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Biden's Executive Agencies Doing 'Net Neutrality' End Run

by

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As consumers increasingly stream music and video, communicate via apps, work and study remotely, and attend virtual health care appointments, they spend more and more time online. Not surprisingly, issues relating to the ability of all Americans to obtain a high-speed Internet connection – "broadband" – are hot topics inside the Beltway. You might be surprised, however, to discover that it is not the mostly independent Federal Communications Commission, the primary agency established by Congress to oversee this critical sector, that is taking the lead in establishing policy.

Instead, Biden Administration executive agencies, in particular the Departments of Agriculture and Treasury, improperly are implementing controversial communications policies, such as rigid "net neutrality" public utility-like restrictions, that are overly regulatory. These end runs are outside their spheres of authority and expertise. And these anti-free market initiatives are often in conflict with current FCC positions.

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The FCC presently is deadlocked with two Democratic Commissioners and two Republican Commissioners, but this is a situation of President Biden's own making. For reasons unknown, he waited longer than any other president, nearly nine months, before nominating a candidate to secure the majority to which Democrats, as the party in control of the White House, are entitled.

But, while delaying a nomination to fill a vacant seat at the agency, President Biden has not ignored communications policy entirely. Early in his tenure, he offered a massive \$100 billion broadband "wish list." Aside from demanding a resurrection of investment-stifling "net neutrality" public utility regulation of broadband providers, Biden also proposed prioritizing government-owned municipal broadband networks over those owned and operated by the private sector – this despite a record of many financially troubled municipal networks going bust and leaving taxpayers holding the empty bag.

Even the President's eventual nominee to fill the third seat on the FCC, Gigi Sohn, one of the most outspoken advocates for imposition of Ma Bell-era public utility restrictions on competitive broadband providers, conceded at her December 1 confirmation hearing that the agency's 2017 decision to reject "net neutrality" rules has not impeded its efforts to promote broadband deployment.

Fortunately, in making available \$65 billion in new funding for broadband, the infrastructure bill negotiated by a bipartisan group of Senators which recently became law, rejected many of the most extreme provisions advocated by President Biden. But this hasn't stopped executive branch agencies under Biden's control from doing "end runs" around the FCC while the agency remains deadlocked with its months-long 2-2 partisan split.

So, for example, the Department of Treasury, tasked with distributing \$10 billion in broadband funding, expressly prioritizes municipal broadband projects and encourages duplicating existing, privately funded networks in the disbursement of those funds.

And the Department of Agriculture, meanwhile, utilizing a points-based system for choosing between competing applications for up to \$1.15 billion in broadband funding, prioritizes proposals that commit to implement "net neutrality" mandates and also municipal government broadband projects.

These "end runs" by Treasury and Agriculture contradict decisions by the FCC, the primary agency responsible for communications policy. The agency determined that "net neutrality" regulations were not warranted at the end of 2017, but Agriculture embraces them. The FCC has defined "broadband" as consisting of speeds of at least 25 Megabits per second (Mbps) downstream and 3 Mbps upstream, but both executive branch departments require unrealistically higher speeds that favor fiber, the technology of choice for municipal broadband networks regardless of the economic case. Moreover, as required by Congress, the FCC presently is developing more accurate, definitive broadband coverage maps, but Treasury encourages applicants to pick and choose service availability data sources that risk the wasteful overbuilding of existing infrastructure.

What's more, FCC Chairwoman Jessica Rosenworcel recently revealed that the FCC had no say in the development of Agriculture's criteria that cut against the grain of current communications policy. And, importantly, the public at large likewise was denied the same opportunity to participate that an FCC-led rulemaking would provide.

Broadband is a critical component of not just our economy, but of Americans' daily lives. Policies that are overly regulatory, like "net neutrality" public utility restrictions, or that favor government communications networks over private sector ones, will deter much needed private sector broadband investment. Rather than exploiting what should be their limited roles as funding dispersers in efforts to dictate highly controversial priorities, the Departments of Treasury and Agriculture, and other agencies, should respect Congress's decision to entrust the FCC with the primary responsibility for developing federal communications policy.

* Randolph J. May is President of the Free State Foundation, a think tank in Rockville, Maryland, and Andrew Long is a Senior Fellow. 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. *Biden's Executive Agencies Doing Net Neutrality End Run* was published in *Real Clear Markets* on December 21, 2021.