Insight

Primer: Network Neutrality and Title II

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Network neutrality is back in the public eye after the administration endorsed Title II reclassification to regulate the Internet as a utility. Network neutrality is the idea that Internet Service Providers should not slow down, speed up, or block data as it is routed from its content originator to end users. Title II reclassification would be the most regressive approach that the Federal Communications Commission's (FCC) could take to legally mandate network neutrality. Reclassification's costs to consumers, investment, and the rule of law far outweigh any purported benefit, especially since other options exist to ensure consumer welfare on the Internet.

Why Is Network Neutrality An Issue now?

The President's endorsement of Title II reclassification just after the election culminated a year in technology policy that was dominated by network neutrality. The decision in *Verizon v FCC*, and the proposed rules by the FCC in May, sparked countless news articles and advocacy campaigns focused on the concern that Internet would be fundamentally changed. The Commission is likely to take further action on network neutrality in the beginning of 2015.

The FCC's last attempt to formally implement network neutrality came through the 2010 Open Internet Order, which included three rules: a transparency rule that would require ISPs to disclose their network management practices; a no blocking rule that would ensure lawful content, applications, services, can be accessed on an ISP; and a no discrimination rule that would not allow fixed broadband providers to unreasonably discriminate. Yet, Congress never gave the FCC these explicit powers. Unsurprisingly, when the court decision came down in January of this year in the *Verizon v FCC* case, the FCC lost in much the same way that it did in an earlier court decision. As noted in both cases, accepting the agency's legal rationale would "virtually free the Commission from its congressional

tether."[1]

The decision by the DC Circuit hinged on an interpretation of the Communications Act that divides communication services into Title I and Title II for regulatory purposes.[2] Title I follows precedent set in the 1970s to lightly regulate broadband and separate it from telephone services, which are governed as though they are common carriers under Title II. As the court stated in *Verizon*, "the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers."[3] In this same decision, however, the DC Circuit gave the agency wide latitude to regulate the Internet through Section 706 of Telecommunications Act of 1996.[4]

Armed with this power, the FCC proposed new rules in May, which included only minor changes from the 2010 Open Internet Order. The big distinction between the two is that the older standard said that ISPs "shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service," while the newer version requires that ISPs "shall not engage in commercially unreasonable practices."[5] It was an important legal distinction that would likely survive court scrutiny. In the aftermath, confusion of the law and FCC authority has lead to a misguided movement pressing for reclassification. Upending decades of precedent by taking broadband providers from their current Title I classification and applying Title II regulation is the worst way to ensure consumer welfare.

Title II Reclassification Will Not Solve The Problem

Many, including the White House, have touted Title II reclassification as a way to ensure that there is no discrimination of any kind. Yet nothing in the letter of the law actually limits this practice.[6] In reality, networks must manage data as it passes over their network in order to check for spam and perform other quality of service operations. For example, AT&T's U-Verse, Verizon's FiOS, and Google's Fiber offerings rely on an Internet-based infrastructure that prioritizes TV programming from regular broadband traffic.[7] Exceptions have also been given to wireless services because of the significant engineering requirements to ensure fast speeds over cellular service.

Moving to a Title II world would be a laborious legal task for the FCC that would ultimately consume years in court and throw the Internet industry into confusion. Additionally, Title II is stuffed with price regulations and mandates designed to regulate telephones. All of these rules would have to be worked out through the normal agency procedures and the courts.

What would this end world look like for web sites? As the law currently stands, edge providers like Google, Netflix, and others would be *required* to make direct payments to

ISPs.[8] It is difficult to see how consumers and the vibrant content ecosystem on the Internet would win in this world. For the ISPs, the mandates would be as costly as they were for telephone companies.[9] Economists have estimated that Title II reclassification would come at the expense of up to $45.4 billion of new investment over the next five years.[10]

To their credit, both the President and other Title II advocates want to pluck out these costly mandates by using the FCC's unique power to strike out laws. But the Communications Act is not a choose-your-own adventure book. As a former FCC Wireline Bureau chief has explained, the agency would likely be legally required to apply the entirety of Title II and its problems to broadband.[11] Worries about reclassification are not just limited to a few legal scholars, but have been expressed by the FCC and the Supreme Court.[12]

The pain won't stop there. Title II would give the states new taxation powers, resulting in an estimated $15 billion of new taxes a year.[13] Moreover, online companies like Facebook and Google might also come under FCC jurisdiction for the first time. Legal definitions outlining Title I services make it difficult to delineate where an ISP ends and an content company begins since both offer services "for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."[14] These industries stand to lose investment and potential rival content start ups. In total, Title II could put into nearly $1 trillion of GDP and 2.5 million jobs under a new regulatory regime.[15] Ironically, in a zeal to ensure broadband innovation through regulation, Title II reclassification would do the exact opposite.

Network Neutrality Solutions

Many options are on the table for network neutrality, including the plan that FCC Commissioner McDowell laid out in his dissent of the 2010 Open Internet Order:

> "In lieu of new rules, which will be tied up in court for years, the FCC could create a new role for itself by partnering with already established, nongovernmental Internet governance groups, engineers, consumer groups, academics, economists, antitrust experts, consumer protection agencies, industry associations, and others to spotlight allegations of anticompetitive conduct in the broadband market, and work together to resolve them. Since it was privatized, Internet governance has always been based on a foundation of bottom-up collaboration and cooperation rather than top-down regulation. This truly 'light touch' approach has created a near-perfect track record of resolving Internet management conflicts without government intervention."[16]

Advocates and top FCC brass have never been content with this approach even though it has built the underlying standards for the Internet. Instead, they have pressed for explicit

rules. If this were the ultimate goal, some have suggested using the agency's Section 706 power would largely serve this function without the regulatory burden of Title II. Yet, these approaches will ultimately yield inefficient outcomes because they will sweep up all business models into illegality without any concern for potential benefits.[17]

The legal development at the Federal Trade Commission (FTC), the agency tasked with ensuring consumer welfare, serves as a model for truly consumer centric enforcement. Beginning in the 1960s and 1970s, advances in economic understanding lead the FTC to move away from similarly strict rules like network neutrality regulation. Now it goes after bad actors once an actual harm has been committed. The FTC could apply its enforcement knowhow, but if broadband were reclassified then the FTC would lose jurisdiction over parts of the Internet since there are carve outs for common carriers.[18]

All of this tees up a much larger role for Congress in the network neutrality debate. For one, it should consider cabining the FCC's power with Section 706, which has broad appeal even among strong network neutrality advocates.[19] Even more broadly, it should consider a comprehensive rewrite of the Communications Act to bring the law into the 21st century. The legal battles over network neutrality highlight the aging regulatory framework that needs reform. The Energy and Commerce Committee in the House has already launched the CommActUpdate to begin this long process, but it needs a much larger buy in across the board. In the meantime, a bill clarifying FCC power over Section 706 and giving the FCC narrowly tailored power could defer concerns, while helping reaffirm our longstanding tradition of light-touch regulation on the Internet.

Regardless of what happens from here, Title II is not the right path. The myriad costs to consumers, investment, and the rule of law far will be far more onerous than any benefit claimed by its advocates. There are better ways to protect consumers, which need to be pursued to ensure the good times continue for the vibrant Internet ecosystem.

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[1] http://1.usa.gov/12oltbf