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### **An Internet Plebiscite: Putting Public Pressure on the FCC Won't Produce Better Communications**

by

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Politicization of policy by plebiscite may be a nice bit of alliteration. But the plebiscite presently taking place at the Federal Communications Commission (FCC) could undermine the idea that the commission's actions should be based on its presumed expertise, not on counting noses, or in this instance, counting computer-generated form comments.

What's transpiring at the FCC could upend the prevailing administrative law theory of the proper approach to agency decision-making. And it's possible the July 12 "Day of Action" proclaimed by pro-regulatory forces who want to maintain the public utility status of internet service providers (ISPs) will do further damage.

In 2015, the Obama administration's FCC, under the leadership of Chairman Tom Wheeler, adopted new "net neutrality" regulations applicable to internet service providers. Even the new rules' supporters conceded the regulations imposed public utility-like mandates on ISPs, in effect, relegating them to the same regulatory classification as last century's Ma Bell.

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The 2015 rules were adopted on a partisan 3-2 commission vote in a notice-and-comment rulemaking under the Administrative Procedure Act (APA), which governs process matters for most federal agencies. Pursuant to the APA, the agency publishes a notice of proposed rulemaking, soliciting public comment on proposed rules before they are considered for adoption.

Typically in rulemaking proceedings, the commission might receive a hundred or so comments from interested parties such as regulated entities or competitors that might be advantaged or disadvantaged, and consumer groups claiming to represent the broader public. However in 2015, the FCC's leadership made an extraordinary effort to get pro-net neutrality groups to flood the commission with an unprecedented number of comments. When the rulemaking record was closed, the agency claimed nearly 4 million comments had been submitted.

The commission stated that the "majority" of comments supported its action to impose public utility regulation on ISPs. The reality is that the vast majority of the nearly 4 million comments were simply brief form letters generated by a tap or two of a key on a computer device. As Mr. Wheeler conceded shortly after the commission vote, "most of the 4 million filings were simple expressions of preference."

It shouldn't be surprising, therefore, that after the Trump administration's FCC under the leadership of new Chairman Ajit Pai initiated a rulemaking proposing to roll back the 2015 mandates, a battle to win the form comment plebiscite began. This time the forces opposing utility regulation have not been caught unawares. An organization called Consumer Action for a Strong Economy recently released a study finding that nearly 5 million comments already have been submitted. The form letter comments are running approximately 65 percent in favor of repealing the regulations.

Perhaps concerned that the pro-regulation forces might be losing the comment plebiscite, Rep. Frank Pallone, the ranking Democrat on the House Energy and Commerce Committee, has called on the Department of Justice and FBI to investigate whether any bogus comments have been submitted.

I say, to what purpose? Of course, I understand that we don't want our federal agency rulemaking processes, in which public participation plays a valuable role, to be distorted or otherwise adversely affected by the submission of bogus comments, whether generated by ever-more-sophisticated "clicktivist" social media campaigns or even Russian bots.

But the tendency for opposing sides to engage in an all-out battle to amass the most computer-generated form comments, if carried to the extreme, may undermine the FCC's institutional integrity. The commission is a so-called independent regulatory agency with its five members serving staggered terms. No more than three commissioners may be from the same political party. The commission — and other similarly structured independent agencies like the Federal Trade Commission and U.S. Securities and Exchange Commission — are supposed, at least in theory, to base their actions on their presumed expertise, not the latest poll results or public opinion surveys.

Put another way, after a million or two form comments have been identified, what is the agency rationally supposed to conclude from the fact that one side might have 500,000 more than the other side — other than that perhaps the “winning” side has run a more sophisticated social media campaign or has spent more on the latest data-mining technology? What difference does it really make if the July 12 “Day of Action” generates tens of thousands of additional form comments?

Granted, an extraordinary number of public comments submitted in a commission proceeding is an indication of heightened interest that should cause the agency to take notice and pay extra special attention to the facts and the law that inform its decision.

But in the case of the FCC’s current rulemaking, there are important economic and technological considerations, often involving complex cost-benefit calculations and tradeoffs, that should carry more weight than a count of comments. For example, there is empirical evidence showing that public utility-like regulation deters investment and that rigid prohibitions on “discrimination” deter innovation because ISPs are discouraged from differentiating their offerings. Highly technical network operations impact determinations as to whether practices, such as prioritization of certain kinds of traffic, constitute reasonable network management techniques or instead attempts to disadvantage competitors. And, finally, there are serious questions relating to the FCC’s legal authority to regulate ISPs as public utilities.

I happen to believe that the commission should roll back the current public utility-like regime. But the fundamental point — an important one relating to maintaining the commission’s institutional integrity — is that the agency’s ultimate determination should be based primarily on the application of its expertise regarding the facts and the law, not on a campaign-style plebiscite.

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