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Why the FCC Needs to Get With the Times, Finally

by

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We are in the midst of a transition away from copper wire-based communications services to broadband Internet-based services – a transition that then-FCC commissioner Michael Powell called the "Great Digital Broadband Migration" way back in the year 2000.

To its credit, on October 23, the House Energy and Commerce Committee held a hearing on the implications of this migration to digital services. While the hearing's title – "The Evolution of Wired Communications Networks" – might put you in mind for a good nap, the hearing did focus needed attention on important public policy issues raised by the digital transition. And now, with the Senate just confirming Democrat Tom Wheeler as President Obama's choice for new Federal Communications Commission chairman, along with Republican Michael O'Reilly as a new commissioner, the House hearing couldn't have been timelier.

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Because the FCC, with a new chairman and a full complement of commissioners now on board, needs to act with dispatch to adapt its regulations to the new digital age marketplace realities.

The digital migration, or migration to IP (Internet Protocol) services as they are often called, already is far along. According to a just-released report by Anna-Maria Kovacs, a visiting senior policy scholar at Georgetown University's Center for Business and Public Policy, as of 2012 only 5 percent of U.S. households still rely only on copper-based wireline POTS (plain old telephone service) lines for voice communications, while 38 percent of U.S. households are wireless only. Over 90 percent of households subscribe to wireless service, increasingly delivered over IP broadband platforms. All the while, the number of subscribers to IP-based voice services provided by cable companies and others has increased steadily as POTS subscriptions have declined.

The IP migration presents policymakers with a fundamental question: will the century-old public utility-style regulatory framework that still largely governs communications service providers be replaced by a free market-oriented framework that benefits consumers, while, at the same time, stimulating investment and innovation? Or instead, will the legacy framework, with rate regulation, nondiscrimination mandates, and other regulatory strictures, be an obstacle to realizing the full benefits of the digital revolution?

There is near universal agreement that IP services provide consumers with more features and functionalities in less costly, more efficient ways than do the old copper-based services. There is also widespread agreement that IP-based services have fostered increasing competition among broadband providers for the provision of voice, high-speed data, and video services, regardless of whether these providers offer these services over wireline, cable, wireless, satellite, fiber, or some other technology.

So the relevant point for the FCC and other policymakers is not, as pro-regulatory advocates often imply, that all of the services offered by all of the competitors are not perfectly substitutable all of the time for all consumers. No, the relevant point is that, for a large, ever increasing number of consumers, a choice of various IP-based competitors exists, and these competitors, in turn, offer a choice of attractive service options.

In other words, within the past decade or two, the communications marketplace has been transformed from a monopolistic environment into a competitive one characterized by increasing consumer choice.

The transition to all-IP networks almost certainly will be completed at some point in time, but given the benefits of IP services, sooner is better than later. The key hangup is this: telephone companies like AT&T and Verizon are required by existing regulations to maintain in place their old copper networks even as they become economically unviable as the traffic they carry declines dramatically. Indeed, in 2010, when the FCC adopted a National Broadband Plan, it acknowledged that continuing to require telephone

companies to maintain the copper-based networks "siphons investments from new networks and services" and "reduces the incentive for incumbents to deploy" new IP facilities.

Despite that now 3-year-old acknowledgment, the FCC nevertheless has been slow to act. The Commission opened a proceeding to consider IP transition issues a year ago, but since then, the proceeding has stalled.

The Commission needs to act more quickly because the longer the old copper facilities must continue to be operated, the greater the costs incurred through loss of foregone investment and innovation. The FCC likely possesses the authority under the Communications Act to eliminate the regulatory changes that impede completion of the digital migration, while, at the same time, safeguarding certain important public safety and universal service interests. For example, as the copper network is phased out, questions relating to the continued availability of reliable E911 services must be addressed.

To the extent the FCC lacks any needed authority, or fails properly to exercise such authority in a timely fashion, then Congress should be ready to step in with near-term legislation. For example, Congressman Bob Latta's recently introduced bill, H.R. 2649, requires the FCC to presume that relief from existing regulations should be granted to the telephone companies, absent clear and convincing evidence to the contrary. This measure establishing a deregulatory presumption could be a useful tool in enabling the FCC to accelerate the IP transition, especially if applied to all entities subject to FCC regulation.

Aside from any near-term legislation that may be needed, ultimately Congress should adopt a comprehensive Communications Act overhaul that substitutes a deregulatory, free market-oriented regime for the current public utility-style regulatory mandates. Under a new Digital Age Communications Act, the FCC's regulatory interventions in the new IP world should be required to be tied closely to evidentiary findings of market failure and consumer harm.

In today's communications environment, the reality is that public utility-style regulation is no longer needed to protect consumers. Maintaining the old regime in place is unduly burdensome and too costly. Marketplace competition can protect consumers, while spurring both investment and innovation crucial to the health of our economy.

With a newly reconstituted FCC ready to get to work, it's an opportune time for the agency to abandon its traditional pro-regulatory mindset.

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