



Written by [C. Mitchell Shaw](#) on March 20, 2015

Net Neutrality's Achilles' Heel

The most onerous part of the FCC's new Net Neutrality rules, [made public last week](#), is not to be found in the "bright-line" rules prohibiting blocking, throttling, and paid prioritization. As objectionable as those rules are, they pale in comparison to what FCC Chairman Tom Wheeler called a "catch-all standard." The rule — known as both the "No Unreasonable Interference or Unreasonable Disadvantage Standard for Internet Conduct" rule and the "general conduct" rule — is so broad and vague that there is really no part of the Internet that it does not allow the FCC to regulate.



Chairman Wheeler, writing in the [report](#) on the FCC's Net Neutrality rules, claimed the general conduct rule is needed because the bright-line rules don't go far enough to protect the open Internet from Internet Service Providers (ISPs) acting as "gatekeepers" to control the flow of information between "edge providers" (companies and individuals providing content) and "end users" (companies and individuals using the Internet). He stated,

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.

The power of this rule rests in its ambiguity. The commission that created it will have sole discretion to define the rule and decide when and how it's enforced on a case-by-case basis. By pitting ISPs against consumers, and consumers against ISPs, the FCC is putting itself in a position to act as referee and gain tremendous power in the process. That would be objectionable enough if there really was a battle between ISPs and consumers, but at least one commissioner says that battle is trumped up.

Commissioner Ajit Pai, who has been critical of the rules from the beginning, wrote a dissenting view which was published 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



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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.

Pai expresses his concern that not only has the FCC “abandon[ed] those policies” and “seize[d] unilateral authority to regulate Internet conduct, to direct where Internet service providers put their investments, and to determine what service plans will be available to the American public,” but that it has done so in “an about-face from the proposals the FCC made just last May.”

Dismissing the idea that any problems between ISPs and consumers reach the level of requiring government intervention on the scale proposed by the Net Neutrality rules, Pai explains the FCC’s “about face” as being politically motivated:

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.

The FCC is supposed to be an independent agency. Instead, it appears to have become a tool of the Obama White House. Constitutionalists find it refreshing to have an FCC commissioner speak and write so clearly on a topic this important.

Pai’s dissent addresses the general conduct rule in similarly unambiguous language:

Even FCC leadership conceded that, with respect to the sorts of activities the Internet conduct standard could regulate, “we don’t really know” and that “we don’t know where things go next,” other than that the “FCC will sit there as a referee and be able to throw the flag.”

In other words, the only limits to how the FCC can apply the general conduct rule are the imaginations and consciences of the commissioners. Given that three-fifths of the commissioners sold this to the American people as “light-touch” regulation that is walled in by “bright-line” rules, it would appear their imaginations outstrip their consciences.

Commissioner Pai’s criticism of the general conduct rule further says that,

Many practices will be reviewed under the general conduct standard that will be, quite literally, a catch-all. Moreover, charges, practices, and classifications will also be reviewed under the amorphous just and reasonable standard in sections 201 and 202. Parties will have no way of knowing, in advance, how a Bureau or the Commission — much less courts acting pursuant to sections 206 and 207 70 — will rule on a particular matter. There will be no certainty. Indeed, one public interest group called the catch-all a “recipe for overreach and confusion.”

The public interest group to which Pai refers is the Electronic Frontier Foundation. EFF has been a supporter of Net Neutrality since the beginning of the discussions about it, but now finds itself concerned about how the rules are playing out. Commissioner Pai’s reference above comes from two separate papers written by Corynne McSherry, intellectual property director for EFF.

In the papers, McSherry addresses EFF’s concerns with the general conduct rule’s open-ended language:



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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.”

After stating that the FCC’s role in preserving the open Internet “should be narrow and firmly bounded,” McSherry states, “We fear the proposed ‘general conduct rule’ may meet neither criteria.”

EFF, an organization dedicated to preserving digital liberty, has been one of the loudest, clearest, and most effective voices in opposition to the illegal and unconstitutional surveillance conducted by both government agencies and irresponsible corporations.

However, in the matter of Net Neutrality, EFF leaders seem to be caught between the devil and the deep blue sea. While they favor rules to prevent ISPs from acting as “gatekeepers” of the Internet, they also recognize the propensity for the FCC to create rules that, in their words, “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.”](#)

With even supporters concerned about where these FCC plans are going, Net Neutrality may have a bumpy road ahead as both legislators and the courts take a hard look at it.



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