Insight

The FCC Should Not Regulate Broadband as a Utility

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Executive Summary

- The Federal Communications Commission (FCC) has begun a network neutrality rulemaking to prevent broadband Internet access service (BIAS) providers from unfairly discriminating against applications such as Facebook and Netflix.
- Because the FCC argues it lacks the authority to pass network neutrality rules under the current regulatory framework for BIAS, it is proposing to reclassify broadband as a utility like voice telephony, giving the agency the legal authority to regulate how BIAS providers manage their networks; additionally, the FCC's reclassification push is likely to add heightened risk to broadband investment decisions by subjecting BIAS providers to a greater regulatory burden.
- Reclassification of broadband as a utility is unnecessary to promote an open Internet, and because it would result in the loss of investment in broadband networks by adding additional risk to investment decisions, would go against the FCC's goals of promoting public safety and national security, which depend on advanced networks.

Introduction

Last fall, the Federal Communications Commission (FCC) launched a rulemaking proceeding to reimpose network neutrality rules designed to prevent broadband Internet access service (BIAS) providers from unfairly discriminating against Internet traffic based on the application or service. While most agree on the merits of an open Internet – characterized by open access to online content with few restrictions or limitations – the FCC seeks to implement net neutrality rules by reclassifying broadband as a utility, giving the agency authority to impose more expansive rules. In fact, this authority would allow the FCC to regulate everything from privacy and interconnection to the rates BIAS providers charge. To

justify this change, the FCC argues that reclassification is necessary to promote an open Internet, as well as to promote public safety and national security.

In both initial comments and reply comments regarding this rulemaking, I explained why the FCC's plan would not fulfill either of these justifications. First, the light-touch framework that has largely governed broadband since its inception has led to the most robust Internet economy in the world. Second, by reclassifying broadband as a utility, the FCC would add additional costs and risk to any new investment decision. As BIAS providers invest less in their networks, both public safety and national security would be diminished, not strengthened, as the FCC claims. If the Biden Administration wishes to reclassify broadband as a utility, such regulations must be passed by Congress, and not the FCC, which lacks statutory authority.

FCC Rulemaking

The FCC rulemaking largely consists of two actions. First, the proposal to reclassify broadband as a Title II Telecommunications service. Second, the proposal of specific network neutrality rules designed to prevent BIAS providers from using their supposed monopoly power to harm edge providers and extract monopoly rents.

Currently, the FCC regulates aspects of BIAS under its Title I general authority. BIAS is an information service, and with some authority granted by Congress, the FCC can impose rules to promote the deployment and growth of the service. For example, the FCC can impose transparency rules on BIAS providers to ensure that consumers know how the BIAS provider will manage traffic or the fees that will come with using the service. The FCC cannot, however, pass rules that would regulate BIAS as a common carrier, as previous attempts to impose strict no blocking/no throttling rules were found by the D.C. Circuit to exceed the agency's authority under a Title I approach.

To implement strict rules, therefore, the FCC believes it needs to reclassify BIAS as a Title II telecommunications service, a designation designed for utility voice telephony. Legally, the FCC can likely reclassify broadband because the definition of telecommunications service is ambiguous and courts generally defer to agency interpretations of its governing statutes, though the revitalization of the major questions doctrine and growing skepticism of agency deference makes a legal challenge likely. If the FCC successfully reclassifies broadband as a Title II telecommunications service, the agency can apply to BIAS all the provisions of Title II (which includes provisions on rate regulation, privacy, pole attachments, universal service, and a wide range of other issues). To justify this change, the agency primarily cites the promotion of an open Internet, public safety, national security, and user privacy.

In addition to reclassification, the FCC also proposes the adoption of specific rules preventing the blocking, throttling, or paid prioritization of content, as well as some additional transparency rules. Further, to the extent that some conduct may not technically violate these bright-line rules, the FCC proposes to impose a general conduct standard that would prohibit practices that unreasonably interfere with or disadvantage consumers or edge providers. Taken together, the new rules would give the FCC significant flexibility in policing the traffic management of broadband networks.

Title II Is Unnecessary to Promote an Open Internet

The current light-touch framework already promotes an open Internet, and proponents of reclassification have been unable to provide one example in which reclassification would prevent harms that the current framework does not.

The concept of network neutrality stems from an antitrust theory that BIAS providers have monopoly power and the incentive to extract monopoly rents, but BIAS providers compete more than ever and lack a financial incentive to degrade their customers' service. Cable, fiber-to-the-home, fixed wireless, and even low Earth orbit (LEO) satellite constellations (which are quickly densifying their networks and making equipment more accessible to consumers) vigorously compete in the traditional home broadband market, while mobile providers must compete with traditionally fixed providers offering mobile services to their consumers using a mix of commercial wireless networks, licensed local networks, and unlicensed hotspots. More than ever, if consumers don't like the service a company provides, they can find alternatives.

Unsurprisingly, the hyperbolic claims from previous reclassification debates never came to pass. Instead, proponents primarily cite the case of Santa Clara Fire Department, which had its data throttled when it hit a data cap during wildfire responses. The situation had nothing to do with network neutrality, however, and no actions by Verizon would have violated the new proposed rules: The Santa Clara Fire Department had simply purchased a data plan that didn't suit their needs as it did not provide enough data. While Verizon misapplied its policies, and a failure did occur, it was a failure unrelated to reclassification.

Instead, as even some proponents of Title II reclassification have pointed out, the current light-touch framework has led to widespread growth of the Internet economy. Subscription-based streaming services, for example, have doubled their users, and just generally the median download speeds have increased by over 150 Mbps over the past seven years. Further, allowing BIAS providers to favor different types of traffic could improve the quality of these services, and reversing course now could jeopardize the growth of the open Internet, harming both consumers and the edge providers benefiting from the robust

broadband networks in the United States.

Title II Reclassification Can Harm Public Safety, National Security, and Other FCC Goals

Because the Internet has remained open under the current framework, the FCC relies heavily on public safety and national security to justify reclassification and its new rules. Title II does give the FCC more authority to require BIAS providers to act in cases of emergency, as well as target foreign threats to our networks. But what the FCC ignores is the costs that come with Title II and how those costs can hinder network improvements.

Research from the Phoenix Center shows that previous attempts to regulate BIAS through Title II reduced investment by around 10 percent below expected over the past decade, led to a reduction of total employment by 195,600 jobs, and reduced gross domestic product by $1.45 trillion over 10 years. In 2017 alone, for example, the capital investment in broadband networks was $10.7 billion below the forecast for what investment would have been absent Title II reclassification, though only $3.1 billion below the linear trend. The Phoenix Center also accounted for more broad infrastructure investment in the economy in another analysis, finding a "negative and statistically significant effect on investment resulting from the implementation of Title II regulation in the *2015 Open Internet Order.*"

This loss of investment directly impacts public safety and national security. Investment leads to increased coverage range, which means more consumers and responders can access potentially time-sensitive information. Investment also leads to increased bandwidth and reliability, which is critical when demand spikes during a disaster. Moreover investment helps the United States outcompete international rivals, a key aspect of our national security as Chinese equipment continues to infiltrate networks across the globe.

Congress Should Grant the FCC More Authority if Necessary

Finally, if BIAS providers actively harm the open Internet and additional regulatory action is necessary, Congress should grant the FCC the authority necessary. The agency cannot unilaterally expand its authority, and the revitalization of the major questions doctrine casts doubt on the agency's authority here at all. For example, Congress granted the FCC the authority to regulate pole attachment rates for telecommunications services, but broadband-only providers likely cannot benefit from these rates because the statute only applies to BIAS providers who also offer telecommunications. While as a policy matter the pole attachment rules should extend to BIAS-only providers, the FCC should not reclassify BIAS simply to shoehorn these providers in; instead, Congress should make it clear that the provision extends to BIAS as well.

Conclusion

While most would agree with the general principles of network neutrality and the open Internet, the proposed rules would not achieve the goals the FCC seeks to meet. Instead, reclassification would harm investment and the consumers who benefit from that investment. The FCC should abandon its proposed rules and continue the light-touch framework that has led to the most robust Internet economy in the world.