Telecommunications & Electronic Media

High Stakes: The FCC Gambles with America's Global Leadership

*By Kenneth T. Cuccinelli II**

Note from the Editor:

On February 4, 2015, Federal Communications Commission Chairman Tom Wheeler put forth a long-awaited net neutrality proposal. The net neutrality question has been discussed for more than a decade and attracted more than four million public comments. Chairman Wheeler's proposal to use the FCC's Title II authority to implement and enforce open internet protections has received strong support and criticism. The Federalist Society believes this is an extremely important issue and seeks to foster further discussion and debate. This article presents a criticism of the FCC's proposal. As an epilogue to the article, we have included Chairman Wheeler's full statement on the proposal. As always, The Federalist Society takes no position on particular legal or public policy initiatives. We also offer links below to various perspectives on both sides of the issue, including a prior Federalist Society publication on the topic, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Harold Field, *Throwing Shade at Title II with Forbearance Fearmongering*, Public Knowledge, Oct. 2, 2014: https://www.publicknowledge.org/news-blog/blogs/throwing-shade-at-title-ii-with-forbearance-fearmongering
- Comments of Public Knowledge, Benton Foundation, Access Sonoma Broadband, GN Docket No. 14-28 (filed Jul. 15, 2014) : https://www.publicknowledge.org/assets/uploads/blog/Public_Knowledge_NN_NPRM_comments_2014_FINAL.pdf
- Katherine Ann Ruane, Congressional Research Service, Net Neutrality: The FCC's Authority to Regulate Broadband Internet Traffic Management (Mar. 2014): https://www.fas.org/sgp/crs/misc/R40234.pdf
- Marvin Ammori, *The Case for Net Neutrality*, Foreign Affairs, July/Aug. 2014: http://www.foreignaffairs.com/articles/141536/marvin-ammori/the-case-for-net-neutrality
- Leticia Miranda, *The FCC's Net Neutrality Proposal Explained*, The Nation, May. 21, 2014: http://www.thenation.com/article/179934/fccs-net-neutrality-proposal-explained#
- Robert M. McDowell, *The Turning Point for Internet Freedom*, Wall St. J., Jan. 19, 2015: http://www.wsj.com/articles/robert-m-mcdowell-the-turning-point-for-internet-freedom-1421712567
- Maureen K. Ohlhausen, *Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, And Not More Regulation, Could Protect Innovation on the Web,* Engage: J. Fed. Soc'y Practice Groups, Feb. 2013: http://www.fed-soc.org/publications/detail/net-neutrality-vs-net-reality-why-an-evidence-based-approach-to-enforcement-and-not-more-regulation-could-protect-innovation-on-the-web
- Larry Downes, *Why Obama's Plan to Save The Internet Could Actually Ruin It*, Wash. Post, Nov. 11, 2014: http://www.washingtonpost.com/blogs/innovations/wp/2014/11/11/why-obamas-plan-to-save-the-internet-could-actually-ruin-it/

As early as the end of February, the Federal Communications Commission is poised to fundamentally unravel the light touch regulatory approach to Internet governance that has made America the world leader in broadband Internet access. The Commission is prepared to vote on an order that would apply 1930s monopoly-era telephone rules to the Internet, reversing over 15 years of successful bipartisan actions, in a decision that is unsupported by facts, law or common sense. Worse yet, the Commission has not identified a market failure or actual consumer harms to justify the decision. The result is a legally unstainable outcome that will create years of legal battles, ensuring a continued lack of certainty for consumers and businesses alike, and will undoubtedly chill investment in the most successful sector of our economy.

The FCC is exploring options for regulating broadband Internet access service in the wake of the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Verizon v. FCC*.[1] As Attorney General of Virginia, I filed an *amicus* brief in the *Verizon* case in opposition to the FCC's position. The court found that Section 706 of the Telecommunications Act of 1996[2] gives the FCC authority to regulate broadband Internet service, but struck down the agency's "anti-blocking" and "anti-discrimination" rules as being outside the scope of that authority. The Court reasoned that these rules were the equivalent of common carrier obligations under Title II of the

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Communications Act of 1934, as amended (the "Act"). The Act subjects telecommunications carriers, but not information-service providers, to regulation under Title II, and the FCC has long classified broadband Internet access service as an "information service." Thus, the court concluded that the agency could not utilize its authority under Section 706 to impose Title II common carrier obligations on broadband Internet access service providers.

The FCC, led by Chairman Wheeler, subsequently issued a Notice of Proposed Rulemaking proposing, among other things, a new path toward promulgating Open Internet rules utilizing the agency's authority under Section 706.[3] The FCC proposed to permit broadband providers (e.g. Verizon, AT&T, and Comcast) to negotiate individualized, differentiated arrangements with similarly situated edge providers (e.g., Disney, Netflix, Google) subject to a separate commercial reasonableness rule or its equivalent. The FCC also proposed to modify and expand the existing transparency rules with separate disclosures to end users and edge providers. The FCC is considering expanding disclosures to end users and others beyond the scope of the existing rule, which covers broadband provider network practices, performance characteristics (e.g., effective download speeds, upload speeds, latency, and packet loss), and/or terms and conditions of service. Regarding disclosure to edge providers, the FCC sought comment on what additional disclosures would aid content, application, service, and device providers to develop, market, and maintain Internet offerings. The FCC also proposed to offer a new rationale for and reinstate the no-blocking rule struck down by the D.C. Circuit. Further, the FCC proposed a multi-faceted dispute resolution process and sought comment on the creation of an ombudsman to act as a watchdog to represent the interests of consumers, start-ups, and small businesses. In the FCC's view, these proposed rules would be permissible because they would permit individualized negotiations and thus are not Title II common carrier regulation. Nevertheless, the FCC emphasized that it will also "seriously" consider regulating broadband Internet access service as common carriage under Title II.

In the months following the NPRM's release, the FCC was swamped with several million comments. Unsurprisingly, the comments covered a broad spectrum of positions. Many commenters acknowledged the FCC's regulatory authority under Section 706 of the Act, but opposed additional regulation of broadband Internet access service. Other commenters supported the FCC's proposed use of its Section 706 authority to impose new regulations on broadband Internet access service.

Some commenters, however, were dissatisfied with the FCC's proposals, arguing that no exercise of authority under Section 706 would be sufficient to prevent broadband providers from charging some edge providers to deliver data to customers through Internet "fast lanes," while relegating other edge providers to the "slow lane." These "Net Neutrality" or "Open Internet" advocates argued that, to avoid this subversion of Internet "openness," the FCC must reclassify broadband Internet access service as a "telecommunications service" and regulate broadband providers as common carriers under Title II of the Act. In their view, only Title II would provide a legally sufficient basis for imposing the sweeping "anti-blocking" and "anti-discrimination" rules Open Internet advocates believe to be necessary. Unfortunately, the Title II supporters appear to be winning the day: In November, President Obama called for reclassification of broadband Internet access as a Title II telecommunications service, and FCC Chairman Tom Wheeler has announced his intent to accede to the President's wishes at the FCC's February 26th Open Meeting. In partial response, Senate and House Republican Commerce Committee leadership recently unveiled draft legislation to provide statutory authority to preserve the Open Internet, but would prevent the Commission from regulating the Internet under Title II or any other regulatory scheme.[4] There are serious legal and policy impediments to the FCC reclassifying broadband Internet service in this manner, however. Reclassification would require the FCC to reverse a more than 15-year-old bipartisan consensus that broadband Internet service should not be regulated as common carriage. As such, the agency bears a heavy burden of showing new, and undoubtedly creative, reasons to justify the new classification particularly because reclassification would necessarily rest "on factual findings that contradict those which underlay its prior policy."[5] And, such a change would not be limited exclusively to broadband network providers as some Open Internet advocates argue, but would open the door to sweeping new regulation over a broad range of market participants. Many have suggested that the FCC could reclassify broadband Internet access as a Title II service but exercise its discretion to only enforce a handful of the most important consumer oriented Title II obligations through a process known as "forbearance". While an option in theory, there is no agreement on which Title II requirements the Commission should forbear from and the path to this type of sweeping forbearance (dozens of statutory provisions and hundreds of rules would need to be forborn from) is far from proven. There will also be significant legal hurdles for the FCC to overcome by relying on a section of the Act to justify a significant regulatory change of course while simultaneously suggesting that the vast majority of Title II need not be applied.

I. Reclassification Would Change Radically the Regulatory Environment That Has Fostered the Extraordinary Growth of Broadband Internet

The Act establishes a strict regulatory demarcation between "information" and "telecommunications" services. A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, regardless of the facilities used."[6] "[T]elecommunications," in turn, is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[7] An "information service," on the other hand, is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ."[8] Telecommunications services are subject to common carriage regulation under Title II of the Act; information services are not.[9]

For more than a decade, the FCC has classified broadband Internet access service as an information service and thus exempt from Title II regulation.[10] In a 1998 Report to Congress, the

FCC held that Internet Service Providers "conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service."[11] Since then, the FCC has repeatedly made this classification based on factual and legal grounds, all of which continue to militate in favor of continuing to classify broadband service as an information service. From a factual perspective, all broadband Internet access offerings, in 1998 and still today, involve both transmission and data processing components, but these components are so intertwined and integral to the overall service offering that they cannot be distinguished and separately classified on any principled basis.

Broadband Internet access service integrates the data processing and transmission components into a "single, integrated service that enables the subscriber to utilize Internet access service through [the] provider's facilities and to realize the benefits of a comprehensive service offering."[12] As such, the agency concluded that broadband Internet access service should be regulated as an integrated service and the Supreme Court agreed.[13] Thus, "when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so."[14]

Broadband Internet service continues to be a unified service that integrates both information and telecommunications inputs. Transmission continues to be fundamentally intertwined with data functionalities such as Domain Name System ("DNS") and Dynamic Host Configuration Protocol ("DHCP") functionality, as well as integrated security, spam filtering, and distributed denial-of-service protections. Indeed, DNS and DHCP functionality is inextricably involved with nearly every broadband Internet access use. The fact that some customers may rely upon third-parties to provide some of these services and functions is not inconsistent with the conclusion that the overall broadband offering is an integrated service offering. As the FCC has acknowledged, these functionalities remain an integral part of the broadband Internet service offering "regardless of whether subscribers use all of the functions provided as part of the service . . . and regardless of whether every [broadband Internet access] service provider offers each function that could be included in the service."[15]

There are also compelling economic policy reasons that justify continuing to classify broadband Internet access service as an information service. Indeed, reclassifying broadband Internet as telecommunications so that the service can be regulated as common carriage under Title II simply makes no economic sense. Many of the FCC's Title II rules and regulations were designed more than 80 years ago for a communications service and market that was drastically different than the broadband Internet access market. Title II is intended to serve a market in which all communications are interconnected through the public switched telephone network ("PSTN") and customers are served by a single monopoly provider. The broadband Internet, by contrast, is a dynamic system of interconnected networks of servers, routers, links, and end-user devices that are owned and operated by consumers and by a multitude of competing service providers, offering different and competing services.

Amending the Act in 1996, Congress concluded that broadband services should exist in a minimal regulatory environment that promotes investment and limits unnecessary and unduly burdensome regulatory costs.[16] The FCC has followed suit, finding that classifying broadband Internet access service as an information service was warranted as a means for encouraging investment and innovation by insulating that service from the burdensome and outdated regulatory obligations associated with Title II of the Act.

This light-handed regulatory approach has been an extraordinary success; network investment, innovation, and broadband availability are all flourishing.[17] "Whole new product markets have blossomed in recent years, and the market for applications has both diversified and exploded."[18] More than 99 percent of Americans now have access to either fixed or wireless broadband service[19] and consumers are benefitting from improvements in high-speed Internet offerings and will continue to do so.[20] 85% of US households have access to networks capable of delivering 100 Mbps[21] and the FCC's own data indicate that the average speed tier to which Americans subscribe increased 36% in 2013.[22] Access to broadband at these speeds did not happen by accident. According to recent analyses, U.S. broadband providers invested over $75 billion (or roughly $612 per household) in 2013 alone, up from $69 billion the prior year.[23] The US invests twice as much per household on broadband as the EU. Investment in telecommunications networks in the US per capita is $197, compared to only $129 across Europe and only $119 in the four largest EU countries (Germany, France, Italy, and the United Kingdom).[24] The United States is the world leader in broadband innovation and is at the epicenter of the global broadband economy.

Retreating from this position and classifying broadband Internet access service as a "telecommunications service" would upend this successful regulatory approach and potentially stymie the ongoing capital investment, technological innovation, and rapid deployment that have been the hallmarks of the broadband Internet market to date. For instance, lying at the heart of the Title II common carrier obligations are highly intrusive price and entry and exit regulations, and a duty of non-discrimination.[25] Price regulation essentially empowers the FCC – as opposed to the market – to determine the value of broadband and is precisely the kind of economic regulation that would stifle infrastructure investment. Entry and exit regulation would require the FCC to approve the addition or extension of new services or the discontinuance of old services, which the FCC is unlikely to accomplish at a pace that could even come close to matching the speed of innovation that has been the essential characteristic of the broadband Internet market to date. Further, the common carrier non-discrimination obligation may well call into question important interconnection arrangements such as those between Content Delivery Networks ("CDNs") (e.g., Akamai) and broadband Internet access providers.

Regulation as a common carrier would also include obligations to contribute to the Universal Service Fund, potentially creating a tax of ten percent or more on Internet access and im-

posing additional regulatory costs on the broadband system.[26] Common carriage regulation also carries with it highly restrictive limits on the use of call location information and could well disrupt the business models for highly popular location-based services such as Uber, Groupon, and Foursquare.[27]

In short, Title II regulation of broadband Internet access would chill investment and discourage innovation, impeding the fundamental public interest benefits enabled by the Internet. Reversing course in favor of Internet regulation would also threaten the United States' role as a global leader in the broadband economy. For instance, a drastic shift in policy here could drive capital to other countries. More significant, substantial new domestic regulation could embolden regimes that want to regulate content, thereby undermining the Internet as an engine for economic development and free speech. Reclassification would send the wrong signals across the globe.

II. Reclassification Would Reach Into Virtually Every Corner of the Broadband Internet System

The adverse effects of reclassification would be sweeping and would reach into virtually every corner of the broadband Internet system. As discussed, reclassification would require the FCC to identify a severable transmission component of broadband Internet access service that could be classified as a "telecommunications service." In "breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult [for the FCC] to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category."[28] Indeed, it would be more than difficult; there is no rational basis for segregating the transmission and data processing components of broadband Internet access service.

Broadband was classified as an information service because it transmits data only in connection with further processing, and because that transmission is necessary to providing Internet access service.[29] Broadband services have become increasingly sophisticated and continue to integrate information services, including data storage or email services that involve storing or utilizing data; parental controls and other security functions that store security preferences, then filter data as it is retrieved or generated by the consumer; and services for personalizing home portal pages through generating or transforming information. Providers integrate into their broadband offerings ever-more advanced features and capabilities, such as cloud-based services for storing information, as well as for retrieving and acquiring information via software services; new spam filters and other reputation systems for processing potentially harmful data; and caching servers and CDNs that store media content to enable consumers to access that content at faster speeds. Today, broadband Internet services tightly integrate data transmission with data processing to the point that the two functions cannot realistically be separated at all.

The statutory definition of "telecommunications" itself underlines this conclusion. "[T]elecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[30] On the Internet, however, the information transmitted is changed in form routinely and often is accompanied by other information the user does not select, such as third-party advertisements. In other words, "telecommunications," as defined by the Act, simply does not exist separate and apart from data processing in the broadband Internet world. Thus, as the Supreme Court recognized, classifying as telecommunications carriers "all entities that use telecommunications inputs to provide information service" would *necessarily* subject "all information service providers that use telecommunications as an input to provide information service to the public" to common carrier regulation.[31]

Open Internet advocates reject this position, arguing that reclassification can be limited only to those providers that own last-mile transmission facilities. This position is wrong as a matter of law. The statutory definitions of "telecommunications service" and "information service" turn on the nature of the service offering and the functionalities provided to the customer and not on the facilities used to provide those functionalities or who owns those facilities.[32] As the Supreme Court acknowledged, "the relevant [statutory] definitions do not distinguish facilities-based and non-facilities-based carriers."[33] Reclassification would thus extend not only to network providers that own last-mile facilities, but also to providers that do not own last-mile facilities, including Internet Service Providers ("ISPs") such as Earthlink and AOL, CDNs such as Akamai, Internet backbone providers like Level 3, providers of broadband-enabled devices such as E-readers, Internet search engines and online advertising companies such as Google, online video services like Netflix, and cloud-computing services like Amazon.com's Elastic Compute Cloud.

All information services are by definition provided "via telecommunications,"[34] but if telecommunications is properly viewed as a distinct transmission component, then all of these entities, and many more, would be subject to classification as common carriers because they are providing "telecommunications service" – i.e., they are offering transmission functionality ("telecommunications") to the public for a fee.[35] For instance, even if they do not own last-mile transmission facilities, ISPs own other network facilities, including fiber-optic links that connect their local access equipment to cache servers and Internet backbone networks.[36] These companies also transport end users' data traffic throughout the Internet, even though they purchase transmission supplied by another provider's last-mile facilities. Likewise, online video and cloud-computing services interconnect directly with broadband Internet access service providers by means of their own facilities or leased transmission capacity, to enable the transmission of data to and from their own servers. Internet transport companies provide backbone Internet access and content-delivery services to thousands of large and small businesses and edge providers using facilities they either own or lease. CDNs use dedicated fiber-optic transmission capacity, perform packet-distribution functions similar to those of backbone networks, and use much the same equipment and architecture as backbone networks, transporting data around the globe, to and from cache servers located closer to their large and small business and edge provider customers.

E-readers enable Internet access through integrated wireless connectivity and web-browsing functionality. Internet search engines and online advertising companies provide for the transmission of search results and advertising messages to end users.

If the FCC accepts the notion that a transmission function is necessarily severable from information-processing functions for purposes of regulatory classification, there is no principled way to cabin the reach of Title II to just one segment of the Internet and not others. Thus, every entity that provides a transmission capability would potentially be regulated as a common carrier.

III. Conclusion

The calls for reclassification of broadband Internet access services give rise to a host of policy and legal problems and ultimately threaten the United States' position as the global leader in the broadband economy. Title II rules and regulations are designed for a market that no longer exists – a market in which all communications are interconnected with the PSTN and customers are served by a single monopoly provider. With no market failure or actual consumer harms identified, the rules can also be seen as a bureaucratic land grab to ensure the government has a central ongoing role in the Internet economy. The broadband Internet is a dynamic system of interconnected networks of servers, routers, links, and end-user devices that are owned and operated by consumers and by a multitude of competing service providers, offering a multitude of services. Subjecting this entire dynamic and innovative broadband marketplace to outdated Title II regulation would fundamentally undermine the extraordinary levels of investment and innovation in the market. Reclassification would affect virtually every entity providing broadband Internet services and would signal a retreat from a decade's-old bipartisan consensus that broadband Internet service should not be regulated as common carriage that would echo across the globe. Countries that are already over-regulating the broadband economy would be emboldened to continue down this dangerous path if the United States, a global leader, abandons its proven and successful innovation policy.

Endnotes

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

2 47 U.S.C. § 1302. Section 706 says that if the FCC finds "advanced services" (broadband) are not being deployed to all Americans in a timely manner, the Commission must take immediate action to remove barriers to such deployment. Thus according to the Court, if properly implemented, Open Internet rules could be justified using Section 706 authority on the theory that the promise of an Open Internet would remove barriers to investment and result in greater broadband deployment.

3 *See Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2014) ("*Notice*").

4 *Congressional Leaders Unveil Draft Legislation Ensuring Consumer Protections and Innovative Internet*, *available at* http://energycommerce.house.gov/press-release/congressional-leaders-unveil-draft-legislation-ensuring-consumer-protections-and.

5 FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009).

6 47 U.S.C. § 153(53).

7 *Id.* § 153(51).

8 47 U.S.C. § 153(24).

9 *Verizon,* 740 F.3d at 655-58.

10 *See Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4824 ¶ 41 (2002) ("*Cable Modem Order*"), *aff'd sub nom.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (hereinafter *Brand X*); Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al., 20 FCC Rcd 14853, 14863-65 ¶¶ 14-17, 14909-12 ¶¶ 103-06 (2005); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks,* 22 FCC Rcd 5901, 5909-11 ¶¶ 19-26, 5912-14 ¶¶ 29-33 (2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006).

11 Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11540 ¶ 81 (1998) ("Report to Congress").

12 *Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38.

13 *Brand X*, 545 U.S. at 999-1000.

14 Report to Congress, 13 FCC Rcd at 11520 ¶ 39.

15 *Id.*

16 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

17 *Notice*, 29 FCC Rcd 5571-72 ¶¶ 30-32.

18 *Id.* at 5571 ¶ 31.

19 National Broadband Map, *Broadband Statistics Report, Access to Broadband Technology by Speed*, at 3 (Feb. 2014), available at http://www.broadbandmap.gov/download/Technology%20by%20Speed.pdf.

20 Research by Cisco Systems, Inc. projects data speeds to nearly triple by 2018. Cisco Systems, Inc., "The Zettabyte Era: Trends and Analysis," at 2 (June 10, 2014), available at http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/VNI_Hyperconnectivity_WP.pdf.

21 *See* https://www.ncta.com/industry-data.

22 *See Measuring Broadband America – 2014: A Report on Consumer Wireline Broadband Performance in the U.S.*, FCC Office of Engineering and Technology and Consumer and Governmental Affairs Bureau (Jun. 18, 2014), http://www.fcc.gov/reports/measuring-broadband-america-2014.

23 *See* Patrick Brogan, *Updated Capital Spending Data Show Rising Broadband Investment in Nation's Information Infrastructure*, USTelecom (Nov. 4, 2013), http://www.ustelecom.org/sites/default/files-/documents/103113-capex-research-brief-v2.pdf. *See also* National Cable & Telecommunications Association, Public Policy, *Setting the Record Straight on Broadband Investment*, May 13, 2014, https://www.ncta.com/platform/public-policy/setting-the-record-straight-on-broadband-investment/ (last visited July 11, 2014). *See also* CTIA, Annual Wireless Industry Survey, http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey (last visited July 11, 2014).

24 Martin H. Thelle & Bruno Basalisco, *Copenhagen Economics, Europe Can Catch Up with the US: A Contrast of Two Contrary Broadband Models* (2013), Copenhagen Economics, *available at* http://www.copenhageneconomics.com/Website/News.aspx?PID=3058&M=NewsV2&Action= &NewsId=708.

25 *See* 47 U.S.C. §§ 201(b), 202, 203, and 214. Non-discrimination is related to end users and between and among carriers.

26 *Id.* § 254; *See* Robert Litan & Hal Singer, *Outdated Regulations Will Make Consumers Pay More for Broadband*, Progressive Policy Institute (Dec. 1, 2014), http://www.progressivepolicy.org/slider/outdated-regulations-will-make-consumers-pay-broadband.

27 *Id.* § 222.

28 Report to Congress, 13 FCC Rcd at 11529 ¶ 57.

29 *Brand X*, 545 U.S. at 998.

30 47 U.S.C. § 153(51).

31 *Brand X*, 545 U.S. at 994.

32 *See, e.g.*, 47 U.S.C. § 153(53) (telecommunications service is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*") (emphasis added).

33 *Brand X,* 545 U.S. at 997.

34 *See* 47 U.S.C. § 153(24) (defining "information service").

35 *Id.* § 153(53).

36 Report to Congress, 13 FCC Rcd at 11534, 11536 ¶¶ 69, 73, & n.138.

This Is How We Will Ensure Net Neutrality

Tom Wheeler, Chairman, Federal Communications Commission

Wired, Feb. 4, 2015: http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/

After more than a decade of debate and a record-setting proceeding that attracted nearly 4 million public comments, the time to settle the Net Neutrality question has arrived. This week, I will circulate to the members of the Federal Communications Commission (FCC) proposed new rules to preserve the internet as an open platform for innovation and free expression. This proposal is rooted in long-standing regulatory principles, marketplace experience, and public input received over the last several months.

Broadband network operators have an understandable motivation to manage their network to maximize their business interests. But their actions may not always be optimal for network users. The Congress gave the FCC broad authority to update its rules to reflect changes in technology and marketplace behavior in a way that protects consumers. Over the years, the Commission has used this authority to the public's great benefit.

The internet wouldn't have emerged as it did, for instance, if the FCC hadn't mandated open access for network equipment in the late 1960s. Before then, AT&T prohibited anyone from attaching non-AT&T equipment to the network. The modems that enabled the internet were usable only because the FCC required the network to be open.

Companies such as AOL were able to grow in the early days of home computing because these modems gave them access to the open telephone network.

I personally learned the importance of open networks the hard way. In the mid-1980s I was president of a startup, NABU: The Home Computer Network. My company was using new technology to deliver high-speed data to home computers over cable television lines. Across town Steve Case was starting what became AOL. NABU was delivering service at the then-blazing speed of 1.5 megabits per second—hundreds of times faster than Case's company. "We used to worry about you a lot," Case told me years later.

But NABU went broke while AOL became very successful. Why that is highlights the fundamental problem with allowing networks to act as gatekeepers.

While delivering better service, NABU had to depend on cable television operators granting access to their systems. Steve Case was not only a brilliant entrepreneur, but he also had access to an unlimited number of customers nationwide who only had to attach a modem to their phone line to receive his service. The phone network was open whereas the cable networks were closed. End of story.

The phone network's openness did not happen by accident, but by FCC rule. How we precisely deliver that kind of openness for America's broadband networks has been the subject of a debate over the last several months.

Originally, I believed that the FCC could assure internet openness through a determination of "commercial reasonableness" under Section 706 of the Telecommunications Act of 1996. While a recent court decision seemed to draw a roadmap for using this approach, I became concerned that this relatively new concept might, down the road, be interpreted to mean what is reasonable for commercial interests, not consumers.

That is why I am proposing that the FCC use its Title II authority to implement and enforce open internet protections.

Using this authority, I am submitting to my colleagues the strongest open internet protections ever proposed by the FCC. These enforceable, bright-line rules will ban paid prioritization, and the blocking and throttling of lawful content and services. I propose to fully apply—for the first time ever—those bright-line rules to mobile broadband. My proposal assures the rights of internet users to go where they want, when they want, and the rights of innovators to introduce new products without asking anyone's permission.

All of this can be accomplished while encouraging investment in broadband networks. To preserve incentives for broadband operators to invest in their networks, my proposal will modernize Title II, tailoring it for the 21st century, in order to provide returns necessary to construct competitive networks. For example, there will be no rate regulation, no tariffs, no last-mile unbundling. Over the last 21 years, the wireless industry has invested almost $300 billion under similar rules, proving that modernized Title II regulation can encourage investment and competition.

Congress wisely gave the FCC the power to update its rules to keep pace with innovation. Under that authority my proposal includes a general conduct rule that can be used to stop new and novel threats to the internet. This means the action we take will be strong enough and flexible enough not only to deal with the realities of today, but also to establish ground rules for the as yet unimagined.

The internet must be fast, fair and open. That is the message I've heard from consumers and innovators across this nation. That is the principle that has enabled the internet to become an unprecedented platform for innovation and human expression. And that is the lesson I learned heading a tech startup at the dawn of the internet age. The proposal I present to the commission will ensure the internet remains open, now and in the future, for all Americans.