Insight

FCC: Regulate First, Ask Questions Later

SAM BATKINS | AUGUST 23, 2012

Last night, the Federal Communications Commission (FCC) suspended a modestly deregulated "special access" regime without conclusive data that the market was "uncompetitive."

Special access is mostly a broadband business service and has been around for decades. These special access lines are often referred to as "last mile" connections and they are generally managed by Local Exchange Carriers (LEC).

The problem with FCC's recent regulation? The Commission is suspending the current regime, which dates back to 1999, asserting that it's uncompetitive for businesses. FCC does this without sufficient data to support the new regulations.

FCC concluded, "[W]e cannot yet evaluate these claims of competitive harm based on the evidence to date." Nevertheless, FCC suspended the current regime and is only now imposing a mandatory request for information.

This mandatory information collection on the state of competition will take, at minimum, until March 2013. Meanwhile, businesses will labor under the current "interim" ruling, knowing that previous "interim" regulations have lasted for decades. Tales of regulatory uncertainty should multiply.

In an act of regulatory hubris, FCC Chair Julius Genachowski claims there is "compelling evidence," but in the same sentence he refers only to "allegations … causing real harm … hindering investment and innovation."

Far from a hindrance to broadband investment, the current market is dynamic and healthy. In 2011, the private-sector invested $66 billion in broadband, and nearly $1.2 trillion since 1996. What evidence does FCC provide that this figure would be higher with price controls and more regulations? None, of course. AT&T and Verizon alone invested $36 billion in 2010, but FCC omitted this investment data.

What did the previous special access regime look like? It's not pretty. In 1990, an LEC could only recover costs plus a fixed return on investment (price controls). With obvious flaws, this system was changed to a "price cap," to "avoid the perverse incentives of rate-of-return regulation." The cap was then adjusted based on productivity.

Then the 1999 regime took hold, which the FCC suspended last night. In 1999, the Commission removed the price controls, allowing carriers pricing flexibility. Until recently, carriers were free to raise and lower rates, generally unconstrained by price cap regulation.

The dissenters, Commissioners Robert McDowell and Ajit Pai, highlighted the majority's "fire, ready, aim" approach. How can FCC claim it has "compelling evidence" that the special access market is uncompetitive, and demand new information in the hope that it can then prove the market is uncompetitive, they asked.

Commissioner Pai noted that just four months ago FCC claimed that it didn't have sufficient data to make presumptions about market competitiveness. Now, FCC will seek "compelling evidence" in future collections of information.

What's worse, there are other non-regulatory remedies available. If a company believes

“that [carriers] are providing special access on terms or conditions that are not just and reasonable, they can bring an action in federal district court seeking damages.” The FCC majority didn’t mention this current legal remedy. Instead, it opted for an overbroad regulatory approach that likely won’t conclude until 2014, plenty of time for uncertainty to actually squelch investment.

The bottom line from this regulatory rush to judgment: the arcane price cap regime of the past will slip back into place and FCC’s regulatory bill will grow larger. Currently, FCC claims that it imposes 79 million hours of red tape, which costs more than $830 million. The Commission is confident in this data, but not much else.