Perspectives from FSF Scholars
April 12, 2022
Vol. 17, No. 19

The FCC Should Keep Broadband Free From Rate Regulation

by

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You can't be for rate regulation of broadband Internet services and – at the same time – be against it. But it appears that two members of the Federal Communications Commission may want to have it both ways. At a congressional hearing on March 31, Chairwoman Jessica Rosenworcel and Commissioner Starks each disavowed support for rate regulation of broadband. This is positive. Yet, many times, they also have publicly supported regulating broadband Internet services under Title II of the Communications Act.

The problem is that Title II, at its core, *is* a rate regulation regime.

Title II obligates the FCC to rule on complaints regarding unjust and discriminatory rates. The now-repealed 2015 *Title II Order* went even further into rate regulation with its ban on paid prioritization agreements as well as its assertion of agency authority over network interconnection agreements that set pricing for peering. And many Title II proponents support rate controls via a ban on "zero-rated" mobile plans. Promoting private network investment and increased broadband deployment, along with more consumer choice and innovation, should

remain Commission priorities. Rate regulation would undermine those aims. The Commission should stick to the 2017 *Restoring Internet Freedom Order*'s pro-market approach to broadband.

At the House Communications & Technology Subcommittee's March 31 oversight hearing, Congresswoman Cathy McMorris Rodgers, the Republican leader of the House Energy & Commerce Committee, asked all four current FCC Commissioners whether they support or oppose rate regulation of broadband Internet access services. Not one of them voiced support for rate regulation.

Commissioner Brendan Carr pointed out that rate regulation comes in *ex ante* as well as *ex post* forms. And he stated: "I am against both forms of rate regulation as to broadband Internet access service." Similarly, Commissioner Nathan Simington testified: "I'm opposed to all forms of rate regulation."

For her part, Chairwoman Jessica Rosenworcel explained: "I support consumer protection but don't believe that that is the place that we should go in order to manage the broadband industry on a going forward basis." Later in the hearing, Representative Tim Walberg asked Chairwoman Rosenworcel if there were "asterisks" to her opposition to rate regulation and also whether she would commit to not applying rate controls to broadband either before or after the fact. Chairwoman Rosenworcel responded: "No asterisks." Commissioner Geoffrey Starks offered a somewhat more modest reply to Congresswoman Rodgers' question: "Going forward I have not envisioned rate regulation as part of our broadband regulatory scheme."

On the one hand, it is welcome news, and commendable, that all four FCC commissioners expressed opposition to – or, in the case of Commissioner Starks, at least disinterest in – rate regulating broadband Internet services. Rate regulation would be bad for consumers and for the country. Government controls on the prices that broadband Internet service providers can charge consumers would undermine the service providers' market freedom to exercise their own best judgments about the value of their service offerings in relation to their competitors and to seek returns on their network investments. Any Commission-imposed restrictions on rates likely would undermine much-needed future private investment in infrastructure upgrades and new deployments to unserved and underserved Americans. Chairwoman Rosenworcel's and the commissioners' responses opposing rate regulation at the House subcommittee hearing suggest a general awareness of the likely negative consequences of such regulation.

But on the other hand, when voiced by consistent vocal proponents of Title II regulation, there is reason to be wary of these rate regulation disavowals. With their voices as well as their votes, both Chairwoman Rosenworcel and Commissioner Starks have supported reclassifying broadband Internet services as "telecommunications services" under Title II. In 2015, for instance, then-Commissioner Rosenworcel voted for the *Title II Order*. And Commissioner Starks criticized the repeal of Title II regulation when he dissented from the 2020 *Restoring Internet Freedom Remand Order*. It is self-contradictory to oppose rate regulation and simultaneously support a return to the now-repealed *Title II Order*.

First and foremost, Title II *is* a rate regulation regime because the key provisions in Sections 201(b) and 202(a) provide that "all charges" must be "just and reasonable" and that it is

"unlawful for any common carrier to make any unjust or unreasonable discrimination in charges." The *Restoring Internet Freedom Order* expressly recognized the likely harm to investment posed by the prospective use of those provisions when it repealed the Title II regulation. As the *RIF Order* observed, "the *Title II Order* did not forbear from *ex post* enforcement actions related to subscriber charges, raising concerns that *ex post* price regulation was very much a possibility." Concerns about *ex post* rate regulation would loom large under a revived *Title II Order*. In such a scenario, the Commission would have a duty to consider complaints that rates charged by broadband ISPs violate Sections 201(b) or 202(a).

Second, the *Title II Order*'s ban on paid prioritization involves rate regulation because it effectively sets a rate of $0 for delivering data with quality-guaranteed service over last-mile broadband networks.

Third, the *Title II Order*'s subjection of network interconnection to regulatory intervention is rate regulation because the Commission necessarily would become involved in reviewing rates that broadband ISPs charge for peering or transit service.

Finally, any curtailment or modification of "free data" mobile broadband plans – sometimes also called "sponsored data" or "zero-rating" plans – necessarily constitutes rate regulation because it involves the Commission restricting usage categories that are subject to a rate charge of $0 when a subscriber's usage exceeds his or her monthly data allotments. Although the *Title II Order* did not expressly ban free data plans, an investigation and report by the Wheeler FCC found that certain free data plans were inconsistent with the *Title II Order* dictates. Thus, a future Title II reclassification decision poses the specter of a Commission-level ban on free data plans.

One may try to escape from the self-contradiction inherent in opposing rate regulation and simultaneously supporting Title II regulation by trying to claim "rate regulation" refers only to agency ratemaking proceedings that impose direct controls on retail prices. But that claim would depend on acceptance of an arbitrarily narrow and incorrect definition of rate regulation. The *Title II Order* and continuing debate over broadband network regulation show that "rate regulation" comes in many different forms. In the end, disavowing rate regulation while also supporting Title II classification of Internet service providers amounts to opposing just one form of rate regulation – while simultaneously supporting the possibility of many other forms of it.

In other words, plenty of asterisks, indeed!

When it comes to broadband Internet services, *ex post* regulation of broadband service rates, bans on paid prioritization, agency second-guessing of ISPs' network interconnection rates, bans or modifications of zero-rating mobile service offerings, or variations of these, all would pose harmful consequences to private investment, network deployment, and innovation in services and applications. This is not good for consumers – or for the nation.

The FCC should keep broadband Internet services free from all forms of rate regulation.

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