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Build Back That Broadband Wall:
FCC Assaults Modern Telecom Services with Old-Fashioned Rules

by

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The Federal Communications Commission's unyielding pro-regulatory proclivities threaten to burden Internet broadband providers with the same public utility-style regulation that prevailed in the telecom world during much of the last century. Given the competition among broadband providers and the rapidly changing technological and marketplace dynamics, this is a huge mistake.

Vigorous efforts will be required during 2012 and beyond to prevent digital broadband services from becoming engulfed in the regulatory morass that long governed analog narrowband services. In instances where such regulation already has occurred, it should be rolled back.

The stakes are high. With cable, telephone, satellite and wireless operators competing to offer new products and services, often in various bundles that continually morph in response to evolving consumer demand, the FCC's attempts to superimpose public utility-style regulation on broadband will impede investment and innovation.

When the FCC concluded in 2002, under then-Chairman Michael Powell's leadership, that broadband services should not be subject to traditional regulation, it appeared a barrier had been erected - a "wall of separation" - that would allow new broadband services to flourish on an unregulated basis.

Alas, the regulatory demarcation between legacy narrowband services and broadband has proven to be more a porous Maginot-like line than a protective wall. Perhaps this shouldn't be surprising given the FCC's long-standing institutional bias favoring regulatory solutions. The current FCC chairman, Julius Genachowski, has shown himself willing to adopt new regulations based on highly anecdotal evidence of consumer harm and market failure.

Here are just a few recent, diverse examples indicative of the FCC's proclivity to extend regulations into the broadband sphere. In each instance, such extension is unnecessary and improper.

- The FCC recently imposed "net neutrality" mandates on Internet service providers. These mandates resemble the traditional public utility-style regulation that prevailed in last century's monopolistic environment. Such regulation, consisting of a strict prohibition against discrimination along with pricing constraints, is ill-suited to today's environment because it puts broadband providers in a straightjacket that prevents them from differentiating their service offerings. This produces commoditization that chills innovation and new network infrastructure investment.

- The agency is proposing to extend legacy network outage reporting requirements into the broadband world. Extending these old outage requirements to new Voice Over Internet Protocol and other broadband Internet services makes little sense because the unique technological characteristics of digital broadband networks have limited the occurrence and scope of network outages, including those impacting 911 services. The old regulations simply cannot be applied wholesale to broadband services in a cost-effective manner.

- The commission proposes to expand existing program carriage rules intended to prevent cable operators and other video programming distributors from discriminating against unaffiliated programming vendors. The existing rules, adopted in the early 1990s when cable operators still possessed market power and when vertical integration was more pronounced, no longer serve any useful purpose. Today, only two of the 25 most-viewed cable networks are wholly owned by cable operators. With two nationwide satellite television operators and a broadband telecommunications provider competing vigorously in most locales - not to mention a growing number of popular Internet video sites - cable operators lack the incentive and ability to discriminate against unaffiliated programmers. So there is a good argument the existing program carriage requirements should be eliminated, especially in light of free speech concerns raised by the government mandating carriage of particular programs. At the very least, however, the regulations should

not be expanded as the commission now proposes. Contrary to the First Amendment, the expanded regulations would have the government injecting itself even further into decisions about what programming video providers must carry and where in their channel lineups such programming must appear.

- In 1996, Congress included a provision in the Telecommunications Act requiring the FCC to adopt regulations intended to promote the availability of set-top navigation devices from vendors unaffiliated with cable companies. In this instance, Congress, presciently, directed the agency to sunset navigation box regulation when the video provider and set-top box markets became competitive. Both now are. Yet the FCC is proposing to require all broadband video providers, whether cable, satellite or telecommunications, to adopt standardized functionalities, such as uniform search and display formats. So despite the fact that video providers compete against each other to attract customers, including competing in the provision of navigation features, the FCC wants to dictate a set-top box design that incorporates precisely the search and display capabilities it thinks consumers should have. Once again, the FCC ignores First Amendment concerns raised by a government mandate dictating particular content through standardized navigation presentations.

These examples all have this in common: The FCC either has extended or wants to extend legacy regulations into the broadband environment. The agency shows no compunction about breaching the wall that should protect competitive broadband services from being engulfed by outdated regulations conceived in a long-gone monopolistic era.

If Ronald Reagan were alive, I bet he'd say: "Mr. Genachowski, build back that wall."

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