Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	

Comments of Bret T. Swanson[1]

July 14, 2014

The Internet is open and will remain so. Consumers and businesses today enjoy access to more communications capacity, more distribution channels, more network options, more devices, more apps, more content, more voices, and more information than ever. The technology, economics, and culture of the Internet promote an open environment. Every ecosystem firm has pledged to maintain an open environment. The debate in this proceeding is not about ends but about means.

For the past 10 years, since we first helped prepare testimony for a Senate Commerce Committee hearing in which we said net neutrality would be the next big policy battle in the technology arena, we have analyzed most technical, economic, and business angles of the debate.[2] In this comment, however, we merely highlight the shortcomings of one proposal contemplated in the May 15, 2014, Notice of Proposed Rule Making — namely, the possibility of "reclassification" of the Internet under Title II of the Communications Act.

Title II reclassification is a potentially catastrophic idea. It could unleash a decade or more of regulatory chaos, litigation, and disincentives to invest and innovate. Meanwhile, it offers not even a theoretical upside. The behaviors its advocates seek to ban are not even prohibited under typical common-carrier regulation. It is worse than a solution in search of a problem. It is a wayward bomb in search of a friendly target.

My colleagues at the American Enterprise Institute and I have offered an alternative vision[3]: a dynamic Internet governed not by detailed prescriptive and proscriptive rules targeting a specific

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[2] See a collection of such analyses here: "A Decade Later, Net Neutrality Goes To Court." bretswanson.com. http://bit.ly/15LyrAH

[3] Bennett, Richard, Jeffrey A. Eisenach, et al. "Comments on Communications Act Modernization." January 31, 2014. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2388723.

industry, or a portion of the network, or even a few firms but by generally applicable laws designed to discourage and punish real harm to consumers while promoting experimentation, investment, and innovation across the landscape.

Chairman Wheeler's proposal to adjudicate open Internet matters on a case-by-case basis, using the section 706 authority granted in *Verizon*, is a cousin of this common law, antitrust approach. It provides for oversight but, in contrast to Title II or other proposals to regulate the Internet, offers the advantage of not presuming to know exactly what technical and commercial arrangements will best serve consumers and citizens at any point, now or in the future.[4]

Instead of restating arguments against Title II that we have made elsewhere, we simply choose to reproduce some of our recent critiques of the proposal. Three of these articles follow:

Title II communications IS the 'slow lane'

by Bret Swanson | TechPolicyDaily.com | May 13, 2014

For the last several decades, the U.S. has conducted a kind of natural experiment in communications regulation. Traditional telephony was subject to detailed public utility style regulation under Title II of the Communications Act. Newer information services like broadband and the Internet, meanwhile, fell mostly under the far less intrusive Title I. Question: In which realm has more innovation occurred — the Title II telecom world or the non-Title II Internet world?

If you said the non-Title II Internet, you are right. But not just right by a slim margin. No, for at least three decades, nearly all innovation in communications technologies and services has taken place in the Internet world. On the other hand, almost no innovation has occurred in the telecom world. While the Internet booms, old telecom rapidly shrinks. While the number of Internet distribution channels, access devices, content choices, and dollars invested in broadband infrastructure explodes, the single-device single-service telephone network withers away. (The telephone network doesn't even lead in telephony! Just a quarter of U.S. households use it as their primary line.) As the mostly unregulated Internet piles success upon success, boosting bandwidth and transforming each industry it touches, with no end in sight, the old, heavily regulated, Title II network is barely an afterthought and is rapidly approaching full retirement.

So what's up with those angry crowds camped outside Federal Communications Commission headquarters? Why are they protesting? Are they, in a reprise of the effective SOPA/PIPA

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[4] The Wheeler case-by-case approach is, in our view, preferable to Title II and other more heavy-handed approaches. That is not to say it is the path we would choose. We think the dynamic digital ecosystem does not need a specific industry regulator, especially one conceived in 1934, and further, that Section 706, which advocated **de**regulation, should not be used to regulate. We comment in the context of the *Verizon* ruling and the FCC's apparent intended path.

backlash, trying to stop a supposed cyberspace takeover by an overbearing government? Are they worried the FCC, in a fit of madness, might subject their beloved Internet to the innovation killer known as Title II? Hardly. The mob at Chairman Wheeler's doorstep is *demanding* he drop the heavy boot of Title II on the Internet. *Please, Mr. Chairman, take our wildly inventive, creative, free, and open platform, and subject it to bureaucratic rule. Save the Internet!*

The fact that crowds are banging pots and pans in support of an arcane and increasingly obsolete piece of telecom law, born in the Communications Act of 1934, is a sort of accident of recent political and jurisprudential history. In the middle of last decade, Congress repeatedly turned down efforts to regulate the Internet known as Net Neutrality. But President Obama, in an effort to get to the left of his opponents and corner the youth vote, vowed no one would surpass his support for Net Neutrality. Net Neutrality was transformed from a technical debate into a political cause, no matter that few voters had not the first clue what it meant.

The FCC tried several times to impose Net Neutrality regulation on the Internet without legislative authority, but courts twice rejected the agency's overreach. (Earlier last decade, courts had three times rejected FCC efforts to impose other forms of open access regulation.) After the most recent court loss, FCC Chairman Tom Wheeler said he would follow the blueprint the court laid out to oversee the Internet within his statutory authority. He was working toward a May 15 notice of proposed rule making (NPRM), a document that would lay out a rough plan and solicit comments, leading toward a final regulation months from now. It was thought Wheeler would seek far more regulation than the industry wanted but would advocate a case-by-case review of alleged infractions while avoiding a more pre- and proscriptive hyper-regulatory approach. A few weeks ago, however, someone inside the agency who thought Wheeler's forthcoming plan too lenient leaked the plan, along with a call to arms, asking the party to oppose its own FCC chairman. And now political activists are camped out on the street insisting on "reclassification of the Internet as a common carrier."

Columbia law professor Tim Wu writes that Wheeler "could well end up being known widely (even if unfairly) as the telecom lobbyist who broke Obama's promises and killed the open Internet, which is rather an unpleasant thing to count as your legacy, and which is what everyone is calling him today."

The great irony is that the Internet, in its mostly unregulated state, is prospering (see Digital Dynamism; The New Network Map; How the Net Works; and metrics on U.S broadband speeds and network usage).[5] The protests are one of the weirdest cases of substance-free advocacy we can remember.

[5] Find the publications referred to in this sentence at these links: http://bit.ly/digitaldynamism; http://bit.ly/newnetworkmap; http://bit.ly/howthenetworks; http://bit.ly/bbandspeed; and http://bit.ly/trafficshare.

The substance of Title II common carrier regulation, however, is very real, and it could deal a huge blow to the Internet economy. Title II means price regulation. It means asking Washington and the state utility commissions for permission to launch new products, change existing ones, or deploy new technology, and to approve marketing and advertising programs. It means hundreds of other rules that were written for the monopoly telephone network 80 years ago but that would now apply to the vastly different Internet environment.

Title II would threaten the healthy system of Internet interconnection and peering that evolved without government oversight. Title II would bring back tariffs, intercarrier compensation, and a host of other bureaucratic do's and don'ts.

Meanwhile, because heavily regulated companies tend to be experts at operating in such a confusing environment, competition from new entrants would falter. Or as Berin Szoka put it in a *Wall Street Journal* debate with Tim Wu: "Public-utility regulation is a self-fulfilling prophecy: It assumes competition is impossible — and keeps it that way."

The FCC may try to confine Title II to regulation of the telecom and cable firms' last mile broadband networks (itself a problematical targeting of some companies, and not others, for regulation). But these efforts would likely fail, as the very nature of the hyper-connected Internet would expose every firm that touches the Net to the new Title II regime. Search engines, content delivery networks (CDNs), Amazon Kindles, cloud-based applications and services — all of them could be subsumed under rules meant for the old telephone monopoly.

Quarantining the Internet from Title II was one of the best economic policies of the last generation. Unleashing Title II on the Internet could spread an epidemic of confusion and litigation across an Internet environment that over decades has developed millions of fruitful technical and commercial connections outside (and often oblivious to) the old Title II regime. In short, Title II would threaten Internet innovation at its very foundation.

Title II advocates say not to worry. "Title II," Tim Wu writes, "was used, in the late nineteen-nineties, to regulate both wireless and broadband carriers. That means the Commission is returning to a previous approach, as opposed to breaking new ground." Yes, we tried it before, and it was a disaster. Remember UNE-P and Telric and the open access wars. These regulatory mistakes were one cause of the tech meltdown of 2000-01. When, in the late-90s, the FCC declared cable modems were information services, cable broadband soundly defeated the more heavily regulated Title II DSL telecom services. When DSL was relieved of its Title II burdens in the early 2000s, it made a comeback. In short, when the FCC and Supreme Court freed broadband from Title II's stranglehold, the Internet blossomed.

An additional irony, as many have mentioned, is that Title II wouldn't even disallow the eighth deadly sin of "paid prioritization," the supposed vice slated for banishment under Net Neutrality.

Title II only bans "unreasonable or unjust" discrimination and explicitly allows paid priority products and services. It simply would not solve the so-called fast-lane/slow-lane complaint, as wrong as that analogy is.

In a [decade's worth of debate] over Net Neutrality, with a long string of poor arguments in its favor, the retrograde push for reclassification of the broadband Internet as a Title II telecommunications service is among the worst.

Title II won't get rid of the slow lane. It *is* the communications slow lane.

(This article can be found at http://www.techpolicydaily.com/communications/title-ii-communications-slow-lane/)

The Real 'Slow Lane' Threat To The Internet

by Bret Swanson | Forbes.com | June 2, 2014

There is a subversive plan to slow the Internet, and it must be stopped. The new plan, now being contemplated by the Federal Communications Commission, could alter the Internet forever. It could slow speeds, limit the content and applications consumers can access, and create a two-tier system that favors some companies over others. The plan even has a code name: it's called "Title II."

FCC Chairman Tom Wheeler's proposal to implement "net neutrality" is the touchpoint for this controversy. After serial losses in federal court, where numerous judges admonished FCC overreach, Wheeler is now trying to thread the regulatory needle. He wants to use the tenuous authority the court has granted him — the legitimacy of which many still challenge — to impose yet a third version of net neutrality rules. But because Wheeler's proposal leaves some room for network experimentation, the net neutrality fundamentalists have cried foul. They say Wheeler sold out to private industry. They say his proposal could result in "fast lanes" and "slow lanes" on the Internet. They insist Wheeler instead reclassify the Internet as a public utility.

The "slow lane" critique could not be more backwards. For many decades we regulated the telephone network as a public utility, with predictable results: it strangled competition, limited innovation in devices and services, and elevated political lobbying to the detriment of investment and consumer welfare. Then the Internet came along, we broke out of this public utility framework, and innovation exploded. We moved from a single slow lane to multitudinous fast lanes, from a sleepy-time utility world to an Internet-time digital economy.

The Telecom Act of 1996 was clear: the Internet should be "unfettered by Federal or State regulation." In the most recent *Verizon* case, the court explicitly said the FCC cannot treat the Internet (which, since the Clinton Administration, it is has classified as an unregulated "information" network) as a heavily regulated, Title II, common carrier, "telecommunications" network. The solution according to the fundamentalists is simple: reclassify the Internet, or at least parts of it, as a Title II telecom network. *Voilà*. Now we can regulate it as an old style public utility.

The stated goal of a Title II reclassification is to circumscribe the behavior of broadband service providers — Comcast, AT&T, and Verizon, for example. The practical effect of such a move, however, could hardly be more devastating for the Internet. Title II reclassification would be an omni-regulatory power grab of historic consequence. Once unleashed, it would reach out and touch every node of our sprawling global networks, including Silicon Valley content firms, app makers, and cloud companies.

Title II regulates prices. It requires government permission to supply new products and services, or to terminate old products and services. It often requires approval for marketing campaigns or new technologies. It would open the door to regulation of the Internet by the 51 state public utility commissions and by every nation around the globe — imagine the fragmented confusion. Title II would blow up the existing technologies, business models, and voluntary interconnection agreements that have resulted in so much Internet success. More ominously, it would dramatically slow the pace of advance in the technologies, business models, and network and service innovations of the future.

Because Title II traditional applied to the transmission of information, as opposed to its storage or processing, any bit-moving function could be exposed to Title II's heavy hand. Most big Web firms, many of whom signed a letter asking for stronger regulations (though, notably, not explicitly asking for Title II), perform lots of transmission. Google has its own global fiber and content delivery networks. Netflix has its own CDN. Same for Amazon and Microsoft and Facebook. And what about Xboxes and Kindles? These products contain transmission components (Xbox Live and WhisperSync). All these firms and products could be swallowed by Title II's omnivorous reach.

The "transmission" distinction is itself thoroughly obsolete, which is why all these networks and products should be considered information services. Even within a microchip or a data center, data is transmitted. It is also stored and processed. The three fundamental acts we perform on information cannot meaningfully be distinguished — especially not by three commissioners and committees of lawyers.

For all of Title II's potential for catastrophic harm, it offers no upside, even for its most hearty proponents. The *bête noire* of the neutrality fundamentalists is so called "paid priority," where some bits (like high resolution videos that require fast and reliable delivery) are prioritized over mundane applications (like data backups or routine emails, where it doesn't matter if the bits arrive now or a few milliseconds later). But common carrier regulation of phones or trains (of which Title II is an example) *explicitly allows* service discrimination (paid priority) as long as all similarly situated customers get the same offer.

Title II thus doesn't even solve the supposed problem — but would cause new problems of its own. Far from a burden on small Web start-ups, paid priority could be an inexpensive and crucial tool. Behemoths like Google, Amazon, and Netflix have built out vast networks and content delivery systems of their own — to speed the delivery of their own bits. But small firms focusing on a first time product don't have the wherewithal to match that physical infrastructure. They often use CDNs to deliver static content. But for other real-time services like gaming, or education, or health care, they may prefer to pay a network provider to move their bits and provide their customers with a first-rate experience. Prohibiting paid priority and other network services could thus harm start-ups and reinforce the big Web firms' position of dominance.

Because Title II's backers know all this by now, it is difficult to take their proposal as anything more than a play for government control of the Internet. The existing hands-off regime has been a boon for Web firms and broadband providers, for software and hardware companies, for cloud and carrier, for content and conduit. If the FCC really thinks we need extra rules to formally codify the open Internet principles that all firms across the ecosystem already support, we should rely on Section 706, which at least emphasizes investment and growth.

Title II regulation *was* the slow lane. Thank goodness we've left it in our dust.

(This article can be found at http://www.forbes.com/sites/bretswanson/2014/06/02/the-real-slow-lane-threat-to-the-internet/)

The choice between Uber and uber-regulation

by Bret Swanson | TechPolicyDaily.com | June 11, 2014

Last week Uber, the Internet-based private car service, garnered new investments valuing the four-year old firm at $17 billion. Uber is a perfect example of the way the Internet can turbocharge a simple idea and transform an industry — taxi cabs — in the blink of an eye.

WhatsApp, the messaging service acquired by Facebook in February for $19 billion, is another example of the speed with which a simple app, built on the foundation of the Internet, can reach hundreds of millions of people around the globe and in so doing challenge the status quo – in this case, existing telecommunications services.

Silicon Valley is churning out lots of these happy stories these days. As the venture capitalist Marc Andreessen says, information technology is supplying everyone with "superpowers" — seemingly superhuman abilities to access the world's information and create and combine new ideas and products in endless ways. It is doing so largely because we've let the Internet grow in an environment of "permissionless innovation," as Adam Thierer terms it in his new book of the same name.

The never-ending fight over net neutrality, however, is threatening to squash this permissionless superpower machine. Not content with Open Internet guidelines that every ecosystem firm has agreed to, nor even with new Open Internet regulations proposed by Democratic FCC Chairman Tom Wheeler, public interest groups and even some Silicon Valley heavy-weights are calling for a more aggressive approach — the application of old Title II monopoly telephone rules to the Internet.

In an era of serial Silicon Valley superpower success, it's not clear there is any problem to solve. The Net is booming. Such regulations thus seem unnecessary at best.

Silicon Valley, however, may not have considered a far more dire possibility — regulatory self-destruction. If the pro net neutrality firms succeed in their mission to regulate the Net, many in Silicon Valley will be like the sailor in *The Hunt For Red October*, who, when the torpedo circles back to destroy their own submarine, exclaims to his captain: "You arrogant ass. You've killed *us*!"

Google is an obvious big loser in any new Title II regime. Google recently said it will expand its fiber optic broadband access networks to 34 more cities. Remember, however, that when it launched its first Google Fiber service in Kansas City, it offered broadband and video *but not phone service* – precisely because of onerous Title II regulations. "The cost of actually delivering telephone services is almost nothing," Google's Milo Medin said at the time. Yet Google, discouraged by old phone regulations, declined to offer the service. "In the United States," Medin said, "there are all these special rules that apply." Well, Title II would now apply to Google's broadband networks, and possibly its global fiber network, and its data centers, and more…

Remember, the old Yellow Pages fell under Title II regulation because it was an appendage of the networks Title II governed. Well, in the digital economy, everything is connected via the Internet. It's easy to see how not only Google's networks but also its search services (the rough modern analog of the Yellow Pages) would also be swallowed up by Title II. And even if the FCC attempted to unshackle certain technologies or services (through regulatory forbearance), rivals and the public would likely petition and complain, and Google would have to defend itself as a presumptive Title II regulated entity. The initial forbearance process would take years, and the battles afterwards would never end. Title II also invites regulation by the 51 state utility commissions and contains endless privacy rules. Just imagine the implications for the firm with more private information than anyone.

The proposal to expand Title II to cover the Internet is among the very worst policy ideas in the history of bad policy ideas (and it's a long list).

We might as well resurrect the Interstate Trucking Commission to regulate Uber and aerial drones. Except Title II could reach all these technologies and firms on its own. Title II applies to transmission of information. The Internet avoided Title II regulation because policymakers, on a bipartisan basis, defined the Internet and other computer networks as "information services." Data storage, processing, and transmission were all considered a collective information service and excluded from Title II regulation of "telecommunications services."

In a kind of natural experiment, heavily regulated Title II services — the telephone network — have withered and now approach extinction. On the other hand, mostly unregulated information services — the Internet economy — have thrived beyond imagination.

Nearly every info-tech based product, service, and firm — which increasingly is to say every product, service, and firm — has some information transmission component. Remember, you don't have to own physical networks to fall under Title II. So the reach of Title II in an information economy, where transmission was once again separated from data storage and processing (assuming such distinctions could be made), would be vast.

We have a choice between Uber and uber-regulation, and it's not even close.

(This article can be found at http://www.techpolicydaily.com/communications/choice-uber-uber-regulation/)