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Is the Internet's Future One of Innovation or Government Control?

by

Randolph J. May *

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If you don't think the direction of the Internet's future is implicated by the choice between two very different paths — free-market innovation on the one hand or government control on the other — I invite you to read the Federal Communications Commission's (FCC) just-released "Open Internet" order. All 300-plus pages and 1,777 footnotes worth of it!

The 1,777 footnotes caught my eye. Before turning the last page, to the "Ordering Clauses," I thought there were only 1,776 footnotes. This would have been fitting because, in my view, the commission's action represents the antithesis of the "spirit of '76." What would our Founders think about an unelected body of government administrators reaching out to seize control, absent clear statutory direction, of the most vibrant, open communications medium the world has ever known — and absent evidence of a present market failure or consumer harm?

Two quotations from President Thomas Jefferson, both pertinent to the FCC's aggrandizing action, leave little doubt:

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

Were we directed from Washington when to sow, and when to reap, we should soon want bread.

Laws are made for men of understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought in metaphysical subtleties which may make anything mean everything or nothing at pleasure.

There are very many troubling aspects to the commission's action. But here I want to focus on only one that goes to the very heart of the question concerning whether the Internet's future is to be guided by free-market innovation or government control.

The new regulations inevitably will lead to more government control at the expense of innovation, because the FCC has arrogated unto itself such open-ended power to decide which Internet practices it will allow or disallow. In other words, the agency deliberately has created a large realm of uncertainty that gives it free rein, in its discretion, to shape the future of the Internet as it goes about deciding, far into the future, what is permissible or not.

I understand the FCC claims that its new rules will create more certainty. Indeed, in a story in the March 16 edition of *Communications Daily*, an unnamed commission spokesperson said: "The Open Internet Order provides clear rules of the road that will enable the Enforcement Bureau to carry out the Commission's policies ensuring that consumers and innovators have access to an open Internet."

This "clear rules of the road" line from agency officials is belied at many turns in the commission's order. To take a notable example, the agency adopts a general "conduct" rule that prohibits Internet providers from "unreasonably interfering" or "unreasonably disadvantaging" others in the Internet ecosystem. You don't need to be a lawyer — or a metaphysician — to understand that these terms don't establish clear rules of the road. Rather, they are so standardless that they necessarily will lead to an ongoing exercise of power akin to the royal "dispensing power" that I wrote about in my recent essay, "Is the FCC lawless?," published in *The Hill*.

In addition to other forms of administrative diktats to be employed, the commission is establishing a whole set of new regulations governing the issuance of "advisory opinions." If the rules of the road were clear, it wouldn't be necessary for the agency to "use advisory opinions to explain how it will evaluate certain types of behavior and the factors that will be considered in determining whether open Internet violations have occurred." Entities may request advisory opinions regarding prospective practices they fear may run afoul of the commission's enforcement officials, but only if they "certify that factual representations made to the Enforcement Bureau are truthful and accurate, and that they have not intentionally omitted any material information from the request." The enforcement officials are not required to respond to such requests. But, if they do, the advisory opinions will expressly state "that they are premised on specific facts and representations in the request and any supplemental submissions."

The way the Commission's new regulations will discourage innovation is obvious. Under a relatively light touch regulatory regime, the Internet has continued to evolve in response to consumer demand without the need to seek a priori bureaucratic permission. Going forward, this

is most unlikely to be the case. When the engineers, marketers, businesswomen and other innovators get together to discuss a proposed new product and service, inevitably the question will be asked: "Before moving ahead, to protect ourselves and avoid trouble, shouldn't we get an advisory opinion from the FCC's enforcement folks?" The lawyers' answer most often will be "yes."

Unless, of course, the decision is made from the get-go not to seek an a priori opinion, but instead simply to reduce the extent to which the new product or service differs from the existing one — or to simply abandon the new idea. Make no mistake, we will never know how much innovation has been foregone and left on the drawing boards. Because you can't really measure foregone innovation.

FCC utility-type regulation of Ma Bell may have been appropriate during the era of monopolistic plain old telephone service. But we don't need "Ma FCC" imposing utility-type regulation — complete with a new "mother-may-I" permission regime — in the dynamic, fast-changing era of the Internet.

* Randolph J. May is President of the Free State Foundation, an independent free market-oriented think tank located in Rockville, Maryland. *Is the Internet's Future One of Innovation or Government Control?* was published in *The Hill* on March 18, 2015.