Internet regulation: full steam ahead?

By Bennett Ross

n an April 2014 blog post that outlined his vision for protecting the open Internet, Tom Wheeler, chairman of the Federal Communications Commission, expressed concern that “opening an entirely new [regulatory] approach . . . invites delay that could tack on multiple more years” before binding net neutrality rules are in place. Escalating those concerns, Wheeler and his Democrat colleagues on the FCC are now poised to do something never done before — regulate the Internet under Title II of the Communications Act, which was enacted in 1934 but modeled after a regulatory regime crafted for the railroads in the 1800s.

Although the text of the proposed order has not been released publicly, the FCC has distributed a “Fact Sheet” that summarizes the chairman’s proposal. While a host of unanswered questions remain, the proposed rules would prohibit blocking, throttling and “paid prioritization,” would require greater transparency by broadband providers, and would apply to both mobile and fixed broadband providers. According to the Fact Sheet, the legal authority for the proposed rules would be Section 706 of the Communications Act as well as Title II, which would apply under Title II regulation can support investment and competition,” pointing to the wireless industry. But this is a flawed comparison. First, while Sections 201 and 202 apply to commercial mobile radio services (CMRS), the FCC historically has relied upon market forces to ensure compliance by CMRS providers with these statutory requirements. There is no reason to believe the FCC will take a similar market-based approach to broadband regulation under Sections 201 and 202. Second, mobile broadband has never been regulated under Title II. In fact, Congress expressly prohibited the FCC from regulating mobile broadband under Title II — a prohibition the agency has honored since enactment but which it now appears intent on disregarding. Third, the vast majority of investment by the wireless industry in the past decade — as evidenced by the billions spent acquiring spectrum and deploying LTE — has occurred in connection with mobile broadband, not CMRS.

When the commission adopted open Internet rules in 2010, which were largely vacated by the D.C. Circuit in Verizon v. FCC, the agency insisted that it was not “regulating” the Internet. The commission makes no such claim this time around, nor could it. Indeed, in contrast to the traditional “hands-off-the-Internet” approach historically followed by the FCC consistent with Congress’s directive that the Internet should remain “unfettered by Federal or State regulation,” 47 U.S.C. Section 230(b) (2), the proposed order would purport to authorize the commission to regulate nearly every aspect of the Internet ecosystem. This regulation would extend to Internet interconnection arrangements and even to services that do not even go over the public Internet (such as a dedicated heart-monitoring service) if, in the FCC’s view, they “undermine” the open Internet rules.

Indeed, the proposed order would grant the commission regulatory discretion to decide whether any new practice in which a broadband provider seeks to engage is “appropriate or not,” applying an amorphous “standard” that involves determining whether that practice would “harm consumers or edge providers.” Apparently, any time a broadband provider seeks to make available a new or different offering, it would have to get prior authorization from the FCC or risk violating the agency’s new “standard.” So much for “innovation without permission.”

Wheeler asserts that the proposed order will “modernize Title II, tailoring it for the 21st century.” But Title II was enacted by Congress, and it is Congress’ job — not the FCC’s — to modify the statute to reflect changes in the communications sector. To the extent the FCC seeks a “firm legal foundation” for open Internet rules that would be sufficient “to withstand future challenges,” Congress could solve this problem by enacting open Internet legislation, which Congress is considering. However, rather than waiting for duly elected legislators to act, the FCC appears intent on following President Barack Obama’s demand for Title II regulation by charging ahead with a decision to apply a 19th century regulatory regime to the 21st century Internet. This decision will undoubtedly be appealed, resulting in delay to binding net neutrality rules and causing considerable regulatory uncertainty — the very outcome Wheeler said he wanted to avoid.