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37. Telecommunications, Broadband, and Media Policy

Congress should

- reject network neutrality regulation of the Internet,
- reject à la carte regulation of the cable industry,
- continue the transition to a system of property rights in spectrum,
- discourage the Federal Communications Commission from imposing nontechnical regulations on the use of privately held spectrum,
- deregulate the radio and television industries, and
- end ''universal service'' and other telecom taxes.

The telecommunications sector is dynamic. Markets and technologies continue to evolve rapidly, but communications policy has not kept pace. The policymaking landscape is encumbered not just with outdated rules and regulations, but also with the same outdated thinking that produced those policies in the first place.

The traditional premises for regulation—a lack of competition and a perceived need to ensure universal service—are vanishing, if not already gone. Telecommunications can be accessed across the nation, and the market for communications services has grown increasingly competitive with each passing year.

Congress last comprehensively revamped telecom law in the Telecommunications Act of 1996. Although that act was widely understood as a liberalization measure, in fact it delegated broad and remarkably ambiguous authority to the Federal Communications Commission and state regulators who have done a poor job of following through with a serious liberalization agenda.

The 1996 Telecom Act's most serious flaw, still unchanged, was that it kept in place increasingly unnatural distinctions that grouped providers

into categories, such as ''common carriers,'' cable services, wireless, and mass media and broadcasting. Technological convergence means that many of these formerly distinct industry sectors and companies have already integrated, and the rest are doing so rapidly. A number of firms are already offering telephone, broadband Internet, and pay-television services under a single brand name, for example.

Congress should reform communications policy to end this asymmetry. Placing all telecommunications providers on the same, deregulated playing field should be at the heart of telecommunications policy. Congress should not institute new regulation of telecommunications providers, especially not Internet service providers and their network management practices.

Reject Network Neutrality Regulations

The most-discussed regulatory proposal of recent years—and the proposal that would cause the most long-run harm—is network neutrality regulation. At the moment, Internet service providers operate largely free of the burdensome regulations that afflict the telephone and cable television industries. Network neutrality regulations would open the way for government regulation of the Internet, a danger that greatly outweighs the harms network neutrality regulations are designed to forestall.

Network neutrality is the technical principle holding that network providers should not route packets of data differently based on their destination or contents. It has played an important role in the Internet's spectacular growth over the last decade because it has kept the Internet's barriers to entry low. Network neutrality activists fear that without government regulation, incumbent telecom providers will seek to undermine network neutrality and erect new barriers to entry, speech controls, and the like. They fail to appreciate that neutrality is deeply embedded in the Internet's architecture and cannot be easily changed by network providers. Any efforts to limit customers' online activities are likely to backfire.

For example, when Comcast tried to control congestion by limiting its customers' use of the BitTorrent file-sharing application in 2007, many customers thwarted its efforts by switching to a version of the BitTorrent protocol that used encryption to evade Comcast's filters. Comcast achieved little in the way of congestion control, but it got a lot of bad press in the process. The episode suggests that network owners' ability to control or limit their users' online activities is much more limited than advocates of regulation imagine.

In addition to being unnecessary, network neutrality regulation would also be counterproductive. The proposed definitions of network neutrality all have significant ambiguity, which would lead to years of legal uncertainty. And history is full of examples of industry incumbents' ''capturing'' the regulatory body ostensibly overseeing them and using it to erect new barriers to entry. The Internet is still a young and dynamic medium; Congress should not risk tying it up in red tape.

Reject ''à la Carte'' Mandates

Another oft-discussed proposal is ''à la carte'' cable regulation, which would limit the bundling of channels by cable and satellite television firms. The concept is often presented as enhancing consumer choice by allowing customers to pay for only those channels they really want. This fundamentally misunderstands the economics of the cable industry.

Bundling is a common practice in information industries because it provides consumers with more value for their money. For example, most newspapers bundle their national and local news, business, sports, and opinion sections and provide copies to every customer. It wouldn't be significantly cheaper—and might even be more expensive—to deliver to each customer only the sections he or she reads.

The same dynamic applies in the cable industry. Once they have been produced, television programs can be retransmitted an unlimited number of times. Delivering fewer channels may actually be more expensive because more complex equipment would be needed. In practice, an à la carte mandate would mean significantly higher per-channel prices. Some customers would see their bills go down, while others would see them go up, but every customer would get fewer channels for his or her money.

À la carte regulation would also undermine niche programming. The current bundling approach puts lesser-known channels in millions of homes, allowing customers to sample them and potentially discover new programs they enjoy. An à la carte mandate would discourage this kind of serendipity by only providing customers channels they request in advance.

Create a Free Market in Spectrum

During the 20th century, the FCC managed the nation's electromagnetic spectrum in a manner reminiscent of the Soviet Union. Spectrum licenses were awarded at the whim of FCC commissioners on the basis of vague and arbitrary criteria. Licensees were rarely allowed to deviate from their

assigned uses. As a result, some applications have been starved for spectrum, whereas spectrum assigned to other uses have sat idle much of the time.

Congress took a big step toward a free market in spectrum in 1993 when it ordered the FCC to begin assigning new spectrum by using auctions. The auctions the FCC has held over the last 16 years have been very successful. Today's dynamic mobile phone market operates largely on auctioned spectrum, and more spectrum is due to come online with the completion of the digital television transition in February 2009.

The transition to property rights in spectrum should be accelerated in three key ways. First, the de facto property rights that have already been created by auctions over the last 16 years should be formalized. Auction winners should enjoy the same legal protections accorded other kinds of property, and the FCC should encourage the creation of robust secondary markets for spectrum by developing rules for selling, leasing, dividing, and combining spectrum rights.

Second, the FCC should convert more spectrum from limited-use licenses to flexible spectrum ownership. Any spectrum that is currently idle should be reclaimed by the FCC and put up for auction. Private parties who are currently using spectrum under restrictive licenses should have their licenses converted into flexible spectrum-ownership rights. Similarly, state or local governments that hold spectrum licenses should be permitted to use the spectrum for any purpose or lease or sell it to third parties. Some spectrum may need to remain under federal control for military, scientific, or other purposes, but the vast majority of the spectrum should be converted to flexible spectrum ownership.

The FCC should also designate some bands for unlicensed use. In a ''spectrum commons,'' anyone can use spectrum for any purpose provided they meet straightforward technical requirements, such as observing maximum power levels. Unlicensed spectrum enabled the creation of a variety of important short-range communications technologies, including Wi-Fi, Bluetooth, and garage door openers. It is unlikely to prove useful for high-power, long-range communications technologies because of interference problems, so only a limited number of additional unlicensed bands are probably appropriate; most spectrum should be assigned by auction for exclusive use.

Third, the FCC should deregulate the use of spectrum by private parties. The FCC plays a crucial role in developing technical regulations to minimize interference between spectrum holders. But it also enforces a wide

variety of regulations that have little to do with preventing interference. Virtually all these regulations are counterproductive and should be repealed.

Reject "Open-Access" Regulations

One example of counterproductive regulation is the FCC's recently imposed ''open-access'' rules. In 2007, the FCC auctioned off commercial spectrum in the 700-megahertz band that came with strings attached: an open-access rule that required the winner to allow any device or application to interoperate with its network. There are two significant problems with this requirement. First, it deprived the U.S. treasury of revenue. The spectrum almost certainly would have fetched a higher price had it not been encumbered by open-access restrictions. Worse, the open-access rules will give the FCC an ongoing veto over the auction winners' future technical and business decisions, creating an ongoing opportunity for the same kind of rent seeking that now afflicts the wired telecom industry.

The open-access rules were proposed as a remedy for a perceived lack of competition in the wireless marketplace. But a much better way to enhance competition is to put more spectrum into circulation so that more firms can enter the market. More auctions, not more red tape, are the recipe for a dynamic and innovative wireless marketplace.

Deregulate Broadcasting

One area of the electromagnetic spectrum that has been particularly stunted by government regulation is radio and television. The FCC tightly regulates every aspect of broadcasters' activities, leading to wasted spectrum and a slow pace of technological innovation.

The media marketplace is now far more competitive than it was at any time in the 20th century. Television broadcasters face competition from cable and satellite television providers, as well as a variety of new Internet-based services. Terrestrial radio stations compete with satellite radio, MP3 players, and audio streaming to mobile devices. Given this explosion of new options, there is no good policy rationale for singling out television and radio broadcasters for regulation.

Broadcasters should be given flexible licenses that allow them to use their spectrum for any purpose or to sell it to third parties who can put it to better use. Over time, the spectrum is likely to be reallocated to technologies such as cellular data networks that make more efficient use

of available spectrum and offer consumers much greater customization. Such networks can continue transmitting the same kind of programming now delivered by broadcast networks, but they could also offer a much wider variety of content, applications, and services. The FCC should have no power to review mergers or spectrum license transfers.

End Arbitrary Media Ownership Regulations

Efforts to reform media ownership rules, which restrict the number of newspapers and television and radio stations that one firm can own, have been bogged down at the FCC for over a decade. In November 2007, the FCC completed its most recent proceedings and announced that it would make just one very minor rule change that would affect only the 20 largest and most competitive media markets. Even this timid decision prompted a firestorm of controversy and legal challenges.

The hysteria over media consolidation is completely unjustified by the empirical evidence. Far from becoming monopolistic, local newspapers and broadcast television stations are being steadily marginalized by new media technologies. Consolidation may help newspapers and television stations continue providing high-quality local coverage in the face of shrinking budgets. In any event, with the explosion of competing communications technologies, there is no longer any good reason for the FCC to micromanage the evolution of the broadcasting industries. The FCC's media concentration rules should be repealed.

Repeal Unconstitutional Indecency Regulations

The growing competition facing traditional broadcasters also undermines the case for ''indecency'' regulations. In 1978, the Supreme Court upheld censorship of dirty words on the broadcast airwaves against a First Amendment challenge on the ground that broadcasting media ''have established a uniquely pervasive presence'' in people's lives.

That was a controversial conclusion in 1978; it is plainly false in 2009. The vast majority of households subscribe to paid cable or satellite television services. Traditional broadcast stations are just another option in today's increasingly robust media marketplace. Moreover, technologies such as the V-chip help parents shield their children from objectionable over-the-air programming. The First Amendment demands the repeal of broadcast indecency regulations.

End ''Universal Service'' and Other Telecom Taxes

As technological convergence brings increased telecom competition, tax policies based on the regulated monopoly model of the past must be comprehensively reformed. The most glaring example is the ''temporary'' federal 3 percent excise tax on telecommunications put in place in 1898 to fund the Spanish-American War. Recently scaled back, that anachronistic tax should be repealed entirely.

Another for the chopping block is the E-Rate program, which taxes telecommunications services to subsidize some telecommunications users through ''universal service'' programs. In May 1997, the FCC, in response to the 1996 law, created the E-Rate program, which established a new federal bureaucracy to help wire schools and libraries to the Internet at a beginning cost of $2.25 billion per year in hidden taxes on phone bills. Recent oversight of the E-Rate program has revealed waste and fraud in the program, even as its necessity in the modern telecommunications environment is gone.

Suggested Readings

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