The Free State Foundation

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Perspectives from FSF Scholars
November 13, 2008
Vol. 3, No. 17

The Last 100 Days

by

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It is common to be speculating now about what President-elect Obama – like FDR - should want to get done in his first 100 days. Here I want to discuss what the Bush Administration's FCC should get done in its last 100 days. (I understand there is not likely to be a full 100 days left for the Bush Administration FCC, even if, strictly speaking, there were such a thing. So, you can read "100 days" in the same way you should read many numbers in the Old Testament, as signifiers. Here I mean to signify "in December.")

In short, more than anything else, at its scheduled December 18 meeting or before December ends, the FCC should devote its principal energies to adopting meaningful steps to reform its intercarrier compensation and universal service regimes. Admittedly, such reform will not be easy to accomplish. Unfortunately, when presented by FCC Chairman Martin with a basis for moving forward in a reform-minded direction, Commissioners Copps, Adelstein, Tate, and McDowell flinched in the face of pressures from various interests (especially smaller and mid-sized telephone companies and state public utility commissions). If the last decade or two is any indication, the pressures from these same quarters to maintain basically the *status quo* will not lessen over time.

There are a lot of not insignificant details that must be decided in putting together sound intercarrier compensation and universal service reform orders. In order to obtain a Commission majority, some trade-offs among commissioners necessarily will be required as various views are accommodated. But from the perspective of sound policy, the fundamental interrelated principles that must undergird reform are clear: First, rates for carrying traffic need to be aligned more closely with real economic costs. Second, wasteful and duplicative subsidies need to be eliminated or reduced. Third, differences in carrier compensation rates that are based on differences in technologies or outdated legacy regulatory classifications, rather than based on differences in costs, should be eliminated or reduced.

Realistically, it is unlikely that any plan adopted will implement overnight all of the desired objectives. Some transition period is likely. What is important is that a definitive plan be adopted now that embodies the above principles and that the plan does not incorporate an unduly long transition period.

The above principles (the notion that intercarrier compensation rates should be aligned with costs; that wasteful universal service subsidies should be eliminated; and that different technology platforms should not be treated differentially absent cost differences) are key elements in establishing a market-oriented environment in which vigorous competition can flourish. Such a market-oriented regime will promote sustainable investment and ongoing innovation and benefit all consumers. Establishing such an environment ought, in truth, to be non-partisan work. But, frankly, whatever the positions of Democratic Commissioners Copps and Adelstein turn out to be, Republican Commissioners Tate and McDowell, with their strongly professed free market-oriented beliefs, should be willing, along with Chairman Martin, to make the tough decisions for reform.

In forcing Chairman Martin to seek further public comment rather than voting on the intercarrier compensation and universal service reform proposals, Commissioners Copps, Adelstein, Tate, and McDowell *en masse* declared they would be prepared to vote at the Commission's December 18 meeting. They stated: "We remain committed to fulfilling our obligation to tackle these difficult issues, and have set forth a reasonable path for completing comprehensive reform."

In an earlier piece shortly before the scheduled November 4 vote on Chairman Martin's plan, "The Time for Bold Action Is Now," I quoted several passages from the Commission's 2001 decision initiating the intercarrier compensation proceeding to the effect that cost-oriented reform was pressing business. In that piece, I said the charges that the Commission was now rushing to judgment and ought to solicit additional comment were ill-founded.

Refer to the Commission's further rulemaking notice and the statements of Commissioners Copps and Adelstein in 2005 when the agency solicited additional public comment on proposals that were outgrowths of the original 2001 notice soliciting comment.

Here's the Commission in 2005:

"*In response to the Intercarrier Compensation NPRM, the Commission received extensive comment from individual carriers and economists, industry groups and associations, consumer advocates, and state regulatory commissions, among others. The Commission also received numerous ex parte filings and considered detailed presentations from interested parties. In addition to the record developed in response to the Intercarrier Compensation NPRM, various industry groups and interested parties recently submitted comprehensive reform proposals and principles for consideration by the Commission in this proceeding*….The record in this proceeding makes clear that a regulatory scheme based on these distinctions is increasingly unworkable in the current environment and creates distortions in the marketplace at the expense of healthy competition. Additional problems with the existing intercarrier compensation regimes result from changes in the way network costs are incurred today and how market developments affect carrier incentives. *These developments and others discussed herein confirm the urgent need to reform the current intercarrier compensation rules*."

Here's Commissioner Copps in 2005:

"Our intercarrier compensation system is Byzantine and broken. We have in place today a scheme under which the direction and amount of payments vary depending on whether carriers route traffic to a local provider, a long distance provider, an Internet provider, a CMRS carrier or a paging provider. In a marketplace defined by convergence and technological change, this hodgepodge of rates looks more like an historical curiosity than a rational compensation system….*Intercarrier compensation is a must-do item for this Commission this year. It should be our number one telecommunications priority*."

And Commissioner Adelstein in 2005:

"The proposals included in this Notice are diverse in scope and solutions: some advocate moderate reform, others more far-reaching changes. *I'm pleased that this Notice seeks comment on these proposals comprehensively and quickly, so that we can harness the momentum provided by these collective efforts.* While this Notice may not precisely reflect my balance of the competing policy goals for intercarrier compensation reform, I am pleased that the item sets out our commitment to harmonize and unify our rules. *Given the rapid changes in the communications marketplace, we must work both promptly and carefully to make sure that our regulatory framework continues to promote the innovation and customer choice that drive so much economic growth and benefit for American consumers*."

In light of the above, arguments that the Commission is in any way rushing to judgment or not providing the public with an adequate opportunity to comment ring hollow. In any event, the Commission has once again solicited public comment on a variety of proposals.

Consistent with the long-standing statements from all the commissioners acknowledging the need for intercarrier compensation and universal service reform, the principal task before the Bush Administration FCC in its "last 100 days" should be to make such reform a reality.

(The corollary of this is that in order to get the job done Chairman Martin should stop wasting his time and energy, and the time and energy of other commissioners and the Commission's staff, pursuing what seem to be petty and unproductive investigations of cable operators on various flimsy grounds. The recent set of "letters of investigation" sent to cable companies concerning the migration of certain channels from analog to digital tiers is one example of such an unproductive diversion of resources. More on the substance of this at a later time. The point here is that, given the likely shortness of his tenure, Chairman Martin should not be using the time he has remaining at the Commission to pursue matters that give the appearance of last minute vendettas.)

A final note: All that said, and not to be misunderstood, the Commission should move forward on intercarrier compensation and universal service, of course, only if it is prepared to adopt meaningful substantive reform plans that are bottomed on and incorporate the market-oriented principles set forth above. After all these years of soliciting comment and contemplating - and then some, and then some more - this is not a case where anything is better than nothing.

A really final note: Clearly, promoting broadband availability in the increasingly few high-cost areas where availability presently does not exist is an important national goal. But it is a mistake to try to address that goal by incorporating subsidies for broadband deployment into a universal service regime that resembles the present one. It looks like Congress soon may be considering a very large multi-billion dollar stimulus "infrastructure" package to address the economic slowdown. If so, it would be reasonable to set aside some modest amount of the package's funds to be targeted to areas where broadband is unavailable. Reverse auctions could be conducted to award the funds to the low bidder who meets the service specifications. In this way, support for meeting this national goal would come from all taxpayers rather through contributions collected from taxes on certain selected communications services. There is no reason why such a program could not be up and running quickly.

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