A User's Guide to Avoid Bad Regulation

Harold Furchtgott-Roth
Furchtgott-Roth Economic Enterprises

PURC Telecom Policy Roundtable
October 30, 2006
Tallahassee, Florida

Why Bad Regulation Matters

- Regulation restricts the behavior of firms, not consumers.
- Bad regulation affects consumers not directly by limiting their behavior, but indirectly by limiting the technological and competitive choices that firms offer in the market.
- Even the possibility of bad regulation indirectly affects firm behavior.
  - Regulatory uncertainty even without specific bad outcomes discourages participation in markets.
  - Examples of bad regulation even without uncertainty discourages participation in markets.

Potential Types of Regulatory Problems

- Asymmetric regulation
- Discriminatory regulation
- Vague and ambiguous regulation
- Jurisdictional conflicts for regulation
- Uneconomic regulation
- Contradictory regulation
- Anachronistic regulation
- Arbitrary regulation
- Unpredictable regulation
- Opaque regulatory process
- Unlawful regulation

Asymmetric Regulation

- Usually the product of statute rather than interpretation of regulators
  - Conscious decisions of legislator for different types of regulations
  - Unanticipated consequence
- Examples usually involve same service but different regulation.
  - Incumbent vs. new entrants
    - Telephony, Sections 251 and 252
  - Large versus small companies
  - Rural versus non-rural companies
  - Different technologies to provide same service.
    - Video programming distribution
      - Broadcast
      - Cable
      - Satellite
      - Internet
    - Voice and data services
      - Wireline
      - Wireless
    - Electricity generation by different technologies

Symmetric Regulation

- No distinction based on
  - Technology
    - Internet and information services
  - Incumbency
    - Cable franchising
  - Size of firm
  - Geographic or other considerations

Lawfully Discriminatory Regulation

- Regulation may be symmetric but still lawfully discriminatory.
- Same service, same technology, same firm characteristics, but different firms treated differently based purely on identity of firm.
- Can lawfully be based on remediation
  - Section 271 and 272-275
- Can lawfully be based on competitive concerns
  - PUHCA
- Discriminatory regulation can also be unlawful.

Vague and Ambiguous Regulation

- Regulations may be symmetric and non-discriminatory but still vague or ambiguous.
- Regulators do not always provide clear guidance on regulation.
  - Compliance standards and safe harbors
  - Information collection process and standards
  - Complaint process
  - Enforcement process and standards
  - Adjudication process and standards
- Particularly problematic for new laws and new regulations

Jurisdictional Conflicts for Regulation

- Jurisdictional conflicts leave firms uncertain about which government agency decides specific issues.
- Faced with uncertain jurisdiction, many firms will not participate in a market.
- Resolving jurisdictional disputes can take years, far beyond the planning horizon of most firms.
- Types of jurisdictional conflicts
  - Different laws within the same level of government (e.g., Historical Preservation Act vs. Communications Act)
  - Different offices within the same agency
  - Different agencies within the same branch or level of government (federal or state or local)
  - Agencies at different levels of government (e.g., federal vs. state)
  - Agencies at different parallel jurisdictions (e.g., agencies from two different states)

Uneconomic Regulation

- Even when regulation is symmetric, non-discriminatory, and possessing other valuable traits, some regulation may be uneconomic.
- Uneconomic regulation occurs when costs of regulation clearly exceed benefits.
- Few agencies actually measure costs and benefits of proposed or future regulation.
  - Little serious work inside agencies
  - Little serious outside comments
- Even fewer agencies examine historical experience with regulation.
  - Effectiveness of past regulation ignored.
  - Automatic reviews routinely ignored.
- Uneconomic regulation harms consumers and some firms, but many benefit other firms and possibly regulatory agency.

Contradictory Regulation

- Even if no jurisdictional disputes, regulation can be contradictory, even from the same agency.
  - E.g., the same agency may require uniform retail pricing for a regulated service, but also require discounts for low-income households, schools, etc.
  - Rules may require notices on consumer bills about rate changes but also prohibit use of consumer bills to communicate information unrelated to billing.

Anachronistic Regulation

- Statutes and regulations are not routinely scrubbed.
- Examples
  - Morse code regulations until mid 1990s
  - Telegraph federal regulations until nearly 1990s
- Regulators routinely chafe at efforts to review regulations.
  - Section 11

Arbitrary Regulation

- Even if regulation is symmetric and non-discriminatory, it can still be arbitrary.
- Arbitrary decisions
  - Absence of record for basis
  - Record could have supported other conclusions
- Arbitrary enforcement
  - Similarly situated firms treated differently
- Arbitrary adjudication
  - Similarly situated firms treated differently

Unpredictable Regulation

- Even if regulation is symmetric, non-discriminatory, and not arbitrary, regulation may still be unpredictable.
- Unclear standards and process for rulemaking
- Unclear standards and process for enforcement
- Unclear standards and process for adjudication
- Many firms unwilling to participate in market governed by unpredictable regulation

Opaque Regulatory Process

- Even if regulation is symmetric, non-discriminatory, not arbitrary, and predictable, regulation may still suffer from an opaque regulatory process.
- Absent transparency, many firms are paranoid about process, reluctant to invest in a regulated market.
- Transparency removes doubt about process.

Unlawful Regulation

- Regulators ultimately only have responsibility to follow law.
- Law may condone many problems of regulation discussed above.
- Willingness of parties to challenge regulator in court is unstable.
  - Many parties unwilling to challenge some agencies for fear of retribution (FDA)
  - Other agencies routinely are challenged.
    - Agency may have poor track record in court.
    - Some firms perceive regulatory benefits to protracted legal fights.
    - Strategy that benefits firms willing to incur large litigation expenses
- Courts review regulatory decisions based on statute.
  - Court review process takes time, creating uncertainty, discouraging business participation in a market.
  - Court reversals not only raise doubts about past agency decisions, but also about future agency decisions.
  - Regulators often have shorter careers than court review process resulting in court reviews having limited disciplining effects on bad regulation.

Best Regulatory Strategy

- Well within established law
- Near perfect litigation experience
- Both factors will discourage
  - Parties from challenging agency in court
  - Judges from ruling against agency

Lawful Regulation is Ultimately Good Regulation

- Predictable
- Certain
- Likely to be economically rational
- Encourages participation in markets
- Ultimately benefits consumers