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The FCC's Regulatory Barrage Imperils Broadband's Future

by

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Power grabs are a regrettable feature of America's regulatory state. And when it comes to agencies pushing their powers beyond lawful limits, the Federal Communications Commission (FCC) is on a roll. Over the past two years, the Obama Administration FCC has sought to blanket the digital communications market with harmful regulations. A proposal to make itself the nation's regulator of video apps is the latest example of the Obama FCC's regulatory overreach.

New FCC mandates threaten to unduly restrict the private sector's use of its own infrastructure. Broadband deployment has been driven by \$1.4 trillion in private investment between 1996 and 2014. But economist Hal Singer has reported broadband investment declines in late 2014, and further declines in 2015. Stifled investment puts consumer choice for new services and broadband sector job growth in limbo.

The digital communications market emerged largely free from bureaucratic controls. Yet despite conditions being more competitive than ever, the Obama FCC has zealously sought to superimpose a slate of onerous regulations on the video and broadband services.

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The FCC has imposed public utility-style regulation over broadband Internet services. Such heavy-handed regulation was designed for 20th century telephone service. This imposition ended the federal government's largely hands-off policy toward broadband that prevailed for a decade. Wielding its new power, the FCC has conducted a 10-month investigation into "free data" mobile broadband plans. The ongoing inquiry jeopardizes consumers' ability to enjoy service plans that offer access to popular apps or content that cost nothing and that do not count against data usage limits.

Further, the FCC sought to preempt state decision-making power over whether their local governments may enter the broadband business to compete against private providers. Congress nowhere gave the FCC authority to so drastically interfere with state government decision-making. A federal appeals court struck down the FCC's preemption order in August.

In addition, the FCC has proposed new rate regulations for broadband business services. Service providers would be required to lease their facilities to competitive rivals at below-market prices. Competitors benefitting from rate controls would be discouraged from investing in new facilities of their own. Among other reasons, recent entry into the broadband business services market by cable providers has rendered new regulation particularly unnecessary.

And, now the FCC also wants to make itself the Internet's privacy cop. It has proposed subjecting broadband Internet service providers – but not other online services – to a slate of stringent privacy restrictions. Those rules include redundant "opt in" requirements for collection of non-sensitive data. Such data collection allows service providers to offer consumers targeted content and features at reduced cost or for free. If imposed, the privacy rules would complete the FCC's wresting of privacy jurisdiction away from the Federal Trade Commission. Yet the fact is the FTC has far more experience and success in protecting consumer privacy through case-by-case enforcement instead of stringent rules.

Finally, the FCC is proposing to regulate navigation apps for viewing video content provided by cable, satellite and other video service providers. The U.S. Copyright Office raised serious concerns, contending that the FCC's proposal would have undermined the rights of video content owners under copyright law. In a more recent twist, FCC Chairman Tom Wheeler is now proposing that the FCC design standardized video apps. And the FCC would require all video content owners to make their content viewable through those apps – even if such a mandate violates contractual agreements regarding what apps the content can be viewed on.

President Obama publicly urged the FCC to pursue many of these proposals. So there is little doubt the FCC will pursue its ambitions up to the end of this administration. Until then, Congress needs to do whatever it can to check the FCC's regulatory overreach. In 2017, a newly-constituted FCC must return the agency to its legal confines. And a lighter-touch regulatory environment must be restored in order to unlock the digital communications market's economic potential.

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