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FCC's NET NEUTRALITY RULES: A FIRST AMENDMENT OFFENSE

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This November rules the FCC adopted December 21, 2010 governing “network neutrality” go into effect. Under these rules, FCC will lord over the net, exercising its subjective discretion to second guess the decisions of the private owners of internet wires on the propriety of their charges, the speed of content carriage, the nature and extent of interconnectivity, and the exclusion of content. FCC lacks statutory authority under the Communications Act for extending its jurisdiction over the internet, but in a classic power grab it has done just that. This is the agency’s regulatory toe in the door. If history is our guide, FCC will use that opening to insinuate itself into all manner of private structural and content based decisions made by internet wire owners.

The argument for net neutrality is presently fictive; it depends on faith that the future will bring about a closed net market without government intervention. Advocates of FCC regulation of the internet in this way argue that without FCC ordered net neutrality (meaning FCC regulation principally to prevent content and traffic speed discrimination on the web) the internet would devolve into an oligopoly in which a small number of internet service providers would erect discriminatory barriers to web access and web content distribution. There is one enormous problem with that argument. It is contradicted by the economics of the web. It is in the financial interest of those who own the wires to avoid limiting

content and to achieve ever higher transmission speeds and market penetration, favoring to a great degree the widest access and interactivity possible. Consequently, it is the rare exception and not the rule in the present environment (free of FCC enforcement of net neutrality rules) that any wire owner engages in acts to dumb down the web, limit access, or constrict content tolerance.

Those who advocate the net neutrality rules are oblivious to a major contradiction in their argument. While internet service providers are a large and competitive bunch, there is but one, all powerful federal government. The greatest threat to media of mass communication has historically been the legal monopoly of the government. Whether federal or state, when the government exercises content or structural controls by force of law and, thus, substitutes for private judgments political ones, it invariably affects who may speak and what may be said universally. The heart of the First Amendment is its anti-government premise. It was designed to disarm the monopoly of the state from exercising any power whatsoever over speech and press. In short, under the First Amendment, if one owns the wires over which communication is conveyed, he or she has the right to determine who may speak (or be carried) and what may be said, and that constitutional command applies regardless of the degree of competitiveness in the market. We are forbidden by the First Amendment from supplanting private choices with public ones.

At root, the net neutrality rules presume to do just that. They allow the FCC to determine whether acts of "discrimination" are occurring in which the owner of net wires has limited access, slowed down the speed of communication, or otherwise treated one set of communicators differently from another. That move by the FCC puts it in the position of favoring certain means of communication or content carriage that the private wire owners may oppose. That move by the FCC enables it to force wire owners to expend resources to accommodate government demands concerning the speed of communication or treatment of content. Each such application of government authority to supplant private judgment offends the First Amendment.

In a thorough analysis of the Net Neutrality rules (Cato Institute Policy Analysis No. 507, "'Net Neutrality' Digital Discrimination or Regulatory Gamesmanship in Cyberspace?"), Cato Institute scholar Adam D. Thierer explains how those rules violate the property rights of wire owners, impose new barriers to market entry, retard innovation, invite subjective regulatory determinations of what constitutes unlawful "discrimination," and defeat freedom of contract. Thierer finds the move toward regulation particularly alarming because it proceeds apace without any proof of significant private limits on openness, end to end design of the internet, or content. Market forces are pushing strongly against such limits. He concludes, "by calling government in to solve a nonproblem, supporters of Net neutrality . . . are essentially inviting regulators into the broadband marketplace and asking them to play a more active role in how the Internet is governed in the future." Indeed, and they are also ensuring monopoly based political decisions by the FCC in place of the competing private elections of the many wire owners.

In a thorough analysis of the economics of the internet (Cato Institute Policy Analysis No. 626, "The Durable Internet Preserving Network Neutrality without Regulation"), adjunct Cato Institute Scholar Timothy B. Lee explains that there are thousands of network owners, hundreds of millions of users, and vigorous competition among them to ensure the broadest and most inclusive service, the greatest service speed, and the highest degree of service penetration, ultimately to even the most remote locations in the United States. Together with wireless services and interconnectivity, there is no significant shortage of access, no shortage of effort to achieve universally high communication speeds, and no shortage of desire to carry all manner of content. Lee observes that "only one institution in American society has the size and power to bring about a return to the bad old days of monopolistic communications markets: the federal government."

The Obama FCC, together with the advocates of net neutrality regulation, have created a problem where none previously existed. They have now invited a monopoly of state power to influence the structure and content communicated over a heretofore wide-open and robustly competitive web. They do so blind to the risks. They make the mistake James Madison did not: They presume it better for government to decide from time to time who may speak and what may be said over mass media rather than trust in the sovereignty of private parties to exercise those quintessential editorial functions.

Although FCC has adopted new internet regulations, the battle for net freedom is far from over; Congress may revoke the regulations; or the courts may hold them a violation of the Communications Act, the Administrative Procedure Act, or the First Amendment. Challenges are in the offing and public pressure against the rule mounts. Freedom and progress on the web depends on vigilantly guarding against adoption and implementation of regulations like those recently adopted by the FCC.