Ex Ante Regulation of Google?
By Mark A. Jamison, Ph.D.

Recent calls for ex ante regulation of Google are reminiscent of other calls for regulation of IT companies. Remember the calls to treat Windows like a public utility, or iTunes as an essential facility? These were all misguided because they misconstrued the basics of the proposed regulations. The calls for regulation then and now also contain an unstated premise that rules designed for truly monopoly industries with public franchises and stable, long-lived technologies could be successfully applied to companies whose technologies change daily and whose customers readily move on when something better comes along.

Advocates of ex ante regulation of Google generally frame Google as a public utility, a common carrier, or a holder of an essential facility. Google fits none of these.

A public utility is a firm that is given a public franchise to hold a 100% market share for a service that is essential to a modern economy. Local electricity, water, and natural gas providers are typical utilities. Google isn’t like them. There is no public franchise for providing general search. Most estimates find that Google has about a 65% market share in general search in the U.S., and a much smaller market share in overall search. And while Google is important, it is not an essential gateway of commerce, as evidenced by how quickly customers switched to Yahoo! when Google had a software glitch a few years ago.

A common carrier is a firm, such as a telecommunications provider or railroad that transports items on someone’s behalf. Regulations for common carriers come from the English common law public calling concept that emerged centuries ago when certain trades that were essential to the functioning of local economies were in short supply so that tradesmen could exploit customers with unique circumstances. Google does not fit the basic premises that make a firm a common carrier. Google does not transport information on a customer’s behalf. Google finds information and provides advertising, but telecom companies provide the transport. Also, general search and advertising are not in short supply, and Google’s pricing approach does not permit exploitation of unique circumstances.

A firm falls under the essential facilities doctrine if the firm is a monopolist or near monopolist in the final goods market, controls an input that rivals need to be able to compete in that market, and denies rivals access to the critical input. Google fits none of these criteria. Google is far from being a monopoly in the relevant retail markets, such as operating systems (Android vs. Apple OS), calendars (Google Calendar vs. Windows Live), and video displays (YouTube vs. Vimeo). And Google does not exclude rivals from advertising or from being included in general search.
Even though Google clearly does not fit these categories of regulation, proponents of regulation remain, claiming vaguely that oversight would benefit competition. This is incorrect. Regulation of Google would likely diminish, if not kill the innovations, investment, and expansion of output that competition is supposed to encourage.