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The Biden Executive Order's Regulatory Proposals: Broadband Consumers and Competition Would Be Harmed

by

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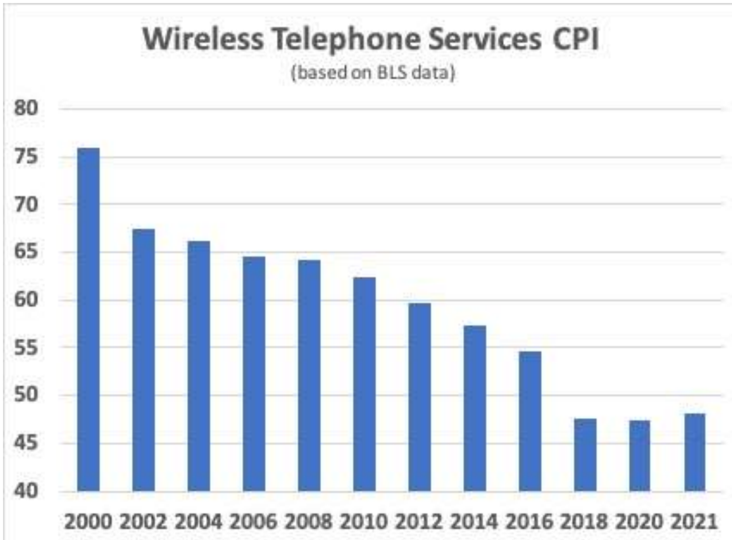
I. Introduction and Summary

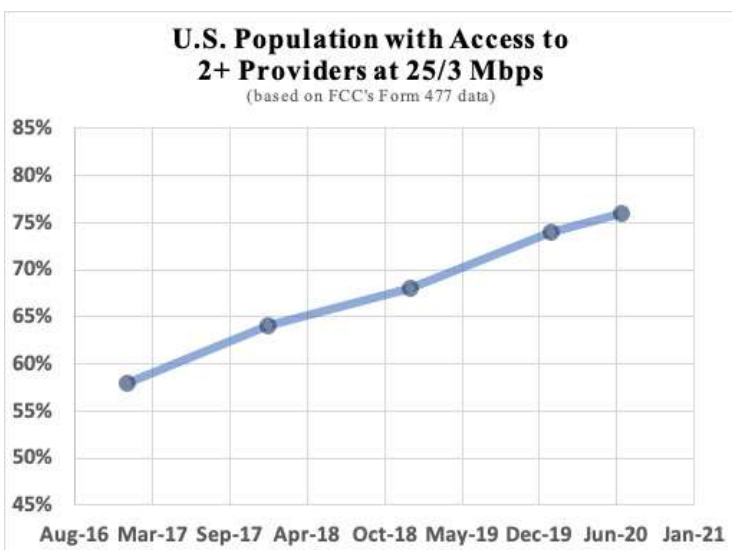
On July 9, President Biden signed an Executive Order that urges the Federal Communications Commission to undertake several regulatory interventions in the broadband Internet services market. Ostensibly intended to increase competition and reduce consumer prices, the Executive Order's regulatory proposals – if adopted by the Commission – would accomplish neither goal. Indeed, imposing public utility regulation and other restrictions likely would harm competition and drive up prices for consumers.

President Biden's Executive Order presents a false picture of today's broadband consumer experience. The Executive Order states that Americans "pay too much for broadband… in part because of a lack of adequate competition." This view flies in the face of reports and data indicating that prices for broadband services have been declining while prices for many other goods and services have been increasing.

According to USTelecom, the most popular tier for broadband service in 2015 offered average download speeds of 43 Mbps at an average monthly price of $65.62. But in 2021, download speeds for the most popular tier increased to 98 Mbps while average monthly prices dropped to $48.42. This is a 126% speed increase and a 26% price decrease. Furthermore, Consumer Price Index (CPI) data maintained by the U.S. Bureau of Labor Statistics has shown a significant overall decrease in wireless prices over the last two decades. As highlighted in CTIA's 2021 Annual Survey, between 2000 and 2020, the annual Wireless Telephone Services CPI decreased 40%. And as CTIA has observed, average cost of an unlimited data, talk, and text plan was $64.95 a month in 2019, down from $113.87 in 2010.



The Executive Order's claim that broadband Internet services lack "adequate competition" also is controverted by data showing that, overwhelmingly, most Americans have choices among competing providers. The FCC's website indicates that, as of June 2020, 76% of the U.S. population had at least two fixed wireline broadband providers offering 25/3 Mbps speeds and over 57% had at least two options for 100/10 Mbps speeds. This is a continuation of a clearly pro-competitive trend in broadband access dating back to at least 2018. And it is almost certain that competing fixed broadband coverage has improved since June 2020.



The call for new regulation appears to be staked on a claim in a White House Fact Sheet that "[m]ore than 200 million U.S. residents live in an area with only one or two reliable high-speed internet providers." But this figure appears to exclude 25/3 Mbps broadband Internet service offerings. The White House Fact Sheet creates a misleading perception of monopoly or duopoly by focusing only on a higher-end product segment and excluding speed tiers that many consumers prefer and which support everyday uses, including HD streaming, for most consumers.

Moreover, President Biden's myopic market view excludes competing broadband technology platforms. The *Communications Marketplace Report* acknowledged that "nearly all areas in the country have access to satellite broadband as an alternative to fixed terrestrial broadband" at 25/3 Mbps levels. HughesNet and ViaSat combine for over 1.6 million satellite broadband subscribers. And Starlink, which has over 600,000 pre-orders, is expected to come online before the end of 2021.

Importantly, mobile and fixed wireless services also are viable alternatives for many broadband consumers. As the *Communications Marketplace Report* found, 99% of the U.S. population had access to at least three 4G LTE providers and about 95% had access to at least four LTE providers at the end of 2019. And the ongoing rapid deployment of 5G networks is providing American consumers with a particularly strong alternative for broadband Internet service. Aside from mobile wireless 5G services, AT&T, T-Mobile, and Verizon offer fixed 5G wireless home broadband in several markets, with ongoing rollouts to new areas.

For all its distorted view of the broadband market, the Biden Executive Order proposes regulatory interventions that wouldn't enhance competition or lower consumer prices. The Executive Order's top proposal is for the FCC to re-impose public utility regulation of broadband Internet services that is "similar" to what was in the Commission's repealed 2015 *Title II Order*. The now-repealed Title II regime conferred almost unfettered authority on the FCC to decide what types of network practices are permissible. And the Title II regime saddled broadband providers with the burden of showing that their practices satisfied the agency's prescriptive rules as well as its vague catch-all "general conduct" standard.

In the 2017 *Restoring Internet Freedom Order*, the FCC sensibly found that Title II public utility regulation *reduces* incentives to invest and that it likely caused reductions in network investment in 2015 and 2016. Those findings are backed up by economic theory: an owner is less likely to invest in the property that is subject to restrictions that reduce the owner's ability to realize returns. If the Commission were to follow the Executive Order and re-impose public utility regulation, broadband service providers would again have reduced incentives to invest in their networks.

Public utility regulation is not a sound way to increase consumer protection in any event, and especially in this instance because it takes an onerous approach to addressing harms that aren't real. There is no evidence that broadband providers are blocking or throttling subscriber access to lawful Internet content or engaging in harmful forms of paid prioritization. But reclassifying broadband Internet services as Title II telecommunications services would strip the FTC of authority to enforce broadband provider pledges not to engage in those kinds of conduct.

Coupled with its claim that consumers pay too much for broadband, the Biden Executive Order's call for an FCC-imposed price reporting requirement appears to lay the ground for future price regulation. But price controls that hold rates to below market levels would reduce the supply of capital for new infrastructure and slow network deployments. These results would make consumers worse off than under a free market policy. Indeed, price controls are particularly unjustifiable because the broadband market is competitive and innovative.

The Biden Executive Order calls on the FCC to engage in a handful of other regulatory interventions that are not likely to improve competition or consumer welfare, but rather risk causing harm to both. For instance, its proposal that the Commission limit the amount of spectrum licenses that wireless providers can bid on at auction or acquire through sale could undermine wireless competition with wireline broadband services. And its call for the Commission to ban "unjust" or "unreasonable" early termination fee (ETF) pricing plans could have the unintended consequence of reducing affordable choices for consumers.

Furthermore, the Biden Executive Order's proposal that the Commission conduct a rulemaking to prohibit exclusive contracts between landlords and broadband providers could help preserve consumer choice for tenants. Yet it also could risk prohibiting the ability of landlords from securing discount prices for tenants. Similarly, the Executive Order's call for an FCC-imposed consumer label requirement conceivably could help provide consumers with information about broadband service offerings. But it also is questionable just how effective this labeling requirement would be in providing consumers with useful information.

The best proposal in the Biden Executive Order is its call for the FCC to support development and adoption of 5G Open Radio Access Network (O-RAN) in 5G equipment markets. While advancing O-RAN primarily should be a private sector undertaking, the Commission likely can play a constructive part by promoting but not mandating a market environment hospitable to open networks and a diverse supply chain for 5G.

The Biden Administration's use of an Executive Order to set forth a regulatory agenda for a multi-member independent agency like the FCC is highly unusual, to say the least. The Commission ought to assert its institutional independence by rejecting public utility regulation and price controls and by being wary of the potential downsides to the Biden Executive Order's other proposals for regulatory intervention in today's competitive broadband market.

II. The White House's Misinformed View of the Broadband Market Excludes Real Competition and Data Showing Declining Prices

The Biden Executive Order claims that Americans "pay too much for broadband… in part because of a lack of adequate competition." But this claim view is rebutted by reports and data indicating that prices for broadband services have been declining while prices for many other goods and services have been increasing. And there is ample evidence that the broadband services market is strongly competitive.

According to USTelecom's 2021 Broadband Pricing Index, prices for entry-level broadband decreased nearly 23% from 2015 to 2021, with a 9% decline in the last year alone. USTelecom also offers an instructive comparison of the most popular tier of broadband services in 2015 with the most popular tier in 2021. The most popular tier of broadband service in 2015 offered average download speeds of 43 Mbps at an average monthly price of $65.62. And the most popular tier in 2021 offered average download speeds of 98 Mbps at an average monthly price of $48.42. This constitutes a 126% speed increase and a 26% price decrease. Additionally, USTelecom reports that prices for fastest speed tier offerings of 151/41 Mbps in 2015 cost an average of $122.94 per month, but in 2021 the fastest speed tier averages 248/99 Mbps and costs an average of $ 74.80 per month. Thus, compared to six years earlier, fastest speed tiers are about 39% lower and 77% faster. When inflation is factored in, the price for the most popular tier of broadband service has dropped 34% and the highest speed tier price has reduced over 45% since 2015.

Furthermore, Consumer Price Index (CPI) data maintained by the U.S. Bureau of Labor Statistics has shown a significant overall decrease in wireless prices over the last two decades. As highlighted in CTIA's 2021 Annual Survey, between 2000 and 2020, the annual Wireless Telephone Services CPI decreased 40%. Those declines are particularly significant given the double-digit increases in prices for many other types of goods and services over that same span of time. And as CTIA has observed, average monthly cost of an unlimited data, talk, and text plan was $64.95 in 2019, down from $113.87 in 2010.

The Executive Order's claim that broadband Internet services lack "adequate competition" also flies in the face of data showing that overwhelmingly most Americans have access to choices among competing broadband providers. According to data provided on the FCC's website, as of June 2020, 76% of the U.S. population had at least two fixed wireline broadband providers offering 25/3 Mbps speeds and over 57% had at least two options for 100/10 Mbps speeds. These competing provider coverage figures from mid-2020 mark the continuation of an unmistakable pro-competitive trend in network access dating back to at least 2018. And it almost certainly is the case that competing fixed broadband provider coverage has improved since June 2020. There are ubiquitous reports of new available and anticipated fiber deployments to cities and regions across the country.

An apparent predicate to the Executive Order's call for new regulation is a claim made in a White House Fact Sheet that "[m]ore than 200 million U.S. residents live in an area with only one or two reliable high-speed internet providers." But this claim appears to be keyed to a much higher speed threshold that excludes 25/3 Mbps broadband Internet service offerings. In other words, to create a misleading perception of monopoly or duopoly, the White House Fact Sheet focused on a higher-end product segment and excluded speed tiers that many Americans have preferred and which readily accommodate everyday consumer usage. For instance, online streaming video services like Netflix, Hulu, and Amazon Prime typically require download speeds of not more than 25 Mbps for 4K Ultra HD and 10 Mbps for HD.

Moreover, the White House takes a technologically myopic view that unjustifiably excludes competing broadband technology platforms. Indeed, U.S. broadband consumers have more real-world competitive choices than what might be indicated by looking only at cable and wireline broadband statistics. The FCC's 2020 *Communications Marketplace Report* acknowledged that "nearly all areas in the country have access to satellite broadband as an alternative to fixed terrestrial broadband" at 25/3 Mbps levels. The Satellite Industry Association reports that satellite broadband was a $2.8 billion industry in 2020, a 10% revenue increase over the prior year. Satellite broadband provider HughesNet reported over 1.1 million U.S. subscribers at end of the second quarter of 2021 and ViaSat reported over 600 thousand broadband subscribers at the end of the second quarter of this year. Meanwhile, Starlink's low earth orbit (LEO) satellite broadband service is expected to come online before the end of 2021. Starlink won provisional funding from the Rural Digital Opportunities Fund (RDOF) program to serve over 640,000 rural locations, and it has reported receiving half a million pre-orders for its LEO satellite broadband service.

Importantly, mobile and fixed wireless services are a viable alternative for most residential fixed wireline broadband consumers. As the 2020 *Communications Marketplace Report* found, 99% of the U.S. population had access to at least three 4G LTE providers and about 95% had access to at least four LTE providers at the end of 2019. Even with the consummation of the T-Mobile/Sprint merger, consumer choices for mobile broadband service include the big three "nationwide service" providers plus regional providers U.S. Cellular and C-Spire, in addition to smaller local providers serving rural areas. Also, continuously increasing numbers of consumers are subscribing to mobile broadband services offered by hybrid cable-mobile virtual network operators (MVNOs). At the end of the first quarter of 2021, the number of subscribers to Xfinity Mobile grew to 3.1 million while Spectrum Mobile increased to nearly 2.7 million. And DISH Network is preparing to enter the 5G market, with reported plans to serve 70% of the U.S. population with 5G by June 2023.

The ongoing rapid deployment of 5G networks is providing American consumers with a particularly strong competitive choice for broadband Internet services. AT&T, T-Mobile, and Verizon now offer mobile wireless 5G services throughout their geographic footprints. Owing to its capacity and speed capabilities, fixed wireless 5G technology offers a growing number of Americans a strong alternative delivery platform for residential high-speed broadband Internet services. AT&T, T-Mobile, and Verizon now also offer fixed wireless home broadband via 5G networks in select markets, with continuing rollouts to new areas in the works.

III. Re-Imposing Title II Public Utility Regulation Would Harm Broadband Competition

Despite ample data showing that the market is characterized by pro-competitive, pro-consumer pricing trends, the Biden Executive Order calls on the FCC to impose a number of regulatory restrictions on the broadband market. If they were implemented by the Commission, the White House's regulatory proposals would *not* actually improve the market's competitiveness or reduce prices. Instead, they risk harming competition and inducing price hikes on consumers.

Most notably, the Executive Order calls on the FCC to re-impose public utility regulation of broadband Internet services that is "similar" to what was contained in the Commission's repealed 2015 *Title II Order*. But if the Commission followed that course, such regulation would not make broadband providers more competitive with each other. Nor would public utility regulation prompt existing providers to deploy to new areas or spur new entrants into the market.

In its 2017 *Restoring Internet Freedom Order* (*RIF Order*), the Commission repealed the agency's 2015 public utility regulation scheme that was established pursuant to Title II of the Communications Act. The now-repealed Title II regime conferred almost unfettered authority on the Commission to decide what types of network management practices are permissible or impermissible. And the Title II regime saddled broadband providers with the burden of showing, to the agency's own satisfaction, that their network management practices satisfied the agency's prescriptive rules as well as its vague catch-all "general conduct" standard. In the *RIF Order*, they concluded that public utility regulation of broadband Internet service actually *reduces* incentives to invest. Indeed, the Commission found that Title II public utility regulation likely caused reductions in network investment in 2015 and 2016.

The Commission's finding in the *RIF Order* about the adverse consequences of public utility regulation for investment is consistent with economic theory. When a property owner's use of his or her own property is restricted, the owner is less able to make a return and therefore less likely to invest in that property or to expend additional capital resources to acquiring property subject to government encumbrances. If the Commission were to follow the Biden Executive Order and re-impose Title II public utility regulation, broadband Internet service providers would again be subject to investment dampening policy.

Public utility regulation is not a sound way to increase consumer protection in any event, and especially in this instance because it takes an onerous approach to addressing harms that aren't real. There is no evidence that broadband service providers block or throttle their subscribers' access to lawful Internet content. Nor is there any evidence that they engage in forms of paid prioritization that harm consumers. In their terms of service, broadband providers have pledged *not* to engage in such conduct. Under the *Restoring Internet Freedom Order*, the Federal Trade Commission has authority to enforce those pledges and police any anticompetitive conduct by broadband providers. The *RIF Order*'s light-touch regulatory approach under Title I and reliance on FTC enforcement thereby protects consumers without subjecting broadband providers to regulatory strictures that harm investment. But reclassifying broadband Internet access services as Title II "telecommunications services" would strip the FTC of authority to enforce pro-consumer pledges by ISPs, and take away its ability to take enforcement actions against providers that engage in unfair and deceptive trade practices. Title II services are outside the scope of the FTC's jurisdiction.

Leading up to the FCC's adoption of the *RIF Order*, advocates of public utility regulation made repeated loud emphatic claims that the FCC's late 2017 repeal of the short-lived Title II regulation would herd consumers into Internet "slow lanes" and spell "the end of the internet as we know it." But those predictions of doom never came true. In reality, investment and access to broadband Internet networks *increased* following repeal of Title II regulation. Given the track record of failed predictions by Title II afficionados, observers ought to be highly skeptical of the Biden Executive Order's resort to public utility regulation as a way to improve enhance broadband competition.

IV. Imposing Price Controls on Broadband Services Would Harm Investment in Next-Gen Networks

Coupled with its claim that consumers "pay too much for broadband," the Biden Executive Order's call for the FCC to impose new price reporting requirement appears intended to lay the groundwork for future price regulation. But new price controls likely would curb private network investment in next-generation broadband networks and discourage new market entry. Price controls would not make the market more competitive or help consumers in the long run.

Since 1996, broadband services providers have invested about $1.8 trillion in network infrastructure. These networks have flourished thanks to a largely uninterrupted federal policy of light-touch regulation. Competition in the broadband services market has emerged, in significant part, due to the absence of price regulation. In a free market environment, broadband providers have invested financial resources to construct networks and offer services that they perceived consumers would demand and pay for. Price controls would undermine the investment-backed expectations of broadband service providers and discourage future investment by incumbent providers as well as would-be market entrants.

On the surface, an immediate price cut might appear attractive to consumers. But price controls that hold rates to below market levels would thwart the investment-backed expectation of broadband providers and reduce the prospect of future returns on investment. Thus, price controls would reduce the supply of entrepreneurial capital for broadband infrastructure and slow network upgrades as well as deployments to new geographic markets. Reductions in future upgrades and deployments would undercut the potential value of next-generation broadband services that consumers should be expected to receive in a free market setting.

No proposal for price controls on broadband services ought to be considered absent a showing of market power that is supported by actual evidence. But price controls are particularly unjustifiable in the broadband services context because today's broadband market is competitive and innovative. Both of these dynamics are reflected in the deployment of successive new generations of competing network technologies, including gigabit fiber, 10G cable Internet, 5G wireless networks, and satellite.

V. Imposing Spectrum Concentration Limits Could Undermine Wireless Competition with Wireline and Other Broadband Service Platforms

The Biden Executive Order also urges the FCC to conduct spectrum auctions "under rules that are designed to avoid excessive concentration of spectrum license holdings" and to thereby "prevent spectrum stockpiling, warehousing of spectrum by licensees, or the creation of barriers to entry."

It's reasonable for the FCC to require, as a license condition, that spectrum be put into commercial use within a set time period after a spectrum auction winner secures a license. Yet, cautions are in order when it comes to imposing *ex ante* limits on the ability of wireless providers to bid on and secure spectrum licenses. Spectrum limits could harm mobile and fixed wireless providers in competing with fiber and cable broadband providers.

Moreover, spectrum concentration limits appear to reflect an outdated picture of competition in the broadband services market. Previously, the Commission imposed a so-called "spectrum screen" as an analytical tool for evaluating proposed transfers of spectrum licenses based on the assumption that wireless services were in their own silo, totally separate from wireline broadband. But today, wireline and wireless networks are increasingly in competition, particularly given the capacity and speed capabilities of 5G networks to enable wireless substitution for wireline for a variety of everyday functions for most consumers of mass market retail broadband services.

A pro-competitive policy that is in line with the reality of wireless and wireline convergence would uphold the marketplace freedom of wireless broadband providers to bid at auction, win, and pay for spectrum licenses and thereby increase network capacity and speeds to better compete with high-speed wireline and cable broadband providers.

VI. Imposing Price Regulation on ETF Contracts Could Reduce Affordable Choices for Consumers

The Biden Executive Order's call for the FCC to ban what it calls "unjust" or "unreasonable" early termination fees (ETFs) may be a reasonable consumer protection policy objective. But restricting ETF service plans could backfire by reducing lower price options that many consumers would freely choose.

The White House Fact Sheet suggests ETFs average $200, and it claims that such fees prevent consumers from changing from their current providers to less expensive competitors. However, the soundness of any FCC-imposed restriction on ETFs will depend upon the details – including how the Commission defines "unjust" and "unreasonable."

Demagoguery of ETFs can easily overlook competitive context in which such plans are offered. Many fixed broadband providers offer service plans with ETFs as well as plans without ETFs. Consumers who are averse to ever paying ETFs or being locked into multi-month service commitments can choose to avoid them.

Use of ETFs can be pro-consumer because they enable a broader set of service choices, including lower monthly prices. Often ETFs are tied to attractively priced monthly rate plans for a term of 12 or 24 months, and a consumer can choose to lock in a lower rate by selecting such plans. In return for offering a lower price for a term of months, broadband providers are assured they can recoup up-front costs they incur in connecting the subscriber in the event that the subscriber decides to break the service contract. Importantly, many ETFs are prorated, so the ETF amount charged to a subscriber who breaks their contract goes down the longer the subscriber paid for monthly service.

Additionally, it is questionable whether FCC regulation of ETFs would be able to offer meaningful price protections to consumers above the protections already conferred by market competition.

Broadband service plans with high ETFs are not likely to be in high demand by consumers. Even if a provider only offered service plans with high ETFs, such a provider is likely to drive many consumers to competing providers – whether it's fiber, cable, satellite, or wireless. Any FCC-imposed restrictions that promise better price checks than market competition likely would risk reducing consumer choices for lower-priced service plans.

VII. Imposing Restrictions on Landlord Contracts With Broadband Providers

It's too soon to venture a definitive viewpoint on the Biden Executive Order's call for an FCC rulemaking to prevent landlords and broadband service providers from "inhibiting tenants' choices among providers." No specific proposal was offered by the White House. Presuming the Commission can identify certain types of exclusive contracting practices that restrict consumers' choices and result in them paying higher prices, then a rulemaking could address such practices and prevent consumer harm. However, it would be critical to ensure that the rulemaking doesn't create new problems by unduly restricting landlords of multi-dwelling properties from dealing with broadband service providers and securing service discounts that could benefit their tenants. To help ensure consumers are protected and not unintentionally harmed, any rulemaking by the Commission to implement this proposal should, to the extent practicable, be guided by microeconomic analysis and the insights of antitrust jurisprudence.

VIII. Imposing Broadband Consumer Labels Might Help Inform Consumers

Less objectionable than the Biden Executive Order's other proposed mandates is the "consumer broadband label" requirement. It calls on the FCC to require broadband providers to impose a nutrition-style label on its website and/or monthly billings in order to show "clear, concise, and accurate information regarding provider prices and fees, performance, and network practices." This requirement undoubtedly would impose costs on broadband service providers to implement. And broadband providers already have incentive to advertise their services and capabilities in order to sign new subscribers and induce their competitors' subscribers to switch services. So while a consumer labelling requirement conceivably could help provide consumers with more transparent information about broadband service offerings, it also is questionable just how effective this labelling requirement would be in providing consumers with additional useful information.

IX. Promoting Open Radio Access Networks Can Help Enhance 5G Competitiveness

On its face, the best proposal in the Biden Executive Order for actually promoting a stronger broadband marketplace for U.S. consumers is its call for the FCC to provide “support for the continued development and adoption of 5G Open Radio Access Network (O-RAN) protocols and software" to "promote increased openness, innovation, and competition in the markets for 5G equipment." O-RAN protocols and standards should be developed and advanced primarily by private sector providers, and direct governmental mandates ought to be kept to a minimum. However, the Executive Order could bolster future initiatives by the Commission to promote robust 5G network competition and also advance U.S. national security interests by increasing supply chain diversity.

X. Conclusion

The Biden Executive Order calls on the FCC to make a number of regulatory interventions in the broadband Internet services market. But the Executive Order's regulatory proposals for public utility regulation of broadband services as well as future price controls – if adopted by the Commission – would not improve competition or reduce prices for consumers.

The false picture of today's broadband consumer experience presented by the Biden Executive Order is at odds with reports and data indicating that prices for broadband services have been declining while prices for many other goods and services have been increasing.

The Biden Administration's use of an Executive Order to set forth a regulatory agenda for a multi-member independent agency like the FCC is highly unusual, to say the least. The Commission ought to assert its independence by rejecting public utility regulation and price controls and by being wary of the potential downsides to the Biden Executive Order's other proposals for regulatory intervention in today's competitive broadband market.

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