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Reject the Internet "Public Option"

by

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The "public option" for health care - which the American public came to see as symptomatic of government overreach -- certainly helped sink the most grandiose visions of ObamaCare. It's possible that proposals for a "public option" of sorts for new Internet regulation could sink the Federal Communications Commission's efforts to adopt new broadband policies.

To be sure, the two public options, one for health care and one for Internet regulation, are dissimilar. After all, they arise in two very different contexts. But they have this in common: both are grounded in an almost unshakeable faith that government should play a central role in regulating certain services provided by the private sector.

With respect to communications policy, this misplaced faith in the superiority of government control over marketplace competition causes some to advance proposals that will be viewed by many as radical overreaching. And, as with health care reform, the very act of overreaching may well sidetrack adoption of more moderate proposals.

Here's what I mean by the Internet public option - and why it should be rejected.

Recently, organizations like Public Knowledge and Free Press have begun to mount a fierce campaign to have the FCC reverse a decision first made in 2002, which it has

since reaffirmed several times, not to regulate Internet providers as common carriers under Title II of the Communications Act. The FCC determined that Title II regulation was inconsistent with its view that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."

Although the burdensome requirements that accompany Title II regulation are manifold, two key elements are at its core. The FCC is required to regulate the rates of common carriers to ensure they are "reasonable" and to enforce a non-discrimination prohibition. These core elements are the hallmark of traditional public utility regulation; hence what I call the public option.

This form of regulation was first adopted at the federal level in the Interstate Commerce Act in 1887, which created the Interstate Commerce Commission to regulate the railroads. In 1910, the ICC was given authority to regulate newly-emerging telephone companies as common carriers, and this authority was transferred to the FCC when it was created in 1934.

By the 1980s, the railroads were largely deregulated and the ICC was abolished in 1995. And towards the end of the last century, with the emergence of competitive choices, the FCC began to relax even the regulation of POTS, or plain old telephone service, provided by formerly monopolistic telephone companies. So it was no surprise when the FCC decided to reject public utility-style regulation for the then new broadband Internet service providers.

What is surprising is that Public Knowledge and others are now advocating a return to such a regime. These "Title Two-ers" claim that common carrier regulation of Internet providers is necessary to enforce their vision of "net neutrality." They want strict mandates that would prohibit the providers from discriminating in any way among content or applications carried on their networks, or even from charging different prices to network users in order to reflect different costs imposed by such users.

During his campaign, President Obama supported the concept of net neutrality, so it is perhaps understandable that he continues to urge the FCC, with a newly-installed Democratic chairman, to adopt some version of the idea. But it could be a big mistake for President Obama to advocate for a net neutrality regime that looks like the traditional public utility-style regulation advocated by the "Title Two-ers."

In his February 1 You Tube interview, President Obama unfortunately seemed to do just that. In reiterating his support for net neutrality, he said regulation was needed so that the Internet providers would not able "to charge more fees and extract more money from wealthy customers." Perhaps this populist-sounding rhetoric may sell, but I have serious doubts. Most Americans understand that someone has to pay for use of the broadband networks that Internet providers have spent over $200 billion building out and upgrading.

The question of pricing of Internet services should not really be about which customers are wealthy or not. It should be about economic efficiency that benefits all customers. As

FCC Commissioner Robert McDowell said recently, those who argue against pricing freedom - such as President Obama perhaps - should be careful what they wish for. As he put it, under a Title II non-discrimination construct," if every consumer is to be treated the same regardless of usage, then all prices must rise to compensate for the costs imposed by heavy users."

Most Americans appreciate the remarkable progress that has occurred since the FCC's 2002 decision not to impose public utility regulation on Internet providers. Over 95% of American households now have access to broadband and 63% presently subscribe. The vast majority of households have a choice of two or more providers. Sure, there is more progress to be made. But the Commission's prediction in 2002 that a minimal regulatory environment would stimulate investment and innovation in broadband networks has proven true.

In the face of such progress, I don't think most consumers wish to retrogress to public utility-type regulation for broadband providers. They know, instinctively, that the same kind of regulation imposed on railroads in the 19th century and on Ma Bell last century is not suitable for 21st century high-speed Internet networks.

While there does not appear to be any present need to adopt new regulations to preserve the openness of the Internet, there are some reasonable actions that could be taken to assuage the fears of net neutrality advocates. For example, the FCC, or the Federal Trade Commission, could adopt transparency rules requiring ISPs to disclose in consumer-friendly language their service terms and practices so consumers are fully informed concerning their choices.

But by pressing the "public option" - proposing that Internet providers be subject to public utility-type regulation - the most strident net neutrality proponents are seriously overreaching. I suspect that if they continue to do so, these Title Two-ers will reduce the chances of achieving any regulation of Internet providers.

From my perspective this would not be a bad result, given the lack of any evidence of a market failure or existing consumer abuses. But less doctrinaire net neutrality advocates may have a different view.

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