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**Net Neutrality Regulation Is Not a Public Safety Measure**

by

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On October 19, the FCC will vote on a draft notice of proposed rulemaking that would impose public utility regulation on broadband Internet access services. In a surprise to many who have engaged in the two-decade debate over Internet openness and regulation, the Commission's newly constituted majority is now trying to reframe "net neutrality" regulation into a national security and public safety measure. But if security and safety depend vitally on public utility regulation, why is the FCC only now telling us?

The new purported national security and public safety line for net neutrality regulation is unconvincing. Executive branch agencies already have charge over security and safety, and the FCC's proposed reimposition of public utility regulation would apply to mass market retail services, not emergency networks. Public safety agencies rely on First Net and other dedicated networks far more than commercial services. Any reimposition of public utility regulation by the Commission is likely to face a significant legal challenge under the Supreme Court's major questions doctrine. If security and safety truly are vulnerable, then the Commission should turn to Congress to request authority to address those concerns rather than impose regulation resting on shaky legal grounds.

In its notice, the Commission proposes to change the classification status of broadband Internet services from a lightly-regulated "information service" under Title I of the Communications Act to a public utility-regulated "telecommunications service" under Title II. The Commission also proposes to revive agency rules against blocking, throttling, and paid prioritization, as well as an open-ended "catchall backstop" standard. Identical restrictions originally were adopted in the 2015 *Title II Order* but were repealed by the 2018 *Restoring Internet Freedom Order*.

In the 2015 *Title II Order*, the FCC's Title II reclassification decision and bright line rules were based on perceived threats to Internet edge provider innovation and Internet openness posed by broadband Internet providers in possession of "gatekeeper power." National security and public safety were hardly mentioned in the 2015 order, and neither was proffered as a justification for Title II regulation. The safety and security provision contained in the 2015 order was peripheral, intended by the Commission to ensure "that open Internet rules do not restrict broadband providers in addressing the needs of law enforcement authorities" and "that broadband providers do not use the safety and security provision without the imprimatur of a law enforcement authority, as a loophole to the rules." Also, the 2015 order deemed traffic prioritization practices that serve public safety as potentially qualifying under the reasonable network management exception to rules against blocking and throttling as well as the general conduct standard.

But now in its 2023 notice, the Commission makes national security and public safety one of the primary claimed justifications for reimposing public utility regulation on broadband Internet services. Over a dozen paragraphs in the notice address supposed or speculated vulnerabilities in network management operations, functionalities, and equipment. The Commission proposes to wield Title II power expansively over broadband Internet services for the supposed purpose of improving security and safety in those services and their constituent components.

Not every Commissioner agrees. According to an October 11 statement, Commissioner Brendan Carr wrote that the plan to be implemented at the agency's upcoming meeting "identifies no gap in national security that Title II would fill" and that Executive Branch agencies such as the Justice and Homeland Security departments already have national security powers to address security issues in the communications sector.

Moreover, it is doubtful that public utility regulation conceivably would improve public safety communications. The 2023 notice is directed to mass market retail broadband Internet services for residential and mobile subscribers. And as the notice acknowledged, "much of the communications between public safety entities and first responders take advantage of enterprise-level dedicated public safety broadband services." Indeed, the Commission's 2020 *Restoring Internet Freedom Remand Order* found that public safety agencies rely increasingly on FirstNet and competing dedicated networks with quality-of-service guarantees for communications.

Yet even if national security and public safety concerns are as pervasive and serious as the FCC's notice suggests, why did the agency wait until the September 28 release of the notice to raise those concerns? To the extent that security and safety are endangered due to existing broadband network management operations, it would appear that the Commission needlessly delayed action for over two years. In the national security and public safety areas where bipartisanship prevails, Chairwoman Rosenworcel and other members of the Commission could have gone directly to Congress to seek clear targeted authority to address any security and safety concerns that they

believed could not be addressed under the agency's present authority. They still can go to Congress.

To the extent necessary, it would be far better for Congress to give the FCC express authority to address specific national security and public safety concerns rather than leave things up to future agency rulemaking – and to future judicial rebuke. As Free State Foundation President Randolph May has explained, "[There's Little Question that Net Neutrality is a Major Question.](#)" In *West Virginia v. EPA* (2022), the Supreme Court wrote that in "certain extraordinary cases... something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." In its 2015 *Title II Order*, the Commission's claimed authority to impose public utility regulation was based upon the ambiguity of statutory terms. However, the Supreme Court's major questions doctrine likely precludes the FCC from relying on statutory ambiguity to reimpose such sweeping regulation. The requirement in Section 151 of the Communications Act that the FCC consider "promoting safety of life and property through the use of wire and radio communication" doesn't come close to conferring clear authority to impose traditional public utility regulation.

Subjecting private broadband Internet networks constructed with over \$2.1 trillion in capital investments to public utility regulation certainly involves a question of vast political and economic significance. And to the extent that the notice's purported national security and public safety concerns have validity, they arguably heighten the political and economic significance of the FCC's proposed grab for more power over broadband networks. For those reasons, if the security and safety issues involving broadband Internet services really are as serious as the Commission's draft notice appears to suggest, then Congress is the proper authority to address them.

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### **Further Readings**

Randolph J. May, "[Net Neutrality Redux: A Fight Over First Principles](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 45 (October 16, 2023).

Seth L. Cooper, "[FCC Ambiguous 'General Conduct' Standard Is Bad Policy and Likely Unlawful](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 44 (October 13, 2023).

Randolph J. May, "[There's Little Question Net Neutrality is a Major Question](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 41 (September 28, 2023).

Randolph J. May, Press Release: "[FCC Proposing to Reimpose Net Neutrality Regulations Is Foolhardy](#)," *FSF Blog* (September 26, 2023).

Randolph J. May, "[Reimposing Burdensome Net Neutrality Mandates Will Harm Consumers](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 39 (September 21, 2023).

Randolph J. May, "[Chevron's Demise Would Check the Administrative State's Expansion](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 21 (May 19, 2023).

Randolph J. May and Seth L. Cooper, "[Second Circuit Hears Preemption Challenge to New York's Broadband Rate Regulation Law](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 7 (February 7, 2023).

Randolph J. May, "[A Major Ruling on Major Questions](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 36 (July 15, 2023).

Randolph J. May and Seth L. Cooper, "[The FCC Should Keep Broadband Free From Rate Regulation](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 19 (April 12, 2022).

Randolph J. May and Andrew Long, "[Biden's Executive Agencies Doing 'Net Neutrality' End Run](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 67 (December 21, 2021).

[Comments of the Free State Foundation](#), Restoring Internet Freedom, WC Docket No. 17-08 (April 17, 2020).

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Seth L. Cooper, "[Response: In Defense of Vagueness](#)," *Perspectives from FSF Scholars*, Vol. 11, No. 38 (November 8, 2016).

Seth L. Cooper, "[FCC's Vague 'General Conduct' Standard Deserves Closer Legal Scrutiny](#)," *Perspectives from FSF Scholars*, Vol. 11, No. 23 (July 6, 2016).