

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
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)	WC Docket No. 17-108
Restoring Internet Freedom)	
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To: The Federal Communications Commission
Date: July 17, 2017

**Comment of Terrell McSweeney,
Commissioner, Federal Trade Commission**

I write¹ to oppose the proposal in the Notice of Proposed Rulemaking WC Docket No. 17-108 (NPRM) and offer responses to some of the questions proposed for discussion in it.² As a member of the Federal Trade Commission (FTC), I would like to provide a perspective on the strengths and limitations of the consumer protection and antitrust remedies that the NPRM envisions as substitutes for the rules promulgated by the Open Internet Order of 2015 that articulated clear rules to guarantee non-discrimination by broadband providers.³ Repealing these rules would be harmful for consumers and the marketplace.

An open internet has been the status quo in the United States since its commercialization began nearly three decades ago. The ability of innovators to reach consumers and businesses over networks free of discrimination, paid prioritization, or anticompetitive constraints helped

¹ This comment represents my views as an individual commissioner of the Federal Trade Commission and does not necessarily reflect the opinions of either my colleague, Acting Chairman Maureen Ohlhausen, or the staff of the Federal Trade Commission.

² *Restoring Internet Freedom*, WC Docket 17-108, Notice of Proposed Rulemaking, (rel. May 23, 2017) [hereinafter NPRM], available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf.

³ *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) [hereinafter *Open Internet*], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

the internet to evolve from a collection of websites to what it is today: an indispensable resource where consumers can learn, shop, read the news, communicate, stream video and enjoy many other conveniences of modern life. Indeed, the internet is no longer a novelty, as it was when Congress passed the Telecommunications Act of 1996,⁴ but an always-on, perpetually connected ambient system vital to almost every activity in which we engage.

The internet is not just a communications network. There are twice as many internet-connected devices today as people on the planet—and that ratio is expected to triple in the next three years. The transformative power of this “internet-of-everything” ecosystem is enormous. For example, U.S. car manufacturers are reinventing themselves as technology companies and leading the way to a transportation future of increasingly autonomous vehicles. Other industries are doing the same.

All of these advancements depend on the ability of data, in all of its digital-age forms, to travel freely across networks. The proposed rule threatens that free flow by treating the services of broadband providers as if they are indistinguishable from those of edge providers. Conflating the edge services provided over broadband with broadband service itself is mistaken. They are different markets that should be governed by different rules.

The proposal before the FCC mistakenly establishes a false equivalence between the static broadband service provider marketplace on the one hand and the dynamic competition offered on the “edge.” Most broadband markets in the United States are highly concentrated. Around 90 million US households subscribe to some form of internet service, but 58 percent of households have only one option for a broadband internet provider, some have no option at all.⁵

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁵ FCC, WIRELESS COMPETITION BUREAU, INDUS. ANALYSIS & TECH. DIV., INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2016, at 6 (2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf (as of June 30,

Even in markets where people have a choice between providers, competition may still be limited by the significant cost of switching between providers.⁶

The proposal calls for much of the current up-front, rule-based protections against discriminatory and anticompetitive behavior to be replaced with after-the-fact enforcement by the FTC through the use of antitrust tools or the FTC's Section 5 authority to police "unfair or deceptive acts and practices."⁷ The FTC is a highly expert consumer protection and competition enforcement agency, but there are limits to the effectiveness of our tools in policing nondiscrimination on networks and protecting competition in markets that are already highly concentrated.

First, proponents of an enforcement-only approach argue that the terms of service offered by Internet Service Providers can provide the FTC with the nexus to bring consumer protection cases if open internet terms are violated.⁸ There are two major problems with relying solely on *ex post* FTC enforcement in this manner. One is that the FTC's jurisdiction over common carriers remains unclear. Currently the Federal Trade Commission Act exempts common carriers. The scope of this exemption is the subject of pending litigation.⁹ Even if the FCC reclassifies ISPs as information service providers, the major providers will continue to provide common carrier services, such as voice telephone service, and will, therefore, remain common carriers.¹⁰ Unless Congress repeals the common carrier exemption in the FTC Act, the FTC could continue to face

2016, only 42 percent of developed census blocks had two or more providers that reported offering at least 25 Mbps downstream and at least 3 Mbps upstream).

⁶ FCC, Broadband Decisions: What Drives Consumers to Switch—or Stick with—their Broadband Internet Provider 3 (Dec. 2010) (unpublished working paper).

⁷ Federal Trade Commission Act, 15 U.S.C. § 45 (2012).

⁸ See, e.g., Jon Brodtkin, *FCC Chair Wants To Replace Net Neutrality with "Voluntary" Commitments*, ARSTECHNICA (Apr. 7, 2017), <https://arstechnica.com/tech-policy/2017/04/fcc-chair-wants-to-replace-net-neutrality-with-voluntary-commitments>; Jim Puzzanghera, *FCC Chief Unveils Plan To Dismantle Net Neutrality Rules*, L.A. TIMES, Apr. 26, 2017, <http://www.latimes.com/business/la-fi-net-neutrality-fcc-20170426-story.html>.

⁹ See *FTC v. AT&T Mobility, L.L.C.*, 835 F.3d 993, 2016 U.S. App. LEXIS 15913 (9th Cir. 2016), *rehearing en banc granted*, 2017 U.S. App. LEXIS 8236 (9th Cir. 2017).

¹⁰ Telecommunications Act of 1996 § 3.

challenges to its authority over common carriers. The second is that ISPs are free to change their terms of service regarding nondiscrimination on their networks without violating the FTC Act's ban on deception so long as they provide clear notice of changes. If these disclosures are truthful, there is no deception for the FTC to police. Furthermore, because the vast majority of consumers have little or no choice in providers, competitive pressure cannot be counted on either to push ISPs to offer consumers better contract terms or quality of service or limit discriminatory conduct.

The NPRM also asks whether existing competition law is sufficient to protect the open internet.¹¹ There are significant shortcomings to relying only on antitrust law enforcement to protect content providers' access to the internet. First, the ability of consumers to access the lawful content of their choosing and express themselves on the internet is at the heart of the open internet policy. Determining whether to allow ISPs to block or interfere with consumer expression and speech requires consideration of non-economic factors that antitrust law may not take into account.

Second, *ex ante* rules provide innovators with confidence that discriminatory network access will not threaten their chances for competitive success. A system that relies solely on backward-looking antitrust enforcement, on the other hand, cannot provide the same assurances because it would require detection, investigation, and potentially lengthy rule-of-reason analysis. For example, assume a content provider foresees a threat from an upstart rival and pays for exclusive "fast lane" access, thereby gaining a competitive advantage over the rival and ultimately driving it from the market. Even if the FTC were to detect the practice, investigate, and conclude that it was competitively harmful, we could not travel back in time to undo the

¹¹ NPRM, *supra* note 2, at ¶¶ 50, 78, 84, 114.

harm to the excluded rival or to the competitive evolution of the marketplace. An up-front rule, by contrast, would be more likely to prevent the harm in the first place.

It is well established that appropriately tailored regulation can complement antitrust law in highly concentrated markets—particularly when vertically integrated incumbents have incentives to harm competitors. For example, FTC staff submitted a comment to the Federal Energy Regulatory Commission earlier this year, voicing support for clear *ex ante* regulation to safeguard the competitiveness of power generation markets.¹² The concern in that matter was that companies that own electricity transmission systems have both the incentive and ability to discriminate against those who would compete against their upstream power generation assets. Like broadband providers, electricity transmission systems operators control the conduit for accessing end users. In particular, FTC staff underscored the limitations of *ex ante* enforcement by noting that “it could be costly, difficult, and time-consuming to detect and document” certain forms of anticompetitive discrimination by transmission system owners regarding interconnection to the electric grid.¹³

Both the FCC and the Department of Justice have also recognized in recent proceedings that the ISPs have both the incentive and ability to harm consumers and competition. For example, in its review with the FCC of the proposed Comcast/Time Warner merger in 2015, DOJ concluded that the transaction would have reduced competition in the video and broadband markets, leaving consumers with less choice, higher prices, and lower quality.¹⁴ The 2015 Open

¹²See, e.g., *Comment of the Staff of the Federal Trade Commission*, FERC Docket No. RM17-8-000, at 3-4 (Apr. 10, 2017) [hereinafter FTC Comment to FERC], available at https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commission-federal-energy-regulatory-commission-concerning-reform/v170004_ferc_interconnection_ftc_staff_comment.pdf.

¹³*Id.* at 5 n.18.

¹⁴ Press Release, Dep’t of Justice, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable after Justice Department and The Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2015), <https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department> (observing both companies’ presence in Video and Broadband).

Internet Order relied on an extensive evidentiary record to reach the conclusion that “broadband providers (including mobile broadband providers) have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users.”¹⁵ In the near term, there is a hypothetical danger that ISPs, which supply connections to both the internet and video programming, could act to hinder new online-video providers (OVDs). Consumers are increasingly using broadband connections to access competitors OVD content.¹⁶ In fact, as more OVDs enter the market, the incentive for ISPs to discriminate against them in favor of their own content increases.¹⁷ In the future, the ISPs will also be the gatekeepers to the internet and customers for entirely new “Internet of Things” products and industries.

As noted above, the FTC has explained in similar contexts that it can be “costly, difficult, and time consuming to detect and document” certain forms of anticompetitive discrimination on networks.¹⁸ Detection of discriminatory conduct by ISPs may be challenging in the first place.

For example, how would a typical consumer be able to determine whether a slow or grainy download was caused by malfeasance or something routine and benign? Moreover, if a violation is alleged (or ongoing), a *post hoc* enforcement action would necessarily take place after an extensive investigation and well after the harm to competition has already occurred. Remedying harm years after it occurs may prove challenging or even impossible.

¹⁵ *Open Internet*, *supra* note 3, at ¶ 78.

¹⁶ See, e.g., Consumers Union, Comment on Open Internet Remand (Mar. 24, 2014), <http://consumersunion.org/wp-content/uploads/2014/03/FINAL-CU-NN-COMMENTS.pdf> (citing consumers’ preference to use various online video providers unaffiliated with their broadband provider)

¹⁷ See Bill Rosenblatt, *Internet TV Skinny Bundle Market Gets More Crowded With Hulu's New Service*, FORBES (May 4, 2017, 10:38 AM) <https://www.forbes.com/sites/billrosenblatt/2017/05/04/internet-tv-skinny-bundle-market-gets-more-crowded-with-hulus-new-service/#496dfac03817> (discussing recent entrants into the OVD market, including Hulu with Live TV, Sling TV, and Sony PS Vue)

¹⁸ FTC Comment to FERC, *supra* note 14, at 5.

Finally, the proposal revisits how best to protect the privacy of broadband consumers.¹⁹ The FTC consulted with the Commission during the development of its Broadband Privacy Rule. The final draft largely tracked the FTC’s enforcement program. The minor additions were well reasoned and distinguished the unique position ISPs have in the lives of consumers. Yet for reasons still unclear to most Americans, Congress jettisoned it.²⁰ The proposed rule, by reclassifying broadband internet access as an information service, would allow for FTC privacy enforcement of ISP terms of service as well as actions or omissions that could be seen as “unfair.” However, as outlined above, Congress must clarify the FTC’s jurisdiction to ensure we have sufficient authority to undertake this mandate. Moreover, our enforcement is most clearly asserted in those situations where harm has already occurred or where terms of service were abrogated. Both of these constraints compare unfavorably to the strong rules the FCC had in place for protecting consumers’ private information. It has long been a bipartisan request of FTC commissioners that Congress provide the FTC with stronger privacy enforcement tools to augment our expert staff and successful enforcement program. In the absence of legislation, consumers would be left worse off if the proposal before the FCC were adopted.

The current rules, if left in place, will continue to allow for the growth, dynamism, and competition that have marked the commercial internet. Allowing for the current framework to be enforced is not heavy-handed regulation. Instead, it is an extension of the market as it has always been—open and non-discriminatory. It has also fostered trust among consumers and businesses with both the FTC and FCC using different sets of tools to protect consumers and the market.

¹⁹ NPRM, *supra* note 2, at ¶ 66.

²⁰ HUFFPOST/YOUGOV, *FCC Rules* (Mar. 31, 2017)

http://big.assets.huffingtonpost.com/tabs_HP_Online_Privacy_20170330.pdf (last visited June 20, 2017) (summarizing survey responses showing 71% of respondents favored keeping the Broadband Privacy Rule in place). *See* 163 Cong. Rec. S1942-43 (recording the passage of S.J. Res. 34 in the Senate by a vote of 50-48, disapproving of the Broadband Privacy Rule); 163 Cong. Rec. H2503-04 (recording the passage of S.J. Res. 34 in the House of Representatives by a vote of 215-205).

Rather than roll back protections, we should augment them with renewed FCC vigor and a change to anachronistic barriers to FTC enforcement.