



Perspectives from FSF Scholars
April 5, 2022
Vol. 17, No. 17

Broadband "Nutrition Labels" Should Stick To a Strict Statutory Diet

by

Andrew Long *

The recently adopted [Infrastructure Investment and Jobs Act](#) directed the FCC to adopt rules requiring that Internet service providers make available broadband "nutrition labels" to assist consumers when shopping for high-speed Internet access service. Commenters have weighed in on the record, and the Commission has [announced](#) that it will convene the second in a series of public hearings on April 7.

Congress made explicit, however, that the requirements for those labels shall be those "as described in" a [2016 Public Notice](#) issued by the Consumer and Governmental Affairs, Wireline Competition, and Wireless Telecommunications Bureaus – thereby circumscribing significantly the range of potential changes on the table. Further, the statutory directive that "the Commission shall ... assess, *at the time of the proceeding*[,] how consumers evaluate broadband internet access service plans" (emphasis added) indicates that permissible modifications thereto are limited to those born from lessons learned over the past six years regarding the point-of-sale experience.

Accordingly, the Commission should reject requests by commenters to overload those labels with extraneous information intended to advance unrelated policy agendas rather than facilitate broadband comparison shopping. Such indulgent proposals to gorge the label formats agreed to

in 2016 would (1) confuse, rather than inform, consumers, (2) constrain competing providers' ability to differentiate their offerings, and (3) impinge upon the First Amendment rights of Internet service providers (ISPs).

Pursuant to Section 60504(a) of the [Infrastructure Investment and Jobs Act](#) (IIJA), the FCC must "promulgate regulations to require the display of broadband consumer labels, *as described in the Public Notice of the Commission issued on April 4, 2016 (DA 16-357)*, to disclose to consumers information regarding broadband Internet access service plans" (emphasis added). On its face, the intent of this language is clear: to embrace, and perhaps update, the labels upon which those representing the viewpoints of both consumers and ISPs reached consensus in 2016. However, in the just-completed comment period, some have advocated for the inclusion of information well beyond not only what Congress intended, but also beyond what consumers are likely to find helpful when choosing between the options available in the competitive broadband marketplace. The Commission should resist such calls.

In its 2015 [Open Internet Order](#), the FCC tasked the Consumer Advisory Committee (CAC) with developing voluntary consumer broadband labels. The CAC, whose members represent the perspectives of both consumers and industry, agreed upon a format responsive to the assigned task. That is, disclosures that are "clear and easy to read – similar to a nutrition label – to allow consumers to easily compare the services of different providers." Separate formats for fixed and mobile broadband were published in the [2016 Public Notice](#) cited in Section 60504 of the IIJA.

Additional provisions set forth in Section 60504 reinforce the narrow comparison-shopping purpose that Congress had in mind for these broadband consumer labels. Subsection (b)(1) requires "information regarding whether the offered price is an *introductory* rate and, if so, the price the consumer will be required to pay following the *introductory* period" (emphasis added) – evidencing a clear focus on the new customer experience. And subsection (c), which directs the Commission to conduct public hearings, seeks input on "how consumers evaluate broadband internet access service plans." Presumably, it is prospective new subscribers who are conducting such evaluations.

Nevertheless, some comments and replies filed in response to the [Notice of Proposed Rulemaking](#) urge the Commission to take steps that would expand inappropriately the purpose of the consumer broadband labels well beyond that which Congress intended.

For example, the [Center for Democracy & Technology](#) would have the agency mandate that ISPs, rather than link to their privacy policies, "include specific information about their privacy practices in their consumer labels." Similarly, [Ranking Digital Rights](#) maligns such links as "inadequate" and asks the agency to require a lengthy list of privacy disclosures. Both proposals would expand significantly the size, and reduce dramatically the utility, of the labels.

[Connected Nation](#) would have the FCC add information regarding "jitter" – a highly technical concept that would be of no use to the average consumer – to the labels.

[Consumer Reports](#), filing jointly with Public Knowledge and Common Sense Media, would have the agency demand that an ISP create and maintain a searchable "broadband label archive" that includes plans no longer offered to new customers.

[New America's Open Technology Institute](#) (OTI), meanwhile, would have the Commission burden ISPs with an obligation to include the labels with every monthly bill – that is, well beyond the point in time when a consumer is choosing between the various choices available. (So, too, would Consumer Reports, *et al.*) In addition, OTI would have the FCC dictate rigid data formats ("standardize[d] information") that sacrifice ISPs' ability to differentiate their offerings in the competitive broadband service marketplace. In so advocating, OTI admits openly that "there is one principle with which [its proposals] are likely incompatible: flexibility."

These and similar suggestions that expand the scope of the labels approved by multiple bureaus in 2016 wouldn't just reduce the utility of the broadband consumer labels to comparison-shopping customers and tie the hands of competing ISPs. They also would threaten broadband providers' First Amendment rights. [Zauderer v. Office of Disciplinary Counsel](#), the 1985 Supreme Court case cited by the FCC in the *Open Internet Order* to justify the creation of voluntary labels, held that "disclosure requirements [must be] reasonably related to the State's interest in preventing deception to consumers." Under the Court's more stringent 1980 [Central Hudson Gas & Elec. v. Public Svc. Comm'n](#) decision, meanwhile, (1) "the restriction must directly advance the state interest involved," and (2) "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."

Consequently, the comments of [NCTA – The Internet & Television Association](#) argued compellingly that "[b]ecause government mandated speech necessarily has First Amendment implications, the Commission should tailor its rules to the situation addressed by Congress" – that is, the point-of-sale consumer experience.

Moreover, those First Amendment concerns are far more acute today than they were six years ago. That is because, unlike the IJA, the FCC's 2015 *Open Internet Order* did not establish a *requirement* that ISPs make labels available – merely "a *voluntary* safe harbor for the format and nature of the required disclosure to consumers" (emphasis added) pursuant to the transparency rule. As [AT&T](#) explained in its comments, "[t]he Commission must tread carefully when considering *forcing* broadband providers to publish specified information in pre-determined formats that the broadband providers themselves believe to be confusing to customers, or so over-simplified that they have the potential to be misleading" (emphasis in original).

This is not to suggest, of course, that the "as described in" language found in Section 60504(a) of the IJA demands that the FCC adopt the 2016 broadband consumer labels without any modification. To the contrary, the directive in subsection (c) to "conduct a series of public hearings to assess, at the time of the proceeding how consumers evaluate broadband internet access service plans" envisions the possibility of revisions. Specifically, revisions that respond to changes that may have occurred between 2016 and "the time of the proceeding" regarding how consumers shop for broadband service.

But commenters that seek to overturn the consensus agreed to by the CAC regarding the general format of the labels, as illustrated by the examples above, are asking for far more than Congress contemplated – or, for that matter, is justified. Accordingly, their proposals should be rejected.

* Andrew Long is a Senior Fellow of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.