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Revisiting Net Neutrality

by

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I. Introduction

The Federal Communications Commission is poised to repeal its 2015 Title II reclassification order (*Title II Order*).¹ That decision subjected cutting-edge broadband providers to a common carrier regime originally designed to discipline the old Bell Telephone monopoly, as a means of satisfying President Obama’s request for “strong net neutrality rules” to govern the telecommunications network of the future. This past May, the agency circulated a Notice of Proposed Rulemaking that seeks to reverse that decision and restore the “light touch” regulatory regime that governed most broadband providers since the Internet’s inception.²

On the eve of that action, which could occur as early as next month, it is worth revisiting the arguments offered in support of the 2015 *Title II Order*. At base, net neutrality seeks to prevent Internet service providers from interfering in upstream markets for Internet-based content and applications. But this harm was both largely conjectural and adequately addressed by existing antitrust law. The order’s prophylactic rules thus provide little additional protection, while barring potentially consumer-beneficial innovation and implicating broadband providers’ First Amendment rights. Moreover, the Title II reclassification required to support the rules was both bad law and bad policy.

II. The Specious Case for Net Neutrality

Although “net neutrality” is a somewhat amorphous term, most would agree that, at its core, it represents the idea that broadband providers should allow customers to access all lawful Internet content and should treat all traffic the same regardless of source or content. The movement focuses on broadband providers because of their allegedly privileged place in the Internet ecosystem: in the words of former FCC Chairman Julius Genachowski, broadband companies control the “onramps to the Internet” and thus are supposedly in a unique position to shape the flow of information online.

Initially, net neutrality seemed driven by the concern that a broadband provider would suppress Internet content that was critical of the company or with which the company disagreed. But this was a spurious concern, as no Internet services provider ever did so, and any company that would attempt such a move would be pilloried in the press. Perhaps surprisingly, the first significant instance of a company suppressing Internet speech with which it disagreed came this year, with the silencing of the neo-Nazi news site *Daily Stormer* following the Charlottesville Unite the Right Rally. But the culprit was not a broadband provider; it was instead GoDaddy and Google (which refused hosting services)³ and Cloudflare (which refused to protect the site from denial-of-service attacks).⁴ The *Daily Stormer* incident illustrates that there are multiple pressure points in the Internet ecosystem, which calls into question the assumption by net neutrality advocates that broadband providers pose a unique threat to Internet content.

Net neutrality proponents also feared that broadband providers would engage in anticompetitive conduct. One concern is that broadband providers would exploit their positions in broadband markets to give affiliated companies (such as cable services) an unfair advantage against Internet-based rivals (like Netflix). And even without anticompetitive intent, the 2015 order found that broadband providers have “powerful incentives to accept fees from edge providers” to exclude competitors or secure priority delivery.⁵ The order feared that such offerings would distort competition among edge providers by giving advantages to well-funded companies that can afford priority delivery over those who lack the resources to do so.

Antitrust scholars recognize this as a classic example of vertical foreclosure. They also recognize that vertical agreements rarely have negative effects on consumer welfare.⁶ One significant empirical study explains that according to the data, “efficiency considerations overwhelm anticompetitive motives in most contexts” and even in natural monopolies or oligopolistic markets, “the evidence of anticompetitive harm is not strong.”⁷ Therefore “under most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms’ but also from the consumers’ point of view.”⁸ As law professor and former FTC Commissioner Joshua Wright explains, “the *economic theory* literature establishes that vertical restraints may be anticompetitive, but the *empirical* literature clearly demonstrates that they most often are not, and are instead generally procompetitive.”⁹

Experience in the broadband industry supports Commissioner Wright’s observation. For all the *strum und drang* about net neutrality, one can identify only two instances of arguably anticompetitive behavior by Internet access providers. In 2005, Madison River Communications

paid a \$15,000 fine to settle FCC charges that it blocked third-party VOIP services from operating on its broadband network, allegedly because these VOIP providers competed against the company's traditional telephone service.¹⁰ Three years later, the FCC fined Comcast for throttling BitTorrent traffic on its broadband network. While Comcast claimed throttling was necessary to prevent a BitTorrent user from overwhelming the limited upload bandwidth shared within a local area, critics argued that the company sought to limit traffic in copyrighted movies (which comprised the bulk of BitTorrent traffic at the time) to protect the company's video-on-demand products.¹¹ One could argue that, with net neutrality never far from the Commission's mind, the threat of potential regulation may have deterred other anticompetitive abuses.¹² But the fact remains that two complaints in twenty years reflects a healthy industry, not one in need of regulatory intervention. As critics often claimed, net neutrality was always a solution in search of a problem.

Moreover, it is easy to imagine instances wherein paid prioritization might be helpful to consumers. Different Internet applications have different sensitivities to congestion. A consumer is unlikely to notice trivial congestion-related delays when loading an email or a webpage. But such delays can significantly erode the quality of a video stream or videoconferencing service. Allowing such applications to insulate themselves from congestion would improve the user experience for these consumers without adversely affecting consumers of congestion-insensitive services. In this way, paid prioritization could improve the overall Internet experience: the price mechanism signals which applications are most susceptible to congestion and allocates them greater bandwidth during congested times – just as prices allocate scarce resources in most other parts of a capitalist economy.

One of the Title II Order's biggest flaws is its failure to appreciate the possibility that some – perhaps many – forms of prioritization may in fact benefit consumers. Though the 2015 order acknowledges that “some forms of paid prioritization could be beneficial,” it nonetheless finds that “the threat of harm is overwhelming” and “simply too great” to allow experimentation.¹³ The order's *per se* prohibition on paid prioritization is thus a policy choice to block potentially consumer-welfare-enhancing business models because of an overwhelming fear of anticompetitive abuse. In this way, the net neutrality rules are even more stringent than the requirements that Title II placed on the old Bell Telephone monopoly, which could offer different tiers of service as long as each tier was available at tariffed rates.¹⁴

Indeed, even the post office – America's quintessential “common carrier” – can offer paid prioritization: first class mail is available to everyone, but those who need their packages delivered faster can pay a premium for priority or next-day delivery. Net neutrality's refusal to offer similar flexibility to broadband providers because of a paranoid risk of anticompetitive abuse is somewhat bizarre, especially since antitrust law already exists to protect consumers from the harm that proponents most fear. In essence, the law prohibits a potentially significant amount of pro-consumer behavior in the interest of securing some (undefined) marginal consumer protection above and beyond that already afforded by antitrust.

III. The *Title II Order* and First Amendment Rights of Broadband Providers

Broadband providers can – and have – argued that strong net neutrality rules violate the First Amendment. The Supreme Court has long recognized that speech conduits such as newspapers and cable providers have a First Amendment right of editorial control that limits the government’s ability to force them to deliver speech against their will.¹⁵ Some commentators have argued that because broadband providers simply transmit messages requested by consumers, they do not make editorial decisions and therefore are not analogous to these other entities.¹⁶ But when presented with this argument, the D.C. Circuit court reviewing the 2015 order curiously sidestepped the question. It held that because, by definition, broadband providers covered by the 2015 order held themselves out as offering access to all or virtually all Internet endpoints, it does not violate the First Amendment to hold them to that commitment.¹⁷ Interestingly, the court explained that “insofar as a broadband provider might offer its own content...separate from its internet access service, the provider would receive the same protection under the First Amendment as other producers of internet content.”¹⁸

In his opinion concurring in the denial of rehearing *en banc*, panel judge Sri Srinivasan reiterated that “an ISP that offers subscribers a curated experience by blocking websites lying beyond a specified field of content” or otherwise “making sufficiently clear to potential customers that it provides a filtered service” would exercise editorial discretion and would lie outside the scope of the FCC’s rules.¹⁹ This consumer protection-focused view of net neutrality suggests that an ISP can behave in a non-net-neutral fashion as long as it makes clear to consumers that it is doing so. While this understanding is somewhat at odds with the beliefs of the FCC and most net neutrality advocates, it might have been necessary to avoid a more serious First Amendment question. But the court’s discussion of the First Amendment issue begs the question what work the rules are doing if a company can opt out of the legal regime merely by stating clearly that it does not offer indiscriminate service to all or nearly all Internet content.

IV. The Harm of Title II Reclassification

Perhaps the most controversial portion of the 2015 order was the Commission’s decision to reclassify broadband providers as Title II common carriers. The Commission had previously gone all the way to the Supreme Court to defend its determination that broadband Internet access providers were not Title II common carriers, but were instead information service providers under Title I and were, at most, lightly regulated.²⁰ This was the regime that governed most Internet service providers from broadband’s infancy. But in *Verizon v. FCC*, the D.C. Circuit held that the Commission could not prohibit all paid prioritization under Title I, because this would effectively impose common carriage obligations on non-common carriage companies in violation of a different portion of the Communications Act.²¹ The court explained that a prohibition that left room for individual companies to bargain would have been permissible, and on remand the FCC Notice of Proposed Rulemaking favored this path. But then-President Obama declared his support for “strong net neutrality rules” and recommended the agency avoid the problem identified by the *Verizon* court by reclassifying broadband Internet service providers as Title II common carriers – a decision that the D.C. Circuit ultimately upheld in *United States Telecom Association v. FCC*.

It was this reclassification decision, more than the net neutrality rules themselves, that the reconstituted Commission has taken issue with in the 2017 Notice of Proposed Rulemaking. And with good reason. Although the D.C. Circuit properly followed the Supreme Court's earlier holding that the statute was ambiguous about the proper classification of broadband Internet access, broadband does not fit well within the Act's definition of a Title II service. The Act explains that "telecommunications," providers of which are governed by Title II, is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."²² By comparison, an "information service," which falls under Title I, is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."²³ As the 2017 NPRM explains, broadband access more closely fits the latter category. Consumers use broadband access to engage in activities such as "generating" and "making available" blog posts or status updates, "storing" and "utilizing" an address book or grocery list, or "transforming" and "processing" filtered photographs.²⁴ Information transmitted via a broadband connection is not "between or among points specified by the user." Routing decisions are instead chosen by network architecture, with the user having little to no knowledge of where the information is stored and instead dependent upon functions such as DNS lookup and local caching to retrieve desired content.²⁵ In short, broadband service is "the offering of a capability" to manipulate information stored online, which falls much more comfortably into Title I.

Moreover, the Commission notes that the imposition of a complex and onerous regulatory regime is likely to deter investment in broadband networks. The Commission cited, among other studies, an analysis by Free State Foundation Research Associate Michael Horney showing that broadband investment slowed by \$5.6 billion since the imposition of the Title II regime in the 2015 order.²⁶ Other analysts have reached similar conclusions.²⁷ Free Press, an ardent net neutrality supporter, has challenged these findings and produced its own report showing an increase in spending,²⁸ though as critics note, this study improperly includes non-broadband spending such as AT&T's capital investments in Mexico and costs associated with its purchase of DirecTV.²⁹

But the broader harm of reclassification is the damage done to innovation in the broadband space. The public utility regime contemplated by Title II works best in stodgy, unchanging industries like water delivery that uneventfully fulfill the same service to consumers each year. These rigid rules are ill-suited to an industry as dynamic as the Internet ecosystem. Title II regulation exhibits a status quo bias, a belief that the way the Internet currently runs is the way it should always run, and for all people. Perhaps in the early days of the Internet, when consumers were mostly using their network connections for the same basic activities of email and web surfing, a one-size-fits-all, static access model posed less of a risk to innovation. But as more of our daily activities move online, the broadband user base has grown both more heterogeneous, meaning the same old one-size-fits-all model may not be optimal for all users.

As a real-world example, many countries feature wireless providers that offer unlimited talk, text, and Facebook or Twitter access for a lower rate than a plan incorporating all Internet content. I would love such a phone for my teenage daughter, who routinely exceeds the monthly data allowance of our shared plan and spends 95% of her time online using Instagram. So when

Sprint teased a similar plan in the United States, I was interested. But the plan immediately came under fire by net neutrality advocates for offering only certain social media applications rather than all lawful Internet content, and ultimately Sprint dropped its plans. Similar criticism faced T-Mobile's decision to zero-rate music and later to zero-rate low-resolution video. Yet these plans were critical to T-Mobile's successful effort to gain market share and lure away customers whose needs were imperfectly satisfied by a traditional mobile broadband plan.

By biasing the status quo, Title II classification discourages this type of experimentation by broadband Internet access providers. And the amount of regulatory authority afforded the FCC by Title II could stifle a dynamic market for broadband access. Though the Commission has forborne from applying several parts of Title II, these forbearances are a notice-and-comment exercise away from repeal. Title II thus hangs like a Sword of Damocles over broadband providers, and the Commission is absolutely right to propose freeing them from this ongoing threat.

V. Conclusion

Ultimately, the ongoing seesaw battle over net neutrality is a problem that Congress created. As the late Justice Antonin Scalia wrote, “[i]t would be gross understatement to say that the...Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.”³⁰ The Communications Act's unnecessarily obtuse language and vague definitions, coupled with its relative lack of reference of broadband networks, opens the door for successive agencies to interpret and reinterpret Congress's meaning. As Justice Scalia noted, this “is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.”³¹

But if the problem ultimately lies with Congress, so too does the solution. For the last two decades, the Act has led the FCC to develop a makeshift “law of the Internet” from the detritus of the “law of the telephone” regime. Rather than forcing the agency to continue hammering square pegs into round holes, Congress should settle definitively the scope of the Federal Communications Commission's authority to regulate the primary communications network of the early 21st century.

The Commission's 2017 NPRM is a positive step toward this final goal. It represents the next phase of an ongoing dialogue between the agency and the D.C. Circuit about the shortcomings of the current statute. By continuing this dialogue, the Commission is continuing to highlight this issue to Congress in the hope of prompting it to action. In the meantime, the proposed repeal of Title II reclassification will restore the light-touch regulatory framework that historically has governed Internet service providers, and which provides room for innovation and growth while the gears of the congressional machinery slowly begin to turn.

Although the NPRM left open the ultimate fate of the agency's net neutrality rules, I hope the final order will repeal the rules and again permit broadband providers to pursue innovative new business models for consumers, protected from anticompetitive harm and abusive practices by the same antitrust and consumer protection laws that govern consumers throughout the rest of the American economy.

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¹ Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (hereafter “2015 Order”).

² Restoring Internet Freedom, Notice of Proposed Rulemaking, 32 FCC Rcd. 4434 (2017) (hereafter “2017 NPRM”).

³ “Google cancels Neo-Nazi site registration soon after it was dumped by GoDaddy”. CNBC. Reuters. August 14, 2017, available at <https://www.cnbc.com/2017/08/14/godaddy-boots-the-daily-stormer-because-of-what-it-wrote-about-charlottesville-victim.html>.

⁴ “Daily Stormer: Cloudflare drops neo-Nazi site”. BBC News. August 17, 2017, available at <http://www.bbc.com/news/technology-40960053>.

⁵ 2015 Order ¶19 (quoting *Verizon v. FCC*, 740 F.3d 623, 645-646 (D.C. Cir. 2014)).

⁶ See James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 643–47 (2005).

⁷ Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629, 677 (2007).

⁸ *Id.* at 680.

⁹ Lindsey M. Edwards & Joshua D. Wright, *The Death of Antitrust Safe Harbors: Causes and Consequences*, 23 Geo. Mason L. Rev. 1205, 1243 (2016) (emphasis added); see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3B ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 756a, at 9 (3d ed. 2008).

¹⁰ *Madison River Commc’ns, LLC and Affiliated Companies*, 20 FCC Rcd. 4295, 4297 (2005).

¹¹ *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). The fine was vacated on appeal for lack of jurisdiction. See *id.*

¹² For this observation I am indebted to Blake Reid, who made this point in a Twitter conversation with me.

¹³ 2015 Order ¶ 19.

¹⁴ See Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029 (2012).

¹⁵ See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Turner Broadcasting Sys. Inc. v. FCC*, 512 U.S. 622 (1994); *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁶ See, e.g., Stuart Benjamin, *Transmitting, Editing, and Communicating: Determining What “The Freedom of Speech” Encompasses*, 60 DUKE L.J. 1673 (2011).

¹⁷ *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 741 (D.C. Cir. 2016).

¹⁸ *Id.* at 741-742.

¹⁹ *United States Telecom Ass’n v. FCC*, 855 F.3d 381 (Srinivasan, J., concurring).

²⁰ See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

²¹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

²² 47 U.S.C. § 153(50).

²³ *Id.* § 153(24).

²⁴ 2017 NPRM ¶ 27.

²⁵ *Id.* ¶29.

²⁶ Michael Horney, Free State Foundation, *Broadband Investment Slowed by \$5.6 Billion Since Open Internet Order* (May 5, 2017), available at <http://freestatefoundation.blogspot.com/2017/05/broadband-investment-slowed-by-56.html>.

²⁷ See, e.g., Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016), available at <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era>; George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix

Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2, available at <http://www.phoenixcenter.org/perspectives/Perspective17-02Final.pdf>.

²⁸ Free Press, Internet Service Providers' Capital Expenditures (Feb. 28, 2017), available at https://www.freepress.net/sites/default/files/resources/internet_service_providers_capital_expenditures_2013-2016_reported_as_of_2_27_17.pdf (noting a decrease in investment from 2015 to 2016, but claiming an increase in investment in the 2-year period of 2015–16 compared to 2013–14).

²⁹ See Hal Singer, Tracing AT&T's Capital Expenditures Over Time, <https://haljsinger.wordpress.com/2017/02/10/tracing-atts-capital-expenditure-over-time/>. The Free Press model also does not adjust for Sprint's changed accounting treatment of leased handset devices from an operating expense to a capital expense. See Hal Singer, 2016 Broadband Capex Survey: Tracking Investment in the Title II Era, <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/>.

³⁰ AT&T v. Iowa Utilities Board, 525 U.S. 366, 397 (1999).

³¹ *Id.*