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Net Neutrality: Internet Regulation Debate Far from Over

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The countdown has begun. On February 26, the Federal Communications Commission (FCC) plans to vote to place massive "net neutrality" restrictions on Internet service providers (ISPs) such as Comcast and Verizon. The details are not yet known—the FCC does not release the text of its rules until they are adopted—but all signs point to a "reclassification" of the providers as public utilities under Title II of the Communications Act. Opponents of regulation should not cash in their chips quite yet, however. Even after its vote, the FCC will face some substantial hurdles before the issue is decided.

Network-neutrality regulation—roughly defined as government-imposed rules that force ISPs to treat every bit of content on their networks exactly the same way—has been contentiously debated for over a decade now.[1] Twice during this time, the FCC has tried to impose such rules—in 2005 and again in 2010—and twice it has been rebuffed by the courts, which found the agency lacked authority to act.[2]

Hoping that the third time would be the charm, the FCC, led by Chairman Tom Wheeler, proposed yet another set of rules last May. Initially, Wheeler intended to more or less re-adopt the 2010 rules, with minor changes intended to address the problems identified in court.[3] President Barack Obama upped the ante in November, however, urging the FCC to take the extreme step of "reclassifying" ISPs as common carriers under Title II of the 1934 Communications Act. This would turn Internet access providers into public utilities subject to comprehensive regulation of their activities with potential consequences far beyond net neutrality itself. Devised for the static world of monopoly telephone service, Title II regulation could be devastating to today's innovative and competitive Internet. Yet, acceding to President Obama's wishes, Wheeler lent his support to the Title II scheme, scheduling a February 26 vote to adopt the new rules.

The prospect that such restrictions could be imposed spurred many opponents to seek a compromise. On January 16, the new Senate Commerce Committee Chairman John Thune (R–SD); House Commerce Committee Chairman Fred Upton (R–MI); and House Telecommunications Subcommittee Chairman Greg Walden (R–OR) released a "discussion draft" aimed at meeting regulation supporters halfway.

The premise of the bill is correct: Congress, not unelected regulators at the FCC, should decide whether and how Internet providers should be regulated. To this end, the legislation strips the FCC of its power to reclassify ISPs as public utilities, as well as of using section 706 to regulate the ISPs.

But the bill also enshrines certain "neutrality" rules into law. Specifically, blocking websites and slowing or "throttling" content is barred, unless justified by "reasonable network management." In addition, the legislation would prohibit "paid prioritization," defined as speeding up or slowing down traffic based on the amount of compensation paid by content providers such as Google or Amazon.

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Economically, such prohibitions are unnecessary and potentially harmful. The ban on paid prioritization, for example, forbids pricing options that are standard in nearly every other industry, and shifts the burden of payment from content providers to consumers. The new rules would impose the most significant burden on wireless carriers, who operate on limited frequencies, making network management tools even more essential.

Moreover, the proposed compromise would be unlikely to end the uncertainty surrounding this issue. The FCC would have to work out the meaning of such terms as "reasonable network management" on a case-by-case basis, a process which would take years.

Despite the proposal's substantial concessions, the proposed compromise has garnered little interest among proponents of FCC regulation, who have largely thumbed their noses at the GOP's olive branch. Not a single Democratic Member of Congress has expressed support for the bill. Many denounced the bill as soon as it was released, with Senator Ed Markey (D–MA) calling it a "legislative wolf in sheep's clothing."[4] A few Democrats, such as Senator Bill Nelson (D–FL), have been more conciliatory, but even they expressed opposition to the bill as it is drafted, saying it needed stronger regulation and fewer restrictions on the FCC.[5]

Talks are going forward to reach an agreement. But opponents of regulation should resist the urge to chase a compromise by making any further concessions toward significant new controls on Internet providers. If anything, the plan already goes too far in a regulatory direction. And, given the dug-in position of so many advocates of regulation—including President Obama—enactment of reasonable legislation anytime soon is unlikely.

There are, of course, times when compromise should be pursued. And, for good or bad, congressional opponents of Internet regulation have offered that. But they also need to lead, and make the case for good policy. Even with the FCC's vote only weeks away, opponents still have opportunities to stop the regulatory scheme even without a deal. Legislatively, Congress could bar the FCC from using its appropriated funds to enforce the new rules.[6] Any new rules are once again likely to be challenged in the courts, where the FCC's authority to act will once again be questioned. Defending its action, especially its use of Title II authority, will present a significant hurdle for the FCC. In fact, it was concern over such a challenge that led Chairman Wheeler himself to initially oppose using Title II—until the President intervened.

Barring any unforeseen developments, the FCC is inexorably moving toward adopting rules restricting the activities of ISPs. But the February 26 vote will not be the end of this long-running debate. Even without a bipartisan compromise, the FCC's action can still be largely blocked by appropriations rider in Congress, and by a nearly certain court challenge. This issue is far from settled.

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1. The definition of exactly which practices would be prohibited under these rules has never been clear. Claimed violations have ranged from the blocking of websites to offering discounts to consumers. See James Gattuso and Michael Sargent, "Beyond Hypothetical: How FCC Internet Regulation Would Hurt Consumers," Heritage Foundation *Backgrounder* No. 2979, November 25, 2014, http://thf_media.s3.amazonaws.com/2014/pdf/BG2979.pdf.
2. Most recently, the FCC's 2010 rules were overturned in February 2014 by the D.C. Court of Appeals, 740 F.3d 623 (D.C. Cir. 2014).
3. The new rules would have been based on section 706 of the Telecommunications Act, an ambiguous provision requiring the FCC to act if advanced services are not being deployed in a timely manner.
4. Gautham Nagesh, "GOP Lawmakers Propose Net-Neutrality Legislation," *The Wall Street Journal*, January 16, 2015.
5. Bill Nelson, "Protecting the Internet and Consumers through Congressional Action," opening statement, Senate Commerce Committee hearing, January 21, 2015, http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=7ba9cc4e-3cd8-44dd-bb84-fed5f6309ab2&Statement_id=844af365-c9f3-4c03-82c4-fc4f60fd0e89&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=1&YearDisplay=2015 (accessed January 29, 2014).
6. While Congress has already appropriated funds for the FCC through fiscal year 2015, a rider could limit the FCC starting in October this year. Such a rider would not affect state-level action or private actions triggered by reclassification, but could be effective by blocking the FCC from acting.