

The Free State Foundation

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Special Access Should Not Be Re-Regulated

May Says Sound Regulatory Principles Suggest Not Turning Back

POTOMAC, MD – In a study released today, Randolph J. May, President, The Free State Foundation, concludes that the “continuing calls to re-regulate ‘special access’ services that the Federal Communication Commission already has determined should be subject to reduced regulation should be viewed with considerable skepticism.” In the study, entitled [“Special Access and Sound Regulatory Principles: The Market-Oriented Case Against Going Backwards.”](#) May examines special access services in the broader context of certain fundamental regulatory principles having to do with the circumstances under which it is appropriate to employ regulatory price controls versus reliance on market forces. The purpose of the paper is not to draw definitive conclusions concerning the competitiveness of any particular special access market, but to put the public policy debate surrounding special access into a broader context that is relevant to considering regulatory issues even beyond the case of special access.

In considering whether to deregulate --or re-regulate-- in today’s dynamic technological and marketplace environment, May says two basic premises are foremost: “First, market forces generally are superior to government economic regulation as a means of constraining market power because there are real and non-trivial costs associated with regulation. These costs include the tangible compliance and related direct costs (regulatory fees, professional fees, etc.) imposed on the carriers by the regulatory regime and passed on to consumers. As importantly, they include the less tangible but no less real indirect costs imposed on the public due to the diminishment of investment and innovation incentives attributable to the regulations.” The second interrelated premise is that regulation should be presumed unnecessary absent market conditions that demonstrate there exists a threat of abuse of market power that poses a substantial and non-transitory risk to consumer welfare and these market conditions, left unchecked, are likely to unduly impair the integrity of the competitive process.

The paper discusses a number of regulatory principles that flow from these two basic premises, and then considers the special access re-regulation issue within the context of its historical regulatory treatment, some recent marketplace developments, and application of the regulatory principles. May concludes that re-regulation likely would bias technology choices going forward because “new entrants would be less likely to invest in more efficient facilities that use new fiber, satellite, cable, or spectrum-based technologies if they believe that the ILECs’ rates may be capped or rolled back.” In other words, “re-regulation likely would have the perverse effect of discouraging new entry

that would provide the additional competition the re-regulation proponents claim to want.” While it is possible that, in the short-term, prices for special access services are higher than incremental costs in particular markets, if so, “it is likely that the ultimate gains to consumers beyond this transitory period from pricing flexibility are likely to outweigh any short-term allocative efficiency losses.” May says that because the ILECs tend to operate with high price-cost margins due to scale and scope economies, this makes them vulnerable to suffering meaningful revenue losses from even relatively small reductions in demand attributable to new entry. “This phenomenon should deter price increases.”

According to May, as the transition to an increasingly competitive telecommunications marketplace continues, the Commission should continue to gather information and monitor developments. “But having acted rather cautiously thus far in implementing the deregulatory intent of the Telecommunications Act, it would be a mistake for the FCC at this time to take a backwards step by re-regulating special access markets it already has found competitive.”

Randolph May has over thirty years of experience working in communications law and policy, including service as Associate General Counsel of the Federal Communications Commission. He is a past Chair of the American Bar Association’s Section of Administrative Law and Regulatory Affairs and a past member of the Administrative Conference of the United States. May is the co-editor of two academic books on communications policy, *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated* and *Communications Deregulation and FCC Reform*. He is the author of over a hundred scholarly law review articles, essays, and commentaries on communications law and policy topics, and many more on other constitutional and regulatory topics.

For the complete study, “*Special Access and Sound Regulatory Principles: The Market-Oriented Case Against Going Backwards*,” click [here](#).

The Free State Foundation is an independent non-profit Maryland-based think tank. Its purpose is to promote, through research and educational activities, understanding of free market, limited government, and rule of law principles.

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