

The Internet Conduct Rule Must Die

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It's fitting that FCC Chairman Ajit Pai recently compared his predecessor's jettisoning of the FCC's [light touch framework](#) for Internet access regulation without hard evidence to the Oklahoma City Thunder's [James Harden trade](#). That infamous deal broke up a young nucleus of three of the best players in the NBA in 2012 because keeping all three might *someday* create salary cap concerns. What few saw coming was [a new TV deal](#) in 2015 that sent the salary cap soaring.

If it's hard to predict how the market will evolve in the closed world of professional basketball, predictions about the path of Internet innovation are an order of magnitude harder — especially for those making crucial decisions with a lot of [money](#) at stake.

The FCC's answer for what it considered to be the dangerous unpredictability of Internet innovation was to write itself a blank check of authority to regulate ISPs in the [2015 Open Internet Order](#) (OIO), embodied in what is referred to as the "Internet conduct standard." This standard expanded the scope of Internet access regulation well beyond the [core principle of preserving openness](#) (*i.e.*, ensuring that any legal content can be accessed by all users) by granting the FCC the unbounded, discretionary authority to define and address "[new and novel threats to the Internet](#)."

When asked about what the standard meant (not long after *writing* it), former Chairman Tom Wheeler [replied](#),

We don't really know. We don't know where things will go next. We have created a playing field where there are known rules, and the FCC will sit there as a referee and will throw the flag.

Somehow, former Chairman Wheeler would have us believe that an amorphous standard that means whatever the agency (or its Enforcement Bureau) says it means created a playing field with "known rules." But claiming such broad authority is hardly the light-touch approach marketed to the public. Instead, this ill-conceived standard allows the FCC to wade as deeply as it chooses into how an ISP organizes its business and how it manages its network traffic.

Such an approach is destined to undermine, rather than further, the objectives of Internet openness, as embodied in Chairman Powell's 2005 [Internet Policy Statement](#):

To foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition.

Instead, the Internet conduct standard is emblematic of how an off-the-rails quest to heavily regulate one specific component of the complex Internet ecosystem results in arbitrary regulatory imbalances — *e.g.*, between ISPs and over-the-top (OTT) or edge providers that offer similar services such as video streaming or voice calling.

As Boston College Law Professor, Dan Lyons, [puts it](#):

While many might assume that, in theory, what's good for Netflix is good for consumers, the reality is more complex. To protect innovation at the edge of the Internet ecosystem, the Commission's sweeping rules reduce the opportunity for consumer-friendly innovation elsewhere, namely by facilities-based broadband providers.

This is no recipe for innovation, nor does it coherently distinguish between practices that might impede competition and innovation on the Internet and those that are merely politically disfavored, for any reason or no reason at all.

Free data madness

The Internet conduct standard's unholy combination of unfettered discretion and the impulse to micromanage can (and will) be deployed without credible justification to the detriment of consumers and innovation. Nowhere has this been more evident than in the confusion surrounding the regulation of "free data."

Free data, like T-Mobile's [Binge On](#) program, is data consumed by a user that has been subsidized by a mobile operator or a content provider. The vertical arrangements between operators and content providers creating the free data offerings provide many benefits to consumers, including enabling subscribers to [consume](#) more data (or, for low-income users, to consume data in the first place), facilitating product [differentiation](#) by mobile operators that offer a variety of free data plans (including allowing smaller operators the chance to get a leg up on competitors by assembling a market-share-winning plan), [increasing](#) the overall consumption of content, and [reducing](#) users' cost of obtaining information. It's also fundamentally about experimentation. As the International Center for Law & Economics (ICLE) [recently explained](#):

Offering some services at subsidized or zero prices frees up resources (and, where applicable, data under a user's data cap) enabling users to experiment with new, less-familiar alternatives. Where a user might not find it worthwhile to

spend his marginal dollar on an unfamiliar or less-preferred service, differentiated pricing loosens the user's budget constraint, and may make him more, not less, likely to use alternative services.

In December 2015 then-Chairman Tom Wheeler used his newfound discretion to launch a 13-month "[inquiry](#)" into free data practices before preliminarily finding some to be in violation of the standard. Without identifying any *actual* harm, Wheeler concluded that free data plans "may raise" economic and public policy issues that "may harm consumers and competition."

After assuming the reins at the FCC, Chairman Pai swiftly put an end to that nonsense, [saying](#) that the Commission had better things to do (like removing barriers to broadband deployment) than denying free data plans that expand Internet access and are immensely popular, especially among low-income Americans.

The global morass of free data regulation

But as long as the Internet conduct standard remains on the books, it implicitly grants the US's imprimatur to harmful policies and regulatory capriciousness in other countries that [look to](#) the US for persuasive authority. While Chairman Pai's decisive intervention resolved the free data debate in the US (at least for now), other countries are still grappling with whether to prohibit the practice, allow it, or allow it with various restrictions.

In Europe, the [2016 EC guidelines](#) left the decision of whether to allow the practice in the hands of national regulators. Consequently, some regulators — in Hungary, Sweden, and the Netherlands (although there the ban was recently overturned in court) — have banned free data practices while others — in Denmark, Germany, Spain, Poland, the United Kingdom, and Ukraine — have not. And whether or not they allow the practice, regulators (*e.g.*, Norway's [Nkom](#) and the UK's [Ofcom](#)) have lamented the lack of regulatory certainty surrounding free data programs, a state of affairs that is compounded by a lack of data on the consequences of various approaches to their regulation.

In Canada this year, the CRTC issued a [decision](#) adopting restrictive criteria under which to evaluate free data plans. The criteria include assessing the degree to which the treatment of data is agnostic, whether the free data offer is exclusive to certain customers or certain content providers, the impact on Internet openness and innovation, and whether there is financial compensation involved. The standard is open-ended, and free data plans as they are offered in the US would "likely raise concerns."

Other regulators are contributing to the confusion through ambiguously framed rules, such as that of the Chilean regulator, Subtel. In a [2014 decision](#), it found that a free data offer of specific social network apps was in breach of Chile's Internet rules. In contrast to [what is commonly reported](#), however, Subtel did not *ban* free data. Instead, it required mobile operators to change how they promote such services, requiring them to state that access to

Facebook, Twitter and WhatsApp were offered “without discounting the user’s balance” instead of “at no cost.” It also required them to disclose the amount of time the offer would be available, but imposed no mandatory limit.

In addition to this confusing regulatory make-work governing how operators market free data plans, the Chilean measures also require that mobile operators offer free data to subscribers who pay for a data plan, in order to ensure free data isn’t the only option users have to access the Internet.

The result is that in Chile today free data plans are widely offered by [Movistar](#), [Claro](#), and [Entel](#) and include access to apps such as Facebook, WhatsApp, Twitter, Instagram, Pokemon Go, Waze, Snapchat, Apple Music, Spotify, Netflix or YouTube — even though Subtel has nominally declared such plans to be in violation of Chile’s net neutrality rules.

Other regulators are searching for palatable alternatives to both flex their regulatory muscle to govern Internet access, while simultaneously making free data work. The Indian regulator, TRAI, famously [banned](#) free data in February 2016. But the story doesn’t end there. After seeing the potential value of free data in unserved and underserved, low-income areas, TRAI [proposed](#) implementing *government-sanctioned* free data. The proposed scheme would provide rural subscribers with 100 MB of free data per month, funded through the country’s universal service fund. To ensure that there would be no vertical agreements between content providers and mobile operators, TRAI recommended introducing third parties, referred to as “aggregators,” that would facilitate mobile-operator-agnostic arrangements.

The result is a nonsensical, if vaguely well-intentioned, threading of the needle between the perceived need to (over-)regulate access providers and the determination to expand access. Notwithstanding the Indian government’s awareness that free data will help to close the digital divide and enhance Internet access, in other words, it nonetheless banned private markets from employing private capital to achieve that very result, preferring instead non-market processes which are unlikely to be nearly as nimble or as effective — and yet still ultimately offer “non-neutral” options for consumers.

Thinking globally, acting locally (by ditching the Internet conduct standard)

Where it is permitted, free data is undergoing explosive adoption among mobile operators. Currently in the US, for example, all major mobile operators offer some form of free data or unlimited plan to subscribers. And, as a result, free data is proving itself as a business model for users’ early stage experimentation and adoption of augmented reality, virtual reality and other cutting-edge technologies that represent the Internet’s next wave — but that also use vast amounts of data. Were the US to cut off free data at the legs under the OIO absent hard evidence of harm, it would substantially undermine this innovation.

The application of the nebulous Internet conduct standard to free data is a microcosm of the current incoherence: It is a rule rife with a parade of uncertainties and only theoretical problems, needlessly saddling companies with enforcement risk, all in the name of preserving and promoting innovation and openness. As even some of the staunchest proponents of net neutrality have recognized, only companies that can afford years of [litigation](#) can be expected to thrive in such an environment.

In the face of confusion and uncertainty globally, the US is now poised to provide leadership grounded in sound policy that promotes innovation. As ICLE [noted](#) last month, Chairman Pai took a [crucial step](#) toward re-imposing economic rigor and the rule of law at the FCC by questioning the unprecedented and ill-supported expansion of FCC authority that undergirds the OIO in general and the Internet conduct standard in particular. [Today](#) the agency will take the next step by voting on Chairman Pai's proposed rulemaking. Wherever the new proceeding leads, it's a welcome opportunity to analyze the issues with a degree of rigor that has thus far been appallingly absent.

And we should not forget that there's a direct solution to these ambiguities that would avoid the undulations of subsequent FCC policy fights: Congress could (and should) pass legislation implementing a regulatory framework grounded in sound economics and empirical evidence that [allows](#) for consumers to benefit from the vast number of procompetitive vertical agreements (such as free data plans), while still facilitating a means for policing conduct that may *actually* harm consumers.

The Golden State Warriors are the heavy odds-on favorite to win another NBA Championship this summer, led by former OKC player Kevin Durant. And James Harden is a contender for league MVP. We can't always turn back the clock on a terrible decision, hastily made before enough evidence has been gathered, but Chairman Pai's efforts present a rare opportunity to do so.

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