Supreme Court Review of UTSA II Would Delay the President's Broadband Policy and Prolong Existing Disarray in Telecommunications

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By Congressman David McIntosh and Julian Gehman[1]

Ten years is too long to hijack wireline telecommunications with uncertainty, litigation and over-regulation. In the Telecommunications Act of 1996, Congress authorized the FCC to require that network elements be made available to competitors, so long as the Commission considers, at a minimum, whether the failure to provide a given network element would impair the competitor's ability to provide service.[2] In response, the FCC invented TELRIC and UNE-P. During the eight intervening years, wireline telecommunications has been in turmoil, with non-stop litigation and remand causing uncertainty.[3] On remand from the D.C. Circuit, the FCC published its controversial Triennial Review Order (the "TRO").[4] In what has been called a "power struggle" and a "palace coup," the TRO was passed by an odd coalition of FCC Commissioners Copps (D), Adelstein (D), and Martin (R), over the dissents of Chairman Powell (R) and Commissioner Abernathy (R).[5] In USTA II, the D.C. Circuit predictably vacated and remanded portions of the TRO, while upholding other parts.[6] FCC Chairman Powell supports USTA II. However, the odd coalition of FCC Commissioners has urged the Solicitor General to petition for certiorari. Such request results from a power struggle within an independent agency and falls outside one of the Solicitor General's core functions, namely, to defend Executive Branch policy that has been duly implemented by federal agencies.

The time has come to stop the cycle of litigation, remand, and more litigation, and instead let the marketplace go to work. "Complexity and uncertainty are the enemies of investment."[7] Investment in wireline and broadband infrastructure must be encouraged through deregulation and finality so that this sagging industry can be revived. The D.C.

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[2] 47 U.S.C. § 251(d)(2).

[3] See Local Competition Order, 11 FCC Rcd 15499 (1996), rev'd in part, aff'd in part, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999); UNE Remand Order, 15 FCC Rcd 3696 (1999); Local Competition Order (Supplemental Order), 15 FCC Rcd 1760 (1999); Line Sharing Order, 14 FCC Rcd 20912 (1999); Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000) (remand decision); Local Competition Order (Supplemental Order Clarification), 15 FCC Rcd 9587 (2000), aff'd sub nom. Competitive Telecommunications Ass'n v. FCC, 309 F.3d 8 (D.C. Cir. 2002); Triennial Review NPRM, 16 FCC Rcd 22781 (2001); Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002); United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"); Triennial Review Order, 18 FCC Rcd 19020 (2003); United States Telecom Ass'n v. FCC, 359 F.3d 554 (2004) ("USTA II").

[4] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 19020 (2003); 2003 FCC LEXIS 4697.

[5] Heather Fosgren Weaver, Wireless Still Waiting To See How UNE Decision Affects Them, RCR Wireless News, Feb. 24, 2003.

[6] USTA II, note 2 supra.

[7] Testimony of Mr. Ivan Seidenberg, Chairman and Chief Executive Officer, Verizon Communications, Inc. Communications Corporation before the U.S. Senate Committee on Commerce, Science, and Transportation (May 12, 2004).

Circuit got it right with the deregulatory USTA II decision. That decision should stand. President Bush got it right with his recently announced broadband policy that seeks to clear out the regulatory underbrush. The President's policy should be implemented immediately. FCC Chairman Powell got it right by dissenting to the TRO and prodding companies to reach voluntary interconnection agreements. Those negotiations should take precedence and the litigators should go home, thereby giving certainty and greater incentive to reach privately negotiated agreements. Supreme Court review of USTA II would damage and delay these well considered efforts, irrespective of the outcome of any Supreme Court decision. Another one to two year period of delay and uncertainty, tacked on to the eight years the telecommunications industry has already endured, would be too much. USTA II should stand with no further review.

1. Grant of certiorari could delay rulings the Administration prefers remain settled.

Were the Supreme Court to grant certiorari, the parts of USTA II and the TRO that directly support President Bush's broadband policy undoubtedly would be dragged into the proceeding and placed on hold for one to two years. Implementation of the President's broadband agenda almost certainly would be delayed by Supreme Court review, which would prolong the current disarray in wireline telecommunications.

To be certain, the Supreme Court could grant certiorari on issues designated by the Solicitor General and not consider questions raised by opponents of the TRO. Notwithstanding this, AT&T, MCI and the other CLECs undoubtedly will appeal the broadband portion (Section III.A) of USTA II, in addition to the more controversial delegation part (Section II). Section III.A of USTA II upholds the TRO in interpreting the "at a minimum" clause of 47 U.S.C. § 251(d)(2) as authorizing the FCC to consider the effect of forced unbundling on infrastructure investment. TRO, 18 FCC Rcd at 17148; USTA II, 359 F.3d at 579. As described below, this directly advances the President's deregulatory broadband policy. However, once persuaded by the Solicitor General to grant certiorari for any issue in USTA II, the Supreme Court could deem this question of statutory construction important enough to also warrant review, even if the Solicitor General were to oppose review of Section III.A.

Further, the Supreme Court may be unwilling to consider issues raised by the Solicitor General in isolation from those raised by opponents of the TRO. For example, in Part II of USTA II (the subject of any petition for certiorari by the Solicitor General), the D.C. Circuit upholds the FCC's use of a "looser concept of impairment," which in turn relies on § 251(d)(2)'s 'at a minimum' language." USTA II, 359 F.3d at 572. The Supreme Court probably would find that this "looser concept of impairment" underpins the D.C. Circuit's impairment analysis throughout USTA II. Consequently, construction of the "at a minimum" language could be considered even where the Solicitor General did not so petition.

More broadly, it does not matter which specific issues are accepted for certiorari. The simple act of granting certiorari in USTA II could prompt the marketplace to discount much of the TRO and USTA II, thereby harming implementation of the

President's agenda by delaying wireline and fiber broadband rollout. For example, even if certiorari were limited to the delegation question, this issue might not be fully severable from the FCC's approach to impairment. See USTA II, 359 F.3d at 572 (impairment standard finds concrete meaning only in its application). The telecom industry would seek to discount for how the Supreme Court's ruling on delegation would impact impairment. Consequently, the current disarray in wireline telecommunications would continue until the Supreme Court rules.

2. Ongoing industry negotiations would be promoted by finality of USTA II.

FCC Chairman Michael Powell, joined by the other FCC Commissioners, has prodded the telecommunications industry to negotiate and enter into voluntary interconnection agreements.[8] While at first blush this appears to be a good step towards freely negotiated arrangements that will yield a more efficient outcome than one mandated by regulation, in fact mediated negotiations are almost certainly doomed to fail. During the negotiations the FCC has requested an extension of the stay of USTA II and the deadlines for appealing the decision to the Supreme Court. As Nobel Laureate Ronald Coase pointed out long ago, parties successfully negotiate optimal outcomes given the assignment of rights and responsibilities. Critical to encouraging freely negotiated interconnection arrangements is the removal of uncertainty. Where there is a pending Supreme Court review with potentially a different or delayed outcome, the parties to a negotiation would naturally seek to game the probabilities inherent in this uncertainty. The most likely outcome will be failed negotiations. Therefore, to promote negotiated agreements, USTA II should become final.

A recent press report suggests that these negotiations have been convened in order to avoid having to make a politically difficult decision of whether to seek certiorari for USTA II.[9] If the report is correct, the FCC and the Administration are hoping that an industry solution will eliminate the impetus for an appeal. However, this would be putting the cart before the horse. The negotiations are not working because the prospect of an appeal is creating uncertainty and opportunities to game the possible outcomes. The situation would only get worse were the Solicitor General to petition for certiorari, and presuming the Supreme Court grants certiorari. The process then would work itself out over a period of two years (during the pendency of the Supreme Court proceeding) instead of the six months or less that it should take under normal circumstances to reach agreement. The ILECs have a good chance of obtaining a favorable Supreme Court ruling, while the CLECs are showing signs of desperation. Consequently, both sides predictably would hold out for vindication in the Supreme Court. The Administration and the FCC could best achieve their goals by cutting off the avenue of a possible appeal and letting the parties reach privately negotiated agreements, which, as Professor Coase accurately predicted, will yield a more efficient result than a regulatory solution.

[8] Competitors React To Powell's Call For UNE Negotiations, Washington Telecom Newswire, March 10, 2004.

[9] Jeffrey Birnbaun & Christopher Stern, Phone Lobbies Push Hard On Local Access, Washington Post, June 4, 2004, E1.

3. The President's broadband policy should be implemented immediately.

Market forces, not micromanagement by litigation, should prompt broadband deployment. Innovations such as VoIP have already made inroads. These innovations should continue under the aegis of the free market, not regulation and court review. President Bush has announced his broadband policy of relying on market forces.[10] The President's agenda includes encouraging inter-modal competition through broadband alternatives such as broadband over powerline and wireless applications. Inter-modal broadband competition also includes wireless, satellite, wireline and cable. The President specifically supported FCC Chairman Michael Powell's efforts to "eliminate burdensome regulations" and "clear[] out the underbrush of regulation." The White House press release that accompanied the President's speech highlighted the FCC's decision, championed by Chairman Powell, to free new fiber-to-the-home investments from traditional telecommunications regulation. Finally, the President set a goal of universal access to broadband by 2007.[11]

President Bush's agenda of clearing out the underbrush of regulation makes sense. Areas of U.S. communications that are the least regulated – email, instant messaging, wireless and cable broadband – are growing, explosively in some cases. By contrast wireline telecommunications has lost market share under the stranglehold of UNE-P and TELRIC.[12] Significantly, wireline's DSL has shown signs of advancing against cable in the last year, or since the FCC passed the broadband portions of the TRO.[13]

The FCC's interpretation of the "at a minimum" clause of 47 U.S.C. § 251(d)(2) and its looser conception of impairment support the FCC's broadband rulings in the TRO. These rulings are the critical legal rationale supporting the FCC's determination that, because forced unbundling provides a disincentive to investment, the costs of unbundling new broadband outweigh the benefits and should not be mandated. As a result of this TRO ruling, 18 FCC Rcd at 17087, upheld in USTA II, 359 F.3d at 583-84, investment in fiber-to-the-home can proceed unimpeded by lower potential rates of return, as referenced in the White House press release that accompanied the President's speech.

The TRO and USTA II significantly advance the President's broadband agenda. The TRO, as upheld by USTA II, incentivizes investment in broadband by freeing it from

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[10] Press Release, Office of the White House Press Secretary, President Unveils Tech Initiatives for Energy, Health Care (April 26, 2004), available at http://www.whitehouse.gov/news/releases/2004/04/20040426-6.html.

[11] Id. See also Adam Thierer, Is The Bush Administration Finally Serious About Broadband Policy? Issue #81, CATO Institute (April 28, 2004).

[12] Cable, which invested heavily in infrastructure after deregulation provided proper incentives and certainty (see Testimony of Mr. Brian Roberts, infra.), has so far won the broadband race in the United States with a commanding 60%, plus, market share, while wireline telecom's DSL lags at below 40%. Georg Szalai, DSL Tops Cable Modem Subscriber Growth, Hollywood Reporter, May 24, 2004 (citing UBS analyst Aryeh Bourkoff); Comm Daily Notebook, Communications Daily, May 12, 2004 (citing Leichtman Research Group).

[13] Id.

much of traditional telecom regulation. Even where it reverses the TRO, USTA II does so in a deregulatory manner that promotes President Bush's agenda of clearing away regulatory underbrush. Leaving the deregulatory USTA II in limbo for a year or two, while it is reviewed by the Supreme Court, could do more harm to the President's broadband policy than could be done by a political opponent. Supreme Court review means an uncertain and postponed outcome until the Supreme Court rules. Fiber and other network infrastructure investment decisions that had depended on incentives established by the TRO could be delayed until it becomes clear whether the incentives will materialize. This delay could call into question the President's goal of universal access to broadband by 2007. The best way to achieve certainty and provide clear investment incentive is for the deregulatory USTA II to become final and binding.

Positive effects of deregulation and certainty, urged by President Bush, are illustrated by the following testimony of Mr. Brian Roberts, President, Chief Executive Officer and Director, Comcast Corporation, before the U.S. Senate Committee on Commerce, Science & Transportation, on May 12, 2004.

> Before 1996, the cable industry was stagnant. The heavy-handed economic regulation imposed by the 1992 Cable Act had frozen investment and innovation. New cable technology and programming had all but ceased.
>
> From 1992 through 1998, the time when the cable industry was under heavy regulation, investment in upgrading the networks and in new programming was very low. You'll notice in 1992 the industry collectively spent only $2.4 billion. By 1995 – in what should have been peak spending years – the numbers were just over $5 billion.
>
> Then, in the wake of the 1996 Telecom Act and increased competition from satellite, the industry made a huge bet. With the lifting of many of the most egregious regulations, the industry concluded that "if we build it they will come." In the eight years since the Act, the cable industry has had a renaissance. We have made massive investments in both video and broadband – over 85 billion dollars to date by the industry as a whole, and 39 billion dollars of investment just by Comcast and our predecessor companies in the markets where we now do business. You can see the dramatic rise between 1998 and 1999, when investment almost doubled from $5.6 billion to $10.6 billion. As we approach 100% completion of the rebuild, the numbers begin to level off and drop slightly year-to-year.

We need to achieve in wireline telecom what we achieved in cable. The question is whether to start now or to start in one to two years after the Supreme Court reviews USTA II. We should start now by letting USTA II become final.