the market is the same as fifteen years ago.

Whether today’s Commission appreciates it or not, under the guise of promoting competition, the agency increasingly appears in the business of propping up competitors for the sake of propping up competitors. In other words, the FCC appears to be invoking the mantra of consumer protection as “a straw man for engaging in industrial policy.”

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