



*Perspectives from FSF Scholars*  
*July 6, 2023*  
*Vol. 18, No. 27*

**Don't Regulate Internet Providers as Public Utilities – Again!**

by

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[Real Clear Markets](#)

July 6, 2023

The Federal Communications Commission normally has five commissioners, with the current president's party holding three of them. But since January 2021, there has been a 2-2 party split, so the Democrat Chairman, Jessica Rosenworcel, has been without a majority to get the agency to adopt orders to which the two Republicans would not concur.

That may soon change. On May 22, President Biden [nominated](#) Democrat Anna Gomez to fill the fifth seat, and she could be confirmed by the Senate in the coming weeks.

If she is, look for the FCC quickly to take actions to create a much more regulatory environment in which Internet service providers (ISPs), like Comcast, AT&T, T-Mobile, and hundreds of others, must operate – a regulatory regime so stringent that it is likely to suppress investment in broadband networks and innovation in Internet services and applications.

The foremost threat to the relative free market environment in which Internet service providers currently operate is the reimposition of public utility-like regulation on the ISPs. This would be

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accomplished in the name of so-called "net neutrality" by classifying ISPs as common carriers under Title II of the Communications Act, even though the pro-regulatory proponents do not even claim there have been any significant violations of net neutrality principles since the Obama FCC's Title II classification [was repealed](#) by the FCC in December 2017.

At the [June 22 hearing](#) before the Senate Commerce Committee considering her nomination, Ms. Gomez readily admitted that, like FCC Chairman Rosenworcel and Geoffrey Starks, the other Democrat Commissioner, she supports Title II regulation of ISPs.

It is important to understand what public utility-like regulation under Title II means in practice. While there are a multitude of regulations that may be applied under Title II, from pre-authorization approval before constructing new facilities to special accounting requirements, two traditional core requirements are most important: (1) there must not be unreasonable discrimination in charges, practices, classifications, facilities, or services; (2) rates must be reasonable.

Keep in mind that public utility regulation traditionally has been applied to firms operating in a monopolistic environment, such as the railroads in the nineteenth century or telephone companies in the twentieth century. It was assumed that these companies, if not subjected to stringent government controls, could exercise their dominant market power to the detriment of consumers.

Today, except in increasingly rare instances, Internet service providers operate in a competitive, not a monopolistic, environment. Moreover, they offer Internet high-speed broadband service, frequently at speeds greatly exceeding the FCC's definition of "broadband," over different technological platforms – fiber, cable, wireless, fixed wireless, satellite, or a hybrid mix of these – that facilitate competitive offerings and differentiation of services.

According to the latest FCC figures, over 98 percent of Americans enjoy access to a fixed connection at broadband speeds, and the majority have a choice of fixed line providers. On top of that, almost all mobile service customers in the U.S. have available high-speed broadband service. Already 93 percent of Americans have access to super-fast 5G service.

In this technologically dynamic and competitive marketplace environment, subjecting broadband ISPs to public utility regulation won't benefit consumers. Indeed, it's likely to harm them. Imposing utility regulation will only serve to inhibit Internet providers' ability to respond to rapidly changing consumer demands.

Regrettably, the primary objective of the fiercest net neutrality acolytes is to prevent ISPs from differentiating their services from one another. They profess to fear that the service providers will use such differentiation – they call it "discrimination" – nefariously to gain an "unfair" competitive advantage over their rivals. They fail to understand that it is just through such differentiation that the ISPs can respond to changing consumer demands in a way that spurs development of innovative new services and applications.

Like application of the nondiscrimination requirement, regulating the prices of ISPs' service offerings also harms consumers. It's widely acknowledged that in a competitive marketplace, rate regulation tends to suppress investment in new facilities because regulators frequently set rates, or threaten to set rates, at levels that do not allow providers to earn a reasonable return on their investment. Indeed, there is evidence this suppressive effect on investment occurred when the Obama FCC subjected Internet providers to public utility regulation.

At her Senate hearing, regarding price regulation of ISPs' services, Ms. Gomez said it is "certainly not something I think is necessary today." This echoes the "no rate regulation" position stated by Chairman Rosenworcel in a March 2022 congressional hearing.

Nevertheless, despite her own pledge, Chairman Rosenworcel recently announced that she wants to initiate a Commission proceeding to examine ISPs' use of "data caps" to determine whether agency action is needed to curtail their use. Properly understood, data caps are simply a form of usage-sensitive pricing or pricing tiers common in network industries with high fixed costs and ultimate capacity constraints. In effect, curtailing usage-sensitive pricing would constitute rate regulation of ISPs.

The point here is not to suggest that data caps, usage sensitive pricing, or any other pricing practice make good business sense for ISPs, but rather to explain that when the FCC intervenes to curtail their use, the agency is engaging in rate regulation – regardless of whether it refuses to call a spade a spade.

Assuming that Anna Gomez is confirmed by the Senate to give the Democrats a 3-2 majority at the FCC, it's likely that Chairman Rosenworcel shortly thereafter will initiate a rulemaking process to once again classify ISPs as common carriers subject to public utility regulation. If such a radical regulatory regime is implemented, this much is clear: Internet providers' incentives to invest and innovate will be diminished, much to the detriment of America's consumers.

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