Regulation Review

Net Neutrality's 400-Page Monstrosity

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Nearly two weeks after the Federal Communications Commission (FCC) officially approved a move to Title II, utility-style regulation of the Internet, the official language appeared for the first time this week. Unfortunately, it's just as bad as many expected. From a purely regulatory perspective, there's not much to analyze from a cost-benefit standpoint.

We know the rule is 400 pages, but FCC declined to quantify or monetize the benefit of an "Open Internet." Despite the additional costs that taxpayers could bear as a result of the rule, the majority does not estimate how these costs would be passed on to consumers. Likewise, there is no effort to determine even the direct costs that regulated companies might face because of the rule.

FCC is required, under the Regulatory Flexibility Act, to evaluate the impacts of the rule on small businesses and to determine whether it would have a "significant economic impact on a substantial number of small entities" (SINOSE). Not surprisingly, FCC punted on whether new net neutrality regulations would impose a SISNOSE, but they did list all of the affected industries:

- Broadband Internet Access Service Providers;
- Wireline Providers, including incumbent local exchange carriers, competitive local exchange carriers; interexchange carriers, and operator service providers;
- Wireless Providers, including fixed, mobile, broadband personal communications services, specialized mobile radio, air-ground radiotelephone service, and fixed microwave services;
- Satellite Service Providers;
- Cable Service Providers; and

- Electric Power Generators, Transmitters, and Distributors.

Clearly, the sheer scope of the rule affects more than just large, last-mile Internet companies. It impacts at least six different industries, and curiously, electric power generators as well. It's not clear why the final rule would affect the energy sector and FCC does not explicitly explain their compliance responsibility or how the energy sector compares to traditional broadband companies.

To its credit, FCC did perform its legal responsibilities under the Congressional Review Act and Paperwork Reduction Act. For the latter, the rule merely states that it "contains new information collection requirements." They will submit the paperwork to the White House, but FCC never quantified or monetized these burdens. For perspective, current net neutrality paperwork costs $560,000 annually and imposes roughly 41,000 paperwork burden hours. It appears this new rule will only add to those burdens, but we won't know the significance until the request lands at the White House.

We do know that the rule will be sent to the Government Accountability Office (GAO) where it will be declared either major or non-major. There is no mention of its status in the rule, but in 2011, FCC declared its previous net neutrality rule was non-major, which is laughable because there are few who believe net neutrality rules won't have a national impact of $100 million or more.

In sum, FCC did the all the analysis that was legally required and no more. Perhaps they should be applauded for just following the law, but ultimately, the courts will decide whether this rule will fall like its previous iterations.

ANALYSIS

At 400 pages and over 2,500 citations, the newly released network neutrality regulations packs in a lot. However, the most intriguing parts are the gaps, especially in economic and competitive analysis. Calls for a thorough economic treatment of the rules' impact over the years have been denied by two different sets of Democratic Chairmen. The new regulations reflect the lack of economic rigor, and will thus have an impact far greater than envisioned in the current plan.

When draft rules were released late last year, the most controversial part was the section surrounding paid prioritization, which would have allowed content creators to pay broadband providers for priority and other quality of service agreements. This new final rule sets up a bewildering conflict, agreeing that "some forms of paid prioritization could be beneficial," and yet decrying the practice because "the threat of harm is overwhelming." For

more than 100 years and in countless court cases, antitrust experts and economists have grappled with this tension, which has yielded a robust body of law that considers the context of deals and changing market realities. The FCC has flatly rejected this history. A group of ideologically diverse economists and antitrust scholars agree that the rules are a blast from the past and will not be good for consumers.

The report also gets it wrong on investment. Earlier this year, an AAF analysis found that these new rules could affect as many as 174,000 broadband related jobs in the coming 5 years, but the FCC downplays the impact it could have on the industry and consumers. Arguing in favor of the change, the FCC claims that "Verizon Wireless has invested tens of billions of dollars in deploying mobile wireless services since being subject to the 700 MHz C Block open access rules, which overlap in significant parts with the open Internet rules we adopt today." However, the report fails to mention that these regulations reduced the value of this spectrum by 60 percent. Now, the broader Internet faces a similar fate.

Ultimately, the rules are stuffed with conflicting statements and sleight of hand that will surely throw the industry into confusion and into the court room. To take one example, the FCC readily admits that they don't have expertise to regulate the interconnection agreements between content and broadband providers, nor have they intervened in this space before. Thus, they decided not to "apply the open Internet rules to interconnection." But in this case, it doesn't practically matter if the open Internet rules are applied since they are just a few pages in a massive document. With all the other legal modifications, the agency now effectively regulates an area of the economy it admits it knows little about.

While it will take some time to comprehensively assess the impact of these new regulations, every small, medium, and large Internet provider faces immediate legal costs. Because the FCC will look at data caps on a "case-by-case" basis and plans to use an extremely vague conduct rule to enforce this massive regulatory change, every company needs to pass over their consumer plans with a legal eye. These unseen costs are rife in this change of law. As always, the lawyers will win with more billable hours, while consumers will suffer and not know why.