



Perspectives from FSF Scholars
December 20, 2023
Vol. 18, No. 52

Stop the Biden FCC's Plan to Control Internet Networks

by

Randolph J. May and Seth L. Cooper*

[Washington Examiner](#)

December 20, 2023

On Dec. 14, public comments were filed in a rulemaking proceeding in which the administrative state is seeking to pull off one of the most significant power grabs of the 21st century. Under the guise of enforcing “net neutrality,” the Biden administration’s Federal Communications Commission is proposing to seize control over key operations of the nation’s private internet service providers.

The FCC’s proposal, in effect, would turn broadband internet networks, built with more than \$2.1 trillion in private capital investment, into government-regulated public utilities. This would be accomplished by classifying ISPs as common carriers — just like the traditional telephone companies of old in the Ma Bell era. Astonishingly, this radical step, in theory to prevent ISPs from “discriminating” among customers and competitors, is proposed even though there is no evidence whatsoever that ISPs presently are engaging in any conduct that is harmful or anti-competitive.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

If implemented, the Biden FCC's net neutrality plan would result in a loss of internet freedom, put future broadband investment at risk, and slow technological innovation. In other words, consumers will be harmed, not benefited.

The agency's proposal is unwise policy and unlawful and should be stopped. Here's why.

While public utility regulation may be appropriate in certain monopolistic markets, the internet services market is effectively competitive, dynamic, and innovative. Entrepreneurial investment, including wireline capital expenditures of more than \$102 billion and wireless capital expenditures of nearly \$35 billion just in 2022, is driving deployment of next-generation high-speed broadband technologies. Since 2018, fast 5G wireless networks have gone nationwide, high-bandwidth fiber is now available to the majority of primary homes, and cable broadband footprints will soon be upgraded to multi-gigabit DOCSIS 4.0 systems.

According to FCC data from 2021, 98% of the population lived in areas with access to broadband download speeds of at least 25 megabits per second. Now speeds are even faster. According to Ookla's Global Speed Index, in October 2023 the median download speed for fixed broadband was 215Mbps and the median download speed for mobile broadband was 103Mbps.

Prices for internet services reflect the competitive, technologically dynamic environment. An October 2023 report by USTelecom indicates that between 2015 and 2023, the consumer price index for goods and services in urban areas went up 28%, while prices for the most popular internet plans decreased 37%.

Importantly, with regard to a proceeding supposedly concerned with net neutrality, ISPs have not engaged in the censorship of content for which Big Tech platforms such as Google, YouTube, Facebook, Instagram, and TikTok have become notorious. ISPs pledge to not block, throttle, or harm consumers' access to lawful content in their terms of service, and their commitments are enforceable by the Federal Trade Commission. But by converting ISPs into common carriers, the FCC's plan, perversely, would strip the FTC of jurisdiction over ISPs' service commitments and online privacy practices.

Lacking any evidence that ISPs' practices are harming consumers, the FCC conjured up a novel justification by claiming that converting ISPs to common carriers is necessary to protect national security and public safety. The fact that the FCC never advised Congress or the public about its supposed security and safety concerns before announcing its plan in September 2023 casts serious doubt on its claim.

Moreover, executive branch agencies such as the departments of Defense, Homeland Security, Commerce, Transportation, and Justice — not the FCC — are charged with important national security and public safety responsibilities. In any event, the FCC has not identified specific safety or security threats that would be counteracted by overreaching public utility regulation rather than by the exercise of more limited powers.

Like other unsound examples of what we might think of as "Regulatory Bidenomics," the FCC's plan will almost certainly stifle broadband investment and innovation, while restricting consumer

choice. This will be the result of application of the rate regulation and nondiscrimination mandates at the very core of traditional public utility regulation. In one way or another, internet access networks will be subjected to price controls and stringent operational constraints.

And to top it off, the FCC's plan overreaches even more by subjecting ISPs to an indeterminate "general conduct standard" — which it unabashedly calls a "catch-all backstop" — that would condemn, after the fact, practices the agency may decide "unreasonably disadvantage" websites such as Google and Facebook. This "catch-all backstop" would be based on a list of manipulable factors, with the agency reserving the power to create new "catch-all" prohibitions at will.

Like many of President Joe Biden's other regulatory overreaches, the Biden FCC's net neutrality proposal will likely crash in court. Supreme Court decisions such as *West Virginia v. EPA* have cemented the major questions doctrine in the court's jurisprudence. Under this doctrine, courts presume that when Congress delegates authority to a federal agency on a matter of vast political and economic significance, it must provide a clear statement of such authority. Whether Congress authorized the FCC to turn innovative, competitive private internet services networks, constructed with private capital, into public utilities certainly constitutes a major question. The lack of any clear congressional authorization likely will be fatal to the FCC's ambitions.

But a judicial smackdown of the FCC's plan could well be a couple years off. Two of the five FCC commissioners oppose this internet power grab. But more help is needed. Congress and the public should take whatever action they can to stop the nation's private internet networks from falling prey to the administrative state's bureaucratic control.

* Randolph J. May is President, and Seth L. Cooper is Director of Policy Studies and a Senior Fellow, at the Free State Foundation, an independent free market-oriented think tank located in Rockville, Maryland. 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. *Stop the Biden FCC's Plan to Control Internet Networks* was published in the *Washington Examiner* on December 20, 2023.