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A Reasonable Alternative to Internet Public Utility Regulation

by

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There is no need for the Federal Communications Commission to take any action to reimpose so-called “Title II” public utility-like net neutrality regulation on Internet service providers. Such heavy-handed regulation was eliminated by the agency’s December 2017 [Restoring Internet Freedom Order \(RIF Order\)](#). Since then, there has been no meaningful evidence of consumer or competitive harm attributable to the agency’s deregulatory action.

Nevertheless, it’s likely that once a newly reconstituted FCC secures a 3-2 Democratic majority, whoever chairs the agency at the time will “feel” compelled to propose reinstating some form of public utility regulatory regime, if only for the sake of repudiating the *RIF Order* adopted under Republican FCC Chairman Ajit Pai’s leadership. This despite the evidence that, since the *RIF Order’s* adoption, there’s been a measurable increase in broadband investment by Internet service providers which enables more ubiquitous, more robust, and higher bandwidth networks redounding to the benefit of America’s consumers.

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Absent any convincing evidence supporting a change in the current deregulatory regime, the proper posture should be Hippocratic: “First, do no harm.”

Therefore, if the new Democratic leadership somehow feels compelled to “do something,” at most it should propose adopting a less stringent “commercial reasonableness” standard along the lines suggested in the agency’s May 2014 [Open Internet Notice of Proposed Rulemaking \(Open Internet NPRM\)](#) under the leadership of then-FCC Democratic Chairman Tom Wheeler. While not endorsing the need for any new net neutrality regulation, at the time I expressed some receptivity to Chairman Wheeler’s proposal, which he subsequently abandoned. I remain open to consideration of such a properly formulated proposal today if it is offered in lieu of what would be a totally unwarranted reimposition of intrusive Title II utility regulation.

In the *Open Internet NPRM*, the Commission explained that the proposed approach:

[W]ould prohibit as commercially unreasonable those broadband providers’ practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects. At the same time, it could permit broadband providers to serve customers and carry traffic on an individually negotiated basis, ‘without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,’ so long as such conduct is commercially reasonable.

Expressing confidence that it could pass judicial muster, the Commission pointed out that the commercial reasonableness approach already had been approved by the D.C. Circuit. In its [Data Roaming Order](#) affirmed in [Cellco Partnership v. FCC](#), the FCC stated that the factors considered should “relate to public interest benefits and costs of [an] arrangement offered in a particular case, including the impact on investment, competition, and consumer welfare.”

And a further key point. In the *Open Internet NPRM*, the Commission considered using rebuttable presumptions in assessing whether a practice is “commercially reasonable.” In light of the technological dynamism and multi-platform competition that generally exists in the broadband marketplace – with cable, telephone, fiber, satellite, and various wireless companies all offering consumers alternatives for Internet service in many places – the proper approach is to presume, absent convincing evidence of market failure and consumer harm, that Internet providers’ practices are reasonable. In other words, the rebuttable presumption should run against imposing Title II public utility-style regulation.

Compared with Internet service providers in Europe and other regions, U.S. providers have performed remarkably well during the pandemic. In any event, there is widespread agreement that the agency’s principal focus for the next few years should be on closing remaining “digital divides.” This means taking actions that promote even more ubiquitous broadband investment, especially in rural areas, and refraining from imposing burdensome mandates that discourage investment. And it means taking actions that help ensure affordable Internet access for low-income persons.

Imposing public utility regulation on Internet providers, even aside from the tremendous controversy that will be generated by merely considering such an approach, will be a time-consuming diversion that only will get in the way of achieving the paramount availability and access objectives. Thus, if and when a Democrat-majority FCC is moved to propose some form of new net neutrality regulation, a reasonable “commercial reasonableness” rule should be offered in lieu of Title II.

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