

# The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

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## FSF Files Comments Opposing FCC's "Third Way" Plan

Today Randolph May, President of The Free State Foundation, and Seth Cooper, FSF Adjunct Fellow, submitted [comments](#) to the FCC in connection with the agency's "Third Way" proposal to reclassify Internet providers as common carriers under Title II of the Communications Act. Some key points contained in the Free State Foundation comments follow:

"Rather than pursue a mistaken course by subjecting Internet providers to common carrier regulation, the Commission should continue to treat broadband Internet services as minimally regulated 'information services.' The Commission's 'Third Way' proposal would be harmful to broadband innovation and investment, and, lacking evidence of market failure or any pattern of consumer abuse, it makes no sense in today's dynamic competitive market to go backwards."

"The Commission's regulatory treatment of wireless voice provides absolutely no basis for reclassifying broadband Internet service. Indeed, the Commission has classified wireless broadband as a minimally regulated information service, and it has treated wireless voice providers as non-dominant carriers whose rates and practices are presumptively reasonable. This treatment is very much unlike what the Third Way plan entails."

"The Commission's *Notice of Inquiry* begins with a false premise. It is factually inaccurate right in the first paragraph in placing the disruption of the 'settled approach' of minimal Internet regulation on the decision in *Comcast v. FCC*. There was, in fact, a widespread consensus (though not unanimity) in favor of a policy of minimal broadband regulation before the Commission initiated its network neutrality rulemaking last fall. It was the *Open Internet Notice of Proposed Rulemaking* that most disrupted this settled approach, despite any latter-day disclaimers to the contrary."

"Consequently, uncertainties resulting from unbundling and rate regulation fostered by Third Way nondiscrimination obligations discourage the continuing investment in broadband infrastructure and services necessary to bring about increasing innovation and to meet consumers evolving demands. The lack of any

proven market failure or any existing pattern of consumer abuses also reinforces the conclusion that there is no pressing need for the Commission to possess express jurisdiction over ISPs for purposes of imposing network neutrality regulation. Like the *NPRM*, the *NOI*, strikingly, contains no reference to any market failure or any linking of the need for nondiscrimination mandates to the status of marketplace competition."

"But a different forbearance analysis for broadband Internet service under the Third Way plan would result in a strangely curious policy whereby broadband is all at once submerged under Title II, but then split off into a separate Title II subculture for forbearance purposes. The already jerry-rigged nature of the Third Way reclassification would be further convoluted – you might say 'jerry-rigged squared' – by employing differing standards for obtaining relief under the statutory forbearance provision. If a different, lighter-touch regulatory treatment of broadband Internet service is desirable – as it is -- then why subject broadband to Title II in the first place? After all, it was the need for a minimal and certain regulatory environment to foster rapid innovation, investment, competition, and deployment that led to the Commission's decisions declaring broadband Internet services to be information services."

"If the Commission determines that, in its view, there needs to be some agency authority over broadband ISPs, it should work with Congress to pass a new, narrowly-circumscribed legislative framework. As a majority of U.S. House members recognize, it is preferable for Congress to enact legislation granting such express authority rather than have the Commission impose a reclassification plan so fraught with problems."

Randolph J. May, President of The Free State Foundation, is a former FCC Associate General Counsel and a former Chairman of the American Bar Association's Section of Administrative Law and Regulatory Practice. Mr. May is a nationally recognized expert in communications law, Internet law and policy, and administrative law and regulatory practice. He is the author of more than 125 scholarly articles and essays on communications law and policy, administrative law, and constitutional law, including several on reform of the FCC's merger review process. He is the editor of the new book, [New Directions in Communications Policy](#), and he is co-editor of other two books on communications law and policy: *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated?* and *Communications Deregulation and FCC Reform*. Seth L. Cooper is an Adjunct Fellow at the Free State Foundation.

A PDF version of the comments is [here](#).

The Free State Foundation is a nonpartisan, Section 501(c)(3) free market-oriented think tank.

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