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**Internet Freedom That Isn't:
FCC Vows Not to Meddle with Innovation and Rates Ring Hollow**

by

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When the Federal Communications Commission (FCC) adopted its Open Internet Order in February 2015, it virtually conceded it was not adopting the new regulatory mandates to correct an existing market failure. The commission didn't claim that the Internet was in any sense "closed."

Instead, the commission's Democratic majority (the two Republican commissioners dissented), asserted more than a dozen times throughout the 300-plus-page order that the purpose of the new regulations, which imposed public utility-like regulation on Internet service providers (ISPs), was to "preserve" Internet openness. For example, one section heading read: "The Commission Must Act to Preserve Internet Openness." The first sentence under that heading referred to the benefits of "preserving the open nature of the Internet."

The FCC's emphasis on preserving Internet openness is relevant. Because it was not fixing something broken, the commission needed to minimize what many saw as the potential harms from applying heavy-handed regulation to ISPs that, up to then, had been only lightly regulated.

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Unfortunately, in his ardor to downplay the potential harms resulting from the new Internet regulations, FCC Chairman Tom Wheeler's rhetoric has far outrun reality. Here are two important instances of the rhetoric versus reality gap:

Mr. Wheeler has repeatedly asserted the Open Internet Order does not mean an end to the era of "permissionless innovation" that is widely acknowledged to have enabled the dramatic evolution of new Internet services and applications. For instance, when the new regulations were adopted, he declared they would maintain the "rights of innovators to introduce new products without asking anyone's permission." Not so.

The FCC's order purports to establish three "bright-line" rules banning certain practices by Internet providers. These rules are by no means crystal clear, so they likely will provoke litigation for years. But that's not the worst of it. The order also contains a so-called "catch-all" general conduct rule prohibiting "unreasonable" actions that interfere with or disadvantage users of an ISP's network or an ISP's competitors.

A catch-all provision giving government bureaucrats discretion to determine what constitutes "unreasonableness" is inconsistent with a permissionless innovation regime. The FCC practically concedes the point by, in the same order, establishing an elaborate new process that allows ISPs to seek "advisory opinions" in advance of offering new services or features. The purpose of the advisory opinion is to try to discern whether the new service or feature will run afoul of the commission's mandates. Whether the new advisory opinion regime even proves useful, its establishment, by definition, demonstrates that "permissionless innovation" is no longer operative.

The fact that the FCC recently has called on T-Mobile, AT&T and Comcast to provide further information regarding their newly developed "zero-rated" and "sponsored data" plans is another tell-tale sign that the "permissionless innovation" rhetoric doesn't match reality. These new plans, in one way or another, allow subscribers to avoid incurring data usage charges when they access certain websites, such as in T-Mobile's case, specified music or video sites. The experimentation now blossoming with regard to zero-rated services is good for consumers. Internet operators are offering new features that meet evolving consumer demands. But if the FCC continues to signal concerns, incentives to continue innovating likely will be chilled.

In defending the Open Internet Order, another mantra is repeatedly invoked: "no rate regulation." But, in fact, the FCC's new mandates implicate rate regulation, and there likely will be more of it.

When the FCC's order was released, Mr. Wheeler said the action means "no rate regulation, no filing of tariffs." By this formulation, he apparently means the agency will not review rates before they become effective, which was its practice in the Ma Bell monopoly era. But the commission pointedly has refused to say it won't require revision of rates in after-the-fact enforcement proceedings, either on its own initiative or after a complaint is filed.

What's more, the "no rate regulation" claim appears to refer only to regulation of end-user subscriber rates paid for broadband subscriptions to the consumer's Internet provider, say, Comcast or AT&T. But the FCC order explicitly bans "paid prioritization." This means that, unlike the U.S. Postal Service, FedEx and many others, ISPs are prohibited from accepting payments from content providers like Netflix or Google's YouTube in exchange for providing speedier content delivery. In everything but name only, the paid prioritization ban constitutes rate regulation. And it harms consumers by preventing the heaviest users of Internet facilities — who happen to be the Netflixes and YouTubes — from paying more to defray the disproportionate costs they impose on ISPs' networks. Those subscribers who use less data are harmed the most, especially low-income subscribers.

Finally, it is likely that sooner or later the FCC's inquiry involving the new zero-rated and sponsored data plans will lead to rate regulation. If the FCC curtails the availability of these plans, under which ISPs exempt subscribers' visits to specified websites from payment of data usage charges, the effect is rate regulation. And whatever you call the agency's action, consumers again will be the losers, especially low-income ones. Not many real consumers are complaining that they can now access a boatload of websites without incurring data charges.

To be sure, invocation of the "permissionless innovation" and "no rate regulation" mantras are not the only gaps between the FCC's rhetoric and reality. But they are important examples demonstrating that consumers are the real losers when new regulatory mandates cannot be justified without the use of misleading rhetoric.

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