The Free State Foundation

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Perspectives from FSF Scholars
May 22, 2009
Vol. 4, No. 10

Deconstructing "Dismantling Digital Deregulation" Part II

by

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Last week after reviewing the introduction to Derek Turner's Free Press paper entitled "Dismantling Digital Deregulation," I published this blog, "Deconstructing 'Dismantling Digital Deregulation.'" Now that I have read the paper, I want to add these thoughts to those, without prejudice to further future reflections.

I can confirm that the core recommendation of the paper – the very core – is a plea that policymakers and regulators require facilities-based broadband Internet providers to unbundle and share their networks so that new "competitors" will have access to existing networks at regulated prices. I explained that this would mean the imposition of a common carrier regime on broadband providers – a goal unabashedly advocated by Free Press. In arguing for the reestablishment of mandatory unbundling and sharing requirements applicable to broadband networks, the Free Press paper harkens back to the "good ol' days" of the FCC's Unbundled Network Elements ("UNE") and line-sharing regime and the still older *Computer II* regime. (See chapter 3 of the Free Press paper.)

Without repeating much of what I said in the initial blog posting, I want to make these further points, especially for those not familiar with *Computer II* or the long UNE saga. And for the benefit of those who were familiar with these proceedings but with faded memories. When put in context, most will agree that those regulatory regimes should not now be invoked as a basis for imposing common carrier regulation on today's broadband providers.

Here are key points:

1. Starting with the more recent history first, the Free Press paper portrays the abandonment by the FCC of the network unbundling and sharing (UNE) regime, including the line sharing regulations, as part of a relentless scheme by the Bush Administration to deregulate the incumbent telephone companies in a way inconsistent with the clear intent of the Telecommunications Act of 1996. The truth is quite to the contrary. The beginning of the end of the UNE rules came in 1999 when the Supreme Court held in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 738 (1999), that the FCC's virtually unlimited network sharing mandates were inconsistent with the 1996 Telecom Act. The Court remanded for further proceedings.

For several years in remand proceedings, the FCC resisted limiting the sharing requirements. Eventually, on the second appeal, the D.C. Circuit again held unlawful the Commission's unbundling mandates, including line sharing, on the basis they were inconsistent with the 1996 Act. In *U.S. Telecom Association v. FCC*, 290 F. 3d 415 (2002), here is what the D.C. Circuit said: "If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines." And to the same effect: "Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."

While Mr. Turner may believe that unbundling and sharing represents sound policy, it is wrong for him to ignore the courts' role in the abandonment of the excessive unbundling and line sharing regimes. The apparent purpose of doing so is to provide cover for the repeated claim that the FCC is now acting contrary to the intent of the 1996 Act. In fact, the FCC's abandonment of line sharing was based on the courts' understanding of the Act, and especially the courts' understanding of the Act's intent to promote facilities-based investment. In last week's blog, I referred to the investment that has occurred since curtailment of the unbundling and line sharing regime. And I explained that the 6000 ISPs that Mr. Turner claims existed prior to the demise of line sharing were not investing in their own facilities and, because they were acting in the capacity of pure resellers, were not offering services that were in any material way differentiated from those of the underlying facilities-based providers.

Nevertheless, ignoring the courts' role, Mr. Turner persists in claiming the Commission sacrificed competitive ISP choice for the promise of greater facilities deployment – a promise that went unfulfilled. This simply ignores the evidence of the massive investment in the deployment of high-bandwidth broadband facilities by telcos and cable companies (and wireless operators) that has occurred over the past five years. Mr. Turner summarizes this part of his argument in these two key sentences: *"Simply put, there is no evidence that the very limited deployment that has occurred since 2006 would not have occurred otherwise. It is quite possible that greater ISP access and choice would have led to more deployment."* It is a strange "money-grows-on-trees" world (but perhaps it is the world in which Free Press inhabits) in which, say, the nearly $20 billion that Verizon has invested in deploying high-bandwidth fiber optic facilities is characterized as "very

limited." Private capital does not yet grow on trees, despite the Fed printing money as fast as trees can be harvested and turned into paper.

Reread the above two sentences carefully. Note that in the first Mr. Turner's suggestion that there is "no evidence" the deployment that has occurred since 2006 would *not* have occurred otherwise. Of course, it is impossible to prove a negative. But we do know for a fact that rapid broadband deployment did occur. And the second sentence asserts it is "quite possible" that more investment would have occurred absent the limitations on the unbundling and line sharing regime. Because under some circumstances, "anything's possible," it is difficult to argue as a literal matter with this statement. But it is telling that after all the pages of *strum und drang* concerning the putative harms resulting from abandonment of mandatory network sharing that all Mr. Turner can muster at the nub of the matter is an unprovable double negative garnished by a possibility. Far better to make communications policy based on economically sound probabilities of outcomes, especially when it comes to promoting investment and innovation.

2. As for the 1980s *Computer II* regulatory regime, which the Free Press paper holds up as the paradigm to which policymakers should return in imposing strict new unbundling and sharing mandates, I know more than a little about the subject because I was at the FCC, serving as Associate General Counsel, at the time the *Computer II* rules were developed and was involved in the discussions relating to development of the rules. The long and short of it is that those regulations were developed in a narrowband world at a time when AT&T, by nearly all accounts, still possessed monopolistic power.

Any fair reading of the voluminous *Computer II* series of orders will show the Commission's intent was two-fold: first, to find a way to protect nascent online entrants from being subjected to common carrier regulation; and, second, to protect the emerging online providers against potential anticompetitive acts in light of the fact that AT&T would offer its own online services.

The first objective was addressed by the establishment of the distinction between "enhanced" and "basic" services, or what became know as 'information" and "telecommunications" services in the 1996 Act. At the time of the development of *Computer II* in a narrowband environment, it was *relatively* simple -- although even then often not without difficulty (witness the decade-long controversies over the categorization of protocol processing and other services) – to classify services as "basic" or "enhanced." As an indication of this, look at the *Computer II* and associated orders and see how often "basic" and "enhanced" were shorthanded as a distinction between "voice" and "data" services, which for practical purposes, was largely true. This is because in a non-digital narrowband environment, voice and data services largely were readily separable and the separation could occur with (relatively) little loss of efficiency gains.

Of course, in a digital broadband environment, this is no longer true. It is impractical, if not impossible, to separate "voice" and "data" (and "video") bits without expenditure of substantial economic resources and loss of substantial efficiency gains that result from integration. This is what "convergence" in a broadband world is all about. Indeed, back in 2004, in its *IP-Enabled Services* proceeding, 19 F.C.C.R. 4863, the Commission made

this same point: "[I]t may become increasingly difficult, if not impossible, to distinguish 'voice' service from 'data' service, and users may increasingly rely on integrated services using broadband facilities delivered using IP rather than the traditional PSTN (Public Switched Telephone Network)." Free Press may wish that technological developments had not radically changed the communicational environment as the nation has transitioned to digital broadband from analog narrowband. But the reality is the environment has changed remarkably, and to the great benefit of consumers. In invoking *Computer II* in talismanic fashion, the Free Press paper does not deal with this technological reality.

The other reality that the Free Press paper does not deal with, of course, is that the competitive environment today is radically different from that which prevailed when *Computer II* was adopted in 1980. At the time, most economists maintained that AT&T possessed monopolistic power. It is possible to have a discussion about the extent to which existing and potential competitive forces presently operate in the broadband marketplace, but no one can reasonably maintain today's landscape resembles the monopolistic one that prevailed at the time of *Computer II*.

So, while I have respect, even fondness, for what *Computer II* aimed to do, and for what it achieved at the time, it is wrong to invoke it as a regulatory model for establishing sound broadband policy in 2009. Better to slip on an old Che Guevara tee-shirt and get one's revolutionary nostalgia fix that way. And the story recited in the Free Press paper concerning the demise of the UNE unbundling mandates similarly should not be relied on as a basis for establishing policy. The truth is the courts instructed the FCC that its then-policies were a deterrent to facilities-based investment, and that such policies were inconsistent with the Telecommunications Act of 1996.

The need now clearly is to adhere to forward-looking policies that encourage investment and innovation, not old policies that were implemented in an environment far different than today's competitive one.

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