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Public Safety Rebrand Won't Save the FCC's Internet Regulation Plan From Unlawfulness

by

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On April 25 the FCC is scheduled to vote on a Draft Order to transform broadband Internet networks into public utilities. The Biden FCC is rebranding public utility regulation of broadband services as a national security and public safety measure. But the Commission's Draft Order released on April 4 fails to substantiate its security and safety rationale for the regulation. The Draft Order attempts to justify the FCC's Title II power grab by invoking generalities and hypothetical security and safety concerns rather than demonstrating concrete existing problems, and it contains no specific rules that would meaningfully protect networks or law enforcement.

The Biden FCC's superficial safety and security rationale for reclassifying broadband Internet access services under Title II of the Communications Act appears to be a thinly-veiled attempt to evade the Supreme Court's Major Questions Doctrine. But that attempt is unlikely to succeed in court. The Draft Order's generalized appeal to federal security and broad statutory goals about safety won't satisfy the doctrine's requirement of a clear statement by Congress authorizing public utility regulation of broadband.

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If the April 4 Draft Order is adopted, it would change the classification of broadband Internet access services from a lightly regulated "information service" under Title I of the Communications Act into a heavily regulated "telecommunications service" under Title II.[1] The Draft Order would subject broadband Internet Service Providers (ISPs) to three so-called bright-line restrictions, a vague "general conduct" catch-all standard, as well as agency oversight of traditionally private network interconnection agreements. Although the Notice mirrored much of the Obama FCC's now-repealed 2015 *Title II Order*, the Draft Order plan's most striking departure from the 2015 *Order* is that it recasts public utility regulation of broadband services as a national security and public safety measure.

Prior to the Draft Order's release, the Free State Foundation filed comments and reply comments in the FCC's *Safeguarding and Securing the Open Internet* proceeding that set forth several reasons why the Biden FCC's national security and public safety rationale for Title II reclassification is unconvincing.[2] For starters, the timing of the rebrand renders the security and safety rationale suspect. The 2015 *Title II Order* was based on market competition and consumer protection rationales.[3] It hardly mentioned security or safety. Indeed, the Commission never characterized public utility regulation of broadband as security and safety measures until Chairwoman Jessica Rosenworcel's September 2023 announcement of the agency's Internet regulation plan.[4] Following the Draft Order's release, a serious question remains: Why did Chairwoman Rosenworcel never bring safety and security concerns to Congress and why did she wait until two-and-a-half years into her tenure as the head of the agency before raising them in a rulemaking about imposing public utility regulation on broadband services?

FSF's comments and reply comments also explained that executive branch agencies already have clear authority over national security and public safety. Public utility regulation of commercial mass-market retail services catering to civilian residences and small businesses is a strange mismatch with the advancement of our nation's security and the general public's safety. First responder and law enforcement agencies rely on FirstNet and other dedicated networks far more than commercial services. And the Commission's Notice fails to recognize that innovative service offerings – such as paid prioritization offerings – could benefit first responder agencies to the extent that they make use of mass-market broadband services. Nothing in the FCC's Draft Order that was released on April 4 changes those facts.

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[1] Safeguarding and Securing the Open Internet, WC Docket No. 23-320; Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Order, Report and Order, and Order on Consideration (April 4, 2024) ("Draft Order"), at: https://docs.fcc.gov/public/attachments/DOC-401676A1.pdf.

[2] *See* Comments of the Free State Foundation, Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (December 14, 2023), at: https://freestatefoundation.org/wp-content/uploads/2023/12/FSF-Comments-Safeguarding-and-Securing-the-Open-Internet-121423.pdf; Reply Comments of the Free State Foundation, Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (January 17, 2024), at: https://freestatefoundation.org/wp-content/uploads/2024/01/FSF-Reply-Comments-Safeguarding-and-Securing-the-Open-Internet-011724.pdf.

[3] *See* Protecting and Promoting the Open Internet, GN Docket 14-28, Report and Order on Remand, Declaratory Ruling, and Order ("*Title II Order*") (released March 12, 2015) at ¶¶ 78-85.

[4] *See* Remarks of Chairwoman Jessica Rosenworcel (September 26, 2023), at: https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf.

Importantly, the FCC's April 4 Draft Order fails to substantiate the national security and public safety rationales for imposing the public regulation on broadband services. The Draft Order makes many generalized allusions to "entities that pose threats to national security and law enforcement" as well as to "concerns" and "risks" posed to communications networks, national security, and law enforcement.[5] Several times, the Draft Order states that Title II reclassification will "enhance," "enable," or "bolster" the Commission's existing ability or regulatory authority to provide protections or safeguards against such dangers. Yet the Draft Order contains no specific new rules to directly address such concerns.

Another deficiency of the Draft Order is its reliance on generalized claims that Title II reclassification will – in some unspecified manner – improve the agency's ability to carry out existing generally stated duties or broad federal policy pronouncements regarding national security and public safety. For example, the Draft Order cites the Obama White House's February 2013 Presidential Policy Directive 21 that "It is the policy of the United States to strengthen the security and resilience of its critical infrastructure against both physical and cyber threats."[6] The Draft Order then suggests that security threats impact broadband ISPs and networks, and thereby finds that Title II reclassifications of broadband services "will enable the Commission to more fully utilize its regulatory authority and rely on its subject matter expertise and operational capabilities to address these concerns and strengthen the security posture of the United States."[7] Precisely how Title II will lead to "more fully utilize[d]" agency power is never explained.

The Draft Order's most specific contention on national security and Title II is that reclassification would allow the agency to protect against the non-existent, hypothetical dangers of Chinese Communist Party-related foreign entities entering the U.S. domestic market. It states that the Commission could use Section 214 to bar CCP-related "entities whose application for international section 214 authority was previously denied or whose domestic and international section 214 authority was previously revoked by the Commission in view of national security and law enforcement concerns."[8] However, the agency's prior denial or revocation of 214 authority to those entities makes such future entry decidedly unlikely.

Additionally, Section 214 is hardly necessary to address such an imagined future scenario because the executive branch already has power to deal with it. As Commissioner Brendan Carr explained in an April 11 statement:

> The Biden Administration already has the authority to prohibit those entities from continuing to operate in the U.S. Indeed, the Commerce Department codified one such set of authorities back in 2021 at 15 C.F.R. § 7. The government can prevent them from operating today. So Title II fills no gap in authority. Indeed, as to those specific CCP-aligned companies, the FCC's own database of broadband providers

[5] *See, e.g.*, Draft Order, at ¶¶ 4, 30, 32, 33, 35.
[6] Draft Order, at ¶ 31 (internal cite omitted).
[7] Draft Order, at ¶ 32.
[8] Draft Order, at ¶ 34.

shows that they are not offering any broadband services that would be subject to Title II or Section 214 even after reclassification.[9]

The Draft Order also poses generalized concerns about foreign entities being able to access Internet Points of Presence (PoPs) located in data centers and thereby misdirect or disrupt data traffic.[10] However, the Draft Order does not substantiate that Title II would give the Commission authority over PoPs in data centers. Nor does the Draft Order contain any new rules that would specifically address such concerns. As a result there, is no basis to expect that Title II would improve security or safety outcomes regarding access to PoPs. Also, to the extent that concerns about access to PoPs in data centers is genuine, government authority already exists to address them. The Commerce Department regulation identified by Commissioner Carr for safeguarding the information and communications technology and services supply chain is one such authority.

Another claim put forth in the Draft Order is that "[r]eclassification will also enhance the Commission's ability to obtain information from BIAS providers that will enable the Commission to assess national security risks."[11] Here again, no specific existing security or safety problems are identified. And the Draft Order includes no new rules for specific information to be collected from ISPs. Instead, reclassification is posited merely as a basis for added power to develop some kind of future information collection requirements from ISPs under Title II.

Even assuming that additional information disclosures of some kind would enable the Commission to somehow better assess risks to the nation, networks, or law enforcement, the agency likely has existing authority to require them. Section 257(a), which furnished the basis for the Commission's transparency rule in the *2018 Restoring Internet Freedom Order* and was upheld by the D.C. Circuit's 2019 *Mozilla Corp. v. FCC* decision,[12] could similarly provide a basis of agency authority for modest, targeted information collection purposes. Additionally, in *Mozilla v. FCC*, the court hinted that the Commission's Title I ancillary jurisdiction may support transparency requirements regarding network management practices,[13] and that same source of authority may similarly support information disclosures regarding network safety.

Given that the national security and public safety rationale for Title II reclassification is superficial and not substantive, why is it being offered? The most probable explanation is that it is an attempt by the Biden FCC to evade the Supreme Court's Major Questions Doctrine. However, such an attempt is unlikely to succeed in a court of law because the Draft Order's generalized appeal to security and safety interests and purposes doesn't satisfy the Doctrine's requirement of a clear statement by Congress authorizing public utility regulation of broadband.

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[9] Office of Commissioner Brendan Carr, "Carr Fact-Checks President Biden's Myth-Filled Plan for Expanding Government Control of the Internet" (April 11, 2024), at: https://docs.fcc.gov/public/attachments/DOC-401818A1.pdf.
[10] Draft Order, at ¶ 36.
[11] Draft Order, at ¶ 35.
[12] Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order ("*RIF Order")* (released January 4, 2018), at ¶ 232; *Mozilla Corp. v. FCC*, 940 F.3d 1, 48-49 (D.C. Cir. 2019).
[13] *Mozilla*, 940 F.3d at 48 (internal cites omitted).

As explained in my April 12 *Perspectives from FSF Scholars*, "The FCC's Internet Regulation Plan Fails the Major Questions Doctrine," under Supreme Court decisions expounding the Doctrine, an agency's action that implicates questions of major economic and political significance requires a clear statement from Congress to support the agency's action.[14]

The Draft Order's denial that its public utility regulation scheme is economically and politically significant lacks credibility and it is contradicted by abundant evidence. Requiring broadband networks across America, costing over $2.1 trillion in private capital, and upon which much of U.S. economy relies, to function as public utilities unmistakably involves issues of vast economic significance. Changing the regulatory classification of broadband from a lightly regulated Title I "information service" into a heavily regulated Title II "telecommunications service" would impact all ISPs, online edge companies, and broadband subscribers – whether through the regulation of revenues, prices, or service terms and conditions.

The political significance of imposing public utility regulation on broadband networks is reflected in the two decades-long public debate over "net neutrality" regulation and Internet freedom. It also is exemplified by Chairwoman Rosenworcel's unusual September 2023 remarks calling on the public to "make some noise" and "raise a ruckus" to influence the agency's decision.[15] Additionally, the Draft Order's claims that Title II reclassification and public utility regulation are necessary to safeguard national security and protect public safety actually reinforce the political significance of the Biden FCC's Internet regulation plan.

Congress never provided a clear statement of authority to regulate broadband Internet networks as public utilities. But the Draft Order appears to be making a long-shot attempt to claim it exists. The Draft Order invokes Section 1 of the Communications Act, which provides that Congress established the FCC "to make available, so far as possible, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications."[16] It also cites the 2019 *Mozilla Corp. v. FCC* decision by the D.C. Circuit, which determined the Commission did not adequately address the public safety implications of Title I reclassification in the *RIF Order*.[17] [It seems the agency is hoping those authorities will back the security and safety rationale for Title II reclassification.

But the generalized purposes of the Commission's enabling provision do not come close to constituting clear authority to impose public utility regulation on broadband networks. And the D.C. Circuit never held otherwise. The court's pronouncements on public safety in *Mozilla* were limited to a "discrete" agency process issue under the Administrative Procedures Act.[18]

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[14] Seth L. Cooper, "The FCC's Internet Regulation Plan Fails the Major Questions Doctrine," *Perspectives from FSF Scholars*, Vol. 19 No. 12 (April 2024), at: https://freestatefoundation.org/wp-content/uploads/2024/04/The-FCCs-Internet-Regulation-Plan-Fails-the-Major-Questions-Doctrine-041224.pdf.
[15] *See* Remarks of Chairwoman Jessica Rosenworcel (September 26, 2023), at: https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf.
[16] 47 U.S.C. § 151.
[17] *See Mozilla*, 940 F.3d at 59-63.
[18] *Mozilla*, 940 F.3d at 17-18.

Moreover, the *Mozilla* decision predated the Supreme Court's landmark 2022 decision in *West Virgina v. EPA* that solidified the Major Questions Doctrine in the Court's jurisprudence.[19]

Lacking a clear statement of authority from Congress, it is quite unlikely that the agency's superficial national security and public safety rationale for public utility regulation of broadband networks will save the Biden FCC's Internet regulation plan from being struck down under the Major Questions Doctrine.

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Further Readings

Randolph J. May, "Don't" *FSF Blog* (April 18, 2024).

Seth L. Cooper "The FCC's Internet Regulation Plain Fails the Major Questions Doctrine," *Perspectives from FSF Scholars*, Vol. 19, No. 12 (April 12, 2024).

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 and Andrew Long, "The 'Network Slicing' Debate Exposes How Title II Will Kill Innovation," *Perspectives from FSF Scholars*, Vol. 19, No. 11 (April 2, 2024).

Reply Comments of the Free State Foundation, Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (January 17, 2024).

Randolph J. May and Seth L. Cooper, "Stop the Biden FCC's Plan to Control Internet Networks," *Perspectives from FSF Scholars*, Vol. 18, No. 52 (December 20, 2023)

Comments of the Free State Foundation, Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (December 14, 2023).

Daniel A. Lyons, "Refreshing the Record on Net Neutrality," *Perspectives from FSF Scholars*, Vol. 18, No. 50 (November 14, 2023).

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

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

[19] *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

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, "A Major Ruling on Major Questions," *Perspectives from FSF Scholars*, Vol. 17, No. 36 (July 15, 2023).