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Perspectives from FSF Scholars
May 16, 2017
Vol. 12, No. 18

FCC Return to 'Light Touch' Regulation Would Encourage Capital Investment

by

Theodore Bolema* and Michael Horney**

The Hill
May 15, 2017

For most of its history, under Democratic and Republican administrations, the Internet thrived under "light touch" regulation. Private companies needed no coaxing from regulators to build the Internet infrastructure we have today. Yet in February 2015, the Federal Communication Commission adopted the Open Internet Order, claiming that it was possible Internet service providers (ISPs) "might" or "could" start choking off broadband capital investment to increase their profits. Now the FCC is poised to initiate a rulemaking proceeding on May 18th to rollback the most heavy-handed regulatory mandates adopted by the Obama administration's FCC.

The FCC issued its Open Internet Order with the dubious presumption that regulating broadband providers like public utilities would encourage them to invest more. It justified imposing Title II public utility regulation on ISPs with what it called the "virtuous cycle" theory. The order described that theory as such:

The key insight of the virtuous cycle is that broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own

video services; and they can extract unfair tolls. Such conduct would, as the commission concluded in 2010, ‘reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure.’ In other words, when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.

Thus, over two vigorous dissents, the 2015 FCC majority promised it could encourage additional Internet capital investment by imposing a set of regulations designed to ensure “net neutrality.”

Two years later, it is becoming clear that the FCC was wrong. In his address on April 26, FCC Chairman Ajit Pai cited Free State Foundation research estimating that the Open Internet Order "has already cost our country $5.1 billion in broadband capital investment." Moreover, the FCC’s reclassification of mobile broadband in a public utility-like fashion has discouraged significant investment from wireless providers. A new survey by CTIA – The Wireless Association found that wireless providers’ investment declined from $32.1 billion in 2014 to $26.4 billion in 2016, a drop of $5.7 billion or 17.8 percent.

One particularly troubling provision in the Open Internet Order is the ban on “paid prioritization,” or agreements between broadband providers and content providers allowing specific data to use a “fast lane” to avoid congestion on the Internet and potentially provide additional revenues for ISPs to further invest in network expansion. Such expansion ultimately benefits all Internet users. The FCC asserted in 2015, however, that allowing ISPs to charge for priority gave them incentives to avoid investing in the “slow lane” until it became so unattractive that content providers would be forced to pay to move to the fast lane. Significantly, the FCC adopted a blanket ban on paid prioritization even though, to that point, broadband providers had not adopted in any meaningful way the practices that the agency decided to preemptively ban.

Evidence from other markets shows that paid prioritization arrangements that develop without regulatory intervention generally benefit consumers and lead to more capital investment. Various forms of paid prioritization are used by grocery stores, book store chains, air travel, sports stadiums, and package delivery services. Governments seeking to attract private investment for road construction are expanding their optional toll lanes for commuters willing to pay to avoid congestion. With respect to broadband, paid prioritization could help optimize public transportation and traffic management, ensure fast and reliable communication among law enforcement officers and first responders, and ensure immediate and quality access to telemedicine, all the while attracting additional capital investment.

Paid prioritization and other practices by Internet providers should not be treated as unambiguously pro-competitive or anticompetitive on a blanket basis. Less intrusive responses, including antitrust, consumer protection laws, and minimum quality standards, should be sufficient to address any consumer or competitive concerns that might emerge in the future. These alternative approaches would restore the real benefits and efficiencies that can be achieved using voluntary contracting arrangements while encouraging more investment and innovation by both ISPs and content providers whose applications require fast and reliable broadband connections.

With the absence of a market failure or evidence of consumer harm, the FCC should return to its long-time bipartisan approach of light touch regulation of broadband, especially given the recent

decline in annual broadband investment. The commission should seek to address specific harms that arise from clearly anticompetitive business practices on a case-by-case basis, while also encouraging the experimentation and innovation that will attract capital investment and provide benefits to consumers.

* **Theodore Bolema is a Senior Fellow and Michael Horney is a Research Associate at the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland. *FCC Return to 'Light Touch' Regulation Would Encourage Capital Investment* was published in *The Hill* on May 15, 2017.