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BE BOLD!

"Be bold!," FCC Chairman Reed Hundt told his staff implementing the 1996 Act.[1] And they were indeed bold in their efforts to open up local telecommunications markets to competition. So bold that the resulting regulatory scheme was repeatedly rejected by the courts.

The goal of competition was laudable, but the means chosen were lamentable. Despairing of actual facilities-based competition, the Commission chose instead to create artificial competition through radical unbundling and rock bottom pricing of the local telephone networks. The jewel in the crown of the FCC's creation was the so-called UNE Platform at TELRIC prices.[2] UNE-P is the sham equivalent of resale; TELRIC is . . . well, few remember what the letters even stand for. The idea was to push prices to idealized levels that no actual provider could possibly match. The result of course would have been to discourage anyone from building competing facilities had the courts not intervened.

Stock market values for start-ups soared as analysts either believed the FCC's rhetoric or anticipated a giant regulatory wealth transfer. Stock market values crashed when investors realized that none of these local competitors had a viable business plan for adding value. Competition has come: but it has come from cable, VoIP, and wireless, not from regulatory fiat.

The FCC itself later admitted that almost no genuine competition resulted from the agency's extreme interpretation of the unbundling and resale provisions of sections 251 and 252.[3] The most significant advances from the 1996 Act were the provisions that simply required regulators to get out of the way: the removal of state and local entry barriers in section 253;[4] the required interconnection among networks; and the entry path to long distance for the Bell companies in section 271.[5] The long distance restrictions in the AT&T consent decree had cost consumers billions of dollars in inflated pricing for a service that, once opened to competition, has become essentially free. The lesson we should take away from the 1996 Act is that regulators cannot create competition. They can only get in the way. The FCC's implementation of the '96 Act created was a costly mess and a cautionary tale.

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. *See* Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, para. 672 (1996).
3. 47 U.S.C. §§ 251, 252 (2012).
4. 47 U.S.C. § 253 (2012).
5. 47 U.S.C. § 271 (2012).

"Be bold!" President Obama directed the FCC in its ironically-named Open Internet proceeding: competition cannot be trusted without extensive regulation to ensure a level playing field; new business ideas are a danger to least common denominator service for all comers. The resulting regulatory scheme will, once again, damage competition, pick winners and losers in the marketplace, encourage regulatory arbitrage, and, we can only hope, be thrown out by the courts.

La plus ça change.