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PERSPECTIVE

Reports of FCC overhaul are exaggerated

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Every time there is a change of guard in Washington, there is inevitably an expectation that the pendulum of telecom policy will swing wildly to the other end. Just as inevitably, that expectation soon proves exaggerated, and the oscillation turns out to be gentler than initially believed and advertised.

Witness the eight years of the Obama administration. Their dawn gave rise to a widespread belief that net neutrality, the idea that the internet service providers controlling the gates to internet access should be barred from interfering with the online experience past the gate, would come into its own and reign supreme. But it took almost all of these eight years, two initially skeptical chairmen of the Federal Communications Commission, almost 4 million vocal commenters agitating for net neutrality, and two trips to the courthouse, for the rules to finally take effect and survive court scrutiny.

Or, witness the FCC's policymaking during the eight years of the George W. Bush administration. The first FCC chairman of that era, Michael Powell, came in with promises that mergers would henceforth be reviewed under a so-called "rulesbased" analysis. This was shorthand for the idea that a merger would be approved unless it violated a specific rule, without reference to the FCC's customary public interest standard. But soon after that promise was made, the agency was moving to stop a larger merger, based not on any rule, but rather on its perception of the very public interest standard that it had said it would disregard. On net neutrality, too, the Bush years started with the controversial, and even then extreme, notion that



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Commissioner Ajit Pai in his office in Washington, Aug. 16, 2013. In his first days as President Trump's pick to lead the FCC, Pai has aggressively moved to roll back consumer protection regulations created during the Obama presidency.

complaining about the digital divide between haves and have-nots was like complaining about not driving a Mercedes-Benz. That notion, too, was soon discarded, as the agency took steps to restraint the behavior of internet service providers under the leadership of Kevin Martin.

What prevented the expected extreme swings in each case? Three things: the Communications Act, which requires the agency to satisfy itself that the public interest is served before granting license or merger applications; the Administrative Procedure Act, which requires notice and comment before a rule is changed; and the pragmatism of many of the leaders holding the telecom policy reins at each time. Unalloyed dogma seldom survives unscathed in the telecom space.

The Trump administration is likely to provide one further illustration of this gap between the initial euphoric expectations of the doctrinaires and the practical implementation of their ideas. In fact, the gap may be more pronounced than usual for two reasons. First, the dogma has been mixed from its inception: There is still an unresolved tension between the laissez-faire, small government impulses of the recent

Republican worldview, and the anti-elite iconoclasm of Donald Trump, who campaigned against media mergers, explaining "it's too much concentration in the hands of too few." Second, new FCC Chairman Ajit Pai is both a pragmatist and a genuine believer both in process and in substantive analysis. Moreover, he earnestly wants to be led by the facts, and by economic analysis, to wherever they lead.

What will all of this mean in practical terms? There is a strong likelihood that the net neutrality rules will be supplemented by incentives for broadband deployment. The rules themselves will likely be modified, and their reach may be lessened, after a rulemaking proceeding. But the changes are likely to be incremental. And Chairman Pai's eloquent objections to regulating ISPs as common carriers are likely to meet with an obstacle: There is a minimum core of net neutrality rules — do not block, do not throttle, do not demand pay to play — that ISPs themselves have said they are willing to live with. But precedent of the U.S. Court of Appeals for the D.C. Circuit suggests that, to impose these rules, the FCC does need to regulate ISPs as just that — as common carriers. The new framework to be developed by the FCC needs to be flexible to accommodate the possibility that common carrier regulation, while deeply unpopular to the FCC's new majority, may turn out to be necessary.

And whither merger review? It is likely to include a public interest examination and economic analysis that may, if anything, be even more robust than before, in light of the new chairman's heavy emphasis on the cost-benefit calculus of each agency action. This will likely be so particularly for so-called "vertical" mergers, for which the public interest standard is more suitable

than the guidelines followed by the antitrust agencies.

To judge by promises and ideas, every Republican FCC would be busily demolishing the rules made by its predecessor and every Democratic FCC would be busily making these rules anew. This has not happened in the past, and is not likely to happen in the future. In fact, the largest challenge of the FCC is one that is not caught in the tug of war between Republican and Democratic ideas at all. It is this: The main telecom issues of our time are ones that neither the previous FCC nor this one is equipped to do much about. They include the loss of full-time, well-paying jobs to the internet and automation in one industry after another, fake news, filter bubbles, selection bias and the internet as the propagandist's echo chamber.

Will the future belong to internet users, or to those manipulating them behind the curtain? The FCC can do little to influence the answer to that question. Here is a prediction: That will not change in the new administration, or the one after. And perhaps nor should it: For some problems, regulation is not the right answer, on either end of the ideological spectrum.

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