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Don't Convert Internet Providers into Public Utilities

by

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Many people know that the Federal Communications Commission is considering imposing new “net neutrality” regulations on Internet service providers because it claims this is necessary to preserve an Open Internet.

What is little understood, however, is that one option under consideration would regulate Internet providers under a “utility model” known in FCC jargon as “Title II.” For those not steeped in the intricacies of the Communications Act, Title II is the part of the statute containing dozens of various public utility-like regulatory mandates.

The FCC also is considering a less burdensome, more flexible “commercial reasonableness” regulatory model for Internet providers. But here’s the problem: FCC Chairman Tom Wheeler continues to take every opportunity – indeed, seems to relish taking every opportunity – to proclaim that “Title II is on the table.”

It’s time for the FCC to take Title II off the table.

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It would be bad for America's consumers to regulate broadband Internet service providers like today's electric utilities, last century's Ma Bell, or the nineteenth century's railroads. Yet that is what the Title II regime would do. Indeed, Susan Crawford, one of the leading Title II advocates, bluntly argues that "America needs a utility model" for Internet providers.

The utility model, with rate regulation and nondiscrimination requirements at its core, along with a host of other outdated regulatory mandates, may be appropriate for static businesses, like the Ma Bell of old or today's electric utilities, that possess dominant market power. But Internet providers – whether cable operators, telephone companies, wireless providers, or satellite companies – operate in a dynamic, competitive marketplace environment.

This is just what the FCC predicted in 2002 when it determined that broadband Internet providers should not be regulated under the Title II utility model, but rather under a "minimal regulatory environment." The agency emphasized then that provision of Internet service already was "evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite."

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

Absent an evidentiary showing of market failure or consumer harm, there really is no basis for the FCC to adopt any new regulations at all. But assuming Chairman Wheeler and his two Democrat colleagues, Mignon Clyburn and Jessica Rosenworcel, are determined just to "do something," they should eschew adopting the Title II utility model in order to reduce the adverse impact on consumers.

After all, the impact on consumers ought to be the foremost concern. Title II regulation would discourage investment and innovation by Internet providers more than the less costly, more flexible "commercial reasonableness" model. Since the FCC decided in 2002 that Internet providers were not subject to the Title II utility model, wireline and wireless Internet providers have invested over \$800 billion in new broadband facilities, with \$75 billion invested in 2013 alone. Obviously, consumers have benefitted from this massive investment by virtue of nearly ubiquitous broadband deployment and ever-increasing speeds and reliability – and consumers would be harmed by an investment slowdown.

Moreover, Title II regulation almost certainly would discourage Internet providers from offering innovative new business models. For example, Title II acolytes vociferously oppose new wireless plans, such as those recently introduced by Sprint and T-Mobile, that allow subscribers access to a limited number of popular Internet sites in exchange for a much reduced monthly fee, or which exclude access to certain content, such as popular music sites, from counting towards data usage caps. Plans like these, which don't treat all sites in a strictly neutral fashion, are attractive to consumers, especially low-income ones.

In 1999, then-FCC Chairman William Kennard rejected pleas – made by many of those now advocating Title II regulation – that cable broadband providers be required to operate under a nondiscriminatory “open access” regime akin to net neutrality. “This would not be good for America,” Chairman Kennard concluded, refusing to dump what he called the utility model’s “whole morass of regulation” on Internet providers.

It is even truer today than in 1999 that converting Internet providers into public utilities would not be good for America or its consumers. It is time for the FCC to take the Title II option off the table.

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