



If FCC repeals net neutrality, F won't leave users unprotected

BY MAUREEN K. OHLHAUSEN, OPINION CONTRIBUTOR - 08/30/17 10:47 AM EDT

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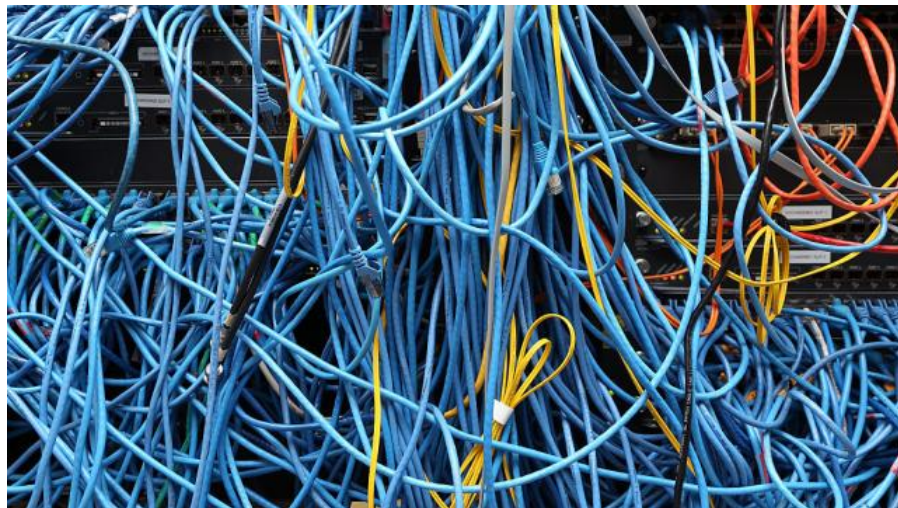
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The internet grew up without much government regulation. But the more central it becomes to daily life, the more vigorous grows the debate about whether and how the government should regulate it.

The best example, of course, is the ongoing debate over net neutrality regulation of broadband providers. Do we need government regulation to preserve the benefits of an open internet?

The FTC analyzed this question 10 years ago in a [bipartisan 2007 report](#) on net neutrality. The report exhaustively cataloged arguments for and against net neutrality regulation. Ten years later, we hear the same arguments based on very similar evidence, and thus the report's conclusions remain highly relevant. And where the evidence has changed, such as in the dramatic growth of wireless broadband, it shows the broadband market is more competitive than it was in 2007, strengthening the report's conclusions.

Our report concluded that banning non-neutral behavior could harm consumers more than it helps them. Applying economic and antitrust analysis, the report explained that certain non-neutral practices could benefit consumers, while others might harm consumers.

Judging such practices often requires rigorously measuring broadband provider market power. It isn't sufficient to assume that broadband providers are monopolists or duopolists. Indeed, the report notes that

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even a monopoly provider would still have some incentive to act in the consumers' interest, although it also would face other, contrary incentives. Given the mixed nature of non-neutral practices, prescriptive net neutrality regulation would overcorrect by prohibiting beneficial practices along with harmful practices.

Fortunately, we don't need prescriptive regulation to prevent harmful non-neutral behavior by broadband providers. As the report explained, the FTC can challenge harmful non-neutral practices on a case-by-case basis under its antitrust authority and under its consumer protection authority. These complementary tools ensure that consumers can effectively pursue their many, varying market preferences, including preferences for values of openness and free expression online.

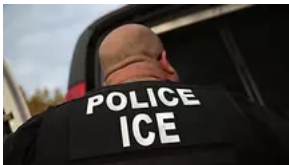
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First, the FTC's antitrust tools protect the competitive process, which motivates companies to deliver what consumers want. Many consumers value neutrality, and are vocal about this desire. Indeed, edge providers and net neutrality advocates have shown themselves quite capable of rallying users and consumers to demand neutral treatment. Where consumers demand neutrality, a competitive marketplace is best suited to meet this demand while balancing it with other features that consumers desire.

Second, the FTC uses its consumer protection authority to ensure that consumers get the benefit of the bargain they strike. As the D.C. Circuit has explained, the very core of net neutrality is ensuring that broadband providers fulfill the reasonable expectations of broadband customers. The FTC's deception and unfairness authority are well suited to this task.

If a broadband provider makes a public commitment to certain neutral practices, but breaks that promise, the FTC could bring a deception case. And if consumers generally expect that broadband services offer connections to all parts of the internet without blocking or throttling, but a provider blocks or throttles certain sites without disclosing this practice, the FTC could bring a deceptive omission case.

Our unfairness authority complements our deception authority nicely. We have brought unfairness cases against companies that unilaterally changed their past promises, harming consumers. Similarly, a broadband provider that unilaterally withdrew its net neutrality promises could face FTC enforcement.

These powerful consumer protection tools apply to all companies regardless of their market power. Indeed, the FTC is currently using its deception and unfairness authority in a net neutrality-like case against AT&T Mobility, which allegedly throttled its "unlimited" data plans.



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This two-pronged competition and consumer protection enforcement approach is case-by-case. We evaluate each practice to see if it actually harms consumers. Such an approach has advantages over prescriptive regulation, which prejudices, in the abstract, entire categories of business practices.

In dynamic, fast-changing industries, case-by-case enforcement better protects consumers and promotes innovation because it focuses agency resources on actual consumer injury and doesn't require regulators to predict the future. The FTC's case-by-case approach includes principled constraints and institutional features that create predictability without rigidity. And contrary to some claims, case-by-case enforcement both corrects past harms and deters future harms.

As a result, if the FCC were to repeal heavy-handed net neutrality regulations, net neutral practices wouldn't disappear. Indeed, where consumers desire net neutrality, they'll get it through market competition, facilitated by antitrust and consumer protection law enforced by the FTC, state attorney generals, and private plaintiffs. And companies will remain free to experiment with innovative business models that could benefit consumers.

Maureen K. Ohlhausen is acting chairman of the Federal Trade Commission.

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