

**Statement for the Record for the
Center for Democracy & Technology**

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**House Judiciary Subcommittee on
Regulatory Reform, Commercial, and Antitrust Law**

**Hearing on Net Neutrality and the Role of Antitrust
November 1, 2017**

Chairman Marino, Vice Chair Farenthold, Ranking Member Cicilline, and Members of the Subcommittee,

The Center for Democracy & Technology (CDT) thanks the Subcommittee for the opportunity to submit this statement regarding the November 1, 2017 hearing on “Net Neutrality and the Role of Antitrust.” CDT appreciates the interest of the Subcommittee in protecting the principles of the open internet, but we have concerns about some of the legal and policy approaches under consideration in this hearing. In this statement, we will address some of the points raised by critics of the 2015 Open Internet Order (OIO) who argue for an alternative that relies exclusively on antitrust law.

First, some of the hearing witnesses claim that the net neutrality protections provided by the OIO are wholly unnecessary because the market for broadband in the United States is competitive.¹ However, this stands in stark contrast with the current reality for many American families. According to the most recent Internet Access Services report released by the FCC, 58 percent of census blocks do not feature more than one high-speed broadband provider.² As a result, many Americans are functionally forced to accept the terms of the sole broadband provider in their neighborhood, regardless of whether the

¹ Maureen K. Ohlhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 Colo. Tech. L.J. 119, 140 (“[E]veryone can agree that ISP markets are not natural monopolies. Hundreds of ISPs compete in the United States today. Competition between wireless broadband access providers is strong. True, wireline ISPs typically operate in concentrated markets, and some U.S. consumers enjoy limited choice between ISPs. Competition not only remains, however, it is growing.”).

² FCC Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2016* (April 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf (FCC Internet Access Services Report).

service provided is consistent with principles of net neutrality. Under these monopoly conditions, the OIO serves as a shield to protect the continued exchange of ideas and facilitate innovation.³

Second, critics of the OIO assert that formal net neutrality protections are wholly unnecessary because internet service providers (ISPs) have not taken actions that would constitute blocking, throttling, or paid prioritization.⁴ In the Notice of Proposed Rulemaking (NPRM) for the repeal of the OIO, FCC Chairman Ajit Pai initially claimed that no formal complaints had been filed regarding net neutrality violations.⁵ Yet after the NPRM was released, a Freedom of Information Act request revealed that at least 54,000 informal complaints had been filed with the FCC regarding alleged violations of the OIO that were seemingly not taken into consideration.⁶ Moreover, the OIO was predicated by a record of such violations, including the following:

- In 2008, the FCC ruled that the throttling of traffic from BitTorrent by Comcast was unlawful, based off of an Associated Press (AP) report that found that the ISP had “actively interfere[d] with attempts by some of its high-speed Internet subscribers to share files online.”⁷ The report found that Comcast’s conduct had a “drastic effect...on one type of traffic--in some cases blocking it rather than slowing it down.”⁸
- In 2011, in advance of the release of its new payment app, Isis Mobile Wallet, Verizon blocked the use of the competing Google Wallet application on its new Galaxy Nexus 4G LTE smartphone.⁹

³ In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Amended Comments of the Center for Democracy & Technology, at 14 (July 19, 2017) (CDT Comments) (Without these protections in place, ISPs may block or slow down access to third-party edge providers in order to help drive traffic to its own competing services, effectively suffocating access to internet users. And if an edge provider is able to develop a successful application, the ISP may levy taxes on the product through the use of paid prioritization.”).

⁴ Ohlhausen, *supra* note 1, at 140 (“[T]here is a dearth of evidence of paid prioritization, throttling, or exclusion that has demonstrably harmed the competitive process.”).

⁵ Jacob Kastrenakes, *As net neutrality dies, one man wants to make Verizon pay for its sins*, The Verge, Aug. 9, 2017, <https://www.theverge.com/2017/8/9/16114530/net-neutrality-crusade-against-verizon-alex-nguyen-fcc>.

⁶ Jon Brodtkin, *FCC makes net neutrality complaints public, but too late to stop repeal*, Ars Technica, Sept. 5, 2017, <https://arstechnica.com/tech-policy/2017/09/fcc-makes-net-neutrality-complaints-public-but-too-late-to-stop-repeal/>.

⁷ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13031, para. 7 (2008) (Comcast-BitTorrent Order).

⁸ *Id.*

⁹ David Goldman, *Verizon blocks Google Wallet*, CNN Money (Dec. 6, 2011, 2:26 PM), http://money.cnn.com/2011/12/06/technology/verizon_blocks_google_wallet/index.htm.

- In 2012, AT&T initially required iPhone users to subscribe to a plan with added fees to use the FaceTime video application over its cellular network.¹⁰

Third, some witnesses have argued that the OIO represents a form of regulation that unfairly subjects ISPs to a higher level of scrutiny than internet-based companies like Google, Facebook, or Twitter (also known as “edge providers”). For instance, Michael Romano of NTCA argues that retail broadband providers would be “subject to specialized, detailed requirements,” while edge providers would face a lower level of scrutiny despite the fact that they “typically hold great, if not greater, volumes of data.”¹¹ But this claim elides the fundamental differences between ISPs and internet-based companies in the broader internet ecosystem.

Whereas edge providers may provide content or an application, ISPs serve a central role as gatekeepers to the internet itself. As a result, providers have tremendous access to information about the entirety of customers’ online activities and communications, which comes with a corresponding responsibility to protect the privacy of that information. Additionally, the lack of competition in many markets for access means that consumers cannot choose between different high-speed broadband providers—they are compelled to subscribe to a particular ISP for lack of other options. In contrast, users can choose between different internet platforms regardless of their geographic location, and can comparison shop based upon their own privacy preferences. The significant distinctions between the roles served by ISPs and edge providers and the monopoly position of ISPs in many jurisdictions justifies the differences in oversight.¹²

Despite the unique central position that ISPs occupy, some of the majority witnesses also argue that the FTC is equipped to provide exclusive oversight and enforcement of ISPs through current antitrust law.¹³ For example, Romano asserts that the FTC is “far better-versed [sic] in such issues and expert in oversight of mass-market services” compared to the FCC.¹⁴ But although the FTC does have a number

¹⁰ David Kravets, *Net Neutrality Groups Challenge AT&T FaceTime Blocking*, *Wired*, Sept. 8, 2012, <https://www.wired.com/2012/09/face-time-fcc-flap/>.

¹¹ *Hearing on Net Neutrality and the Role of Antitrust Before the H. Subcomm. on Reg. Reform, Commercial and Antitrust L. of the H. Comm. on the Judiciary*, 115th Cong. 5 (2017) (statement of Michael Romano, Senior Vice President, NTCA (The Rural Broadband Assoc.)).

¹² The dominant market position of ISPs in many locales is further fortified by high barriers to entry, including the costs of infrastructure build out. See, e.g., Susan Crawford, *Google Fiber Was Doomed From the Start*, *Wired*, (March 14, 2017) <https://www.wired.com/2017/03/google-fiber-was-doomed-from-the-start/> (“...80 percent of the cost of installing fiber is labor....The cost of that labor isn’t going down right now.”).

¹³ Ohlhausen, *supra* note 1, at 141 (arguing that consumers would still enjoy protection in a world without net neutrality, based upon the assumption that antitrust law alone is enough to protect the public interest).

¹⁴ Romano, *supra* note 11, at 4.

of enforcement tools at its disposal, it lacks the rulemaking ability and the deep subject matter expertise of the FCC to protect consumer rights.

Without the authority to make rules, the FTC can only pursue violations of net neutrality and consumer privacy after the fact. As FTC Commissioner Terrell McSweeney noted in her comment to the FCC, “these rules provide innovators with confidence that discriminatory network access will not threaten their chances for competitive success.”¹⁵ In comparison, a system that relies on enforcement after the fact cannot provide the same assurances because it would require detection, analysis, and a potentially lengthy rule-of-reason analysis.¹⁶

From a legal perspective, the authority of the FTC to protect consumers primarily stems from Section 5 of the FTC Act, which allows the agency to investigate “unfair and deceptive acts and practices in or affecting commerce.”¹⁷ More specifically, this means that the FTC can pursue violations on a case-by-case basis when (1) a company’s practices cause a substantial and unavoidable injury to consumers that is not outweighed by other benefits or (2) companies mislead consumers and fail to abide by their own privacy policies. As Commissioner McSweeney notes, under these terms, ISPs can still change their terms of service regarding net neutrality without violating the ban on deception so long as they provide clear notice of the changes.¹⁸

But it is not currently clear that the FTC has the legal authority to regulate many ISPs. Under an exemption in the FTC Act, the agency is barred from regulating common carriers.¹⁹ And in the recent case of *AT&T Mobility v. FTC*, the 9th Circuit found that this exemption extends to include all services of a company with a common carrier component.²⁰ If the decision is upheld on appeal, consumers would have no federal remedy for violations of privacy by ISPs with common carrier services.

Furthermore, the FTC is not as well-equipped as the FCC to handle many of the network engineering issues that will accompany its new oversight role. Consequently, protection of the fundamental rights of internet users would shift from a specialized agency with deep expertise in telecommunications policy to an agency with greater constraints on staff resources and less expertise in the field.

¹⁵ In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Comment of Terrell McSweeney, Commissioner, Federal Trade Commission, at 4 (July 17, 2017).

¹⁶ *Id.*

¹⁷ 15 U.S.C. § 45.

¹⁸ McSweeney, *supra* note 15, at 4.

¹⁹ 15 U.S.C. § 45(a)(2).

²⁰ *AT&T Mobility, LLC v. Federal Trade Commission*, No. 15-16585, at 2,9 (9th. Cir. 2016).

Detractors also argue that net neutrality protections will unduly burden the development of smaller ISPs.²¹ However, the OIO included a temporary exemption from its reporting requirements for ISPs with 100,000 or fewer subscribers when it was finalized in March 2015,²² which was renewed for another year in December 2015.²³ And from a practical perspective, the default configuration of networking equipment is consistent with net neutrality; setting a different configuration that violates those principles would actually require extra work on behalf of the ISP.²⁴ When complaints are made, the FCC estimates that it should only take 15 minutes for ISPs to respond.²⁵

Furthermore, the repeal of net neutrality protections could actually inhibit the growth and development of small ISPs. As Dane Jasper, the CEO of Sonic, points out, larger ISPs could use paid prioritization and ad-tracking policies to force smaller ISPs out of the market. The larger ISPs could use the revenue to discount their service and undercut smaller ISPs, forcing small ISPs to choose between offering a lesser version of broadband access or extinction.

Finally, critics allege that broadband infrastructure investment declined as a result of the OIO.²⁶ Yet, numerous ISPs explicitly and repeatedly told investors, the SEC, and the general public that the OIO had no negative effect on infrastructure investment during its implementation.

- In December 2014, Verizon CFO Francis Shammo explicitly said that reclassification under Title II “does not influence the way we invest” and that Verizon would continue to invest in network infrastructure.²⁷

²¹ See Romano, *supra* note 11, at 4 (NTCA has...expressed consistent concern regarding the prospect of heavy-handed, one-sided regulation and its particular impact on smaller and rural operators.”).

²² *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5609, paras. 23-24 (2015) (Open Internet Order).

²³ Lydia Beyoud, *FCC Extends Small Business Net Neutrality Reporting Exemption*, Bloomberg BNA, Dec. 15, 2015, <https://www.bna.com/fcc-extends-small-n57982065242/>. Additionally, former FCC Chairman Tom Wheeler was seeking to make the exemption permanent and was circulating a draft of a proposed rule in October 2016. Brendan Bordelon, *FCC Officials: Transparency Exemption for Small ISPs to Be Reinstated*, Morning Consult, Dec. 16, 2016, <https://morningconsult.com/2016/12/16/fcc-officials-transparency-exemption-small-isps-reinstated/>.

²⁴ Jacob Kastrenakes, *The FCC Says Net Neutrality Destroys Small ISPs. So Has it?*, The Verge, July 13, 2017, <https://www.theverge.com/2017/7/13/15949920/net-neutrality-killing-small-isps>.

²⁵ *Id.*

²⁶ *Hearing on Net Neutrality and the Role of Antitrust Before the H. Subcomm. on Reg. Reform, Commercial and Antitrust L. of the H. Comm. on the Judiciary*, 115th Cong. 9-12 (2017) (statement of Robert McDowell, Senior Policy Advisor, Mobile Future).

²⁷ Brian Fung, *Verizon: Actually, strong net neutrality rules won't affect our network investment*, Wash. Post, Dec. 10, 2014, <https://www.washingtonpost.com/news/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/>.

- In December 2015, AT&T CEO Randall Stephenson said that the OIO would not affect the business plans of the company,²⁸ noting that AT&T would deploy more fiber in 2016 than it did in 2015.²⁹
- In December 2016, Charter CEO Tom Rutledge said that Title II reclassification did not “hurt” the company.³⁰

The statements made by the ISPs are consistent with the nature of infrastructure investment, which involves careful decisions made years in advance.³¹ Accordingly, as the NCTA points out, it is unlikely that any decrease in investment over the last two years was a result of the OIO, as “[m]any of the investments were set into motion several years before and may not have accounted for the prospect of Title II regulation.”³²

²⁸ Interview by John Hodulik with Randall Stephenson, Chairman and CEO, AT&T Inc. at the UBS Global Media and Communications Conference (Dec. 8. 2015).

²⁹ *Id.*

³⁰ Jon Brodtkin, *Title II hasn't hurt network investment, according to the ISPs themselves*, Ars Technica, May 16, 2017, <https://arstechnica.com/information-technology/2017/05/title-ii-hasnt-hurt-network-investment-according-to-the-isps-the-mselfes/>.

³¹ See Gordon L. Clark et al., *The New Era of Infrastructure Investing*, 17 Pensions: An Int'l Journal 103 (May 2012) (arguing that institutional investors like insurance companies, pension funds, sovereign wealth funds, endowments, and foundations have a unique advantage in markets for long-term, illiquid assets like infrastructure because of the longer time horizon for such investments).

³² Rick Chessen, *Dear Harold Feld*, (June 13, 2017) <https://www.ncta.com/platform/public-policy/dear-harold-feld/>.