



*Perspectives from FSF Scholars*  
*June 22, 2023*  
*Vol. 18, No. 24*

**Don't Initiate a "Data Cap" Inquiry**

**by**

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Federal Communications Commission Chairwoman Jessica Rosenworcel recently [announced](#) she is asking her fellow Commissioners to support issuance of a formal Notice of Inquiry "to learn more about how broadband providers use data caps on consumer plans."

I'm old enough to recall when James Quello, who served in a distinguished manner as FCC Commissioner from 1974 - 1997, frequently would remark, when voting to concur in the issuance of a Notice of Inquiry about which he harbored doubts, "Well, it's only an inquiry!"

So, on the one hand, I might be tempted, a la Commissioner Quello, to let this possible inquiry pass on the theory, "Well, it's only an inquiry!"

But on the other hand, I have serious doubts about whether the initiation of what I'll call a "Data Cap Inquiry" is a worthwhile use of the Commission's time. In fact, more than anything else, I think it's political theatre inhabiting what, in a somewhat related context, Tim Brennan, a former Chief Economist of the FCC and member of FSF's Board of Academic Advisors, called, if only half seriously, ["an economics free zone."](#)

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Commensurate with the fact that, at this stage, only a potential inquiry is on the table, I'll keep my explanation brief regarding my concerns. But, first, here is the way Chairman Rosenworcel framed it in the FCC's [news release](#):

*"Data caps, or usage limits, are a common practice where an internet service provider (ISP) restricts how much bandwidth or data a consumer uses, though many broadband ISPs temporarily or permanently refrained from enforcing or imposing data caps in response to the COVID-19 pandemic. In particular, the agency would like to better understand the current state of data caps, their impact on consumers, and whether the Commission should consider taking action to ensure that data caps do not cause harm to competition or consumers' ability to access broadband Internet services."*

It is most important at the outset to stress that there is never a frank acknowledgment by those who support FCC (or congressionally) compelled elimination of data caps that, aside from government subsidies providing support for some consumers, the costs of providing broadband service, in one way or another, must be recovered from an Internet service provider's users. And, relatedly, there is never a frank acknowledgement that broadband networks don't have unlimited capacity, and that, historically, data caps have been one way for ISPs to manage capacity constraints so that those users responsible for imposing more costs on the network pay more than those who impose less costs. In other words, "data caps" are simply a form of usage-sensitive pricing – price discrimination, if you will – not uncommon with respect to the provision of services where the amount of usage ultimately is related to cost incurrence.

In other words, properly understood, and properly constructed, usage-sensitive pricing may be especially beneficial to lower-income consumers who are lighter users to the extent that they may avail themselves of less costly plans than otherwise would be available under mandated "one size fits all" unlimited data offerings.

This kill-the-data caps Don Quixote-like bugaboo has been around for almost two decades. And, not surprisingly, it's not unrelated to the quest to impose various forms of "net neutrality." In a January 2016 *Perspectives from FSF Scholars*, ["Usage-Based Pricing, Zero Rating, and the Future of Broadband Innovation,"](#) Daniel Lyons, a member of the Free State Foundation's Board of Academic Advisors, explained:

*"There is nothing inherently anti-consumer or anticompetitive about the practice [of usage-based pricing.] It simply represents a different way that a provider might spread its network costs across its customer base. The unlimited flat-rate model charges each customer the same amount regardless of use. As the Commission noted in its 2010 rules, '[r]equiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users.' Usage-based pricing mitigates this problem by shifting more network costs onto those who use the network the most."*

This is a simple statement of widely accepted principles of network economics. This doesn't mean that, in a competitive broadband marketplace, consumers won't demand various pricing models, including "unlimited" data plans, and that ISPs won't be responsive to these demands. To be sure, as Christopher Yoo, another member of the Free State Foundation's Board of Academic Advisors, has explained in comments submitted in one of the FCC's early net neutrality proceedings and elsewhere, companies often test new business models without knowing beforehand how consumers will react to the features of the new models. They rely on a trial-and-error process to identify how best to deliver value to consumers.

So, it may well be that, in today's marketplace, imposing "data caps" may not be a sound business practice. And, in any event, if they are imposed by ISPs, they should be applied in a transparent manner that is not confusing or misleading. But that's different than suggesting there is a sound reason for the government to interfere in the competitive broadband marketplace by mandating their elimination.

Recall that after the Obama-era FCC classified Internet service providers as common carriers subject to public utility-like regulation under Title II of the Communications Act, then-FCC Chairman Tom Wheeler initiated an investigation of new "zero-rating" or "free data" plans offered by some ISPs. These plans, popular with consumers, exempted certain content from then-existing data caps. It is somewhat ironic that those who now support investigating data caps with an eye to eliminating them, for the most part, are the same persons and groups who urged that "free data" plans, with their exemptions from data caps, be eliminated – even though in both instances, properly constructed plans might benefit disproportionately consumers at the lower end of the income scale.

Well, as Commissioner Quello was at times wont to say, "it's only an inquiry." So, I'll save more for later "if the time comes." But, in closing, I do want to make a final point that should not go unsaid. A government mandate to eliminate data caps – just like one to eliminate "free data" plans had such a mandate ever been adopted – would surely constitute rate regulation of Internet service providers.

As I explained (with my colleague Seth Cooper) in an April 2022 *Perspectives from FSF Scholars*, ["The FCC Should Keep the Internet Free From Rate Regulation,"](#) "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." Of course, the same logic applies to government mandates to eliminate data cap plans, which are, in effect, pricing tiers. Both are *ex post* forms of rate regulation that restrict the freedom of ISPs to set prices to recover the costs of building and operating their networks in the manner they choose, even if such manner happens to be economically efficient and consumer-friendly.

Oh, and on this score, don't forget, as I detail in ["The FCC Should Keep the Internet Free From Rate Regulation,"](#) that at a March 2022 House Communications & Technology Subcommittee's oversight hearing, Chairman Rosenworcel pledged her opposition to rate

regulation of broadband Internet services and committed to not applying rate controls to broadband either before or after the fact. And, she emphasized, with "no asterisks."

As a personal matter, I carry no brief for data caps. If I had my druthers – like you – I'd prefer an infinite amount of data use, at blazingly fast speeds, and at amazingly low prices. But when it comes to broadband Internet services, I understand it's not good for anyone if the FCC becomes "an economics free zone." Regulation of broadband service rates, whether by virtue of bans on data caps or imposition of some other price control mechanism, poses harmful consequences to private investment, network deployment, and innovation in services and applications.

This is not good for consumers.

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