

Policy Comments of the International Center for Law & Economics, Restoring Internet Freedom NPRM

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## Summary

“Federal administrative agencies are required to engage in “reasoned decisionmaking” based on a thorough review and accurate characterization of the record. Their analysis must be based on facts and reasoned predictions; it must be rooted in sound economic reasoning; it must be logically coherent; it must not entail subterfuge or misleading statements. On even these most basic grounds the 2015 OIO falls short.

The entire open Internet rulemaking enterprise is an exercise in post hoc rationalization — the formulation of policy, not statutory interpretation. Net neutrality was determined by certain activists to be “necessary;” proponents were unable to get it from Congress; the FCC was willing; and it tried at least three times to cobble together some statutory basis to justify its preference for open Internet rules, as opposed to determining that such rules were necessary to enforcing a particular statutory provision.

The post hoc/ultra vires problem with the 2015 OIO is disturbingly similar to the one at issue in *State Farm*, which sets the standard by which the sufficiency of the Commission’s analysis is judged. In that case, the Court held that an agency’s (NHTSA’s) decisionmaking did not follow from the analysis it undertook, nor the statutory purpose it purported to further. The same is true here. If deployment really were the aim of the 2015 OIO, the FCC could have directly encouraged it through any number of more direct (and almost certainly more effective) means. Instead, the Commission concocted a regulatory Rube Goldberg apparatus to do so only, at best, indirectly — and in a way that happened also to further a different, arguably ultra vires objective. Perhaps most tellingly, the

Commission was forced to undertake a series of actions, superficially independent of the 2015 OIO, in order to engineer several of the factual predicates necessary to enable it to justify its rule under the statute. An agency properly acting within the scope of its authority would not have to work so hard to fit the round peg of its chosen policy into the square hole of its statute.”

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