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Restoring Internet Freedom: Rolling Back “Net Neutrality” Will Restore Innovation to Broadband Transmission

by

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Thankfully, on April 26, Federal Communications Commission Chairman Ajit Pai formally announced a proposal to curtail the overweening internet regulation regime adopted in February 2015 under the leadership of his predecessor, Tom Wheeler. The Obama administration’s FCC’s rules went overboard in restricting the freedom of internet service providers to innovate and to invest in extending and modernizing their high-speed broadband networks.

Consumers, of course, were the real losers.

At bottom, running under the guise of ensuring “net neutrality,” in order to assert much greater government control over internet providers, the FCC reversed the previous light-touch internet regulatory regime that generally had prevailed since the Clinton administration.

And worst of all, the FCC did this while conceding there was no real evidence of a market failure justifying heavy-handed government intervention. Rather, the FCC’s internet power grab was based on reams of rhetorical conjecture about “possible” harms that “might” occur in the future

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if internet service providers adopted practices that possibly “could” harm consumers or competitors.

Let me be clear: I am not opposed to government oversight, or even more active regulation, in cases where there is convincing evidence of market failure resulting in harm to consumers. But basing government regulation on conjectured possible harms that may never materialize usually has negative consequences. And it is especially wrong when such government intervention occurs in a marketplace as technologically dynamic as the internet.

There are many troublesome aspects to the Wheeler FCC’s net neutrality rules that Chairman Pai now seeks to revise. To his credit, Mr. Pai is attacking, frontally, the two most harmful rules, the two that place internet service providers in a regulatory straitjacket that limits their freedom and, consequently, their incentive to innovate and invest.

The first objective of the new rule making proceeding is to reverse the classification of internet providers as Title II common carriers, so called because they are subject to Title II of the Communications Act of 1934. In effect, under Title II, the internet service providers are regulated like public utilities. This form of strict government regulation, with controlled rates and non-discrimination prohibitions at its core, was conceived in the 1800s to regulate railroads, and applied in the 1900s to the Ma Bell telephone monopoly. It is ill-suited for the 21st century’s dynamic internet, with competitive providers offering services over different broadband platforms in nearly all areas of the country.

Predictably, adoption of the public utility regulatory regime has slowed the rate of investment by internet service providers. According to a Free State Foundation analysis, which was cited by Mr. Pai in announcing his proposal, the Obama administration’s net neutrality order has already cost our country \$5.1 billion in broadband capital investment. Other estimates are higher.

It’s worthwhile noting that the decline in the rate of investment has occurred even though the most stringent forms of public utility regulatory controls haven’t yet been implemented, though they could be. It’s likely that just the overhanging threat of even more stringent regulation in the future has contributed to the decline in investment.

The second objective of the proposed rule making is to eliminate the amorphous “good conduct” rule adopted by the Wheeler FCC. This rule prohibits internet providers from engaging in “unreasonable” discrimination or anti-competitive conduct, but provides little guidance as to what practices actually would be subject to sanctions. Don’t take my word for it. The commission itself called the “good conduct” rule a “catch all” provision. Mr. Pai had it right when he said the good conduct regulation “gives the FCC a roving mandate to micromanage the internet.”

Indeed, soon after the good conduct rule was adopted, the agency invoked its new roving mandate to begin investigating wireless internet providers’ consumer-friendly free data plans like T-Mobile’s “Music Freedom” and “Binge” programs for music and TV streaming. Without any evidence that these popular free data programs caused any anti-competitive harm, the FCC put them into a legal never-never land. One of Mr. Pai’s first acts as chairman was to halt the free data investigations.

Aside from public utility and good conduct regulation, there are other unnecessary burdensome regulatory mandates that will be re-examined in the FCC's new proceeding. For example, the absolute ban on so-called paid prioritization, which requires that even Amber alerts and medical imaging data be accorded the very same priority as ordinary emails, needs to be revised in a way that provides internet service providers with some degree of flexibility to differentiate their services without harming consumers.

Restoring internet providers' freedom will incentivize more investment and more innovation. This will create more jobs and grow the economy. Above all, it will ensure that the internet continues to evolve, dynamically, in a way that meets consumers' expectations and demands.

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