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Net Neutrality

Are Congressional Democrats Playing a Dangerous Game of ‘Chicken’ Over Net Neutrality?

BY LAWRENCE J. SPIWAK

The Congressional Review Act of 1996 (“CRA”) is an interesting piece of legislation. Expressly designed to bypass the typical judicial appeals process for regulatory acts, the CRA allows Congress to intervene and set aside new regulations on its own motion. Significantly, because the CRA does not amend the underlying law upon which the offending rule was promulgated, if Congress passes a CRA discharge petition, then the issuing agency is free to take another bite at the apple, so long as the next attempt is not “substantially similar” to the first attempt.

Given the high burden to get both houses of Congress and the White House to sign off, the CRA has been sparingly invoked since its enactment over two decades ago. After the election of 2016, however, the Republican-controlled Congress and the Trump Administration breathed new life into the CRA, passing and signing a staggering 13 resolutions of disapproval within the first 100 days, reversing many of the Obama Administration’s last-minute regulatory actions.

In politics, however, turnabout is fair play.

Disapproving the Reversal Senate Democrats are now peddling a CRA discharge petition to overturn the Federal Communications Commission’s *Restoring Internet Freedom Order*, which reverses the Obama Administration’s controversial 2015 decision to reclassify broadband internet access from a lightly regulated “information service” under Title I to a heavily-regulated com-

mon carrier “telecommunications” service under Title II of the Communications Act of 1934, as amended.

Politics and hysteria aside, reversing the 2015 *Open Internet Order* was the right thing for the current FCC to do. The Obama Administration’s heavy-handed approach curbed investment in critical broadband infrastructure at a time when more investment is needed. And the Obama Administration’s naked disregard for the plain language of the statute and years of legal precedent raised a host of Fifth Amendment due process issues and greatly expanded the power of the federal regulatory state.

With the Republicans controlling the Senate, House and White House, this CRA petition appears to be nothing more than a ploy to delay action on an actual piece of legislation that could put to rest the debate over whether and how to regulate the internet. The Democratic minority is using the CRA to stoke their electoral base, and to force the Republican majority to make a public choice against net neutrality—a choice the Democrats believe could have significant consequences in the upcoming mid-term elections and the next Presidential election. But as anything is possible in politics, Democratic leaders may be playing a dangerous game of chicken that could have severe legal and policy consequences for the internet going forward.

When Congress Gives You Lemons Indeed, let’s assume for the moment that House Republicans and President Trump cave to the political pressure and support the CRA discharge position. What should FCC Chairman Ajit Pai—a person who withstood death threats both to himself and, worse, to his family as the FCC conducted a public rulemaking to reverse his predecessor’s regulatory efforts—do in response?

While there are several legal paths Mr. Pai could take in this unlikely hypothetical scenario, sometimes the best solution is the easiest solution: If the Democrats really want Title II for the internet, then perhaps Mr. Pai should oblige them.

In particular, Chairman Pai, unlike his predecessor Tom Wheeler, should not deliberately ignore the “vast

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majority of rules adopted under Title II” by selectively picking and choosing whatever provisions of Title II he finds convenient. Instead, Mr. Pai should expose what common carrier regulation really is by applying Title II in a manner consistent with the statute and case law.

What does this mean in layman’s terms?

Title II in Action The key statutory provisions the advocates for Title II regulation deem critical are Section 201 and 202, which, if deployed proactively, necessarily draw in Section 203. Let’s take a quick look at each.

First, consider Section 201. Title II—properly applied—means that Broadband Service Providers (“BSPs”) get to charge “edge” providers, such as Google and Netflix (and everyone else) a positive price for terminating their bits to broadband users. Because these edge providers impose a direct cost on the network, the Fifth Amendment demands that BSPs be compensated appropriately under the “just and reasonable” standard of Section 201. As such, Title II prohibits the FCC from imposing a “below cost” (i.e., “confiscatory”) rate. The 2015 Open Internet Order arbitrarily set a rate of zero without any cost justification, which by all accounts is confiscatory. A zero price is not just and reasonable, but robs providers of proper compensation for the cost of providing services.

Second, Section 202—properly applied—specifically permits BSPs to engage in reasonable discrimination, provided that customers are not “similarly situated.” As such, Title II expressly prohibits the FCC from imposing a rule that would mandate blanket non-discrimination to all comers. Moreover, paid prioritization is perfectly lawful, so long as the same option is offered to similarly situated customers at similar prices.

Third, Section 203—properly applied—requires regulated firms to file tariffs with the FCC when the government sets the rates, terms, and conditions of service.

The FCC may do away with tariffs, but in doing so it also does away with its right to set a specific price, thereby surrendering all pricing decisions to the market. If the Commission doesn’t trust the market to ensure that rates are “just and reasonable” and set a price, then it cannot eliminate tariffs by the plain terms of the Communications Act. (This point was made explicit in now-Chairman Ajit Pai’s lengthy dissent to the 2015 Open Internet Order.) Significantly, a tariff is not simply a document to protect end users from unreasonable prices; it is also the mechanism by which the regulated firms secure their due process protections against the government.

Legislation, Finally? Without question, full-blown common carrier regulation on the internet would be the ultimate “nuclear” option; applying a law enacted in 1934 and designed for the old “Ma Bell” telephone monopoly to the internet was, and remains, a very bad idea.

But if folks really want to apply Title II to the internet, then let’s stop being timid about it. Let’s actually read Title II of the Communications Act and adhere to its prescriptions and the decades of case law on what is and is not sound regulatory practice.

But as just demonstrated, it won’t be pretty.

Who knows? If edge companies are threatened with the harsh reality of a legitimate application of Title II to the internet, then perhaps they can persuade Congress to come up with some well-reasoned net neutrality legislation and clean this mess up once and for all. But if the debate on the issue cannot transcend the current overheated and ultimately deceptive environment—if proponents insist on resolving the issue for tactical political advantage, and not for the benefit of consumers—the net neutrality merry-go-round will continue to run its cyclical, and ultimately futile, course.