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The FCC's Ignoring Broadband Competition

by

Seth L. Cooper *

In early 2024, the FCC has pending proposals to impose costly, heavy-handed public utility regulation and expansive digital discrimination mandates on broadband Internet service providers. This despite the fact that convincing evidence demonstrates that the broadband Internet services market is vibrant and strongly positioned to connect more Americans this year than ever with advanced network capabilities. The evidence of effective competition in the broadband market – which is set forth below in bountiful detail – should dictate less regulatory policies. Instead, the Commission appears oblivious to the evidence.

Sustained broadband market trends favoring competition, next-generation network upgrades, faster and more capacious services, strong private sector investment, and competitive consumer pricing, by all rights, should cause the agency to employ a light-touch regulatory approach for Internet services. To align broadband policy with today's effectively competitive market conditions, the Commission should refrain from imposing investment-stifling and innovation-chilling public utility regulation on Internet services and also decline to impose any more unnecessary digital discrimination mandates on broadband service providers. Or imposing other unnecessary regulatory mandates on broadband providers.

Instead, the Commission should focus its efforts on working with Congress and the NTIA to make more spectrum available for commercial wireless services, particularly mid-band spectrum for licensed use.

Industry reports, market analyses, and other publicly available data for 2022 and 2023 show that broadband access and service capabilities of wireline, cable, mobile, and satellite providers have improved significantly compared to 2021. Meanwhile, market competition has held steady or strengthened.

Increases in high-speed broadband access in 2022 and 2023 have been observed by market researchers. According to RVA, LLC, fiber deployment to U.S. homes grew 12% or 9 million in 2023. Unique homes with broadband access rose to 69 million, compared to 54 million in 2020. And RVA, LLC found that 51.5% of primary homes in the U.S. now have access to fiber. In a November 2023 [report](#), BroadbandNow found that the average fiber access rate was about 55.6% of U.S. households in June 2023, up from about 45.9% of households in December 2021.

Although the market share of “fiber” providers has been steadily increasing, RVA, LLC [found](#) that cable broadband providers still had a market share of just over 50% among broadband Internet service providers (ISPs) in late 2023. Cable broadband providers have invested heavily in fiber optics, as [NCTA](#) has cited findings that there are over 550,000 thousand route miles of fiber within U.S. cable networks. Cable ISPs are continuing to roll out upgrades to their [DOCSIS 3.1](#) systems capable of delivering multi-gigabit speeds. During 2022 and 2023, [Charter Communications](#) expanded its gigabit cable footprint, reportedly activating a combined total of 420,000 subsidized rural passings. Charter plans to activate a combined total of 900,000 subsidized rural passings in 2024 and 2025.

In 2023, satellite broadband options also improved significantly compared to prior years. A December 2023 news [article](#) by *PCMag* spotlighted a filing with the FCC indicating that Starlink serves about 1.3 million subscribers or 59% of the total satellite broadband subscriber base. That is far more than Starlink’s [reported](#) global subscribership of only 250,000 in March 2022. *PCMag* also reported late last year that satellite broadband provider HughesNet began offering residential subscriber services with advertised download speeds of up to 100 Mbps. That is up from HugheNet’s prior offerings of up to 25 Mbps and 50 Mbps. The improved capabilities are enabled by the deployment of HughesNet’s high geostationary orbit Jupiter 3 satellite.

There was tremendous growth in 5G-enabled fixed wireless access (FWA) services in 2022 and 2023, which provides a new competing platform for residential broadband services. At the end of 2023, T-Mobile had about 4.78 million FWA subscribers and [Verizon](#) had 3.06 million. Importantly, AT&T launched its FWA services mid-way through 2023, [reportedly](#) ending the year with about 93,000 subscribers. Notably, FWA provides a cost-effective technology for providers to reach [rural consumers](#) with an affordably priced service.

Indeed, the rapid rollout of 5G wireless continued in 2022 and 2023. As of the third quarter of 2023, the total of 5G connections in the U.S. and Canada had grown to 176 million connections, way up from 56.5 million in September 2021. More particularly, 5G mobile coverage in the U.S. expanded significantly in 2022 and 2023. In October 2023, T-Mobile [announced](#) that its Ultra

Capacity 5G service covered 300 million people and that its overall 5G footprint covered more than 330 million people, or 98% of the population. In 2023, AT&T touted that its low-band 5G network covers more than 295 million people and that its mid-band 5G+ network covers more than 210 million. Also, in December 2023, Verizon [announced](#) that its 5G network was available to more than 230 million people.

Additional mobile wireless broadband competition has come from multi-regional cable mobile virtual network operators (MVNOs) that combine Wi-Fi networks with leased spectrum. At the end of 2023, multi-regional MVNOs [Xfinity Mobile](#) had 6.58 million subscribers and [Spectrum Mobile](#) finished with 7.8 million. Those figures are much higher than in the third quarter of 2021, when Xfinity Mobile had 3.67 million wireless subscribers and Spectrum Mobile had 3.2 million.

Network upgrades supported continuous boosts in broadband speeds in 2022 and 2023. [Ookla](#) found that median U.S. fixed broadband speeds increased to 237.41 Mbps upload and 28.55 Mbps download in January 2024. That is significantly higher than in November 2021, when Ookla found U.S. fixed speeds of 134.10 Mbps/19.45 Mbps. Furthermore, Ookla found that median U.S. mobile download speeds rose to 115.40 Mbps/9.85 Mbps in January 2024, showing a strong boost in download speeds compared to 53.31 Mbps in November 2021. And [HighSpeedInternet.com](#) reported that the national average for download speeds in 2023 across different platforms increased to 171.3 Mbps, up nearly double from 99.3 Mbps in 2021.

These developments were made possible by strong private market investment. For fixed wireline providers, capital expenditures by U.S. broadband providers surged to \$102.4 billion in 2022, according to USTelecom's "[2022 Broadband Capex Report](#)." Those investment totals were up from \$86 billion in 2021 and \$79.4 billion in 2020. And annual wireless investment climbed to an industry record \$39 billion in 2022, up from \$35 billion in 2021.

Strong private market investments are enabling ongoing rollouts of fiber and FWA services. And private investment-backed innovations will bring additional benefits to consumers within the next two years. These technological advancements include DOCSIS 4.0 upgrades to Comcast's Xfinity cable broadband network that will offer significantly expanded capacity and symmetrical or near-symmetrical multi-gigabit speeds. Other cable providers plan to launch DOCSIS 4.0 within the next two years. Fast and capacious [Wi-Fi 7 technology](#) is [projected](#) for rapid adoption with the deployment of 233 million devices globally in 2024. The launch of direct-to-device (D2D) capability will enable connectivity between standard wireless handsets and satellite networks to ensure continuous coverage in the most difficult-to-reach areas of the country. The FCC has approved testing by T-Mobile and Starlink, with AT&T and Verizon also developing D2D capabilities with satellite partners.

Importantly, broadband prices have remained competitive and more resistant to increases than for services in other sectors of our economy. According to USTelecom's "[2023 Broadband Pricing Index](#)," between March 2022 and March 2023, inflation-adjusted prices for the most popular broadband speed tier offered by fixed wireline broadband providers (DSL, cable, and fiber) decreased by 18.1% and prices for their fastest speed tier option went down 6.5%. And between 2015 and 2023, inflation-adjusted prices for the most popular speed tier declined by

54.7% and prices for the highest speed tier option dropped by 55.8%. Moreover, the broadband sector outperformed most other sectors of our economy in the face of persistent inflation. The BPI Report also shows Consumer Price Index (CPI) trends for broadband Internet services compared to other goods and services. Between 2015 and 2023, costs for consumer goods and services rose by 28%, according to the CPI-U (a barometer of overall urban inflation). Still, consumer prices for the most popular and fastest speed options went down by 37% and 39%, respectively.

These indicators that broadband access is increasing and the market is effectively competitive and innovative should impact FCC policy and prompt the agency to adhere to a market-oriented, light-touch approach to broadband Internet services. Such a policy will sustain and promote the full growth and benefits of these advancements. But in some critically important respects, federal communications policy has veered off track.

Broadband providers are saddled with an entirely new layer of regulatory controls by the FCC. The Commission has imposed digital discrimination mandates that far exceed the Commission's lawful authority to combat intentional digital discrimination of access to broadband services. In a November 2023 Order, the agency decided to subject ISPs to legal liability in untold circumstances – concerning virtually every aspect of their operations – based on unintentional disparate impact liability theory. Pending before the Commission is a proposal to also impose burdensome periodic reporting requirements on broadband ISPs regarding their networks, their customer demographics, as well as the demographics of areas they don't serve but might plan on serving in the future. Such requirements are particularly unjustifiable given that the Commission effectively acknowledged in its November 2023 Order that there is no evidence of intentional digital discrimination. The Order identified no specific areas or instances where broadband access disparities exist due to unintentional discrimination.

And the Commission also is preparing to impose another layer of costly regulatory constraints on broadband ISPs in the form of public utility regulation. The agency has proposed a set of specific restrictions on network management practices and offerings that likely will result in the banning of popular free data and sponsored data plans that are popular with mobile subscribers, particularly low-income subscribers. Those plans allow a wireless subscriber to access popular online content such as social media or streaming music without such access counting against the monthly data allotment of one's wireless service plan. Another harmful component of the Commission's proposed regulation of broadband networks is a vague catchall to second-guess ISP decision-making on engineering decisions and control outcomes based on unknown factors and unarticulated policy preferences and arbitrary whims of a majority of the Commission's members. None of its proposed public utility regulation will expand broadband access to Americans living in unserved and underserved areas. But the restrictions will inhibit broadband ISPs' ability to generate financial returns on their investments and risk significant harm to future investment and innovation.

Aside from being unjustified by today's effectively competitive market conditions and the lack of any showing of actual harm to consumers, the Commission's impositions of burdensome regulations are a diversion from what should be the agency's primary focus: getting more spectrum into use for commercial wireless services. The U.S. faces a looming deficit of mid-

band spectrum for licensed commercial wireless use and there is an empty spectrum pipeline. Congress has let the FCC's spectrum license auction authority lapse entirely and the National Spectrum Strategy appears devoid of any near-term actions to put more mid-band spectrum into commercial use.

The FCC should do whatever it can to prompt a speedy conclusion to the study of the lower 3 GHz bands and other mid-band spectrum candidates for repurposing. It also should promote global harmonization efforts to enhance the usefulness and cost-efficiency of that spectrum for wireless service providers. Additionally, the Commission needs to take all steps it can to prompt and encourage Congress to revive the agency's spectrum license auction authority.

By aligning its policy with the effectively competitive conditions that exist in today's broadband Internet services market and focusing on freeing up more spectrum to support next-generation services, the FCC ensures the continuation of these positive trends and promotes the continued rapid deployment of broadband to all Americans.

* Seth L. Cooper is Director of Policy Studies and a Senior Fellow 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.