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Congress Needs to Stop the Net Neutrality Definitional Merry-Go-Round

BY LAWRENCE J. SPIWAK

In a few weeks, it is widely expected that the Federal Communications Commission will release a draft order reversing the Obama Administration's controversial 2015 decision to reclassify broadband internet access from a lightly-regulated "information" service under Title I of the Communications Act to a heavily-regulated common carrier "telecommunications" service under Title II of that same Act. As with the original 2015 decision, a court appeal of this policy change is a virtual certainty. Yet, even though the D.C. Circuit in *USTelecom v. FCC* upheld the FCC's 2015 open internet rules just over a year ago, this very same case provides the current FCC with ample authority to return to the pre-2015 status quo. As such, assuming current FCC Chairman Ajit Pai can construct a good analytical story, the Trump Administration's reversal of the Obama Administration's power grab nonetheless has a good chance of success on appeal.

To understand why, we first need to go back to the Supreme Court's seminal 2005 decision in *NCTA v. Brand X Internet Services, Inc.*. The question at bar in *Brand X* was whether the FCC had the authority to define (the then-nascent) cable modem service as a Title I information service. The Commission argued that even though cable modem service comprised both an "information service" component and a transmission "telecommunications service" component, there were two reasons why a Title I definition made sense: first, consumers did not view cable modem service as a telecommunications offering because the consumer used the high-speed wire always in connection with the information processing capabilities provided by internet access; and second, because the transmission was a necessary component of internet access. After review, the Supreme Court, finding both that the statute was suffi-

ciently ambiguous and the Commission's explanation reasonable, ruled that the Commission's determination was entitled to deference and upheld the agency's decision.

With this precedent established in *Brand X*, the FCC then went on to classify both DSL and wireless broadband as Title I information services. By all accounts, this "light-touch" regulatory approach led to the explosive growth of the internet we all enjoy today.

In 2015, however, the Obama Administration radically reversed course from this bi-partisan light-touch approach toward the internet. Engaging in some definitional gymnastics, the FCC under the leadership of then-chairman Tom Wheeler determined that broadband internet access was better viewed as a common carrier telecommunications service subject to the archaic rate and conduct regulation provisions of Title II. Although the appellants made an assortment of technical arguments about why internet access did not fall within the definition of a telecommunications service, the D.C. Circuit in *USTelecom* nonetheless upheld the agency.

Citing *Brand X*, the D.C. Circuit found that the FCC had great latitude to change its mind and reclassify broadband access as a common carrier telecommunications service, noting that "nothing in the Telecommunications Act suggests that Congress intended to freeze in place the Commission's existing classifications of various services." In fact, argued the court, "such a reading of the Telecommunications Act would conflict with the Supreme Court's holding in *Brand X* that classification of broadband 'turns . . . on the factual particulars of how Internet technology works and how it is provided, questions [Supreme Court precedent] leaves to the Commission to resolve in the first instance.'"

So where does this leave the state of the law? Under logic set forth by the D.C. Circuit in *USTelecom*, when it comes to the regulatory classification of the internet, it would appear that what one Commission can do another can undo. So, if the current FCC decides to "un-reclassify," then the crux of the case will rest upon whether the Commission can articulate a compelling argument for changing the definition of broadband. Stating it another way, having just told the court that its 2015 rules will result in rainbows and unicorns in the internet ecosystem (assertions that the court accepted at face value), the current FCC is going to have to demonstrate that its predecessor either severely over-

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estimated the benefits of the 2015 open internet rules or severely underestimated the costs.

Fortunately for the current Commission, that won't be a problem.

Let's start with the Obama Administration's central theory of the case—mentioned repeatedly with favor by the D.C. Circuit in *USTelecom*—the FCC's "virtuous circle" theory of investment. For those unfamiliar with the Commission's "virtuous circle" theory, it goes something like this: (1) "edge" providers such as Google and Netflix invent cool stuff for consumers to use; (2) as consumers use this cool stuff, the demand for better broadband networks correspondingly rises; (3) this increase in demand for broadband drives network operators (the "core") such as AT&T and Comcast to invest more in their networks; (4) which, in turn, leads edge providers to innovate further, leading to more demand and network investment, and so forth. In this depiction of the broadband ecosystem, the cycle of innovation and investment is beneficial to all participants and thus self-enforcing. It is, quite simply, "virtuous."

However, if the circle is indeed "virtuous," what part of virtue needs to be regulated? After all, a truly virtuous circle requires no government intervention. Economically justified net neutrality regulation therefore requires an "unvirtuous circle"—a market failure in the broadband ecosystem—that the hand of government is required to remedy. The FCC's "virtuous circle" argument contains no defect, and therefore cannot justify corrective intervention. And, when the government regulates a "virtuous circle" in ways that intentionally interfere with the natural workings of the market, such regulation must, by the agency's own theory, lead to reduced broadband investment.

And that is precisely what happened. Investment in telecommunications is below expectations by about 25 percent since the FCC's introduction of the Title II reclassification. In fact, since FCC Chairman Julius Genachowski first introduced the specter of reclassification in 2010, investment in telecommunications is about

\$150 to \$200 billion lower than it would have been absent reclassification of broadband as a Title II telecommunications service. Recent data shows that capital spending for 2016 was again down, and by large levels, in relation to historical spending patterns. For the wireless industry in particular, capital spending is about \$6 billion below expectations, a decline of 20 percent.

The FCC's 2015 *Open Internet Order* was hardly a model of legal rigor. Selectively interpreting the statute and ignoring years of legal precedent, the FCC's implementation of Title II raised a host of Fifth Amendment due process abuses that should trouble anyone concerned about the unchecked growth of the regulatory state. Fortunately, the current FCC appears poised to rollback the excesses of its predecessor.

Still, as *USTelecom* holds that regulators have great discretion to define the appropriate regulatory classification of the internet, the FCC's expected rollback of the 2015 open internet rules will not be the end of the story. Indeed, given the highly politicized nature of telecom policy these days, it is perfectly reasonable to expect that the top priority of the next Democrat-led FCC will be to reverse the Trump Administration's deregulatory efforts and subject the internet once more to a legal regime designed for the old Ma-Bell monopoly, and to restore some form of the FCC's 2015 rules. Given the huge, demonstrated adverse economic effects resulting from reclassification—or even the threat of reclassification—this inevitable seesaw in regulatory policy every four or eight years will do nothing to engender the investor confidence needed to fund the aggressive deployment of new broadband infrastructure as mandated by Section 706 of the Telecommunications Act of 1996.

If we want this legal merry-go-round to stop, then there is only one solution: Congress needs to pass legislation. Unfortunately, given the tenor of the current broadband policy debate, I am not particularly optimistic. But given the state of the law, if Congress fails to act, then it will just be *deja vu* all over again.