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Where's the Beef?

by

Randolph J. May *

Perhaps you are too young to have witnessed the iconic Wendy's ["Where's the Beef?"](#) commercials, at least when they originally ran in 1984. They were classic!

I was reminded of the "Where's the Beef?" line – of course, in the commercials, there was little beef to be found in the burgers of Wendy's competitors – when I read yet another article focused on this question: Where's President Biden's permanent Chair of the Federal Communications Commission and nominees to fill one present and soon-to-be another vacant seat as Commissioner?

Wait a minute! Don't think for one second that I am suggesting that the persons to be named to fill these positions in any way, shape, or form should be considered "Beef."

No, I don't have in mind a humanoid, but rather the missing rationale in support of a public policy position.

Let me explain.

There have been a multitude of articles in the press quoting advocates bemoaning the fact that President Biden has yet to fill these FCC positions. And, in many of these articles, a primary reason given for the need to fill the positions is the desire to restore Title II public utility regulation of Internet service providers (ISPs).

The recent piece by Cristiano Lima, the *Washington Post's* able "Technology 202" reporter, is headlined "[Where Are President Biden's Telecom Picks?](#)" In the article, both Samir Jain, Director of Policy at the Center for Democracy and Technology (CDT), and Chris Lewis, President and CEO of Public Knowledge, say that the lack of action by President Biden has meant that Title II public utility regulation of ISPs has not been able to be implemented. But notably, no evidence is offered that the lack of such regulation is actually causing any present consumer or competitive harm.

And this is true of all the other articles I have read in which Title II advocates have complained about the failure to appoint a new chair and a full slate of commissioners.

And it is true as well with regard to the [letter](#) signed by CDT and Public Knowledge and more than 50 other pro-Title II, pro-regulatory groups. Nowhere in the letter is there any evidence – or any suggestion, really – that the lack of public utility-style regulation for Internet services is causing any consumer harm.

You see why I am reminded of Wendy's "Where's the Beef?" commercial.

I understand that the lack of any evidence of *present* consumer harm absent Title II regulation will never assuage the pro-regulatory advocates. They will always speculate about what "may" or "could" occur absent having strict net neutrality rules in place. Indeed, if you go back and review the FCC's [Open Internet Order](#) – all 300+ pages and 1777 footnotes – released in March 2015 you will see that the adoption of the Title II regime rested almost entirely on the back of hundreds of "mays," "mights," and "coulds," as in what *may*, *might*, or *could* possibly happen in the future *if* the ISPs did such and so.

Such speculation is easy. But some things we know for sure. We know that after Title II regulation was repealed by the [Restoring Internet Freedom Order](#) the rate of investment in broadband facilities, after having slowed under the Title II regime, started to accelerate again.

And we know that when the COVID-19 pandemic hit, in the main ISPs in the U.S., after nearly \$1.8 trillion in private sector investment over the last two decades, were able to handle the surge in Internet traffic and altered traffic patterns without noticeable disruptions. This was not true in many European countries where, at least for some time, throttling became the norm because the European networks could not handle the surges or traffic pattern changes. Many knowledgeable experts attributed the positive U.S. consumer experience vis-à-vis EU countries to the generally less regulatory, more investment-friendly policies here at home.

This is not to say that there are not public policy actions that could be implemented that may promote even more ubiquitous deployment of high-speed broadband facilities and greater adoption, especially with regard to low-income persons who otherwise may not be able to afford

service. There are. But imposing Title II public utility-like regulation on Internet service providers is not one of those actions, especially when there is no credible evidence that ISPs presently are engaging in practices that harm consumers or competition.

I will have much more to say about this subject, of course, should the FCC, with a new permanent chair and a new commissioner (or two) in place, propose adopting Title II regulation for Internet service providers. After all, Free State Foundation scholars have had much to say on the subject over the last fifteen years. Indeed, if you want to read up on "net neutrality" to be ready, a good place to start is the Free State Foundation book, [A Reader on Net Neutrality and Restoring Internet Freedom](#). You can find it on Amazon [here](#).

A final word that is especially appropriate to the long-running effort of pro-net neutrality advocates and some policymakers to impose a regulatory regime on today's Internet service providers – a regime resembling the one applicable to the Ma Bell monopoly in the twentieth century and the railroads in the nineteenth. Beware of the "[Nirvana fallacy](#)" popularized by acclaimed economist Harold Demsetz! Professor Demsetz cautioned that, when considering adoption of a policy, don't compare it with idealized unattainable theoretical models, but rather with real world alternatives that have real world costs and benefits.

And it always pays, when considering the adoption of new regulations, to have in mind the admonition of Nobel Laureate economist F. A. Hayek in his monumental work, [The Constitution of Liberty](#). In language particularly relevant to the net neutrality debate, Professor Hayek warned more than sixty years ago that "there is a strong presumption against such measures because their overall cost is almost always underestimated and because one disadvantage in particular – mainly the prevention of new developments – can never be fully taken into account."

Bottom line: You don't need to be a Nobel Laureate economist to ask "Where's the Beef?" before embarking on new regulatory adventures in which the costs are likely to outweigh the benefits.

* Randolph J. May is President of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.