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Return of the 'Net Neutrality' Scheme: Regulation Backers Are Turning Up the Volume for Internet Regulation

by

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The Federal Communications Commission (FCC) is scheduled to vote Thursday on Chairman Tom Wheeler's proposal to adopt new net neutrality regulations. Free Press, an organization advocating for net neutrality mandates that equate with public utility regulation, is calling on its supporters to "bring pots and pans and whatever else you can bang on" to make a lot of noise at the FCC's doorstep.

This "pots and pans" strategy certainly doesn't fit comfortably with the idealized notion of a so-called independent regulatory agency such as the FCC. After all, in theory at least, the decisions of the FCC are supposed to be based on the commissioners' presumed expertise, not politics or other types of noise.

Since the D.C. Circuit Court of Appeals' Verizon decision in January, I have argued that the FCC should not try to reinstate net neutrality regulations. Nevertheless, when Mr. Wheeler announced on April 24 he intended to propose yet another net neutrality rule-making, this time one based on

a "commercial reasonableness" standard for assessing the lawfulness of the Internet access providers' business practices, I acknowledged, "there appear to be elements in his proposal that may mitigate the otherwise potential harmful effects of unnecessary government intervention."

A properly implemented "commercial reasonableness" standard at least would not impose on the Internet providers the same inflexible common-carrier regime that was devised early in the last century to regulate Ma Bell's offering of POTS, or "plain old telephone service." This common-carrier regime is commonly referred to as "Title II" regulation after its placement in the Communications Act. The irony of urging protesters to bring pots to the FCC to make noise in the cause of imposing on today's Internet providers the same public-utility regulation that applied to Ma Bell's POTS-era service seems to have escaped Free Press.

When confronted with the usual sloganeering from "consumer advocacy groups," Mr. Wheeler quickly backed away from articulating a principled defense of the "commercial reasonableness" standard he had only shortly before proposed. Instead, he pivoted to a "get tough" mode of threatening Internet providers with Title II common-carrier regulation.

The shift to "Title II talk" didn't mollify the net neutrality advocates —it only further fueled their fires.

For many reasons of sound policy, it would be wrong to put today's Internet access providers in the regulatory straitjacket that is Title II public-utility regulation. This course is legally problematic as well.

While it is true that under established administrative-law principles, an agency may change its mind, it nevertheless must provide a well-reasoned explanation for abandoning its prior reasoning. Pointing to protesters banging on pots and pans outside the FCC's doors will not suffice. Neither will pointing to the agency's disappointment at already having been rebuffed twice in court for its net neutrality actions.

In defending its 2002 decision to classify Internet service providers as "information service" providers — thereby removing them from the ambit of Title II public-utility regulation — the commission argued that from a consumer's perspective, the transmission component of an information service is integral to, and inseparable from, the overall service offering. This functional analysis of Internet service providers' service offerings was the chief basis upon which the Supreme Court upheld the FCC classification determination in 2005 in the landmark Brand X decision.

From a functional standpoint, and from a consumer's perspective, the integrated, inseparable nature an Internet service provider's service offerings hasn't changed since the Brand X decision, so it won't be easy for the commission to argue that it is changing its mind about the proper regulatory classification based on changed consumer perceptions of the service offering's functionality. Moreover, to the extent that the Supreme Court in 2005 cited favorably the FCC's claims that the dynamism and competition in the broadband marketplace made public-utility-style regulation unnecessary, those factors, if anything, argue even more strongly against a Title II common-carrier classification.

We are now at a juncture where — assuming no present convincing evidence of market failure and consumer harm — the FCC ought to await further direction from Congress. It is true that in its Verizon decision, the D.C. Circuit Court interpreted Section 706 of the Telecommunications Act of 1996 in a way that arguably gives the agency some measure of authority to adopt some form of new net neutrality rules, as long as they don't amount to imposing common-carrier obligations on Internet service providers. However, FCC Commissioner Michael O'Rielly makes a persuasive argument — one that happens to reflect the commission's original position until the agency did a late switcheroo — that Congress never intended Section 706 to be interpreted as an affirmative grant of regulatory authority to allow the agency to adopt a net neutrality regime.

Now that we've come to the current messy juncture, the FCC ought to give Congress an opportunity to act before moving forward. After all, the members of Congress actually were elected to make important policy decisions. In order to agree with me, you don't have to think the FCC couldn't possibly succeed in adopting new net neutrality regulations. You simply have to agree that it is a good time for Mr. Wheeler and his colleagues to exercise a modicum of regulatory humility.

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