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Tsar of Telephony: Comes Now the Ghost of Judge Greene Past

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The Supreme Court recently considered the future of telecommunications regulatory policy, and responded by resurrecting a ghost from the bygone era of monopoly telephony. This threatens the growth of robust facilities-based telecommunications market competition—most notably, that for emerging broadband data and video services. *Verizon Communications v. FCC* involved the FCC's so-called TELRIC[1] cost standard for pricing network elements—an acronym that George Gilder has aptly translated as the Telco Extortion Law Ravaging Internet Commerce. The Court granted the FCC plenary discretion to set network element prices, effectively making FCC Chairman Michael Powell the latest Tsar of Telephony -- a title first assumed *de facto* by the late Judge Harold Greene upon adoption in 1982 of the consent decree ending the life of the unified Bell System.

Powell's two immediate predecessors, Reed Hundt and William Kennard, acted like regulatory Caesars (the Russian term for Caesar is "Tsar").[2] Those twin telecom terrors were, at least theoretically, subject to the legal constraint of judicial review as to decisions they made setting prices for network elements. But the latest Supreme Court ruling, if literally interpreted by the courts, makes Powell a true pricing Tsar, subject to no serious legal constraint. Prices, if wrongly set, will kill competition even if the rest of the rules don't. To further cement Powell's authority, President Bush, speaking at a White House technology forum, tapped the agency as the focus of efforts to speed deployment of high-speed Internet services.[3]

The Protean Chameleon

Deciding the issue of whether the FCC's below-cost pricing for network elements constituted abuse of administrative agency discretion, the Court sided with the FCC. Verizon argued that the "plain language" rule of statutory interpretation dictates that "cost" in the Telecommunications Act of 1996 must refer to actual rather than hypothetical cost. But Justice Souter, writing for the majority, answered with plain language of his own: "The fact is that without any better indication of meaning than the unadorned term, the word 'cost' in sec. 252(d)(1), as in accounting generally, is a chameleon."[4] And just to nail his point down, Souter later added that "the term 'cost' is simply too protean to support the incumbents' argument."[5]

Lawyers for Enron will be pleased to know that, "in accounting generally," cost is "protean" and a "chameleon." (Wonder how much added flexibility in calculating cost basis of assets will the IRS now give the average taxpayer?) The practical impact of a lackadaisical construction of what constitutes "cost" is to give the FCC—and, quite possibly, other administrative agencies as well—*de jure* plenary latitude to construct cost standards, however hypothetical they may be. Arguments as to what is below a given cost level will be hard to sustain, now that the Supremes have judicially deemed that cost is a highly fluid concept. If the courts apply the judicial landmark *Chevron* standard[6] of deference to agency expertise, almost anything passes a protean/chameleon test.

Conferring plenary power on an agency to set industry prices seems hardly to comport with the efficient market competition goal that lies at the heart of the 1996 Act, as Justice Breyer pointed out in his dissent—especially if an agency sets prices below-cost, which discour-

ages efficient competitive entry. TELRIC will do just that, Breyer noted, by promoting sharing of network facilities at below-cost prices, maximize sharing of facilities, and thus undermine competition by minimizing deployment of unshared facilities.[7] Further, Breyer cited that the 1996 law provided for *privately negotiated* pricing agreements between the parties, supplemented in event of stalemate by *state* public utility commission intervention.[8] Finally, the 1996 law is not a typical regulatory statute, Breyer stressed, but rather is a *deregulatory* enactment that seeks promotion of new market entry.[9]

The Chameleon Becomes a Tsar

But Breyer's argument did not prevail with a majority of his colleagues. The majority has made FCC Chairman Powell a Tsar of Telephony, before whom telecom firms must now prostrate themselves. An appropriate form of address from Tsarist Russia days would be for firms seeking FCC approvals to petition the Commission in the name of "our father the Tsar."[10]

For telecom firms, then, the issue is whether Powell desires to be a "Tsar Liberator" like Alexander II, or like Alexander's immediate predecessor, Nicholas I, known by his hapless subjects as "the Cudgel." Alexander II freed the serfs. Will Tsar Michael II[11] free the Bell-serfs, by allowing network element prices to be determined by the marketplace? Or like Nicholas I will he wield the regulatory cudgel that the Supremes gave him, and keep network access prices far below true incremental cost? Before addressing this, a federal appeals court ruling a fortnight after the Supremes ruled must be added to the brew.

Enter the DLEC Dragon: The D.C. Circuit Speaks

Competitive carriers seeking access to residential loops became known as DLECs (DSL-LECs, to distinguish them from the CLECs that target business customers). The US Court of Appeals for the District of Columbia Circuit decided in *USTA v. FCC*[12] that the FCC's decision to order "line sharing" of local loops—*i.e.*, requiring phone companies to allow competitors to share the high frequency portion of phone company copper wire loops that is used for providing DSL service[13]—was an abuse of even the broad agency discretion conferred by *Chevron*. The Court ruled that the FCC had failed to consider geographic market variations in competition, and that the agency had simply ignored its own repeated findings that cable companies had by far the largest market share of broadband access. (The Circuit Court did not address TELRIC pricing, and thus did not put itself in the position of directly contradicting the Supreme Court; drawing such distinctions ensures that the next generation of communications-lawyer children will go to the nation's finest universities.)

Will the Tsar Slay the Dragon?

The Supreme Court's decision giving the FCC plenary authority over pricing of network elements does not necessarily lead to the FCC gaining similar authority to mandate access regardless of actual geographic market conditions. It seems unlikely that any court will find geography as protean and chameleon-like as it found the concept of cost. However, the Supremes could apply *Chevron* and reach the same result by deferring to the agency's own interpretation of its earlier decisions.

Fortunately for the Bells, Chairman Powell is well-versed in geography. Even better, he is not inclined to artificially subsidize new entry even though the Supreme Court gave him blanket license to do so. Bet that he will pursue deregulation of new technology local loop investment, and thus move closer to overall telco/cable regulatory parity along the lines of the Senate's Breaux-Nickles Broadband Regulatory Parity Act of 2002. This bill requires the FCC to adopt rules mandating regulatory parity within 120 days of the bill's enactment.

Powell has consistently maintained that excessive regulation stifles market evolution. It will be ironic indeed if Powell's Tsarist rule is the engine, rather than the victim, of a revolution. The "palace" the revolutionaries shell this time would be the elaborate, hubristic regulatory edifice erected by the Clinton Caesars.[14]

[ET CETERA]

Port Protection: Does Your Cargo Glow in the Dark? All 8,500 US Customs inspectors, who cover 300 points of entry into the US, will have handheld radiation scanners by January; 4,000 inspectors already have them. The Customs Service, America's oldest law enforcement agency (formed 1789), also plans to pre-screen containers entering domestic ports. With six million containers arriving annually and only two percent currently screened, it is no mean task. Customs has already entered into several agreements with embarkation ports.[15] This is necessary, as a nuclear device arriving at port can be detonated before any search is conducted.

Airport Security Hole: Beware Plutocrats with Plutonium? While commercial flyers endure airport security searches, private air security is nearly an oxymoron: 1,453 charter operators fly 7,102 aircraft, and 200,000 small private planes are scattered around America's more than 18,000 airports.[16] Since October the FAA has required screening on flights exceeding 12,500 pounds (eight seats or more), but only in response to a specific threat. The rule has not been invoked to date. Shortly the Transportation Security Administration (TSA) plans to implement a rule mandating screening for charter planes weighing 95,000 or more pounds, which carry 15 or more passengers and account for "significantly less" than 10 percent of air charter flyers. The Washington area's three main airports, plus Chicago and Boston airports, have already instituted security rules for private planes.[17]

Airport Security II: Curious Priorities. National Review founder William Buckley recounted a story about a man whose mustache trimmer was confiscated by security personnel before boarding—but he was allowed to carry his .357 Magnum, for which he had the correct paperwork, on board. The man asked the security guard which device he would more likely use should he wish to take over the plane? The security agent's response is not given. By strict application of bureaucratic principles (*i.e.*, paperwork *uber alles*), the trimmer goes, the gun stays. Buckley suggests a point system of factors permitting presumptive security clearance, including a clean record, age, gender, race, and payment method.[18]

South Korea Surges. The latest OECD figures show South Korea still tops the planet in broadband penetration, at 13.9 per 100 persons. By comparison, the US sits at 3.2, Japan at 0.9 and the EU at 0.8. (*N.B.*, the figure is based on *persons*, not households.)[19]

Cell Phone Distraction. A woman talking on her cell phone in Greece left her baby on the bus when she got off, only catching up to the bus half an hour later.[20]

[1] TELRIC is an acronym meaning Total Element Long-Run Incremental Cost. It is the "green fields" forward-looking (*i.e.,* excludes any consideration of actual historical cost) price of a hypothetical most-efficient network using today's newest technology, leavened only by adoption of existing network wire centers (switching facilities) as part of the network. TELRIC, in essence, assumes that networks spring full-grown, like Pallas Athene from the head of Zeus. That networks do not do so did not disturb the Hundt-FCC in 1996 when it adopted the rule, nor, apparently, does it disturb seven Justices today.

[2] *Tsar* is, in fact, derived from the Roman *Caesar*; the latter term's transliteration is *tze-sar*.

[3] Remarks by the President at the 21st Century High-Tech Forum, Presidential Hall, Dwight David Eisenhower Executive Office Building, June 13, 2002. < http://www.whitehouse.gov/news/releases/2002/06/20020613-11.html >

[4] *Verizon Communications v. FCC*, No. 00-511, *Slip Opinion*, p. 28, 5/13,2002.

[5] *Id*., p. 29.

[6] In *Chevron USA Inc. v. Natural Resources Defense Council*, 467 US 837, 866 (1984), the Court set a high bar to contesting agency discretion: "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."

[7] *Verizon Communications v. FCC*, fn. 3, *supra*, Breyer (dissenting), pp. 12-13.

[8] *Id.*, p. 21.

[9] *Id.*, p. 22.

[10] The historian Richard Pipes calls Tsarist Russia a "patrimonial state"—the Tsar was viewed an owner of everything, and his subjects as his children, who must submit to his absolute authority. Russia Under the Old Regime (Charles Scribner & Sons, 1974).

[11] Continuing the Russian history analogy, Tsar Michael I, founder of the Romanov dynasty that held sway in Russia from 1613 to 1917, ruled 1613-1645. This makes Powell Tsar Mikhail II.

[12] No. 00-1012, consolidated with 00-1025 (May 24, 2002). < http://pacer.cadc.uscourts.gov/common/opinions/200205/00-1012a.txt >

[13] Copper loops can accommodate a range of radio frequencies suitable for communications. The "baseband" portion of the loop, from 0 to 4,000 Hertz (in analog terms, cycles per second) is used to provide voice service; higher frequency bands in the loop are dedicated to data transmission.

[14] Bolsheviks shelled the Winter Palace in 1917 (actually, the last Tsar, Nicholas II, had already abdicated, so the metaphor takes poetic license). The traditional "palace" metaphor for excess regulation is "regulatory Alhambra," after the famed Moorish architectural masterpiece in Granada.

[15] "US Border Security Targets Nukes," AP, May 30, 2002. < http://webcenter.newssearch.netscape.com/aolns_display.adp?key=20020529221700016286 2_aolns.src >

[16] There are 429 major U.S. airports, with 70 percent of the traffic concentrated in just 30 of them.

[17] "Private Plane Charters: One Way Around Air Security," Washingtonpost.com, June 2, 2002. < http://www.washingtonpost.com/wp-dyn articles/A45468-2002Jun1.html >

[18] "Put Your Toothpicks in the Mail," National Review Online, June 11, 2002, 2:30 PM. < http://www.nationalreview.com/buckley/buckley061102.asp >

[19] Source: *Korea Times*, June 6, 2002.

[20] "Woman Talks on Cell; Leaves Baby," AP, June 16, 2002. < http:/webcenter.newssearch.netscape.com/aolns_display.adp?key=20020615141200019429 6_aolns.src >

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