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Thinking the Unthinkable – Part V

by

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Well, if you've been reading this "Thinking the Unthinkable" series, you know that I think it unthinkable that Congress would now act to subject Internet service providers to the same public utility-type regime that was applied in the last century to the monopolistic Ma Bell. You don't need a degree in economics or engineering to understand that today's dynamic Internet ecosystem is vastly different – with regard to competition, consumer choice, and constant change – than the era characterized by the black rotary telephone.

You really don't need any degrees at all. You just need to understand the import of injecting too much purely partisan politics into the development of sound communications policy.

The series began in September 2014 with "Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers." At that time, it was the Obama-era FCC that proposed to impose public utility regulation on Internet providers. If you want to dig even deeper into the background of the arguments as to why the imposition of the utility model on Internet service providers is unthinkable, please see: "Thinking the Unthinkable – Part II" and "Thinking the Unthinkable – Part III".

Then, on April 1, I published Thinking the Unthinkable – Part IV explaining why Congress should not adopt the Democrats' so-called "Save the Internet" bill which seeks to impose Title II

public utility regulation on ISPs. It proposes to do this by repealing the *Restoring Internet Freedom Order* that eliminated such regulation and reestablishing the Title II regime that was included in the Communications Act to regulate telephone monopolies.

Now, after a "markup" on April 3 of the "Save the Internet" bill, HR-1644, in the House Commerce Committee, it should be crystal-clear, if it wasn't before, why it is unthinkable that the bill should become law.

At the markup, the Republicans offered a series of amendments – all of which were rejected on a nearly unanimous basis by the Democrats. While the Republicans did not succeed in altering the "Save the Internet" bill one iota, their defeated amendments do clarify – by a whole bunch of iotas – what the Democrats' bill portends for the Internet.

It's better to know now than later.

Based on the April 4 report of the House Commerce Committee markup in *Communications Daily*, and with acknowledgment that the following is drawn from that reporting, here are some of the amendments that were offered and defeated:

- An amendment offered by Rep. Adam Kinzinger from his "No Rate Regulation of Broadband Internet Access Act." [This amendment explicitly would have prevented the FCC from regulating the rates charged for broadband Internet access service. Its defeat signals that if the "Save the Internet" bill is enacted, rate regulation of Internet services clearly remains an option. This is consistent with the intent of the Obama-era FCC when it imposed public utility regulation on ISPs, while explicitly refusing to forbear from Title II's Section 201 rate regulation provision.]

- An amendment by Rep. Bill Flores that would bar the FCC from using Title II reclassification to "initiate or assess a fee on broadband Internet access service." [This is another amendment, like Rep. Kinzinger's, that would have prevented the FCC from regulating rates or assessing fees that would increase end users' charges for broadband Internet service.]

- An amendment by Rep. Greg Gianforte that would have prevented the FCC from using HR-1644 to "initiate or assess a network management fee on a provider of broadband Internet access service." [Another amendment to prevent the assessment of a fee on broadband Internet service.]

- An amendment by Rep. Bob Latta to prevent the FCC from using HR-1644 to "direct, control, or seize any portion of investment, contracts, or infrastructure relating to the Internet." [This amendment was intended to prevent the government from nationalizing 5G networks and placing them under government control.]

- An amendment by Rep. Tim Walberg that would bar the FCC from limiting the ability of broadband customers to "choose sponsored data plans" or the ability of ISPs "to offer sponsored data plans." [After the Title II public utility regulations were adopted in 2015,

the Obama-era FCC initiated investigations of several popular "free data" plans that allowed consumers to access certain websites without incurring usage charges. The amendment would have limited the FCC's ability to curtail the offering of "free data" plans.]

- An amendment by Rep. Greg Walden to make all of the FCC's Title II regulations in its 2015 rules that it determined to "forbear" from enforcing "permanently inapplicable" to ISP service. [This amendment would have prevented the FCC from readopting any of the various burdensome regulatory provisions that it said in 2015 it would not apply to Internet service providers. In other words, defeat of the amendment signals all of the various regulatory provisions of Title II might be applied to ISPs at some future date.]

There were other amendments offered by the Republicans that were rejected. But it should be evident from the recital above that the Democrats did not want to alter the "Save the Internet" bill in a way that would limit the FCC's authority to regulate the rates of broadband Internet access services. This is not surprising because rate regulation is at the very core of the Title II public utility regime the bill seeks to impose.

Nor did the Democrats want to limit the FCC's authority to impose various fees and assessments that likely would have the effect of increasing Internet access charges for customers.

Nor did they want to limit the FCC's authority to curtail the ability of Internet providers to offer popular "free data" plans.

Nor did they want to remove the possibility of the government seizing 5G network infrastructure.

As I said earlier, although not adopted, the defeated amendments offered by the Republicans did serve usefully to clarify – a whole lot – what the Democrats' bill portends for Internet providers and those who use the Internet. And because it should be clear that an imposition of Title II's public utility regime would grant the government far too much intrusive regulatory control over Internet providers, the portents are not good.

If Congress legislates in an attempt to resolve the longstanding net neutrality controversy, it should do so in a way that will protect consumers from any demonstrated abusive practices by Internet service providers, while, at the same time, preserving the freedom necessary to encourage continued innovation and investment.

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