Phoenix Center "Teleforum" (March 24, 2015)

The FCC's Open Internet Order: A Law and Economic Analysis
Today’s Agenda:

• Part 1: Welcome and Introduction
  – Phoenix Center President Larry Spiwak

• Part 2: An Economic Perspective
  – Phoenix Center Chief Economist Dr. George Ford

• Part 3: Legal Discussion
  – Sam Feder, Partner – Jenner & Block and former General Counsel – Federal Communications Commission;
  – Angela Giancarlo, Partner – Mayer Brown and former Chief of Staff – FCC Commissioner Rob McDowell;
  – Tom Navin, Partner – Wiley Rein and former Bureau Chief, FCC Common Carrier Bureau; and
  – Jeff Lanning, Vice President of Federal Regulatory Affairs, CenturyLink

• Part 4: Q&A and Conclusion

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Tariffing the Internet: A Post-Order Update

Dr. George Ford
Chief Economist – The Phoenix Center
Brief Review of *Tariffing the Internet*

*Tariffing the Internet* is the first and only attempt to outline how Title II regulation gets done and to offer specifics on how the FCC would “protect the Open Internet” under its Title II authority.

Brief Review of Tariffing the Internet

In the 2010 Open Internet Order and the 2014 NPRM, as well as in the Verizon Opinion, it is recognized that net neutrality deals with a transaction is between the BSP and the Edge Providers.
“the second side of the market – between broadband providers and edge providers” (FCC, 2014 NPRM).
The FCC has labeled the BSP a “terminating monopolist” and its Net Neutrality regime is focused entirely on remedying the incentives of this terminating monopoly.
Net Neutrality regulation is price regulation. Thus, under Title II, Net Neutrality must be implemented by tariffing a termination service.
Hybrid Proposal agrees with *Tariffing the Internet*

Wheeler’s “hybrid proposal would establish a divide between ‘wholesale’ and ‘retail’ transactions.”

New York Times (10/31/2014)
Open Internet Order (2015) attempts to abandon the FCC’s two-sided market view of Broadband Internet Service. The Order specifically rejects the Tariffing the Internet logic in its text.

“We also reject the argument, set forth by the Phoenix Center, that reclassification would require broadband providers ‘to create, and then tariff, a termination service for Internet content under Section 203 of the Communications Act (2015 Order at para. 419).’”
Since this is the FCC’s third attempt to regulate the Internet, I think it is safe to assume the Agency may not be correct in its legal analysis.

Let’s look more closely.
“In defining this service we make clear that we are responding to the Verizon court’s conclusion that broadband providers ‘furnish a service to edge providers’.... [W]e make clear that broadband Internet access service encompasses this service to edge providers. (para. 27).”
“Broadband providers function as gatekeepers for both their end user customers ... and edge providers ... (para. 78).”
“the record provides substantial evidence that broadband providers have significant bargaining power in negotiations with edge providers and ... (para. 80).”
“broadband provider is the sole provider of access to an end user... (para. 80).”
“The D.C. Circuit noted that the Commission ‘convincingly detailed’ broadband providers’ market position, which gives them ‘the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers’... (para. 80).”
“‘tolls’ for edge providers seeking to reach a broadband provider’s subscribers,’... (para. 82).”
“charge edge providers for access to end users (para. 80)”
“... even with competition, mobile providers have an interest in seeking rents from edge providers ... (para. 96)”
“The Commission may waive the ban on paid prioritization... (para. 130)”
“It is true, generally speaking, that the ‘customers of broadband providers are end users. But that hardly means that broadband providers could not also be carriers with respect to edge providers . . . regardless of whether edge providers are broadband providers’ principal customers. This is true whatever the nature of the preexisting commercial relationship between broadband providers and edge providers . . . . No one disputes that a broadband provider’s transmission of edge-provider traffic to its end-user subscribers represents a valuable service ...” (Verizon v. FCC).
“today’s no-blocking rule prohibits broadband providers from charging edge providers a fee... (para. 13).

This is price regulation – at a zero price.
Both majority and dissent in Verizon recognized that “non-discrimination” and “no blocking” rules amounted to “zero-price regulation”
“while there is a possibility that a ‘fast lane’ Internet service might be offered on a non-common carriage basis, the service that most users receive under this rule would still have to be offered as common carriage, at a regulated price of zero.”

– Judge Silberman dissent
“[W]e make clear that broadband Internet access service encompasses this service to edge providers. (para. 27).”

It’s really clear in the Order, and all precedents to it, that termination and origination are two distinct services. The customers are different. The prices can be different. The incentives are different.

Conveniently lumping them together is expedient, but silly.
Forbearance from Section 203 tariffs?

Commission re-affirms that broadband providers are monopolists in termination, if not origination:

“provider has a monopoly on access to the subscriber” (para. 80)

“45 percent of households have only a single provider option for 25 Mbps/3 Mbps broadband service, indicating that 45 percent of households do not have any choices to switch to at this critical level of service.” (para. 81)

What is protecting the consumer under 10(a)?
Order does not address Orloff v. FCC, which stands for the proposition that when the FCC forbears from tariffing it effectively surrenders its authority to enforce Sections 201 and 202 to the market.
The Tariffing the Internet logic stands and is, oddly enough, buttressed by the 2015 Open Internet Order.

Zero-price regulation, without tariffs, is, in my opinion, the Order’s greatest vulnerability.
Legal Panel

• Moderator:
  – Phoenix Center President Larry Spiwak

• Panelists:
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