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FCC Should Not Presume It Can Regulate the Internet

by

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Despite judicial rebuffs of the Federal Communications Commission's two previous attempts to impose net neutrality mandates on Internet service providers, the agency is at it once again.

In case you don't know by now, net neutrality regulations, in one way or another, would convert Internet providers into some form of government-regulated public utility akin to an electric company.

There are many things wrong from a policy and legal perspective with the FCC's latest net neutrality proposal. But here I want to focus attention on just one: what the agency says about the use of regulatory presumptions.

The commission seeks comment "on the use of rebuttable presumptions as a tool to focus attention on the likely impacts of particular [Internet provider] practices." In and of itself, this is a perfectly valid line of inquiry. Indeed, for several years I have been urging that the FCC should be required to employ evidentiary presumptions in connection with its regulatory analyses.

But the commission's majority is thinking about presumptions in the wrong way. For example, in discussing how it should consider certain competitive impacts, the commission asks whether it should "adopt a rebuttable presumption that broadband provider conduct that forecloses rivals (of the provider or its affiliates) from competing in the marketplace is commercially unreasonable?"

The way the commission frames the presumption seems designed from the outset to dictate substantial restrictions on Internet providers' permissible business practices.

In light of the technological dynamism and multi-platform competition that exists in the broadband marketplace – with cable, telephone, fiber, satellite, and various wireless companies all offering consumers alternative choices for Internet service – the proper approach for the commission is to presume that, absent clear and convincing evidence of market failure and consumer harm, Internet providers' practices, including practices involving prioritization of services, are commercially reasonable. In other words, the rebuttable presumption should run in favor of not imposing new public utility-style regulations on Internet providers.

Not only is there no showing of a present market failure in the broadband Internet marketplace in the commission's latest proposal, the agency largely dismisses the need to perform any market analysis. It simply maintains that its Internet neutrality concerns are not limited to markets in which Internet providers may have market power.

Although the matter is not without doubt, the FCC may possess authority to readopt some form of net neutrality regulations in the absence of a showing of market failure. But this in no way means this is a sound approach. Indeed, it would be unwise for the Commission to implement new regulations while disclaiming the need, first, to find a market failure and resulting consumer harm.

The Communications Act may not directly require the FCC to adopt the presumptively deregulatory approach I advocate. But Congress did state when it adopted a major revision to the act in 1996 that, in light of the marketplace changes already occurring, it intended to create a "pro-competitive, deregulatory national policy framework."

And Congress also declared in the 1996 legislation that U.S. policy is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulations."

After two previous court setbacks, the wisest course now is for the FCC to put its latest net neutrality proposal on the shelf, while continuing to watch the marketplace and giving Congress a chance to work its will if it wishes.

In other words, the agency should not be so presumptuous as to simply presume the need for new Internet regulations.

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