THE DAILY CALLER

Proposed Internet regulation: A harmful blast from the past

By Robert McDowell

7/15/2010

Starting today, the Federal Communications Commission begins reviewing comments from the public on what the regulatory future of the Internet should be. Should the FCC impose 19th century-style monopoly "common carriage" rules on 21st century broadband network providers? Or should the agency continue its four-decade approach to rely on the light-touch regulation that has delivered an explosion of innovation and choices to consumers while also imposing marketplace discipline on the providers of those networks? Although the regulatory issues may strike most observers as arcane, the real-world stakes are enormous.

Before turning to the specifics of the FCC proceeding, I can't emphasize enough that an open Internet that maximizes consumers' freedom should be the goal of American communications public policy. It is important to remember, however, that the open and freedom-enhancing Internet that exists today is the result of a decades-old, bipartisan and international consensus that governments should not interfere with the business of Internet network management. At the same time, authorities already have the legal tools needed to discourage and punish anti-competitive conduct today, as they have had for some time.

The FCC's proceeding itself, officially dubbed an "inquiry" and launched in June, proposes to upend years of bipartisan consensus. Under both Democrat and Republican administrations, the FCC made deliberate choices to apply only minimal regulation to Internet access services – whether telephone companies, cable operators or wireless providers, provided those facilities. By opening the new inquiry, however, the Commission is laying the foundation for a possible reversal of course. The agency is poised to impose a set of old-fashioned, Ma Bell-style regulations on those who build and maintain the Internet's infrastructure.

I profoundly disagree with the premise of the Commission's action. As a young attorney 20 years ago, I cut my legal teeth on those old common carriage rules. The dense restrictions are set forth, in great detail, in what is known as "Title II" of the Communications Act of 1934. Lawmakers of the Depression era modeled Title II on statutory restraints adopted in the 1880s for railroad monopolies. Thus, a decision to classify broadband as a Title II service would, in essence, impose 19th century-style railroad monopoly regulation on dynamic, complex 21st century Internet technologies that compete fiercely for customers.

The ideas put forth for comment in the inquiry are not new, despite their "Third Way" moniker. They were discussed and discarded in an overwhelmingly bipartisan way in the 1990s. By that time, a strong consensus emerged among tech companies and policy makers from both parties: New computer-oriented communications technologies should be shielded from common carrier regulations.

Reversing course now would carry several risks for the Internet's future operation and development. First, the proposal is likely to create asymmetries in the marketplace. It would leave investment and innovation at the "edge" of the Internet, specifically devices and applications, largely unfettered by regulation. This is as it should be. But the proposed new regime would place the heavy thumb of government on the "core" of the 'Net – the broadband infrastructure – by subjecting network providers to the whims of "Mother-May-I" regulators.

Moreover, should the proposed FCC rules go forward, I believe they will seriously undermine investment and job creation. In fact, merely launching the inquiry already has caused harm in the marketplace. Independent analysts are counseling a wide variety of investors to withhold badly needed investment capital in fear of regulatory uncertainty and litigation risks. So although Title II classification is being advanced in the name of furthering broadband deployment, it may have the unintended consequence of stunting growth in this sector. This observation is borne out by the number-crunchers. For example, one recent economist's study estimates that a net 1.5 million jobs could be put at risk by a Title II classification.

These concerns have been voiced not just by big business but by representatives of America's small businesses as well. Recently, the head of the Minority Media and Telecommunications Council told the FCC that:

> Lender and investor uncertainty stemming from potentially years of litigation over Title II reclassification could make it profoundly difficult for [minority businesses] and new entrants to secure financing. [Minority businesses,] especially, continue to experience great difficulty securing access to capital in the broadband space.

There are alternatives to increased regulation. I have offered an idea for a couple of years now that would certainly withstand judicial appeal while, at the same time, preserve the ability of our nation's business owners, small and large, to continue to innovate and grow our economy: The FCC could take on a heightened role in spotlighting allegations of anti-competitive conduct while working with long-standing non-governmental Internet governance groups and consumer protection and antitrust agencies. This approach already has proven to work: The few cases cited by proponents of reclassification were all rectified quickly, without new rules.

I also hope that rather than divert resources towards creating new regulations, the Commission focuses instead on adopting policies that will help create abundance, competition and jobs. For example, the FCC has yet to take action on several near-

term opportunities to put the power of key slices of the airwaves – such as the unused spectrum located between television channels, known as “TV white spaces” – into the hands of consumers for new, advanced wireless services. Attention to such forward-looking initiatives would better serve our nation’s communications future than would an unnecessary detour back into our regulatory past.

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