Insight

Net Neutrality Refresher

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Executive Summary

- "Net neutrality" is the idea that Internet users should be free to access the content and services of their choosing, and that internet service providers shouldn't unfairly discriminate among content and service providers.
- Despite general agreement among relevant stakeholders on the core principles of net neutrality, implementation of these principles has driven stark debate, primarily regarding how broadband should be classified.
- The Federal Communications Commission (FCC) could return to a Title II (of the 1934 Communications Act) classification under Democratic leadership, but with Title II comes a swath of regulations designed for utility telephony that would be ill-suited for broadband internet.
- Congress can step in to resolve the issue, codifying the core principles of network neutrality without the extraneous regulation and uncertainty that come with reclassification of broadband as a Title II service.

Introduction

The net neutrality debate never seems to go away, and it is likely that we will revisit it soon.

Generally speaking, "net neutrality" is the policy that internet users should be free to access the content and services of their choosing, and that traffic-management or interconnection practices that discriminate unfairly among edge services, such as tech companies, should be prohibited. For example, if an ISP decided that video services like Netflix were a waste of time and prevented users from accessing them, that discrimination would negatively affect consumers and violate the core principles of internet freedom. In recent years, the FCC has explored a variety of options to create rules enshrining these principles and using

everything from transparency requirements with Federal Trade Commission (FTC) enforcement to strict common carrier regulations, which has, in turn, sparked much public outcry.

Despite the heated conversation around the topic, the general principles of network neutrality aren't as controversial as one might imagine. Most parties agree that ISPs shouldn't block lawful traffic or unfairly limit an edge provider's ability to reach consumers. And even the staunchest net neutrality advocates acknowledge that ISPs should be free to manage bandwidth consumption and ultimately "police what they own."

The net neutrality issue mainly comes down to the specific regulatory model used to implement the rules. In practice, any net neutrality regulation creates numerous issues both with the regulations themselves and, more important, the classification that comes with it. As a result, despite numerous FCC rulemakings on the subject, the FCC may yet again revisit net neutrality regulation in the new year if Democrats approve the nomination of a third Democratic commissioner; this would give Democrats the majority necessary to bypass Republican objections and implement their preferred version of net neutrality.

This primer provides a refresher on the history of the debate as well as the implications of the 2017 Restoring Internet Freedom Order, when the FCC most recently acted on the issue. As the FCC explores different options for regulation, it will be critical for lawmakers to carefully consider the potential impact of its actions on the broadband ecosystem.

Net Neutrality vs. Broadband Classification

If the principles of net neutrality are widely accepted, why does the FCC keep revisiting the issue and why does it spark so much outrage? Broader than the issue of net neutrality is the question of broadband classification, and understanding this distinction informs why this debate has persisted.

The Communications Act of 1934 has a variety of different regulatory regimes for different services. Regulating broadcast television, for example, differs significantly from regulation of cable video. Key here are Title I and Title II of the Act. Title I covers so-called information services, or more practically, services outside of the core network that offer "the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Title II covers telecommunications services, which are those services that allow "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

Broadband has traditionally been treated as a Title I information service, and in 2010, the

FCC adopted rules using Title I's Section 706 that prohibited blocking and unreasonable discrimination by ISPs. The D.C. Circuit Court struck down these rules, however, holding that they treated broadband providers as common carriers. If the FCC wished to pass strong rules prohibiting blocking or discrimination, then it could only do so if broadband was a Title II service.

In 2015, the FCC faced two choices: 1) Pass less stringent protections that still restricted the ability of ISPs to block lawful traffic while maintaining Title I classification; or 2) reclassify broadband as a Title II service to impose stricter regulations that treated broadband as a common carrier. Despite initial indications implying the agency would retain the Title I classification, after pressure from the White House and a timely segment from Last Week Tonight, the FCC decided instead to reclassify broadband as a Title II service. In doing so, the FCC imposed rules that went beyond the 2010 order, enacting restrictions on paid prioritization and a general conduct standard that gave the FCC broad authority to police the practices of ISPs.

After a change in administration led to a Republican-led FCC, the Commission reversed course back to a Title I approach, choosing to forgo rules against the blocking of traffic and instead relying on transparency requirements with Federal Trade Commission Section 5 authority to enforce the promises to consumers. This decision was seen as an abdication of authority by many prominent Title II proponents who wish to see the FCC retain its role in regulating broadband ISPs.

Implications of Reclassification

While this all sounds relatively mundane, classification decisions can lead to drastic differences in outcomes. By relying on Title II to impose restrictions on blocking or unfairly discriminating traffic, the FCC would open the door for a wide array of future regulation on broadband.

Because Title II was designed to regulate utility telecommunication services, many of the provisions could drastically limit potential profitability of broadband network. For example, Section 201 prohibits unjust prices and Section 204 allows the FCC to set rates when the rates are found to be unjust. This rate regulation makes some sense when applied to monopoly legacy voice networks, but fails to encapsulate the distinctions between broadband and telephone networks. If a broadband provider, for example, can't make a return on profit, it will have less incentive to improve the network to offer a more competitive service than its rivals.

Clearly, this is well beyond the principles of net neutrality, but the two are inextricably

linked when net neutrality regulation involves reclassification. In the 2015 order, the FCC tried to address this issue by using its forbearance authority to limit the applicability of many Title II provisions to broadband ISPs. If the FCC revisits classification and applies the same forbearance, however, any future FCC could simply reverse course and elect not to forbear specific Title II provisions. As courts have explained, a regulatory agency must show that there is a good reason for the new policy, but does not need to show the new policy is better than the old one. Therefore, while there is still a regulatory hurdle for the FCC, if broadband is reclassified as a Title II service, the door would swing open for a revisitation of the forbearance in the initial decision. Considering the White House alluded to this possibility in an executive order over the summer, broadband providers will undoubtedly worry about potential expansion.

Practical Effects of Net Neutrality Regulation

Apart from the potential outcomes of reclassification, the FCC's recent policy changes can help inform the likely practical outcomes of reclassification.

Proponents of Title II reclassification argue that the transparency regime with FTC enforcement inadequately protects consumers and leaves the FCC with limited authority to regulate broadband, even when harms occur. Yet in the four years since the Restoring Internet Freedom order, the main case proponents cite (Verizon throttling firefighters during California wildfires) would have still occurred under the 2015 Title II regime. As it turned out, the fire department had purchased a plan inadequate for its needs. Verizon quickly made changes to its policies to prevent similar occurrences for public safety officials in the future, but nothing Verizon did violated net neutrality principles or the 2015 order.

Even with the additional authority that Title II would have granted the FCC, the outcome may not be what proponents envision. As TechFreedom has argued, strict Title II regulation may have prevented Verizon from quickly addressing the problem: "Had the Title II regime been in force, and the services provided deemed to be 'telecommunications services,' Verizon's new offerings would have had to undergo lengthy internal regulatory review to determine whether they might run afoul of some aspect of the 2015 Order." Instead, the transparency requirements, as well as public pressure, quickly led to action by Verizon.

Critics of Title II focus primarily on investment effects: Stringent regulation and uncertainty regarding future application of Title II provisions add risk to deployment, limiting the investment by providers into broadband infrastructure. George Ford, the chief economist of the Phoenix Center, used difference-in-difference event study methodology to examine investment effects from reclassification, using 2010 as a starting point under the theory that the FCC introduced the potential for reclassification at that point. The study examined

whether broadband investment deviated significantly from other previously correlated industries, which it found to be the case. As Ford explains, "no negative investment consequences are found for the period where Net Neutrality was enforced via the FCC's 'Four Principles' to promote an Open Internet, suggesting it is reclassification—and not the principles of Net Neutrality—that are reducing investment." While some early investment numbers indicate the Restoring Internet Freedom order has led to increased investment, empirical economic analysis is still needed to see the full effect.

Role for Congress

The reclassification issue stems from inaction by Congress. The last major change to telecommunications law came in 1996, and little was said on the topic of broadband Internet, which was in its infancy at the time. Neither Title I nor Title II perfectly fit broadband, and as a result, regulators must attempt to shoehorn the service into a classification that could come with significant harms. Further, the lack of clear congressional direction has led to uncertainty from the courts, especially regarding how far the FCC should go under a Title I approach without treating ISPs as a common carrier. Congress can step in to resolve this issue.

The simplest solution for Congress should they wish to divert from the 2017 Order would be to craft strong net neutrality protections without reclassifying broadband as a Title II service. This would allow Congress to ban the blocking of legitimate traffic or prohibit unfair discrimination of edge providers without adding uncertainty and risk associated with a vague conduct standard or fear that additional regulation may be coming down the pike. Congress could also develop an entirely new title for broadband under the Communications Act, but considering the political weight necessary to do so, focusing on the principles of net neutrality would be a better starting point.

Conclusion

With a Democrat-led FCC, net neutrality will likely make its way back into the limelight. Regulators should understand that the real disagreement comes not from the principles of net neutrality but instead the classification of broadband under the Communications Act. While Title II classification would give the FCC the authority to impose stricter net neutrality rules, it would also give the FCC broad authority to go beyond these principles and impose utility-style regulation on broadband. This, in turn, adds uncertainty and risk into deployment, limiting investment without providing significant benefits that couldn't be achieved with a Title I regime.