Issue Analysis

FreedomWorks Foundation

October 20, 2014

Title II Regulation of the Internet

By: Logan Albright

Since its inception, the internet has been a continual source of consternation for federal regulators anxious over a free market in information. The Federal Communications Commission (FCC) has traditionally filled the role of internet supervision, but so far there has been relatively little regulation. The Internet Tax Freedom Act, preventing government from imposing taxes on internet service, was enacted in 1998 and has been in effect ever since.[1]

The latest, and most expansive, effort at internet regulation comes from the FCC's attempt to designate the internet as a "common carrier" under Title II of the Federal Communications Act of 1934. The implications of such a designation are vast, and deserving careful examination before such a dramatic change is made to the government's treatment of the internet.

Net Neutrality and its Relation to Title II

Net Neutrality is a set of guidelines that prevent internet service providers (ISPs) from giving preferential access to certain companies based on the amount of bandwidth they consume through differential pricing structures. The argument alleges that big companies could use their resources to secure an "internet fast lane" for their services that would put smaller competitors at a substantial disadvantage.[2]

In fact, what Net Neutrality advocates ignore is the fact that large content providers like YouTube and Netflix already consume a disproportionate amount of bandwidth by streaming video content to millions of users.[3] Much like with insurance risk pools, a flat rate for both low- and high-bandwidth consumers means that small companies pay for more than they use, while large companies pay for less than they use. By not allowing ISPs to set prices according to usage, Net Neutrality regulations effectively compel small companies and consumers to subsidize large ones.

In 2010, the FCC asserted its authority to enforce Net Neutrality regulations,[4] which were kept in place until January, 2014, when a federal appeals court ruled that such rules fell outside the agency's

[1] U.S. Public Law 105-277: http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf
[2] "President Obama: No Internet Fast Lanes," *The New York Times*, August 13, 2014: http://www.nytimes.com/2014/08/14/opinion/president-obama-no-internet-fast-lanes.html?_r=0
[3] Spangler, Todd, "Netflix Remains King of Bandwidth Usage, While YouTube Declines," *Variety*, May 14, 2014: http://variety.com/2014/digital/news/netflix-youtube-bandwidth-usage-1201179643/
[4] FCC Final Rule: https://www.federalregister.gov/articles/2011/09/23/2011-24259/preserving-the-open-internet

purview.[5] While the ruling was a partial victory for advocates of internet freedom, the language used by the court codified the FCC's ability to expand its regulatory powers over the internet, an ability that the Commission is eager to take advantage of today with its Title II proposal. The ruling states that section 706 of the Telecommunications Act of 1996—discussed below—gives the FCC the authority invest in the deployment of broadband infrastructure, as well as to impose rules governing ISPs' treatment of internet traffic. It is only because ISPs are not currently designated as common carriers that the FCC lacks the authority to enforce Net Neutrality *per se*.

Title II regulation removes this obstacle to regulation, by classifying the internet as a utility similar to water, gas, electricity, radio, and television. The FCC already has broad statutory power to regulate utilities, originating in the Federal Communications Act of 1934. Needless to say, these laws were designed at a time when a communications network of the internet's scale would have been inconceivable to lawmakers.

Section 706

In 1996, Congress amended the Communications Act of 1934, including provision for the regulation of the internet. Section 706 of this Act[6] was specifically cited by the Federal Appeals Court to grant the FCC authority to oversee broadband infrastructure and manage the delivery of content through ISPs. The relevant subsection reads as follows:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advance telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

The Court's ruling gives the FCC ample latitude to address anticompetitive practices under this existing statute, without resorting to the much more restrictive common carrier designation.

Bill Kennard, served as Chairman of the FCC at the time the Telecommunications Act of 1996 was passed, recognized the dangers of reclassifying internet service under Title II. Testifying before Congress in 1998,[7] he said:

"[C]lassifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it."

[5] United States Court of Appeals, District of Columbia Ruling: http://www.foxnews.com/tech/interactive/2014/01/14/raw-data-federal-appeals-court-ruling-on-fcc-net-neutrality-law/
[6] Telecommunications Act of 1996: http://transition.fcc.gov/Reports/tcom1996.pdf
[7] Congressional Testimony, April 10, 1998: http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf

Kennard's recommendation have stood as guidance for the FCC's approach to internet regulation ever since, and the intervening years have seen tremendous growth in U.S. broadband investment. Title II regulation would reverse the existing precedents that have been working for the past 20 years.

Details of the FCC's Proposal

The proposal under consideration at the FCC is to classify the internet as a "common carrier" under Title II of the Federal Communication Act of 1934. The following is an extract from the FCC's proposed rule.[8]

In a series of decisions beginning in 2002, the Commission has classified broadband Internet access service offered over cable modem, DSL and other wireline facilities, wireless facilities, and power lines as an information service, which is not subject to Title II and cannot be regulated as common carrier service.

In 2010, following the D.C. Circuit's Comcast decision, the Commission issued a Notice of Inquiry that, among other things, asked whether the Commission should revisit these decisions and classify a telecommunications component service of wired broadband Internet access service as a "telecommunications service." The Commission also asked whether it should similarly alter its approach to wireless broadband Internet access service, noting that section requires that wireless services that meet the definition of "commercial mobile service" be regulated as common carriers under Title II.

The Federal Communications Act of 1934

A close reading of the law reveals just how dangerous this proposal is, and how much power it would grant the FCC. Let's examine a few choice sections so that we may get a glimpse of what is actually being proposed, away from the fog of overly general rhetoric that too often influences public opinion.[9]

Section 201:

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Thus, in the very first section of the law, we already have companies compelled to provide service, not on their own terms, but on the terms of the FCC. Section 201 continues:

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful…

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[8] FCC Proposed Rule: http://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm

[9] Communications Act of 1934: http://transition.fcc.gov/Reports/1934new.pdf

Here we see the first occurrence of the intentionally vague phrase, "just and reasonable." This is the kind of language that should always be questioned, as providing no clear and well-defined boundaries for limitations on government power. Who determines whether a practice is just and reasonable, and on what grounds? The FCC appears to claim nearly unlimited discretion in this regard.

In general, public utilities are subject to ratemaking procedures in which the government dictates the prices that can be charged to consumers based on mathematical formulas that factor in costs of service, operating expenses, taxes, depreciation, investment in capital and interest rates. Rather than allow market competition to set prices, a centralized authority presumes to determine what is "fair."

The U.S. Energy Information Administration lists more than 47,000 individual rates for electricity alone, illustrating the immensity and impracticality of this regulatory task.[10] One can only imagine the chaos of trying to apply this process to something as decentralized and quickly evolving as the internet.

Section 205:

Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed…

A plain English translation of this somewhat obscure passage basically states that the FCC can impose any fine it likes on companies that violate its rules, so long as they are "just and reasonable," which is again undefined and left to the discretion of the Commission.

Section 208:

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

This section permits anyone to complain about the activities of a carrier to the Commission without any need of having actually been harmed. In short, there is no limit on the extent to which carriers can be legally harassed by their competitors who might wish to use the Act to their own advantage.

Section 210:

Nothing in this Act or in any other provision of law shall be construed to prohibit common carriers from rendering to any agency of the Government free service in connection with the preparation for the national defense

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[10] Open Energy Initiative Rate Database: http://en.openei.org/wiki/Utility_Rate_Database

Note that the Commission is careful to leave themselves an opening to demand free service from any carrier they like, irrespective to the costs to that carrier. The Thirteenth Amendment to the U.S. Constitution, prohibiting involuntary servitude, appears to have been overlooked here.

The Act contains many more pages of this sort of language, where regulation is piled upon regulation, each one imposing a cost and inefficiency upon private carriers, but the point is made.

Like so much of the legislation passed under President Franklin Delano Roosevelt's New Deal, the broad scope of the powers granted to government by the Federal Communications Act of 1934 is breathtaking. Today, the FCC wants the authority to force ISPs to provide service on the government's terms, not the market determined price, to withstand endless harassment from complaints which are not the result of direct harm, and bend unquestioningly to whatever rules the intentionally vague and capricious "just and reasonable" Commission may demand. Furthermore, the FCC claims the authority to punish any violation of its unilateral terms by fines that are left entirely up to its own discretion.

Conclusion

Title II regulation of the internet is a solution in search of a problem. Despite allegations about what "might" happen if we allow the internet to remain unregulated, as it has, for the most part, always been, no one has yet demonstrated a market failure that would justify government intervention.[11]

Furthermore, the Federal Communications Act of 1934 is so broad in the discretionary powers it would grant the FCC, and so ill-suited to apply to modern technology, that the long-term consequences of applying it to the internet as a whole are difficult to foresee. What we do know is that Net Neutrality regulations restrict ISPs' abilities to set prices according to their costs, and impose a burden on smaller companies and consumers who are forced to pay higher rates to cover the costs of high bandwidth consumers.

By examining the rate-setting procedures for existing utilities, it becomes apparent that the system is costly, convoluted, and administratively difficult. Prices set by markets, instead of a central authority, have no such difficulties. Title II regulation of the internet is a clear example of unnecessary federal overreach that would saddle ISPs with the same costs and inefficiencies as traditional utility carriers, with no clear justification for doing so.

[11] Brito, Jerry et al. "Net Neutrality Regulation: The Economic Evidence," Working Paper, April 12, 2010: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1587058