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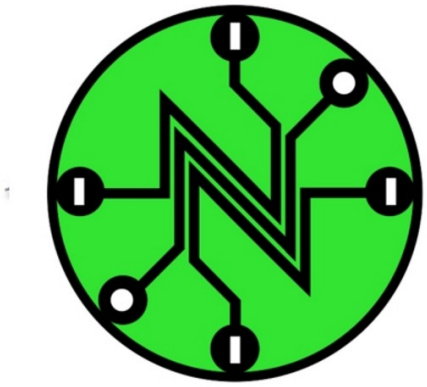
A Look Inside the Net Neutrality Rules: It's Worse Than You Think!



After the FCC made its "Net Neutrality" rules public late last week, *The New American* began poring over the 400 pages of rules and comments in the document, officially entitled "Report and Order on Remand, Declaratory Ruling, and Order" in an effort to inform our readers about what is actually in the rules.

What we found affirms the statements by FCC Commissioner Ajit Pai that the rules are a threat to the future of the Internet and a danger to both liberty and a free market.

The report put forth by the regulatory regime is broken down into several parts. Before actually getting into the rules, the document spans 45 pages laying down philosophical and legal arguments for both the FCC's justification and authority for regulating the Internet in the first place. Furthermore, the FCC document relies on and quotes from sources that have a history of attempting to abolish the free market capitalist nature of the Internet. As pernicious as those arguments and sources are, what's actually in the rules is even worse.

The report repeatedly makes mention of the "bright-line rules" the FCC has created to keep the Internet open and free. "Bright-line" refers to rules, laws, or legal decisions that are clear and unambiguous. These are usually created when a previous rule, law, or legal decision left room for multiple interpretations. 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." The USLegal website gives a similar definition and explains, "For example, in American statutory rape laws, the age of the victim and the age of the accused are the only relevant factors determinative of guilt or innocence. Because it is a bright-line rule, there is no balancing test to examine factors such as mistake of the accused, the misrepresentation of age by the minor, or the minor's consent to sexual intercourse."

So bright-line rules are clear, and do not allow anything other than the rule to be considered when determining a case.

What exactly are the bright-line rules the FCC has created to regulate the Internet?

1. 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."

While this seems straightforward, the devil is in the details. The report offers the following "clarification" to this 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." One is left to wonder why the categories are listed in the first place, if the definition is broader than the categories.

The report's "clarification" goes on to explain, "Further, the no-blocking rule adopted today again applies to transmissions of lawful content and does not prevent or restrict a broadband provider from refusing to transmit unlawful material, such as child pornography or copyright-infringing materials." This opens up a whole new Pandora's Box of ISPs being put in a position to determine what is "unlawful material." Might ISPs block traffic to torrent sites that host "copyright-infringing materials" alongside public domain materials?

Since the "No Blocking" rule bans ISPs from blocking "lawful content," what are the ramifications for services such as American Family Online, which offer filtered Internet access to customers who want to have pornography and other materials blocked at the server level? Since such content is lawful and the bright-line rule does not allow the fact that the customer wants such materials to be blocked to be taken into account, one is left to believe it would violate the rule.

Notice, too that the rule allows blocking for "reasonable network management." One can imagine a new set of bright-line rules in the next iteration of Net Neutrality to clarify what constitutes "reasonable network management."

2. 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 details of the rule demonstrate its problems. The report explains, "With the no-throttling rule, we ban conduct that is not outright blocking, but inhibits the delivery of particular content, applications, or services, or particular classes of content, applications, or services. Likewise, we prohibit conduct that impairs or degrades lawful traffic to a non-harmful device or class of devices. We interpret this prohibition to include, for example, any conduct by a broadband Internet access service provider that impairs, degrades, slows down, or renders effectively unusable particular content, services, applications, or devices, that is not reasonable network management."

Again, there is an exemption for "reasonable network management" that will undoubtedly need to be defined later.

The report continues, "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," meaning lawful content of any type whether or not it fits any of the categories listed. As in the "No Blocking" rule, "unlawful material" is neither protected nor clearly defined: "Further, transfers of unlawful content or unlawful transfers of content are not protected by the no-throttling rule."

Under the "No Throttling" rule, the commission is showing what it meant by its commitment to "forbear" regulating rates and plans. According to the continued explanation, "Because our no-throttling rule addresses instances in which a broadband provider targets particular content, applications, services, or non-harmful devices, it does not address a practice of slowing down an end user's connection to the Internet based on a choice made by the end user. For instance, a broadband provider may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier." Sounds nice until the next line: "If the Commission were concerned

about the particulars of a data plan, it could review it under the no-unreasonable interference/disadvantage standard." So much for forbearance.

The "no-unreasonable interference/disadvantage standard" will be covered in more detail later in this article. Spoiler alert: It's particularly nasty. By application of the "no-unreasonable interference/disadvantage standard," the report seems to hint at regulating both rates and plans and much, much more.

3. 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."

If it weren't for the "no-unreasonable interference/disadvantage standard," this would possibly be the most excrable rule of them all. "Paid Prioritization" is a name given to the practice of ISPs striking deals with content providers (often their own affiliates) to speed up traffic to and from those services to make them more attractive and valuable to the end user. The entire argument against the practice is that it is not "fair" to services who can't or won't pay the price to have their traffic sped up.

The report's explanation for the adoption of this rule is that many of the people who participated in the public comment period don't like this practice and fear the results if it continues. According to the report, "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."

Commenters further argue that paid prioritization will introduce artificial barriers to entry, distort the market, damage competition, harm consumers, discourage innovation, undermine public safety and universal service, and restrict free expression. Never mind that ISPs have expenses connected to bandwidth, network maintenance, and equipment — all of which are more costly for services that use higher bandwidth, particularly those that stream large video files. It only makes good business sense to pass part of that faster-connection cost along to the consumers they are trying to reach with their content; however, because "commenters" were "concerned," the FCC has banned the practice.

For a bright-line rule to mean anything, there can be no exceptions, especially those that are handled on a case-by-case basis; however, that is exactly what the FCC is doing with this rule. According to the report, "Given the potential harms to the virtuous cycle, we believe it is more appropriate to impose an ex ante ban on such practices, while entertaining waiver requests under exceptional circumstances."

The report explains the waiver process: "Under our longstanding waiver rule, the Commission may waive any rule 'in whole or in part, for good cause shown.' General waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such a

deviation will serve the public interest. In some cases, however, the Commission adopts specific rules concerning the factors that will be used to examine a waiver or exemption request. We believe that such guidance is appropriate here to make clear the very limited circumstances in which the Commission would be willing to allow paid prioritization. Accordingly, we adopt a rule concerning waiver of the paid prioritization ban that establishes a balancing test, as follows: The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet."

So "No Paid Prioritization" really means that rather than the free market deciding this practice, the FCC will decide it on a case-by-case basis. It is a system wide open for favoritism.

After listing the bright-line rules which have dominated most of the discussion of the Net Neutrality issue, the report addresses the rule that is the vilest of all:

Preventing Unreasonable Interference or Unreasonable Disadvantage that Harms Consumers and Edge Providers.

This is not a bright-line rule by even FCC Commission Chief Wheeler's definition. He describes it in his commentary toward the beginning of the report, referring to ISPs as "gatekeepers" because he claims they have the ability and the motive to manipulate the Internet. He writes, "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, 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.

What does Wheeler mean when he writes, "Gatekeeper power can be exercised through a variety of technical and economic means"? The body of the report puts it this way, "We believe that there may exist other current or future practices that cause the type of harms our rules are intended to address." So now the report is attempting to protect end users from something that has not even happened yet, and the architects of this rule are not even trying to hide it.

How exactly will the regulatory regime go about enforcing a rule that prohibits something as nebulous as "unreasonably interfer[ing] or unreasonably disadvantag[ing]" the use of the Internet? On a case-by-case basis. The report states, "For that reason, we adopt a rule setting forth a no-unreasonable interference/disadvantage standard, under which the Commission can prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet."

Here is the greatest danger of the whole scheme. This is total control of the Internet. It is how digital freedom dies.

This rule allows the FCC to unilaterally decide everything from rates to plans, from equipment to content, from the introduction of new technologies to the number of ISPs in a region. Everything. On a

case-by-case basis. With only the conscience of the commissioners as their guide.

This is why concerned citizens must defeat Net Neutrality. Congress could set it aside. The courts could overturn it.

Americans must act soon in order to save the greatest form of communication, education, information, and innovation man has ever known.