

Repeal of Network Neutrality Eliminates Important Antitrust-Regulation Partnership, Deprives Competition and Consumers of Needed Safeguards

Last week, the Federal Communications Commission (FCC), in a controversial 3-2 party-line vote, chose to repeal net neutrality rules. As part of this rollback, it also reclassified internet service providers (ISPs) as Title I “information services” rather than Title II “telecommunications services.”

The FCC’s repeal of net neutrality rules contravenes the agency’s important public interest mandate and will likely lead to anticompetitive and anti-consumer outcomes. Repeal places an unreasonable burden on antitrust enforcement to police anticompetitive, anti-consumer conduct by dominant ISPs. It also dissolves the partnership between sector regulation and antitrust enforcement that has been vital for promoting competition and innovation on the internet.

Recent events expose the incongruity of the FCC’s decision. The Antitrust Division of the U.S. Department of Justice (DOJ) recently sued to block the AT&T/Time Warner merger based on concerns over content access and discrimination. This raises the question: Why then repeal the net neutrality rules?

I. Net Neutrality in a Nutshell

Net neutrality rules have been the primary tool used to pursue open internet policy. This policy aims to prevent broadband providers like AT&T, Comcast, and Verizon from intruding to manipulate the relationship between internet users and internet content, application, and services providers (or “edge providers”). Historically, such rules have consisted of transparency requirements, which require ISPs to disclose their network management practices and policies; anti-blocking requirements, which prohibit ISPs from denying consumers access to lawful internet content, applications, and services; and anti-discrimination provisions, which prohibit ISPs from treating network traffic unequally.

Net neutrality rules are necessary because most consumers have only one or two choices for high-speed internet access,¹ and even the precious few who have meaningful options face high hurdles – in the form of added costs, inconvenience, and contractual restrictions – if they want to switch. This prevents the forces of competition from disciplining anti-consumer conduct and frees ISPs to extract greater profits by offering higher-priced, lower-quality service.

The net neutrality rules serve to prohibit broadband providers from degrading the quality of service end-users experience from disfavored edge providers (including disruptive, innovative new entrants),

¹ See Federal Communications Commission., Internet Access Services: Status as of December 31, 2015 Fig. 4, at 6 (Nov. 2016) (showing that 76% of census blocks in the United States have at most one provider offering a 25 Mbps connection).

promoting proprietary or contractually favored content over other edge providers' content, and demanding excessive fees from end users or certain edge providers. Without such rules, Comcast or Verizon, for example, can charge streaming video services exorbitant fees for minimally sufficient speed, raising their costs and preventing them from effectively competing with cable.

II. What Repeal of Net Neutrality Means and How the FCC Majority Has Defended It

ISPs have fought tenaciously against net neutrality rules. Why? Because they stand to profit enormously from the freedom to discriminate for and against favored and disfavored edge providers. With last week's reclassification-and-repeal vote, the FCC's three-commissioner majority stripped the agency of authority to impose preventative anti-discrimination and anti-blocking requirements on ISPs.

Chairman Pai and Commissioners Carr and O'Reilly have defended their unpopular decision with a number of questionable arguments. Among other things, they claim that reclassification will simply engender a return to the status quo prior to the 2015 Open Internet Order, which implemented Title II regulation for the first time. They also assert that the federal antitrust and consumer protection laws, administered by the DOJ and Federal Trade Commission (FTC), can fill the void created by the FCC's forbearance.²

III. Repeal Does Not Restore the Status Quo, It Ushers in an Entirely New Era

The first proposition – that reclassifying ISPs as information services will restore the status quo prior to the 2015 Open Internet Order – is misleading at best. From 2010-2014, the FCC asserted authority to impose net neutrality rules on ISPs under Title I, and successfully did so, pursuant to Section 706 of the Telecommunication Act. From 2008-2010, it asserted authority and successfully imposed net neutrality rules on ISPs pursuant to “ancillary jurisdiction” under Section 4 of the Communications Act.³ Both assertions were subsequently rejected by the U.S. Court of Appeals for the D.C. Circuit pursuant to challenges by major broadband providers, which prompted the 2015 Title II classification.

Given this history, today's vote would only restore the pre-2015 status quo in the most meaningless, nominal sense. ISPs will once again be formally classified as information services, but in a totally different regulatory environment. After reclassification, coupled with the majority's commitment to no longer prevent blocking and discrimination, ISPs will be allowed to operate without net neutrality restrictions for the *first time* in the modern internet era (save for brief transition periods where ISPs were still constrained by legal uncertainty).

² See, e.g., Brendan Carr, *No, the FCC is not killing the Internet*, Wash. Post (Nov. 30, 2017), https://www.washingtonpost.com/opinions/no-the-fcc-is-not-killing-the-internet/2017/11/30/9205ac88-d457-11e7-a986-d0a9770d9a3e_story.html?utm_term=.1cd5ee3e1259.

³ See *Verizon v. F.C.C.*, 740 F.3d 623, 632, 635 (D.C. Cir. 2014).

IV. Antitrust Is Unlikely to Fill the Sizeable Void Left by the FCC’s Abdication of Its Public Interest Mandate

The second proposition – that the DOJ and FTC can fill the void created by the FCC’s forbearance – is dubious. To be sure, one significant drawback of the Title II classification was to strip the FTC of jurisdiction to challenge unfair and anticompetitive business practices by ISPs, because of the ill-conceived “common carrier” exemption included in the Federal Trade Commission Act. But it is exceedingly unrealistic to expect restoring jurisdiction to the FTC to satisfy all of the goals of open internet policy, for several reasons.

- ***First, unless existing case law is overturned, as a practical matter the FTC may still be stripped of jurisdiction over nearly all the ISPs that matter most.*** Under a recent Ninth Circuit ruling, the common carrier exemption is “status-based” rather than “activity-based.”⁴ That means the ISPs that have common carrier status because of other service offerings – like Verizon and AT&T, which provide common carrier wireless telephone services – may be bootstrapped into the common-carrier exemption for their ISP activity as well.⁵
- ***Second, the antitrust and consumer protection laws, as currently applied, may not offer any means of directly addressing certain goals of open internet policy.*** In particular, the goals of preserving free speech, preserving the free exchange of diverse viewpoints, and preventing censorship, can sometimes be completely divorced from competitive harm, unfairness, and deception.
- ***Third, competitive misconduct addressed by net neutrality rules may be difficult to prosecute under the antitrust laws.*** Where, for example, an ISP would accept payment in exchange for prioritizing the network traffic of one well-heeled edge provider to the exclusion or disadvantage of the edge-provider’s rivals, the exclusionary effects may be subtle, impairing innovation over the long run by deterring startups or raising the overall costs of content distribution. A dearth of timely, actionable proof, coupled with unfavorable case law, would be an overwhelming deterrent to enforcement, creating the prospect of rampant “false negatives.”⁶

⁴ FTC v. AT&T Mobility LLC, 835 F.3d 993, 998 (9th Cir. 2016).

⁵ See Jessica Rich, *The false promise behind the FCC’s net neutrality repeal plan*, Washington Post (Dec. 12, 2017), https://www.washingtonpost.com/opinions/the-false-promise-behind-the-fccs-net-neutrality-repeal-plan/2017/12/12/06471386-dec9-11e7-89e8-edec16379010_story.html?utm_term=.43ab63c63e55. In an amicus brief signed by Commissioner Carr, who was then General Counsel of the FCC, the agency made clear that it understood this risk, which makes the three-commissioner majority’s FTC talking point particularly specious. See Brief of FCC as Amicus Curiae, FTC v. AT&T Mobility, No. 15-16585 (9th Cir. filed May 30, 2016) (“[T]he fact that AT&T provides traditional common-carrier voice telephone service could potentially immunize the company from any FTC oversight of its non-common-carrier offerings, even when the FCC lacks authority over those offerings—creating a potentially substantial regulatory gap where neither the FTC nor the FCC has regulatory authority.”). The case is awaiting en banc review by the full Ninth Circuit.

⁶ Many forms of ISP misconduct also would be difficult to prosecute under the consumer protection laws, insofar as ISPs can often avoid liability by foregoing explicit promises about service. Some may have already begun to do so. See Jon Brodtkin, *Comcast deleted net neutrality pledge the same day FCC announced repeal*, Ars Technica (Nov. 29, 2017),

- ***Fourth, conduct violations under the antitrust laws are policed ex post, not ex ante.*** In other words, antitrust challenges against ISPs can only be initiated *after* they harm competition. Even if evidentiary and legal obstacles can be overcome, the ship may have already sailed. To the extent net neutrality rules are designed to prevent harm to innovation by small edge providers, a lengthy, costly private enforcement or public agency proceeding is likely to be cold comfort, particularly in dynamic internet markets characterized by first-mover advantages and network effects.⁷
- ***Fifth, behavioral remedies in antitrust merger decrees are not a viable substitute for regulation.*** Antitrust merger enforcement at least has prophylactic characteristics insofar as it can prevent anticompetitive combinations, or impose conditions before the merged firm engages in anticompetitive conduct. Indeed, Comcast is temporarily subject to net neutrality restrictions pursuant to a consent decree it accepted as a condition of its joint venture with NBC-Universal (NBCU). But as skepticism around the effectiveness of that remedy illustrates,⁸ antitrust agencies and courts are often ill-suited to the task of implementing and monitoring conduct remedies in antitrust merger decrees.⁹

Moreover, the antitrust agencies can only impose conditions on ISPs that affirmatively choose to come before them with merger proposals, which can lead to patchwork regulation and distortions. In the aftermath of last week's vote, for example, Comcast will remain bound by net neutrality commitments until September 2018 under the NBCU consent decree, while other ISPs are not bound by any similar constraints.¹⁰

<https://arstechnica.com/tech-policy/2017/11/comcast-deleted-net-neutrality-pledge-the-same-day-fcc-announced-repeal/?amp=1> (noting that Comcast deleted website pledge to forego paid prioritization the day after Chairman Pai announced his intention to repeal net neutrality rules).

⁷ Hal Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, Antitrust Source, at 3, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf; see also Letter to Commissioners of the Federal Trade Commission from Professors of Law, Economics, Business, Communication, and Political Science (Jan. 29, 2015), available at <http://www.pijip.org/wp-content/uploads/2015/01/Net-Neutrality-Prof-Letter-01292015.pdf>.

⁸ See, e.g., Emily Steel, *Comcast's Track Record in Past Deals May Be Hitch for Merger with Time Warner Cable*, N.Y. TIMES (Apr. 21, 2015), https://www.nytimes.com/2015/04/22/business/media/6-senators-urge-rejection-of-comcast-time-warner-cable-deal.html?_r=1 (discussing alleged sidestepping of commitment not to interfere in management and operations of Hulu).

⁹ See John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979, 994, 1010 (2012); Makan Delrahim, Asst. Att'y Gen., Dep't of Justice, Antitrust Div., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

¹⁰ Senator Richard Blumenthal (D-Conn.) recently suggested re-opening the Comcast-NBCU investigation to consider extending the behavioral conditions or perhaps unwinding the transaction. See Ted Johnson, *Senator Asks DOJ to Take Another Look at Comcast-NBCUniversal Merger*, VARIETY (Dec. 13, 2017), www.heritage.org/technology/commentary/time-repeal-the-ftcs-common-carrier-jurisdictional-exemption-among-other.

V. Antitrust and Net Neutrality Rules Are Both Needed to Preserve Open Internet Policy

The FCC's three-commissioner majority apparently does not see the contradictions that their decision to repeal exposes. Perhaps they view antitrust and regulation as substitutes. AAI believes the better view, and sound competition policy, requires seeing them instead as complementary policy tools that should *both* be employed where necessary, and tailored to their respective strengths.¹¹ The antitrust laws have a critical role to play in the media and telecommunications industry, but a sober assessment should recognize that they cannot bear the full weight of open internet policy on their own.

¹¹ The AAI supports the DOJ's lawsuit to block the AT&T/Time Warner merger. *See* Press Release, AAI Applauds Move to Block AT&T-Time Warner Merger, Sets Record Straight on Vertical Merger Enforcement, American Antitrust Institute (Dec. 6, 2017), <http://www.antitrustinstitute.org/content/aai-applauds-move-block-att-time-warner-merger-sets-record-straight-vertical-merger>.