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Regulating Your e-Freedom

On February 26, the FCC voted 3-2 to reclassify the Internet as a public utility under Title II of the Communications Act of 1934 and begin regulating it in much the same way the commission already regulates the electric, telephone, and cable television industries. This vote transforms the FCC into what many are now calling the "Federal Department of the Internet." Under a plan known as "Net Neutrality," the regulatory regime has produced over 400 pages of rules to "protect the Internet" and "keep it free and open." As if freedom and openness ever stem from government regulation that interferes with the free market.

The pretense for this action on the part of the FCC is that some big Internet Service Providers (ISPs) have been engaging in practices that some consider unfair. The chief complaints were blocking, throttling, and paid prioritization.

Many supporters of Net Neutrality have claimed that these practices threaten the Internet itself as a free and open platform for communication and innovation. These people and organizations have said that users are injured by their ISP's actions. A close look at each of these practices does not bear out these claims.

Blocking

Many ISPs are also cable television providers and offer streaming services for watching movies and television programming and listening to music. The bandwidth necessary for streaming large data files — such as video and audio — is huge compared to that of simply viewing webpages or sending and receiving e-mail. The ISPs that offer these paid services obviously have an interest in steering subscribers to their services rather than having those subscribers use other services. By identifying the IP addresses of other streaming services and blocking access to them, the ISPs hoped to increase use of their own services. Because ISPs ultimately answer to their subscribers and don't want to lose their business, cases of blocking have been rare. Usually, ISPs opt for throttling those services instead.

Throttling

If ISPs identify the IP addresses of streaming services that compete with them, they may simply lower the available network speeds to those addresses. This causes the device accessing the video or audio service to "buffer" — or pause — while waiting for enough data to be received before continuing. It is annoying and inconvenient, and many users look for the alternative offered by their ISP rather than deal with the inconvenience. Others just start the video stream ahead of time, pause it, and wait for the entire video to load before viewing it.

Paid Prioritization

Because building and maintaining the infrastructure needed to provide the bandwidth required for streaming large video and audio files is so expensive, many ISPs have reached out to those services and offered a deal wherein the service would pay a fee to offset the cost in return for faster speeds for those services. The only other alternative would be for the subscribers to pay an additional fee. Raising prices could cause the ISPs to lose subscribers, so they offered paid prioritization to services willing to pay for it.

In reality, having the cost of Internet access subsidized by the services that account for much of its cost is not any different than what happens when someone buys a budget-priced laptop preloaded with trial versions of software. The software vendors pay the computer manufacturer to install that software on the PC in the hopes that a certain percentage of users will purchase a license for it when the trial version expires. This keeps the cost of the PC down and appeals to buyers who are more concerned about price.

While some of these practices may cause inconvenience to end users, they do not reach the level of threatening the very freedom and openness of the Internet and injuring end users. Even in the rare cases where ISPs have engaged in blocking access to video streaming sites, is anyone really injured? Inconvenienced, yes; injured, no. Is it really necessary to have a federal bureaucracy protect Internet users from being inconvenienced? There are worse things than not being able to go on a Netflix binge and watch all nine seasons of *The X Files*. While some have called for government to step in and save the Internet from the inconvenience of having some services slowed by some ISPs, others have simply taken the free market approach and switched to an ISP that does not engage in these practices.

Admittedly, these practices do create a problem, but government does not have the solution. It should be clear to those who value a free and open Internet that in this case the antidote is worse than the poison: Granting government the ability to *regulate* the Internet will grant government control of the Internet.

The Internet has evolved into the most innovative, free, and open form of communication ever known to man. More people now have greater access to it than ever before, and an ever-growing number of people are using it as their communication method of choice. With software tools such as TOR and JonDo — which are freely available via download — the Internet allows private, anonymous communication in a way that is unrivaled by any other method. But beyond that, it is also a marketplace, a research network, and an alternative news source. The Internet is all these things and more because it grew up largely unhindered by government regulation. Until now, that is. If the architects of “Net Neutrality” get their way, all of that will change and the Internet, as we know it, will no longer exist.

Hands on the Internet

This is not the first time the FCC has attempted to enforce Net Neutrality. Two previous attempts were fairly short-lived, with the courts deciding that the FCC lacked the authority to enforce Net Neutrality. So, FCC Chairman Tom Wheeler began seeking a legal tool to make the third time a charm. When President Obama called on the FCC to reclassify the Internet as a public utility, Wheeler (who had originally opposed the idea) reversed his previous position and began pushing reclassification as the

legal tool Net Neutrality advocates had been seeking. Having been denied the ability to regulate the Internet in the past because of a lack of legal authority, the FCC simply reclassified it as a Title II public utility, and — voilà! — the authority to regulate it suddenly exists.

The first volley in this new attempt came on February 4, when Chairman Wheeler authored an op-ed piece for *Wired* in which he attempted to make his case for reclassification. Wheeler claimed that his plan would save the Internet from the ISPs. "My proposal assures the rights of internet users to go where they want, when they want, and the rights of innovators to introduce new products without asking anyone's permission," he wrote. It reads a little too much like, "If you like your Internet, you can keep your Internet. If you like your data-plan, you can keep your data-plan."

While claiming that the clear language of the plan would protect consumers and not include things such as rate regulations and Internet taxes, he went on to say that his plan "includes a general conduct rule that can be used to stop new and novel threats to the internet. This means the action we take will be strong enough and flexible enough not only to deal with the realities of today, but also to establish ground rules for the as yet unimagined." Just what those "new and novel threats to the Internet" are is left to be defined later. They are, after all, "as yet unimagined."

Wheeler called the general conduct rule a "catch-all standard" and wrote that it is necessary because

The bright-line bans on blocking, throttling, and paid prioritization will go a long way to preserve the virtuous cycle. But not all the way. Gatekeeper power can be exercised through a variety of technical and economic means, and without a catch-all standard, it would be that, as Benjamin Franklin said, "A little neglect may breed great mischief."

"Thus," Wheeler noted, "the Order adopts the following standard":

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.

At least Wheeler was being honest when he called it a "catch-all standard." The "no-unreasonable interference/disadvantage standard" — the actual name of the general conduct rule — is indeed so vague and general that there is no part of the Internet that it would not allow the FCC to regulate.

Even some organizations that are favorable to the idea of Net Neutrality found the open-ended general conduct rule objectionable. One such group is the Electronic Frontier Foundation. EFF has been a supporter of Net Neutrality since the beginning of the discussions about it, but has openly denounced the general conduct rule "as a recipe for FCC overreach." Corynne McSherry, intellectual property director for EFF, has written at least two different papers on the subject. In the papers McSherry addresses EFF's concerns with the general conduct rule's open-ended language:

We also wish to express our deep concern that the Commission is poised to adopt a "general conduct rule" that may lead to confusion and litigation, and perhaps even regulatory overreach. As we understand it, the Commission intends to apply this standard on a case-by-case basis, assessing whether given practices not included within the "bright-line" rules might nonetheless undermine the open

Internet … and, that, unfortunately, could be a recipe for litigation and confusion, as the FCC, providers, and customers fight over what qualifies as "unjust and unreasonable."

As an organization dedicated to preserving liberty in the digital age, EFF has been on the tip of the spear in the fight against the illegal and unconstitutional surveillance conducted by government agencies. In the matter of Net Neutrality, however, EFF seems to be in a tough spot. While favoring rules to prevent ISPs from acting as "gatekeepers," the organization finds itself concerned over the way those rules are playing out. The organization is concerned that the general conduct rule "could be abused by a future Commission to target legitimate practices that offer significant benefits to the public but could also be construed to cause some harm to a specific provider or consumer" because "it's also very easy to see [the general conduct rule] as a recipe for FCC overreach."

When Wheeler's plan was circulated to the other members of the FCC, the two Republicans on the commission wasted no time in voting against the plan, causing it to pass by a three-to-two margin split neatly along party lines. One of those commissioners, Ajit Pai, quickly became an outspoken opponent of Net Neutrality and tweeted a picture of himself holding the report — which had not yet been released to the public — and the caption, "Here is President Obama's 332-page plan to regulate the Internet. I wish the public could see what's inside." By the time the report was made public, it had grown to 400 pages. In a press release, Commissioner Pai made it clear that this is the beginning of a complete government takeover of the Internet, including tax hikes on broadband services, rate regulation, rules that stifle competition and innovation, and provisions that morph the FCC into a sort of "Department of the Internet" with authority to "micromanage the Internet." His release begins with a clear condemnation of the rules and the intentions of the people behind Net Neutrality:

The American people are being misled about President Obama's plan to regulate the Internet. Last week's carefully stage-managed rollout was designed to downplay the plan's massive intrusion into the Internet economy and to shield many critical details from the public. Indeed, Chairman Wheeler has made it clear that he will not release the document to the public even though federal law authorizes him to do so.

Pai also wrote a dissenting view as part of the report. In it he asserted,

For twenty years, there's been a bipartisan consensus in favor of a free and open Internet. A Republican Congress and a Democratic President enshrined in the Telecommunications Act of 1996 the principle that the Internet should be a "vibrant and competitive free market … unfettered by Federal or State regulation." And dating back to the Clinton Administration, every FCC Chairman — Republican and Democrat — has let the Internet grow free from utility-style regulation. The result? The Internet has been an amazing success story, changing our lives and the world in ways that would have been unimaginable when the 1996 Act was passed.

He goes on to express his concern that the FCC has done "an about-face" and that the reasons are purely political.

So why is the FCC changing course? Why is the FCC turning its back on Internet freedom? Is it because we now have evidence that the Internet is not open? No. Is it because we have discovered some problem with our prior interpretation of the law? No. We are flip-flopping for one reason and one reason alone. President Obama told us to do so.

On November 10, President Obama asked the FCC to implement his plan for regulating the Internet,

one that favors government regulation over marketplace competition.

You can tell a lot about a plan by looking at the people and organizations that promote it. One of the key players in the plan to regulate the Internet is Robert McChesney, who co-founded Free Press. Free Press has been instrumental in shaping the discussion about Net Neutrality and has poured time, money, and effort into the goal of seeing it become a reality. McChesney is a proud socialist who is "hesitant to say [he's] not a Marxist." He was interviewed in 2009 for the SocialistProject website and said, "At the moment, the battle over network neutrality is not to completely eliminate the telephone and cable companies. But the ultimate goal is to get rid of the media capitalists in the phone and cable companies and to divest them from control."

David Kaye is a professor of law at the University of California's School of Law in Irvine and the director of the school's International Justice Clinic. He is also the United Nations special rapporteur on freedom of opinion and expression and a member of the Council on Foreign Relations. According to his university website profile, he is "interested in efforts to translate international law — especially human rights law — in a domestic American context, whether in courts, legislatures, or the executive branches of government, at federal and state levels." In keeping with his internationalist goals, he praised the FCC for reclassifying the Internet. "This is a real victory for freedom of expression and access to information in the United States," he declared.

He went on to say, "The United States follows a small number of States, such as Brazil, Chile and the Netherlands, that have adopted net neutrality rules." Considering the history of Internet censorship in the nations he lists as members of the Net Neutrality Club, America should resign its membership.

Sales Pitch

While Net Neutrality has been sold to the American people as a plan to protect the Internet, the truth is that it is a plan to strip us of our liberties in the digital age. The Internet has provided an amazing and irreplaceable platform for information and activism. It is truly a thorn in the flesh of Big Government when patriots use it to communicate and collaborate. In the digital age, there is no line of demarcation between digital freedom and other freedom. If the American people can be robbed of the Internet as we know it, Big Government can more easily become Bigger Government.

But what about the rules themselves? Once the report was finally made public, journalists, legislators, and lawyers for the ISPs were able to see what was actually in it. When The New American looked at it, all of Commissioner Pai's worst claims were confirmed.

The heart of the report is a list of "bright-line rules" to regulate the Internet. Cornell University Law School's legal dictionary defines a bright-line as "An objective rule that resolves a legal issue in a straightforward, predictable manner. A bright-line rule is easy to administer and produces certain, though, arguably, not always equitable results." With a bright-line rule, the only thing allowed to be considered when determining the case is the rule itself.

Since the main issues Net Neutrality is intended to address are blocking, throttling, and paid prioritization, we will examine those rules here. Remember, these are the bright-line rules that Chairman Wheeler says don't go far enough.

No Blocking: "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices,

subject to reasonable network management."

Sounds innocuous enough. Until you read the report's explanation of the rule: "The phrase 'content, applications, and services' again refers to all traffic transmitted to or from end users of a broadband Internet access service, including traffic that may not fit clearly into any of these categories." So the rule that clearly says it deals with "content, applications, and services" is expanded to cover "traffic that may not fit clearly into any of these categories." What part of "bright-line" does Chairman Wheeler not understand? With a rule that broad, is there anything that cannot reasonably be included?

Since ISPs are forbidden by this rule from blocking "lawful content," what about the Christian-owned ISPs that offer to block pornography at the server level? Remember, bright-line rules don't allow for anything other than the rule to be considered when deciding a case. So it seems it would not matter that the subscriber requested that the material be blocked. It may violate the rule anyway.

No Throttling: "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."

Again, the report's explanation makes the rule's boundaries meaningless: "For purposes of this rule, the meaning of 'content, applications, and services' has the same as the meaning given to this phrase in the no-blocking rule." Why list categories at all if the definition is broader than the categories?

The no-throttling rule, combined with the general conduct rule, is where rate regulation comes into play. The explanation says, "If the Commission were concerned about the particulars of a data plan, it could review it under the no-unreasonable interference/disadvantage standard."

So, for all of his promises about not regulating rates, Wheeler admits that the FCC could — and would — apply the general conduct rule to address rate plans that cause the commission to be "concerned." Again, we see an example where the general conduct rule makes a bright line rule not so very bright line after all. Translation: expect rate regulations.

No Paid Prioritization: "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. 'Paid prioritization' refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity."

The explanation for this rule makes it clear that the reason for the rule is that many of the public comments about this practice were from people who didn't think it was "fair." "The record is rife with commenter concerns regarding preferential treatment arrangements, with many advocating a flat ban on paid prioritization. Commenters assert that permitting paid prioritization will result in the bifurcation of the Internet into a 'fast' lane for those willing and able to pay and a 'slow' lane for everyone else. As several commenters observe, allowing for the purchase of priority treatment can lead to degraded performance — in the form of higher latency, increased risk of packet loss, or, in aggregate, lower bandwidth — for traffic that is not covered by such an arrangement."

So, because many of the comments were negative, a rule had to be made — whether there was any real

issue with the practice or not. Because "commenters" were "concerned," the FCC has banned the practice.

If the commenters for this part of the report are like those that helped shape the public debate, there is even more to be concerned about. During the past few months, there has been a pattern of bogus comments made to online articles about Net Neutrality. Advocates and "bots" (computer programs that post while appearing to be real people) have been posting comments that make purely emotional and illogical appeals for government regulation to "save the Internet." A prime example is the following comment that appeared verbatim in several news articles under several different usernames:

Cable companies need to be regulated. They're working together to prevent having to provide better service or lower prices. The internet in the US is extremely slow and over priced.

My cable/internet costs me $150/month (from Time Warner). Contrast with my other expenses:

— Gym ($11/month from Planet Fitness)
— Mobile Phone ($21/month from TMobile)
— Car insurance ($25/month from Insurance Panda)
— Groceries ($90/month for me)

Yes, that's correct, my gym, cellphone, car insurance, and food COMBINED cost less than my TWC bill.

This will be a win for consumers by increasing competition and expanding infrastructure. Prices drop and speed increases. Profits drop. Aww.

Since the comments platforms most websites use allow users to click a commenter's username to see a list of other comments made by the same user, we were able to verify that many of the usernames associated with this comment logged no other comments, indicating that the username was created for the sole purpose of posting this comment. This tactic seems to be part of the pattern of dishonesty and subterfuge that has marked the entire path to Net Neutrality.

Taxing the Internet

Wheeler dismissed the idea of new taxes and fees as a myth. The real myth is that Big Government can regulate one of the greatest innovations mankind has ever known without adding to its cost. The reality is that new taxes and fees are coming.

Wheeler and others have pointed out that the Internet Tax Freedom Act (ITFA) prevents "state and local jurisdictions from imposing new taxes on the Internet." But now that the FCC has decided that the Internet is a public utility, ISPs can be taxed at a much higher rate, and they will have to pass that cost along to consumers in the form of increased subscriber fees. Wheeler may call it whatever he likes; I call it a tax.

It's not only people and organizations on the Right who are predicting new taxes on the Internet. The Progressive Policy Institute issued an eight-page report back in December showing why "U.S. consumers will have to dig deeper into their pockets to pay for both residential fixed and wireless broadband services" because of the reclassification. The group realized no one had done a study on the economic impact of Net Neutrality on consumers. What they found was bad news:

We looked into the issue and discovered there is nothing but bad news on this front: Once ISPs are labeled "telecommunications providers" under Title II, their services become subject to both federal

and state fees that apply to those services. The two main federal charges are an excise tax and a fee for "universal service." (We ignore the federal excise tax for the purposes of our calculation.) States and local municipalities impose similar fees and taxes — from franchise fees to high-cost funds to utility user fees to state-based universal service funds — which vary from state to state, and within states by locality. (We ignore any state and local fees that apply to businesses.)

Although the state and federal governments collect these fees from broadband providers, history shows — and economic models of competitive markets predict — that the fees are passed along to customers, just as they are now on telecommunication services. So consumers' Internet bills will soon have all those random charges tacked on at the end, much like they see on their phone bills. And these new reclassification-induced fees will be *on top of* the FCC's planned 16-cent-per-month (or $1.92 per year) increase in wireless and wireline fees to add $1.5 billion to the fund that finances Internet connections in schools. [Emphasis in original.]

The battle for regulating — and taxing — the Internet under the guise of protecting it goes back more than a decade. It has failed every time, thanks to the independent nature of the Internet and the clear thinking of innovators, lawmakers, and judges who see the value in an unregulated Internet. Even during the most liberal days of the Clinton administration, those who sought to gain government regulatory control over the Internet found no allies within the administration. As John Fund observed in *National Review*, "Back in the 1990s, the Clinton administration teamed up with Internet pioneers to promote a hands-off approach to the new industry and keep it free from discriminatory taxation." It's a strange turn of events when the Clinton years start looking like the good old days.

The American Cable Association (ACA), AT&T, The Wireless Association (CTIA), the National Cable & Telecommunications Association (NCTA), and USTelecom have all filed lawsuits petitioning the courts to set the Net Neutrality order aside as a violation of existing laws. AT&T's petition asks the same court that "vacated and remanded the Commission's previous attempt at Internet regulation in *Verizon v. FCC*" to review the order "on the grounds that it is arbitrary, capricious, and an abuse of discretion" and that it "violates federal law, including, but not limited to, the Constitution, the Communications Act of 1934, as amended, and Commission regulations promulgated thereunder," and that it "conflicts with the comment and rulemaking requirements" of federal law, "and is otherwise contrary to law." The petition "requests that this court hold unlawful, vacate, enjoin, and set aside the Order, and that it provide such additional relief as may be appropriate."

Two Republican Representatives — Marsha Blackburn of Tennessee and Doug Collins of Georgia — have introduced bills to kill Net Neutrality in its infancy. Blackburn's bill, H.R. 1212, the Internet Freedom Act, "would block the FCC's Net Neutrality rules by stating that they shall have no force or effect." In addition, it "prohibits the FCC from reissuing Net Neutrality rules." Collins has introduced a "Resolution of Disapproval" under the Congressional Review Act in an effort to set the Net Neutrality order aside. If either of these bills can get the support of the two-thirds of federal legislators who have said they are opposed to what the FCC is trying to do, these bills could be veto proof and ObamaNet will be a thing of the past.

Let's hope that between the courts and Congress, Americans can continue to enjoy the liberty of a free and open Internet.

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