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What Does 'Open Access' Mean?

By Randolph J. May

On July 31, the Bush administration's Federal Communications Commission voted to impose a burdensome 1960s-era regulatory regime on currently unregulated wireless broadband operators.

Republicans Kevin Martin and Deborah Tate joined with the two always pro-regulatory Democrat commissioners to require whichever entity wins the bidding on soon-to-be auctioned 700 MHz radio spectrum to operate on an "open access" basis. The fifth commissioner, Republican Robert McDowell dissented, stating that he favored "a market-based pro-competition solution…over a prescriptive regulatory approach."

What does open access mean? According to the commission, the auction winner "will be required to allow customers, device manufacturers, third-party application providers, and others to use any device or application of their choice" on its network. In other words, the nondiscrimination principle at the core of open access means traditional common carrier type regulation.

While the FCC casts its action as pro-consumer, in fact, it will harm consumers by deterring investment in new networks and innovative new services. And it will cost taxpayers to boot.

FCC Chairman Martin equated the agency's decision to one rendered "decades ago" that allowed AT&T's subscribers to go from renting black rotary phones to purchasing new telephone sets and services. He's referring to the FCC's 1969 *Carterfone* decision ordering Ma Bell to allow non-AT&T equipment to be attached to AT&T's ubiquitous telephone network.

Of course, the difference between the communications marketplace in 1969 and today is the difference between night and day, or between the 1960-ish black rotary phone and the latest BlackBerry or iPhone. As Commissioner McDowell explained, "the AT&T of the 1960s was nearly 100-year-old government protected and subsidized market monopoly."

The wireless market was deregulated more than a decade ago. Since then, the FCC consistently has determined that it is vibrantly competitive. In a September 2006 report, the FCC concluded "effective competition" exists in the wireless marketplace, with 98 percent of the U.S. population living in counties with access to three or more providers and nearly 94 percent in counties with four or more operators. Not surprising to anyone who has trouble keeping up with the latest cool wireless devices and services, the commission determined "the record indicates that competitive pressure continues to drive carriers to introduce innovative pricing plans and service offerings."

In the face of this evidence, the decision to impose the open access regulation is wrongheaded. In competitive markets, service providers have all the incentives they need to be responsive to consumer demands for new products and services. If there is a market demand for consumers to be able to access any application or use any device on a wireless provider's network, the operators will respond. Indeed, as Commissioner McDowell pointed out, the wireless market already is moving toward greater device and application portability "because it has been allowed to function freely."

There are costs to forced access mandates the FCC does not acknowledge. First, there are often efficiencies realized when service providers are allowed to negotiate voluntary business arrangements that prefer one firm over another. The cost savings realized from such non-neutral integrated business arrangements fuel the investment in networks and innovative new services that the FCC, in its September 2006 report, recognized is currently occurring. Conversely, because the forced standardization that inheres in open access mandates hinders service providers from differentiating their services from those of competitors, the operators lack incentives to invest in new network infrastructure.

Second, an open access mandate requires the commission to develop and implement detailed rules if it is to be enforced. In 1999, William Kennard, the Clinton administration's FCC chairman rejected pleas to impose a similar open access mandate on cable operators. Fearing what he called the "morass of regulation" that always follows an open access mandate, his reasoning then is fully applicable now: "It is easy to say that government should write a regulation...It is quite another thing to write that rule, to make it real and then to enforce it. You have to define what discrimination means. You have to define the terms and conditions of access."

This is why, immediately after the FCC's action, the telecom analysts at Stifel Nicolaus' research arm adroitly advised that "much of the meaning of the open access rules will be determined by the (2008) election (which will determine the leadership of the FCC) and the courts." The uncertainty engendered during the period before the new regulatory obligations are eventually sorted out through the interminable litigation is yet another reason why investment will be deterred.

Finally, taxpayers will be stiffed too. The simple fact that the spectrum is encumbered at all diminishes the amount that will be bid at auction. And the veritable economic theorem that no one wants to buy a "pig in a poke" holds true, even for the FCC. Not knowing the full extent of the new regulatory obligations at the time of bid further ensures the forthcoming auction will realize less than if the spectrum were auctioned on an unencumbered basis.

So, not only do consumers lose as a result of wireless operators' diminished incentives to invest and innovate, but so do Uncle Sam and the taxpayers who support him.

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