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Don't Regulate the Internet as a Public Utility!

by

Randolph J. May *

The [record is clear](#) that, during the COVID-19 crisis, broadband providers of all sizes, nearly universally, have altered their terms of service in many different ways to further expand Internet access and adoption. And from the very outset of the COVID-19 shutdown, the Federal Communications Commission, as part of its [Keep Americans Connected](#) program, has taken various measures to expand broadband access to those who lack it.

That said, it is also undoubtedly true the shutdown has further heightened our awareness, as a nation, of the importance of ubiquitous access to high-speed broadband service. With such heightened awareness, it is appropriate for government, at all levels, to consider additional measures that may be useful and proper in a continuing effort to expand deployment and adoption. Certainly, this is no time for end zone high-fives. Some examples of measures that should be considered are listed below.

But, first, it is important to declare, emphatically, that recent calls to regulate Internet broadband providers as public utilities are not useful. For example, in discussing national responses to the coronavirus pandemic on May 1, Michigan Congresswoman Elissa Slotkin (D-MI) [stated](#): "We clearly need to see broadband Internet as a public utility." And a May 26 [Washington Post article](#) discussing Internet access for some low-income families in Arlington, Virginia, reported that

some local lawmakers, school officials, and advocates say they want to replace current laws "with regulations that treat Internet access as a public utility."

Without questioning the intentions of those issuing such calls, it is important to stress that such public utility regulation would be harmful and counterproductive. Indeed, to my mind, public utility regulation of Internet providers would be just as "unthinkable" now as it was in 2013 – 2014, when I called the Obama-era FCC's public utility broadband Internet action unthinkable.

During that period, I wrote many, many pieces explaining why public utility regulation should be rejected. Putting aside any legal objections relevant at the time, I explained that, as a matter of policy, ample evidence demonstrates that public utility regulation suppresses investment in new facilities and innovation in new services and applications. Of course, both of these suppressive effects work against the objective of achieving more ubiquitous broadband deployment and adoption.

It is not my intent in this short piece to "write a book" explaining why public utility regulation of Internet providers is a bad idea. Indeed, my Free State Foundation colleague, Seth Cooper, and I already have published just such a book in 2018 – [A Reader on Net Neutrality and Restoring Internet Freedom](#). It consists of 24 separate works by 11 different Free State Foundation scholars, many of which contain empirical data and other evidence. So, if you wish to delve more deeply into the issues surrounding public utility regulation, I commend the book to you.

Here I will just highlight excerpts from two of my pieces published in 2014 as the FCC then was considering adopting public utility-like regulation of the Internet. From "[Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers](#)," published in September 2014:

"It means regulating Internet providers under a regime like the one applied to electric utilities. Susan Crawford, one of the leading advocates of Title II regulation, explicitly equates the provision of electricity service and Internet service and advocates regulating them the same way. On page 265 of her book, *Captive Audience*, she concludes that 'America needs a utility model' for Internet providers. Professor Crawford's thinking is fully in line with that of other Title II advocates."

"In 1999, [Democratic] FCC Chairman William Kennard firmly rejected the notion of dumping the 'whole morass of regulation' of the utility model on the cable pipe. He concluded: 'This is not good for America.' Given that competition in the broadband Internet marketplace is indisputably more robust today than in 1999, what would not have been good for America in 1999 would certainly not be good for America in 2014."

And this from "[Don't Convert Internet Providers into Public Utilities](#)," published in October 2014:

"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."

What was true in 2014 is even more clearly true in today's technologically dynamic environment. While investment decisions regarding broadband facilities, like others decisions involving major capital expenditures, no doubt are multifactored, there is evidence that the FCC's abandonment of public utility regulation in its January 2018 [Restoring Internet Freedom Order](#) reversed an apparent multi-year decline in investment attributable to the Obama-era regulations. The [figures reported by USTelecom](#) for wireline broadband providers show a modest increase in investment in 2017 and 2018. Both 2018 and 2019 set records for deployment of fiber in the United States. And CTIA's annual surveys regarding the capital investment in wireless showed a modest increase in 2018 after the adoption of the *Restoring Internet Freedom Order* following two years of declines. See [here](#), [here](#), and [here](#).

While further progress remains to be achieved, the extent to which high-speed broadband already has been deployed on a widespread and timely basis should be acknowledged. An examination of the most recent data on broadband deployment clearly demonstrates the progress made to date – after capital expenditures of \$1.7 trillion by broadband providers over the past two decades. For easy reference to many specific data points regarding the most recent broadband deployment progress in 2018-2019, please see this recent *Perspectives* by Seth Cooper, Free State Foundation's Director of Policy Studies and Senior Fellow: [FCC's Report Shows Broadband Success Under Pro-Market Policies](#).

Now, back to where I began. Despite the steady progress that has been made in advancing deployment and adoption, more remains to be done to close, to the extent possible, remaining digital divides. These market-oriented principles and policies should inform government efforts.

- Any government funding for broadband should be targeted to unserved areas, not areas that already have available service.
- The FCC's Rural Digital Opportunity Fund program is an important part of the effort to foster broadband deployment in rural areas, and primarily unserved areas. It is important that the auction to distribute RDOF funds move forward as scheduled in October 2020.
- The FCC should take additional measures to build on its already significant efforts to remove local government barriers to wireless and wireline infrastructure deployment.

- The FCC should continue its efforts, which already have been significant over the past two years, to implement actions that make available more spectrum, especially including mid-band spectrum, for use by private sector broadband providers. This is especially important to realize the promise of next-generation 5G wireless networks, which will offer speeds at least 10 times faster than LTE or 4G networks.
- The Trump Administration and Congress should be supportive of the FCC's efforts in various proceedings to redeploy underutilized government-designated spectrum for use by private sector wireless companies. And Congress and the Administration should support FCC actions (such as in the FCC's C-Band and Ligado L-Band proceedings) to deploy spectrum for private sector use where the Commission has rejected government and/or private party interference claims.
- The FCC should continue certain administrative actions, which it took at the outset of the COVID-19 pandemic, to ensure that low-income persons had access to communications capability through its Lifeline program. It is vitally important that these measures, and others if appropriate, remain in place as long as necessary to ensure that federal and state Lifeline programs are available to provide support to low-income persons.

In closing, I reiterate that treating broadband providers as public utilities would be harmful and counterproductive. Indeed, in today's technologically dynamic, steadily increasingly competitive broadband environment, any such notion ought to be unthinkable. Instead, there are many proper actions that government authorities can take to promote more rapid and more ubiquitous broadband deployment.

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