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Thinking the Unthinkable – Part IV

by

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In September 2014, I posted an essay I called "[Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers.](#)" I said then that it was unthinkable the FCC actually would decide to regulate Internet service providers "under a public utility-type regime that was applied in the last century to the monopolistic Ma Bell – even though the Internet service provider market is now effectively competitive."

It was sufficiently unthinkable, to me at least, that in the next two months I published two more essays arguing against imposition of the utility model on Internet service providers – "[Thinking the Unthinkable – Part II](#)" and "[Thinking the Unthinkable – Part III](#)."

Well, the Obama-era Federal Communications Commission did the unthinkable. In March 2015, it released the so-called [Title II Order](#) regulating ISPs as common carriers under Title II of the Communications Act, in effect, subjecting them to a utility regime. And the supporters of Title II regulation evidenced little squeamishness in doing so, despite the fact there was no meaningful evidence of market failure – indeed, none was even claimed – and there were credible predictions that such action would depress investment and innovation.

Then, in January 2018, the Trump-era FCC, at the conclusion of another rulemaking proceeding, released the [Restoring Internet Freedom Order](#). The essence of that action was to repeal the Title

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II public utility regulation in favor of a "light-touch" regime that (other than the enforcement of meaningful FCC transparency rules) relies primarily on the Federal Trade Commission and Department of Justice consumer protection and competition-protection authorities to police and remedy any abusive practice by ISPs.

Shortly after release of the *Restoring Internet Freedom Order*, I published an essay in *The Regulatory Review* in February 2018 titled, "[Chevron and Net Neutrality at the FCC.](#)" Here is the way that essay began:

"For the old timers reading this, you may recall Bobby Vee's 1960 hit, [Rubber Ball](#), with the sticky refrain: 'Rubber Ball, I come bouncin' back to you.'

Well, a bouncing ball comes to mind – and the *Chevron* doctrine – when I think of the Federal Communications Commission's long saga dealing with 'net neutrality' regulation. Most recently, in December 2017 in its [Restoring Internet Freedom Order](#), the Commission, for the most part, repealed the [net neutrality regulations](#) adopted by the Obama Administration FCC in 2015."

I was pleased with the attention the piece received – but not pleased that I had to write yet again about the "net neutrality" bouncing ball.

Here is the way [The Regulatory Review](#) essay ended:

"While I favor the latest FCC decision, it's difficult to argue that this unstable regulatory policy is good for consumers, Internet service providers, or the entire Internet ecosystem. *Chevron* only comes into play when Congress legislates in an ambiguous way. I'd say it's time for Congress to end the 'FCC and Net Neutrality' saga and legislate unambiguously."

Well, most readers of this page know all of the foregoing. And most know that Democrats in the House of Representatives are seeking to adopt a "Save the Internet" [bill](#) that has the declared intent, once again, of imposing Title II public utility regulation on ISPs. It proposes to do this by repealing the *Restoring Internet Freedom Order* and revivifying the Obama-era regulations. (Whether the bill, if adopted, actually would accomplish this as a matter of law is another matter entirely.)

As I have suggested here and elsewhere, it would be good if Congress could pass, on a bipartisan basis, a bill that would settle, at least for some significant period of time, the net neutrality controversy – now approaching fifteen years running.

But it would *not* be good for Congress to adopt the Democrats' bill which seeks to reimpose Title II regulation. Indeed, it still ought to be "*unthinkable*" for the reasons I set forth in 2014, but even more so now.

For present purposes, in this "Thinking the Unthinkable – Part IV," I am just pasting in below excerpts from the September 2014 essay with my updated comments in bold. Of course, in some

places, please substitute "Congress" for the FCC commissioners and, for context, please take into account the piece was written before the release of the Title II Order in March 2015.

It means regulating Internet providers under a regime like the one applied to electric utilities. Susan Crawford, one of the leading advocates of Title II regulation, explicitly equates the provision of electricity service and Internet service and advocates regulating them the same way. On page 265 of her book, *Captive Audience*, she concludes that 'America needs a utility model' for Internet providers. Professor Crawford's thinking is fully in line with that of other Title II advocates. Well, I think it is unthinkable that Chairman Wheeler and his two Democrat colleagues might adopt a utility model for broadband. **[Today's advocates favoring reimposition of Title II regulation have even less hesitancy than in 2014 in advocating utility regulation for Internet providers.]**

More to the point, while a few of the Title II advocates suggest the FCC could forbear from applying all but Title II's Section 202 nondiscrimination prohibition, this is a distinct minority view. Most do not advocate forbearing from Section 201's rate regulation provision. After all, the "utility model" advocated by Professor Crawford and others has rate regulation at its very core. Many of the complaints of these Title II advocates concerning Internet provider practices, including wireless Internet providers, concern what they claim are 'unreasonable' data tiers or limits, and they routinely seek to have the FCC compel the production of information concerning demand and usage levels, service provider costs, and service revenues. This is the very type of information central to traditional utility rate cases. **[In fact, the Title II Order did not forbear from the Section 201 rate regulation or Section 202 nondiscrimination provisions. Indeed, it invoked them in embarking on an investigation questioning the lawfulness of popular 'free data' plans.]**

In 2002, the Commission declared 'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.' In classifying cable broadband, and then wireline broadband, as information services rather than services subject to Title II regulation, the Commission emphasized it wanted to create a rational framework 'for the competing services that are provided via different technologies and network architectures.' It recognized, in 2002, that Internet access already was 'evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite.' Of course, since the FCC adopted a 'minimal regulatory environment' for broadband in 2002 – and then successfully defended its decision all the way to the Supreme Court in the *Brand X* decision – the broadband Internet market, in fact, has become increasingly competitive, with facilities-based competition evolving over multiple platforms as the Commission envisioned. **[High-speed broadband Internet access is much more ubiquitous now, and subject to more competition, than in 2014. And now, with super-fast 5G on the horizon, wireless will be even more competitive with wireline broadband than it is today. The Internet access market is not subject to a market failure that justifies utility regulation that would threaten continuing investment. Indeed, in an interview in the March 18, 2019, edition of *Broadcasting + Cable*, American Cable Association President Matt Polka said this regarding rural broadband deployment: "[T]he FCC has already**

done the biggest thing for our members, which was to eliminate heavy-handed regulation under Title II, which has encouraged investment in deployment...This single act has done more for our members' ability to deploy broadband and secure investment than anything I could ever ask for...."]

It is wrong to ignore the remarkable progress in broadband that American consumers have enjoyed since 2002 when the Commission adopted the minimal regulatory broadband regime, which has, for the most part, prevailed since then. **[And for most of the period since 2002 there was a bipartisan consensus against regulating Internet service providers under Title II in a public utility-like fashion.]**

The FCC is proposing to impose new net neutrality regulations without requiring any showing of market failure or consumer harm resulting from existing Internet provider practices. **[There was no showing of market failure or consumer harm in the Title II order and since the release of the Restoring Internet Freedom Order in January 2018, there has been no evidence of market failure or consumer harm.]**

In a 1999 speech, FCC Chairman William Kennard firmly rejected the notion of dumping the 'whole morass of regulation' of the utility model on the cable pipe. He concluded: 'This is not good for America.' Given that competition in the broadband Internet marketplace is indisputably more robust today than in 1999, what would not have been good for America in 1999 would certainly not be good for America in 2014. **[William Kennard, a Democrat, was appointed by President Clinton to chair the FCC.]**

The case against imposing a utility regulatory regime on Internet service providers is even stronger now than in 2014 when I wrote ["Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers."](#) That being so, Congress should not do the unthinkable by imposing utility regulation on Internet providers, with all the attendant risks to innovation and investment that such an intrusive regulatory regime entails.

Instead, if Congress legislates, it should do so in a way that will protect consumers from any demonstrated abusive practices by Internet service providers, while, at the same time, preserving the freedom necessary to encourage continued innovation and investment.

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