

Opening the “Open Internet”

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Things I've heard, none of which are true

- I'm glad this will keep Google from biasing searches
 - Not here, at least yet
 - Try the EU
- I'm tired of paying these high cable bills
 - The FCC says it's not going after those—but camel's nose?
 - This could even make them higher
- It's about time someone did something about privacy
 - Not at all in this, but maybe FCC will have to step in
 - This could take away the FTC's authority
- I've been worried about competition in the backbone
 - No, just the last mile
 - Interconnection to come

So, what is it?

- 400 pages, 3-2 decision
 - 313 page text of order, including final rules, flexibility analysis
 - Statements by commissioners
 - 64 page dissent by Commissioner Pai, 16 page dissent from Commissioner O'Reilly
- What's significantly new? [More detail to come]
 - The FCC issued an Open Internet Order (FCC “net neutrality” synonym), but voided by the courts as outside Sec. 706
 - 2015 OI Order changed legal authority by reclassifying broadband service providers as telecommunications service providers subject to Title II “common carrier” regulation
 - Added paid prioritization provisions to 2010 rules against blocking, throttling
 - Extended rules to mobile broadband providers

How did we get here? “Ancient” history

- Arguably goes back 40 years
- *Computer II* distinction between “basic” and “enhanced services”
- *US v AT&T* (1984) MFJ: Divested monopoly Bell operating companies precluded from offering “information services”
- RBOCs allowed back into information service markets in 1990, following lack of interest of DOJ and AT&T in that restriction

Telecommunications Act of 1996: definitions

- **Information service: generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications ... but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service**
- **Telecommunications service: 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**
- **Only the latter subject to “common carrier” Title II**
 - Like basic vs. enhanced, RBOC allowed vs. prevented

The (in)famous Sec. 706

- (a) The Commission ... shall encourage the **deployment ... 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.
- (b) “take immediate action” following inquiry
- FCC had claimed, claims as basis for OI authority
- Policy statement or legal mandate?

FCC Chair Powell 2004: “Internet Freedom”

- “Empowering Consumers Without Regulating the Internet”
 1. Consumers should have access to their choice of legal content
 2. Consumers should be able to run applications of their choice
 3. Consumers should be permitted to attach any devices they choose to the connection in their homes
 4. Consumers should receive meaningful information regarding their service plans
- A non-binding “Internet Policy Statement” unanimously approved in 2005

A primer on US judicial review

- **Hard to understand net neutrality or most other important regulations (e.g., environmental, electricity) without it**
- **Three main areas**
- **First, constitutional**
 - **Free speech (FCC, defer to corporate owner as “speaker”?)**
 - **Regulatory takings**
 - **Interstate commerce (who has authority)**
 - **Non-delegation: Has Congress given the regulator too much authority**
- **Constitutional issues least important in practice; process and authority more prominent**

Process: The Administrative Procedure Act (1946)

- **List of reasons for courts to find agency action unlawful**
 - (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;**
 - (2) contrary to constitutional right ...;**
 - (3) in excess of statutory jurisdiction, authority, or limitations...;**
 - (4) without observance of procedure required by law;**
 - (5) unsupported by substantial evidence ... or otherwise reviewed on the record**
 - (6) unwarranted by the facts subject to trial de novo by the reviewing court**

Authority: The “*Chevron* deference” doctrine

- Two prong test:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.

[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

- “Permissibility” based on legislative history, rest of law
- Agencies may “properly rely upon the incumbent administration’s views of wise policy

Brand X (really!) – 2005, Supreme Court

- “Brand X” group of firms wanting broadband regs
- FCC declared “broadband cable modems” (later extended to all broadband as information services outside common carrier regulation
- This is where the “reclassification” term comes from
- Justice Thomas, for majority, said this was within scope of *Chevron* deference, as statute ambiguous
- Justice Scalia, dissenting(!), said broadband cable offered a telecommunications service as Congress defined, so the FCC did not warrant deference
- Justice Thomas said that FCC also had discretion to classify broadband as telecommunications service

The two episodes

- **Madison River, 2005: denying ports to VoIP providers**
 - North Carolina company with 40K DSL subscribers
 - Consent decree, MR paid \$15,000 and agreed not to block ports
- **Comcast, 2010: delaying peer-to-peer (BitTorrent)**
 - Comcast changed management, but FCC ordered transparency
 - Comcast appealed anyhow, claiming FCC lacked jurisdiction, didn't provide APA notice, reasoning arbitrary and capricious
- **DC Circuit ruled against FCC on jurisdiction**
 - Brand X decision did not give FCC authority over management
 - Congressional policy statements regarding “private blocking” did not delegate, provide ancillary authority
 - Rejected FCC change of tune regarding 706 “advanced broadband deployment” provision of ‘96 Act

Rather than appeal, FCC issued 2010 OI Order

- Only two violations: Not much evidence of a problem
- Nevertheless, ISPs allegedly have incentive, ability to “limit openness”, reduce innovation
 - Interfere with third party competing services (RRC)
 - Charge content providers for access, including priority
 - Degrade non-priority traffic
- Inadequate *ex ante* competition; terminating monopoly
- Accordingly ...
 - **Transparency** re network management, performance
 - **No blocking** of legal content, competing “voice, video telephony”
 - No **unreasonable discrimination**

Leading up to:

- **Jan. 2014: 2010 Open Internet Order (FCC “net neutrality” term) voided by D.C. Circuit, 2-1 decision**
 - Agreed now with FCC that it has authority to act under 706
 - Upheld for transparency
 - But no blocking or discrimination looked too much like “common carrier” to be supported by 706
- **FCC options: 706 or reclassify to apply Title II**
- **May 2014: NPRM with “commercially reasonable” test**
 - Upheld by D.C. Circuit for data roaming agreements as sufficiently discretionary to not imply common carrier status
 - John Oliver and other hilarity (3.7 million “comments”) ensued
 - “Benghazi for liberals”
 - Progressive populists fighting to keep corporations from paying

What is “Title II”? Common carrier under FCA

- **Sec. 201**
 - Just and reasonable rates for service, interconnection
 - Mandatory interconnection with other carriers
- **Sec. 202**
 - No unjust or unreasonable discrimination or undue preference
 - Charges, practices, services
- **Sec. 214**
 - Building facilities or discontinuing service requires FCC “public convenience and necessity” certificate
- **Numerous other provisions; FCC asserts forbearance except from privacy, universal service, disability access**
- **FCC still claims 706 would work, but Title II clears way**

Specifics seemingly simple (leaving out details)

- Enhanced transparency, esp. regarding congestion
- Extended to mobile, not institutional (e.g., campus WiFi)
- No blocking of “lawful content, applications, services”
- No throttling: “shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service”
- No “paid prioritization”: shall not “favor some traffic over other traffic, ... either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity”
- “No unreasonable interference or unreasonable disadvantage ”
- All but paid prioritization subject to “reasonable network management” and can allow general “specialized services”
- Provide “advisory opinions” regarding proposed network practices, “specialized services”
- Interconnection, data caps, zero rating case by case under Title II
- Broad forbearance, including subscriber rates, tariffing

Stated economic rationales (almost nothing new)

- “Virtuous cycle”: OI=> content=> demand => deployment
 - Claim DC Circuit upheld specific policies [?]
- “[ISPs able] to deceive consumers, degrade content, or disfavour the content that they don’t like”
- Bargaining power as gatekeepers, from switching costs (now including mobile)
- Paid prioritization creates entry barriers and degrade the “slow lanes”
 - Commercially reasonable not good enough
- Economics an astonishingly small part of Order
 - Only two episodes (+ Apple? Netflix?)
 - Citations to literature on price discrimination in input markets

Commissioner Pai's 64 page dissent

- **Abandon openness for power grab, inhibit investment**
 - No guarantee forbearance will last
 - FCC can reject investment plans as insufficiently neutral
 - Reduces choice: Response to zero-rating, pre-paid
- **All harms beyond two mentioned hypothetical**
 - Plus Apple not letting FaceTime initially run on mobile
- **Process**
 - Doesn't follow 706 roadmap in *Verizon*; 706 gives no authority
 - Inadequate notice
 - Every FCC precedent is that broadband is information service
- **Response to Pres. Obama; adding ISPs to universal service fund tax base (neither on merits of policy)**

A bit of economics

- **Zero price to content providers? Two-sided market**
 - Incentive to attract customers with positive access prices
 - Which way does the virtuous cycle go?
- **Monopolies lack incentive at margin to cut quality**
 - Don't have inefficient incentive to favour affiliates
- **How many monopolies? I've got seven**
- **Paid prioritization—no express mail?**
 - Why stifle high quality uses (surgical video)
 - “Slow lane” min quality regs?
 - Price discrimination in inputs a real concern, but not against higher price for better service
- **The “not a scarce resource” claim: A big deal**

Less intrusive justifications (assuming evidence)

- **Consumer protection**
 - If an ISP says it's neutral, be sure it is
 - Rationale for transparency, if inconsistent with consumers unwilling to switch
 - FCC or FTC?
- **Network externalities**
 - Broadband value depends on provider of Content A knowing viewers can open links to Content B
 - Does not justify zero price, prohibiting specific uses
- **Minimum quality standards**
 - Sufficient for network externalities (but may not be worth it)
 - FCC says it rejected, but inherent in “no throttling”
- **Is there a lack of competition? Matching rival speeds**

Potential legal stumbling blocks (Gus Hurwitz)

- **Comcast 2010 “no authority” still on the books**
 - Appeal to 2014 OI 706 grant, but FCC lost that, too
- **Fulfilling APA notice requirements**
 - **Pai: Only two paragraphs in 85 page NPRM on Title II**
- **Paid prioritization: arbitrary and capricious?**
- **Title II reclassification**
 - **FCC: Brand X decision suggests OK**
 - **Impressive backtracking in order: Is that enough?**
- **Zero price rate regulation**
 - **Confiscatory: How is this “just and reasonable”?**
- **Regulatory takings? (discussed by FCC)**

Forbearance authority (Phoenix Center)

- **FCC wants to restrict Title II to only listed services for content providers**
 - Claiming not regulating downstream rates
- **Statutory criteria:**
 - (1) enforcement ... is not necessary to ensure that the charges, practices, ... are just and reasonable and are not unjustly or unreasonably discriminatory;
 - (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
 - (3) forbearance from applying such provision or regulation is consistent with the public interest
- **Consistent with “terminating monopoly”?**

What about antitrust?

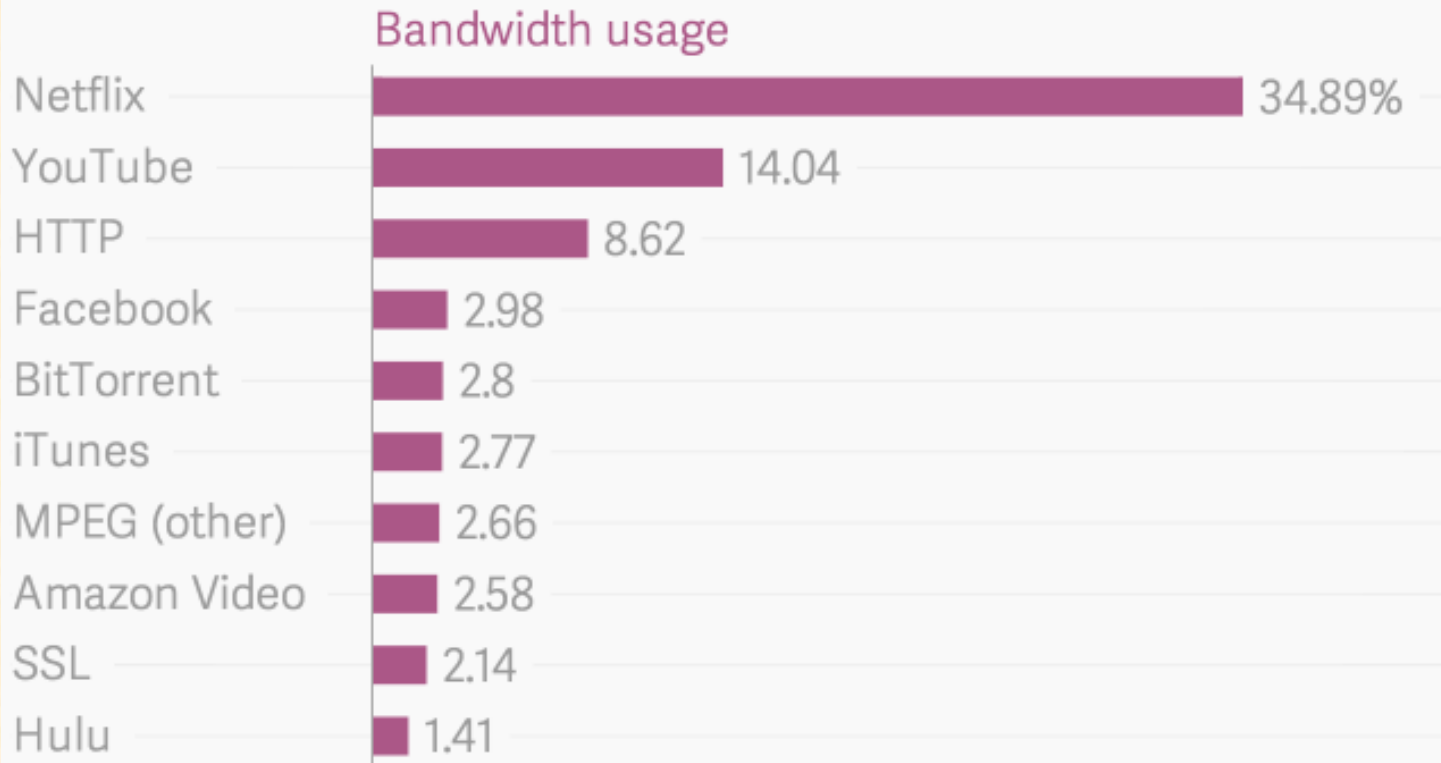
- Many argue for *ex post* antitrust vs. *ex ante* regulation
- FTC out because FTC Act excludes common carriers from FTC's jurisdiction
- Private antitrust and possibly DOJ out because of *Verizon v. Trinko* (2004)
 - If a regulator has authority, antitrust is extraneous
 - Just this side of declared regulatory immunity
 - Not just FCC, but securities (*Credit Suisse*), postal (*Flamingo*)
- Not every justification antitrust
 - Network externalities from content access
 - Misrepresentations of unbiased service
 - Regulating rates of terminating monopolies

Is this really about economics and competition?

- **Who gets to control “the Internet”?**
 - First Amendment rights of communication facility owners
 - Lawrence Tribe argued that for RBOCs to support removing “information services” line-of-business restrictions
 - Or access rights of the users?
- **Arbitrary or capricious conduct**
 - Lazy or locked-in business management conduct
 - Much potentially bad conduct is inconsistent with profit maximization: the “Zipcar” example
 - “No incentive to do that” provides shockingly little reassurance
- **Or is it about old values vs. new realities?**
 - “Net neutrality” a vision of an Internet shared community
 - Does that fit a world where it’s just another way to watch TV?

Information sharing or just more TV? 03/15 data

Netflix dominates video streaming in North America



Quartz | qz.com

Data: Sandvine

- **Where's Newton Minow when we need him?**