

The Federal Communications Commission
45 L St. Northeast
Washington, DC 20554

Re: WC Docket No. 23-320, FCC 23-83, Safeguarding and Securing the Open Internet

To whom it may concern:

I write to reply to comments calling the Commission’s proposed general conduct standard into question. These comments¹ persuasively argue that the standard’s vagueness will impede innovation. I write to explain why that is not just bad policy, but undermines the Commission’s proffered rationale for the standard.

The Commission claims that the general conduct standard would “provide certainty and flexibility to the industry and encourage innovation, while best protecting the open Internet.”² But in fact, the standard as implemented under the framework laid out in the proposal would decisively side with the goals in the second half of the foregoing sentence while disregarding those in the first half. The Commission’s failure to recognize as much threatens to make any resulting rule arbitrary and capricious.

The general conduct standard forbids providers to “unreasonably interfere with or unreasonably disadvantage” end users’ access and use and edge providers’ provision of content and services.³ Each one of the quoted terms (except “with” and “or”) is quite open-ended, and the key term “unreasonably” is so indefinite as to lack content altogether. A provider considering any measure that would in any way impede end users or edge providers simply has no way to know whether the measure *unreasonably* (and therefore unlawfully) impedes access or not.

The proposal seems to contemplate that the evident vagueness of the general conduct standard is ameliorated by the Commission’s proposed enforcement policy. That policy, though, proceeds on “a case-by-case” basis.⁴ And the only guidance for the application of the policy is a set of seven factors, each of which is (to varying degrees) itself indefinite.⁵ For instance, consider the

¹ Such as the comments of the Information Technology and Innovation Foundation.

² Proposal ¶ 166.

³ *Id.* ¶ 165.

⁴ *Id.* ¶ 166.

⁵ *Id.*

first factor, “whether a practice allows end-user control and enables consumer choice.”⁶ What of practices that facilitate end-user control but do not promote consumer choice, or vice versa? Even whether a practice promotes one or the other of these objectives will surely be debatable in many cases. Moreover, the proposal gives no guidance about how to weigh the seven factors against each other. What of a practice that very strongly promotes one of the desiderata but very weakly impedes the other six? What if the proportions are two to five? Three to four? Does each factor matter as much as every other?

But the most troubling feature of the seven-factor list is that it is “non-exhaustive.” Even assuming a provider could resolve the content of each of the seven factors sufficiently to be certain that each factor favored its proposed practice, the provider could not know whether the Commission would itself favor the practice, because the Commission always has the option to produce a new set of factors that doom the practice. It is this last feature, more than any other, that shows that the general conduct standard, if enforced in the way contemplated by the proposal, would give providers no firm guidance whatsoever.

We can now see how the Commission’s explanation of the general conduct standard fails to hold up. The Commission claims that the standard strikes a balance between predictability (and hence innovation) and protection. But in fact, the Commission proposes to tilt the table entirely toward protection. That is bad policy, but that’s not my point, which is rather that the Commission’s explanation is inadequate. If the Commission wishes to side with protection against predictability and innovation, it must say so candidly and explain why it prioritizes the former over the latter. The proposal’s current claim to achieve both goals cannot support the general conduct standard it offers.

Sincerely,

Paul J. Ray

⁶ *Id.*