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Don't Regulate the Internet as a Public Utility – Part II

by

Randolph J. May *

Last week, in an FSF *Perspectives* titled "[Don't Regulate the Internet as a Public Utility!](#)" I responded to some recent calls to do exactly that. I explained why these pleas ought to be rejected, why they ought to be just as "[unthinkable](#)" now as they were six or seven years ago.

In the main, public utility regulation of Internet service providers (ISPs) ought to be unthinkable because, as I said, "ample evidence demonstrates that public utility regulation suppresses investment in new facilities and innovation in new services and applications." These suppressive effects work to counter the supposed objective of achieving more ubiquitous broadband deployment and adoption.

And they dampen incentives to develop new services and applications that otherwise would encourage product differentiation to meet changing consumer demands. They are thus contrary to the interest of consumers.

But there are other evident ways that the straight-jacket of public utility Internet regulation of the type implemented by the Obama-era FCC directly implicate consumers. One that reared its head again recently involves so-called "zero-rated" or "free data" services. These are offerings that typically allow consumers to access certain online content, without any additional charge, as a result of an exemption from any applicable data caps.

It's not hard to imagine why these free data offerings are popular with consumers.

But – surprise! – the free data offerings are almost uniformly subject to attack by those who want to see Internet service providers subject to traditional public utility regulation. The claim is that they *might* or *could* discriminate against applications that are not included within the free data program. So, in the latest dustup, Senators Edward Markey, Richard Blumenthal, and Ron Wyden – all proponents of public utility-like regulation of Internet providers – are questioning AT&T's exemption of HBO Max, an affiliated video streaming service, from data caps that might otherwise apply.

AT&T has a long-standing "sponsored data" program whereby applications like HBO Max pay for the right to be exempt from data caps. And AT&T's sponsored data program is open to all who wish to participate. But the senators say this does not matter because AT&T, in allowing one arm of the company to pay another, may be disfavoring other content providers.

In a [letter](#) to AT&T Chairman and Chief Executive Officer Randall Stephenson, Senators Markey, Blumenthal, and Wyden state: "Zero-rating carries a risk of manipulating the content marketplace in ways that ultimately harm internet consumers." They point out that, under the Obama-era regulations imposing a public utility regime on Internet providers, the FCC had begun an investigation that almost certainly was leading to the shut-down of nearly all free data services.

It is true that free data services were nearly shut-down on a wholesale basis before the Trump Administration FCC adopted the [Restoring Internet Freedom Order](#) jettisoning the public utility-like regulation of ISPs. And shortly after becoming the new FCC Chairman succeeding Tom Wheeler, Ajit Pai had the investigation into free data services [terminated](#).

And a good thing too.

For it is clear that, in the main, free data programs like AT&T's and many others benefit consumers by giving them access to more services and applications without incurring additional charges. In other words, free data programs increase the value of offerings by increasing consumer choice.

They especially benefit low-income consumers. This is what the Multicultural Media, Telecom, and Internet Council said in a May 2016 paper titled "[Understanding and Appreciating Zero-Rating: The Use and Impact of Free Data in the Mobile Broadband Sector](#)": "[T]his overall trend toward greater consumer empowerment, of which free data is the recent example, benefits all consumers in many ways – but for communities of color and low-income households, these benefits are especially impactful given their above-average use of mobile broadband."

Furthermore, free data programs benefit consumers by improving broadband adoption and providing application and content providers more customers. Thus, both consumers and ISPs benefit when increased network usage helps defray the costs of broadband infrastructure investment.

Moreover, they also give both ISPs and content providers a way to differentiate themselves in a competitive marketplace. Both newer entrants and established providers can use free or sponsored data programs as a way to market to new customers who otherwise might be unwilling to use such services. Indeed, then upstart T-Mobile introduced its new zero-rated Binge On video application several years ago in an effort to gain additional market share – and it worked. In competitive responses, Binge On was followed by Verizon's FreeBeeData and Comcast's Stream TV, and others.

And that, of course, is an important point. The ISP and content provider marketplaces are effectively competitive, rendering it very unlikely, as Senators Markey, Blumenthal, and Wyden suppose, that AT&T, Comcast, or any other ISP has sufficient market power to harm consumers through the operation of its free data programs. This is because competitive alternatives exist for application and content providers to align with other distribution outlets if they wish, and ISPs have no incentives, in a competitive market, to favor their own applications over others if it means less overall usage on their networks.

This was exactly the point made by U. S. District Court Judge Richard Leon in his [opinion](#) rejecting the government's challenge to the AT&T/Time Warner merger – not coincidentally, on a basis entirely relevant to considering concerns raised by AT&T's inclusion of HBO Max in AT&T's sponsored data program. In his [June 2018 decision](#) after trial, Judge Leon agreed with AT&T and Time Warner that the video distribution and programming market is "in the middle of a revolution where high-speed internet access has facilitated a 'veritable explosion' of new, innovative video content and advertising offerings over the past five years." Judge Leon said that "tectonic changes" in the video distribution and content marketplace have rendered prior competitive assessments obsolete.

In concluding, I am not contending here that free data programs would not be problematic in a monopolistic marketplace like the one in which Ma Bell operated last century, or that the antitrust laws shouldn't be available to entertain claims that certain particular programs possibly may raise anticompetitive issues today. I think antitrust should remain available as a backstop for remedying particular competitive problems in specific instances.

But surely in the current competitive environment in which AT&T and other ISPs and content providers operate today, free data programs should not generally be looked on with disfavor. This is what advocates of public utility regulation of Internet providers, quite reflexively and almost uniformly, do. Instead, there are good reasons the popular free data programs are now widely accepted as pro-consumer – as a means of providing consumers with more choices and ISPs with a basis for differentiating themselves in an increasingly competitive marketplace.

* Randolph May is President of the Free State Foundation, a free market-oriented think tank in Rockville, MD.