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**Challenging the FCC's Unlawful Open Internet Order**

by

**Justin (Gus) Hurwitz \***

The judicial challenge to the FCC's Open Internet Order lumbers forward. Oral arguments have been scheduled for December 4, 2015. And amicus and intervenor briefs from those challenging the Order were filed last week. I co-authored one of those amicus briefs, working with Geoffrey Manne and Ben Sperry of the [International Center for Law and Economics](#) and other scholars. Our [brief](#) was signed by several Free State Foundation scholars, including Randy May, Richard Epstein, Dan Lyons, and me.

We're all proud of the brief, which builds on recent Supreme Court precedents – as well as arguments that both Randy May and I have discussed in past Free State Foundation *Perspectives* – to argue that the Commission's Order exceeds its statutory authority.

The brief's basic argument is that the Order would expand the FCC's authority far beyond what the Communications Act permits. This follows both because the FCC is asserting a massive expansion of its regulatory authority to encompass basically the entirety of the Internet, and because of the lengths to which the Commission must go in crafting its Order, picking and choosing among statutory provisions on the one hand and disclaiming various effects of the Order on the other. All in all, the brief demonstrates that the Commission has created a "Frankenorder" that bears no resemblance to Congressional intent. These were, of course, some of Verizon's central arguments in its challenge to the FCC's previous iteration

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of the Order. And in that case they were losing arguments, rejected by the DC Circuit. But as we argue in the brief, recent Supreme Court decisions have strengthened the precedent on which Verizon had relied, and the Commission has doubled down on its claims of authority, claiming both more broadly and aggressively than it had before.

To recount briefly what the Order does, we need to think about the substantive rules that it adopts today, the sort of substantive consequences that it could have in the future, and the legal authority on which these substantive actions are based. The core substantive features of the Order are its rules mandating transparency and prohibiting blocking, throttling, or paid prioritization of traffic. These rules, the FCC repeatedly assures us, are meant to apply only to last-mile Broadband Internet Access Service (BIAS). But despite these assurances, the Commission would retain much broader authority.

For instance, while the Order “today do[es] not apply” these rules more broadly, it “encompasses arrangements for the exchange of Internet traffic.” *Order*, para. 186. In other words, the Order asserts authority over Interconnection agreements. And the Commission reserves to itself authority to extend its regulations to edge providers. While it “rejects calls ... to exercise [its] section 706 authority to adopt open Internet regulations for edge providers,” it does not disclaim having such authority. *Order*, note 725. And, although it ostensibly only classifies the consumer-facing, last-mile, BIAS service as a Title II service, *Order* para. 308, it nonetheless applies common carrier regulations to the edge – though, as I will suggest shortly, the Commission goes to great pains to conceal this fact.

There are two things to understand about what the Commission has done. First, the scope of what it has claimed authority to regulate: the last mile connection from users to their ISPs, the interconnection arrangements between ISPs and other bandwidth providers, and the connection arrangements and business models (e.g., use of paid-prioritization and privacy policies) of edge providers. The Commission has claimed authority to regulate from the user to the edge. Try as it might to argue otherwise, the Commission has effectively asserted authority to regulate the entire Internet. And second, it has done so using *both* Section 706 and Title II. It claims that each provides an independent, “complementary” grant of authority, such that if either fails the rules still survive (“all,” actually, since it argues that both Sections 706(a) and 706(b) provide separate, independent grants of authority, and also that Title III provides it further authority).

This presents a bit of a puzzle – one to which those who oppose the Commission’s assertion of authority should look forward to seeing the DC Circuit respond. In the *Verizon* opinion, the DC Circuit expressly rejected the Commission’s prior rules prohibiting paid prioritization, finding that the Communications Act prohibits imposing common carrier regulations on non-Title II services, and that the ban on paid prioritization imposed such regulations on edge services. Yet the *Order* simultaneously reinstates the ban on paid prioritization while, at the same time, claiming it is not reclassifying connections to the edge as Title II services. In other words – in reality – the 2015 Order does the exact same thing that the DC Circuit said the 2010 Order could not do.

But that is not the most amazing thing. The most amazing thing is that the Commission’s explanation for re-implementing the very rule that the *Verizon* court said was impermissible is that the Judges simply didn’t understand the prior Order. That is not a joke. In paragraph 338 of the Order, the Commission explains that the fault of the 2010 Order was a “failure to explain.” Relying on the exact same legal authority, the Commission re-implements a more extreme version of the same rules rejected by the *Verizon* Court, offering to assuage the Court by speaking more slowly.

OK. “Speaking more slowly” might not be entirely fair. Rather, the Commission attempts to remedy its prior “failure to explain” with a new theory of common carrier regulation, which we can call “secondary regulation.” This new theory apparently holds that common carrier regulation of the last mile necessarily implicates common carrier regulation of the edge – or, conversely, that any common carrier regulation of the edge is “subsumed within” its last-mile regulation, that it is “subsidiary to” regulation of the last-mile, that it is “secondary, and in support of,” its regulation of the last-mile. *Order* paras. 338, 339. In other words, the Commission acknowledges that it is imposing common carrier regulations on the edge – that it is doing exactly what the *Verizon* court said it cannot do – but argues that this is permissible because this regulation is “secondary” to its reclassification of the last-mile service. Under the Commission’s theory, it seems, “secondary” regulation doesn’t count as regulation.

The problem with this approach is clear: the Communications Act *prohibits subjecting non-common carriers to common carrier regulation*. That is the plain language of the statute; and that is what the DC Circuit has said it means. The statute does not contain an exception for “secondary” regulations. But the Commission has rewritten the statute, adding in an exception that simply is not there. This is a particularly egregious example of the basic flaw with the Commission’s Order: it doesn’t match the statutory structure or language of the Communications Act. As the Supreme Court recently reminded us, it is a “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Utility Air Regulatory Group v. Env’tl. Prot. Agency*, 134 S. Ct. 2427, 2446 (2014) (“*UARG*”). Rather, the Commission relies on provisions stitched together out of context, omitting, rewriting, and tailoring language as necessary, and then making an unprecedented use of forbearance to recraft the Communications Act to fit its preferred – but not statutorily authorized – policy preferences.

The same problem plays out with the Commission’s Title II reclassification. Title II was designed to govern a pervasively regulated monopoly providing a single service on a relatively simple, static platform. As the pace of technological advancement increased – especially following the advent of the transistor – this regime rapidly fell apart, leading ultimately to the largely deregulatory Telecommunications Act of 1996. But the Order would use this same basic machinery to regulate the entire Internet ecosystem – thousands of companies offering and developing hundreds of new services operating on dozens of constantly evolving platforms. There is simply no way that the Commission could practically implement such a regulatory regime. The burdens would be too great on both the Commission and those whom it regulates.

This is not a unique situation for an agency to face: just over a year ago, in *UARG*, the Supreme Court considered an EPA rule that would have placed plainly excessive demands on the EPA and those that it regulates. In order to make its preferred policy enforceable, the EPA limited application of its policy to a subset of those subject to it, ignoring the plain language of the Clean Air Act.

The Supreme Court rejected the EPA's approach on grounds directly relevant to the FCC Order. First, the Court said that the fact that the EPA's rule would make "plainly excessive demands on limited governmental resources is alone a good reason for rejecting it" – the same concern holds true with the FCC's Order. In response to the "EPA assert[ing] newfound authority to regulate millions of small sources" and the fact that the Clean Air Act was written to give EPA authority over "thousands, not millions" of pollution sources, the Court said: "We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery." Again, the same analysis applies to the FCC's Order, with the FCC expanding the scope of Title II to reach orders of magnitude beyond the regulation of a limited number of regulated telephone monopolies.

Defenders of the FCC contend that the Commission can avoid these concerns through use of its Section 10 forbearance authority. But this is a misunderstanding – and perversion – of the statutory forbearance provision. Congress intended forbearance to be a *deregulatory* power, one that requires the Commission to eliminate regulations that have been obviated by competition. It is not a tool that allows the Commission to tailor the statute to suit the Commission's – not Congress's – own policy objectives. The conflict between Congressional and Commission policy is especially clear given expressions of Congressional intent such as in Section 230. 47 USC 230(b) ("It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"). As the Supreme Court said when confronted with EPA's "transformative expansion in [its] regulatory authority without clear congressional authorization," *UARG* at 2444, "Agencies are not free to 'adopt...unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'" *Id.* at 2446.

This brings me back to the overarching framing of the brief: that the Order expands the FCC's authority far beyond what its statute permits. *UARG* was the first of two recent Supreme Court cases – the other being *King v. Burwell* – to affirmatively make use of the Major Questions doctrine to strike down aggressive agency assertions of statutory authority. The Major Questions doctrine dates to *Brown & Williamson*, a 2000 case in which the Court overturned the FDA's assertion of authority to regulate tobacco as a drug. The Court held that the FDA was encroaching into an area of deep "economic and political significance." As the Court later explained, "when an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *UARG* (quoting *Brown & Williamson*).

This doctrine lay fallow for nearly fifteen years after *Brown & Williamson* was decided, cited only rarely by the courts and viewed as an argument of last resort by litigators. And, indeed, the DC Circuit in *Verizon* rejected Verizon’s challenge to the 2010 Order on *Brown & Williamson* grounds. But *UARG* and *King* have changed the calculus.

As we have argued in our [amicus brief](#), and as we hope will be clear to the DC Circuit, the efforts to which the Commission has had to go in self-tailoring the Communications Act – rewriting, omitting, and adding text, ignoring established Commission and Congressional policy, and playing fast-and-loose with the facts – make clear how far the Commission has gone in deviating from the Congressional design.

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The Free State Foundation is an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

### **Further Readings**

[Chevron Decision’s Domain May Be Shrinking](#), by Randolph J. May, *Perspectives from FSF Scholars*, Vol. 10, No. 23 (July 7, 2015).

[Title II Reclassification Is Rate Regulation](#), by Daniel Lyons, Vol. 10, No. 12, February 25, 2015.

[Regulation Won’t Preserve a Dynamic and “Open” Internet](#), by Robert W. Crandall, *Perspectives from FSF Scholars*, Vol. 10, No. 10 (February 20, 2015).

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

[Don’t Let Governments Own the Internet’s Future](#), by Seth L. Cooper, *Perspectives from FSF Scholars*, Vol. 10, No. 6 (February 6, 2015).

[Is the FCC Unlawful?](#) by Randolph J. May, *Perspectives from FSF Scholars*, Vol. 10, No. 3 (January 16, 2015).

[Five Faulty Premises in Telecom Policy Debates](#), by Justin (Gus) Hurwitz, *Perspectives from FSF Scholars*, Vol. 9, No. 3 (January 9, 2014).