Perspectives from FSF Scholars
May 21, 2024
Vol. 19, No. 19

The FCC's New Title II Order Allows Harmful Rate Regulation

by

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Tomorrow, on May 22, the FCC's *Safeguarding and Securing the Open Internet Order*, the new Title II Order regulating Internet service providers like public utilities, is scheduled to be published in the Federal Register. This will start the clock running for appeals which, most likely, will eventually hold the FCC's action – a harmful exercise in "Regulatory Bidenomics" – unlawful.

The Commission's Title II decision allows rate regulation of broadband Internet access services at both federal and state levels. Repeated disavowals of rate regulation made by Chairwoman Rosenworcel and echoed in the order itself are based on a narrow and arbitrary definition of rate regulation only as mandated federal rates at the retail consumer level established by traditional utility "rate case" methodologies. In fact, the new Title II Order expressly endorses state-level rate regulation, and it imposes other forms of rate regulation at the federal level. For example, the FCC indicates that, in the name of preserving "affordability," it supports state laws or regulations that set a maximum price at which a particular service may be offered.

Rate regulation restricts the ability of broadband providers to use their networks and generate returns on investment. Such regulation reduces the financial incentives for future investment in network facilities needed to connect all Americans to next-generation broadband. The agency should avoid doing further harm by preempting state-level rate regulation of broadband services and by not imposing additional types of controls on rates at the federal level.

In an April 2022 *Perspectives from FSF Scholars*, "The FCC Should Keep Broadband Free from Rate Regulation," Free State Foundation President Randolph May and I explained that Title II of the Communications Act, at its core, is a rate regulation regime. We also identified ways that the Commission's short-lived 2015 *Title II Order* went even further into rate regulation. Additionally, we observed that, at a congressional hearing on March 31, 2022, Chairwoman Jessica Rosenworcel disavowed support for rate regulation of broadband – no rate regulation and "No asterisks." Later, in the September 2023 public announcement of the Commission's proposal to repeal the 2018 *Restoring Internet Order* and change the classification of broadband service from a Title I information service into a heavily regulated Title II information service – Chairman Rosenworcel denied that the rulemaking she was proposing would be a stalking horse for rate regulation, stating "Nope. No how, no way."

It is true that, in the new Title II Order, the FCC "do[es] not find *ex ante* or *ex post* rate regulation necessary for purposes of section 10(a)(1) and (a)(2)" and thus the Commission "find[s] it in the public interest to forbear from applying sections 201 and 202 insofar as they would permit the adoption of such rate regulations for BIAS in the future."[1] The order adds: "We therefore find to be unfounded claims that our refusal to forbear entirely from sections 201 and 202 means that the Commission could introduce rate regulation of BIAS despite our commitment not to do so."[2]

Yet the new Title II Order does support rate regulation of broadband Internet access services in different ways. Notably, the order declined to preempt state-level rate regulation of broadband services, specifically including those termed "broadband affordability programs." New York's Affordable Broadband Act of 2021 (ABA), for instance, requires broadband service providers operating in the state to offer Internet access plans for $15-per-month or $20-per-month, depending on the speeds provided. By some estimates, the law's mandated price-controlled offerings to certain lower-income households apply to over one-third of New York households.

The new Title II Order found that "the mere existence of a state affordability program is not rate regulation" and therefore not preempted.[3] It is conceivable that some affordability programs, including subsidy programs, may be able to help make broadband more affordable for low-income households without setting prices. But state laws setting maximum rate limits or mandating prices certainly constitute rate regulation, and they ought to be preempted.

In *New York Telecommunications Association, Inc. v. James* (2024), the Second Circuit upheld New York's ABA from claims that the state's law was preempted by the Communications Act

[1] Order, at ¶ 386.
[2] Order, at ¶ 386.
[3] Order, at ¶ 275.

and the 2018 *Restoring Internet Freedom Order*. The Second Circuit concluded that the Commission lacked preemptive authority under Title I of the Act and that preemption of rate regulation of interstate broadband services is a function only of Title II. Now that broadband services have been reclassified under Title II, the Commission should use its conceded preemptive authority to clear away New York's rate regulation.

Moreover, the new Title II Order probably overstates the Commission's commitment or at least the agency's ability to avoid rate regulation. Title II *is* a rate regulation regime because its central provisions – Sections 201(b) and 202(a) – provide that "all charges" must be "just and reasonable" and that it is "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges."[4] Also, Section 208(a) states that "[if]…there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of."[5] Absent forbearing entirely from those central provisions, it appears that the Commission has a duty to consider complaints that rates charged by broadband providers violate Sections 201(b) or 202(a).

Furthermore, the Title II Order supports other forms of rate regulation. The bright-line rule banning "paid prioritization" offerings constitutes a type of rate regulation. The order defines "paid prioritization" as network management techniques that directly or indirectly favor some traffic over other traffic "in exchange for consideration (monetary or otherwise) from a third party."[6] The order outright prohibits payments for such offerings, leaving broadband providers a likely futile option to seek a waiver from the ban if they can meet a "high bar" in "exceptional circumstances."[7] As a result of the regulation, the Commission has set an effective rate of $0 for broadband ISPs to deliver data with quality-guaranteed service over their last-mile networks.[8]

The new Title II Order threatens future effective rate regulation of "free data" mobile broadband plans – sometimes also called "sponsored data" or "zero-rating" plans. These plans allow subscribers to access social media, streaming music, or other content without their usage of that content counting towards their mobile plans' monthly data allotments. Such plans have been popular with many consumers because they offer a lower-cost service choice. But the new Title II Order subjects "free data" plans to the vague "general conduct" standard or "catchall."[9] That standard for analyzing complaints about broadband provider practices is comprised of several ambivalent factors described in ambiguous terms that the Commission will apply to challenged practices – in addition to any currently unknown factors that the agency may choose to include ad hoc in its analyses, all based on a totality of the circumstances. By itself, the general conduct standard puts "free data" plans into a state of regulatory uncertainty.

Beyond that, the new Title II Order states that "free data" plans have the potential to cause harm, and it declined to preempt restrictions on some of those plans in California law. And not to be overlooked is the Wheeler FCC's investigative finding that certain free data plans were

[4] 47 U.S.C. § 201(b); 47 U.S.C. § 202(a).
[5] 47 U.S.C. § 208(a).
[6] Order, at ¶ 503.
[7] Order, at ¶¶ 510-511.
[8] *See* Order, at ¶¶ 502, 503.
[9] Order, at ¶ 533.

inconsistent with the 2015 *Title II Order* dictates.[10] Thus, there is a significant likelihood that "free data" plans will be subjected to future Commission-level restrictions if not an outright ban. Any curtailment of "free data" plans necessarily constitutes rate regulation because it involves the Commission restricting usage categories that are subject to a rate charge of $0 when a subscriber's usage exceeds his or her monthly data allotments.

Similarly, the new Title II Order lays the groundwork for rate regulation in the form of limits or bans or usage-based pricing for broadband Internet services. The new Title II Order does not make any "blanket determinations," but states that it will "evaluate individual data cap practices under the general conduct standard based on the facts of each individual case."[11]

Usage-based broadband service plans often allow lower-usage customers to pay less and higher-usage customers to pay more. Such plans may, for example, include monthly allowances for high-speed data, whereby a value-conscious customer pays a lower monthly rate for 25GB or 100GB of data instead of a higher rate for unlimited data. Although usage-based pricing plans sometimes are characterized as having "data caps," the term is somewhat of a misnomer. They don't halt connectivity when allowances are exceeded. Rather, customers may experience reduced speeds or incur additional charges when they use more than their data allowances. The Commission's transparency rules include "usage-based fees" as well as "data caps and allowances" as commercial terms for "pricing" that must be disclosed. Restricting or banning usage-based pricing undoubtedly would constitute a type of rate regulation and take away valuable low-cost options for consumers.

It would have been better if the FCC had not reclassified broadband services under Title II and supported rate regulation in its new Title II Order. Even so, the Commission should avoid further harm to network investment and Americans' access to broadband by preempting state-level "affordability programs" that involve rate regulation. At the federal level, the agency ought to resist the expansion of rate regulation of any kind.

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Further Readings

Daniel A. Lyons, "Second Circuit Preemption Decision Won't Save New York Broadband Rate Regulation Scheme," *Perspectives from FSF Scholars*, Vol. 19, No. 18 (May 10, 2024).

[10] *See* FCC (Wireless Telecommunications Bureau) "Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services" (released January 11, 2017). See also FCC (Wireless Telecommunications Bureau), Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services, Order (released February 3, 2017) (rescinding January report).
[11] Order, at ¶ 542.

Seth L. Cooper, "Second Circuit Rejects Preemption Challenge to New York's Broadband Rate Regulation," *Perspectives from FSF Scholars*, Vol. 19, No. 16 (May 3, 2024).

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