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## Decision Time for the Open Internet

On February 26 of this year the Federal Communications Commission (FCC) of the United States will vote on a proposed new ruling on the issue of "Network Neutrality" in the United States, bringing into force a new round of measures that are intended to prevent certain access providers from deliberately differentiating service responses on the carriage services that they provide.

At this point the exact nature of the FCC rule making to be voted on by the FCC's Commissioners is not public, but there has been a certain level of momentum behind the move to classify US Internet Service Providers under Title II of the US Telecommunications Act, which in effect would formalise these enterprises as common carriers. In such a scenario they would be subject to a higher degree of regulation on the services that they provide, with the constraint to operate certain declared services within the parameters of certain technical abilities, the inability to discriminate declared services and even to impose tariff rates on certain declared services. A positive aspect of such a move is that it would impose anti-blocking and anti-discrimination provisions on carriage service providers that would allow users to access content and services without the access provider actively discriminating between various content providers and their offerings. The carrier would be unable to discriminate or provide unfair competitive access to one content provider over another. However there is another aspect to common carrier measures, and that is the potential to impose regulation of pricing, services and interconnections. The extent to which these related measures would be applied by the FCC in this context is unclear, but these measures are intended to provide a regulatory control mechanism that counters the potential problems that arise through the formation of local access monopolies. Such a ruling could also clearly protect carriers from liability over carried content, particularly in providing carriers stronger protections than the Digital Millennium Copyright Act provides. It would be up to the FCC in the first instance to determine to what extent regulatory controls and protections would be imposed in the context of the use of Title II as applied to broadband carriage access providers, and there is some current expectation of a relatively light touch on the part of the FCC.

The other option open to the FCC in February 26 is to rephrase the previous rules under Section 706 of the Telecommunications ACT to ensure that they address the issues raised by the US Appeals Court when they reviewed, and rejected, the previous rule set. While it may appear to be somewhat retrograde step for the FCC to persist with the Section 706 model of industry "light touch" regulatory engagement, there are some sound reasons for such a move. Section 706 of the Act requires the FCC to promote broadband in the United States. The intent here is allow, and encourage, a so-called "virtuous circle" of investment and innovation in broadband infrastructure. This allows a range of different investment models with a range of possible retail offerings in broadband services without the imposition of regulated process, a potentially narrow set of declared set of access services and without what many see as the "dead weight" of regulatory compliance that would stifle further innovation in access offerings, and avoid locking the national infrastructure into a lowest common denominator of access services that would persist well beyond conventional technical expectations because of regulatory impost. This option of persisting with a Section 706 rule presents a far less onerous set of constraints on providers than the common carrier option of Title II, but at the same time it has fewer protections relating to neutrality and non-discriminatory practices. Indeed, one interpretation of Section 706 is that Internet access providers would be able to levy different charges to different content

providers in exactly the manner that this proposed rule making is intended to prevent. However, the January 2014 Court of Appeals decision was a clear warning that the rule making activities of the FCC need to be diligent to remain within the defined bounds of the FCC's authority. If the desired outcome of the FCC's actions is truly a common-carrier structure for access service providers, then the FCC would need to invoke the common carrier provisions of the Telecommunications Act under Title II and classify them as carriers subject to those specific provisions in the Act.

It would appear the common carrier path has generated some resonance within the country. The satirical monologue by John Oliver on the topic in June 2014, in his HBO show characterised the behaviour of the access industry in discriminating between content providers as having "all the ingredients of a mob shakedown." He described the FCC's initially proposed pro-industry rules that passed effective oversight to the industry players themselves as the broadband equivalent of "needing a baby sitter and hiring a dingo" (<https://www.youtube.com/watch?v=fpbOEoRrHyU>) and his observations of the relatively high cost and comparative low quality of the services provided by these local access monopolies being foisted on US consumers pushed this issue well to the forefront of public attention. As John Oliver pointed out, the cable industry has purchased significant levels of political influence over the years, and it could be observed that the level of true competition in the local access market has declined in direct proportion to the level of lobbying of politicians to protect the interests of the remaining incumbents in this sector. Allowing these local access monopolies to operate without any effective form of oversight allows for predatory pricing structures to emerge, and ultimately it's the consumer who ends up paying the price for this form of market failure. It is hoped that a common carrier ruling for ISPs would be an effective counter to such market distortions. The support for the classification of ISPs as common carriers includes the office of the President, who stated explicitly that: "I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act — while at the same time forbearing from rate regulation and other provisions less relevant to broadband services." (<http://www.whitehouse.gov/net-neutrality>).

With this level of popular and executive support it would seem that the FCC will just proceed with this reclassification of ISPs as common carriers under Title II of the Act. But it's not as simple as that. It's not a case of "Section 706 Bad, Title II Good". It's more that each option has its own set of advantages and risks, and deciding between them is more about determining what is an acceptable level of compromise within both the industry and within the larger domain of public discourse, rather than a clear black and white decision. As Professor Christopher Yoo of the University of Pennsylvania pointed out at NANOG 63 ([https://www.nanog.org/sites/default/files/monday\\_general\\_yoo\\_commoncarriage\\_63.33.pdf](https://www.nanog.org/sites/default/files/monday_general_yoo_commoncarriage_63.33.pdf)), earlier in February, it's not clear that the current situation will be any better under a Title II ruling that would place access service providers within a common carrier framework. He makes the case that it's a case of the determination of the lesser of two sets of evils: an unregulated market that has the potential for distortions of market-based mechanisms that would further entrench the position of monopoly incumbents, as compared to the inefficiencies of a regulatory structure that would lock in regulatory-inspired inflexibility and impose additional costs related to regulatory compliance and impose a bureaucratic stasis on an activity that is desperately in need of further investment, technical innovation, higher efficiencies and improved services to consumers. There would be, in effect, a regulatory inspired barrier to entry that would deter new entrants, creating a competitive vacuum, leaving regulatory price controls as the only mechanism to protect consumer interests in local access monopolies. Professor Yoo poses a set of provocative questions on whether the regulation of this access market into a common carrier framework would impede further technical innovation in this activity, whether the activity would deter further private capital investment in access infrastructure, as distinct from encouraging it, whether it would cement in place a particular access model that may prove to be inefficient and costly to maintain over time. The track record of governmental regulation of activities that are based on rapidly evolving technologies is unimpressive, and there is no promise whatsoever that in this case at this time, and despite a history of precedent that would point to the opposite conclusion, the FCC is in a unique position to get this particular regulatory measure "just right".

On the other hand, simply hoping that an access provider will be adequately motivated to act in a broader public interest even when self interest as a defacto local monopoly points elsewhere is perhaps overly naive. What are the expectations that are being placed on these access providers? The FCC's efforts, and Section 706, are certainly a good place to start when thinking about this question. Internet access should be a service that is neutral and non-discriminatory. It should be fairly available to all consumers. Providers should charge a fair price for the service, and not impose monopoly premiums. The carriage service should be entirely independent of the content that is passed across it. But perhaps there's a bit more as well. Distortions in pricing or services in access carriage should trigger regulatory remedies that allow the common public interest in the fairness and impartiality in of a common carrier to be expressed and enforced. If that means, in the context of the FCC and the US Telecommunications Act, that the service of Internet access is one that is entirely consistent with the role of a common carrier of telecommunications services, then it makes a lot of sense to place this activity within the framework of Title II of the Act.

This is not just a debate within the industry. The public has also been highly engaged in this debate about network neutrality, and the terms of this debate appear to be more and more about the value of protecting an open and uncaptured Internet and less and less about the intricate details of the appropriate economic framework for efficient investment in access services for the country's data transmission infrastructure. The FCC reported in December 2014 that it had received 2.5 million responses to its call for comment on proposed rule making on the Open Internet (<http://www.fcc.gov/blog/fcc-releases-open-internet-reply-comments-public>), which appears to be a record for the FCC. So perhaps this is now much more a matter of politics and public perceptions about the fate of a network that has managed to capture the minds and hearts of an entire nation than a clinical economic debate about the comparative merits and risks of the various rule making measures being considered. Perhaps it was in recognition of this public momentum that the President stepped in with his own views about the desirability of firmly supporting the notion of an open and uncaptured Internet through common carrier-styled rule making by the FCC as an unabashed populist measure by the President.

The original position of the US to place the Internet outside of the conventional carrier regulatory structure was considered to be a novel move. It was intended to be a clear statement of intent to foster the continued development of the Internet in the US as a poster child for deregulation and the power of technical innovation and creativity to provide the main sustenance for vibrant competition within the industry without carrying the dead weight of inappropriate regulatory imposts. Their intentions were clear. But what has happened in the intervening period has not really matched those expectations. The developments in access infrastructure in the US has been through piggybacking the existing deployments of telephone copper and television cable. Major investments in fibre access networks have not eventuated and instead competition has dwindled in the face of such large scale aggregation in the access market using this existing copper infrastructure, while retail prices reflect monopoly rentals rather than the marginal cost of operation of the service, coupled with discriminatory practices directed to levy additional revenues directly from content. And then the Appeals Court intervened to unwind even these existing light touch regulatory measures, leaving these access providers in firm control of local access monopolies. When viewed in such a light it is difficult to make the case that these measures were an unabashed success, and it's hard to see how to make changes to such a regulatory framework that does not contain some level of enforceable impost to curb the worst excesses of monopolistic behaviour in the access sector. Consumers now need a better outcome from the industry regulator, not more of the same.

So the question now is: what form of rule making for network neutrality will the FCC's Commissioners commit the FCC to on February 26th?

We'll see soon enough.

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