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Thinking the Unthinkable: Imposing the "Utility Model" on Internet Providers

by

Randolph J. May *

Back in 1997, then-FCC Chairman Reed Hundt titled a speech, "Thinking About Why Some Communications Mergers Are Unthinkable." In his address, Mr. Hundt explained why, in his view, it was "unthinkable" to contemplate a merger between AT&T and one of the Bell Operating Companies. A principal reason had to do with what Mr. Hundt claimed would be the "resulting concentration" of "the long distance market."

Well, this thinking about the unthinkable was not very prescient regarding the development of what, even then, was a rapidly changing marketplace. There is no longer any meaningful "long distance market." Long distance is long gone.

But the regulatory immodesty that leads FCC commissioners, even well-meaning ones, to think that they can predict – and then manage for the benefit of consumers – increasingly fast-paced technological and marketplace changes is not, like long distance, long gone. Indeed, I fear that, right now, such immodesty is at a dangerously high point.

So much so that in recent days I have found myself "thinking the unthinkable." It now looks possible that FCC Chairman Tom Wheeler and his two Democrat colleagues, Mignon Clyburn and Jessica Rosenworcel, might actually vote to classify broadband Internet service providers

(ISPs) as common carriers under Title II of the Communications Act. This means regulating Internet providers under a public utility-type regime that was applied in the last century to the monopolistic Ma Bell – even though the Internet service provider market is now effectively competitive.

It means regulating Internet providers under a regime like the one applied to electric utilities. Susan Crawford, one of the leading advocates of Title II regulation, explicitly equates the provision of electricity service and Internet service and advocates regulating them the same way. On page 265 of her book, *Captive Audience*, she concludes that "America needs a utility model" for Internet providers. Professor Crawford's thinking is fully in line with that of other Title II advocates.

Well, I think it is unthinkable that Chairman Wheeler and his two Democrat colleagues might adopt a utility model for broadband. Sure, I understand that there are various theories going around that, after imposing Title II regulation, the Commission could then decide to forbear from actually applying some of the Title II common carrier requirements, such as requiring advance agency permission before ISPs construct new networks, or imposing agency-prescribed regulatory accounting requirements and equipment depreciation schedules on ISPs, or prescribing the value of the providers' property. But the Commission is not even proposing at this time to exercise such forbearance authority. And, in any event, it has exercised forbearance authority only sparingly, and then only very slowly, since the Telecommunications Act of 1996 granted the agency such authority. And through its precedents the Commission has established high hurdles to granting forbearance.

More to the point, while a few of the Title II advocates suggest the FCC could forbear from applying all but Title II's Section 202 nondiscrimination prohibition, this is a distinct minority view. Most do not advocate forbearing from Section 201's rate regulation provision. After all, the "utility model" advocated by Professor Crawford and others has rate regulation at its very core. Many of the complaints of these Title II advocates concerning Internet provider practices, including wireless Internet providers, concern what they claim are "unreasonable" data tiers or limits, and they routinely seek to have the FCC compel the production of information concerning demand and usage levels, service provider costs, and service revenues. This is the very type of information central to traditional utility rate cases.

In a recent letter to Verizon Wireless concerning the way Verizon administers its unlimited data plan, FCC Chairman Wheeler questioned whether the provider was trying to "enhance its revenue streams." Frankly, I don't believe America's Internet providers could have invested over $1.3 trillion since 1996 – and $75 billion just in 2013 –if they didn't have an eye on their revenue streams. But what is most important to appreciate is that FCC inquiries regarding Internet provider revenue streams, usage levels, data tier modeling, and cost of providing service presage rate regulation under Title II.

To me, it is unthinkable that the FCC would now consider going backwards by imposing Title II common carrier regulation on broadband Internet providers. In 2002, the Commission declared "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." In classifying cable broadband, and then wireline broadband, as information services rather than services subject to Title II regulation, the Commission emphasized it wanted to create a rational framework "for the competing services that are provided via different technologies and network architectures." It recognized, in 2002, that Internet access already was "evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite."

Of course, since the FCC adopted a "minimal regulatory environment" for broadband in 2002 – and then successfully defended its decision all the way to the Supreme Court in the *Brand X* decision – the broadband Internet market, in fact, has become increasingly competitive, with facilities-based competition evolving over multiple platforms as the Commission envisioned. Now, I understand that Professor Crawford wrote an entire book, *Captive Audience*, in an attempt to demonstrate that cable operators have a "monopoly" in the provision of Internet service because, in her view, only they can provide the speed of 100 Mbps that she claims qualifies as high-speed (or "high-enough" speed) broadband.

Recently, Chairman Wheeler gave a speech in somewhat the same vein. He acknowledged that 80% of American households have access to a broadband connection that delivers a speed of 25 Mbps or better, and that a majority of households have access to a speed of 100 Mbps. Then, remarkably, he suggested it is "unacceptable" that 40% presently do not have access to 100 Mbps.

Of course, we all want to see deliverable speeds continue to improve as they steadily have improved over the past decade. But it is wrong – and it leads to the wrong policy prescriptions – to suggest that the "market" is uncompetitive by defining market parameters in a Crawford-like way that necessarily excludes alternative service providers that satisfy consumer demand at prices consumers are willing to pay. In his speech, Chairman Wheeler did something like this by concluding that wireless is just not a "full substitute" for fixed broadband – this despite accumulating evidence to the contrary. Indeed, three of the four major wireless providers in the U.S. already offer average actual speeds of over 30 Mbps, and 91.6% of the U.S. population has access to three or more wireless Internet providers. But if "full substitute" is taken to mean that, in every case and at all times, wireless will satisfy the demands of all consumers, then this is just a mistaken attempt at unsupportable market definition narrowing.

It is wrong to ignore the remarkable progress in broadband that American consumers have enjoyed since 2002 when the Commission adopted the minimal regulatory broadband regime, which has, for the most part, prevailed since then. It is wrong to suggest market definitions that do not comport with the way consumers see the available choices for services they demand.

Indeed, perhaps recognizing, at least *sub silentio*, that claims that the broadband market is uncompetitive are wrong, the FCC is proposing to impose new net neutrality regulations without requiring any showing of market failure or consumer harm resulting from existing Internet provider practices.

Even though I once thought the notion of imposing the Title II "utility model" on Internet providers was unthinkable, most unfortunately, it is now thinkable. And, even though Chairman Wheeler and his two Democrat colleagues will say they are acting in the name of consumers, and in conformance with the wishes of "consumer advocates," I am convinced such action will harm consumers and diminish overall consumer welfare.

In order to avoid the unthinkable, it will be necessary for Chairman Wheeler very shortly to begin to mount a vigorous principled defense of his proposal to adopt a "commercial reasonableness" standard for assessing the lawfulness of Internet provider practices. As I have stated here many times, in light of the lack of evidence of present market failure or consumer harm, the preferred course at this time is for the Commission not to adopt any new net neutrality regulations. (The transparency regulation remains in effect, and it is a useful consumer protection measure.) But assuming there is Commission majority for adopting additional regulatory mandates, from a consumer welfare standpoint, the "commercial reasonableness" proposal under Section 706 is superior to adoption of the Title II utility model.

As for consumer welfare, which ought to be the Commission's lodestar, I want to end on this point, one I made in remarks during the FCC's first Open Internet Roundtable and in this Free State Foundation *Perspectives*, "Net Neutrality v. Consumers." The most vocal Title II advocates, including those in the Roundtable in which I participated, Public Knowledge's Michael Weinberg and Stanford's Professor Barbara van Schewick, insist that new so-called "zero-rating" wireless plans, such as those introduced by Sprint and T-Mobile, must be considered discriminatory and, therefore, unlawful under the net neutrality regime they advocate. Essentially, these plans, in one way or another, limit consumers access to the entire Internet in exchange for offering a lower price for access, or they prefer some sites over others for purposes of avoiding data charges. You can read the details of the plan in my "Net Neutrality v. Consumers" piece. I agree with the Title II advocates that these plans are based on a form of "discrimination," as they use the term, because the plans do not treat all bits in a completely "neutral" fashion. So they claim such plans are inconsistent with an "Open Internet."

I maintain plans, such as those offered by T-Mobile and Sprint, are attractive to consumers, especially low income and minority consumers. Indeed, I am confident that if consumers are asked, "If an Open Internet is interpreted to mean that plans like T-Mobile's and Sprint's must be withdrawn, do you favor an Open Internet?" the vast majority of consumer would say "no." This is a much different, but much more meaningful – and much more honest – question to ask than "Do you favor an Open Internet?"

As far as I know, unlike the Title II advocates, neither Chairman Wheeler nor Commissioners Clyburn or Rosenworcel have yet taken the position that, in their view, "zero-rating" plans like T-Mobile's and Sprint's harm consumers. But as they seemingly go further down the road towards adopting the utility model for the Internet, including for wireless Internet providers, they should ask themselves, and then tell the rest of us, whether they agree that those plans, and similar ones, should be banned as discriminatory and inconsistent with an Open Internet. Because, if they do think so, then I don't think they will find themselves on the side of the majority of consumers.

So, it comes to this: At least under the multi-factored “commercial reasonableness” standard, properly implemented, there would be an opportunity to defend, in a principled way, innovative, consumer-friendly plans. But the Title II advocates will settle for nothing less than rigid interpretations that outlaw any differential treatment of data, regardless of consumer benefits.

If the unthinkable of regulating broadband under the “utility model” is not going to become the reality, it is time for Chairman Wheeler, along with all those on the side of consumers, to make clear the stakes. In 1999, FCC Chairman William Kennard firmly rejected the notion of dumping the “whole morass of regulation” of the utility model on the cable pipe. He concluded: “This is not good for America.”

Given that competition in the broadband Internet marketplace is indisputably more robust today than in 1999, what would not have been good for America in 1999 would certainly not be good for America in 2014.

* Randolph J. May is President of the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland.