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Don't Stifle Internet Services With More Regulation

by

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Having served both as a commissioner at the Federal Communications Commission and a state public utility commission, I often find myself sympathetic to a "states rights" perspective regarding regulatory issues when there are claims of overlapping or conflicting jurisdiction. Government "nearer" to the people often is more responsive and accountable.

But I am opposed to a resolution which my former state public utility commission colleagues intend to consider at their annual summer conference this week in Sacramento. The resolution would urge the FCC to adopt a so-called "fourth way" to regulate broadband Internet providers – one which would give the FCC as well as 50 state utility commissions shared authority to regulate Internet traffic.

The resolution adopts the "fourth way" moniker as a play off FCC Chairman Julius Genachowski's Internet regulation proposal, which he calls the "third way." The

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"third way" is Genachowski's latest attempt to put a moderate face on what, in effect, would be unprecedented new regulatory mandates governing Internet providers and the management of their broadband networks.

In addition to stifling large-scale overall network investment, additional government regulation usually results in higher costs to the individual consumer. More unnecessary burdensome government paperwork costs us doubly: as consumers and taxpayers. In addition, if Internet providers are unable to access the necessary capital, and yet demand for bandwidth-intensive services continues at the current rate, consumers could encounter more latency and dropped calls, or even the inability to access websites and high definition video.

More importantly, if Internet providers lack the ability to manage their own networks, bandwidth hogs could negatively impact critical broadband services so a patient cannot be assured of an uninterrupted telesurgery procedure. Lack of certainty regarding the interpretation of laws and regulations at any level, much less concern regarding 50 different state interpretations, is likely to cause capital to flow to other economic sectors; or even worse, to other countries.

After Genachowski announced his "third way" proposal in April, I said that the proposal went in the wrong direction because it would begin regulating the incredible broadband Internet marketplace we have today "much like old-fashioned monopoly telephone service" of years gone by. The state public utility commissioners' proposal is unsound because, if adopted, it would place yet another layer of regulatory oversight on top of one that is itself unnecessary and counterproductive, and at least according to one federal court: not legally sustainable.

Unlike last century's monopolistic environment when Ma Bell was the dominant provider of plain old analog telephone service, in today's digital world most Americans have a choice of two or more providers of broadband Internet services. Fueled by private investment and risk-taking entrepreneurs, the growth of the broadband marketplace has been remarkable. Americans who access broadband at home grew from 8 million in 2000 to nearly 200 million last year, reaching approximately 95 percent of U.S. households.

Internet service providers already have spent more than \$200 billion in building out and upgrading their broadband networks. Mobile phones also have experienced robust growth, with more than 850 different models on the market in 2009. Almost a third are fully Internet-capable smart phones. All this points to an explosive marketplace – a far cry from the time in which a monopolistic utility necessitated the need for regulatory control.

With the Internet constantly evolving and the marketplace rapidly expanding, more infrastructure investment will be required. Even the FCC found that as much as \$350 billion in new private investment is needed to bring broadband to the 5 percent of American households that lack access and to continue to upgrade existing networks so they can support expanded demand for high-bandwidth applications.

Of course, state utility commissions and consumer protection offices still have important roles to play in the digital age. For example, the FCC has invited the states' participation regarding reform of the arcane universal service system intended to increase access to communications networks by persons with disabilities or low income.

But having 50 states asserting authority to engage in public utility-like regulation of broadband Internet services in this truly global communications environment is not only beyond their legal jurisdiction, it would certainly deter much-needed investment and innovation. This doesn't make sense at a time of continuing severe economic distress when their states – and this country – desperately need the jobs that more investment and innovation can mean.

In the 1996 Telecommunications Act, Congress declared the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by federal or state regulation." That is still the law of the land. Recently, 240 members of Congress from both sides of the aisle reiterated that policy, asking the FCC not to take any action to regulate Internet providers.

Thus, seeing the present dynamism and proliferating marketplace for broadband Internet services under this "light touch" regulation, I hope my federal and state colleagues will heed the law as well as the policy imperatives. They should say "no

way" to a "third way" or "fourth way" and focus on the incredible successes of the deregulatory way.

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