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The Strange and Fascinating Save the Internet Act

by

Daniel T. Deacon *

The House of Representatives on Wednesday [April 10, 2019] passed the Save the Internet Act of 2019. In broad strokes, the bill would restore the Obama-era FCC's order that classified Internet service providers as "telecommunications carriers" subject to regulation under Title II of the Communications Act and imposed a set of net neutrality rules on ISPs pursuant to that authority.

In some ways, the bill is perhaps not worthy of comment. It is almost certain not to pass the Senate, and the Trump administration has already signaled that, in the very unlikely event it did, the President would veto it. For the administrative law crowd, however, I did want to flag the unique nature of the bill, which, if it ever did pass, would doubtlessly spawn endless rounds of litigation trying to settle questions regarding what, in fact, the Act actually does.

To describe the bill's provisions is to set forth many of the key questions. Section 2(a)(1) of the Act provides that "[t]he Declaratory Ruling, Report and Order, and Order in the matter of restoring internet freedom that was adopted by the Commission on December 14, 2017" – that is, the Trump-era FCC's order rescinding the Obama-era one – "shall have no force or effect." Section 2(a)(2), in language resembling that of the Congressional Review Act, then states that the Trump-era order "may not be reissued in substantially the same form" and further that the Commission may not issue a "new rule" that is "substantially the same" as the Trump-era rule.

Section 2(b)(1) then "restore[s] as in effect on January 19, 2017" the Obama-era FCC order and the regulations promulgated along with that order.

When the bill was originally released, that was basically all it did. At the time, I wondered what the bill was intended to do, exactly. Did the bill enshrine the Obama-era order in the U.S. Code, such that future FCC's could not depart from it? I thought not. Instead, I thought the most natural reading of the bill was that it "restored" the Obama-era order but allowed (consistent with normal principles of administrative law) future FCC's to depart from it, at least to the extent that the resulting legal regime was not "substantially the same" as the Trump-era one.

The apparent response to such a reading is the current bill's section 2(c)(2). That provision defines what it means to "restore" the Obama-era FCC's order. It states that "restore" means "to *permanently* reinstate the rules and legal interpretations set forth in [the Obama-era order], including any decision (as in effect on such date) to apply or forbear from applying a provision of the Communications Act of 1934 . . . or a regulation of the Commission."

That provision presumably is designed to move the bill closer to the interpretation I had previously rejected – if the bill passes, the FCC is more or less stuck with the Obama-era rules, for better or worse. Once you drill down into the details, however, the bill remains a minefield of potential legal issues. For one, whoever has read a few FCC orders knows that they contain sprawling discussions of various issues, often resembling a judicial opinion more than a code of law. The rules that are to be codified as regulations in the Code of Federal Regulations are then appended to the order itself. The Save the Internet Act does not just return the CFR to its pre-Trump state of being, however. It protects, on a permanent basis, "the rules and legal interpretations set forth" in the *order* itself. Which parts of the underlying order this effectively codifies and which it doesn't is, to say the least, not self-evident.

In addition, section 2(c)(2) specifically states that it is permanently restoring the Obama-era order's "decisions" regarding which statutory provisions and regulations to forbear from applying to ISPs. (Through forbearance, the FCC can nullify otherwise applicable statutory and regulatory provisions as applied to particular categories of carriers.) For example, the Obama-era FCC decided to forbear from section 203 of the Communications Act – dealing with tariffing requirements – when it comes to ISPs. Presumably, then, the Save the Internet Act would bar the FCC from reapplying section 203 to ISPs. But the Obama-era order also reserved the FCC's authority to act more aggressively going forward, including by imposing forms of rate regulation under its sections 201 and 202 authority, which the FCC did not forbear from. If a future FCC did decide to get more aggressive, how far could it push such rate regulation before running afoul of the Save the Internet Act's apparent intent not to allow forms of rate regulation resembling section 203 tariffing? Again, I don't think it's at all clear.

On the other side, how much does the bill really tie the FCC's hands when it comes to *deregulation*? The apparent intent of the bill is to set the Obama-era rules as a solid floor. But given the rigidity this reading would impose, I could see a future FCC trying to cheat around it, and a sympathetic court potentially allowing the Commission to. For example, say a future FCC promulgates a new rule, formally codified some other place in the CFR, exempting a subset of Internet service providers – wireless ISPs, for example – from the Obama-era net-neutrality rules

"notwithstanding" those rules, which continue to appear in the CFR just as before. Would that violate the bill's command that the Obama-era rules be "permanent"? A good argument could be made that it would, but I don't think that conclusion would necessarily be a slam dunk, particularly if there was solid evidence that the rules were wreaking havoc on some category of providers.

These are just some of the many issues that I could see enveloping the FCC were the Save the Internet Act to pass. As I said at the beginning, it won't. But if somehow it ever did, it would be an administrative-law lawyer's dream.

* Daniel T. Deacon is Visiting Assistant Professor of Law at the University of California, Irvine School of Law and a Member of the Free State Foundation's Board of Academic Advisors. This essay was originally published on April 11, 2019, on "Notice and Comment," a blog of the *Yale Journal of Regulation* and the ABA Section of Administrative Law & Regulatory Practice. FSF is grateful the author granted permission for republication here.