

**TechFreedom**  
**02/05/15**  
**09:00 am ET**

**Operator:** Good day, everyone, and welcome to today's program. At this time, all participants are in a listen-only mode. Later, you will have the opportunity to ask questions during the question and answer session. You may register to ask a question at any time by pressing the star and one on your touchtone phone. You may withdraw yourself from the queue by pressing the pound key. Please note this call may be recorded. I will be standing by if you need any assistance. It is now my pleasure to turn the conference over to Mr. Berin Szoka. You may begin.

**Berin Szoka:** Well, thanks very much, and thanks to everybody who's joining us today. We're going to give you a quick overview. We'll be walking through what's likely to happen, take questions about the overall political landscape, then walk through the major litigation, how we see that playing out, take questions about legal issues specifically, and then walk through what the FCC actually did and didn't say yesterday, what the rules might look like, what our questions are, and then open up for a general Q&A about that or anything else you'd want to talk about, including muni broadband, the other issues that are likely to be on the agenda for the February 26 meeting. So in summary, we encourage you to ask questions about politics in the first session, about legal issues in the second Q&A, and then any other questions you have in the general discussion. So I'll give you a quick overview. Geoff Manne, my colleague from the International Center for Law and Economics, and I are going to tag team on this. So don't worry, you won't listen to either one of us monologue for too long. Just to set the table here for our general overview, as we've said in our release yesterday, we really see Tom Wheeler having flip-flopped on his two key promises. First is that when he was in his confirmation, he was specifically asked by Senator Thune whether he

would return to Congress and seek guidance if the FCC lost in court, and the FCC did lose and, of course, he's refused to do that; that's not surprising. Much more surprising is last May, he specifically said that interconnection would be a different matter for a different proceeding, and yet has rolled interconnection right into this proceeding despite having very thin record on that. He's moved the goal post several other ways. First, as we'll discuss, is this catchall provision that the commission slipped in and is only briefly described in their fact sheet; not clear exactly what that means, but that could be quite a large grab by the FCC of additional authority. And of course, Title II [light] has just grown from merely sections 201, 202, and 208 to four more sections, and we'll talk about those and what they cover. And of course, there is always the potential, as our friends with public knowledge have reminded us, for [unforbearance], for Tom Wheeler or any future chairman to decide to move the goal posts yet again. So in summary for us, there's always – the chief problem here has always been what net neutrality would be about far more than just some minimal protection. It would always be as friends at the Electronic Frontier Foundation put it, a Trojan horse, and we're just waiting for the next flip-flops or extensions of the FCC's authority; and that could cover edge providers or other services, but it's very clear that what's really driving all of this and will drive it in the future is political pressure. Folks are witnessing at the outset here that while Wheeler said, he wasn't going to apply Universal Service Fund taxes on broadband, he can't stop states from doing so, so that would be entirely up to Congress and whether it'd be tax-free or not, it actually covers all state taxes, whether it still allows states to impose some fees, which is not clear. We think the FCC is like a losing court. I'll explain that briefly, but for us, as we've said before, legislation really is the answer, but we should be realistic about its chances, and our bottom line and all that as we'll walk through is that this probably does take the wind out of the sails of getting

anything passed or at least signed by the president, until after litigation has concluded, and then finally we just highlight our general concerns about the lack of transparency here. Wheeler could have shared the draft order; he didn't do so. He simply outlined it in a way that really raises more questions than answers. So, Geoff, before I get into the legal issues, let me turn things over to you to lay out what happened yesterday.

**Geoff Manne:**

Okay. Thanks, Berin. So just very quickly, because you guys all probably know most of this, obviously, Wheeler released his op-ed in an FCC fact sheet purporting to lay out what would be in his proposal to regulate net neutrality, the open Internet. I think it's fair to say that Wheeler says very much, whether that's calculated or just a function of how the process typically goes is not entirely clear, but we do think that in part, the not saying very much is self somewhat politically calculated. I think at the same time, we can learn from the fact sheet and the op-ed itself that there really is a political motivation behind all of this, and let me just give a couple of examples why I think that. First, as you may or may not have noticed, one of the things that Wheeler did in setting the stage for this was telling a story about his experience with NABU, which is an early effort to provide consumer access to Internet-like services; and his story of the failure of NABU lays the blame at the feet of the cable systems, which NABU tried to connect to, and claimed that they were closed systems that prevented this service from getting off the ground. The reality is very different than that. NABU wasn't boarded by a lack of access, but by a lack of demand for its services; and before it went under, it did, in fact, had agreements with many cable operators. NABU required a dedicated server-based system at a time when the move to personal computers was really ascendant; it was itself a closed system and it's pretty clear that it failed for lack of consumer demand, not for lack of cooperation with cable systems. Another point that Wheeler made in trying to defend the need for

his proposal was – or to defend the lack of problems that will rise from his proposal was that wireless investment hasn't been driven by common – sorry – was that wireless investment proceeded apace even though, according to Wheeler, wireless was regulated under Title II. He had cited the years, I think, 1993 to 2009, and said that the companies made \$300 million of investment then. But his claims here are inaccurate or even dissembling. The reality is that while during all that time, indeed mobile voice services were regulated as a Title II common carrier. Mobile data services were not, and it's very clear that the vast majority of that investment was driven by mobile data, not by mobile voice, and that's the service that is now going to be regulated. So the reference to the kind of investment that happened in the world in which mobile voice was regulated as a Title II service really isn't particularly instructive for what's going to happen going forward. I think the point is that these are both self-serving revisionist history on Wheeler's part, and it just shows that the actual evidence to support the kind of regulations that are being proposed here is very weak. The fact sheet dodges a lot of key questions. It simply asserts that the FCC has "strong legal arguments to defend its position." We'll talk about these more later, but these are really the key to understanding the basis of authority here, which is, of course, the central question about the likely success or failure of this rule, and there what Wheeler should be sharing with the community at this point, that he didn't, also suggests to us some likelihood that his strong legal arguments aren't as strong as he suggests. All right. So what's going to happen next? Obviously, the very next thing is that the full proposal will be shared with the members of the commission, and in theory, the proposal will be refined through conversations with the other commissioners before their release to the public. We can assume that there will be no contributions accepted from the Republican commissioners; recent experience make that very clear that Wheeler is not interested in listening

to his Republican colleagues or taking their advice. The Democrats may have input, and in some sense, at the end of the day, this whole thing stands in Clyburn's and Rosenworcel's hands. We'll talk a little bit more about their incentives here, and it could get dialed back on the margins, but at the same time, Wheeler has put stakes in the ground over the most important points here, and it's extremely unlikely that conversations with Clyburn and Rosenworcel are going to roll back and have the key provisions out on here. I want to make one more quick point to clear up some confusion I've seen in people's comments about what happened to stock prices immediately following the release, and then I'll turn it back over to Berin. It's been noted on several occasions that I've seen in the media and on social media that there was a sharp increase in share prices following the release and that this shows that the investor community doesn't think that these rules would be a problem; in fact, they will help the ISPs. We have to be careful deriving much from casual [increases], and stock prices change for many reasons. By far, the biggest increases were at Comcast and Time Warner Cable, and it's quite likely that's attributable to the expectation that implementing Title II also happens to mean that the Time Warner, Comcast merger is more likely to go through; that those two things are tied together is actually a failure of policy, not a reason to celebrate. Also, of course, when looking at stock price changes, the relevant change is the change from previous expectations. All this really shows if the stock price movements are attributable to the announcement is that the proposal here isn't as bad as expected. Maybe that's because rate regulation looks to be less likely, according to what was released yesterday, but that's a far cry from saying the proposal actually bolsters these stock prices, simply a statement that expectations were a little bit lower than they should. So let me turn it back over to Berin now.

**Berin Szoka:**

Sure. So we'll take questions on politics, but let me just wrap up by explaining what we think is likely to happen next. Of course, what happens on February 26, the FCC will likely that day simply publish overview and the statements by the commissioners, and then we'll see how long it takes for them to put the order out. In 2010, they put the order out two days; they were ready to do it and ready to go. This time they could do that, or they could wait weeks or even months as sometimes happens with FCC orders, and that's especially true if there is actually negotiation going on in the background. Once the order itself comes out, it will still be another potentially few months before it's published in the Federal Register. In 2010, that – actually, 2011, that took 10 months, and nobody can file a legal challenge until the publication of Federal Register has occurred. For political reasons, it seems pretty likely to us that the FCC will release the order quickly and will try to get the Office of Management and Budget to approve the publication of Federal Register quickly. In terms of chronology, we've figured that a lawsuit would likely start at the earliest, say, by perhaps May or June, and would likely take at least a year to be resolved. With Verizon, AT&T have said that they would sue, it is possible that there could be an injunction granted. It's also possible that the parties would ask instead of having an injunction, simply have accelerated briefing. Whatever exactly happens, the point is the decision – the initial appellate decision would likely come now probably between May and October of next year, at the earliest. So it could potentially come down after the election or even in the next presidency. So to wrap up, the bottom line for us is if this is really first and foremost about politics and always has been, it seems to us that this looks to the White House like a win-win. They get to talk tough about net neutrality, which is clearly a winning issue for them, clearly something that Republicans have not learned to message very well; and if they lose in court, they simply get to dial up that machine and those groups that have

built an entire apparatus of donations and political influence around this, simply get to go [with a fight]. Once again, if the FCC wins in large part, they can tap themselves on the back, but if the FCC does lose and they have to go back to Congress to negotiate, I don't think they'll have lost much. They'll probably get at least as good a deal as they would've gotten today. So we'll just wrap up here on politics, but it does seem like the White House is pursuing the policy that's driven largely by politics, but it is on [some level, a rationale], that they may figure that either they won't have another opportunity after a decision comes down towards the end of the presidency to resolve it, or that this problem will simply be kicked on to the next administration, and it won't be their problem. So we're going to take questions now about politics. If you have anything to ask here about anything we've said thus far or how this plays out politically, please ask them now, but if you have questions about what the actual litigation will look like, we'll turn to those topics next, and then take questions on that, and then finish by just discussing what the order it seems likely to look like and taking a general Q&A. So, if you have any discussion here, or any questions, please feel free to ask them now.

**Operator:**

At this time, if you'd like to ask a question, please press the star and one on your touchtone phone. You may remove yourself from the queue by pressing the pound key. Once again, to ask a question, please press the star and one on your touchtone phone; and we'll pause a moment to allow questions to queue.

**Berin Szoka:**

While we're doing that, Geoff, do you have anything to add to what I said?

**Geoff Manne:**

No, I don't think I would add – everyone knows this, right? It's just to flag the point that's been made many times that so much of this does seem

to be driven from the White House, and that's unfortunate for the operations of the allegedly independent regulatory agency. It does seem very clear that what's happening here is that Wheeler is acceding to the White House's demands; and the real question is: what's going to happen with Clyburn and Rosenworcel? Are they, too, going to accede to what the President wants here or are they going to have independent ideas that deviate from Wheeler's proposal, such that either they get some amendments put in or some edits to the proposal so that it looks different, or, conceivably, even vote against it.

**Berin Szoka:** Any questions from the audience or participants?

**Operator:** It appears we have no questions at this time.

**Berin Szoka:** Okay. Then we'll just move through to discuss the legal risk here. So just as an overview, we're going to talk about reclassification and the parts of that, and where we think the FCC may be likely to lose; and then move to forbearance, and then take questions about the legal issues; and like I've said, we'll then discuss the substance of the order. So Geoff, if you want to kick things off in discussing about what we think is actually newsworthy from yesterday about what the President said – excuse me...

**Geoff Manne:** [Laughter]

**Berin Szoka:** ...what the Chairman said, and how it might factor into litigation.

**Geoff Manne:** I think the biggest takeaway is that on reclassification, particularly on wireline reclassification, Wheeler's op-ed declares that his proposal will "modernize Title II, tailoring it for the 21<sup>st</sup> century." He intends to invoke Title II, and then as expected, use forbearance to effectively rewrite the



law. What's perverse about this and noteworthy about this is that this means forbearance will be used to justify greater regulation, which is the opposite of what Congress intended. The use of the word "tailoring" is particularly pointed here as well. Just last year, the Supreme Court ruled in *Utility Air Regulatory Group versus EPA* that a similar sort of tailoring of the Clean Air Act by the EPA was effectively rewriting the Act, in that case, to include greenhouse gases and pollutants, which according to the court was something Congress could not reasonably have intended to allow the agency to do. That sort of statutory rewriting, whether it's through tailoring or something else, is no more permissible here. I think, Berin, maybe I'll turn it over to you; or let me just summarize what I've just said.

**Berin Szoka:**

Yes, I would just summarize by saying that I think you'll see that line turn up in the court's decisions about this. The courts have, in the past, said that where they do draw the line is where agencies rewrite statutes to deal with extremely important issues, issues of grave importance, such as what's precisely the line the Supreme Court used [Crosstalk] *Utility Air Regulatory Group*, the EPA. Wheeler has really just hung himself with his words. [Unintelligible] what he said yesterday [Unintelligible] he's previously at the January meeting, he declared with very grand rhetorical effect that this was the most powerful network in the history of mankind, offering transformation opportunities we can't even imagine at this point in time, and really impressing upon everybody the importance and gravity of the FCC's decisions. All those words will come back to bite him when it actually comes to court, and it's going to be, I think, very easy for the courts to say for Verizon and AT&T, whoever else challenges this, that that's essentially what the FCC is doing; they're fundamentally rewriting or tailoring Title II to be able to do something that Congress didn't intend, and it's forbearance perversely [Unintelligible] being used as a way of

achieving greater regulation rather than reducing regulation. So that is the key overarching legal question before the agency, but that's even on top of underlying legal questions along the lines of can the agency actually justify its change interpretation, will it make a big deal yesterday about saying that broadband providers no longer offer the same bundle the consumers expected from them 10 years ago, consumer expectations have changed; that's convenience talking points for the agency, but as a legal matter, I think it's going to be fairly easy for Verizon and AT&T to show that the [age] that broadband is essentially the same set of offerings today that it was 10 years ago, and those who were consistently relying on Justice Scalia's views on this back in the Brand X case forget that he was in the minority. So it's not, by any means, clear that the FCC will actually win on explaining its change in the classification of broadband, but let's assume this for the moment that they do, and if they get around the problem of Utility Air Regulatory Group and the earlier decision of [Unintelligible] it's going to be very difficult for the FCC to win on reclassifying of the wireless broadband. Geoff alluded to this earlier, and this is one of the areas where the Chairman has been frankly dishonest. At Vegas, he claimed that he helped to write Section 332, which governs wireless services, but didn't even mention that Section 332 draws a completely – a very sharp line and offers completely different treatment as between wireless voice service, which like all voice service is always going to tie up to a service on the one hand, and other wireless services on the other that are not “interconnected” with the public switched network. The only way the FCC is going to be able to win in this area is to claim that those terms are ambiguous and that they had several [Unintelligible] in redefining them; and we can get into this in Q&A. I think that's a very difficult argument to make, given that the Act clearly uses the term “public switched network” to refer to the telephone network, in which case, you just can't argue that wireless broadband is interconnected, that it

is not a private service. So again, yesterday's fact sheet simply asserts that the FCC has showed their legal arguments; it doesn't tell us what they are; so we'll have to wait and see. But the real difficulty the FCC faces is justifying whatever argument it makes on reclassification with forbearance at the same time. The two cut in very different directions, and that really is part of the problem that will [Unintelligible] it to the chainsaw of the Utility Air Regulatory Group line of cases about agencies trying to effectively tailor, as we already [explained it], their statutes. We'll just briefly mention some other problems that the agency will deal with in forbearance, and this really gets back to this constant carping about wireless services and how forbearance has actually worked there. So it's worth putting out just to begin with that the situation of wireless services is very different. Gus Hurwitz has a great piece up at Tech Policy Daily this morning that I would encourage all of you to read, that among other things outlines that wireless services really had never been controversial, unlike the great fight now about what to apply, which requires Title II to apply to broadband. The market structure has always been different in terms of the number of players, and the service itself technologically is fundamentally different. Wireless service is a fairly immigrated service that is quite distinguishable from wireline broadband service, and much more subject to means of network management operators, or operators for network management. And of course, since the FCC went through a [stretch with] forbearance with wireless services, it has made forbearance essentially impossible in markets with only one or two players; that was the point of the [Unintelligible] Qwest decision where the FCC refused to grant forbearance. So the FCC would have difficult times exchanging its justification for forbearance without opening a door to blanket forbearance by future Republican administrations, both with regard to those parts of Title II the FCC is applying today, but also to the rest of the Act. The FCC, by tinkering with forbearance, really puts in jeopardy their ability to

hold onto provisions of the Act across many other issues, including traditional voice services that they want to keep in place. So it's hard to see them really being able to square the circle. Then finally, there is one market, and that is the market that they claim in determining access monopoly as between broadband providers on the one hand, and edge providers on the other. If that's truly a monopoly, as the FCC says, how can the FCC forbear it all from core requirements to Title II? If they can't, [Unintelligible] has repeatedly outlined, that would mean not only opposing the whole – the rest of Title II, but indeed, the general principle of Title II that parties have to pay for carrying their traffic, which would mean in practice that edge providers, or at least the carrying companies that carry their traffic, would have to pay broadband providers for [carrying] that traffic, which would be a [standard page routine]; that would be the very opposite of net neutrality. All of this is going to be hashed out in court. I'd like to take questions here, but while we're filling up the queue – and I believe that's star/one – if Geoff wants to add anything on the legal issues here, please do so.

**Geoff Manne:**

Yes, I just wanted to amplify something that Berin was saying that it's particularly inappropriate to use the experience with wireless to justify what's going on here today for [the two businesses]. One is this forbearance issue in that in the wireless case, as Berin points out, wireless voice was always regulated like the typical voice services under Title II regime, and forbearance in that realm was indeed a [Unintelligible] of regulation. It was an appropriate use of the forbearance process as made out by Congress. To then refer to that here in the effort to justify the initial application of the Title II regime to mobile or even wire data services is wholly [in opposite]. Then the second point, the one that Berin was just mentioning, is that while it may be inappropriate for the FCC to consider wired and wireless communications as being in separate markets,

indeed they have tended to do that, and they are, in that respect, different markets, whereas there may or may not, but at least according to the FCC there is, a terminating monopoly in the wired market, it's very hard to make that claim in the wired space. So the justification for applying the rules in the wireline space, according to their assessment of the markets, may be greater, but that makes it very difficult to justify the application of the rules on the wired space.

**Berin Szoka:** Right. Again, the point here is simply that the arguments for forbearance on the one hand, and reclassification on the other, they'll all be in the same order and they're all going to be challenged together apparently, and the FCC is going to have to reconcile them. So if we have some questions, please, Mr. Operator, if you could take them now.

**Operator:** We'll take our first question from John Eggerton with Multichannel News. Your line is now open.

**John Eggerton:** Hi, guys. Can you explain to me why this might make the Comcast, Time Warner cable approval more likely?

**Geoff Manne:** Yes, it's pure politics, I think. Perhaps there's a more substantive sort of explanation for this, but I'm not sure what it would be. I think basically all along, it's been made clear, perhaps explicitly to those companies, but implicitly in various things they have [Unintelligible] said, that the two dockets were tied together; and to put it – my interpretation has always been the FCC was very unlikely to ever approve the merger if they didn't apply Title II regulations to the case. In other words, you could get one without the other, and perhaps that meant that even if they – excuse me, that the merger would be [boarded] if they weren't able to apply Title II in the net neutrality docket. But this sort of outcome was always sort of

seemingly an implicit offer by the FCC. If we regulate you as Title II sort of in exchange for that and not explicitly that I know of, we're more likely at least to allow the merger to go through. I don't think that they're legitimately tied together in any real way. It's just a matter of politics [as I see this].

**Berin Szoka:** Well, I would just add to that, there is a substantive connection in that what will likely happen, I think, is that the...

**Geoff Manne:** [Crosstalk] Go ahead.

**Berin Szoka:** Well, the FCC is likely to impose the same rules, exactly as it did in the Comcast, Universal merger. They'll impose the same rules on the merged company, as merger conditions. So if they do lose in court, they'll at least be able to say that we've got the biggest player in the market covered.

**John Eggerton:** Okay.

**Berin Szoka:** Geoff, did you want to add something on interconnection there?

**Geoff Manne:** Well, just that if you tried to find the substantive tie between them, it might be in the interconnection realm. It may very well be that we're giving the FCC a lot of credit that they feel like the merger has the potential to do less damage if interconnection is regulated under strong net neutrality type rules. Again, I don't know that to be the case, but it could very well be that that's how they view the connections [Unintelligible]. So now, applying Title II rules to interconnection, maybe they'd feel like there's less risk from the [merger].

**Berin Szoka:** John, did I answer your question?

**John Eggerton:** That does indeed. One other thing in that is, can you go through what briefly again the timeline? I mean you think it'll be months to get this published in the register. Don't they sometimes do it like in three or four weeks?

**Berin Szoka:** So it's up to the agency and just the White House. My understanding in 2011 was that there were some genuine Paperwork Reduction Act problems raised at the Office of Management and Budget, and so as much as this is driven about politics, there are also real issues here that the more burdensome the rules are, the more that the good folks [Unintelligible] who I think are immune from political pressure as anybody could be inside any administration, the more likely they may need to ask some difficult questions, and they may draw this out no matter how much pressure is brought to their own end, but let's say best case scenario, it is certainly possible the FCC could issue the order itself, even the day of the vote or a few days after, or within a few weeks, and it's possible that publication could occur [Unintelligible] perhaps within a month, but it's hard for me to see how the order gets published in less than a month, probably less than two months from the vote.

**Geoff Manne:** Well, I would just say the Paperwork Reduction Act issue, the fact that they did go through this before suggests that assuming they do want it to come out sooner than later, and I think there's good reason to think they do, that they'll be prepared for those issues this time around, and I think it's a lot less likely that we'll see delays arising from the OMB.

**Berin Szoka:** I think, John, to your question, I think probably more important to the timeline than whether it takes OMB a few weeks or more to publish, it's going to be the questions that we alluded to of what happens in the

litigation. Is it assigned quickly to one court when it gets there? Do the parties insist on fighting about the injunction or do they get an accelerated briefing schedule instead? It's really hard to predict any of those things, so I would just again summarize by saying that it just seems likely to us, based on the [appellate] [Unintelligible] that we've talked to that at the earliest, you might see a decision next year perhaps around May, but it could drag on. Wherever it falls, it seems like to me it's going to fall as the election is heating up, and I think that's part of the point here that if that happens, it can only help Democrats. If it comes after the election, then at least they can kick this can down the road, maybe that means trying to actually negotiate over legislation to the very end with the administration, or maybe it means simply kicking the issue over to the next president and that, in turn, may depend on who wins the election.

**John Eggerton:** Do you think that the Republicans will come out with something like a bad dog resolution or disapproval, or something like that?

**Berin Szoka:** Well, the Congressional Review Act, which you called "bad dog," it really is sort of toothless. It only works if you have the president on-board or 2/3 majority in [either chamber]. So I don't think that's a productive strategy for Republicans. If Republicans are really serious about this, and I think they are, what I think you'll see them do is work this through regular order, offer to do just multiple [peerings] and a markup, and give Democrats the chance to come to the table and offer amendments, and then vote for these bills out of committee; and I think that [I'd] have a reason to expect that this will ultimately pass the House, just as – and I always remind people about this – a net neutrality fix, indeed a fix for muni broadband as well - were both part of the 2006 Communications Act update that passed the House with 215 Republicans, which is almost everyone - there were a few not voting and 102 House Democrats; that's



the majority of their caucus. So they voted for that by two-thirds majority and that went to the Senate and it got through the Senate Commerce Committee and it just didn't get floor action. So this isn't crazy. We've already seen this happen before. The question really that you're asking John is, where do Republicans go with this. I think that they have an incentive. If they can get a few Democrats onboard to get the Senate committee, the next big question will be, "Can they actually get to 60 votes?" If they do, they'll really force the administration's hand.

**Geoff Manne:**

That's a big problem though of course with this kind of a proposal on the table, clear support from the administration or I should say clear support by the FCC of the administration. Democrats have very little incentive to offer much by way of compromise. I could certainly imagine that the kind of bill that could possibly get 60 votes is not the sort of bill that the Republicans would want to push at the end of the day. So while there is certainly some movement in that direction by the Republicans, there is only so much they're going to be willing to give up. I would say that it's quite likely that the events of yesterday suggests you'll give a lot of strength to the Democrats and in negotiation there and maybe so much so that any kind of legislative compromise is going to be extremely difficult to reach.

**Berin Szoka:**

Or at least delay it. I mean the most likely scenario is whatever Republicans do, putting it through the House, even putting it through the Senate Commerce Committee if they can get a few votes, I think they probably could. What does seem most likely is that any floor action on the Senate would probably be delayed until the litigation came down. If Democrats lose or the FCC loses, at least, in significant part they're finally then going to have an incentive to come to the table. Some of them may still hold out for the Supreme Court to change whatever the decision might

be. But at that point, and this is why I think this is just a win-win for them while they really have no incentive to negotiate now, I don't think they'll have lost anything because they'll probably get at least as good a deal then as they would get now. If they're really smart, they'll play good cop, bad cop. They'll have a few Democrats, for example, on the Senate Commerce Committee work with Republicans and move the bill further to the left in exchange for getting out of committees. So that what's actually on the table by the time we get there is something that Democrats like more.

Anyway, we have a few other questions. Let's take those, and we'll move on to just covering briefly the substance of what was discussed yesterday, and then open up to general Q&A about anything else anybody wants to discuss. So, any other questions about politics – excuse me, legal issues and [their tie] into politics.

**Operator:** We'll take our next question from the line of Gordon Crovitz with Wall Street Journal. Your line is now open.

**Gordon Crovitz:** Hey. Thanks, guys, for taking the time to do this. You may be planning to cover this later, and if so that's fine. Setting aside the issues about what's going to happen next and the legal issues around this which I think are terrific issues. What will happen, practically speaking, in the next year or 18 months assuming there's no injunction against this [B] classification? In particular, how will it be different for potential new broadband providers like a Google Fiber to enter the market with Title II applying to them?

**Berin Szoka:** It's a great question, Gordon. Thank you. So the legal answer is, the rules will go into effect probably 60 days after their publication in the Federal Register which as we were saying earlier could be as early as this summer.

The FCC is probably going to have additional proceedings about how to implement what it is they are proposing. So what you're likely to see happen at the [FCC] is first of all someone will file a petition for reconsideration. The agency doesn't have to deal with that, but they may and that may foreshadow what the litigation would look like. Then simultaneously on parallel tracks, the agency will have to start figuring out how it's actually going to apply the various provisions of Title II that it's authorized today. For example, that would include things like privacy and data security.

So essentially all of those issues will be transferred overnight from the Federal Trade Commission, where they are dealt with on a case by case basis, and where the FTC doesn't have formal rules, has been very active, those will be transferred over to the FCC which will have to figure out how to deal with them in a regulatory fashion. So all of that will start moving and will probably move very slowly. I suspect the agency – it can go one of two ways. It could generally try to downplay enforcement for fear that it may run into additional legal chainsaws about how it's applying the rules. Or it could, if they think it's politically convenient, they could get fairly aggressive and just throw their lot to the court. It's hard to say exactly what will happen, but the agency will be quite busy having to deal with this while also having to battle Congress.

You asked a particular question about Google Fiber, if there is one silver lining in all of these, I would say that it's that the chairman is extending the [Unintelligible] rules to broadband companies more generally. I actually think that's a good idea. I'd love to see Congress do that. I'm sorry that it's happening this way, but it's certainly crazy that Google Fiber would get a different treatment or that the prices that you pay the local utilities vary according to whether you're a telecom or a broadband

company or Google Fiber. So that, if anything, may help and that's the only thing Google said here that's positive or encouraging.

More generally, I think you've seen this from broadband companies like Cedar Falls, Iowa, the very company that Obama went to visit to [praise it's media] broadband. They've expressed their concerns with the burdens of Title II which fall most on small broadband providers.

**Geoff Manne:** Yes. That's what I was going to say is the most likely. You're probably not going to see a lot of actual enforcement action by the FCC in the next 12 months. I think they're going to be very busy trying to figure out what that's supposed to look like. But I think you will see companies trying to anticipate what the FCC is going to do in changing their organizations and procedures accordingly, and to the extent that really plays out in any appreciable way, it's mostly going to happen for these small ISPs, , some of whom I think will probably lose some of their expectations around investment in particular, and probably some of them will [shatter] perhaps not in the next 12 months. That's certainly a predictable outcome of this.

**Berin Szoka:** Unfortunately, Gordon, the biggest cost here is going to be unseen. It's the small companies that – I've talked to some of these folks they are trying to deploy that will be discouraged from doing so. They will never see the double whammy of Title II and also the FTC trying to authorize competition from government-owned networks that ultimately have the backing of taxpayers and significant advantages over small, private providers.

Any other final questions on these legal issues before we finish the last round here?

**Operator:** We'll take our next question from John Mello with TechNewsWorld. Your line is now open.

**John Mello:** So during the period when we have all these manipulation and running around with the [Unintelligible] suit and nothing happening, who's going to be harmed doing this? Who's going to be harmed?

**Geoff Manne:** Well, I think as we just said most obviously it will be the small ISPs that are scrambling to try to anticipate what the rules are ultimately going to look like on the expectation that - realistic expectation, that of course the courts might not strike down the rules. So I think most obviously in the near-term, if I have to point my finger at anyone, it will be the small ISPs.

**John Mello:** What about net neutrality? I mean net neutrality isn't just - fades into the background. It doesn't seem to even enter into the picture here. All of a sudden it seems like it's just left in limbo.

**Berin Szoka:** Well, I'd say for my part that net neutrality has always been rather auspicious justification for the real agenda, which is getting the FCC larger authority. There simply isn't a demonstrated track record of problems. We haven't...

**Geoff Manne:** Right.

**Berin Szoka:** ...really had any enforcement matters even when the rules were in effect. I don't think we're likely to have any problems going forward. All that will really have changed here is that the FCC will have taken away the Federal Trade Commission's ability to enforce the consumer protection laws, the anti-trust laws. Then most importantly, the FTC's potential to enforce what I think is the best answer all along should be a multi-stakeholder

code of conduct. We could have had that hammered out years ago. The FCC could enforce it, but that's not going to happen now that we go down this road.

I would just add to what Geoff mentioned the other unseen cost here is going to be consumers on the margins. So if you live in an area that's not particularly profitable, broadband companies are likely subject to delay investment in your area. That most likely means that the telephone companies that have been starting the process of upgrading their DLS networks are likely simply to delay those investments just as cable companies delayed their investments in upgrading to Cable Modem after the 1992 Cable Act. You're likely to see a slowdown in investment. So ironically, if anything, that really perhaps helps cable companies most by protecting them from competition.

We have a few more questions. I'm going to just try to get through these quickly so we can wrap up here. So please if you can take the next question.

**Operator:** Our next question is from John Miley with Kiplinger. Your line is now open.

**John Miley:** Hi, thanks. Yes, you might have answered it a little, but just some of the – a legal question. So they're reclassifying it – as you can glean from the factsheet, reclassifying it in Title II and then they're using 706 authority to put in the net neutrality rules.

**Berin Szoka:** Well, it seems like a belt-and-suspenders approach. In other words, they're reclassifying, but also rounding things on 706 as fallback. I will say on the reclassification point, the factsheet, if you look at the first bullet on Page 1

of the factsheet, is rather confusing, but as far as we can tell what they're really saying is that they're reclassifying retail, and they're reclassifying on the backend. So it's the hybrid approach plus full reclassification. So we'll see what the order actually looks like, but the point is the commission is trying to protect itself from losing in court.

So we've been focused mostly on Title II. I'll just very briefly say that Section 706 that we - very shortly after the decision came down last year, we expressed our concerns about Section 706 in a piece in [Wired] that we'll share with all of you. But we continue to believe that Section 706 is at least, as great a danger to the internet overall as Title II is because the FCC reinterpreted it in 2010 as not being a command to use other sources of authority as it had thought since 1998, but simply to say that the FCC can regulate any form of communications so long as it claims that doing so somehow promotes broadband, and it's not specifically illegal.

So that opens the door to regulations and not just net neutrality, but any number of things. As a legal matter that issue is going up to the Supreme Court right now. The Tenth Circuit last year approved the FCC's reinterpretation of 706 very, very briefly, and it's being challenged now. It's possible the FCC could lose on those grounds and that same issue could also come up, will come up in the muni broadband case. So we'll see, but it's possible the FCC could go home with nothing here.

Geoff, do you want to add anything quickly before we go to the next questions.

**Geoff Manne:** Yes. I think the question suggests maybe some confusion about what's happening here. I think net neutrality is enforced under Sections 201 and 202 of Title II that preclude unjust and unreasonable practices. I think they

are also suggesting that if for any reason that fails, the attempt to reclassify fails, they can maintain the exact same rules by reference to their authority under Section 706. But in either case, net neutrality is being enforced here. It's just a question of whether it's enforced under Title II or 706 or in this case both if either fails.

**Berin Szoka:** There is perhaps a little bit of [optimization] here because remember the Chairman himself told the Congress last May that even under Title II the FCC can't categorically ban all paid prioritization which Congress could do, but the FCC under Title II has to allow people to recover their costs. So it is possible that part of the vagueness here and the language about the catch-all is really designed to fudge so the FCC can try once again even while it's invoking Title II to push the envelope as far as it can by being vague as to what it's grounding under 706.

**Geoff Manne:** Yes.

**Berin Szoka:** So it's really hard to say until we see the order.

**Geoff Manne:** Yes.

**Berin Szoka:** We're going to do a lightning round here. So if I could take the next question.

**Operator:** The next question is from Carola Balbuena with Telefonica. Your line is now open.

**Carola Balbuena:** Thank you. It has already been answered. Thank you very much.



**Operator:** Right. We'll take our next question from Keri Murakami with Communications Daily. Your line is now open.

**Keri Murakami:** Hi, Berin and Geoff. AT&T and ATN have raised some questions about procedural issues in a prolific [Unintelligible]. What do you think about those?

**Berin Szoka:** So yes. They have raised the procedural issues. Look, the FCC, it historically has a very broad authority to do whatever is in the public interest. It gets litigated or sued all the time. More often than not, it loses all procedural issues. Here, it has some pretty serious procedural problems, many of which could have been addressed by issuing a further notice of proposal making. So just very briefly to highlight for example, saying that you're not going to deal with interconnection and then suddenly dealing with it raises basic problems of notice that the Administrative Procedure Act is designed to deal with to ensure that parties really know what the agency is proposing that they build in adequate records. So that's one example. There are a few others. Forbearance is the most obvious one. The record for the agency is pretty thin. The chairman would have been on much stronger legal ground if he had issued a further notice, but for political reasons, he has chosen not to do so.

So the short answer to your question, Keri, is that those issues are going to come up really first and foremost because the way the courts tend to resolve issues is first, if you can knock them out on administrative procedural grounds, you do so. Then you go to the statutory grounds that we've been discussing like the Utility Air Regulatory Group case. Then only, if you got through those issues, do you get to the fundamental constitutional issues like the First Amendment, which has not been

addressed in any litigation here only because the courts have never actually given the FCC a clear win.

So the FCC has got to jump through a lot of hoops to win completely. You're quite right that it could lose on any one of those, and if it does, they're going to have to go back for the third time to do this or finally admit that legislation is the better way to address these issues.

Geoff's go to go in a minute. So if you have anything to add here before you go, Geoff, please do so?

**Geoff Manne:** No. I'll take the next question and then we can try to get through this before I go.

**Operator:** We have one more question. It's from James Dunstan with Mobius Legal Group. Your line is now open.

**James Dunstan:** Thanks, Berin and Geoff. My question is I'd like you to kind of drill down a little bit into the impact of Brand X case, and sort of indicate how you think the FCC is going to address that with specific implication of if they are going to essentially argue that all of these services are similar now and there isn't any sort of distinction between data and voice then do we really believe the Commissioner when he says that USF contributions aren't going to be applied to data services?

**Berin Szoka:** It's an astute question, Jim, because what you're really putting your finger on is that the way that the FCC is most likely to win on just fine and reclassification is, as you said, to go broad. If you go broad and you say, "Look, these services are all indistinguishable," you've already started down a slippery slope. You've made it very easy for future FCC, if not for

this one, to either invoke universal services taxes to un-forbear for some of the provisions that they claim they're forbearing from today or to start expanding the scope of the rules.

So we've already seen the FCC by covering their connections. As far as I can tell, a company like Netflix only gets the benefit of the interconnection provisions of the Act if they themselves are subject to Title II. So by bloating the scope of the rules, the FCC is already going down the road of expanding what they're applying Title II to to cover other services. It's not a rhetorical question to say, "Where will they stop?" I really don't know. I think that Jeff Pulver really put this best based on his experience dealing with the FCC and trying to get them to refrain from applying Title II to voice over internet services back in 2002 and 2004 when he said that as soon as we abolish the current line, the new line really will exist only in the mind of whoever happens to be chairman at that time.

So today it may be broadband and net neutrality, and tomorrow it could be regulating interconnected services like Netflix or VoIP or gaming or telemedicine or who knows what else.

**James Dunstan:** Yes. Berin, that's what I was specifically thinking of was the battle over VoIP before 2002 it was not subject to USF funds and was really sort of treated more on the data side and suddenly now it's treated on the voice side because of the distinction of interconnection with the public switched network. If that all goes away then, as you say, that slope gets really slippery and really steep very fast.

**Geoff Manne:** Jim, I think you're right to focus on the USF question. I think it's a nice compromise that the Chairman suggest that the USF contribution isn't

going to be required here, but it's not one that anyone should think is sustainable for very long. I just don't see the FCC or those that may pressure it politically forbearing from that massive source of potential revenue for very long nor do I see the companies that do have to contribute to USF whether offering services that are identical to what the broadband companies are offering forbearing from encouraging that and ultimately making it happen. I will say one thing though that we haven't really mentioned yet here, but is worth keeping in the back of everyone's mind. Eventually all of this may be sort of sidelined by a Communications Act rewrite. So in a few years from now, sort of none of these discussions may be relevant anymore, but up until then I think that's inevitable.

**Berin Szoka:**

Well, indeed this discussion may be what finally prompts a communications update. Just at the '96 Act was really Congress's attempt to reclaim authority from the courts which ended up having to deal with the mess of the AT&T breakup. Similarly, all these issues are going to be litigated and will be litigated not just because of the FCC, but because of states and because of private litigants. They're taking advantage of Title II's provisions in trying to push the envelope. So I would just predict like Cassandra, years of devastation and legal uncertainty. [Laughter] Again, summarize by saying that we can resolve all this legislatively. Republicans have come to the table to address these concerns and that doesn't seem to be good enough for the administration.

As a legal matter, just before we wrap up, we just have one more thing which is at the end of the day, and this is one of the good things to look for, for all of you reporters, when you see the order come out. If the FCC is really, really concerned about losing, they will bootstrap their own justification for Title II by both saying that that the circumstances have changed since Brand X. Things like DNS are now easier to get from

alternative sources and so broadband is now on a bundled service, but also pointing to the need for the market and saying it is uncompetitive and in that sense, relying on the 25 megabit threshold that the FCC has just issued for its 706 report. If they do that, it does give them another source of argumentation to justify invoking Title II. This the more legalistic ones, but that becomes extremely difficult to reconcile with any argument for forbearance and makes the slippery slope of unforbearance all the more dangerous.

**Geoff Manne:** Okay.

**Berin Szoka:** Any final questions to wrap up here?

**Operator:** We have no further questions at this time.

**Berin Szoka:** Okay. We'll just very, very briefly cover – just a quick lightning round here. We've already alluded briefly to the things that the commission is not forbearing from and that notably with the Section 222 of so-called CPNI consumer pricing. Network information rules, that's privacy and security. That would again essentially replace the FTC's model regulation and it's something that the FCC has been encouraged to do for a long time in particular by the Department of Defense, which is very frustrated and likes having neat rules in place especially over cyber security because for example CENTCOM just had their Twitter paged hacked and there's really not anything that they can do about that. They need someone to regulate and they're frustrated with Congress for not giving the FTC statutory authority to regulate because in their mind regulation is the thing that matters not case by case enforcement.

So I would expect the FCC to be potentially very aggressive here and set the new rules, which could really flow through to internet companies that use data that's collected by the companies that are directly subject to the rules. The FCC could end up becoming not just the privacy and cyber security police for broadband, but really for all of the apps and services that end up riding on the network. So we'll have to see how they handle those things.

I've already mentioned [full] attachments. Again something I think Congress ought to be doing as part of a larger [pro] deployment package. The Chairman mentioned disability provisions and also universal service. I mean we've covered all of those.

Just briefly on the content of the rules, I think it is worth noting that they expand fairly considerably upon the NPRM in a few senses. We discussed adding interconnection and covering not only retail broadband, but also [Unintelligible] provider services potentially under Title II. There is no commercially reasonable limitation, the language the Chairman seems to be allergic to that politically because it didn't really go over very well when he first started talking about that last year. Of course he's adding mobile, which is something that I think again is likely to fail in court. Something that Congress could do and the Republicans have offered to do.

Then finally, there is that catch-all where the FCC seems to be claiming authority over any kinds of harm. It's not clear what that means, but that could turn into really a key provision and end up doing a lot of the work here. It could end being used to regulate things like zero-rating plans. Things that are really not net neutrality issues, but that some of the people pushing the FCC to go hard-line have been concerned about and have been complaining about since 2010 when MetroPCS was trying to offer free

YouTube as part of its starter plan targeted at urban underserved populations. So we'll see.

Then finally, the FCC doesn't really seem to justify a ban on paid prioritization at all. I don't think we're likely to see much analytical work from them on that. Geoff, do you want add anything here to the content rules?

**Geoff Manne:**

I just want to amplify the CPNI point going back to Gordon and Jim's questions. I think if we're going to see any kind of enforcement or sort of aggressive proactive activity by the FCC, that's where we're most likely going to see it. That's particularly troubling and problematic. Then just to amplify your point about the catch-all, I think we'll have to wait to see what the rules actually say. But because there was this commercially reasonable limitation essentially imposed by the courts when these rules were going to be enacted under Section 706, there was at least some sense of it that there was a kind of cost benefit analysis there, that things that had commercially reasonable justification couldn't simply be hoarded by the FCC. Now that they've moved to Title II and have no need to impose that kind of limitation or have that limitation imposed by the courts, that really does open them up to doing just about anything they want. I do agree with Berin that the [rift] that this would be expanded to content providers is substantial. Certainly, I think we're likely to see rules that effectively commit that which means ultimately as Berin mentioned we're in the world where, as Jeff Pulver described, where the scope of these rules is entirely up to three commissioners.

**Berin Szoka:**

Just briefly on the CPNI point because this is confusing. I just want to make clear that the CPNI rules would apply directly only to broadband providers. The concern is that the way that the statute is written it talks

about them having a duty to protect information and not make it available unless it's protected by the rules. Congress meant that, of course, to cover telephone companies and to make sure the telephone companies didn't sell your information to data brokers, but the FCC couldn't potentially interpret that to say for example that AT&T's wireless network makes available sensitive, private information to Uber every time that Uber runs on your phone. So Uber could end up getting sucked into the FCC's rules in addition to having to deal with the Federal Trade Commission. That really could be quite burdensome to the very [edge] companies that have been pushing for net neutrality protection. It remains to be seen how other companies may end up getting sucked into Title II more generally.

I'm about to wrap about. I'm just taking a final question we have from the audience. While we're taking the queue, I'll just briefly touch on the broadband issue. This is also being put up, of course, on the February 26 meeting. The two things are likely to be tied together politically and potentially legally in the future. I've already mentioned that underlying the – I mean the broadband [Unintelligible] is the question of whether 706 really can reasonably be interpreted as an independent grant of authority as the FCC claimed in 2010.

We don't think so. We think that the court really should ultimately strike that down, but they may or may not actually resolve that issue because the other big question is the federalism question. Even if 706 is ambiguous and therefore subject to deference under [Chevron], under federalism, the analysis is completely different. The question is not, is it ambiguous, but rather is it unmistakably clear. It's hard for me to see how it could be both ambiguous and also unmistakably clear as evidence of Congress's intent to supersede the authority of the state.



You don't have to take my word for it because we already went through this before. The FCC tried to preempt state laws regarding muni broadband and lost back in 2004 using a section of the Act that was far more clear than Section 706 is. So I think it's about as likely as anybody could say anything as likely that the FCC will lose on muni broadband. That also will kick the issue over to Congress where as I said earlier Republicans and Democrats already voted in the Community Broadband Act as part of the 2006 update of the Communications Act. Sen. Booker has introduced legislation along those lines.

Today, I think the heart of a bipartisan compromise is in there. I would just want to make sure that when the law says cities can't discriminate against private providers, does that mean that they've got to make the infrastructure that they build like [Unintelligible] conduits available to anybody and then finally that they give private providers an opportunity to use municipal infrastructure before assuming that private providers won't deploy. In other words, that it's all very well and good for cities to try to stimulate deployment by building [Unintelligible] conduits or putting up fiber ready poles or leasing their own assets, but they really should be building their own network and running that really as a last resort not as a first resort.

I think that there is the heart of a compromise there. If Republicans do want to get net neutrality legislation done, they really will probably have to consider rolling this in at some point because that's the only way to get Democrats to let go of this broad authority that the FCC has claimed under Section 706. So you could see those two things roll together. As Geoff said, they could be rolled into a larger update of the Communications Act as it happened back in 2006.

If there are no further final questions, we'll wrap things up today. I'll give anybody who wants to a chance to put themselves in the queue. If not, then we'll encourage all of you to come to our future events. We'll likely have an event right after the – or the day after the FCC broke on the 26<sup>th</sup> to discuss what was actually said. If you would like to follow up with us, of course, you can simply email us at [media@techfreedom.org](mailto:media@techfreedom.org). We're happy to discuss any of these things with you on the phone for as long as you like. Obviously, we don't mind talking and we encourage you to follow us both on Twitter Berin Szoka and Geoff Manne TechFreedom & Law Econ Center. We are engaged in all these issues all the time and happy to talk things through with you in greater detail.

So if there are no further questions, I will thank all of you for your time today and Geoff for joining me. I just personally will just say in closing that I've been doing this for seven years, engaged in this field for seven years and been in the think tank role for five. I've been involved in the net neutrality fight since 2002 when Tim Wu described this idea and [Unintelligible]. I'd like to see these all resolved and I think we can, and Congress can do that instead of leaving these all to the courts to fight over for the next two to 10 years. So let's see what happens. Thanks for joining us today.

**Geoff Manne:**

Yes. Thanks very much everyone. I really appreciate this.

END