Phoenix Center Policy Bulletin No. 36:
Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications

... and see related Op-Eds and Blog posts at our @lawandeconomics Blog.
idea v. policy
Open Internet is an idea.
Reclassification is an idea.
How would reclassification work?
Classification is merely the first step.
Regulators regulate relationships to solve a particular problem. So the questions to ask are:

(a) what is the transaction to be regulated?
(b) what is the problem we wish to solve?
(c) what are the specific tools we have to solve that problem?
What is the relevant transaction (or relationship, or market)?
Three Incentives

The record in this proceeding reveals that broadband providers potentially face at least three types of incentives to reduce the current openness of the Internet.
Three Incentives, *First*

*First,* broadband providers may have economic incentives to block or otherwise disadvantage specific edge providers or classes of edge providers, for example by controlling the transmission of network traffic over a broadband connection, including the price and quality of access to end users.
Three Incentives, Second

Second, broadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet, for access or prioritized access to end users.
Three Incentives, Third

Third, if broadband providers can profitably charge edge providers for prioritized access to end users, they will have an incentive to degrade or decline to increase the quality of the service they provide to non-prioritized traffic.
“the second side of the market – between broadband providers and edge providers.”

2014 NPRM
“broadband providers could [] be carriers with respect to edge providers”

DC Circuit, Verizon v. FCC
[a broadband provider] must be viewed as having a separate duty with respect to [edge providers], in addition to its duties to end users and interconnection/peering partners. Privity in network traffic management has been changed, fundamentally, through deep-packet inspection ...”

Mozilla Petition, May 5, 2014
What is the problem we are trying to solve?
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(1) block or otherwise disadvantage specific edge providers or [using] the price and quality of access to end users

(2) increase revenues by charging edge providers

(3) can profitably charge edge providers
What is the problem we are trying to solve?

“...the service that most users receive under this rule would ... be offered ... at a regulated price of zero.”

Verizon v. FCC, 2014
What is the problem we are trying to solve?

**PAID-Prioritization**
What is the problem we are trying to solve?

“broadband providers have the ability to act as gatekeepers … [a]lso known as a terminating monopolist.”

2010 Open Internet Order
What is the problem we are trying to solve?

“‘terminating monopolies’ for content providers needing high-speed broadband service to reach end users.”

2014 NPRM
Net Neutrality is price regulation of the termination market.
How are prices regulated under Title II?
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By tariffs, as required by Section 203, to ensure compliance with Sections 201 and 202.
Under 201 and 202, rates cannot be set arbitrarily and cannot be confiscatory.
Common carriers services are offered for a fee.
Title II generally prohibits “zero” price regulation. A zero price would be confiscatory.
Title II generally permits paid prioritization. Different levels of service at different prices is not discriminatory. Different levels of service at the same price is discriminatory.
Why not forbear from Section 203 tariffs?
Why not forbear from Section 203 tariffs?

First, why would you? The express intent of reclassification is to control the pricing behavior of the broadband provider. Also, forbearing from 203 does not mean the FCC can set a rate at zero, and does not mean the FCC can mandate discriminatory prices.
Why not forbear from Section 203 tariffs?

Second, it would be difficult to forbear from tariffs when the purpose of the regulation is to control the behavior of a “terminating monopolist.” The FCC has never detariffed without an appeal to competition.
Why not forbear from Section 203 tariffs?

Third, it is the tariff that specifies what the rules and rates are. Without it, there’s no reference for what is proper and what is not. As revealed in *Orloff v. FCC*, when the FCC forbears from tariffing on competition grounds it effectively surrenders to the market the enforcement of Sections 201 and 202.
The Box the FCC finds itself in:

The most natural implementation of Title II for broadband results in a positively-priced tariffed termination service. Thus, for the first time, edge providers would have to pay to reach end users. Paid prioritization would be permitted. Forbearance from tariffing would be both silly and difficult.