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It's Net Neutrality Groundhog Day – Again!

by

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The incessant efforts to impose public utility regulation on broadband Internet providers under the guise of "net neutrality" are as regular as Groundhog Day, and just as predictable. The difference is that Punxsutawney Phil – playing his assigned role – is cuddly and cute, while the unremitting efforts to impose utility regulation on broadband providers are damaging and destructive.

Nevertheless, here comes the Net Neutrality Groundhog again!

With the Federal Communications Commission deadlocked 2-2, it is unable to reinstitute the common carrier regime for Internet service providers (ISPs) jettisoned by the agency in January 2018. But on July 28, Sens. Ed Markey, (D-MA), and Ron Wyden, (D-OR), and Rep. Doris Matsui, (D-CA), introduced the "Net Neutrality and Broadband Justice Act" in both the Senate and House. The bill would classify ISPs as common carriers and reinstate inflexible nondiscrimination prohibitions, which, as the *Washington Post's* Cristiano Lima explained, would have "massive implications" for the technology industry and the rest of the economy.

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According to the *Post's* report, the bill would "shift how aggressively the FCC can regulate issues like internet pricing, consumer privacy, and competition in the broadband market."

Stripped of much of its hyperbolic rhetoric, in essence, "net neutrality" regulation means that broadband ISPs like AT&T, Charter, Verizon, Comcast, T-Mobile, and hundreds of others, which were once classified as common carriers, would be regulated in much the same way as legacy telephone and telegraph carriers in the last century's monopolistic Analog Age environment.

Perhaps the "net neutrality" mantra might sound appealing in the abstract. But in the world of today's competitive marketplace realities, adopting another Biden-era heavy-handed regulatory approach won't protect consumers – it will harm them. There are several reasons why imposing utility-style regulation on Internet service providers will hurt far more than help.

Here are some key ones.

First, there is no present evidence – and there hasn't been any for years – that ISPs have engaged in any deliberate discriminatory conduct. Almost all ISPs' terms of service contain legally enforceable commitments not to block or throttle subscribers' access to lawful content. To the extent that a couple of old incidents are cited that conceivably would run afoul of stringent anti-discrimination prohibitions, they have been isolated and quickly remedied. That's why the net neutrality advocates are left to conjecture about what "might," "could," or "possibly" happen absent new regulation, rather than identifying any existing problem warranting costly new regulatory mandates.

Second, the market for broadband Internet services is already effectively competitive in most of the United States and is becoming more competitive in those areas where it is not already. FCC data indicate that by Dec.31, 2020, about 99% of the U.S. population already had access to two competing broadband providers. Since then, consumer choices for broadband services have expanded significantly, including in rural areas. Studies by RVA, LLC, indicate that fiber broadband availability to U.S. homes increased 12% in 2021, and that fiber already was available to 60.5 million homes, or 43% of all homes, by January 2022.

Consumers also have benefitted from the rapid rollout of super fast 5G wireless broadband services in 2021 and 2022. AT&T, T-Mobile, and Verizon have nationwide 5G network footprints. In the last year, subscriptions to 5G fixed wireless access broadband services have climbed sharply. Cowen Inc. has projected that fixed wireless providers will add nearly 2.3 million new broadband subscribers in 2022. Meanwhile, satellite broadband services such as Elon Musk's Starlink are being rolled out and offering additional choices.

Third, imposing utility regulation will stifle investment and innovation. Price controls, which inevitably accompany utility-style regulation in one form or another undermine the ability of ISPs to generate returns and to invest in new or upgraded networks. Recent experience confirms this anti-investment effect. After the Obama-era FCC imposed utility regulation on ISPs in 2015, private network investment declined in each of the next two years. But after repeal of the utility regulation regime in January 2018 by the Trump FCC, ISPs' annual investment increased, and it has remained strong to date.

According to just-released data from USTelecom, capital expenditures by U.S. broadband providers totaled $79.4 billion in 2020 and $86.1 billion in 2021. And, significantly, while ISPs have been investing tens of billions each year in deploying new networks, the price of the providers' most popular broadband speed tier dropped by 14.7% from 2021-2022 – this despite the general spike in inflation. New price controls almost certainly would upend the current pro-investment climate.

Also, utility regulation's inflexible nondiscrimination requirement impedes the ability of Internet providers to experiment with new business models that respond to differentiation in consumer demands.

In sum, reimposing utility-style net neutrality regulation on Internet service providers would be harmful to America's consumers and to the nation's economy at a time when dark economic clouds loom large. It might be possible for Congress to fashion a light-touch "net neutrality" regulatory approach that would benefit consumers rather than harming them – and it should try to do so after two decades of ongoing net neutrality controversy. But bills such as the one introduced by Sens. Markey and Wyden and Rep. Matsui should be non-starters.

The Groundhog in net neutrality garb should go back in its burrow. And stay there.

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