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Title II Reclassification

The Law, the Public Interest, and the FCC—A Critique of Title II Comments from Eleven Democratic Congressmen

By Lawrence J. Spiwak

Last spring, the Federal Communications Commission issued a *Notice of Proposed Rulemaking* in which it proposed to roll back the Obama Administration's controversial 2015 decision to reclassify broadband internet access as a ''common carrier'' telecommunications service under Title II of the Communications Act of 1934. The matter has stoked the public passion—to date, the FCC has received over twenty million comments.

Amid this avalanche of paper were the comments filed by eleven Democrat members of Congress—several of whom sit on the House Energy and Commerce Committee—who claim their background working on telecom issues over the years gives them the ''unique ability to provide input on the actual meaning and intent'' of both the Communications Act and the Telecommunications Act of 1996. A simple review of the plain text of these statutes and the substantial case law interpreting them, however, appear to raise doubts about that claim.

Proper Interpretation of the ''Public Interest'' Standard

Let's start with the Congressmen's central argument that the FCC ''fundamentally and profoundly misstates the law'' because the FCC's NPRM ''takes an impermissibly narrow view'' of the Communications Act's ''public interest'' standard. ''Any action the FCC takes based on the analysis contained in the proposal,'' they claim, ''will be legally flawed and contrary to the law.''

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The problem with this argument is that regardless of how one views the ''public interest'' standard, application of this standard is *irrelevant* to the fundamental legal question raised in the NPRM. At bar is a simple binary definitional determination: is broadband internet access a Title I ''information service'' as defined by Section 3(24) of the Communications Act, or is it a Title II common carrier ''telecommunications'' service as defined by Section 3(53) of the Act? Under neither section is the phrase ''public interest'' ever mentioned. As the D.C. Circuit just reminded the Commission in *Global Tel*Link v. FCC*, 859 F.3d 39, 52 (D.C. Cir. 2017), amended and aff'd in relevant part, No. 15-1461, 2017 BL 273143 (August 4, 2017), it is wholly impermissible for an administrative agency ''to conflate[] two distinct statutory grants of authority into a synthetic . . . standard.''

As it happens, the bounds of the FCC's ''public interest'' standard has been a favorite research topic of mine over the years. Assuming the public interest standard were indeed applicable in this case, have these lawmakers properly interpreted the standard? I don't think they have.

The Congressmen argue that the FCC's NPRM overlooks ''important national priorities'' such as the harm reversing reclassification could have on small businesses, economic development and jobs in the broader U.S. economy. According to the Democrats, while the FCC is right to consider the effects of its actions on small internet service providers (''ISPs''), the FCC's proposal ''fails to acknowledge the effects that its actions could have on other small businesses and jobs across the country.''

That argument raises red flags about the appropriate scope of the FCC's subject matter jurisdiction. Under the plain terms of the Communications Act, the FCC has subject matter jurisdiction over, inter alia, ''interstate . . . communications by wire or radio.'' So while the Democrats correctly concede that the FCC must look at the effect of the regulation on entities subject to the FCC's jurisdiction (i.e., small ISPs), looking at the effects of reversing reclassification on small businesses outside of the agency's jurisdiction (e.g., an ice cream

store in Paducah, Kentucky) is clearly beyond the Commission's statutory charge. As the Supreme Court recognized over forty years ago in *NAACP v. Federal Power Commission*, 425 U.S. 662, 699-70 (1976), ''the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare.''

Privacy Concerns The Congressmen next argue that by reversing reclassification, the FCC ''would remove the statutory privacy rules that can protect broadband users before they are harmed.'' Again, this argument is legally inaccurate.

By way of quick background, prior to reclassification, privacy concerns in the internet ecosystem were generally handled by the Federal Trade Commission. But reclassification triggered two unintended consequences.

First, due to a quirk in the law, the FTC has no authority over ''common carriers,'' so reclassification immediately took them out of the privacy enforcement game in the broadband arena.

Second, with reclassification, all broadband service providers—whether wireline, cable or wireless—became subject to the Customer Proprietary Network Information (CPNI) statutory framework contained in Section 222 of the Communications Act. The problem is that Section 222, designed for a pre-internet telephone world, applies only to a specific type of information collected in the provision of basic voice telephone service. As a result (and as the FCC conceded), the CPNI rules on the Commission's books suddenly became hopelessly outdated. Thus, the FCC needed a legal way to put a square peg into a round hole.

Nearly a year and a half after the FCC elected to reclassify, the Commission finally issued a set of privacy rules which it hoped would solve the problem. However, rather than harmonize its approach with that of the Federal Trade Commission to minimize disruption and create a consistent set of protections for network operators and edge providers like Google, the FCC chose to blaze its own path by issuing draconian rules that only addressed actions by broadband service providers, despite overwhelming evidence in the record that such a regime would disserve consumers and curtail emerging competition to Google and others in the digital advertising market. Thus, rather than create a harmonized industry-wide regulatory approach to digital privacy, the FCC created two discrete asymmetrical regulatory regimes: a restrictive ex ante regime specifically for broadband service providers with rules enforced at the FCC, and an ex post case-by-case regime enforced by the FTC for everybody else.

But putting away the policy question of whether an asymmetrical privacy regime makes any sense for the moment (and I think it does not), what is important to understand from a legal perspective is that the privacy rules the Democratic lawmakers claim will be removed *never went into effect in the first instance*. First, the FCC stayed the Obama-era rules in March 2017, and then shortly thereafter Congress—employing its rarely used Congressional Review Act authority—threw the FCC's rules out altogether. In other words, there are no privacy rules to remove. If anything, it appears these lawmakers are attempting to pressure the FCC to do administratively what they could not convince their colleagues in Congress to do legislatively.

Investment Inquiry The Democrat lawmakers' third major legal argument is that the FCC is improperly focusing on whether the *2015 Open Internet Order* depressed investment in broadband infrastructure. According to the Democrats, under the Communications Act the FCC must also look at, among other things, ''investment and innovation from ancillary businesses like websites and apps.'' Thus, argue the Democrat Congressmen, network investment ''alone cannot satisfy the heavy responsibility of determining whether a policy is in the interest of the pubic. If we had intended network investment to be the sole measure by which the FCC determines policy, we would have specifically written that into the law. We did not.''

But according to the plain terms of the statute, that is *exactly* what Congress did.

Under Section 706 of the Telecommunications Act of 1996 (a central legal backstop to the Commission's reclassification decision), Congress expressly commanded the Commission to ''encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans'' and to ''remove barriers to infrastructure investment.'' Under the plain language of the statute, therefore, the promotion of broadband infrastructure investment across the nation—and not the promotion of investment in edge services—is the express and exclusive focus of the FCC's statutory mandate. In fact, the Democrat Congressmen's pleading says as much, noting that the ''national priority'' the FCC should consider is ''how many people the networks reach and the quality of the connections.''

(Ironically, if Section 706 did contain language that the Commission must also promote edge investment, under existing case law and the FCC's own ''virtuous circle'' theory of investment the FCC would have a strong argument that it has regulatory authority over edge providers—an outcome I seriously doubt these Democrat lawmakers would support.)

Every serious attempt to analyze the data indicates that the prospect of Title II regulation has reduced investment in broadband infrastructure, and by a significant amount. When we at the Phoenix Center tackled this question, we used Bureau of Labor Statistics data back to 2010 (the date then-FCC Chairman Julius Genachowski first introduced the specter of reclassification into the net neutrality debate) and calculated a ''counterfactual'' analysis—that is, how much would have BSPs invested ''but for'' the regulatory intervention.

And guess what?

From 2011—the year after reclassification was first introduced as a possibility by then-FCC chairman Julius Genachowski—to 2015, another $80 billion in additional infrastructure investment would have been made ''but for'' the regulatory revival at the FCC under the Obama administration. Recent analysis from other data also suggests that reductions in capital spending for 2016 are large relative to historical changes in spending.

Moreover, if the commenting Congressmen want the FCC to contemplate the effects on jobs and ''relative speeds,'' the FCC also has robust statistical evidence on both. Advanced statistical analysis of both jobs and broadband speeds reveal that following the imposition of Title II regulation, employment in telecommunications is down 100,000 jobs relative to what it would have been (in no small part due to declining invest-

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ment) and broadband speed growth has decelerated since the 2015 Open Internet Order. The FCC is not limited to ''one narrow data point,'' as the lawmakers claim, but have at their disposal a wealth of analysis on the detrimental effects of reclassification.

Conclusion The legal and economic issues raised in the net neutrality debate are complex, and require seriousness of purpose if we are to derive the correct policy answer. For this reason, it is disappointing to see the purported telecom experts on the Democratic side of the aisle in Congress file such a questionable piece of advocacy at the FCC. Or, perhaps the letter is just one more addition to an already rich body of evidence demonstrating that there are no good arguments for applying Title II to broadband services.

At some point, we all hope that Congress will step up and pass some sort of Open Internet legislation to put this debate to bed. If that effort is to be successful, then it is incumbent on Members of Congress to bring greater focus, insight and analytical rigor than they demonstrated in this particular filing.