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**The Middle Way to Internet Regulation**

by

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Immediately after the D. C. Circuit's *Comcast* decision this past April, holding that the Federal Communications Commission's "ancillary jurisdiction" did not extend to regulating broadband Internet services, agency staffers let it be known that the agency might respond by invoking jurisdiction under Title II of the Communications Act. The victory celebrations by proponents of an unregulated Internet had to be cut short for the victory now appeared to be a Pyrrhic one. Of course, that latter view assumed the FCC would get away with its Title II claim, and this might not be a sure thing.

After all, only five years have passed since the Supreme Court in the *Brand X* case affirmed the FCC's declaration that cable modem broadband service was not a telecommunications service subject to common carrier-style regulation — a declaration later applied by the agency to wireline broadband services even when those services were provided by conventional telecommunications carriers, not cable companies. But, as everyone who follows these matters knows, the FCC bears the burden of its own precedent lightly. Finley Peter Dunne ("Mr. Dooley") famously quipped, "the Supreme Court follows the 'fiction returns.'" Unsurprisingly, so does the FCC. To be sure, the courts require all agencies to justify their actions by something other than the election returns. But judicial review is a sometime thing

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and rarely is the FCC deterred by need to spin out words (by the thousands) to justify itself.

As it turns out, the FCC now appears to have decided not to opt for *complete* Title II regulation. I say “appears” advisedly since its pending notice of inquiry on the issue leaves open that possibility. However, it has signaled a clear preference towards what it is calling “the third way.” Under this way, the FCC will declare that the full array of Title II regulations and requirements applies to broadband, but it will simultaneously invoke its forbearance authority (under Section 10 of the Act) to refrain from enforcing all but “a small number” of key Title II provisions. The FCC did not follow the Buddha’s precedent and call it “The Middle Way,” but it characterizes it in a similar vein, as an intermediate way between two extremes.

If this new middle way seems moderate, that appearance is an illusion. Of course, the FCC has authority to forbear from enforcing provisions of Title II, but Congress gave the FCC that authority for the purpose of eliminating existing regulations that were no longer needed. The FCC’s current proposal, however, invokes forbearance authority not as a means of removing old regulations but as a means of affirmatively engineering new ones. The Commission’s approach resembles its use of ancillary jurisdiction in that it involves selective use of various Communications Act provisions to achieve some particular regulatory outcome that is not part of the statutory design. In the case of ancillary jurisdiction the practice has been to rummage among the flotsam of statutory language to find an imaginary congressional intent to support some new regulatory venture that Congress had not addressed — statutory interpretation as a game of anagrams. In the present case that process is inverted insofar as the rummaging is for the purpose of throwing out provisions in the statute that the agency deems to be obstacles to its new regulatory invention. But in large measure it is the same rummaging process. Even if you believe the FCC should have forbearance authority (as I do), you ought to be nervous about this transparently manipulative use of it to design a new tailor-made form of regulation.

To be sure, the FCC could avoid the objection of manipulation if it were simply to declare that broadband service is subject to all of the provisions of Title II, and then, if the courts accepted that proposition, proceed then to rule on a case-by-case basis to decide whether to forbear from enforcing particular provisions. Proceeding in this conventional manner, however, would likely draw even more political fire than the proposed “third way” approach has drawn. It might also make it more difficult for the FCC to persuade a reviewing court that such a sharp departure from *Brand X* and the *Wireline Broadband* decisions is not arbitrary and capricious. The Commission’s middle way approach allows it to argue that it is only partially revising, not abandoning, its earlier decisions.

By emphasizing the small number of provisions it seeks to enforce the FCC would like to create the appearance of a restrained regulatory ambition. But numbers aren’t important. What is important is the substance of those provisions selected

and what that selection says about the shape of the ensuing regulatory regime. Although the FCC has not made its final selection, it has said it clearly intends to retain as operative all those provisions that are necessary to support control of rates and services (Sections 201, 202, 208) for these are central to its ostensible purpose of preventing “unreasonable discrimination” in the provision of broadband service. However, the Commission’s NOI suggests that it may not be content with just those provisions necessary to prevent discrimination. Among the other provisions the FCC is considering enforcing is Section 254 which governs universal service which, it hardly needs saying, has nothing to do with net neutrality.

Questions about the Commission’s strategic use of forbearance to revise the Communications Act to suit its current policy purposes ultimately lead to questions about the purposes themselves. The debate over net neutrality long ago reached the point of diminishing returns, when virtually everything said reprises what has been said. However, my criticism of the FCC’s methods would be incomplete if I did not comment on the end purposes the methods are designed to serve.

The public controversy over net neutrality has been framed largely (though not exclusively) by reference to the facts of the *Comcast* case and the less publicized earlier *Madison River* case—both involving discriminatory traffic management practices. Within that framework much of the debate has centered on whether to adopt fixed rules on the subject or whether to leave the matter to ad hoc adjudication. In virtually all its regulatory tasks the FCC’s traditional *modus operandi* has been to prefer the former over the latter. In its most recent public notice seeking additional comment on certain aspects of the *Open Internet* rulemaking (in particular what to do about “specialized services” and mobile broadband), the FCC expresses a preference for “enforcing high-level rules of the road through case-by-case adjudication, informed by engineering expertise....” We shall see whether the FCC does in fact confine itself to “high-level” rules implemented by flexible case-by-case adjudication. However, nothing in its new public notice suggests any retreat from earlier proposed (“low-level”) fixed rules.

What is most noteworthy about some of these rules, moreover, is that they have nothing whatsoever to do with any applying “engineering expertise” on an ad hoc or a fixed-rule basis. As I said, the public controversy over net neutrality has focused primarily on network management issues of the kind presented in *Comcast*. However, the rules originally proposed in its *Open Internet* notice of proposed rulemaking in 2009 go beyond network management. Most notably, the rules proposed in 2009 would ban broadband providers from charging any content application or service provider for enhanced or prioritized access to their subscribers, with an exception for what it now calls “specialized services.” This proposed ban – which so far as is known is still on the table even though it is not mentioned in the FCC’s most recent public notice — reflects a curious conception of discrimination. Conventional legal and economic definitions of discrimination do not apply that term to charging different prices *for different services*. Moreover, the FCC does not propose to ban broadband providers from charging *end users* different

prices for different levels of service, so the proposed ban cannot be really aimed at discrimination. It is rather a ban on a particular form of pricing — a restriction on what economists call two-sided pricing.

Two-sided markets are common. Credit card markets are a familiar example. Such markets raise some complex economic questions about how the firm should price services that benefit two sides of a transaction. In some cases providers charge both sides (as in the case of credit cards); in other cases only one side of the market is charged. The particular pricing rule is a matter of business judgment. There is no reason to think something nefarious is going on when a firm allocates the price of its product between two parties that benefit from it. Of course, there could be a regulatory or antitrust concern if a firm is found to have and to abuse dominant market power. However, the mere presence of two-sided pricing doesn't establish such market power or its abuse.

No matter. The FCC's proposed restriction on two-sided pricing for enhanced transport services isn't about correcting monopoly power in any event. It is simply industrial policy disguised as consumer protection. The FCC wants to protect content/application/service providers from having to pay for enhanced services that, given a choice, they would prefer not to pay for. The agency apparently believes that this protection is necessary in order to promote investment and innovation in content, though it concedes that this might also discourage investment and innovation in broadband service infrastructure. There is no substantial evidence that the former effect is more likely or more important than the latter. Unfortunately, evidence is not what fuels the Commission's engine on the net neutrality express.

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I earlier compared the FCC's "third way" proposal to the Buddha's concept of the "Middle Way," but the analogy is a literary conceit that is completely misleading. In Buddhism the Middle Way is not simply an intermediate path between two extreme alternatives; it is a path on a different plane of value. Specifically, it is the "Noble Eightfold Path" characterized as "right understanding, right thought, right speech, right action, right livelihood, right effort, right mindfulness and right concentration." Not one of those right characteristics describes the FCC's wrong way.

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