



Carr Opposes President Biden’s Plan to Give the Administrative State Effective Control of all Internet Services and Infrastructure in the U.S.

This Unlawful Power Grab Chooses Central Planning Over Free Market Capitalism

WASHINGTON, DC, November 6, 2023—FCC Commissioner Carr issued the following statement:

Democrats have been in charge of the FCC and administrative agencies in DC for approaching 12 out of the last 16 years. They have had the opportunity, over that stretch of time, to put in place nearly any federal telecom policy of their choosing. In fact, the federal government has allocated hundreds of billions of taxpayer dollars for the purpose of ending the digital divide while Democrats have run the administrative state. After all of that time and after all of that spending, the Biden Administration has concluded that the Democrats’ policies are not working.

I agree with President Biden on this point. The Administration’s broadband policies are failing. The costs of building Internet infrastructure in this country have skyrocketed thanks to the Biden Administration’s inflationary policies. The Administration has no plan for filling a now empty spectrum pipeline—one that is vital to America’s economy and geopolitical leadership. Meanwhile, the FCC is just sitting on spectrum that could connect millions of Americans to new, 5G services. The Administration has needlessly blocked and delayed new broadband infrastructure builds. Fiber and cell site components are laying fallow in warehouses and laydown yards across the country due to the government’s failure to remove regulatory red tape. Permitting reform has gone nowhere. And the Biden Administration is preparing to waste additional taxpayer dollars through its multi-billion dollar “Internet for all” initiative by pursuing extraneous political goals at the expense of connecting Americans.

But the Biden Administration is taking away all the wrong lessons from its failed broadband policies. Rather than righting the ship, the Biden Administration is going hard left. It is now blaming the private sector and free market capitalism itself for the Administration’s own policy shortfalls. The problem, the Administration has apparently concluded, is that the FCC has never gone full command and control when it comes to regulating the Internet.

So last month, President Biden gave the FCC its [marching orders](#). The President called on the FCC to implement a one-page section of the 2021 Infrastructure Investment and Jobs Act (Infrastructure Act) by adopting new rules of breathtaking scope, all in the name of “digital equity.” For the first time ever, those rules would give the federal government a roving mandate to micromanage nearly every aspect of how the Internet functions—from how ISPs allocate capital and where they build, to the services that consumers can purchase; from the profits that ISPs can realize and how they market and advertise services, to the discounts and promotions that consumers can receive. Talk about central planning.

Needless to say, Congress never contemplated the sweeping regulatory regime that President Biden asked the FCC to adopt—let alone authorized the agency to implement it. Nonetheless, the Commission will vote next week, on November 15th, to put President Biden’s plan in place. A draft of the FCC order implementing President Biden’s plan is available [here](#). I oppose the plan for several reasons.

President Biden’s plan hands the Administrative State effective control of all Internet services and infrastructure in the country. Never before, in the roughly 40-year history of the public Internet, has the FCC (or any federal agency for that matter) claimed this degree of control over it. Indeed, President

Biden's plan calls for the FCC to apply a far-reaching set of government controls that the agency has not applied to any technology in the modern era, including Title II common carriers. The closest analog would be the heavy-handed rules the FCC applied to the Ma Bell telephone monopoly during the height of the New Deal era—a copper wire period of time when it was hard to distinguish between government regulator and telephone provider.

But do not take my word for it. The text of the order expressly provides that the FCC would be empowered, for the first time, to regulate each and every ISP's:

- “network infrastructure deployment, network reliability, network upgrades, network maintenance, customer-premises equipment, and installation”;
- “speeds, capacities, latency, data caps, throttling, pricing, promotional rates, imposition of late fees, opportunity for equipment rental, installation time, contract renewal terms, service termination terms, and use of customer credit and account history”;
- “mandatory arbitration clauses, pricing, deposits, discounts, customer service, language options, credit checks, marketing or advertising, contract renewal, upgrades, account termination, transfers to another covered entity, and service suspension.”

As exhausting as it is to read that list, the FCC itself says it is not an exhaustive list. The Biden Administration's plan empowers the FCC to regulate every aspect of the Internet sector for the first time ever. The plan is motivated by an ideology of government control that is not compatible with the fundamental precepts of free market capitalism.

But it gets worse. The FCC reserves the right under this plan to regulate both “actions and omissions, whether recurring or a single instance.” In other words, if you take any action, you may be liable, and if you do nothing, you may be liable. There is no path to complying with this standardless regime. It reads like a planning document drawn up in the faculty lounge of a university's Soviet Studies Department.

President Biden's plan sweeps entire industries within the FCC's jurisdiction for the first time in the agency's 90-year history. It would be one thing if the FCC cabined its intrusive new regime to ISPs or even businesses within the communications sector. It does not. The draft FCC order says that “we are not explicitly tasked with regulating entities outside the communications industry” (a rare moment of regulatory humility) but it then goes on to say that the FCC will do so in this case nonetheless (the moment passed). Landlords are now covered, construction crews are now covered, marketing agencies are now covered, banks are now covered, the government itself is now covered—all newly regulated by the FCC and liable for any act or omission that the agency determines has an impermissible impact on a consumer's access to broadband. Congress never authorized the FCC to regulate these industries or entities. So, to all the businesses and individuals that will be subject to FCC regulation for the first time ever, welcome, I hope you have good lawyers.

President Biden's plan allows the FCC to impose unfunded build mandates on ISPs and unlimited monetary fines on every covered entity. Section 60506, the one-page portion of the Infrastructure Law that President Biden cites as authority for the FCC's new regime, does not authorize the Commission to create or enforce new punitive liability rules or compel builds. Instead, it directs the FCC to “facilitate equal access to broadband internet access service.” Nonetheless, the FCC's draft order determines that the agency will apply the full suite of the Communications Act's enforcement powers to any act or omission that violates its new Section 60506 regime, although it will do so with one minor deviation from the Communications Act norm: it imposes no ceiling on the level of potential fines. This means that

ISPs could very well be compelled to build out Internet infrastructure without any compensation. And every decision from the C-Suite to the call center will be subject to FCC second-guessing.

President Biden’s plan includes price controls. Last month, at the eleventh hour, the FCC slightly softened its proposal to use its Title II proceeding to regulate broadband rates. Now we know why. The Section 60506 order that the FCC will vote on next week expressly states that the FCC can use it to regulate broadband pricing and even an ISP’s profitability. Title II is no longer necessary to achieve that end. But the Section 60506 rules do more than that. The FCC arrogates to itself the power to review and determine the lawfulness of promotional pricing and discounts. It even puts the use of credit checks squarely in the cross hairs. Of course, Congress did not give the FCC the power to do any of this—the agency just creates it out of whole cloth.

President Biden’s plan adopts an expansive and disfavored theory of liability that Congress neither directed nor authorized the FCC to adopt. Section 60506 of the Infrastructure Act speaks in brief and straightforward terms: it states that it is the policy of the United States that, insofar as technically and economically feasible, subscribers should benefit from equal access to broadband. Section 60506 then directs the FCC to adopt rules that facilitate equal access to broadband (again, to the extent technically and economically feasible) and to prevent and eliminate “digital discrimination” based on income level, race, ethnicity, color, religion, or national origin.

After nearly two years and several rounds of comments, the FCC’s draft order concludes that “there is little or no evidence” in the agency’s record to even indicate that there has been any intentional discrimination in the broadband market within the meaning of the statute. But instead of proceeding with forward-looking rules on that basis, the FCC—at President Biden’s direction—reads an expansive and disfavored theory of liability into the law that exists nowhere in the statutory text. Even in the absence of any evidence of intentional discrimination, the Biden plan states the FCC can impose potentially unbounded liability if the agency finds that some act or even failure to act happened to result in a disparate impact based on the FCC’s own judgment. Reading this theory of liability into the law conflicts with the Supreme Court’s civil rights precedent. The FCC should not adopt it.

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In the end, the FCC could have adopted rules that lawfully and faithfully implemented Congress’s decisions in the Infrastructure Act. The FCC could have taken concrete steps that would have extended high-speed Internet services to more Americans. In fact, the FCC cites a few such actions in its draft order that were raised in the record—including eliminating government-imposed barriers and regulatory red tape that have been slowing down broadband builds. But instead of going that route, the FCC opts for this ideological approach instead.

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