Perspectives from FSF Scholars
October 16, 2023
Vol. 18, No. 45

Net Neutrality Redux: A Fight Over First Principles

by

Randolph J. May *

Real Clear Markets
October 16, 2023

Federal Communications Commission Chairwoman Jessica Rosenworcel has proposed that the agency vote on October 19 to initiate a rulemaking to change the regulatory classification of all providers of Internet access services to "telecommunications carriers" under Title II of the Communications Act. Presently, Internet services are classified as "information services." The proposed change is the latest chapter in the long-running saga to implement so-called "net neutrality," now mostly a sweet-sounding political slogan that belies its potential for neutering the Internet.

As I've chronicled elsewhere, if ultimately adopted by the Commission, the practical impact of the regulatory classification change will be substantial, including an almost certain reduction in investment and innovation that will adversely affect American consumers. But to appreciate fully why the proposed agency action is so meaningful – such a "major question" in current Supreme Court parlance for agency actions requiring clear congressional authorization – it's necessary to recount, as a matter of first principles, what's at stake in this latest fight over net neutrality.

Simply put, Chairwoman Rosenworcel and those who support classification of Internet service providers (ISPs) as common carriers ("telecommunications carriers" in Communications Act terminology) favor imposition of rigid government controls over most of their business operations and practices, whereas those opposed favor marketplace freedom. This stark difference is much clearer now than it was in the earlier chapters of the now two-decades old net neutrality saga.

This time, however, Chairwoman Rosenworcel frankly acknowledges that Internet providers should be regulated as "essential utilities," just like electricity and water companies, and the telephone companies of old. Even though it has been evident for many years, at least to me, that the ultimate goal of neutrality acolytes is subjecting Internet providers to traditional public utility regulation, this was often denied. No longer.

It's unsurprising that net neutrality advocates heretofore preferred not to admit they want to treat broadband Internet providers as public utilities with the accompanying intrusive government controls, including rate regulation, anti-discrimination mandates, facilities-approval requirements, and other control measures. In part this is because, as far back as the late 1990s, there appeared to be a consensus, even among many Democrats, that the newly available Digital Age broadband Internet services should not be regulated like narrowband Analog Age telephone services.

Recall what William Kennard, President Clinton's FCC Chairman, said in September 1999 when he rejected calls to impose "open access" regulations – an earlier version of what soon morphed into "net neutrality" – on then-emerging broadband services:

"I have been there on the telephone side. . . [I]f we have the hope of facilitating a market-based solution here, we should do it, because the alternative is to go to the telephone world, a world that we are trying to deregulate and just pick up this whole morass of regulation and dump it wholesale on [Internet providers]. That is not good for America."

Since 1999, for the most part, Chairman Kennard's forward-looking vision of market freedom for Internet providers has prevailed, except for the period between 2015 - 2018 when the Obama-era FCC classified ISPs as common carriers, just as Chairman Rosenworcel now proposes to do. Fortunately, those regulations were repealed in 2018 by the aptly named Restoring Internet Freedom Order.

After elimination of the public utility mandates in 2018, investment in new facilities by ISPs resumed apace at historic levels. There is no dispute that over the last two decades private sector Internet providers have invested over $2 trillion building out high-speed broadband networks.

The FCC proposal's primary justification for imposing utility regulation on ISPs is that the COVID-19 pandemic and the rapid shift of work, education, and health care to online have demonstrated how essential broadband Internet connections are for consumers' participation in our society and economy. And that "there is currently no expert agency ensuring that the Internet is fast, open, and fair."

This claimed justification only highlights what's so problematic about the Commission's proposal. As FCC Commissioner Brendan Carr recently showed, what the COVID pandemic actually demonstrated is that U.S. broadband networks are superior to those in European Union countries where public utility-like regulation of ISPs is the rule. When Internet traffic spiked sharply after the COVID lockdowns in both the U.S and Europe, European regulators asked Netflix and YouTube to throttle their services "to prevent the internet from collapsing under the strain of unprecedented usage." Not here in America where the traffic surges were handled without slowdowns.

As for the claim the FCC must adopt net neutrality regulations to keep the Internet fast, open, and fair, this is nothing more than rhetoric in the service of another Biden administration power grab. There is no evidence whatever that, at present, the Internet is not fast, open, and fair. Indeed, as I've recently detailed, the available evidence confirms that, in significant part due to increasing facilities-based competition among ISPs using different advanced wireline and wireless technologies, access to the Internet at ever-faster speeds is rapidly becoming ubiquitous across the country.

And Congress recently has appropriated over $100 billion for more high-speed network buildouts in currently unserved areas. Instead of proposing substantial new regulatory burdens absent any present problem, the FCC, the Department of Commerce, and the other agencies responsible for disbursing these unprecedented federal subsidies should devote their full attention to ensuring these funds are used efficiently, and without the fraud and abuse that characterizes so many other large expenditure of taxpayer dollars.

So, at bottom, the FCC faces a fundamental choice: continue the largely free market policies that have enabled the vibrant ubiquitous Internet Americans enjoy today or revert to the form of utility regulation that EU countries to throttle Internet services during the pandemic.

As a legal matter, the Communications Act doesn't clearly authorize the Commission to impose public utility regulation on Internet providers. It should be obvious that the choice to do so or not involves a "major question," and that, therefore, as I've explained elsewhere, the agency most likely will not succeed in defending its action in the courts.

But the evident legal problems aside, it's important for Americans to understand that, as a matter of first principles, the stakes in this new battle over "net neutrality" are between intrusive government control or marketplace freedom for Internet providers.

* Randolph J. May is President of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. *Net Neutrality Redux: A Fight Over First Principles* was published in the *Real Clear Markets* on October 16, 2023.