Process over Substance: Why Regulatory Process is More Important than Substantive Regulatory Decisions

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I. INTRODUCTION

Since the 1980s, telecommunications policy makers around the world have initiated efforts to liberalize their telecommunications markets.[1] To date, and with limited exception, the primary focus of these efforts has been to amend pre-existing law and policies which supported the monopoly provision of telecommunications services in favor of policies supporting competition in telecommunications markets. Policy makers enacted new statutes eliminating the historic monopoly for telecommunications services, establishing interconnection rights and obligations, extending public service obligations, and otherwise setting the framework for what they hoped would be a competitive market for telecommunications services.[2] National regulators also embarked on efforts to re-write their rules in support of these new statutes and policies, following their respective administrative procedures.

For the most part, policy makers and regulators succeeded in establishing a pro-competitive framework in a relatively short time. Of course debate continues about the efficacy and sufficiency of these efforts, but there can be little doubt that signatories to the Basic Agreement of the World Trade Organization have succeeded in eliminating the legal barriers to entry in the telecommunications markets.

While much progress has been made from a policy perspective, one area policy makers have neglected is the decision-making process. The majority of national telecommunications regulators have yet to sufficiently reform their decision-making

[1] While individual nations have undertaken efforts to liberalize their telecommunications markets, the collective efforts of nations is embodied in the Fourth Protocol to the General Agreement on Trade in Services (GATS), April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

[2] The full nature and extent of individual country efforts can be found in the schedule of commitments and exemptions to the WTO Basic Telecom Agreement.
http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm

process to keep pace with rapidly changing technology, the introduction of new products and services, and increasing competition. Thus, the regulatory process itself has become one of the primary barriers to market entry and success.

When one considers, for example, that in the U.S. some estimate that carriers spend more money on litigation and dispute resolution than they do on research and development,[3] it is apparent that something is fundamentally wrong with the decision-making process. Granted, the U.S. may be particularly litigious, but we have seen in Germany[4] and elsewhere how regulatory decisions devolve into seemingly perpetual debates with no conclusion.

When combined with a lengthy judicial appeals process, the decision-making process has become too costly for all but the largest carriers to effectively participate. Since one hardly loses an argument with oneself, the largest carriers (in all cases the incumbent carriers) are able to achieve their policy goals through their sheer stamina in the decision-making process. If policy makers are to realize greater success in their efforts to liberalize their markets and introduce effective competition, then they must reform their decision-making process as much as they must reform their past policy decisions.

II. THE DECISION-MAKING PROCESS AND INTERCONNECTION

While each country has its own unique decision-making process, there are common elements to most if not all of them. These elements include (1) legislative acts, which establish the governing law for not only the telecommunications carriers and

[3] See, Dr. Charles H. Ferguson, Brookings Institution, "Broadband Policy and the Future of American Information Technology," Testimony Before the Senate Commerce Committee, Apr. 28, 2004.
[4] In May, 2003, the European Commission fined Deutsche Telekom €12.6 million for over-charging its wholesale customers for network access during the period 1998-2001. In April 2008, a full ten years after the initial illegal conduct started, the European Court of First Instance upheld that decision in full.

services, but the regulatory agency as well; (2) regulatory agency rules applicable to telecommunications carriers either as a whole (as they now do in Europe) or as various classes (as they now do in the United States, Asia and Latin America); (3) regulatory adjudicatory decisions resolving particular disputes which may or may not have general applicability; (4) judicial rulings; and (5) inter-carrier agreements.

Each of these elements is accompanied by its own process and virtually every country has repeatedly exercised every element in order to establish the policies which are in place today. For example, when the WTO Basic Telecom Agreement was signed, most every country had to conform their existing telecommunications laws. The national regulator then had to pass rules enacting the statutory changes and settle disputes arising under the rules. Courts were called upon to review regulatory interpretations. And carriers entered into interconnection agreements.

Each of these elements of the decision-making process is integral to free and democratic societies and reflects fundamental tenets of due process. But taken as a whole, they make for a rather cumbersome decision-making process. In government where stability and continuity is perhaps of greater value than speed, these elements are indeed laudatory. But they are ill-suited to the rapidly changing technology, services, and markets, and can have a negative effect on investment and consumer welfare.

The limitations of these elements are most apparent when applied to interconnection disputes between carriers. The interconnection of competing carriers' networks is absolutely required in order to ensure that calls placed by the customer of one carrier are completed to customers of another carrier and visa versa. Without interconnection – at the technical, operational, financial, and administrative levels – no

carrier could successfully compete against the incumbent carriers. Thus, interconnection is a significant entry requirement.

Since incumbent carriers serve the majority of customers owing to their legacy monopoly, the incumbent carriers enjoy considerable bargaining power vis-à-vis their competitors when it comes to interconnection negotiations. So incumbent carriers have insisted, and regulators have required, that incumbent operators interconnect with competitors within a specific market segment (e.g., wireline telephony) on a "non-discriminatory" basis. This allows the incumbent to offer a single form of interconnection suited to its business model rather than have to negotiate multiple interconnection arrangements more suited to the business model of competing carriers.

An entire regulatory regime has been established to police this non-discrimination requirement and this regime affords the incumbent carrier multiple advantages. First, a uniform interconnection offer provides the incumbent with economies of scale and reduced operational and administrative costs;[5] second, incumbent carriers can apply to modify their uniform interconnection offer to adapt to market conditions;[6] third, incumbent carriers can refuse requests for "non-standard" interconnection;[7] fourth, regulated rates strengthen the incumbents' hand during interconnection negotiations and provides price stability for a significant revenue stream;[8] and fifth, incumbent carriers

[5] Uniform interconnection allows the incumbent, *inter alia*, to standardize its equipment, training, and inventory and achieve volume discounts.
[6] For instance, if a new technology emerges (e.g. VoIP) that undermines their business model, incumbent carriers can modify their interconnection offer so that it attacks key aspects of the business models for the new technology.
[7] By refusing interconnection, incumbent carriers are able to delay or outright prevent the introduction of new technologies and services.
[8] It is estimated that Verizon Communications earns $11 billion in wholesale revenue out of over $70 billion in total revenue.

enjoy considerable retail market flexibility and are not bound by uniform retail offerings for their customers.[9]

Each of these advantages is legitimate in their own right, but taken together, along with the regulatory process surrounding these matters, these advantages overwhelm the competitive market and frustrate the introduction of new services and technologies. Compounding matters is the fact that the regulatory process around enforcement of interconnection rules consumes so much time and money that individual competitors are not able to challenge the incumbent's behavior except in the direst of circumstances.[10] This allows the incumbent carrier to suppress a multitude of niche market players and greatly influence the pace and development of the telecommunications market. To put it plainly, the incumbent carriers can invoke (or ignore) the regulatory process to delay progress and competitors have no alternative but to engage the regulatory process for relief. If policy makers are to realize the goal of truly competitive telecommunications markets they are going to have to modify their process to allow for rapid and efficient dispute resolution outside of the traditional regulatory process, particularly as it pertains to interconnection.

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[9] In the United States business services have been largely deregulated since the 1980s. Residential services are already under price caps. At least sixteen states have deregulated telephone features (e.g., call waiting, call forwarding, etc.) and a growing number of states are considering complete deregulation within the next several years. In Europe, national regulators are conducting market reviews to determine which, if any, carriers have significant market power. Ofcom in the United Kingdom, for instance, has indicated it intends to deregulate the wholesale broadband market in 65% of the country. See, http://www.ofcom.org.uk/media/news/2008/02/nr_20080214.

[10] Consider the hypothetical example where a competitor seeks to lease a local access line to reach a customer for a sale involving $100,000 in revenue over the lifetime of the contract. If the incumbent carrier refuses to cooperate with the competitor, it may easily cost the competitor $200,000 and several months or years to challenge the incumbent's actions in the regulatory arena. A competitor would see that the costs of challenging the incumbent far outweigh the revenue to be gained from the customer and in any event in the time it takes to resolve the dispute the customer would have taken service from another carrier.

III. PROCESS AS A WEAPON

There are a host of examples where incumbent carriers engaged the regulatory process in order to delay competitive progress –

- Collocation[11]
- Local loop unbundling[12]
- Inter-carrier compensation[13]
- VoIP termination[14]

Inter-carrier compensation deserves special attention because it demonstrates how the regulatory process is used as a sword as much as a shield. In the United States during the 1990s, when CLECs first emerged on the scene, the paramount issue concerned the compensation arrangements governing the exchange of traffic between competing carriers. Known as reciprocal compensation, CLECs generally advocated low, cost-based rates (between approximately $0.0025 and $0.0075 per minute) while the incumbent carriers argued for the application of existing access charges (between

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[11] Collocation refers to the practice whereby a carrier will locate equipment in the central offices of another carrier in order to cross-connect to unbundled network elements such as local loops. In the United States, several state regulators as well as the Federal Communications Commission were asked to establish collocation regulations after the incumbent carriers refused collocation to competitors on commercially reasonable terms. See, e.g., Expanded Interconnection with Local Telephone Company Facilitites, 7 FCC Rcd 7369 (1992).

[12] In the United States, several state regulators as well as the Federal Communications Commission were asked to establish local loop unbundling regulations after the incumbent carrier refused to provide unbundled local loops to competitors on commercially reasonable terms. See, e.g.,

[13] Inter-carrier compensation refers to the financial arrangements between carriers that govern the exchange of traffic when the customers of one carrier call the customers of the other carrier and visa versa. Typically, the originating carrier will pay the terminating carrier a fixed rate for each minute of traffic delivered for termination. Throughout most of the world, regulators have established a single rate for inter-carrier compensation regardless of where the traffic originates. In the United States, inter-carrier compensation rates vary depending upon the origination of the traffic (i.e., whether the traffic is local or long distance).

[14] In the United States, VoIP service providers and incumbent carriers are unable to agree on the appropriate treatment of VoIP traffic for purposes of inter-carrier compensation. See, e.g., *Petition of Feature Group IP for Forbearance from Enforcement Pursuant to 47 U.S.C. § 160(c) From Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b)* in WC Docket No. 07-256

approximately $0.015 and $0.035 per minute). The difference was enormous and for most CLECs, critical to the success or failure of their business plans.

One CLEC in particular, however, accepted the incumbent's offer.[15] MFS, one of the first CLECs, had recently purchased UUnet, an Internet backbone operator. UUNet hosted Internet content, including AOL® and other websites. This was at the time that dial-up Internet was the dominant means of Internet access and residential local exchange service was priced on a flat-rate basis with no usage charges in many areas. MFS realized that customers of the incumbent carrier would dial-up the Internet using a local telephone number and remain on-line for long periods of time, especially when viewing the AOL and other websites. So MFS made sure that the local dial-in numbers were on its network so that when incumbent carrier customers dialed the Internet, they were dialing MFS's network and requiring the incumbent to deliver traffic through their negotiated interconnection arrangement.

MFS accepted the incumbent's offer to compensate each other at the higher access charge rate rather than the lower, cost-based rate for the exchange of traffic and soon enough, millions of the incumbents' customers were dialing up the Internet which required the incumbent carrier to hand the traffic off to MFS and pay MFS the per minute charge that was negotiated. The incumbent carriers quickly saw that enormous sums of money were being paid out to MFS and quickly realized that the inter-carrier expenses associated with the exchange of traffic surpassed the revenue derived from the customers for their flat-rate local telephone service.

Having been bested at the negotiation table by a much smaller competitor, and out maneuvered in the market place, the incumbent carriers did the only other thing they

[15] "Bell Atlantic, MFS Agree to Interconnect Networks", Bell Atlantic press release July 17, 1996

could and engaged the regulatory process. The incumbent carriers sent letters to MFS and every other CLEC claiming that calls to dial-up Internet service providers were not eligible for compensation under existing interconnection arrangements and that such compensation would no longer be paid. By taking this action, the incumbent carriers called into question the legitimacy of a significant portion of CLEC revenue and forced CLECs to engage the regulatory process to resolve the dispute.[16]

Owing to their superior political, legal, and regulatory resources, after four years the incumbent carriers ultimately succeeded in establishing unique compensation rules for what is now called "ISP-bound" traffic.[17] This example, more so than any other, demonstrates how the regulatory process itself is used as a weapon by incumbent carriers – a shield against competition as well as a sword against competitors. MFS out-negotiated the incumbents at the bargaining table. MFS out-competed the incumbents for service to Internet service providers. But rather than compete with MFS or re-negotiate with MFS, the incumbent carriers out-lasted them in the regulatory process.

A more recent example of this can be found in the market for voice over Internet Protocol services or VoIP. VoIP enables, *inter alia*, the functional equivalent of telephony services over the Internet. By utilizing the Internet, VoIP is able to dramatically lower the cost of international calling.[18] Recognizing the threat that VoIP posed, and unable and unwilling to match it quickly in the market, incumbent carriers in the United States initiated a series of regulatory proceedings that ultimately undermined

[16] The CLEC business is very capital intensive and if a significant portion of their revenues were in doubt, it would impact their ability to raise capital to fund network expansion.
[17] Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) ("ISP Remand Order").
[18] In the United States, VoIP is often a lower-cost alternative for domestic long distance services as well due to the arbitrary inter-carrier compensation regime maintained by state and federal regulators.

the majority of VoIP business models.[19] Rather than focus their limited resources on customer service and feature innovation, VoIP service providers were forced to defend themselves before state and federal regulators and fully engage in the legal, regulatory and political process across literally hundreds of jurisdictions. As nascent start-ups with limited access to capital, VoIP service providers quickly found themselves unable to adequately participate in the governmental process and the incumbent carriers largely prevailed in their efforts to shield their customer base from the threat of VoIP services.

IV. THE EMPHASIS OF POLICY OVER PROCESS REDUCES COMPETITION

To date, regulators have focused on reforming their regulatory policies and have largely failed to recognize how their processes has as great as, if not greater, an impact on the development of competition. Policy makers are more concerned with establishing a defined outcome than in establishing a functioning process for dispute resolution.

a. The United States

After a decade of state experimentation with the introduction of local exchange competition,[20] the U.S. Congress passed the Telecommunications Act of 1996 ("1996 Act").[21] The 1996 Act was intended to nationalize the policy of local exchange competition and end the judicial oversight of the telecommunications industry that was in effect since the Modified Final Judgment was accepted by AT&T to settle the U.S.

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[19] See, e.g., *Report and Order and Notice of Proposed Rulemaking* in WC Docket No. 06-122, Universal Service Contribution Methodology, released June 27, 2006; *First Report and Order and Notice of Proposed Rulemaking* in WC Docket No. 05-196, E-911 Requirements for IP-Enabled Service Providers, released June 3, 2005; *First Report and Order and Further Notice of Proposed Rulemaking* in ET Docket No. 04-295, Communications Assistance for Law Enforcement Act and Broadband Access and Services, released September 23, 2005.

[20] Prior to the passage of the Telecommunications Act of 1996, multiple states had already taken measures to permit local exchange competition. New York, Illinois, Massachusetts and Connecticut were among the pioneers of this effort.

[21] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("1996 Act").

Department of Justice anti-trust suit against AT&T.[22] At the time of its passage, the 1996 Act was heralded for ushering in a new era of competition in the local telecommunications market.

Immediately upon its enactment in February 1996, several CLECs initiated interconnection negotiations under the framework established by the 1996 Act.[23] At the same time, the Federal Communications Commission ("FCC") embarked on its effort to adopt rules implementing the key provisions of the 1996 Act, including interconnection. In August 1996, the FCC released its rules.[24] The rules were significant for two reasons. One, the rules were adopted in a remarkably short period of time relative to past FCC rulemakings. Second, the FCC Order adopting the rules was nearly 800 pages long and did little to clarify the interconnection rights and obligations of carriers.

The complexity of the FCC rules instantly overwhelmed the on-going interconnection negotiations and arbitrations at the state level and literally froze progress as all parties attempted to discern the applicability of the Local Competition Order to their efforts. The Local Competition Order was quickly followed by a series of Petitions for Reconsideration and ultimately appeals.[25] Over the course of several years, the appeals were successful in overturning key aspects of the Local Competition Order which

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[22] *See* United States v. American Tel. & Tel. Co., 552 F. Supp. 131(D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[23] Under the terms of the 1996 Act, carriers could initiate interconnection negotiations for a period of 135 days after which either party could petition a state public utility commission to arbitrate any open issues. See, Sec. 252(b) of the 1996 Act.

[24] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) ("Local Competition Order"). *Order on Reconsideration*, 11 FCC Rcd 13042 (1996). *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996). *Further recon pending, aff'd in part and vacated in part sub. Nom. Comptel v. FCC.* 11 F.3d 1068 (8th Cir. 1997) ("Comptel"). *Aff'd in part and vacated in part sub. Nom. Iowa Utilities Bd v. FCC and consolidated cases.* No. 96-3321 *et. al.* 1997 WL 403401 (8th Cir., Jul. 18, 1997) ("Iowa Utilities Bd.").

[25] See, footnote 24 supra

required the FCC to revisit the issues. The effect on the negotiations for interconnection between carriers was devastating.

Under the 1996 Act, state regulators were singled out to act as arbitrators in the event that interconnection negotiations between carriers failed.[26] When the FCC established interconnection *policies* in its' Local Competition Order, it dramatically narrowed the range of interconnection options for CLECs. The result of this was that a multitude of carriers with very unique and specific interconnection requirements were forced into a generic arrangement that was ill-suited to their business models, and the states were denied the opportunity to assume the rather novel and innovative responsibility of an arbiter of commercial disputes between carriers.

Had the FCC instead focused the Local Competition Order on the interconnection negotiation and arbitration *process*, it could have fostered the negotiation of a multitude of robust interconnection arrangements in support of the CLECs' business plans which would have allowed them to better manage through the economic bust of the telecommunications industry in 2001. It may have also averted some of the horizontal mergers[27] that have occurred in the U.S. market, resulting in a dramatically different competitive landscape.

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[26] Sec. 252(b) of the 1996 Act.

[27] Since the passage of the 1996 Act, there have been a series of mergers involving the former Bell Operating Companies. Initially Bell Atlantic acquired NYNEX. Southwestern Bell Telephone acquired Pacific Bell. Southwestern Bell acquired Southern New England Telephone Company. Southwestern Bell Telephone acquired Ameritech. The combined Bell Atlantic and NYNEX acquired GTE. Southwestern Bell Telephone acquired AT&T. The combined Bell Atlantic-GTE-NYNEX (now referred to as Verizon) acquired MCI. The newly re-branded AT&T acquired BellSouth. Of the seven original Bell Operating Companies, there remain only three – AT&T, Verizon and Qwest (originally US West).

b. Europe

A similar phenomenon is occurring in Europe involving all levels of government. Under the New Regulatory Framework ("NRF"),[28] the European Commission ("EC") called for the "harmonization" of the legislative, legal, and regulatory policies of the European Union Member States in so far as they relate to the "Information Society."[29] The emphasis of harmonization is on the policies each Member State has adopted in support of competition in the information and telecommunications markets.

Not surprisingly, the harmonization process has caused significant friction between Member States and the EC. For example, in its efforts to harmonize unbundling and resale policies, the EC has taken action against the German government several times, recently resulting in a €12m fine against Deutsche Telekom for maintaining wholesale rates for competing carriers above customer retail rates.[30] Many other Member States, particularly in the former Eastern European bloc,[31] are similarly straining the policy making authority of the EC.

By emphasizing uniformity of policy, the EC is attempting to establish a Pan-European market for information and telecommunications services. The underlying assumption is that uniform policies better support Pan-European business models and a single European market. While there is merit to the assumption, there is merit as well to

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[28] In July of 2000, the European Commission proposed a package of measures which came to be known as the New Regulatory Framework. The framework is intended to provide "a coherent, reliable, and flexible approach to the regulation of electronic communication networks and services in fast moving markets." See, http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/text_en.htm#Introduction for more information.

[29] http://ec.europa.eu/information_society/index_en.htm

[30] See, *Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of EC Treaty* (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG) http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/717&format=HTML&aged=0&language=EN&guiLanguage=en

[31] See, e.g., "EU Takes Poland to Court Over Telecom Regulator" http://www.eubusiness.com/news-eu/1201784520.9/

the fact that uniform interconnection policies hinder the development of niche market players, elevates the importance of economies of scale, and encourages horizontal consolidation.

The European Commission would do well to consider the processes in place to support competition. The example with Deutsche Telekom demonstrates very clearly the burden of process. Competitors had to suffer for ten years under a price squeeze before obtaining relief from the European Commission. New entrants cannot be expected to succeed under such duress.

V. PROCESS OVER POLICY

The better approach for the U.S., Europe, and all nations is to reform the decision-making processes to enable policy experimentation. This requires policy makers to abandon the notion of "non-discrimination" as that term has traditionally been applied to the telecommunications industry. Historically, policy makers have required monopoly providers to treat all customers equally so as to prevent abuse of their monopoly power.[32] In the transition to liberalized telecommunications markets, policy makers have sought to preserve this practice of non-discrimination in the wholesale market, failing to recognize that discrimination is part and parcel of a competitive market.[33]

Discrimination that results from negotiations among multiple parties of relatively equal strength is not *per se* bad because the discrimination does not result from the exercise of undue bargaining power. Where there is unequal bargaining power, the

[32] For instance, in the United States Section 202 of the Communications Act of 1934 states "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. 202(a)

[33] Curiously, through deregulation regulators have allowed discrimination at the retail level.

weaker party requires not policy support, but process support – to equalize bargaining power. One way of equalizing bargaining power is to create the right of an aggrieved party to invoke final-offer or "baseball-style" arbitration.

Final-offer arbitration requires both parties to submit "best and final" offers from which the arbitrator selects one of the offers in its entirety to the exclusion of the other in its entirety. The benefits of such an approach are that the process is rapid and efficient, and it forces the parties to narrow their differences and moderate their positions before submitting their best and final offer lest they be rejected for being extreme. Arbitration has been used by some regulators around the world. In Europe, for example, the European Commission encourages the use of some form of commercial arbitration and requires incumbent carriers to maintain arbitration provisions in their reference interconnection offers.[34] It is unclear to what extent the arbitration process has been exercised in Europe.

In Brazil, the regulator, ANATEL, acts as an arbitrator for inter-carrier disputes.[35] The process can be invoked by either party to the negotiations. Unfortunately, however, arbitration has failed to accelerate the decision-making process. Because ANATEL itself acts as the arbitrator, disputes are entangled in the bureaucracy and politics of ANATEL. The practice in Brazil demonstrates that in order to be effective, arbitration must be conducted by a neutral, non-political, third party.

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[34] Directive 2002/21/EC OF THE EUROPEAN PARLIAMENT AND THE COUNCIL of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) Article 8(4)(b)

[35] Anex Resolution n. º 040/98, de 23/07/1998. (General Rules on Interconnection, Chapter II). http://www.anatel.gov.br/Portal/documentos/english_site/regulations/anexo_res_english_040_1998.pdf?numeroPublicacao=19566&assuntoPublicacao=Anex%20Resolution%20n.º%20040/98&caminhoRel=Cidadao

In the United States, the FCC has adopted final offer arbitration in the context of sports programming negotiations between satellite operators and cable television companies,[36] but to date it has not been exercised and the FCC has so far refused to expand final offer arbitration to other contexts.[37] Of course, as discussed in Section IV above, by issuing detailed interconnection regulations, the FCC preempted the ability of state regulators to act as effective arbitrators of interconnection disputes.

The emphasis of policy over process once again portends dire consequences in the context of the net neutrality debate.[38] Advocates of net neutrality seek legislative or regulatory rules prohibiting specific behaviors. Since there is no way to account for all of the undesired behaviors, a better approach would be to establish a dispute resolution process that quickly resolved any dispute at minimal cost and in short order.

Consider the recent example of Comcast's alleged blocking of traffic using the peer-to-peer networking service of BitTorrent.[39] If a complete regulatory regime were in place to ensure non-discriminatory treatment of Internet content, Comcast could have

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[36] See, e.g., *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 (2004).

[37] During the FCC's review of the merger between SBC Communication and AT&T and Verizon Communications and MCI Corp., Global Crossing asked the FCC to require commercial arbitration for the settlement of disputes arising during negotiation of leased lines. The FCC refused to adopt such a condition, opting instead for alternative conditions. See, *In re Applications of SBC Commc'ns Inc. & AT&T Corp.*, Memorandum Opinion and Order, WC Dkt. No. 05-65, FCC 05-183, (Nov. 17, 2005) and *In re Applications of Verizon Commc'ns Inc. & MCI, Inc.*, Memorandum Opinion and Order, WC Dkt. No. 05-75, FCC 05-184, (Nov. 17, 2005).

[38] The Congressional Research Service defines network neutrality as follows - "The move to place restrictions on the owners of the networks that compose and provide access to the Internet, to ensure equal access and nondiscriminatory treatment, is referred to as "net neutrality." There is no single accepted definition of "net neutrality." However, most agree that any such definition should include the general principles that owners of the networks that compose and provide access to the Internet should not control how consumers lawfully use that network; and should not be able to discriminate against content provider access to that network." See, Congressional Research Service, "Net Neutrality: Background and Issues", May 16, 2006, http://www.fas.org/sgp/crs/misc/RS22444.pdf

[39] "Comcast blocks some Internet traffic" by Peter Svensson, October 19, 2007 http://www.msnbc.msn.com/id/21376597/ BitTorrent is a peer-to-peer file transfer service that facilitates the distribution of very large files on the Internet.

blocked BitTorrent all together based on any number of assertions related to the non-discrimination rules. BitTorrent would have been compelled to engage the regulatory process in order to challenge Comcast's actions and assertions. Once engaged, the regulatory process could take months and years to conclude. All the while BitTorrent would have been in a suspended state, unable to reach Comcast's customers. Of course, if Comcast engaged in the alleged blocking efforts before BitTorrent's technology gained consumer acceptance, it could have effectively prevented BitTorrent from ever gaining market acceptance at all.

Ironically, it was the lack of an established policy and set of rules that allowed the dispute to be resolved relatively quickly. When news spread of Comcast's alleged actions with regards to BitTorrent, policy makers were able to operate outside of the formal regulatory process and exert political pressure on Comcast to alter its practices. Conversely, if there were extensive rules in place governing the behavior of network operators, the full regulatory process would have had to been exercised before BitTorrent could obtain relief.

VI. CONCLUSION

Inter-carrier disputes are plentiful and the existing tools for addressing them are so clumsy, time consuming and expensive that they rise to the level of acting as a barrier to entry in their own right. Competitors lack the ability to obtain equitable relief in a timely and efficient manner and it is jeopardizing their long-term viability. Policy makers must reform and reinvigorate their decision-making process, especially in light of the speed with which the telecommunications market is changing.

If policy makers truly embrace a competitive market, then they must abandon the desire for fixed and uniform outcomes. The emphasis on policy assures uniform outcomes, but does little to foster the development of innovative new entrants, services, and technologies which by definition are not uniform. The availability of a low cost, efficient dispute resolution process, such as final offer arbitration, will prevent the incumbent operators from utilizing the regulatory process as competitive weapon and remove a significant barrier to entry in the telecommunications market.