When does deregulation become re-regulation?

To watch this happen in real time, take a close look at the Federal Communications Commission, which is poised to re-impose price regulation on a market for a nearly obsolete technology at its **Nov. 17** public meeting. The FCC has been looking to re-

regulate this market since 2005.

How did we get here? In 2012, to help break the impasse, the FCC started collecting data, once again, in a surgical approach toward considering whether to regulate an emerging competitive and complex market. Casting data and deliberation to the wind, the agency recently reversed course to instead embrace a machete-like approach that will lop off entire types of technology and declare all markets for business services un-competitive across the country.

Through a "**fact sheet**" the agency seeks to re-regulate legacy time-division multiplexed copper-based business communications services in all markets across the country, while ignoring its own market data showing vibrant competition in this market throughout the U.S. And it is pushing for a vote this month on whether to impose price regulation on all antiquated copper-based business services offered by incumbents nationwide.

No evidence exists on the lack of nationwide competition. Highlighting the absurdity of the FCC's approach, just focus on one issue in the agency's proceeding: fiber interoffice transport networks that **competitive local exchange carriers** and others deploy in competing to offer services to businesses.
The FCC's own data show that competitive providers offer transport networks in more than 95% of Census blocks where there is demand for business data services, covering about 99% of America's businesses.

Even excluding cable company competitors from this analysis, limiting it just to

to make up

Allentown Morning Call
How the Trump team sees Pennsylvania

CLECs, the comparable figures are 83% and 92%.

And, as one would expect, in the business centers of larger cities, there is even more competition. In many places, more than 20 different communications providers offer competitive transport services, but the FCC is still pushing for nationwide price regulation. In fact, competition is so pervasive that not even CLEC competitors have called for nationwide price regulation on these services, yet the FCC wants to impose it anyway.

We appear to live in a world where an expert regulatory agency that doesn't like the results of the data it collects can just choose to ignore it. There is an old saying that "the plural of anecdote is data," but for the FCC the opposite is true: Cherry-pick data for the anecdotes that support a case and call it fact. In defense of its fact sheet findings, the agency maintains only that "evidence of market power is strongest" in legacy TDM markets.

To use the proper legal term here, the FCC's proposed action is arbitrary. It bears no connection to the data. Across the country, competitors and incumbents compete side-by-side. Deregulation worked. Yet now a partisan majority on the FCC intends to just do what it wanted from the start, data be damned. Does all this matter to anyone other than purchasers or sellers of BDS services?

Yes, it does because if the FCC is going to say with a straight face that it is willing to impose price regulation even in situations with dozens of competitors in a market, what does that say about its attitude or potential attitude toward other parts of the industry? What company is safe from fear that it, too, could become subject to price regulation and decide, therefore, that investment and innovation in the U.S. telecommunication market is just not worth it?

If adopted, this dictate from the FCC won't increase competition in the newer market for Ethernet services. It won't encourage new investment and new builds but the opposite. It will instead send the discouraging signal that the FCC isn't willing to follow data that doesn't support its preferred conclusion, that some competitors are more favored than others and that investments aren't secure. Not a great showing after 12 years of work, with a hurried vote to wrap up an agenda before the new president comes in.

Through a path that is as duplicitous as it was circuitous, the FCC has ended up further back than its starting place. By seeking to end a proceeding promoting deregulation with imposing re-regulation, the FCC has simply failed. – ***The Street***

Eminent domain attorneys and their clients battling new pipelines in Pennsylvania courts feel they may have a new weapon in the fight against controversial projects like Sunoco's Mariner East. The recent decision by the Pennsylvania Supreme Court to toss out industry-friendly provisions of the state's oil and gas law included eminent domain for gas storage.

All across the state, private landowners have fought eminent domain takings for pipelines, arguing that the lines do not serve the public good. But they haven't had much luck in convincing county judges, who have in all but just a few cases, ruled against landowners.

In September, a majority of the Supreme Court ruled that using eminent domain for underground gas storage violated both the federal and state constitutions. The court wrote that the public was not the "primary and paramount" beneficiary, as the state had claimed. "Instead, it advances the proposition that allowing such takings would somehow advance the development of infrastructure of the Commonwealth. Such a projected benefit is speculative, and, in any event, would be merely an incidental one and not the primary purpose for allowing these takings," wrote Justice Debra

McCloskey Todd for the majority.

The decision was cheered by lawyers like Alex Bomstein, an attorney for the Clean Air Council challenging eminent domain takings by Sunoco Logistics for the Mariner East 2 pipeline. Mariner East 2 will carry natural gas liquids from western Pennsylvania to Delaware County where it will be shipped to Scotland to make plastics. “Mere economic benefit is not enough,” said Bomstein. “Right now in Pennsylvania nobody is starving from lack of ethane. Nobody is crying in the streets for more butane. There is no apparent public need for these things and that’s demonstrated by the fact that [the gas products] are being exported.”

Sunoco Logistics would not comment on the Supreme Court’s decision for this story but the company says some of the fuel will be offloaded in Lebanon and Berks counties, thus serving the public good by addressing potential shortages and insuring an adequate supply of heating fuel for the winter months. Pipeline opponents say that’s a ruse used to convince the courts that the pipeline will serve a public good.

The Pennsylvania Public Utility Commission granted Sunoco a “certificate of convenience,” which designates it as a public utility and allows the company to argue for eminent domain. A spokesman for the PUC said the agency is “not in a position to speculate about the future impacts of the court’s decision,” regarding gas storage, and how that may play out regarding pipeline cases.

Although the legislature gave the PUC authority to designate pipeline companies public utilities, it did not grant them authority over where and how the pipelines are installed. Once a company receives a certificate of convenience, it’s essentially a blank check to develop its infrastructure, utilizing eminent domain to seize land if negotiations with landowners over compensation are unsuccessful. The Department of Environmental Protection has oversight when it comes to earth-moving and water-crossing permits, which is practically the only chance for the public to weigh in on how the project is implemented.

The PUC says its decisions regarding certificates of convenience are public and transparent. And it insists it has no role in how the courts decide issues of eminent domain. But Sunoco has argued, and the courts have ruled, that pipeline companies can take land through eminent domain based on decisions made by the PUC. The courts have used the certificates of convenience, issued by the PUC, as conclusive evidence for allowing the exercise of eminent domain.

This puts landowners in a difficult position when it comes to challenging the original PUC decision, which they must do within 30 days. For example, if, as in the case of Mariner East, the certificate of convenience was issued for Washington County, it would be difficult for a landowner 300 miles away in Delaware County to know that the PUC’s decision may result in a new pipeline coming through their backyard several years later.

Eminent domain attorney Rich Raiders, who represents a number of landowners who have cases with Sunoco, says his clients feel left in the dark on these decisions, and that the deck is stacked against them and in favor of pipeline operators. “These guys are used to going to the PUC, and they go in and do what they want and nobody notices,” said Raiders. “And by the time the citizen knows it happened it’s already too late.”

The PUC says their decisions are made in public, broadcast online and are based on facts and laws. PUC spokesman Nils Hagen-Frederiksen says the commissioners and staff take their responsibilities toward the public seriously. “As you well know, the Commission is an independent, neutral agency – tasked with ensuring safe and reliable utility service at reasonable rates, and balancing the needs of consumers and utilities,” Hagen-Frederiksen wrote in an email. “Anyone has the right to disagree with a Commission decision; that’s fair, and that’s part of the process – but there is

absolutely no basis to attack the Commission's impartial approach to any case, and those kinds of claims are unfair."

Attorney Rich Raiders says landowner notification of potential disruption by pipeline builders during the PUC's process would help reduce the perception of bias. That's something that would have to be taken up by the legislature. In the meantime, Raiders has already used the Supreme Court's decision regarding gas storage to file new briefs in some of his cases pending in common pleas courts across the state. He says the hot question for him and the landowners is whether the Supreme Court decision about gas storage could be applied to future decisions about natural gas pipelines. "I don't know, but they left a big fat opening for what exactly is public use and public benefit, he said. "Justice Todd raised a big red flag and that's what they're interested in hearing about." – ***WITF-TV/FM, Harrisburg & WHYY-TV/FM, Philadelphia***