

**Hearing on “The Uncertain Future of the Internet”**

**Before the Subcommittee on Communications and Technology**

**Committee on Energy and Commerce**

**U.S. House of Representatives**

**Written Testimony of Larry Downes<sup>1</sup>**

**Project Director**

**Georgetown Center for Business and Public Policy**

**Feb. 25, 2015**

Chairman Walden, Ranking Member Eshoo and members of the Subcommittee, thank you for the opportunity to testify on the uncertain future of the Internet.

My name is Larry Downes. Based in Silicon Valley for over twenty years, I have been actively engaged with the remarkable development of the broadband Internet ecosystem in several capacities, including as an entrepreneur and advisor to start-ups and investors. I am the author of several books on the information economy, innovation, and the impact of regulation.

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<sup>1</sup> Larry Downes is Project Director of the Evolution of Regulation and Innovation Project at the Georgetown Center for Business and Public Policy. His books include *Unleashing the Killer App* (Harvard Business School Press, 1998), *The Laws of Disruption* (Basic Books, 2009) and *Big Bang Disruption: Strategy in the Age of Devastating Innovation* (Penguin Portfolio, 2014).

I have also written extensively on the effect of communications regulation on the dynamic broadband ecosystem, and in particular the role played by the FCC.

Since March, 2014, I have served as Project Director of the Evolution of Regulation and Innovation project at the Georgetown Center for Business and Public Policy at the McDonough School of Business, Georgetown University, studying the increasingly uncomfortable tension between the accelerating pace of disruptive innovation and the deliberative processes of regulators.

### Summary

- Chairman Wheeler's flip-flop, at the urging of the White House, from pursuing basic Open Internet rules to what now appears a full-force effort to transform broadband into a public utility, threatens to end nearly twenty years of bi-partisan policy favoring "light touch" regulation for the Internet, perhaps the most successful approach to regulating an emerging technology in history.
- The May, 2014 NPRM, which promised to follow the "roadmap" laid out by the *Verizon* court, appears to have been jettisoned in favor of an all-inclusive plan to regulate every aspect of the Internet, including peering, transit and other essential non-neutral network management principles the 2010 FCC Report and Order wisely excluded.
- Recent developments in this long-running debate over who and how to regulate the Internet have now made clear that for many advocates, Open Internet rules were

always the populist tail wagging the less appealing Title II dog. Though the rhetoric of net neutrality remains, the substance of the FCC's pending rulemaking instead completes a long-running effort to abandon the "light touch" model and replace it with a public utility regime—the goal all along for many supposed Open Internet advocates.

- Abandoning the *Verizon* court's "roadmap" in favor of a public utility regime, as the Chairman has not hesitated to acknowledge, introduces considerable legal uncertainty that, at best, will mean another two years or more without resolution to the Open Internet debate. Proposed legislation would quickly and cleanly resolve the FCC's persistent jurisdictional problems and enact precisely the rules called for in President Obama's plan, but only if those rules and not a vast regulatory expansion were the true goal of those calling for a future under full Title II, which the legislation wisely forecloses.

### The End of the Bi-Partisan Model of Light-Touch Regulation?

At stake in the FCC's upcoming Open Internet order is nothing less than the unbroken chain of far-sighted decisions by Congress and the FCC, under Democratic and Republican Chairmen, to defer Internet governance largely to the wildly successful engineering-driven multistakeholder process.

That governance model has proven its value to consumers and developers alike, and has

been urged by the U.S. on other governments as a model of regulatory restraint.<sup>2</sup> It has also given the U.S. considerable competitive advantage over most of the rest of the world in securing private investment of over \$1 trillion in broadband infrastructure.<sup>3</sup>

Recent and forthcoming interventions by the FCC and the White House have cast Silicon Valley and other technology hubs into considerable—and unnecessary—uncertainty about the future of that model. Nearly twenty years of relative regulatory peace, a dividend of the long-standing bi-partisan commitment to “light touch” oversight of the Internet, is now at extreme risk.

This week, in the name of protecting the Open Internet and its core principles, the FCC is on the brink of following the President’s instructions instead to transform it into a public utility, a plan that seems more designed to serve short-term political goals than the long-term health of the most valuable technology platform invented since the Industrial Revolution. These actions threaten the long-term health of and continued investment in the entire Internet ecosystem.

Having spent the last three years working with leading innovation experts on a research project chronicling the next generation of “Big Bang” technology disruptors,<sup>4</sup> most of them originating here in the U.S., I now have significant doubts that the speed and trajectory of those innovations will be maintained as expected.

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<sup>2</sup> Larry Downes, *Why Internet Governance Should be Left to the Engineers*, THE WASHINGTON POST, Sept. 3, 2014, available at <http://www.washingtonpost.com/blogs/innovations/wp/2014/09/03/why-internet-governance-should-be-left-to-the-engineers/>.

<sup>3</sup> U.S. Telecom, *Broadband Investment*, available at <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>.

<sup>4</sup> See Larry Downes and Paul Nunes, *Big Bang Disruption: Strategy in the Age of Devastating Innovation* (Portfolio 2014).

Even if the FCC's upcoming Open Internet Order or the complex forbearance proceedings the Chairman has promised fail to withstand certain legal challenges, the next two years or more of proceedings have the potential to substantially divert investment in both essential broadband infrastructure and new services built on top of it.

My testimony highlights some of the most worrisome aspects of these recent developments.

### The *Verizon* Court's "Invitation" Goes Unanswered

Though we will not see the FCC's upcoming Report and Order on the Open Internet rulemaking until after the Commission votes on Feb. 26<sup>th</sup>, 2015, written comments of Chairman Wheeler and others who have seen the document make clear that the proceeding now has little to do with the Chairman's promise in early 2014 to simply follow "the roadmap laid out by the D.C. Circuit."<sup>5</sup> In rejecting much of the FCC's 2010 rulemaking on jurisdictional grounds, the majority in the *Verizon* case indicated that the FCC could prevail on remand, provided it grounded its rulemaking on Section 706 of the Act. Chairman Wheeler eagerly agreed to accept the court's "invitation" to try again.

But the Section 706 approach has, at the urging of the White House, apparently been abandoned. In undertaking a third effort to pass enforceable rules to protect the Open Internet from future anti-consumer and anti-competitive network management practices, the agency now seems poised to undertake the much larger and much more dangerous project of

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<sup>5</sup> Statement of Chairman Tom Wheeler, Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, May 15, 2014, available at <http://www.fcc.gov/article/fcc-14-61a2>; *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

transforming broadband Internet into a public utility—perhaps the true goal of Open Internet advocates all along.<sup>6</sup>

The Chairman performed an abrupt about-face, and now proposes to adopt what the White House has itself referred to repeatedly as “President Obama’s plan.”<sup>7</sup> Announced in November, 2014, the President’s plan reflects a radical change in policy, sharing little with the relatively straightforward rulemaking announced by the FCC in May. In particular, the President’s plan explicitly calls for the FCC to subject the Internet to public utility regulations, specifically those originally designed to control the former monopoly telephone system.<sup>8</sup>

President Obama’s plan, which Chairman Wheeler indicated in early January he intended to adopt instead of his own proposed rulemaking, will attempt the legal equivalent of a Hail Mary pass. Broadband Internet access has always been understood by the FCC to constitute an “information service” subject to light-touch regulation under Title I of the Communications Act. To transform it into a public utility, the FCC has long believed it must “reclassify” broadband as a telephone service before subjecting it to some as yet indeterminate subset of Title II of the Communications Act, which has for decades regulated the increasingly diminishing public switched telephone network (PSTN) as a “telecommunications service.”

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<sup>6</sup> “Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet,” *available at* <http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet>.

<sup>7</sup> “Net Neutrality: President Obama’s Plan for a Free and Open Internet,” THE WHITE HOUSE, Nov, 10, 2014, *available at* [www.whitehouse.gov/net-neutrality](http://www.whitehouse.gov/net-neutrality). Beyond the very title of the announcement, the White House refers repeatedly to the President’s “plan,” e.g. “That’s why the President has laid out a plan to do it, and is asking the FCC to implement it;” “Watch President Obama explain his plan, then read his statement and forward it on;” “Share the President’s Plan.”

<sup>8</sup> President Obama’s plan explicitly embraces the transformation of broadband into a public utility, one that “must carry the same obligations as so many of the other vital services do.” *Id.*

The Chairman has also indicated his implementation of the President Obama’s plan will go far beyond simply using Title II as a jurisdictional lever to introduce last-mile prohibitions on throttling, paid prioritization and blocking. As Chairman Wheeler noted in his recent “Fact Sheet,” the rulemaking will now, “for the first time” grant the FCC oversight of potentially every link in the connections between networks that make up the Internet’s unique, engineering-driven architecture.<sup>9</sup>

Yet before the White House’s intervention, Chairman Wheeler himself acknowledged that policing interconnection and network optimization technologies had nothing to do with the Open Internet, stating repeatedly earlier in 2014 that peering and interconnection “is not a net neutrality issue.”<sup>10</sup>

Depending on how interconnection rules are drafted and enforced, everything from Internet backbone services to peering, transit, co-located servers and content delivery network—and other network management technologies that help balance an explosion of video traffic—could soon become subject to FCC oversight and intervention. Disappointed parties will no doubt choose to invoke the agency’s new self-granted authority rather than continuing to rely on market negotiations.

Connections before the last mile—that is, behind the connection between ISPs and consumers—were explicitly and wisely exempted from the 2010 rulemaking on both legal and

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<sup>9</sup> See “Fact Sheet.” (“For the first time the Commission would have authority to hear complaints and take appropriate enforcement action if necessary, if it determines the interconnection activities of ISPs are not just and reasonable, thus allowing it to address issues that may arise in the exchange of traffic between mass-market broadband providers and edge providers.”)

<sup>10</sup> Larry Downes, *How Wheeler’s ‘Net Neutrality’ Became Obama’s ‘Public Utility,’* FORBES, Feb. 12, 2015, available at <http://www.forbes.com/sites/larrydownes/2015/02/12/how-wheelers-net-neutrality-became-obamas-public-utility/print/>. (Attached as Appendix I)s

technical grounds. That was true despite the fact that the FCC acknowledged, also correctly, that such arrangements belie the naïve view of some legal academics that Internet traffic management is or ever has been in any engineering sense “neutral.”<sup>11</sup>

According to the OECD, over 99% of all such arrangements are so uncontroversial that they are not even reduced to writing.<sup>12</sup> They are based on technologies and protocols that are rapidly evolving, in a perpetual arms race with new forms of content and new services that can take off suddenly when consumers embrace them all at once, a phenomenon of Big Bang Disruption that my co-author and I refer to as “catastrophic success.”<sup>13</sup>

The only thing that has changed since 2010 has been that ISPs and content providers, especially those serving video traffic and especially on spectrum-constrained mobile networks, have become even more dependent on active network management technologies. Far from making the case for FCC oversight and regulation of such agreements, the opposite is true. The smooth operation of the commercial Internet relies on quick decision making, new arrangements, and regular experimentation.<sup>14</sup>

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<sup>11</sup>Larry Downes, *Unscrambling the FCC's Net Neutrality Order: Preserving the Open Internet, but Which One?*, 20 COMMLAW CONSPLECTUS 83 (2011). The 2010 Report and Order identified, by my count, over a dozen practices the agency concluded were both “non-neutral” yet essential to the continued operation of the network.

<sup>12</sup>Rudolf Van Der Berg, *Internet Exchange Traffic: Two Billion Users and it's Done on a Handshake*, OECD, Oct. 22, 2012, available at <http://oecdinsights.org/2012/10/22/internet-traffic-exchange-2-billion-users-and-its-done-on-a-handshake/>.

<sup>13</sup>See *Big Bang Disruption*, Chapter 4.

<sup>14</sup>Advocates argue that the very public complaints from Netflix that leading ISPs were intentionally slowing delivery of Netflix content to the ISPs' customers in early 2014 in order to induce the company to upgrade its delivery technology, justifies a more interventionist FCC. (During peak hours, Netflix consumes over a third of all Internet capacity, and uses a variety of mechanisms to get its traffic onto the network, including its own proprietary content delivery networks placed at strategic points in ISP networks.) In fact it was later discovered that the slow-down of Netflix traffic was based entirely on a decision made by Cogent, one of the companies Netflix had contracted for bulk transit of traffic. When Cogent became unable to deliver all of the traffic for its customers, the company elected to de-prioritize the traffic of its wholesale customers, including Netflix. Once the truth was revealed, Cogent admitted to the decision, but Netflix never withdrew its claims that it was the ISPs who



## Open Internet Rules Remain the Tail Wagging the Public Utility Dog

Whatever versions of the rules has been discussed in the last decade, their prohibitions of certain network management practices deemed harmful to the Open Internet has always been, to use the FCC's own wording, "prophylactic" in nature.<sup>15</sup> To the extent that Internet traffic management follows open principles, it has always done so without the existence of enforceable rules by any regulator other than the multistakeholder engineering-driven groups that manage network protocols.

What is true, however, is that though no two advocates ever agree on precisely what is meant by key terms, including the nebulous and non-engineering legal concept of "net neutrality," in substance most versions of the rules, including those likely to be included in the FCC's upcoming order, were never the true source of controversy. They prohibit business arrangements and network management behaviors that the agency acknowledges are not found in practice, and which leading ISPs have disavowed interest in or are already prohibited from pursuing under the terms of transaction consent decrees and conditions and spectrum licenses.<sup>16</sup>

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had instituted the slowdown rather than its own business partner. See Larry Downes, *How Netflix Poisoned the Net Neutrality Debate*, FORBES, Nov. 25, 2014, available at <http://www.forbes.com/sites/larrydownes/2014/11/25/how-netflix-poisoned-the-net-neutrality-debate/> (Attached as Appendix II).

<sup>15</sup>Report and Order, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, Dec. 21, 2010, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-10-201A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf). The Report described the 2010 rules as "prophylactic" over a dozen times. See also Downes, *Unscrambling the FCC's Net Neutrality Order*.

<sup>16</sup>For example, AT&T, even at the time of the 2010 Order, disclaimed any interest in last-mile paid prioritization. Comcast is bound to a stricter version of Open Internet rules than those rejected by the *Verizon* court under the terms of its merger with NBC Universal. And Verizon is subject to Open Internet requirements on its LTE network under conditions placed at the behest of Google on the 700 MHz "C" block auction.

Indeed, depending on the interpretation of terms including blocking, discrimination, and throttling, and the implementation of theoretical last-mile paid prioritization, the practices the White House and its colleagues worry about for the future are almost certainly prohibited by longstanding anti-trust and anti-competition law, law that is aggressively enforced by the Federal Trade Commission specifically in the Internet ecosystem.<sup>17</sup>

The real problem with—and the principle objection to—having those rules be made enforceable exclusively by the FCC has and remains the agency’s lack of statutory authority to do so. Since 1996, it has been the bi-partisan policy of Congress, the White House and the FCC to respect the visionary “light touch” approach to broadband regulation codified in the statute.

Self-styled consumer advocates and some content providers, however, have since the beginning of the commercial Internet sincerely believed instead that the U.S. would be better off regulating broadband following both the model and the rulebook developed for the former monopoly Public Switched Telephone Network, embodied in Title II and associated state and federal regulations regarding tariffs, taxes, service and infrastructure. For these groups, the Open Internet rules have always been a rhetorically appealing sound bite in support of the true goal-- the transformation of broadband into a public utility.

With the President’s November statement, the White House has explicitly embraced that view. The FCC is now poised to follow the White House’s lead, acceding to the President’s urging.

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<sup>17</sup> But not if the FCC succeeds in “reclassifying” broadband. Title II explicitly forecloses enforcement by the FTC of anti-competition laws for common carriers regulated under Title II. Implementation of the President’s plan thus seems certain to end a long and aggressive enforcement of competition law by the FTC against ISPs in favor of complete authority for the FCC alone but without access to much of the FTC’s legal toolkit. See Association of National Advertisers, “How Will Net Neutrality Rules Impact Advertisers?” available at <http://www.ana.net/blogs/show/id/33695>.

While I strongly disagree with the view that transforming broadband Internet into a public utility will in any manner improve adoption, pricing, innovation or any other consumer value, one thing is no longer in doubt. It should now be clear to consumers being dragged into this debate that for many of the participants, the goal has never been passage of enforceable Open Internet rules at all, but rather the reversal of the light-touch model for broadband in favor of a public utility regime.

That reality is underscored by the deafening silence thus far from Open Internet advocates in response to legislation circulated in January, both in the House by this Committee and by its Senate counterpart.<sup>18</sup>

That legislation would at long last resolve the FCC's lack of jurisdiction over broadband without reliance on any legal legerdemain. It would explicitly enact every one of the network management prohibitions called for in President Obama's plan. It would go far beyond the 2010 Order rejected by the *Verizon* court, the 2005 principles rejected by the *Comcast* court, and the Chairman's own May, 2014 NPRM. It explicitly prohibits "paid prioritization," "throttling" and blocking, for example, and treats mobile broadband under the same set of rules as wired access.

The only thing the draft legislation would not enact from President Obama's plan is the transformation of broadband into a public utility. Instead, it removes any doubt left by multiple court decisions and twenty years of bi-partisan policymaking that Title II was ever intended to cover broadband Internet access.

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<sup>18</sup> Larry Downes, *Eight Reasons to Support Congress's Net Neutrality Bill*, The Washington Post, Jan. 20, 2015, available at <http://www.washingtonpost.com/blogs/innovations/wp/2015/01/20/eight-reasons-to-support-congress-net-neutrality-bill/>.

The proposed legislation gives the Open Internet advocates precisely what they have asked for, in other words, but removes the dangling sword of Title II hanging precipitously over the head of the Internet.

On that basis, the draft legislation has been rejected outright by pro-public utility advocates as a basis for resolving a decade-old issue, even though its passage would secure the goals they claim to have been pursuing without further legal, technical and economic uncertainty.

So it is Title II and not the Open Internet or “net neutrality,” it seems, that has and remains the actual goal of this long-running campaign.

If anything positive comes from this latest set of missteps at the FCC and the certain legal challenges to follow, my hope is that it will lead at last to an honest debate on the merits of the topic that has intentionally been hidden in the background: the appropriateness of public utility regulation for the Internet.

Congress can then weigh the pros and cons of applying the model created for monopoly power, water, and PSTN telephone companies to the unique characteristics of the Internet. Perhaps once consumers understand what is really being urged in their name, they will honestly and sincerely support the idea of transforming broadband into a public utility. Perhaps, reflecting on the level of investment, innovation, and maintenance demonstrated by existing utilities, they will think otherwise. But in any case they should at least be told plainly what it is they are actually being urged to advocate for.

Choosing Legal Uncertainty

Beyond uncertainties about what precisely is in the Chairman’s implementation of President Obama’s plan and how the FCC will or will not try to use forbearance to limit the damage of a public utility regime on mobile and wired broadband Internet, the uncertainty that most concerns responsible participants in the Internet ecosystem is, of course, the legal uncertainty. As the Chairman was quick to point out before the White House’s intervention, any effort to “reclassify” broadband as a public utility will without doubt be met with legal challenges whose scope and obstacles will dwarf those faced by the agency in its unsuccessful defense of two previous efforts to create enforceable Open Internet rules.

There are at least three major legal obstacles to force-fitting Title II onto broadband. Resolving these in the courts will likely engage multiple proceedings taking two years or longer. I discuss each of them briefly below:

1. Overcoming **Brand X** and FCC precedent – In the *Brand X* case,<sup>19</sup> the U.S. Supreme Court acknowledged ambiguity in Congress’s definitions of “information service” and “telecommunications service.” But the Court has never held that Congress intended for the FCC to have discretion to *define* those terms, only to interpret Congress’s intent-- interpretation subject to the *Chevron* standard of deference. The FCC gave a reasoned explanation for its view that Congress intended broadband Internet to be governed as an information service subject to Title I and not Title II, and the Court held that interpretation was not unreasonable.

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<sup>19</sup> *National Cable and Telecommunications Association v. Brand X Internet*, 545 U.S. 967 (2005).

In litigation involving any attempt to “reclassify” broadband as a Title II telecommunications service, the agency cannot simply announce it has changed its mind about what Congress intended in 1996. Making the case that changed circumstances have somehow changed the nature of broadband in the interim will also be difficult, especially when all of the evidence, including the lack of Open Internet violations documented in the exhaustive 2010 proceeding, makes clear that the statutory intent of light-touch regulation has worked so well.

2. Forbearance – There is a great deal of uncertainty regarding which provisions of Title II the FCC initially intends to forbear from, and the process by which it will attempt (or not) to sustain those decisions in successive legal challenges. In Chairman Wheeler’s announcement in early January of his decision to implement the President’s plan rather than his own, the Chairman assured attendees at the Consumer Electronics Show he could achieve the President’s public utility goal with only the three “core” provisions of Title II – Sections 201, 202 and 208.

These, of course, are the provisions that taken together form the basis for public utility treatment of telecommunications services, so relying “only” on these sections is cold comfort to those who fear the application of Title II as a means to enact enforceable Open Internet rules will quickly lead to expanded regulation of the Internet as a whole, including oversight (pre or post facto) of fees, services, and taxes.

Considerable cause for concern comes from the fact that the Chairman has already backtracked from these self-imposed limits. By the time the Chairman released

his “Fact Sheet” a few weeks later, that list had ballooned to twelve provisions, including “partial application” of Universal Service to broadband, and several added enforcement provisions, along with rules regulating the attachment of broadband equipment to existing utility poles and conduits under terms and conditions approved by regulators.<sup>20</sup>

Even in that expanded list, the Chairman was disturbingly vague about how forbearance from tariffing, taxes, Universal Service and interconnection would actually achieve the cabined Title II jurisdiction he claimed to be designing in his effort to “modernize” Title II.

3. Jurisdiction over mobile broadband – While Chairman Wheeler is correct in frequently repeating that mobile voice services, under Section 332, have long been subject to a limited subset of Title II provisions, he conveniently leaves out the corollary that mobile broadband—the only aspect of the mobile Internet, increasingly, that matters—is explicitly *excluded* from Title II.<sup>21</sup>

Even if the FCC can convince the courts to approve its Title II gambit for wired Internet access, I see no path to making a similar case for mobile broadband.

I appreciate the opportunity to testify, and look forward to your questions.

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<sup>20</sup>See “Fact Sheet;” Larry Downes, “How Wheeler’s ‘Net Neutrality’ Became Obama’s ‘Public Utility.’” (Attached as Appendix I)

<sup>21</sup> 47 U.S.C. §332. See *Cellco P’Ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (Section 332 presents a “statutory exclusion of mobile-internet providers from common carrier status.”); see also *Verizon*, 740 F.3d at 650 (“treatment of mobile broadband providers as common carriers would violate section 332”).

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[Larry Downes](#) Contributor

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## How Wheeler's "Net Neutrality" Became Obama's "Public Utility"

In the lead-up to the FCC's Feb. 26<sup>th</sup> vote on new net neutrality rules (the agency's third effort in a decade), the debate over the legal, technical, and economic consequences of having the agency anoint itself to police broadband network management practices has descended into the surreal, complete [with stranger-than-fiction details](#) of a shadow FCC operating within the White House, staffed by lobbyists for large Internet content companies.

But if there was ever any doubt about what this campaign was really about, it should now be abundantly clear that its true goal was never to enact rules that preserve the open Internet.

For over a decade, it's been obvious at least in Washington that the populist rhetoric around net neutrality was [merely a useful wedge to drive the true objective](#)—the transformation of Internet access into an unbundled, rate-regulated public utility, with ISPs large and small treated as quasi-public agencies, much like water, power, and gas companies.

Or, more to the point, like the former telephone monopoly, whose rates, services, and business practices were tightly controlled for decades by a combination of FCC and state public utility commissions.

Controlled, that is, until the free and open Internet, left almost entirely on its own to establish rules based not on politics but on engineering, overwhelmed the slow-moving regulated telcos on price, technology, flexibility and service.



The wireline telephone utilities [have almost no customers left](#), and have been hemorrhaging money for years. Like the railroads, their main objective now is to get regulators to let them go out of business in an orderly fashion, transferring what remains of their usable assets and legacy consumers to better, faster, and cheaper broadband services, on which voice is just another app.

With sad irony, the rules that helped kill the switched telephone business, known as Title II, are precisely the ones the advocates have been trying since the 1990's to apply to the Internet. And now, thanks to last-minute lobbying by the President, it seems a majority of FCC Commissioners have decided to cave in, attempting to "reclassify" broadband as a telephone service in the legal equivalent of a Hail Mary pass.

As the end-game approaches, consumers who were duped into believing they had been mobilized to fight for Internet freedom have been cast to the curb.

And the dwindling number of Internet "edge" companies cheerleading (and funding) the efforts of advocacy groups to put "strong" rules in place are beginning to see the profound danger of inviting the government to exercise unchecked authority in an ecosystem that has grown exponentially and evolved quickly with limited federal oversight.

In December, sixty leading tech companies including Qualcomm, IBM, and Cisco, [urged the FCC not to pursue the Title II approach](#). And Google, which was a strong voice in favor of regulation during the 2010 reboot of this morality play, has stayed out of it this time, [except to lobby for its own interests](#) in deploying fiber networks.

### **President Obama's Blindside**

No matter. As an FCC rulemaking dissolved into chaos last year thanks in large part to misinformation [promoted by Netflix and embraced by comedian John Oliver](#), the advocates, with strong influence inside the White House and at the FCC, showed their hand late last year—not that there was ever much doubt about the cards they were holding.

Under the title, "President Obama's Plan for a Free and Open Internet," the White House in November [blindsided the on-going FCC proceeding](#) by proposing an alternative plan that would transform the Internet into a public utility.

"The time has come for the FCC to recognize that broadband service is of the same importance and must carry the same obligations as so many of the other vital services do," the President announced in proposing his own plan, one that would explicitly transform broadband into a public utility.

FCC Chairman Tom Wheeler, appointed by Obama in 2013, [abruptly flip-flopped](#), ditching a more narrow rulemaking initiated in May that followed a legal course charted by a D.C. court earlier in the year.

The May proposal made clear the Chairman saw no need to rely on Title II to achieve the goals the President reiterated. “My preference has been to follow the roadmap laid out by the D.C. Circuit in the belief that it was the fastest and best way to get protections in place,” [Wheeler wrote](#) in announcing his plan.

But the Obama plan has instead prevailed. And so confident are the pro-Title II forces that they have [now dropped all pretense](#) that the public utility hammer was merely an unfortunate but necessary means to the end of shoring up the Internet with a modest net neutrality nail.

Reclassification, according to the President’s plan, “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.”

This is no longer a campaign for rules that would (to use the FCC’s term) “prophylactically” ban future network management practices, including website blocking and other forms of anti-competitive discrimination. (Which were and always have been illegal, in any case, under antitrust and anti-competition law actively enforced by the Federal Trade Commission—that is, until Title II goes into effect and explicitly removes the FTC’s authority.)

This is now a plan that will, if it passes legal muster, regulate every inch of the Internet’s infrastructure, from content providers to consumers and every node along the way. For better but much more likely for worse.

Let me be clear about my preferences. Like everyone else, I have always supported the principles of the free and open Internet, as I’ve made clear in four books on the disruptive potential of innovation that takes place without the permission of platform operators or government regulators. Faster and cheaper “Big Bang Disruptions,” as I explain [in my recently co-authored book](#), rely on open standards, robust fixed and mobile networks, and unfettered access to all consumers.

And while I’ve been skeptical at best about the FCC’s authority or ability to enforce rules that the market has, up until now, done an extremely efficient and rapid job of enforcing itself, I supported the alternative of actual legislation from Congress that neatly and efficiently closes any potential gaps.

A bill introduced in both the House and Senate early in January [enacts precisely the rules the Obama plan calls for](#), and resolves any doubt about the FCC’s legal authority.

But since it also takes off the table any future effort to force-fit 21<sup>st</sup> century technologies into 20<sup>th</sup> century public utility law, the advocates dismissed it without any discussion. The White House, according to sources in Congress, has put pressure on Democrats not to engage in revising the bill.

### **What’s in the FCC’s Obama Plan?**

What alternative has the White House and the FCC cooked up? We don't yet know the specifics of the FCC's implementation of the Obama plan. Adhering to longstanding practice, Chairman Wheeler has refused to make the proposal public until after the vote, though he did [issue a brief overview](#) that described the broad strokes of the Obama plan. (Two cheers for transparency.)

We know, for example, that the Report and Order that was circulated last week by the Chairman to the other four Commissioners (two Republican, two Democrat) is over 300 pages long.

The rules themselves are reported to be only eight pages. But as with the 2010 version, the all-important details on what the agency means by key terms such as "reasonable network management" and "unreasonable discrimination" (along with new terms such as "paid prioritization," "throttling," and the kitchen sink of legal arguments supporting this radical shift in policy), will be buried in the report and its footnotes.

[\(My testimony before a House Committee](#) attempting to parse the much shorter 2010 Report and Order was itself forty-six pages long.)

We also know that as the agency positions itself to implement the new public utility regime called for by the White House, Chairman Wheeler has repeatedly fallen victim to the kind of regulatory mission creep that should worry consumers and content providers alike.

While emphatically claiming throughout last year, for example, that peering and interconnection "is not a net neutrality issue" because it does not involve the last mile between ISPs and consumers, the Chairman's new proposal gives the agency "broad authority" over all "interconnection activities."

If, according to Wheeler's overview, the agency determines that any back-end traffic management agreement is not "just and reasonable," the FCC will "for the first time" be empowered to "take appropriate enforcement action." (Today, [according to the OECD](#), over 99% of such agreements are so simple they aren't even reduced to a written agreement.)

So as the FCC prepares to vote on the Obama plan, the entire Internet ecosystem seems poised to be swept into the cold dead hands of Title II, including mobile broadband, interconnection, content delivery networks, co-located servers, peering, transit, backhaul and backbones. To the extent content providers use such services to get high-bandwidth video and other traffic to their customers, they too will likely be subject to FCC oversight.

And just how much of Title II that will be applied is also growing at a remarkable pace. At the annual Consumer Electronics Show in early January, where Wheeler first revealed his flip flop on Title II, the Chairman reassured the audience that only a small subset of the full public utility book was to be thrown at broadband.

Mobile voice, he pointed out, had long been subjected to three sections of Title II, which hadn't seemed to slow deployment of mobile services. (Wheeler then and since, however, has conveniently left out that while mobile *voice* services, which make up a small fraction of mobile

traffic, are subject to limited Title II regulation, mobile *data* never has been and, under the law, cannot be—one of many legal hurdles the new rules will face.)

Those three provisions, in any case, are what Wheeler admits form the “core” of Title II’s public utility authority, requiring regulated providers to offer “just and reasonable” rates and services to all customers, with the FCC empowered to define those terms and adjudicate a wide range of complaints.

But in applying Title II to the entire Internet, Wheeler told the CES audience, its other provisions would be ignored under a complex legal process known as forbearance.

That approach, [specifically called for in the Obama plan](#), reflected a significant scaling back of an earlier failed effort to apply Title II to broadband during the last iteration of the net neutrality debate in 2010.

At the time, former FCC Chairman Julius Genachowski, facing similar pressure from public utility advocates, [offered what he called a “third way”](#) to enact Open Internet rules, relying for authority on Title II but forbearing from all but six provisions. These included the three “core” sections mentioned at CES by Wheeler, plus three more that dealt with universal service fees, privacy, and access rules for consumers with disabilities.

Back then, when cooler heads prevailed, [a bi-partisan majority of both the House and the Senate](#) strongly urged Genachowski to steer clear of Title II. (Internet policy, starting with the Clinton Administration, has largely been a non-partisan issue, at least until now.) The “third way” plan was dropped.

Last week, however, when Chairman Wheeler promised to “modernize” Title II in implementing the Obama plan, his more limited application of Title II suddenly mushroomed, in less than a month, [from three provisions to twelve](#).

The added sections provide “partial application” of Universal Service to broadband, fold in several enforcement provisions, and apply rules for attaching equipment to existing utility poles and conduits under terms and conditions approved by regulators.

And while the Chairman was adamant that the Obama plan would not include rate regulation, unbundling requirements, or any new fees or taxes, Republican FCC Commissioner Ajit Pai challenged that view at a press conference on Tuesday.

Pai, one of the few people who has actually seen the full 332-page document, said that under the Chairman’s proposal, ex post rate regulation was allowed any time the FCC found the broadband market was not sufficiently competitive—a finding the agency has made repeatedly.

For example, in its annual report on broadband deployment published last week, the FCC cynically changed [the definition of broadband speed from 4 Mbps to 25 Mbps](#), leading to the not surprising finding that broadband deployment, especially to rural Americans, is not “reasonable

and timely,” the trigger for the FCC to take more aggressive regulatory action according to the agency’s view of the law.

Commissioner Pai identified several other worrisome aspects of Wheeler’s effort to enact the Obama plan:

- Sponsored data and zero rated services will likely be prohibited, [as public utility advocates have demanded](#). These are innovative and well-regarded services where content providers subsidize consumer use of the most popular applications (including Facebook and Wikipedia) on mobile plans.
- Usage-based pricing may also be banned, meaning average users will subsidize power users who consume far more broadband services.
- Class actions lawsuits will be allowed for challenges to ISP practices, a perennial Christmas gift for Washington trial lawyers.
- Forbearance from rate regulation, unbundling, and new taxes and fees is only temporary. No future utility-style regulations has been taken off the table.

No surprise the FCC’s other Republican Commissioner, Michael O’Rielly, [characterized the Chairman’s reassurances](#) of limited Title II public utility rules as “fauxbearance.”

### **A Dangerous Exercise In Political Theater**

Even in the best case scenario, the Obama plan will generate years of uncertainty—for consumers, for the agency, for content providers and for ISPs. That is perhaps the most significant factor weighing in favor of waiting for the Congressional alternative to proceed, and for Democrats to collaborate rather than simply condemn it.

Or to do nothing at all, and wait to see what kinds of network management abuses actually emerge before trying to figure out where new laws are needed to curb them.

Instead, it seems almost certain now that the FCC will proceed with its legally fraught plan to rewrite Clinton-era laws that kept broadband Internet from being subjected to public utility regulation.

With the voices of reason shouted down, we will instead have to wait for the convoluted administrative processes that follow. The FCC will vote on the new rules on Feb. 26<sup>th</sup>, then begin the steps necessary to get them published in the Federal Register. With the 2010 rulemaking, the FCC’s most recent effort, that effort took almost a year.

Then of course, as Chairman Wheeler readily admits, multiple legal challenges will certainly follow. (Aspects of Title II, [notes former FCC Commissioner Robert McDowell](#), has been litigated in court 2,600 times, and at the FCC over 25,000 times.)

The advocates, as last time, will cynically file suit themselves in hopes of directing the case to a friendlier federal court than the D.C. Circuit, which has slapped the agency down repeatedly when its reach exceeded its legal grasp, including twice rejecting the FCC's efforts to extend its limited jurisdiction over broadband.

In any event, count on a year or longer of legal proceedings, by which time there will almost certainly be a new FCC Chairman, and possibly a different party in the White House. Which could render much of this effort moot.

Until the next time.

Enacting the Obama plan, as both the White House and the FCC surely know, could in the end amount to little more than political theater. But win or lose, the public utility gambit risks the continued expansion of the Internet economy for short-term partisan gain, making it that much harder in the future to solve legitimate regulatory problems that do arise in the fast-changing Internet ecosystem.

In the rush to support the President Obama's political agenda, all reasonable alternatives and common-sense considerations have been thrown out the executive floor windows at FCC headquarters, which is, by law, supposed to be independent of political or other influence from the White House.

Well, perhaps the advocates are right. Perhaps a majority of Internet consumers would prefer a return to the high prices and slow pace of investment and service innovation that characterized life in the age of a regulated telephone monopoly.

But if so, they should at least be relieved of any illusion that this has not been and remains the true goal of those who are now boldly calling for public utility regulation as an end in itself.

Or that independent regulatory agencies, staffed by experts in the industries they oversee but run by political appointees, can be effectively immunized from partisan tampering.

*My new book, co-authored with Paul Nunes, is "[Big Bang Disruption: Strategy in the Age of Devastating Innovation](#)" (Portfolio 2014). Follow me on [Twitter](#) and [Facebook](#) for more on the accident-prone intersection of technology and policy.*

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[Larry Downes](#) Contributor

[Tech](#) 11/25/2014 @ 4:00AM 34,006 views

## How Netflix Poisoned The Net Neutrality Debate

Just when it seemed things couldn't get any worse for President Obama's recently-appointed FCC Chairman Tom Wheeler, the fight over "net neutrality" and the fate of the private Internet has now become a political football in gridlocked Washington.

Days after the mid-term elections, [the President posted a video](#) strongly advocating his own "plan" for net neutrality rules, upping the volume on this year's loud, confusing, and often intentionally misdirected debate on how best to maintain the open Internet.

The FCC, which by law is independent of the White House, has been considering new rules since a federal appeals court in January largely voided on jurisdictional grounds an earlier effort from 2010. In May, based on guidance from the court, the agency [proposed a revised version that differed only slightly from the 2010 rules](#).

In the meantime, the FCC's proceeding has been overshadowed by a frenzied media circus that casts the agency, and Chairman Wheeler, as conspirators in a plot to destroy the Internet.

Now, unrefuted evidence has emerged that the unraveling FCC proceeding, almost certain to land the agency back in court for a third time, initially spun out of control based on wildly misread data on early 2014 network performance issues—an error that at least one leading industry analyst suspects may not have been accidental.



## The Plot Thickens

The story begins back in March, when the strictly legal debate over the FCC's limited authority over broadband ISPs first turned toxic [with inflammatory statements from Netflix CEO Reed Hastings](#) on the company's blog.

The 2010 rules, even if reinstated, were too "weak," Hastings wrote. "A stronger form of net neutrality is required," he insisted, to "prevent ISPs from charging a toll for interconnection to services like Netflix" and other dominant content providers. To protect the Internet, he wrote, the FCC must force ISPs to provide Netflix "sufficient access to their network without charge."

At the time, Netflix was concluding a series of agreements with leading ISPs to directly interconnect Netflix's proprietary content delivery technology with their networks, as other large content providers had long done. Before that, and to keep up with rapid growth, Netflix has been paying third-party transit providers including Cogent and Level 3 and general purpose content delivery networks, which are provided by companies such as Akamai and Limelight.

Hastings, dissatisfied with the negotiations, urged the FCC to redefine net neutrality, transforming it from a set of last-mile consumer protections to detailed government control of connections at the Internet's back-end. Rather than pay the transit providers, Netflix wanted to connect directly to the ISPs and do so "without charge."

And Hastings demanded that the FCC make such arrangements a matter of federal law.

To emphasize the need for FCC oversight, Hastings insisted that ISPs were intentionally "constraining" Netflix traffic to force the company to upgrade its connections, "sacrific[ing] the interests of their own customers to press Netflix and others to pay." (Netflix did not respond to requests for comments on this story.)

That claim quickly upended the on-going FCC proceeding. Soon after, comedian John Oliver launched his satirical tirade against cable company interference with Internet traffic, [prominently featuring the Netflix-supplied data](#).

Comments began flooding into the FCC's pending Open Internet proceeding, derailing efforts by Wheeler to respond quickly, as he promised, to the appeals court's "invitation" to clear up the few remaining issues with the on-going rulemaking and move on to more urgent work.

But Netflix had fatally misread the data.

Earlier this month, Frost & Sullivan's [Dan Rayburn](#), a leading media industry analyst, reported damning evidence that Hastings's claims of ISPs throttling were untrue all along, based on a fundamental misidentification of the cause of measurable traffic congestion being experienced at the time across the Internet.

There was intentional throttling going on, [Rayburn reports](#). But it was not being done, as Netflix claimed, by Comcast or other large ISPs, intentionally or otherwise.



The congestion, rather, resulted from a calculated choice made by [Cogent](#), Netflix's own Internet transit provider. Cogent, it turns out, had implemented a practice of prioritizing the traffic of its retail customers over that of its wholesale customers, including Netflix, during times of heavy network usage that strained Cogent's capacity to deliver the traffic being pulled by end-users.

Faced with irrefutable evidence reported by Rayburn and others, [Cogent quickly admitted to intentionally slowing the traffic of all its wholesale customers](#), a practice that may still be in place.

Cogent explained in a blog post that “retail customers were favored because they tend to use applications...that are most sensitive to congestion” and that in response they implanted a “structure” that “impacts interconnections during the time they are congested.”

According to Rayburn, Cogent never publicly disclosed that it was intentionally prioritizing outgoing traffic of its retail customers, in violation of industry practice (and possible contractual responsibilities with its wholesale customers).

And its own policy: Cogent's website proudly proclaims “Cogent practices net neutrality. We do not prioritize packet transmissions on the basis of the content of the packet, the customer or network that is the source of the packet, or the customer or network that is the recipient of the packet.”

The failure to disclose the practice even as the FCC proceeding spun out of control because of it was particularly damaging. As Rayburn notes, “What Cogent did is considered a form of network management and was done without them disclosing it, even though it was the direct cause of many of the earlier published congestion charts and all the current debates.”

It was Cogent's undisclosed actions, in other words, that resulted in a widely-reported slowdown of Netflix's outgoing Internet traffic.

The slowdown had nothing to do with the lack of enforceable net neutrality regulations. And it said nothing about the potential danger of so-called “paid prioritization” arrangements that have been the rallying cry in this round of the ten year old net neutrality debate.

Quite the opposite. It proved that network management, absent intervention from federal and state regulators, rapidly resolved its own problems through private agreements and new technologies. If anything, it demonstrated the value of an FCC rule, upheld by the court, that required transparency for such practices—rules that have previously not extended to transit providers such as Cogent.

### **Enter Netflix, Screaming**

Though the mainstream media and average consumers have only just joined the story, “net neutrality” has been for years a favorite rallying cry for self-proclaimed consumer advocates who have used it as shorthand for a range of efforts to introduce government regulation—or outright

nationalization—for fast-changing Internet technologies, both at home and abroad. (See my earlier post, [“The Biggest Net Neutrality Lie of All”](#).)

Yet as every consumer knows, despite regular claims of imminent doom, those technologies have continued to improve and evolve, superbly regulated by the engineering groups who maintain and update the underlying standards and protocols that define it.

Under a legal structure enacted by a bi-partisan coalition of Congress during the Clinton Administration, both the FCC and the Federal Trade Commission provide backup for potential anti-competitive practices under a “light touch” model of regulation.

Against that backdrop, Netflix’s dramatic entry into the net neutrality maelstrom earlier this year was both sudden and, so far, largely counter-productive.

Back in 2010, the last time the FCC was testing the limits of its legal authority over broadband ISPs, Netflix was largely absent from the debate. The company was just becoming the dominant source of Internet traffic that it has since solidified. Netflix was then in the process of winding down its original service: mailing DVDs via a sweetheart deal with the U.S. postal service [that, in an irony that may be lost on the company, has since been held to have unlawfully discriminated against similar services.](#)

In 2011, the company announced plans to spin off the DVD business into a separate company, but consumers and investors revolted against the idea, and the plan was quickly dropped.

Since then, the company wisely shifted its strategy to focus on digital distribution, a move that proved wildly successful. Today, the company has over 35 million subscribers in the U.S. alone. At peak viewing times, the company’s streaming movies and television shows make up as much as a third of all Internet traffic in the world.

As the need to provide more and more video at higher resolution strained the company’s Internet infrastructure, Netflix developed Open Connect, the company’s proprietary content delivery system. And it began flexing its growing competitive muscle by insisting that ISPs either co-locate Open Connect for free [or be denied access to HD programming](#). Like its earlier preferred deal with the postal service, and unlike every other CDN large and small the company has insisted that its equipment be accommodated “without charge.”

In the U.S., however, some large ISPs balked at the idea of offering Netflix preferential access. In many cases, Rayburn told me, the interconnection takes place in third party co-location “hotels,” a service for which both parties must pay.

When the January court decision reopened the question of whether the open Internet required regulatory intervention, Netflix injected itself into the new FCC proceeding, hoping to gain leverage in the stand-off. It’s in that context that Hastings argued the FCC rules should mandate free interconnections and accommodation of unlimited capacity, if not for all content providers, [than at least for Netflix.](#)

## The Interconnection Misdirection

Netflix's call for regulatory intervention to help manage its costs is nothing unusual, nor illegal. Indeed, as startups offering ride-sharing, temporary housing, commercial drones, driverless cars, Internet TV, genetic testing and crowdfunding platforms have all found, [it is an accelerating and alarming trend among incumbents faced with disruptive innovations](#).

Rather than compete evenly with the startups, they urge regulators to stifle or stop the innovators by forcing them to abide by laws written for earlier technologies.

[In filings with the FCC](#), Netflix argued the FCC should assert authority it still maintains over the declining switched telephone network, authority granted nearly a century ago for what was then a legal monopoly granted to the former Bell System.

In a legally-dubious process that advocates euphemistically refer to as “reclassification,” the Internet would be turned into a public utility, granting the FCC and state regulators vast powers to oversee any and all aspects of its deployment and operation. (In his plan, Obama explicitly calls for the public utility approach, [without addressing any of the downsides](#) that are well known based on the failings of existing utilities and their regulators.)

But Netflix IT costs aside, the case—legal and economic—for an FCC transformation of the Internet into a public utility is extremely weak. The Internet transit market has worked brilliantly with almost no government oversight since the beginning. [According to the multinational OECD](#), over 99% of all peering agreements are so simple they aren't even reduced to writing.

“Net neutrality” is also a dangerously simplistic term, one concocted by legal academics rather than network engineers.

In fact, during the almost twenty years when the FCC had no enforceable net neutrality rules in place, new network management technologies including co-located servers, content delivery networks, virtual private networks and other specialized services have evolved to handle traffic that has increased exponentially.

Networks must be flexible in order to handle rapid changes in consumer behavior, especially as the Internet is dominated more and more by video and other applications that require high bandwidth and low latency to maintain their quality.

Misunderstandings of modern network engineering by lawyers explains much of the current public confusion. When Netflix announced that Comcast's alleged throttling had forced it to switch its transit from Cogent to a direct connection with Comcast, for example, Columbia law professor Tim Wu, who coined the phrase “net neutrality” in 2003, [claimed it was](#) “the first-ever direct interconnection deal between a broadband provider, like Comcast, and a content company, like Netflix or Google.” The beginning, once again, of the end.

But that too proved to be wildly inaccurate. As [Rayburn noted in May](#), nearly every major content provider, including Apple, Amazon, Facebook, eBay, and Google had long since established such deals with nearly every large ISP and backbone provider. Not because they were forced to, but because such deals made good technical and business sense.

### Direct Interconnections as of May, 2014

	<u>AT&amp;T</u>	<u>Comcast</u>	<u>Verizon</u>	<u>CenturyLink</u>	<u>Sprint</u>	<u>Level 3</u>
Google	X	X	X	X	X	X
Amazon	X	X		X		X
Facebook	X	X	X		X	X
Akamai	X	X	X	X	X	X
Microsoft	X	X	X	X		X
Netflix		X	X	X		X
Limelight	X	X	X	X	X	X
Pandora		X				X
Ebay	X		X	X	X	X
Apple	X		X			X

(Source: Streaming Media)

(Rayburn’s chart shows the extent of direct interconnection between large content providers, who generate significant Internet traffic, much of it video. Rayburn notes “I didn’t look at every ISP out there or every content owner, simply some of the larger ones.”)

Indeed, despite its public rhetoric, Netflix privately acknowledged the unremarkable nature of these deals—and their cost. At a June event sponsored by the Aspen Institute in Washington, [as reported by fellow Forbes contributor Hal Singer](#), a Netflix representative admitted that the price the company was paying Comcast to connect directly to its network was too trivial to report, or to serve as a source of competitive marketing. (Content licensing from copyright holders accounts for [the vast majority of the company’s expenses](#).)

### Tarred with Cogent’s Brush

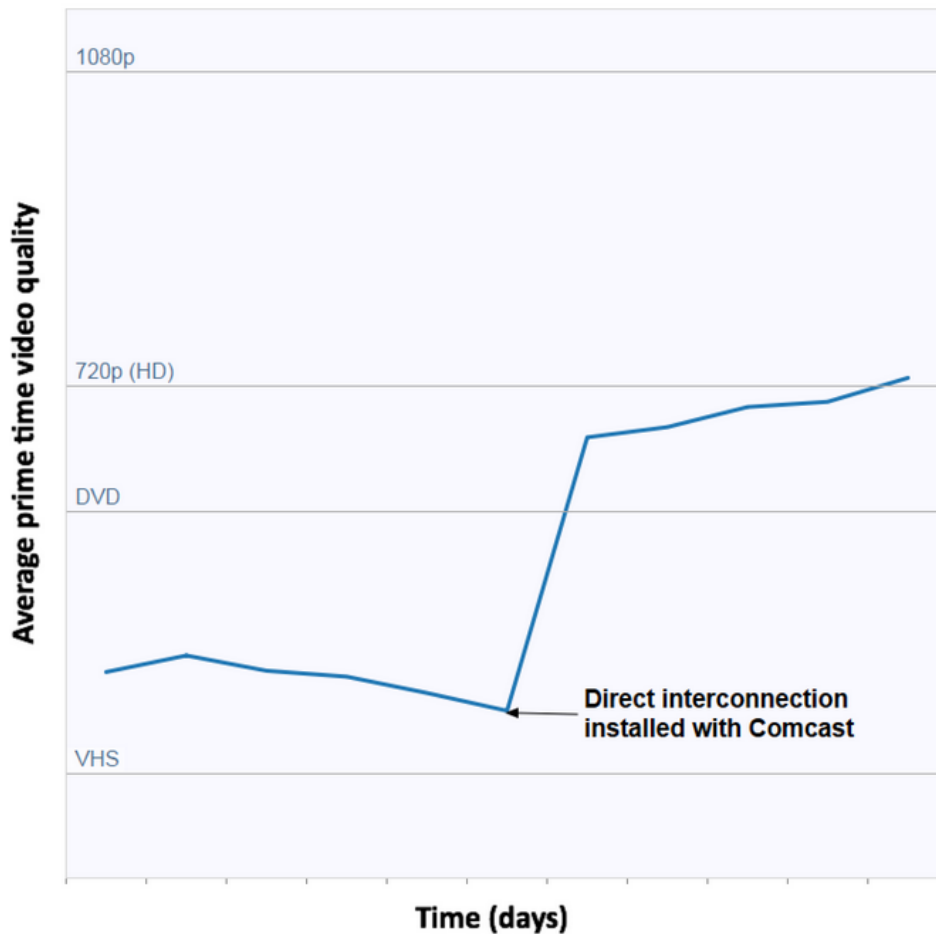
Neither Netflix nor Comcast released details of their particular deal, [but Rayburn estimated at the time](#) that Netflix may actually be paying Comcast less than it previously paid to Cogent, and under a long-term contract that protects Netflix from price increases. (Netflix did not respond to a request for details of the deal.)

Still, before the ink had dried on its agreement with Comcast, Netflix’s Hastings began trashing it, claiming in March they had been forced to pay a special “ISP toll” or face continued and intentional degradation of their traffic.

In a [follow-up blog post in April](#), the company’s vice president of content delivery went farther, writing that “Netflix agreed to pay Comcast for direct interconnection to reverse an unacceptable

decline in our members' video experience on the Comcast network. These members were experiencing poor streaming quality *because Comcast allowed its links to Internet transit providers like Level3, XO, Cogent and Tata to clog up*, slowing delivery of movies and TV shows to Netflix users.” (emphasis added)

The post included a now-infamous chart purporting to show how Comcast had intentionally slowed Netflix traffic prior to the switch from Cogent to the direct connection. “Comcast’s ability to constrain access to Netflix can be clearly seen in the following chart,” the company wrote, “which shows how Netflix performance deteriorated on the Comcast network and then immediately recovered after Netflix started paying Comcast in February.”



(Source: Netflix)

But the Netflix data proves something very different. It proves the catastrophic effect of Cogent’s unilateral decision to prioritize the traffic of its retail customers over its wholesale customers, including Netflix. As Rayburn’s research reveals, the chart [reflects the intentional prioritization scheme Cogent now admits to](#).

Netflix quality improved after establishing direct interconnection with Comcast, in other words, just as the chart shows. But only because Cogent had been disfavoring wholesale traffic en route to the ISP. Once Netflix took Cogent out of the loop, the problem went away. Immediately.

Netflix repeated the false claim against the ISPs as recently as a [July filing with the FCC](#), which argued that the only way the FCC could protect consumers from continued “interconnection congestion” was to transform the Internet into a public utility. When asked if Netflix wished to revise its claims that it was ISPs rather than its own contractor who was intentionally creating the “clog up,” the company did not respond.

Cogent also did not respond to a request for comment for this story, but [told a reporter for Ars Technica](#) earlier this month that its decision to intentionally disfavor wholesale customers during times of congestion on its network was “put in place only because Internet service providers refused to upgrade connections to Cogent to meet new capacity needs.”

Rayburn finds the timing of Cogent’s prioritization suspicious. “It seems extremely unusual that Cogent implemented this traffic change during the very same week that Comcast announced the Netflix deal,” he wrote.

### **The Damage Done**

Since Rayburn’s report became public earlier this month, Netflix, for its part, has said nothing.

But even if the company was unaware of what was really happening earlier this year, the company’s call for FCC intervention in its network business dealings has nonetheless profoundly skewed the net neutrality debate, perhaps in ways the company neither intended nor desired.

In particular, since Hastings’s original post and follow-up outreach through public interest proxies, there is now widespread confusion over what’s at stake in the FCC’s on-going Open Internet proceeding.

Whether by design or accident, most mainstream reporters and consumers commenting in the FCC docket erroneously point to what has now been revealed as Cogent’s intentional degradation of Netflix and other wholesale traffic as proof that ISPs have both the power and intention to force content providers to pay for prioritization, or what is sometimes inaccurately characterized as Internet “fast lanes.”

(President Obama’s plan, for example, calls for an explicit prohibition on paid prioritization. Obama explains: “No service should be stuck in a ‘slow lane’ because it does not pay a fee. 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.”)

But paid prioritization has nothing to do with the kind of network management Netflix accused ISPs of exploiting—and which turns out not to have been taking place in the first place.

Paid prioritization has always referred instead to a theoretical service in which content providers would pay ISPs to have their packets delivered to consumers more quickly than those of other providers (including competitors) when traveling the last mile from the ISP's equipment to the consumer's device. Such a service would prioritize traffic, in other words, *only after the packets had reached the ISP*—not at the point of interconnection with other networks, including those of transit providers such as Cogent.

To date, no ISP has ever offered such a service, and several have long indicated they have no interest or intention to do so in the future.

[Under the terms of its merger with NBC Universal](#), in fact, Comcast is still legally bound to a stricter version of the non-discrimination rule from the 2010 Open Internet order that the court rejected. AT&T has [volunteered to a prophylactic ban on paid prioritization](#), and has offered to commit to it legally by making it a condition of its pending merger with DirecTV.

Though the 2010 rules did not explicitly prohibit paid prioritization in the future (it may, in fact, prove useful for future applications requiring such priority, including emergency applications [and remote health services](#)), the D.C. Circuit court ruled in January that the FCC's wording of the "non-discrimination" rule exceeded the agency's limited authority.

So in May, the agency sensibly proposed slightly different terminology already approved by the same court for rules in effect for data roaming. Still, and despite self-serving claims that the agency was instead proposing to "authorize" or "mandate" Internet "fast lanes," the Commission made clear its view that a prohibition on network management practices that were "commercially unreasonable" (the revised phrase) would include paid prioritization.

Consumer groups, however, seized on the unrelated issues of transit and co-location raised by Netflix's complaints about intentional "clog ups" as proof that the revised rules were insufficient—or worse, a conspiracy to "kill net neutrality." For most of this year, reports on the FCC proposal have hopelessly and opportunistically conflated prophylactic last-mile "prioritization" bans with back-end transit arrangements.

We now know not only that Netflix's traffic management issues had nothing to do with paid prioritization, but that they were also the fault not of any ISP but of its own business partner.

The damage, however, has already been done. And if the end result is the insertion of the FCC into every link in the Internet's efficiently-engineered architecture, Netflix may soon regret its calls for government help.

Unfortunately, and even more likely, so will Internet users. Whether Netflix customers or not.

*My new book, co-authored with Paul Nunes, is ["Big Bang Disruption: Strategy in the Age of Devastating Innovation"](#) (Portfolio 2014). Follow me on [Twitter](#) and [Facebook](#) for more on the accident-prone intersection of technology and policy.*