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Response: In Defense of Vagueness

by

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My [FSF Perspectives paper](#) singled out the problem of vagueness in criticizing the *Open Internet Order*'s “general conduct” or “no-unreasonable interference/disadvantage” standard. I welcome the occasion afforded by Mr. Blake’s thoughtful response to supply fuller context to that criticism.

The problem with the FCC’s general conduct standard is not merely that it involves case-by-case adjudication. As a general matter, I agree with Mr. Blake that a case-by-case process is often the preferred method for an administrative agency to address matters of concern. In [Free State Foundation’s July 2014 comments](#) in the *Open Internet* proceeding, FSF President Randolph May and I maintained that the least objectionable approach to regulating broadband Internet service provider (ISP) practices would be a “commercially reasonable” standard subject to a circumscribed case-by-case adjudicatory process. We recommended a presumption of commercial reasonableness running in favor of ISP practices, requiring complainants to provide evidence of market failure or consumer harm caused by questioned practices. We also recommended the complainant bear the burden of rebutting the presumption by clear and convincing evidence. Regrettably, the FCC adopted a much more open-ended regulatory standard that disregards market power and consumer harm concepts that find clear definition in antitrust jurisprudence.

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In order to satisfy rule of law norms regarding knowable legal requirements and also to prevent arbitrary agency decision-making, case-by-case adjudication requires a necessary degree of clarity as to regulatory terms and impartiality in enforcement. As explained in my paper, I believe the general conduct standard's factors – both listed and unlisted – including its application based upon the totality of the circumstances, lacks that necessary clarity to adequately inform regulated ISPs of what they can and cannot do.

Left unstated in my paper is the role of the FCC's pro-regulatory bias in enforcing its standards. In particular, the *Open Internet Order*'s requirement that ISPs bear the burden of demonstrating their compliance with that vague standard will permit arbitrary decision-making and do far too little to cabin FCC discretion. Pursuant to paragraph 252 of the *Open Internet Order*, once a complaining party makes a *prima facie* case of a violation of the general conduct standard, the ISP bears the burden of rebutting it: "Defendants do not have the option of merely pointing out that the complainant has failed to meet his or her burden; they must show that they are in compliance with the rules."

The *Order* also states: "We retain our authority to shift the burden of production when, for example, the evidence necessary to assess the alleged unlawful practice is predominately in the possession of the broadband provider." Given the vague and open-ended nature of the general conduct factors, making a *prima facie* case should be relatively easy. In practice, ISPs will bear the burden of justifying their conduct in all but the most frivolous cases. Thus, vague standards combined with the *Order*'s burden of shifting rules will allow the FCC to ban or restrict ISP practices based on little more than agency predilection rather than a clear showing of harm according to knowable principles.

In my view, the general conduct standard in the *Open Internet* order is an improperly applied form of case-by-case adjudication. Its vagueness, particularly when operated upon by the *Open Internet Order*'s rules regarding burdens of proof and production, creates regulatory uncertainty. This undermines the potential benefits associated with a case-by-case approach which Mr. Blake very ably advocates. Regulatory uncertainty discourages innovation in network practices, undermines investment in those networks, and ultimately harms consumers by reducing choices in the broadband marketplace.

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