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FCC's Vague "General Conduct" Standard Deserves Closer Legal Scrutiny

by

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The June 14 decision in *US Telecom v. FCC* counts as a sweeping victory for government regulation of the Internet. Surprisingly, a 2-1 majority of the D.C. Circuit panel upheld every aspect of the *Open Internet Order*.

The FCC's Title II reclassification of broadband services was the lead legal issue of the case. But secondary issues also at stake are important too. The *Open Internet Order*'s "general conduct" standard governing broadband services was challenged as unconstitutionally vague. From a rule of law standpoint, the D.C. Circuit's legal validation of the "general conduct" standard is particularly troublesome. And, as a matter of policy, this aspect of the court's decision likely will lead to severe restrictions on Internet innovation.

I. The General Conduct Standard

The Commission's "general conduct standard" poses a serious regulatory certainty problem. It is unclear what kind of conduct the standard allows and what kind of conduct it prohibits. The D.C. Circuit's light-touch review of a heavy-handed regulatory order offered an unsatisfying analysis of the general conduct standard, too eagerly downplaying its vagueness.

In its *Open Internet Order*, the Commission supplemented its bright line rules restricting blocking, throttling, and paid prioritization with a "general conduct" or "no-unreasonable

interference/disadvantage" rule. The "general conduct rule" provides that broadband service providers:

> [S]hall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

The Commission says it will apply the standard on case-by-case basis, considering the "totality of the circumstances." To guide that case-by-case analysis, the Commission adopted what it conceded is "a non-exhaustive list of factors" to be considered. And the Commission also conceded it will attach different relative weight to the factors, whenever and however it deems fit. It's useful here to recall what the late Justice Antonin Scalia once called the "ol' totality of circumstances test." In *United States v. Mead Corp.* (2001), he said, "applications of this test…are of little use to bench and bar."

In the D.C. Circuit, the general conduct standard was subject to a facial challenge under the "void for vagueness" doctrine. Modern Supreme Court jurisprudence grounds the doctrine in the Fifth Amendment Due Process Clause. Two concerns animate the "void for vagueness" doctrine: first, regulated parties should know what is required of them; second, precision and guidance are needed to prevent arbitrary or discriminatory enforcement. And when government "regulates business conduct and imposes civil penalties" due process of law is satisfied if the regulation is "sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations required."

For its part, the D.C. Circuit majority concluded in cursory fashion that the general conduct standard provides a good enough indication regarding its application to satisfy the void for vagueness doctrine. The D.C. Circuit pointed to the Commission's regulatory objectives: to complement the bright-line rules and to protect consumers' ability to access Internet content of their choice. The court also declared that the role of the advisory opinion process "cures it of any potential lingering constitutional deficiency."

However, it is hardly persuasive that a stated objective of the general conduct standard is to serve as an appendage or backstop to the bright-line rules. The net effect of this view is that the named and yet-to-be-named factors will collectively function like blurred lines. Moreover, although the D.C. Circuit praised the advisory process as a cure for constitutional defects, in truth it's more like a placebo. Advisory opinion authority is delegated to the Commission's Enforcement Bureau, which retains absolute discretion on whether or when to issue such opinions. And, significantly, the *Open Internet Order* acknowledges they are non-binding on the Commission.

According to the D.C. Circuit, the Commission's specification of the seven factors and description of how they will be interpreted and applied mitigated against any finding of unconstitutional vagueness. The D.C. Circuit contended that "[a]ny ambiguity in the General Conduct Rule is therefore a far cry from the kind of vagueness this court considered problematic

in *Timpinaro v. SEC* [1993]." In *Timpinaro*, the D.C. Circuit struck down the SEC's multi-factor rule defining a professional trading account as unconstitutionally vague. A key supposed difference in the SEC case is that "'five of the seven factors…are subject to seemingly open ended interpretation.'"

II. An Open-Ended Multi-Factor Test That Is Inherently Vague

Not so fast. A closer reading of the *Open Internet Order* and its description of the factors – footnotes and all – suggests that at least five of the seven factors at issue in *US Telecom v. FCC* are likewise subject to open-ended interpretation. Indeed, when considered in light of the entirety of the *Order* and the Commission's rationale, several factors become downright fuzzy:

End user control – According to the Commission, a practice that allows end-user control is deemed less likely to violate the general conduct standard. However, "we are cognizant that user control and network control are not mutually exclusive and that many practices will fall somewhere on a spectrum from more-end-user-controlled to more broadband provider-controlled." Also, "there may be practices controlled entirely by broadband providers that nonetheless satisfy" the standard. Clear? I don't think so.

Competitive effects – The Commission says that practices that have anti-competitive effects "that would have a dampening effect on innovation, interrupting the virtuous cycle" will likely violate the general conduct standard. The Commission "will also review the extent of an entity's vertical integration as well as its relationships with affiliated entities." But the *Open Internet Order* eschewed reliance on antitrust-like market power analysis of competitive conduct. That leaves unanswered what set of principles one could derive a competitive analysis from. Clearer? I don't think so.

Effect on Innovation, Investment, or Broadband Deployment – "[P]ractices that stifle innovation, investment, or broadband deployment" likely violate the general conduct standard. This factor sounds like it is in part a protection for broadband providers from self-harm. In any event, the *Order* nowhere identifies a criterion for measuring or anticipating such effects. Clear now? I don't think so.

Application agnostic – Practices that "do[] not differentiate in treatment of traffic, or if it differentiates in treatment of traffic without reference to the content, application, or device" will likely not violate the general conduct standard. "We note, however, that there do exist circumstances where application-agnostic practices raise competitive concerns, and as such may violate our standards to protect the open Internet." Also, left unclear is whether there might be instances where reasonable network management might allow for departures from application-agnostic practices. Helpful? I don't think so.

Standard practices – The Commission "will consider whether a practice conforms to best practices and technical standards adopted by open, broadly representative, and independent Internet engineering, governance initiatives, or standards-setting organization" [sic]. In other words, the general conduct standard will be based in part on a factor that will consider but not necessarily rely on another standard adopted by other bodies. Got that? I don't think so.

Those five factors are much too open-ended to provide fair warning about what is required. As Senior Judge Williams wrote in dissent, "these factors themselves are vague and unhelpful at resolving the uncertainty." They contain no safe harbor "numerical thresholds" as the D.C. Circuit suggested might save the regulation in *Timpinaro*. Remember also they are "nonexhaustive factors" – the Commission can add new factors as it suits them. That's hardly the precision and guidance required to guide against arbitrary and capricious enforcement.

The general conduct factor concerning consumer protection against unfair and deceptive billing practices, including cramming and spamming, may offer more clarity than the rest. So too, the free expression factor may offer more clarity than the factors just listed. Even so, it is difficult to see how the free expression factor improves upon protections from the no blocking and no throttling bright-line rules. Indeed, even in their pro-Title II amicus brief, the Electronic Frontier Foundation and the ACLU expressed constitutional free speech concerns with the general conduct standard "because of its sheer complexity." Wrote EFF-ACLU: "The burden on regulated providers in litigating such cases *ad hoc* would discourage innovation and impede the Internet's continued growth as a platform for speech, commerce, and social activity." To no avail, EFF-ACLU even urged the D.C. Circuit to consider a limiting construction of the standard to avoid the vagueness problem.

III. Conclusion

It's especially regrettable that the vagueness problems with the general conduct standard received so little attention in the rulemaking process and in the litigation thus far. The Notice of Proposed Rulemaking proposed only a less intrusive "commercially reasonableness" standard for network management – which it later jettisoned. The D.C. Circuit concluded, again in cursory fashion, that the Commission's request for "comment on whether [it] should adopt a different rule to govern broadband providers' practices to protect and promote Internet openness" was sufficient notice of the general conduct standard.

Understandably, the Commission's mistaken Title II reclassification has consumed the most attention in this case. Often in litigation the lead issue effectively becomes *the* issue. And in wide ranging and complex cases – like *US Telecom v. FCC* – other momentous legal issues that would normally receive significant attention from litigants and judges receive curtailed treatment.

The general conduct standard shouldn't be let off the hook so easily. It is possible that the vagueness issue will receive closer scrutiny in a possible future appeal – and it should. Or a future facial challenge to the standard or as-applied challenge may be the vehicle for finally giving the issue a full vetting. In any event, the rule of law deserves no less.

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Further Readings

Tim Brennan, "Is the Open Internet Order an 'Economics-Free Zone'?" *Perspectives from FSF Scholars*, Vol. 11, No. 22 (June 28, 2016).

Daniel A. Lyons, "Net Neutrality's Path to the Supreme Court: Chevron and the 'Major Questions' Exception," *Perspectives from FSF Scholars*, Vol. 11, No. 21 (June 24, 2016).

Seth Cooper, Gus Hurwitz, Daniel Lyons, and Richard Epstein, "Free State Foundation Scholars React to the D.C. Circuit's Decision on the Open Internet Order," *Perspectives from FSF Scholars*, Vol. 11, No. 18 (June 15, 2016).

Randolph J. May and Seth L. Cooper, "The FCC Threatens the Rule of Law: A Focus on Agency Enforcement," *The Federalist Society Review*, Vol. 17, Issue 2 (May 24, 2016).

Seth L. Cooper, "Wireless Report Data Undermine the FCC's Rationale for Regulation," *Perspectives from FSF Scholars*, Vol. 11, No. 5 (January 22, 2016).

Enrique Armijo, "Net Neutrality, Administrative Procedure, and Presidential Overreach," *Perspectives from FSF Scholars*, Vol. 10, No. 39 (November 19, 2015).

Randolph J. May, "Regulatory Uncertainty Harms Broadband Investment and the Economy," *FSF Blog* (December 10, 2015).

Daniel A. Lyons, "Title II Classification *Is* Rate Regulation," *Perspectives from FSF Scholars*, Vol. 10, No. 12 (February 25, 2015).

Randolph J. May, "Is the FCC Lawless?" *The Hill* (February 25, 2015).

Robert W. Crandall, "Regulation Won't Preserve a Dynamic and 'Open' Internet," *Perspectives from FSF Scholars*, Vol. 10, No. 10 (February 20, 2015).

Justin (Gus) Hurwitz, "Regulating the Most Powerful Network Ever," *Perspectives from FSF Scholars*, Vol. 10, No. 9 (February 19, 2015).

Dennis L. Weisman, "Regulating Under the Influence: The FCC's Title II Initiative for Broadband," *Perspectives from FSF Scholars*, Vol. 11, No. 7 (February 13, 2015).