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PERSPECTIVE

Internet regulation: full steam ahead?

By Bennett Ross

In an April 2014 blog post that outlined his vision for protecting the open Internet, Tom Wheeler, chairman of the Federal Communications Commission, expressed concern that "opening an entirely new [regulatory] approach … invites delay that could tack on multiple more years" before binding net neutrality rules are in place. Eschewing those concerns, Wheeler and his Democrat colleagues on the FCC are now poised to do something never done before — regulate the Internet under Title II of the Communications Act, which was enacted in 1934 but modeled after a regulatory regime crafted for the railroads in the 1800s.

Although the text of the proposed order has not been released publicly, the FCC has distributed a "Fact Sheet" that summarizes the chairman's proposal. While a host of unanswered questions remain, the proposed rules would prohibit blocking, throttling and "paid prioritization," would require greater transparency by broadband providers, and would apply to both mobile and fixed broadband providers. According to the Fact Sheet, the legal authority for the proposed rules would be Section 706 of the Communications Act as well as Title II, which would apply by virtue of the FCC's decision to reclassify retail broadband service as a telecommunications service under Title II, reversing more than a decade of commission precedent treating broadband as an unregulated information service under Title I.

In an attempt to downplay the significance of its reclassification decision, the proposed order would apply some key provisions of Title II but forbear from (i.e., not apply) most others. Of particular importance, however, the proposed order would apply Section 201, which prohibits unjust and unreasonable rates, acts, or practices, and Section 202, which prohibits unjust and unreasonable discrimination.

The Fact Sheet claims that the proposed order will make clear "that broadband providers shall not be subject to tariffs or other form of rate approval." However, this claim is misleading because, by virtue of the decision to apply Sections 201 and 202 to retail broadband services, broadband rates would be subject to FCC oversight.

For example, along with the enforcement provisions of Title II from which the FCC does not intend to forbear (Sections 206 through 209), Section 201 would empower the agency to regulate broadband rates without compelling the broadband provider to seek "rate approval" in the first instance. Specifically, these provisions would allow a customer to file a complaint with the FCC challenging a broadband provider's "charges." In response to such a complaint, the agency could declare the broadband provider's "charges" to be "unjust or unreasonable" and thus "unlawful," an inquiry typically based on the cost of providing broadband service. The FCC also could determine a "just and reasonable" charge for broadband, and the customer could recover "damages" for the "unlawful" charge by suing in a "court" "of the United States." Only in Washington could an administrative agency claim that the power to declare a broadband rate to be unlawful and determine a lawful broadband rate does not constitute "rate regulation."

Furthermore, rate regulation under the proposed order would not be limited to retail broadband service. For example, the proposed order would prohibit paid prioritization but permit unpaid priority, which effectively imposes a zero rate for any priority arrangements furnished by a broadband provider. And, by reserving the right to adjudicate interconnection disputes between edge providers and "mass market broadband providers," the FCC apparently intends to establish "just and reasonable" interconnection rates.

Likewise, the FCC's regulatory authority over broadband would not be limited to rate regulation. Sections 201 and 202 would vest the FCC with oversight of any act or practice in which a broadband provider may be engaged. This oversight would extend to a broadband provider's decision where to offer service and on what terms and conditions.

Wheeler asserts that "modernized

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President Barack Obama discusses Internet regulation in Cedar Rapids, Iowa, Jan. 14.

Title II regulation can support investment and competition," pointing to the wireless industry. But this is a flawed comparison. First, while Sections 201 and 202 apply to commercial mobile radio services (CMRS), the FCC historically has relied upon market forces to ensure compliance by CMRS providers with these statutory requirements. There is no reason to believe the FCC will take a similar market-based approach to broadband regulation under Sections 201 and 202. Second, mobile broadband has never been regulated under Title II. In fact, Congress expressly prohibited the FCC from regulating mobile broadband under Title II — a prohibition the agency has honored since enactment but which it now appears intent on disregarding. Third, the vast majority of investment by the wireless industry in the past decade — as evidenced by the billions spent acquiring spectrum and deploying LTE — has occurred in connection with mobile broadband, not CMRS.

When the commission adopted open Internet rules in 2010, which were largely vacated by the D.C. Circuit in *Verizon v. FCC*, the agency insisted that it was not "regulating" the Internet. The commission makes no such claim this time around, nor could it. Indeed, in contrast to the traditional "hands-off-the-Internet" approach historically followed by the FCC consistent with Congress's directive that the Internet should remain "unfettered by Federal or State regulation," 47 U.S.C. Section 230(b)(2), the proposed order would purport to authorize the commission to regulate nearly every aspect of the Internet ecosystem. This regulation would extend to Internet interconnection arrangements and even to services that do not even go over the public Internet (such as a dedicated heart-monitoring service) if, in the FCC's view, they "undermine" the open Internet rules.

Indeed, the proposed order would grant the commission regulatory discretion to decide whether any new practice in which a broadband provider seeks to engage is "appropriate or not," applying an amorphous "standard" that involves determining whether that practice would "harm consumers or edge providers." Apparently, any time a broadband provider seeks to make available a new or different offering, it would have to get prior authorization from the FCC or risk violating the agency's new "standard." So much for "innovation without permission."

Wheeler asserts that the proposed order will "modernize Title II, tailoring it for the 21st century." But Title II was enacted by Congress, and it is Congress' job — not the FCC's — to modify the statute to reflect changes in the communications sector. To the extent the FCC seeks a "firm legal foundation" for open Internet rules that would be sufficient "to withstand future challenges," Congress could solve this problem by enacting open Internet legislation, which Congress is considering. However, rather than waiting for duly elected legislators to act, the FCC appears intent on following President Barack Obama's demand for Title II regulation by charging ahead with a decision to apply a 19th century regulatory regime to the 21st century Internet. This decision will undoubtedly be appealed, resulting in delay to binding net neutrality rules and causing considerable regulatory uncertainty — the very outcome Wheeler said he wanted to avoid.

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