THE GOOD, THE BAD, AND THE UGLY: *COMPREHENDING THE FCC OPEN INTERNET RULING*

By James Phelps, Ph.D.
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There is good in FCC Order 15-24. There is also bad. Most importantly, there is some real concern about the ugliness that underlies the way it was ultimately consolidated and released. Let's start by looking at some of the good that is contained within the Order.

To paraphrase Commissioner Wheeler's appended statement to the Order, the Internet and therefore Broadband networks must be fast, fair, and open. I agree and so should you. This is something that we all want to see maintained. These three components are essential to the continued innovation and opportunity the Internet offers to everybody from startup businesses to free speech advocates. The Order established three rules intended to maintain these fundamental concepts.

Para. 112 – the **No Blocking Rule**: *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 nonharmful [sic] devices, subject to reasonable network management.*

Para. 119 – the **No Throttling Rule**: *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*

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Bio

Dr. James Phelps, owner of *Phelps and Associates, LLC*, is the primary developer of the top ten ranked on-line undergraduate and graduate degrees in Border and Home-land Security currently offered at Angelo State University. Prior to earning his Ph.D. in Criminal Justice from Sam Houston State University Dr. Phelps served in the U.S. Navy in a variety of positions including assignments as a Nuclear Repair officer, Assistant Radiological Controls officer, sub-marine nuclear power plant operations, maintenance, and supervision billets, and ended his career as the Quality Assurance officer for deep submergence systems at SEAL De-livery Vehicle Team 1.

content, application, or service, or use of a non-harmful device, subject to reasonable network management.

Para. 125 – the **No Paid Prioritization Rule**: *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 this were where the rule making left off, rather than where it began, then establishing rules for the Internet would make sense. Unfortunately, the FCC went about establishing these rules by claiming potential threats and violations from all manner of beastly origins as their justification for moving forward – and moving beyond the fundamentals of Net Neutrality.

It is the fear mongering that leads a reader to see that this particular rule making goes beyond addressing standards that level the playing field and delves into a terrifying potential apocalypse of which there is no reported evidence. As noted by Commissioner Clyburn, without these rules any Broadband provider could curtail free speech by throttling or blocking content, or through the extraction of restrictive tolls. This would reduce the Internet in the United States to a similarity with police states worldwide – where the service provider restricts speech and access based on their own concepts of acceptable content. Am I afraid that my BIAS will throttle my speed, or block my access to content or applications? Sometimes it seems that I ought to have those fears. Most of the time it doesn't. Why? Well, just because it hasn't happened in the U.S. before doesn't mean it won't happen in the future. Think about it, our corporations are clearly modeled on the dictatorships of Myanmar and Syria or the theocracies of Saudi Arabia and Iran. If their governments can throttle and block the Internet whenever they want – surely U.S. businesses would do so to maintain a certain political mindset of their consumers?

Commissioner Rosenworcel adds to the fear mongering in her succinct argument that: "We cannot have a two-tiered Internet with fast lanes that speed the traffic of the privileged and leave the rest of us lagging behind. We cannot have gatekeepers who tell us what we can and cannot do and where we can and cannot go online. And we do not need blocking, throttling, and paid prioritization schemes that undermine the Internet as we know it" (FCC 15-24, p. 320). She's right! But there is no evidence this has happened or will happen.

In fact, I'd be happy to pay a bit more for faster service if my BIAS could

provide it. As a professor I teach online, and do research and writing using online assets and information sources. Sustained high-speed access is particularly important when I'm conducting online courses or researching a topic – but this is when I'm competing with all those people accessing Netflix and Amazon Prime movies and games. The throttling problem addressed in the FCC Order isn't the real problem. Instead, the order should have prohibited the throttling of information suppliers (which it does) while concurrently allowing a BIAS to allow consumers to select their speed and pay an associated premium for faster connectivity. Unfortunately, it doesn't address or allow the later proposition.

Commissioner Pai writes that this Order will result in higher costs, slower service, stifle competition, particularly resulting in the loss of small competitors in the rural arena. He's right in that the burden of complying with Title II regulations and micromanagement could wipe out many small businesses through being taxed as telecommunications providers. That the majority in this 3-2 FCC decision based their argument on the application of Title II to Broadband providers as essential to prevent a hypothetical list of problems that have few real examples to fall upon is just plain ludicrous.

The Order specifically defines broadband Internet access service as:

A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part. (FCC 15-24, p. 10)

It goes on to apply Title II to BOTH fixed and mobile BIAS (FCC 15-24, pp. 14, 15, & 22).

Pai states that, "Title II is not just a solution in search of a problem – it's a government solution that creates a real-world problem" (FCC 15-24, p. 334). Pai goes on to address many faults in the rule making process where the rules proposed in the 2014 Notice of Proposed Rule Making (NPRM 14-28) differ from the final rules adopted in this Order. He also attacks the very premise that the FCC has the authority to reclassify BIAS and mobile BIAS as a Title II telecommunications service, essentially utilizing his dissent as a forum for building an evidentiary case for future court challenges to this Order.

Commissioner Pai's dissent aggressively charges what is clearly stated within the order – the forbearance on Universal Service Fees is only temporary. You know what USFs are – they are the charges that make having a telephone more

expensive than actually using the telephone. USF will ultimately be applied to BIAS and consumer costs will concurrently rise. When it comes to this new Order addressing broadband, Pai writes, "More new taxes are coming. It is just a matter of when" (FCC 15-24, p. 326). That's a fact – Jack! The stage is set for the imposition of user fees, access fees, local, state, and federal communications taxes, etc. It's just a matter of time – and we don't know how long it will be before these get implemented. The forbearance of these is always left open ended. They could be implemented, tomorrow, next month, or just prior to the next election cycle – whenever it is most expedient for the party in power to do so.

Now for the ugly that you've all been waiting for. The application of Title II status to fixed and mobile Broadband providers making them regulated common carriage systems is a direct refutation of decades of FCC rule making and Congressional legislation. That it originated as an afterthought in the 2014 NPRM as a point for future discussion is instructive.

Commissioner O'Rielly notes in the opening of his dissent that the application of Title II has been intentionally hidden from public view and imposed without sufficient consideration, saying, "It is fauxbearance: all of Title II applied through the backdoor of sections 201 and 202 of the Act, and section 706 of the 1996 Act. Moreover, all of it is premised on a mythical "virtuous cycle"—not actual harms to edge providers or consumers" (FCC 15-24, p. 385). Seems like there is some dissention within the ranks when it comes to how Title II was applied to the Internet.

When President Obama made it a clear component of what his plans were for regulating the Internet[1] – the process at the FCC suddenly went underground. The White House never released its regulation plan for the Internet, but provided it in secret to only a select few of the FCC hierarchy.[2] That plan still has never been released for public scrutiny. Yet we suddenly see the FCC Chairman and the Democratic Commissioners supported by Democrats in Congress endorsing a complete government take-over of the Internet through application of Title II?[3] Sounds a little fishy to me.

Thousands of pages and hours of sound bytes will be produced arguing about FCC Order 15-24 establishing an Open Internet. The simplest expression of what all this really means comes from Commissioner Pai who notes, "I am optimistic that we will look back on today's vote as an aberration, a temporary deviation from the bipartisan path that has served us so well. I don't know whether this plan will be vacated by a court, reversed by Congress, or overturned by a future Commission. But I do believe that its days are numbered." (FCC 15-24, p. 384).

Before you get up in arms and start throwing talking points and political rhetoric at me – please remember – I've read all 400 pages of the FCC Order, including all the footnotes. I've even gone back to review the 2014 NPRM that started this process, the Verizon court case, and etc. I haven't read or listened to a single talking head comment, any news releases from any agency, nor any jabbering from my Broadband Internet Access Service (BIAS). This is strictly my opinion and analysis of the order and in no way reflects the position or opinion of my current or past employers, any other person except as specifically quoted, or any particular political party or group.

[1] The White House, Net Neutrality: President Obama's Plan for a Free and Open Internethttp://www.whitehouse.gov/net-neutrality (Nov. 10, 2014)

[2] Tom Wheeler, FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality, Wired, http://wrd.cm/1EGifR4 (Feb. 4, 2015) ("[T]he time to settle the Net Neutrality question has arrived. This week, I will circulate to the members of the Federal Communications Commission (FCC) proposed new rules to preserve the internet as an open platform for innovation and free expression.").

[3] Mario Trujillo, Dems to FCC: 'Time for action' on Web reclassification, The Hill (Dec. 18, 2014), available at http://bit.ly/1GwPOTF

Available at: https://www.surfwatchlabs.com/news-and-analysis/posts/the-good-the-bad-and-the-ugly-comprehending-the-fcc-open-internet-ruling