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Obama presses to regulate Internet as a public utility

By Richard Moore
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With a lame-duck session of Congress getting under way, and a defiant President Barack Obama threatening to take unilateral actions on multiple fronts, it's hard to keep up with the headlines these days.

Most of the ink is going to immigration policy and Obama's plan to grant practical amnesty to up to 5 million illegal immigrants. His threat to veto congressional approval of the Keystone pipeline if it had come to his desk (the Senate failed to get it there) was another attention grabber last week.

A little farther down the list but one that might be as important as any and more so than most is what is being called net neutrality. It's important as an issue because, as both sides of the debate agree, the future of the Internet depends upon the outcome.

That's as far as the agreement goes. As a general rule, liberals are for net neutrality and conservatives are against it - what is being proposed, not the idea - and both sides say the outcome will decide whether the Internet remains a relatively free place where entrepreneurs can compete, and where innovation brings daily advances in broadband access and capacity, or whether it becomes a stunted wasteland where only the privileged few can play.

For net neutrality

There's no one more powerful to make the case for net neutrality than the president himself, and he makes a pretty powerful case.

Obama calls it his plan for a free and open Internet. Government regulation, the president says, will level the playing field for everybody.

"By lowering the cost of launching a new idea, igniting new political movements, and bringing communities closer together, it has been one of the most significant democratizing influences the world has ever known," Obama said of the Internet in calling for a government-imposed net neutrality.

Net neutrality, Obama acknowledged, has been built into the fabric of the Internet since its creation, but, he said, it's a concept that can't be taken for granted. Without government regulation, the president argues, Internet Service Providers - Verizon, Comcast, AT&T and others - will be able to limit fast access to preferred customers, namely, those willing and able to pay more.

"We cannot allow Internet Service Providers to restrict the best access or to pick winners and losers in the online marketplace for services and ideas," Obama said.

To prevent that from happening, Obama called upon the Federal Communications Commission to create a new set of rules to ensure, in his words, that neither cable companies nor phone companies can act as gatekeepers, restricting what people can do or see online.

Specifically, the president called for:

• A prohibition on blocking, that is, if a consumer requests access to a website or service, and that content is legal, the ISP would not be permitted to block it.

• A prohibition on throttling, or allowing an ISP to intentionally slow down some content or speed up others, based on the type of service or your ISP's preferences.

• No paid prioritization. The fear is that ISPs will create "fast lanes" in which services will pay more for quicker speeds.

"Simply put: No service should be stuck in a 'slow lane' because it does not pay a fee," Obama said. "That kind of gatekeeping would undermine the level playing field essential to the Internet's growth. So, as I have before, I am asking for an explicit ban on paid prioritization and any other restriction that has a similar effect."

The rules would apply to wireless networks, too, the president said.

"The rules also have to reflect the way people use the Internet today, which increasingly means on a mobile device," he said. "I believe the FCC should make these rules fully applicable to mobile broadband as well, while recognizing the special challenges that come with managing wireless networks."

In the end, to accomplish those objectives, Obama asked the FCC to reclassify the Internet as a Title II telecommunications industry. To say it another way, the president wants the Internet to be re-labeled a public utility, like the phone company.

Companies that connect people to the world have special obligations not to exploit the monopoly they enjoy over access in and out of a home or business, the president said.

"That is why a phone call from a customer of one phone company can reliably reach a customer of a different one, and why you will not be penalized solely for calling someone who is using another provider," he said. "It is common sense that the same philosophy should guide any service that is based on the transmission of information - whether a phone call, or a packet of data."

What it all means, Obama said, the FCC must recognize that broadband service is of the same importance and must carry the same obligations as so many other vital services do.

"To do that, I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act - while at the same time forbearing from rate regulation and other provisions less relevant to broadband services," he said. "This is a basic acknowledgment of the services ISPs provide to American homes and businesses, and the straightforward obligations necessary to ensure the network works for everyone - not just one or two companies."

Practicalities

None of this is an abstract argument. If what Obama says will happen does in fact come to pass, Internet consumers will find their services more expensive and their choices limited, while small businesses will find it hard to compete with established leviathans.

For example, to put it on day-to-day terms, net neutrality advocates say Comcast shouldn't be able to charge Netflix higher rates than other video services. Then, too, Internet radio is popular, but what if Apple, using its market clout, was able to negotiate sweet deals for iTunes at the expense of Pandora?

Indeed, net neutrality advocates argue, though the Internet has been self-policing, examples of favoritism have already surfaced. For several years Comcast blocked various peer-to-peer services, while some ISPs blocked Vonage, an online phone service providing cheap Internet phone calling. For a while, too, Apple reached a deal with AT&T to block Skype and other phones services on the iPhone.

Such practices will become common without government intervention, these observers say. And despite conservative talk about competition, there isn't any among ISPs, who live in a world where local cable monopolies control the vast majority of Internet access.

The argument against

Conservatives, though, marshal their own powerful arguments. While Obama was making his statement, Berin Szoka, a former intern with the libertarian Cato Institute and now the head of Tech Freedom, was making his argument in an open letter to FCC chairman Tom Wheeler.

"Subjecting broadband to Title II of the 1996 Telecom Act would trigger endless litigation, cripple investment, slow broadband deployment and upgrades, and thus harm underserved communities," Szoka said.

Szoka said President Bill Clinton's FCC chairman, Bill Kennard, avoided subjecting the Internet to Title II regulation, and, because he did, more than $1 trillion in private investment was unleashed.

"Abandoning that approach would truly break the Internet," he wrote. "Net Neutrality supporters such as Google, Facebook, and the NAACP haven't jumped on the Title II bandwagon because they understand that Title II would threaten the entire Internet. Title II proponents claim the FCC can simply 'reclassify' broadband, but in truth, there's no such thing as reclassification, only re-interpretation of the key definitions of the 1996 Telecom Act."

If the FCC re-opens that Pandora's box, Szoka wrote, the bright line between Title II and the Internet will disappear forever. Startups and edge/content providers will inevitably be caught in the fray

"Invoking Title II would trigger years of litigation," Szoka said. "It's not clear the FCC could ultimately 'reclassify' broadband at all, and even less clear the FCC could, or actually would, follow through on talk of paring back Title II's most burdensome rules, like retail price controls."

What Szoka is referring to is the FCC's authority to set prices at a level that allows ISPs to turn a profit. Regulation rather than competition would determine prices and create little incentive for companies to lower them, opponents say. That would have a huge impact on consumers and hit minority communities especially hard.

Even if reclassification stood up in court, Szoka said, the FCC still couldn't do what net neutrality hardliners want and what Obama called for: banning prioritization.

"The FCC would succeed only in creating a dark cloud of legal uncertainty," he said. "That would slow broadband upgrades and discourage new entrants, such as Google Fiber, from entering the market at all."

As such, Szoka said, the best policy is to continue the government's hands-off approach, whereby regulators keep a watchful eye but intervene only where there is clear evidence of actual harm.

Practicalities

Over the past several years, a raft of studies have pointed out what the negative ramifications - many of them unintended - of so-called net neutrality could be.

For one thing, opponents say, innovation will be derailed by the slow pace of regulatory decision-making. Regulators inevitably lag far behind the pace of inventors, further choking the broadband system.

For another, they say, if the Internet is reclassified as a utility, innovation will grind to a halt cost-wise. Technological innovation usually comes at a premium price - a price ISPs won't be able to charge. Under this view, investors will refrain from investing because of the inability to recoup their money in a cost-effective manner. They point to the slow pace of telephone innovation during decades of utility regulation.

For example, a recent study by Stratecast, a telecommunications strategic consulting and analysis company, found that net neutrality had the potential to distort business decisions when operators looked at whether investments to expand network capacity were justified from a business sense.

"And because it distorts the operator investment business decision, net neutrality has the potential to significantly discourage infrastructure investment," the study stated. "This is due to the fact that investments in infrastructure are highly sensitive to expected subscriber revenue. Anything that reduces the expectation of such revenue streams can either delay or curtail such investments."

On the other side of the coin, the study asserted, if thwarted by the government in charging a premium for expanded broadband use, ISPs could pass along investment costs to all consumers.

"In the case of cost allocation to the consumer, these costs could be substantial: net neutrality could impose anywhere from $10 to as much as $55 each month on top of an average broadband access charge of $30.00," the study stated. "To the extent that consumers were unwilling or unable to incur such costs, net neutrality could, ironically, have the effect of actually reducing broadband penetration."

Indeed, the study stated, the model indicates that net neutrality would act like a tax on the Internet.

It's not just consumer costs and innovation but jobs and gross domestic product that might be on the line, according to a June 2010 New York Law School paper by Charles M. Davidson, the director of the school's Advanced Communications Law & Policy Institute, and Bret T. Swanson.

Sustained capital investments in broadband infrastructure have generated hundreds of thousands of U.S. jobs and annually contribute tens of billions of dollars to the nation's GDP, the authors wrote, and they contend that that robust broadband ecosystem stems directly from the stable, light-touch regulatory approach of the FCC.

"The innovative vibrancy evident throughout the broadband ecosystem is in danger of being undermined by FCC (2010) proposals, including the impending application of common carrier regulations to some elements of the Internet, that would both overturn decades of precedent and fundamentally alter existing and future business models of broadband service providers," Davidson and Swanson wrote. "For a capital intensive sector like U.S. broadband - one that has invested hundreds of billions of dollars in network expansion and upgrades over the past decade, and that has directly generated hundreds of thousands of jobs in the communications sectors and many thousands more in related industries - the FCC's proposed actions are enormously significant."

Because the broadband sector has evolved and thrived under a light-touch regulatory regime, the authors asserted, the entire broadband ecosystem is sensitive to changes in regulation.

"Indeed, many estimate that, in the absence of the FCC's network neutrality proposals, investment and job growth will continue apace across the sector," they wrote. "This paper supports estimates that broadband service providers will commit at least $30 billion annually in capital expenditures on broadband alone between 2010 and 2015, resulting in the creation or sustainment of 509,000 jobs."

In turn, Davidson and Swanson asserted, those investments would spur capital expenditures by others in the ecosystem.

"To this end, a 5 percent incremental increase in capital expenditures by these ecosystem companies could boost investment by approximately $18 billion per year between 2010 and 2015, and yield an additional 450,000 jobs created or sustained," they wrote. "Conversely, decreased investments by broadband service providers will hinder capital expenditures by others in the ecosystem, particularly those at the edge."

Just how bad would the hit be?

A 10-percent decrease in investment by wireline and wireless broadband service providers, coupled with likely spillover effects, could result in the loss of 502,000 jobs across the entire ecosystem and would have a negative impact on U.S. GDP to the tune of approximately $62 billion per year, the authors wrote.

And that was a less-than-worse-case scenario. A 30-percent decrease in investment by wireline and wireless broadband service providers, coupled with likely spillover effects, would result in the loss of 604,000 jobs and more than $80 billion in GDP losses per year.

"Despite FCC assertions to the contrary, history suggests that the Commission is incapable of micromanaging a dynamic sector via regulatory fiat and that such action results in consumer welfare and economic losses," they concluded.

Minority opposition

It's not just Republicans and Internet Service Providers who are concerned about the impact of treating the Internet as a utility. Civil rights groups and leaders are also weighing in, saying such regulation could harm minority communities.

According to the Washington Post, for example, none other than the Rev. Jesse Jackson showed up at the FCC recently arguing against applying Title II regulations.

"We got a lot of poor folks who don't have broadband," Jackson told The Post. "If you create something where, for the poor, the lane is slower and the cost is more, you can't survive."

What Jackson and other civil rights leaders would prefer to see is continued light-touch regulation under Section 706 of the Telecommunications Act.

Under that section, the FCC is obligated to determine whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

The FCC thus derives the ability to regulate broadband distribution, and on a case-by-case basis according to its own determinations, rather than the one-size-fits all regulatory impositions of Title II. As such, the chairman of the FCC has stated, broadband providers are obligated to provide customers with the broadband speed and access they pay for.

That means, Wheeler has said, broadband companies could set up "fast lanes" for content providers that can foot the bill, but the FCC could intervene if the "fast lanes" degraded speed and service for anyone else.

It's an approach endorsed by the Minority Media and Telecommunications Council.

"Regulation under Section 706 of the Telecommunica-tions Act, coupled with an EEOC-derived, expedited, consumer-friendly 'probable cause' enforcement mechanism recommended by nearly four dozen national civil rights organizations in comments with the FCC, is a superior approach that would provide a solid foundation from which to ensure an open Internet while allowing some flexibility and room for experimentation in services and business models as the economy develops," the group said in a statement after Obama's announcement.

Section 706 regulation would achieve all of the goals of Title II reclassification, but would do so in a way that avoids the uncertainty of forbearance proceedings and without creating disincentives to infrastructure investment, the group stated.

"Less investment would translate into less deployment, fewer jobs for our communities, and fewer service options to boost broadband adoption and close the digital divide," the group stated.

The group's statement urged the FCC to be mindful "of the unintended consequences of far-reaching regulations." It also observed that a recent study had demonstrated that schools populated with the children of low-income families receive much slower broadband speeds than other schools.

"The FCC should avoid rules that will discourage investment and innovation, and instead create investment incentives that will ensure the underserved will receive state-of-the-art broadband, no matter where they live, or how much or how little income they make," the group declared.

"We need net neutrality, and we also need net equality," said MMTC president and CEO Kim Keenan. "While MMTC stands with the President in striving for an open Internet, we will continue to press our case for Section 706 regulation enhanced by expedited consumer protection mechanisms such as those used successfully for 50 years by the EEOC."