Avoiding The Coming Regulatory Irrelevance: A 10-Point Plan

Editor's Note: Welcome to our new "Perspectives" feature. We hope it will provide you with interesting insights on our industry from individuals who are not members of the local exchange carrier industry. The opinions expressed here are not necessarily those of USTA.

In the movie *Jurassic Park*, Sam Neil describes the pack hunting habits of the dinosaur velociraptor. He explains that a lone raptor confronted its intended victim head on, and would motionlessly stare down its prey, putting it into an almost hypnotic trance. Of course, in the meantime the other members of the pack would be stalking the victim and in a moment swoop down upon the unsuspecting animal and have lunch.

So it is too with regulation. The regulators and the regulated are frozen in a kind of hypnotic stare down. And like the raptor's victim, many of the regulators aren't aware of the gathering threat on their flanks preparing to make them extinct.

Peter Huber, in an op-ed piece in the June 25 Wall Street Journal, got it right; the future is bleak for anyone wanting to be a state or federal telecommunications regulator. For in assessing the future of regulation, to paraphrase Gertrude Stein, "There's no there there."

For a variety of reasons—including, of course, the explosion of new technologies in recent years—we are in the midst of the long-announced convergence of the computer, broadcast, cable, consumer electronics, and telephone industries into the integrated cornucopia of the information age. And one of the most striking and unpredicted aspects of it all is that the providers or would-be providers of the new services are, and will largely be, unregulated or de-regulated companies.

As Huber wrote, "What began in the 1970s as a tiny stream moving toward freedom of the airwaves and the airwaves has become a flood." The coming central fact of regulatory life is the inability of traditional regulation to control the floodwaters. As a regulator I am not bemoaning that fact. Quite the contrary. I believe it will assure that we realize the full potential of the long-awaited "information age."

Until recently regulation has perpetuated, and regulators have thrived in, an atmosphere of communications apartheid. The networks over which communications travel have been segregated by the content of the service itself, and identified by the nature of the communication sent over them. Thus, the "telephone companies" provide what we think of as phone service: voice and some data, over their lines. Cellular companies provide voice and some data through the airwaves, mirroring the essential services of their landline cousins, but they offer the added value of mobility. And cable TV offers programmed entertainment over its network of glass fiber and coaxial cable.

Under this regime, technological advancement and service introduction has been steady but slow. As we now move into the second decade of divestiture, the bright line restrictions of this sort of communications apartheid are becoming blurred by the relentless technological advances unleashed by the sponsorship of risk-taking entrepreneurs' expectations of open markets. Furthermore, we're witnessing the creation of the long-awaited seamless "network of networks."

But unlike the monopolist's conventional vision of a single seamless wired network provided by a single monopoly company, today companies, and even entire industries which didn't exist 10 years ago, appear ready and willing to build their part of the network and provide the "gee whiz" products and services people are going to want. And the consumer isn't going to care whether the provider is regulated or not, unless he finds out it's the government that is preventing him from getting the desired service.

Until now, what has hindered the rapid unfolding of the future has not been largely technological or economic. Rather, it has been the continued existence of regulatory barriers, erected under the regulated monopoly paradigm. These barriers have diminishing relevance as each day passes.

Regulators, especially the state variety, are, in too many instances, trying to understand the new competitive forces so they can harness them and not lose control over their development. But to borrow a contemporary political analogy, that will be as successful as Mikhail Gorbachev trying to change the old Soviet system in order to save it. The only successful strategy is to mimic Boris Yeltsin, who recognized that the system was out of touch and opted to jettison it in favor of a new order.

Make no mistake, the new emerging order is making the current regulatory scheme obsolete. Everywhere you look, new entrants are straining to respond to the demands of the customer. Enhanced voice and data communications over wire, glass and through the airwaves are reaching our homes, cars, briefcases, and offices. Alternative access providers, which up until now have sought out only high capacity business customers to provide redundancy of service and access charge by-pass, are announcing plans to partner with
cable TV and electric utilities to reach the small business and residential customer. (Witness the purchase of C-Tec by Metropolitan Fiber System’s parent company, Peter Kiewit) Cable TV and computer software and chip manufacturers have announced ventures to provide the gateway technologies that will make interactive video available, which will give rise to a market that former Apple Computer Chairman John Scully predicts will become a $3.5 billion a year business.

This is not to say the new entrants have an open field. Clearly the regulated firms are scurrying about with their large sums of money, trying to figure out how to respond and compete with the new players and, in the process, get out from beneath the petticoats of regulation. In short, the regulated companies are trying to grow their business by exiting from regulation. This exit strategy is, I think, at the heart of the plans offered recently by Rochester Telephone and Ameritech.

Although vibrant competition at the local exchange level is not yet upon us, it’s surely coming at an accelerated pace, sooner than anyone predicted a few short years ago. So what does all this mean for the regulation of fiber in the loop? Regulation is ill equipped to manage fiber, as is the case with other breakthrough technologies. To encourage the introduction of new services, the challenge now facing regulators is to run—not walk—toward the creation of transition to a rough and tumble competitive communications marketplace.

We all believe, I hope, that competition: (1) protects consumers from having to pay prices in excess of costs; (2) ensures that costs will be minimized; (3) improves the efficiency of suppliers; and (4) constantly pressures them to improve quality and to innovate. It ensures that suppliers succeed or fail on the basis of how well they satisfy consumers’ demands. Under its discipline, success is based on ever-improving service, not on the accumulation of monopoly power or political influence.

But probably most of all, the competitive market owes its superiority in delivering new services to its reliance upon the “pleasant surprise” born of individual genius and the undiluted rewards paid to those who are free to exercise their ingenuity and innovation. Regulation, no matter how enlightened, is incapable of matching the unregulated, competitive market in this regard.

To the extent competition begins to emerge, even imperfect competition, the first duty of regulators is to dismantle the barriers to the emergence of a fully competitive market and concentrate on making competition work as well as possible. Regulators have an affirmative obligation to craft a smooth transition. Therefore, here is the Barnich 10-Point Plan for a smooth transition to a competitive communications paradigm:

1. Eliminate franchise restrictions. This almost doesn’t need to be mentioned, because if you’re moving toward a competitive regime you usually don’t grant monopoly franchises. But many states do just that. On the other hand, the Illinois General Assembly explicitly provided for non-exclusive certifications. And the Illinois Commerce Commission has been very aggressive in granting certificates to an array of LEC competitors.

2. Permit liberal interconnection among network and service providers, competing communications carriers and end users. A necessary corollary to interconnection is the need to push for further unbundling of basic LEC network functions, including end user access, the local loop, the local switch, and local transport end signaling.

3. There must be full number portability and third party control of the numbering plan.

4. Require publicly developed interoperable interface standards.

5. Eliminate the need for prior governmental approval of new service introduction. Only government and its busy-body bureaucratic cadres have the arrogance to second guess the “need” for providers to meet consumer wants.

6. Permit the free entry and exit of markets consistent with universal service goals. This may include the creation of a market for the purchase and sale of local exchanges with any subsidies that remain.

7. Grant new entrants the same access to conduits and rights of way as the erstwhile utility enjoys.

8. Permit the incumbent LEC to have pricing flexibility consistent with the principles of non-discriminatory, de-averaged cost-based pricing.

9. Structure a pricing regime that flows the benefits of competition to those customers for whom real time competition is unlikely in the near future. Leveraged pricing, which indexes the prices of identified functionalities for non-competitive services to those movements in prices for the same or similar functionalities for competitive services. This will not only flow back the price benefits of competition to “captive customers,” but it will also shrink the size of the universe of “captive ratepayers” as they begin to migrate out of the captive category.

10. Restructure social subsidies so they are equitably imposed and distributed on the basis of need. In Illinois we have all but eliminated these remarkably inefficient and inequitable cross subsidies.

Promulgation of this or similar plans by regulators who are preparing for a competitive future, will go a long way to unleash the full promise of the technologically driven information age.

Terrence Barnich is a commissioner on the Illinois Commerce Commission. These remarks were originally given at a “Fiber-in-the-Loop: Competition and Cooperation” Forum held in Dallas, Texas earlier this year; they are not intended to reflect the opinions of the Illinois Commerce Commission.