

IS THERE ANYTHING NEW TO SAY ABOUT NETWORK NEUTRALITY?

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Despite endless economic, legal, and policy discussion about network neutrality over the last two decades,¹ there has been little to no actual policy or regulation imposed. The Federal Communications Commission (FCC) first ruled on the issue, fifteen years ago, in the cable-modem decision of 2002.² Under Republican Chair Michael Powell, the FCC played a “hands-off” regulatory role, concluding that Internet access was an “information service” regulated under Title I,³ a rarely used and rather limp statutory authority. The FCC reasoned that the nascent Internet industry should be free from regulatory oversight in order to develop.⁴ Succeeding FCC chairs, under different Presidents, have tried to assume a larger regulatory role. But their efforts, notably in the 2008 BitTorrent Order⁵ and the 2010 Open Internet Order,⁶ have failed. In both these instances, the

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1. Rob Frieden, *What's New in the Network Neutrality Debate*, 2015 MICH. ST. L. REV. 739, 739 n.1.

2. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, ¶ 38, at 4822 (2002) [hereinafter Cable Modem Order]; see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 991-92 (2005) (affirming the FCC's original classification of Internet service as an “information service” regulated under Title I (internal quotation marks omitted)).

3. Cable Modem Order, *supra* note 2, ¶ 38, at 4822, 4867.

4. *Id.* ¶¶ 4-28, at 4801-18.

5. See Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13,028 (2008), *vacated sub nom.* Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) (holding that the FCC acted beyond its statutory authority when punishing Comcast for protocols aimed at discouraging peer-to-peer traffic).

6. See Preserving the Open Internet, 25 FCC Rcd. 17,905 (2010) [hereinafter 2010 Open Internet Order], *aff'd in part, vacated and remanded in part sub nom.* Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014). For the FCC's response to the D.C. Circuit's decision to remand in *Verizon v. FCC*, see Protecting and Promoting the Open Internet, 29 FCC Rcd. 5561 (2014) [hereinafter 2014 Open Internet NPRM].

D.C. Circuit rejected the FCC's claims to have legal jurisdiction to regulate the Internet.⁷

But this static policy cannot be blamed on legal, jurisdictional shortcomings alone. The sound and fury signifying nothing also stems from confusion about the basic terms of the discussion. As has been pointed out before, the Internet consists of a variety of networks that typically interconnect in bilateral-transit or peering agreements, making the weave of the web inherently “non-neutral”: certain bits inevitably receive different treatment and always have.⁸ Defining neutrality, openness, or whatever policy goal of “fair” treatment for web actors in a network that is inherently differential presents no clear policy rule.

Or, at the very least, the FCC's proposed standards for open or fair Internet—whether the Open Internet of 2010's “reasonable network management” and “unreasonable discrimination”⁹ or the 2014 Open Internet's “minimum level of access” or “commercially reasonable”¹⁰—gloss over this fundamental difficulty of defining equal treatment. In fact, the proposed standards hide the inherent complexity of Internet interconnection—which constitutes the technical details that would determine differential (or equal) treatment of any bit of Internet traffic. The FCC could attempt to tackle the complexity of Internet interconnection, and at the very least, this would clarify the public discussion. Instead, its obfuscating regulatory concepts contribute towards legal and policy arguments that turn on calls on the Left to “[s]ave the Internet”¹¹ and grave warnings of “[h]ands [o]ff the Internet” from the Right.¹²

Is there anything new to say in the static debate? Well, the FCC seems poised to try again—indeed, as of the writing of this Article, the FCC has placed on its February calendar its order to implement

7. *Comcast Corp.*, 600 F.3d at 644; *Verizon*, 740 F.3d at 628.

8. See generally Adam Candeub & Daniel McCartney, *Law and the Open Internet*, 64 FED. COMM. L.J. 493 (2012).

9. 2010 Open Internet Order, *supra* note 6, ¶¶ 68-69, at 17,944, ¶¶ 81-82, at 17,951-52.

10. 2014 Open Internet NPRM, *supra* note 6, ¶ 97, at 5596, ¶ 122, at 5604.

11. *Save the Internet*, MOVEON.ORG, http://civic.moveon.org/save_the_internet/ (last visited Mar. 23, 2015).

12. Jacqueline Bodnar, *FreedomWorks to Obama: Keep Your Hands Off the Internet*, FREEDOMWORKS (Nov. 10, 2014), <http://www.freedomworks.org/content/freedomworks-obama-keep-your-hands-internet>.

its most recent Notice of Proposed Rulemaking (NPRM).¹³ Taking to heart a comment by the D.C. Circuit that § 706 may provide the necessary jurisdiction,¹⁴ the FCC in its NPRM relies upon § 706 to regulate the Internet.¹⁵ Statute or not, President Obama's endorsement of action on network openness almost determined action by someone.¹⁶ So it seems that now is the time that the debate will move in a new direction, if not move forward.

The FCC's previous network-neutrality efforts have depended upon ancillary jurisdiction under Title I—as an “information service”—as opposed to Title II, the comprehensive regulatory regime that the FCC has used to regulate interstate telecommunications for almost a century.¹⁷ This jurisdictional authority has traditionally been used to supplement existing jurisdictions, as with *United States v. Southwestern Cable Co.*¹⁸ There, the Court relied upon § 152 to give the FCC jurisdiction to regulate cable television.¹⁹

But, the FCC's cable-modem order, the FCC's effort to treat Title I use as an independent basis to regulate the dominant form of communications today, strains the text and structure of the

13. Gautham Nagesh, *FCC Will Vote on Broadband Internet Rules in February*, WALL ST. J. (Jan. 2, 2015, 4:53 PM), <http://www.wsj.com/articles/fcc-will-vote-on-broadband-internet-rules-in-february-1420235637>.

14. See *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010) (“[S]ection 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods.’ Because the Commission has never questioned, let alone overruled, that understanding of section 706, and because agencies ‘may not . . . depart from a prior policy *sub silentio*,’ the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority.” (citations omitted) (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd. 24,011, ¶ 69, at 24,044 (1998); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009))).

15. 2014 Open Internet NPRM, *supra* note 6, ¶ 4, at 5563.

16. Ezra Mechaber, *President Obama Urges FCC to Implement Stronger Net Neutrality Rules*, WHITE HOUSE BLOG (Nov. 10, 2014, 9:15 AM), <http://www.whitehouse.gov/blog/2014/11/09/president-obama-urges-fcc-implement-stronger-net-neutrality-rules>.

17. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 996-97 (2005); *Cable Modem Order*, *supra* note 2, ¶ 95, at 4847-48.

18. 392 U.S. 157, 172-73 (1968).

19. *Id.* (“Nothing in the language of s 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. . . . We have found no reason to believe that s 152 does not, as its terms suggest, confer regulatory authority over ‘all interstate . . . communication by wire or radio.’”).

Communications Act. The most fundamental problem is that it is unclear as to what Title I Internet regulation is ancillary to. Title I's ancillary expansion of Title II's basic jurisdiction over telecommunications to include accounting policies for phone handsets made sense in *Louisiana PSC* because there was a regulated service: telephones, to which handsets were arguably ancillary. Broadband is a complete service by itself; it is not ancillary to anything.

Regardless, in the important *Brand X* case, a bare majority upheld this authority by a six-to-three vote.²⁰ Justice Breyer's concurrence stated, in what could be characterized as a jurisprudential sigh, that the FCC's jurisdictional claim under Title I, 47 U.S.C. §§ 151, 152(b), was reasonable—"though . . . just barely."²¹

But, for the FCC, Title I proved to be a gift that quickly stopped giving; while the Supreme Court ruled that Title I gave the FCC power to regulate the Internet, the D.C. Circuit was unwilling to affirm any real regulatory regime built upon such a weak reed. In *Comcast Corp. v. FCC*²² and *Verizon v. FCC*,²³ the D.C. Circuit struck down the FCC's specific Open Internet regulations, reasoning that while Title I gave the FCC the jurisdiction to regulate the Internet, its grant of authority was too limited to support any meaningful regulation.²⁴

However, in *Comcast*, the court suggested that § 706 offered the possibility of giving the FCC jurisdiction to regulate the Internet—but, alas, the court observed that the FCC explicitly disclaimed any authority to regulate under § 706.²⁵ The FCC in the 2014 Open Internet NPRM claimed authority to regulate under § 706.²⁶

So, there is much new concern about § 706. And rightly so, given that certainly the D.C. Circuit and perhaps even the Supreme Court will soon decide the matter, as the regulations the FCC is poised to promulgate will no doubt be appealed. And, indeed,

20. 545 U.S. at 972.

21. See *id.* at 1003 (Breyer, J., concurring) ("I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority—though perhaps just barely.")

22. 600 F.3d 642 (D.C. Cir. 2010).

23. 740 F.3d 623 (D.C. Cir. 2014).

24. *Comcast Corp.*, 600 F.3d at 661; *Verizon*, 740 F.3d at 632.

25. *Comcast Corp.*, 600 F.3d at 658-59.

26. 2014 Open Internet NPRM, *supra* note 6, ¶ 143, at 5610-11.

authors in our symposium have added much to that discussion, which will perhaps influence arguments presented to the Court.

Professor Blevins points out, in a novel and insightful argument, that § 706 provides several unrecognized, pragmatic benefits.²⁷ These include allowing the FCC to create rules at lower political and legal cost, thereby preserving the agency's political capital.²⁸ At the same time, the FCC would retain the threat of reclassification to § 201.²⁹ This threat of stronger jurisdictional authority could deter anticompetitive behavior on the web.³⁰

Professor Hurwitz argues, quite creatively and convincingly, that § 706 offers a better basis for the FCC's rules because Title II would lead to significant delay and market uncertainty.³¹ This would occur because Title II would require the FCC to forbear large portions of the statute, and as parties would challenge the FCC's forbearance actions, there would be long delay and uncertainty created from the inevitable legal challenges to the forbearance actions.³²

Professor Frieden points out that § 706 jurisdiction gives the FCC the authority to promote broadband rollout and dissemination.³³ As such, measuring broadband access, always a difficult and tendentious task, will become a more central issue.³⁴ As Professor Frieden points out, fundamental disagreement exists on what benchmarks to use: national penetration goals, localized goals to ensure that particular areas are not left out, what data speeds constitute broadband connections, etc.³⁵ These highly technical issues will move to the forefront of FCC concerns.³⁶

These observations, indeed, are new, and I believe both helpful and important. To the degree I would add anything to them is to point out the "newness" of regulation under § 706. Consider previous grants of jurisdiction to the Federal Communications Commission. The first, § 201, which goes back to the 1934 and the original Act,

27. John Blevins, *The Risks and Rewards of Network Neutrality Under § 706*, 2015 MICH. ST. L. REV. 723, 729-31.

28. *Id.* at 729-30.

29. *See id.*

30. *Id.* at 730, 732-33.

31. Justin (Gus) Hurwitz, *Net Neutrality: Something Old; Something New*, 2015 MICH. ST. L. REV. 665, 681-82.

32. *Id.*

33. Frieden, *supra* note 1, at 759.

34. *Id.* at 770-71.

35. *Id.*

36. *Id.* at 768-72.

gives the FCC jurisdiction to do very specific things, such as set rates and mandate routes of interconnection.³⁷

In 1934, regulators already had a long experience with setting rates.³⁸ An elaborate and precise set of accounting rules, along with a relatively understood theory of pricing, guided these ratemakings.³⁹ And, indeed, the FCC has promulgated long-distance rates, and later long-distance access charges, without controversy for decades.⁴⁰

The 1996 Telecommunications Act constituted the next significant increase in FCC jurisdiction in §§ 251 and 252.⁴¹ They empowered the FCC to set interconnection rates between carriers and access charged for unbundled network elements for the local network.⁴² But, these sections required the FCC to do something that no one ever had before: set rates—in an ostensibly competitive market—for interconnecting telephone networks and for unbundling portions of telephone networks.⁴³ The 1934 Act commands the FCC to set rates—rates which were in a monopolistic environment in which it could be possible, in theory, to capture the entire cost basis of the network.⁴⁴

In contrast to these well-understood ratemaking principles implicated in the 1934 Act, §§ 251 and 252 asked something—access rates to portions of a network—which the FCC had never

37. 47 U.S.C. § 201(a) (2012) (“It shall be the duty of every common carrier . . . 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.”).

38. Adam Candeub, *Network Interconnection and Takings*, 54 SYRACUSE L. REV. 369, 382 (2004).

39. Gregory J. Vogt, *Cap-Sized: How the Promise of the Price Cap Voyage to Competition Was Lost in a Sea of Good Intentions*, 51 FED. COMM. L.J. 349, 355 (1999) (“In the 1960s, with the advent of some competition in the local market, the FCC turned to rate-of-return regulation, a widely used means of regulating industries with limited competition, in order to control the amount that could be charged by LECs for allowing a long-distance call to go over the long-distance network. More recently, as the idea that telephony is a natural monopoly has been discarded in the face of technological advances, regulators have considered alternative means of regulating rates charged by LECs to IXC for interconnecting long-distance calls with the local networks.”).

40. *See id.* at 410-11.

41. 47 U.S.C. §§ 251-252.

42. *Id.* §§ 251(c)(2)-(3), 252(c), 252(d)(3).

43. *Id.*

44. *See generally* Irston R. Barnes, *Bonbright, The Valuation of Property*, 52 Q.J. ECON. 155 (1937) (book review).

done before.⁴⁵ Essentially, the 1996 Act gave the FCC carte blanche to create an entire regulatory regime. While the FCC achieved some success—for instance, the Supreme Court’s approval of its TELRIC pricing methodology⁴⁶—the FCC certainly failed in the stated objective of the 1996 Act and the Local Competition Order⁴⁷—to create a vibrant, competitive market in local telecommunication competition. And, indeed, many attribute its quixotic efforts as the cause of the telecommunications bubble, which burst so dramatically in 2000.⁴⁸

Yet compared to § 706, §§ 251 and 252 are crystalline in their precision. Section 706 makes the vaguest of commands and requires no established regulatory methodology, i.e., some sort of known ratemaking technique. Instead, it refers to all of them with a jurisdictional grant that seems aspirational, not instrumental:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced 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.⁴⁹

This vagueness is a curse and an opportunity for the FCC. It has great freedom—a freedom that might result in spectacular failure, as did the implementation of local competition under the 1996 Telecommunications Act. Or, it is a freedom that might result in rebuff from the D.C. Circuit. Only time will tell.

Even if the D.C. Circuit were to uphold the FCC’s order, which given its current composition seems likely, we would still be left

45. Without providing the entire regulatory scheme, §§ 251 and 252 set forth a system whereby carriers can purchase portions of “network elements” or interconnection on a per-minute or per-call basis. This is opposed to the traditional ratemaking of setting rates to recover the cost basis of the entire network.

46. See *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 527-28 (2002).

47. See *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 FCC Rcd. 15,499, ¶ 3, at 15,505 (1996) [hereinafter *Local Competition Order*] (stating that one of the principle goals of the 1996 Act was “opening the local exchange and exchange access markets to competitive entry”).

48. Peter W. Huber, *Telecom Undone: A Cautionary Tale*, MANHATTAN INST. FOR POL’Y RES. (Jan. 26, 2003), <http://www.manhattan-institute.org/html/miarticle.htm?id=4503#.VKozR3tc8Zw>.

49. 47 U.S.C. § 1302(a) (2012).

with the regulatory question that no one has yet to answer: What *is* an open Internet? And, in particular, how does paid prioritization affect such an Internet? Despite the decades in which we have been involved with this issue, we still have trouble answering these questions because our legal and regulatory notions of openness and neutrality simply do not easily graft onto the reality of Internet routing.⁵⁰

Here, Sam Hurwitz adds in his interesting and important discussion of routing protocols.⁵¹ He argues that only in congested networks will paid prioritization degrade or hurt connections to other applications.⁵² In these situations,

Given the (small, but hard to define) range of possible applications that could be adversely affected by prioritization, the uncertain ways and extent to which they may actually be affected in any particular case, and the myriad approaches to mitigating such effects, the Commission should address any concerns arising from prioritization on a case-by-case basis.⁵³

His caution reflects the difficulties the FCC will face if it attempts to determine what a “fair” or “open” Internet requires—because capacity is largely a shared resource. What users and which packets receive which place and priority in the router cue are hard questions that the debate so far has tried to ignore.⁵⁴ Certainly then, good answers will be new.

50. Candeub & McCartney, *supra* note 8, at 531-32 (“[T]he failure to analyze the meaning of discrimination in a packet-switched network has led many in the debate to apply theoretical, even metaphorical, solutions that lack practical applications and leave engineers scratching their heads. For instance, Internet pioneer David Clark remarked that “[m]ost of what we have seen so far [concerning internet openness] . . . either greatly overreaches, or is so vague as to be nothing but a lawyer’s employment act.” (alteration in original) (quoting David D. Clark, *Network Neutrality: Words of Power and 800-Pound Gorillas*, 1 INT’L J. COMM. 701, 708 (2007))).

51. Hurwitz, *supra* note 31, at 714-19.

52. *Id.* at 717-18.

53. *Id.* at 718.

54. This problem with creating any legal standard from “best efforts” routing or other network engineering principles has been previously explored. *See* Candeub & McCartney, *supra* note 8, at 525 (“The term ‘best effort’ is misleading. Network engineers use it to describe a single default treatment of traffic. To some, this seems to define a neutral network. But is anything really the best if they are all the same? *You are a special little snowflake . . . just like everyone else.* Of course nobody wants your worst effort. Or what if something else is actually treated better? It is literally inaccurate to call it ‘best’ when some are treated better, and it is misleading if none are treated worse.” (footnotes omitted)).

Also, what is likely new to the debate is that unlike the first Open Internet Order, the FCC seems poised to enter deeper into the Internet. Its prior efforts were focused on the last mile—which is woefully inadequate. As the Comcast–Netflix dispute showed and as some commentators predicted, potentially discriminatory efforts can occur deeper in the Web.⁵⁵

While this widened focus will more effectively find potentially anticompetitive behavior, it still does not come to grips with the fundamental problem: “network neutrality,” “open Internet,” and “routing fairness” are legal concepts that do not translate in any recognizable way into routing practice, network engineering, or interconnection. Sam Hurwitz’s article focuses on the problem of applying these principles to routing, and others have demonstrated equal problems in interconnection.

Instead of dealing squarely with this fundamental conceptual problem—a problem that will haunt and likely doom any Internet regulatory regime—the FCC in the 2014 NPRM once again abstracts away from it. The FCC’s standards for determining whether a network actor allows for a “minimum level of access,” refrains from “unreasonable discrimination,” or engages “commercially reasonable” contracts with other network actors are hopelessly vague.⁵⁶ Again, these standards may prove intractable, so perhaps despite the FCC’s new regulatory energy and claimed jurisdictional authority, *plus ça change, plus c’est la même chose*.

55. *Id.* at 500 (“An access provider can ‘outsource’ discrimination by adopting discriminatory terms in peering and transit contracts with other network providers. The literature on Internet openness, for the most part, ignores this possibility.”); Christopher T. Marsden, *Net Neutrality: The European Debate*, J. INTERNET L., Aug. 2008, at 1, 7 (“[S]uch discrimination may possibly be detected by the end-user when it is conducted by its ISP, while a far more pernicious and potentially undetectable discrimination may occur at peering points.”); *see also id.* at 15 n.13 (“The debate in regard to the subtleties of service degradation is beyond this article, and experts at the Paris conference of 29 May 2007 were divided as to whether degradation that is deliberate could be well enough disguised to suggest off-net discrimination.”).

56. 2014 Open Internet NPRM, *supra* note 6, ¶ 97, at 5596, ¶ 113, at 5600, ¶ 122, at 5604 (using “unreasonable discrimination,” “minimum level of access,” and “commercially reasonable” as touchstone standards in Internet regulation).

