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Stop Converting Internet Service Providers Into Public Utilities

by

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By a regulatory decree issued in May 2024, the Biden-Harris administration's Federal Communications Commission (FCC) tried to turn broadband Internet service providers (ISPs) into public utilities so that it can control their rates. A court has temporarily halted this sweeping power grab. But if Vice President Kamala Harris wins the election, it's almost certain she and her administration's officials will continue the misguided quest to rate regulate ISPs.

The Biden-Harris Administration's regulatory objective should be opposed in Congress, the courts, and the agencies. Converting ISPs into public utilities provides no benefit to American consumers. Rate regulation undermines their ability to make pricing decisions that allow them to earn a reasonable return on their investment, discouraging the massive private investment needed for new network deployments.

Since 1996, broadband providers have invested over $2.2 trillion in private capital to construct cable, fiber, fixed wireless, and satellite networks. In 2023 alone, capital expenditures by fixed line and mobile providers totaled $94.7 billion and $30 billion, respectively.

Rapid deployment of fiber, cable, 5G-enabled fixed wireless, and next-generation satellites have fostered increasing competition – and increasing consumer choice. There are several hundred million U.S. subscriber broadband connections. According to the FCC's own National Broadband Map, at the end of 2023, 99% of U.S. households had Internet access.

Despite flourishing competitive conditions in the broadband market under the light-touch regulatory framework that has largely prevailed since 1996, the Biden-Harris FCC reversed course with its May 2024 order imposing a public utility regime that includes rate regulation. The agency shifted the classification of broadband Internet services from a lightly regulated "information service" to a "telecommunications service – in effect, a traditional common carrier public utility service.

The FCC's May 2024 order lays the groundwork for broadband rate regulation in different ways. Now, as "telecommunications" carriers, "all charges" must be "just and reasonable." No "unreasonable discrimination in charges" is allowed. And the FCC must resolve complaints about rates. The agency's order also endorses state-level rate regulation in the form of price ceilings at which particular services may be offered.

Additionally, the FCC's order subjects certain lower-price options for consumers to legal jeopardy under a vague, open-ended multi-factor "general conduct" standard under which the agency virtually has a blank check to hold unlawful ISPs' rates and other practices.

For example, the FCC's new rate regulation regime puts in jeopardy "free data" broadband plans that allow subscribers to access social media, streaming music, or other content without such usage counting towards their plans' monthly data allotments. These plans are popular because they offer a lower-price choice for consumers. Yet the FCC suggests they are potentially unlawful because they may be discriminatory or anticompetitive.

Another category of lower-price options the FCC has put in its crosshairs is usage-based pricing plans, or so-called "data caps." Usage-based pricing, commonplace in many markets for various products, allows lower-usage Internet customers to choose to pay less than higher-usage customers.

Indeed, the term "data caps" is imprecise because ISPs typically do not block usage if subscribers exceed any monthly data allotments they have chosen; instead, they provide access at reduced speeds or charge more money for the extra data usage. A ban on such plans likely would eliminate a lower-price option valued by many cost-conscious consumers while leading to higher prices for all.

In granting the stay of the FCC's May 2024 order, the court recognized the likelihood that a regulatory transformation of privately-owned broadband Internet providers into public utilities is unlawful. The court's stay is based on the likelihood that Congress never authorized the FCC to take such drastic action regarding such a politically and economically significant matter. While the court has not yet ruled on the merits, it's likely that when it does so it will hold the agency's order violates the Supreme Court's "major questions doctrine."

And the specter of Internet rate regulation extends beyond the FCC. The Biden-Harris administration's implementation of the $42 billion Broadband, Equity, Access, and Deployment (BEAD) program – the funds are intended to be used to build out broadband networks in unserved or underserved areas – has incorporated a rate regulation approach. This, along with other problematic aspects of the BEAD program's implementation, such as requiring the payment of prevailing union wages and "Buy American" mandates, has delayed any new broadband build-outs. The administration has pressured states to require Internet providers to offer a "low cost" option at specific uneconomic rates. So, perhaps it should be no surprise that the BEAD program, adopted by Congress in 2021, has yet to bring broadband to a single American home.

In sum, converting Internet service providers into public utilities and regulating their rates serves no public good. Doing so definitely discourages investment in broadband infrastructure, especially in unserved or underserved areas, that would benefit Americans. And a public utility regime likely will lead to the elimination of choices, such as lower price usage-based options and "free data" plans, that consumers may prefer.

Perhaps in the twentieth century there was a justification for regulating the old monopolistic Ma Bell telephone network akin to a public utility. But there's certainly no justification today for subjecting Internet providers, operating in a technologically dynamic, competitive marketplace, to a public utility regime that includes rate regulation.

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