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FCC Ambiguous "General Conduct" Standard Is Bad Policy and Likely Unlawful

by

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On October 19, the FCC will vote on a notice of proposed rulemaking that would reimpose public utility regulation of broadband Internet services that was repealed by the 2018 *Restoring Internet Freedom Order (RIF Order)*. The Commission proposes to reclassify broadband services as "telecommunications services" under Title II of the Communications Act. It also proposes to adopt a so-called "general conduct" standard as a "catch-all backstop" that would restrict an unknown variety of network practices that the Commission believes "unreasonably disadvantages" retail service end users or Internet edge providers like Google and Facebook. But this proposed "catch-all backstop" is rife with ambiguity and potential for abuse. If adopted, it would grossly expand agency power over private broadband networks and have a negative impact on innovation and investment. And, along with the reclassification proposal itself, it likely will not survive judicial review under the "major questions" doctrine.

The Commission's proposed general conduct standard consists of several elusive factors with ambiguous meaning that are not tied to any safe harbors, credible economic theory, or legal precedents that would provide predictable application. If adopted by the Commission, broadband providers would lack ability to reasonably ascertain what practices are allowed. The catch-all

backstop effectively would give the Commission latitude to restrict willy-nilly nearly any network practice, enabling arbitrary agency decisions. Also, the Commission's proposed enforcement rules, in many instances, would require broadband providers to prove that they comply with the agency's ad hoc determinations regarding what technical network practices best promote Internet openness. The Commission should not repeat a past mistake by reimposing the murky catch-all rule but stick to the demonstrably successful policy of a free market Internet.

The FCC's September 28 release of its draft notice of proposed rulemaking was the opening act of its *Safeguarding and Securing the Open Internet* proceeding. At its October 19 public meeting, the Commission will vote on whether or not to adopt the draft notice for public comment. In its draft notice, the Commission proposes to change the classification status of broadband Internet services from a lightly-regulated "information service" under Title I to a public utility-regulated "telecommunications service" under Title II. Included in the draft notice is the Commission's proposal to impose bright-line rules against blocking, throttling, and paid prioritization arrangements. Those bright-line rules originally were adopted in the 2015 *Title II Order*. But that order was short lived, as it was repealed by the 2018 *RIF Order*.

Along with those bright-line restrictions, the draft notice includes the Commission's proposal to revive the 2015 general conduct standard which is "to operate as the catch-all backstop":

> Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

The notice definition sets forth seven factors: (1) end user control; (2) competitive effects, (3) consumer protection; (4) effect on innovation, investment, or broadband deployment; (5) free expression; (6) application agnostic; and (7) standard practices. The 2015 *Title II Order* set forth short descriptions of the purported meanings of those same seven factors. Given the 2023 notice's close mirroring of the 2015 *Order*, it can be presumed that the Commission will consider re-adopting those same descriptions.

But some of the factors listed in the FCC's 2023 draft notice – end user control, competitive effects, effect on innovation, investment, or broadband deployment, application agnostic, and standard practices – were defined by the 2015 *Title II Order* using ambiguous terms that could be applied to prohibit any number of network practices. I described some of the uncertainty problems with the catch-all factors in my July 2016 *Perspectives from FSF Scholars* paper, "FCC's Vague 'General Conduct' Standard Deserves Closer Legal Scrutiny."

For example, the 2015 *Order* stated that a practice allowing end-user control is less likely to violate the standard but "user control and network control are not mutually exclusive" and "many practices will fall somewhere on a spectrum from more-end-user-controlled to more broadband provider controlled." Yet "there may be practices controlled entirely by broadband providers

[that] nonetheless satisfy" the standard. Also, the 2015 *Order* stated, regarding the application-agnostic factor, that practices that "do[] not differentiate in treatment of traffic, or if it differentiates in treatment of traffic without reference to the content, application, or device" will likely not violate the standard. But it declared that "there do exist circumstances where application-agnostic practices raise competitive concerns, and as such may violate our standards to protect the open Internet."

Additionally, the listed factors regarding effects of network management practices on competition as well as on innovation, investment, or broadband deployment are less than helpful because they are not tethered to any clearly ascertainable economic theory to provide predictable and consistent application of those factors. The 2015 *Title II Order* rejected antitrust-like market power analysis of competitive conduct, and the 2023 draft notice also appears to reject that analytical framework. And there are no common law precedents or agency precedents that directly inform or cabin the meaning of what constitutes "unreasonable interference" and "unreasonably disadvantage."

Moreover, the list of factors that define unreasonable interference/disadvantage is declared to be "non-exhaustive." The Commission may include any additional factors that the agency might later make up in the midst of enforcement proceedings. And the Commission accords itself freewheeling authority to place relative weight on all factors as it chooses in light of the "totality of the circumstances" in the course of case-by-case adjudications. Subjecting broadband providers to liability in enforcement proceedings for practices that are contrary to previously unannounced factors would be contrary to the rule of law principles that one should be able to know what the law is and be able to conform one’s conduct to it. But the 2023 draft notice appears to permit such scenarios.

Notably, neither the listed factors in the FCC's 2023 draft notice nor the descriptions of those same factors in the 2015 *Title II Order* include knowledge requirements, numerical thresholds, or other bright-line safe harbors to limit their scope and provide legal certainty.

The notice does ask whether the rules should recognize certain practices as permissible under its standard, such as "free data" or "zero-rated" plans and "sponsored data" plans that enable mobile wireless subscribers to access certain online services without such access counting toward their monthly data plan allotments. Such plans benefit consumers by offering them access to online content at no added cost, and they have been adopted by many consumers. However, the Commission exhibited hostility toward those plans while the public utility regime was in effect. In early 2017, the Wireless Bureau issued a report purporting to find that free data programs offered by AT&T and Verizon Wireless potentially were harmful to consumers and might be proscribed by the general conduct standard. Yet even if the newly-constituted Commission's majority later declares free and sponsored data plans to be permissible, such a declaration would only go partway in alleviating the ambiguities of the proposed general conduct standard.

Also, the "reasonable network management" exception that the FCC proposes in its 2023 draft notice does not reduce legal uncertainty regarding the general conduct standard. Indeed, the exception would apply narrowly. The 2015 *Title II Order* stated that "[f]or a practice to even be considered under this exception, a broadband Internet access service provider must first show

that the practice is primarily motivated by a technical network management justification rather than other business justifications." The line between technical network and other business justifications is by no means clear, but the Commission proposes to follow the 2015 *Order*'s approach. Moreover, under the 2015 *Order*, differential services apparently were not considered to be based primarily on technical justifications and thus were ruled out: "a practice that permits different levels of network access for similarly situated users based solely on the particular plan to which the user has subscribed, then that practice will not be considered under this exception." Not surprising nor helpful for broadband providers seeking regulatory certainty, the 2015 *Order* also stated that "some network practices may have a legitimate network management purpose, but also may be exploited by a broadband provider."

According to the draft notice, the Commission also proposes to re-establish an advisory opinion process for the Enforcement Bureau to declare whether it thinks specific types of conduct comply with the rule or not. But the draft notice is quick to point out that those opinions have no controlling legal effect and do not bind the Commission. In other words, broadband providers can be certain that those opinions do not literally provide them with certainty about whether their conduct complies with the general conduct standard or not.

Left largely unspoken in the FCC's draft notice is the pro-regulatory bias of the 2015 *Title II Order*'s enforcement standards. Given the elasticity of scope and weight of its non-exhaustive factors, it likely would be easy for a complaining party to make – according to the Commission's judgment – a prima facia case of a violation of the general conduct standard. Once prima facie cases are made, a broadband provider "must show that they are in compliance with the rules." Furthermore, in the 2015 *Title II Order* the Commission acknowledged that "[w]e retain our authority to shift the burden of production" onto broadband providers when the agency deems it appropriate to do so in enforcement proceedings. This burden-shifting authority was not original to the *Title II Order*'s enforcement rules, but a carryover from the 2010 *Open Internet Order*. That history indicates that such burden-shifting would be part of any rules that the Commission may later adopt based on its draft notice. In a November 2016 *Perspectives from FSF Scholars*, I addressed the compound effect of the general conduct's ambiguous terms with the FCC's enforcement procedures under the 2015 *Title II Order*: "In practice, [broadband Internet service providers (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." The Commission's proposal in its 2023 draft notice suffers the same defect.

In *US Telecom Association v. FCC* (2016), D.C. Circuit Court of Appeals upheld the 2015 *Title II Order*'s general conduct standard and swatted down a Fifth Amendment Due Process Clause challenge based on the vagueness doctrine. The doctrine "requires the invalidation of laws [or regulations] that are impermissibly vague" because regulated parties should know what is required of them so they may act accordingly" and so that "those enforcing the law do not act in an arbitrary or discriminatory way." The Court's 2-1 majority concluded that the general conduct factors and descriptions satisfied vagueness concerns.

But the decision in *US Telecom v. FCC* will provide no consolation to broadband providers subject to a revived general conduct standard. Dissenting Senior Judge Stephen Williams concluded that the factors were themselves vague, that the advisory opinion process was slow and unhelpful, and that application of Section 207 of the Communication Act would further increase uncertainty by making broadband providers subject to agency complaints or lawsuits brought by "[a]ny person claiming to be damaged by any common carrier."

If the FCC re-imposes the general conduct standard, the Supreme Court might well reach a different conclusion than the D.C. Circuit on the due process issue of vagueness. Furthermore, the breadth of the proposed catch-all backstop for regulating all private broadband networks offering retail mass-market Internet access services supports a prospective finding that imposing public utility regulation on broadband Internet services as proposed in the 2023 draft notice involves a matter of deep economic and political significance under the Supreme Court's major questions doctrine. As Free State Foundation President Randolph May stated in a September 26 press release: "[I]t's very likely the Supreme Court will determine that any FCC action reimposing net neutrality regulations is a 'major question' and Congress has not clearly authorized the agency to exercise the power it claims."

The FCC's newly-minted majority has proposed Title II reclassification and the general conduct standard as a means to amplify and consolidate government power over the nation's private broadband networks. But such a heavy-handed regulatory approach will be harmful to innovation and investment. For broadband providers, the risks of investing in and offering new broadband service capabilities and options increase when rules are ambiguous. In its *RIF Order*, the FCC stated that "[t]he Commission has long recognized that regulatory burdens and uncertainty… can deter investment by regulated entities," and that "regulatory uncertainty serves as a major barrier to investment and innovation."

And, in its 2018 *Wireless Messaging Declaratory Order*, the Commission recognized the flip side that, whereby "regulatory certainty and a 'minimal regulatory environment . . . promote[] investment and innovation in a competitive market.'" The Commission should not endanger broadband innovation and investment but maintain the market-oriented light touch federal policy under which broadband service capabilities and access are persistently improving and expanding.

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