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COMMUNICATIONS POLICY APPROACHES AND COVID-19

ENSURING ACCESS TO EFFECTIVE, RELIABLE,
AND AFFORDABLE COMMUNICATIONS SERVICES



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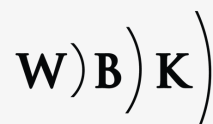


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INTRODUCTION

We recently wrote a white paper exploring considerations for utility regulators dealing with the impact of the COVID-19 pandemic on their rate regulated utilities, especially focusing on state regulated electric and natural gas companies. (1) In that paper, our central conclusion was that utility regulators should both support customers impacted by the crisis while also ensuring the stability of the necessary services utilities provide, and we noted that similar conclusions may apply to other network services like communications. (2)

Here, we turn our attention specifically to communications networks to distinguish why the policy response for COVID-19 should be different from that taken for regulated utilities. In doing so, our narrow focus is on how COVID-19 customer-protection measures for communications should differ from those employed for regulated utilities because of the fundamental differences between the two.

Communications networks, like traditional utility networks, possess high fixed costs relative to variable costs. However, the market structure of these industries, the regulatory changes in communications over the past 30 years, and the dramatic pace of technical innovation in communications network infrastructure compel very different policy approaches. U.S. communications networks have proven themselves to be highly resilient and robust in enabling many millions of consumers to learn, work, be entertained, and remain connected throughout the pandemic thus far. The public policy response has also been up to the task as over 750 communications companies have signed the FCC's Keep Americans Connected Pledge ("the Pledge"), which originally provided, in part, that residential and small business customers would not be disconnected or charged late fees for non-payment for 60 days (until May 13th) but was subsequently extended to June 30th. (3) We appropriately laud these voluntary measures in the face of serious public health and economic crises.

But we must caution that—for reasons explained below—the tools and policy levers for ensuring communications providers' continued viability, operational stability, and network enhancement are categorically different than they are for core state-regulated utilities. Unlike these utilities, there is no regulatory architecture providing pathways through which communications firms may recover the costs they bear in undertaking the Pledge.

Here, we address how to support communications customers in need while also maintaining financial stability and network reliability in the communications sector. Communications services are as vital as the energy and water delivered to our homes, and communication networks have consistently demonstrated that they are up to the task, whether it has been handling sharp increases in video conferencing from home, facilitating remote education classes, or accommodating mega-binging of streaming videos and massive downloads of new online games. In this way, the communications networks in this country stand in contrast to the networks in Europe and Australia where companies like Netflix, YouTube, and Disney have been asked to lower the bandwidth consumption of their services to ease the strain on communications networks. (4)

1. See Tony Clark, Ray Gifford & Matt Larson, COVID-19 and Critical Infrastructure: An Agenda for Decisive State Regulatory Action (Apr. 2020), <https://www.wbklaw.com/wp-content/uploads/2020/04/COVID-19-and-Critical-Infrastructure-4.16.20.pdf>.

2. By "communications," we are referring to the services that keep us connected, including wired and cellular telephone, and broadband.

3. Press Release, Fed. Comm'n, Over 750 Broadband and Telephone Providers Extend Keep Americans Connected Pledge (May 14, 2020), <https://docs.fcc.gov/public/attachments/DOC-364358A1.pdf>.

4. See, e.g., John Archer, *Netflix Starts To Lift Its Coronavirus Streaming Restrictions*, FORBES (May 12, 2020), <https://www.forbes.com/sites/johnarcher/2020/05/12/netflix-starts-to-lift-its-coronavirus-streaming-restrictions/#7f5693d47388>; Anne Morris, *Australia's NBN under spotlight amid COVID-19 usage spikes*, LIGHTREADING (Apr. 7, 2020), <https://www.lightreading.com/optical-ip/fttx/australias-nbn-under-spotlight-amid-covid-19-usage-spikes/d/d-id/758721>.

In expanding our analysis to include how policymakers can help ensure communications companies continue providing robust network performance throughout this unprecedented crisis, especially for those most heavily impacted, several important aspects of communications companies inform the proper policy response. The short of it:

- The market structure of communications services means the tools for spreading impacts from non-payment across all customers are not available because the regulated utility business model differs so dramatically from the communications market. (5)
- Consequently, short-term, voluntary efforts by communications providers to keep their customers who cannot pay connected are to be lauded, but they can only be of limited duration relative to the efforts of regulated utilities. (6)
- The high fixed, low marginal cost nature of communications networks means that, even as demand drops or non-payment increases, the providers must nevertheless cover their fixed costs, including substantial ongoing network investments, to maintain stability, reliability, and continued network enhancement.

As we noted above, under the Keep Americans Connected Pledge, many companies have agreed to suspend service terminations and to waive late fees for any residential or small business customers because of their inability to pay their bills resulting from the disruptions caused by the pandemic. So far, over 750 companies and associations have signed the Pledge to suspend terminations until June 30, and a number of other companies have adopted even broader and more ambitious policies. (7) Also at the federal level, three Democratic senators—Jeff Merkley, Bernie Sanders, and Ron Wyden—have introduced legislation to mandate suspension of disconnections until 180 days after the COVID-19 state of emergency terminates. (8) Because the state of emergency could continue much longer, the total period during which disconnections would be prohibited could in turn out to be more than a year under the senators' proposal.

Finally, although no legally enforceable policy is in place, in April, several state attorneys general called for the extension of the Keep Americans Connected Pledge through August 11, 2020. (9) The letter also called for communications companies to develop payment plans for any bills in arrears for customers experiencing economic hardship related to the pandemic, reconnection of previously disconnected services, and expanded data caps over the same period. Finally, the state attorneys general requested that companies inform their customers about the availability of services they are offering under the Pledge.

5. Setting aside debates about the depth of competition in the communications sector, the competition in regulated utilities is different in kind, not degree. Whereas regulated utilities operate in a closed system that prohibits entry, communications firms are free to enter new areas of business and to attract customers away from their current provider. For example, a Verizon customer may switch to AT&T. Or a cable broadband customer may switch to DSL or mobile broadband. The tools available in a closed regulatory system of monopoly regulation (where customers must continue taking service from one provider) to spread losses among customers—like accounting orders, charges to cover bad debt, and securitization—are simply not available in the communications space.

6. To be sure, as we detailed in our prior paper, regulated utilities also cannot maintain no-disconnect policies in perpetuity, and the period of time that they can do so without material financial impacts are dependent on constructive regulatory treatment of such costs from utility regulators. Short-term efforts are necessary; in the medium- and long-term, all policies must transition back to the norm that customers must pay to receive service.

7. See *Companies Pledging to Keep Americans Connected During Pandemic Go Above and Beyond the Call*, FED. COMM'NS COMM'N, <https://www.fcc.gov/companies-pledging-keep-americans-connected-during-pandemic-go-above-and-beyond-call> (last visited May 19, 2020).

8. See Jon Brodtkin, *Democrats try to ban Internet shutoffs until pandemic is over*, ARS TECHNICA (May 12, 2020), <https://arstechnica.com/tech-policy/2020/05/democrats-try-to-ban-internet-shutoffs-until-pandemic-is-over/>.

9. See Letter from twenty-seven state attorneys general, to Ajit Pai, Chairman, Fed. Commc'ns Comm'n, (Apr. 22, 2020).

Although we understand the state policymakers' desires to protect their citizens most heavily impacted by this crisis, the proposal of the attorneys general does not align with the regulatory structure that governs providers of advanced communications services like broadband. Readers may note that we supported suspension of disconnections in the regulated utility sphere to protect customers when those suspensions were also paired with constructive cost recovery treatment. (10) We are more cautious, however, about mandatory suspensions of disconnections in the communications realm that includes other vital network services.

The key—and dispositive—reason for our differing conclusion is that electric and gas utilities are rate regulated monopolies that serve an exclusive territory; communications providers, by contrast, operate in a competitive environment with free entry and customer choice. Thus, the utility system is relatively “closed” for purposes of social policy-making; the communications system is “open.”

We proceed by explaining these differences in more detail and why they affect the proper COVID-19 policy response. We must also emphasize, however, that we do not support regulating communications providers in the way utilities are regulated. Unlike delivering electricity, gas, or water—where the laws of physics *require* using a pipe or wire—communications services can be delivered through DSL wires, cable wires, or through mobile networks, and so the natural monopoly rationale supporting regulation in the electricity, gas, and water spheres, among others, is inapplicable in communications. Communications firms more closely resemble parcel delivery services like FedEx, UPS, the USPS, and even Amazon’s project to bring delivery in-house. Given these differences and the natural monopoly characteristics inherent in the delivery of electric, gas, and water, the communications sector has responded to pressures in the marketplace to advance technological development and innovation in communications networks over the past two decades.

BACKGROUND ON DIFFERENCES BETWEEN COMMUNICATIONS AND ENERGY UTILITY SERVICES

As we have noted, key differences between communications companies and regulated energy utilities compel a different response to COVID-19 for each. We describe those reasons more thoroughly here.

First, and most fundamentally, the utilities serve an exclusive territory that prohibits entry, meaning they do not face competition from other firms for their customers. (11) This difference is crucial to programs like the suspensions of disconnections because customers do not have the option of abandoning their debt and switching to another provider. In the communications sector, except for a very narrow range of services, there is free entry and competition. Thus, a fixed broadband, mobile broadband, satellite, or DSL customer is not constrained to receiving broadband service from one provider, and a customer could potentially accumulate bill arrearages and then switch to another provider without facing a disconnection of service once the program prohibiting service disconnections has concluded. (12) The same point holds for competition between and among mobile wireless providers.

10. See Tony Clark, Ray Gifford & Matt Larson, *supra* note 1, at 2–3.

11. Of course, some states have restructured and introduced competition and retail choice for electricity service and in this way the contrast does not hold for all states. As we note below, however, in discussing the COVID-19 approach taken in Texas, the competition in the electricity sector has not displaced the regulated monopoly providing transmission and distribution service. Thus, even in states with competitive retail suppliers, there is still only one provider in the supply chain that consumers cannot avoid.

12. We do not question the good faith of the vast majority of customers who may fall behind on their payments. On the margin, however, we would expect that more people will pay their bills when the possibility of disconnection looms larger. And the switching problem applies equally to other customers. If one company in the competitive marketplace were to have a more expansive suspension of disconnections policy, it would not be able to recover those costs through other customers because the other customers could simply switch to a different provider rather than help pay down other customers’ bills.

Second, and relatedly, a regulated utility may recover costs and lost revenues from a suspension of disconnection through several different avenues. Utility regulatory commissions may establish special charges that recover costs related to the COVID-19 response as they occur, *i.e.*, current recovery.

Alternatively, commissions may instead provide for cost recovery through a backward-looking proceeding where the utility will present the costs it has recorded related to the program. Then, a prospective rate will be set to recover those recorded costs plus a reasonable return for the utility. In any case, and as part of the regulatory compact, these regulated utilities are afforded an opportunity to recover their costs, which may require spreading impacts resulting from COVID-19 to other customers. These policies can keep regulated utilities stable for purposes of meeting their obligation to serve during and following the pandemic.

Our survey of the current actions addressing COVID-19 for regulated utilities illustrates these differences in practice. We have identified 39 states plus the District of Columbia as having adopted an official policy either requiring suspension of disconnections or strongly encouraging that electric and gas utilities do so. Of those jurisdictions, about half have explicitly announced a mechanism for utilities to record the costs of the program for future recovery, and the cost recording announcement tends to lag the initial program announcement. We therefore expect many of these jurisdictions will and should allow utilities to recover the costs of the programs.

As we noted in our earlier paper, providing for cost recovery is a sound approach. Public utilities must make very large capital investments in both their generation assets and their transmission and distribution systems, and they must continue spending on operations and maintenance to keep these systems running. These assets are necessary to the proper functioning of their systems, and utilities must collect enough revenue to cover these costs and earn a reasonable return, and we therefore recommended that state commissions establish a regulatory process through which electric and gas utilities could recover the costs of any disconnection program. For communications providers, by contrast, there is no direct regulatory process already available through which companies might recover their costs even though these companies also have very large capital investments in their networks and must continue to spend on operations and maintenance to keep the networks running.

The approach used for electric providers in Texas makes the difference more concrete. In Texas, the regulatory commission suspended disconnections for electric customers but also established a rate rider to recover the costs of the policy. The program in Texas is notable in that its features show the steps that must be taken to implement a disconnection suspension and deferred payment plan in a competitive market. First, unlike most other states, Texas has a competitive retail market for electricity, meaning that residential customers can choose among different retail electric providers (REPs). (14) In this dimension, the market for retail electricity in Texas parallels communications markets because the REPs compete against each other, and customers can switch between providers. Recognizing this fact, the commission in Texas thus ensured that customers who enter a payment plan with their REP are not able to then switch to another service provider and thereby render the debt more difficult to collect. (15) Second—and this is the critical difference—although the REPs operate in a market open to entry and competition, the entities responsible for providing transmission and distribution service are still regulated, and it is these regulated utilities that collect the added rate that will offset the costs of the program to suspend disconnections. (16)

13. See *Issues Related to the State of Disaster for the Coronavirus Disease 2019*, Order Related to Accrual of Regulatory Assets, Case No. 50664 (Tex. Pub. Util. Comm'n Mar. 26, 2020).

14. Our skepticism of the benefits of these restructured “markets” or “retail choice” regimes is well known and detailed in other papers. This is beyond the scope of this paper, which focuses on the communications sector.

15. *Id.* at 5–6 (providing that REPs may enter a “switch-hold” for customers while they are on a deferred payment plan).

16. See *id.* at 6. We do not recommend a similar method for communications, however, because generally there are not any remaining regulated monopoly providers along the value chain, which means that customers could evade any attempt to recover costs from all customers by switching services.

Accordingly, Texas spread costs from the disconnection policy through the monopoly portion of its grid to all customers—communications firms have no such option.

In sum, although there may be some parallels between utilities and communications providers (they are both network industries with significant fixed costs), those parallels evaporate when it comes to allocating the costs of COVID-19 relief policies. Because communications companies lack the ability to shoulder the financial burden of suspending disconnections for an extended period by reallocating costs to other customers, we think another crucial service offers a more apt analogy to demonstrate the applicable economics and policy considerations: grocery stores. Many of us have come to rely more heavily on grocery stores for food as restaurants have temporarily shuttered or curtailed services, and like communications companies, they provide an important service. Despite grocery stores' important role, we are not aware of any serious proposals to require or encourage grocery stores to sell their products on credit without significant collateral when customers are unable to pay. Perhaps this reflects the basic intuition that even when a service is important, that fact does not relieve customers of their obligation to pay. Equally likely, it may also reflect the practical reality that when multiple providers offer a service, customers may switch from one provider to another, which undercuts the providers' ability to withhold service as a form of collateral on a customer's debt obligation. Indeed, an approach requiring grocery stores or other important businesses to sell on credit would be counterproductive as it would discourage investment in businesses that might be considered vital. And perhaps for that reason, public policy has addressed access to grocery stores through a different avenue by providing a social safety net to ensure that customers who are unable to pay have access nevertheless. (17)

RECOMMENDATIONS ON APPROPRIATE COVID-19 POLICY RESPONSE FOR COMMUNICATIONS SERVICES

Policymakers can simultaneously balance the need for continued robust communications services to satisfy all customers' requirements with the desire to provide relief to customers in financial distress because of the pandemic. As part of that balance, we first emphasize that policymakers should be careful not to treat communications companies as the primary source of funding to protect customers who cannot pay their bills by imposing mandatory disconnection suspension policies as utilized in the regulated utility sector. Unlike utilities, these companies cannot recoup any portion of the costs of such policies through an existing regulatory process. Consequently, if a disconnection suspension policy lasts too long or is used by too many customers, the financial positions of the companies will deteriorate more rapidly as compared to a regulated utility where regulators have established constructive cost recovery treatment for attendant costs. This potential for material and fast-moving financial erosion of communications companies should concern policymakers for the exact same reasons we articulated in our prior paper addressing the energy sector—these companies incur significant costs in assuring their networks are reliable, and without a strong financial position, the stability of these networks may unravel at a time when they are needed most.

To that end, the Keep Americans Connected Pledge and its subsequent extension to June 30 strikes a reasonable balance. It encourages companies to shoulder the burden to the extent of their ability for a substantial (but known) period of appropriate duration. By striking this balance, the Pledge does not undermine the ability of these companies to continue providing robust service when we need it most. In some cases, companies have been able to voluntarily shoulder a heavier burden based on considerations and circumstances specific to their business.

17. For example, the Supplemental Nutrition Assistance Program (SNAP) provides direct funding to households meeting income and resource requirements to purchase food. Moreover, in the communications sector, the FCC's Lifeline program has played an analogous role.

For example, Comcast, AT&T, Verizon, and T-Mobile have announced various programs and offers that exceed the Pledge. (18)

But asking or even mandating that companies extend pledges for extended or indefinite periods does more harm than good. Without more data on the number of customers requiring COVID-19 related assistance, it is impossible to say how much revenue companies are likely to lose from customer nonpayment. Moreover, of the more than 750 companies that undertook the Pledge's commitments, not all are large enough to carry the same financial burdens over longer timeframes that other companies might be able to bear. And even for the largest of these companies, we must be careful that an effort to protect customers unable to pay does not hamper the needed ongoing network investments, especially over a 12 to 18-month time horizon, to assure quality and robust network performance for all, both during the current crisis and going forward.

In our view, policymakers should give communications providers space to develop and adjust their business plans so that they may continue serving their customers' needs both now and into the future. The bottom line, however, is that policymakers should dig past the superficial similarities between regulated utilities and communications services. Failure to do so may undermine the ability of those companies to serve all their customers right when they are needed most. Policymakers must avoid making a bad situation even worse.

18. See, e.g., *COVID-19: Our Response*, AT&T, <https://about.att.com/pages/COVID-19.html#consumers> (last visited May 19, 2020); *Comcast Response to COVID-19*, COMCAST, <https://corporate.comcast.com/covid-19> (last visited May 19, 2020); Allen St. John, *ISPs Raise Speeds and Suspend Data Caps in Response to the Coronavirus Pandemic*, CONSUMER REPORTS (Mar. 23, 2020), <https://www.consumerreports.org/internet-providers/isps-respond-to-coronavirus-raise-speeds-suspend-data-caps-keep-america-connected-pledge/> (describing steps taken by internet service providers like removing data caps and increasing speeds in response to the pandemic).