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With Last-Minute Regulations, FCC Has Its Eye on the Clock

by

Randolph J. May *

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According to a 2012 study by the Administrative Conference of the United States, "there has been a documented increase in the volume of regulatory activity during the last months of presidential terms." The rules adopted during this late-term regulatory spurt are commonly called "midnight rules." Because they are proposed and adopted with at least one eye glued to the clock, they often are ill-conceived.

The Obama administration's Federal Communications Commission (FCC), led by Chairman Tom Wheeler, is an example of midnight rule-making on steroids!

In the past few months, the FCC has proposed three new major regulatory initiatives. First, the commission proposed costly rules that would require the multi-year development of a new "open standard" for set-top boxes used by subscribers to access and navigate the programming provided by cable, satellite and telephone multichannel video distributors. Second, the agency proposed privacy regulations applicable to broadband Internet service providers (ISPs) that are more stringent than those that the Federal Trade Commission (FTC) applies to internet giants like

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

Google and Amazon. And, finally, despite the lack of evidentiary support, the commission proposes to regulate the rates for business broadband services.

Each of these initiatives is ill-conceived and harmful. I'll briefly highlight some problematic aspects of each. But before doing so, it bears emphasis that the commission has refused to grant requests to extend the dates for public comment, even though such requests usually are granted on a fairly routine basis. And this despite the profound marketplace consequences associated with each proposal. In and of itself, this indicates that Wheeler's eyes are more likely fixed on the clock than on the evidence submitted in the proceedings.

The proposal to require the development of a new government-designed set-top box is one of the more backward-looking initiatives in the agency's history. Indisputably, the video marketplace is changing rapidly — and all in the direction of providing more competition and consumer choice and movement away from set-top boxes in favor of online apps. This is happening without the need for new government mandates. Indeed, in June 2015, the FCC adopted a presumption that cable programming and the associated equipment, including set-top boxes, are provided on a competitive basis across the nation. In March 2016, FCC Commissioner Jessica Rosenworcel acknowledged the "dizzying array of channels, an expanding number of screens, and an exploding range of on-demand programming."

To be sure, consumers now have available many video choices other than traditional cable, satellite and telephone video offerings. Due to technological and marketplace innovation, proliferating online video services, streaming video devices, gaming consoles and smart TVs render the FCC's proposal for a government-devised set-top box entirely unnecessary. Today's consumers may choose from among a multitude of services and devices, such as Netflix, Hulu, TiVo, Amazon Fire TV, Google Chromecast, Apple TV, PlayStation4 and Roku, that are accessed without a cable or satellite company-supplied set-top box.

Already, more than half of America's households are able to stream video to their TVs, laptops, tablets, smartphones and other internet-connected devices. Online video subscriptions, led by Amazon Prime and Netflix, now total 100 million, equal to the number of subscriptions to traditional multichannel video programming (MVPD) distributors. Not surprisingly, Apple CEO Tim Cook has declared that "the future of TV is apps."

Not only is the FCC's set-top box proposal truly a solution in search of a problem, it actually creates new problems by facilitating the theft of copyrighted programming and making it more difficult for minority or niche programming to gain access to multichannel video distributor lineups. Likewise, the privacy and broadband rate regulation proposals create new problems too.

The agency's proposed privacy regulations would create an asymmetric regime in which internet service providers (ISPs) like Comcast and AT&T that are subject to the FCC's regulations would confront far more stringent regulations than internet giants like Google that collect and store far more consumer data. This differential regulation almost certainly will confuse consumers, who — quite logically — will not understand why less stringent privacy protections apply to companies like Google than the ISPs. Moreover, the more restrictive overarching FCC

regulations, as opposed to those developed by the FTC on a case-by-case basis, likely will impede the ISPs from developing services and applications that consumers want.

Finally, the proposal to regulate business broadband rates is deeply flawed. For instance, the FCC actually assumes, for purposes of its competitive analysis, that each building in the U.S. constitutes its own separate market. In other words, the agency assumes that potential competitors won't build out new facilities to serve a building presently served by only one provider, even if that potential competitor is serving a nearby building. While there may be legitimate differences concerning the proper scope of a market, narrowing the geographic scope to a single building is divorced from marketplace realities. Indeed, new entrants in the business broadband market, like cable operators, vigorously oppose the FCC's proposal because it will suppress the rates for business broadband services charged by telephone companies. They know that this will make it more difficult for new entrants to compete.

The FCC is not the first agency to engage in midnight rule-making during the last year of a presidential term. And it almost certainly won't be the last. But right now, it is a prime example of midnight rule-making on steroids. Consumers are likely to be the losers in the rush to adopt a potpourri of ill-conceived new regulations before time runs out.

* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. *With Last-Minute Regulations, FCC Has Its Eye on the Clock* was published in The Hill on June 15, 2016.