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Regardless of Its Composition, the FCC Should Avoid the Title II Morass

by

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On March 7, 2023, Gigi Sohn, President Biden's pick for the open fifth seat on the Federal Communications Commission, withdrew her name from consideration after a prolonged confirmation process. First nominated more than 16 months prior, Ms. Sohn had no clear path forward after Senator Joe Manchin (D-WV) [announced](#) earlier that day that he would vote "no."

When Ms. Sohn [first was nominated in October 2021](#), Free State Foundation President Randolph May offered his [congratulations](#) – but at the same time acknowledged that, should she be confirmed, "Free State Foundation scholars will not always agree with ... Commissioner Sohn on the issues, especially with regard to proposals to maintain or impose regulation of ... information services providers ... in the absence of convincing evidence of market failure or consumer harm." And he added: "In today's marketplace environment, there should be a deregulatory rebuttable presumption."

As demonstrated by Seth Cooper, Free State Foundation Director of Policy Studies and Senior Fellow, and Andrew Magloughlin, Legal Fellow, in a [December 2021 Perspectives from FSF Scholars](#), so-called "net neutrality" – that is, the reclassification of high-speed Internet access as a "telecommunications service" subject to onerous common carrier regulation – arguably is the

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most compelling contemporary example of a regulatory proposal wholly devoid of the essential "convincing evidence of marketplace failure or consumer harm" to which Mr. May referred.

Nevertheless, Ms. Sohn's support for "net neutrality" is long-standing and well-established. Most recently, during her [third confirmation hearing](#) before the Senate Commerce Committee on February 14, 2023, Ms. Sohn reiterated her conviction that "[the FCC can and has the authority to act](#)" despite the Supreme Court's invocation of the "major questions" doctrine in [West Virginia v. EPA](#) – a doctrine that, as Mr. May pointed out in a [July 2022 Perspectives](#), "presumes that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"

Ms. Sohn's [statement](#) announcing her decision to bow out similarly invokes her unwavering dedication to the cause of reinstating a strong form of "net neutrality" regulation. Specifically, it claims in relevant part that, because the composition of the FCC will remain, for the immediate future, split evenly between the two political parties:

[Y]our broadband will be more expensive for lack of competition, minority and underrepresented voices will be marginalized, and your private information will continue to be used and sold at the whim of your broadband provider. It means that the FCC will not have a majority to adopt strong rules which ensure that everyone has nondiscriminatory access to broadband, regardless of who they are or where they live, and that low income students will continue to be forced to do their school work sitting outside of Taco Bell because universal service funds can't be used for broadband in their homes. And it means that many rural Americans will continue the long wait for broadband because the FCC can't fix its Universal Service programs.

As an initial matter, it is important to point out that these unsubstantiated claims ignore the fact that, according to USTelecom's [2022 Broadband Pricing Index](#), the price of broadband dropped between 11.6% and 14.7% (depending on the level of service) during 2021, while "the cost of overall goods and services rose by 8%" over the same time period. Thus, the fundamental premise underlying the quote above – that is, that competition in the broadband marketplace is insufficient to drive efficient outcomes, including greater consumer welfare in the form of lower prices and expanded access – lacks any evidentiary foundation.

Moreover, these allegations grossly understate what the Biden FCC has been able to accomplish with respect to broadband policy, both generally and specifically with regard to the very concerns that Ms. Sohn suggests compel the regulatory reclassification of broadband. Led by Chairwoman Jessica Rosenworcel, a politically divided Commission has, among other things:

- Worked together to adopt rules implementing two programs specifically created by Congress to address the affordability of broadband subscriptions: (1) the \$3.2 billion [Emergency Broadband Benefit Program](#), and (2) its successor, the \$14.2 billion [Affordable Connectivity Program](#).
- Administered the \$7.171 billion [Emergency Connectivity Fund](#), established by the [American Rescue Plan Act of 2021](#) to "help provide relief to millions of students, school

staff, and library patrons and ... help close the Homework Gap for students who currently lack necessary Internet access or the devices they need to connect to classrooms."

- [Released](#) a "pre-production draft" of its [new broadband maps](#) – an essential resource that Congress directed the National Telecommunications and Information Administration (NTIA) to rely upon for its \$42.45 billion Broadband Equity, Access, and Deployment (BEAD) Program and [an invaluable tool for ensuring that federal subsidies are not \(1\) used to overbuild existing, often privately funded broadband networks, or \(2\) subject to waste, fraud and abuse.](#)
- [Initiated a rulemaking](#), as required by the [Infrastructure Investment and Jobs Act](#), regarding the prevention of "[digital discrimination](#)."
- Issued the [2022 Communications Marketplace Report](#).
- Submitted to Congress a [report required by statute](#) addressing interagency broadband funding coordination efforts between the FCC, NTIA, and the Department of Agriculture.
- Released a [Report on the Future of the Universal Service Fund](#).

As evidenced by the lengthy *Further Readings* section below, Free State Foundation scholars certainly do not agree with the specific conclusions ultimately reached by the Commission in every one of these proceedings. At the same time, however, we do acknowledge the relevance of the questions tackled therein to the efficient realization of the big-picture policy objective of affordable, ubiquitous high-speed Internet connectivity – or at least the importance of those proceedings to our elected political representatives, as articulated by the statutory directives that gave them birth.

In stark contrast, yet another lengthy and contentious undertaking to reclassify broadband as a "telecommunications service" subject to common carrier regulation under Title II of the Communications Act would distract policymakers from much more important broadband-related responsibilities, divert agency resources, and disregard the Supreme Court's invocation of [the "major questions" doctrine](#) in *West Virginia v. EPA* – all in pursuit of a "solution" to [a truly non-existent problem](#).

As such, while I would like to see a fully staffed Commission, as the Communications Act contemplates, I remain hopeful that, going forward, rather than falling into the "net neutrality" trap, the FCC continues to focus on the immediate tasks at hand. These include, for example, efficiently overseeing the Affordable Connectivity Program; producing steadily more accurate versions of the national broadband maps; working with other federal agencies to prevent waste, fraud, abuse, and duplication in connection with the multitude of broadband subsidy programs; and adopting proper rules to prevent digital discrimination which do not have the unintended effect of curtailing deployment of broadband facilities to presently unserved areas.

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Further Readings

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