



August 18, 2018

United States Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5510
Washington, DC 20580

Re: *Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201*

Issue 2: Competition and consumer protection issues in communication, information, and media technology networks

I. Introduction

These comments are submitted in response to the U.S. Federal Trade Commission (FTC)'s announcement on the hearings on competition and consumer protection in the 21st Century. The Computer and Communications Industry Association (CCIA)¹ commends the FTC's study of the legal and policy challenges and opportunities that arise with the digitalization of the economy, and welcomes the opportunity to provide views on the issues identified by the FTC.

To ensure that tech-related innovation continues to drive the economy, sound competition policy and antitrust enforcement both must play a crucial role in ensuring that competition exists across markets. With respect to the market for broadband Internet access service (BIAS), CCIA has opposed the Federal Communications Commission (FCC)'s *Restoring Internet Freedom Order* as it would undermine this objective.² CCIA will continue to advocate for the necessity of strong, enforceable net neutrality rules so consumers are protected from unfair, deceptive, and anticompetitive practices.³

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.ccianet.org/members>.

² *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, FCC 17-166, WC Docket No. 17-108, 83 Fed. Reg. 7852 (rel. Jan. 4, 2018).

³ See Motion for Leave to Intervene of the Computer & Comm'ns Indus. Ass'n (CCIA), *County of Santa Clara v. Fed. Comm'ns Comm'n*, No. 18-70506 (9th Cir. Mar. 22, 2018). The case has since been consolidated with others and transferred to the United States Court of Appeals for the District of Columbia Circuit under *Mozilla Corp. v. Fed. Comm'ns Comm'n*, No. 18-1051 (D.C. Cir. Apr. 26, 2018).



II. Competition problems in telecommunication network industries

While the FTC’s inquiry refers to both telecommunications networks and industries “subject to network effects”, these comments focus on telecommunications networks. As noted in CCIA’s response to Issue 3, while the concept of a network effect is generally agreed upon, there is no consensus, empirical test for whether an industry is subject to a network effect. In addition to telecommunications networks, operating systems, languages, and communications protocols have all, at some point, been characterized as being subject to network effects. Due to its highly fact-based nature and the lack of an easily applied economic test, this label does not form a useful predicate for regulatory intervention. Network effects may in some cases be relevant to enforcement actions but will be fact-specific, and their impact will be dependent on other local considerations, like multi-homing. Because they must be assessed on a case-by-case basis, observations about network effects — particularly their strength — cannot be easily generalized. Accordingly, the following comments address the second half of the Commission’s inquiry, regarding competition problems in telecommunications networks.

A. Network neutrality

At its core, net neutrality pertains to the ability of a broadband Internet access provider (BIAP) to block, throttle, or otherwise discriminate against traffic across its network from the end user to the desired source of content. These practices inhibit competition and commerce when BIAPs prevent or discourage their subscribers from reaching the end points that they seek or otherwise would seek, for reasons other than technical network management. Without clear “rules of the road” for the Internet access market, BIAPs would be free to charge tolls for reaching certain types of content and services online. Furthermore, if BIAPs could charge content, application, and service providers for “fast lanes” that avoid congestion on consumers’ standard, best-efforts Internet connections, they would have an incentive *not* to invest in improving the speed and quality of their basic Internet access offerings so as to create demand for such prioritized access. Small businesses and startups generally do not have the financial resources for the prioritization or selective access that a BIAP would be able to create under the FCC’s 2017 *Restoring Internet Freedom Order*. Nor do they have the bargaining power to negotiate more favorable terms with a large BIAP. They rely on the Internet to build their businesses, advertise their products and services, and attract customers. In reality, open Internet rules foster competition and network investment, and they facilitate innovation. However, the Internet ecosystem faces serious threats without bright-line nondiscrimination rules or diligent oversight of BIAPs’ practices.

To date the following anticompetitive practices continue to exist, to the detriment of consumer welfare: blocking, throttling, and other forms of discrimination on communications networks.



Blocking refers to the ability of a BIAP to block access to certain sites and applications. For example, AT&T has had a history of blocking content from competing companies. From 2007-2009, AT&T forced Apple to block Skype and other competing Voice over Internet Protocol (VoIP) phone services and attempted to prevent iPhone users from using any other application that would allow them to make voice calls.⁴ In 2009, the Google Voice app received similar treatment.⁵

Throttling occurs when BIAPs impair or limit available bandwidth for lawful Internet traffic on the basis of content, applications, or services. In 2007, Comcast was caught interfering with users' Internet traffic by slowing down peer-to-peer applications like BitTorrent and Gnutella. Although Comcast did not outright block these applications, it limited users' upload and download rates, eventually making the applications difficult to use.⁶

Other forms of discrimination occur when BIAPs accept payment or other forms of consideration from content providers in exchange for the prioritization of how their traffic moves across the network. This practice, in particular, has serious competitive implications for startups that often do not have the capital to spend on prioritization schemes.

B. Agency responsibility for safeguarding against network neutrality violations

Congress created the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio”.⁷ Given this institutional division of mandates, the FTC has not recently prioritized enforcement actions against broadband industry participants, nor did it devote sufficient resources for its staff to specialize in the broadband industry. As a result, the current institutional structure and expertise of the FTC has been limited to maintaining market competition and consumer protection outside the sphere of telecommunications networks.

Following the FCC's policy reversal in the 2017 *Restoring Internet Freedom Order*, however, CCIA understands that the FCC and FTC have entered into a memorandum of understanding

⁴ Amy Schatz, *In Reversal, AT&T Will Allow Skype, Similar Services on iPhone Network*, WALL ST. J. (Oct. 7, 2009), <https://www.wsj.com/articles/SB125486091615268647>.

⁵ See Adi Robertson, *Here's How Companies Have Flouted Net Neutrality Before and What Made Them Stop*, THE VERGE (June 11, 2018), <https://www.theverge.com/2018/6/11/17438638/net-neutrality-violation-history-restoring-internet-freedom-order>.

⁶ See Timothy Karr, *Net Neutrality Violations: A Brief History*, FREE PRESS (Jan. 24, 2018), <https://www.freepress.net/our-response/expert-analysis/explainers/net-neutrality-violations-brief-history>.

⁷ 47 U.S.C. § 151.



(MOU).⁸ CCIA anticipates that the FTC will rely on the FCC’s expert knowledge of communications networks and its ability to “monitor the broadband market and identify market entry barriers”.⁹ The FTC is now tasked with safeguarding a large segment of the U.S. economy in committing to “investigate and take enforcement action as appropriate against Internet service providers for unfair, deceptive, or otherwise unlawful acts or practices, including but not limited to, actions pertaining to the accuracy of the disclosures such providers make pursuant to the (Restoring) Internet Freedom Order’s requirements, as well as their marketing, advertising, and promotional activities.”¹⁰

While CCIA commends the FTC’s commitment to ensuring that market competition is not distorted by BIAPs, CCIA believes that the FCC’s current transparency rule, as promulgated by the *Restoring Internet Freedom Order*, is insufficient to address these competition concerns. Even if the FTC were to detect and intervene regarding a BIAP’s hypothetical practice of favoring an affiliate’s offering, an unaffiliated startup could be irreparably damaged before the FTC resolves an investigation into the practice. Such a practice would also hinder the startup’s ability to engage enough users to reach long-term viability.

The FTC itself has acknowledged that it can be “costly, difficult, and time consuming to detect and document” anticompetitive discrimination on telecommunications networks, i.e., network neutrality violations.¹¹ Insofar as the FTC will prospectively have enforcement responsibilities given the changes in the regulatory landscape, it must be adequately equipped with the resources necessary to build its capacity to enforce actions for anticompetitive practices occurring in the broadband marketplace.

III. The welfare effects of regulatory intervention to promote standardization and interoperability

Within the zone of infrastructure-layer telephony and telecommunications, standardization and interoperability have long been essential to the success of voice and data communications services. Where consumers have no meaningful choice among BIAPs, achieving this interoperability through regulatory action of legacy infrastructure providers has been

⁸ *Restoring Internet Freedom FCC-FTC Memorandum of Understanding*, Fed. Trade Comm’n (Dec. 14, 2017), https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf [hereinafter *FCC-FTC MOU*].

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., *Comment of the Staff of the Federal Trade Commission*, FERC Docket No. RM17-8-000, at 3-4 (Apr. 10, 2017), 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.



commonplace. When the focus of the question moves to the various competing “edge” communications services, among which consumers can choose, the answer is necessarily different. Regulatory intervention at the competitive edge of the network can impede consumers’ ability to choose between competing, optional services. This question is discussed at greater length in CCIA’s response to Issue 4.

IV. The application of the FTC’s Section 5 authority to the broadband Internet access service business

In theory, the FTC’s Section 5 authority¹² allows it to police against anticompetitive practices by BIAPs. The FTC has confirmed this theory by claiming that its primary source of authority to police Internet discrimination is Section 5 of the Federal Trade Commission Act, which prohibits both “unfair methods of competition” and “unfair and deceptive trade practices.”¹³

While CCIA commends the FTC for clarifying its legal basis to pursue anticompetitive conduct, in practice it remains to be established whether Section 5 can successfully remedy competition concerns in the highly concentrated market for BIAS, especially since the FCC has abdicated its authority over BIAS and apparently handed off all oversight to the FTC.

Previous FTC enforcement actions in the broadband industry are scarce, mainly for two reasons. First, due to Congress’s mandate that the FCC serve as the primary regulator of communications by wire or radio¹⁴ and its accompanying role of ensuring competition for communications networks, the FTC did not prioritize these actions. Second, in the limited occasions where the FTC has dealt with these matters, it interpreted this authority narrowly, such as by identifying violations of terms of service when companies have misled or deceived consumers. CCIA believes that the FTC will have to change its priorities to include policing broadband service providers’ anticompetitive practices.

Finally, CCIA is concerned that due to the *ex post* nature of the FTC’s enforcement authority and resource constraints, the Commission may not be able to catch or address every or even most

¹² 15 U.S.C. § 45.

¹³ *FCC-FTC MOU*, *supra* note 8.

¹⁴ 47 U.S.C. § 151; *see In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, GN Docket No. 14-28, (rel. Mar. 12, 2015); Comments of Thomas B. Pah, Fed. Trade Comm’n Bureau of Consumer Protection, Acting Director, et al., WC Docket No. 17-108 (July 17, 2017), at 25 (“Unilateral conduct on the part of broadband providers—for example, foreclosing rival content in an exclusionary or predatory manner—may be challenged under Section 2 of the Sherman Act. Section 1 of the Sherman Act could be used to analyze contractual relationships that may block access to the Internet by content or applications providers or discriminate in favor of a supplier with whom the broadband provider has an affiliated or contractual relationship under exclusive dealing theories.”).



instances where a BIAS provider could block, throttle, or otherwise favor some Internet traffic over others.

V. Unique competition and consumer protection issues associated with the Internet and online commerce

The Internet has allowed for many enterprises and new business models to emerge. This, in turn, has changed the economic landscape from a consumer's perspective. An increasing number of consumers now use online services to acquire products and services otherwise available at traditional brick and mortar spaces. Inevitably, these new forms of commerce increase the importance of ensuring that BIAPs do not engage in anticompetitive practices.

The importance of policing BIAPs' business practices becomes even more relevant given that many of these carriers compete at the downstream level with companies that also offer their products and services on the Internet, and therefore are dependent upon the Internet being a level playing field. As vertically integrated firms that own essential infrastructure for which there is little or no meaningful competition, BIAPs have the incentive and ability to engage in anticompetitive practices to distort downstream markets. Given the importance of online commerce to the United States, discrimination in the provision of BIAS to disadvantage or exclude downstream rivals will severely harm consumer welfare.

VI. Conclusion

Recognizing that the FCC has abdicated its authority to police discrimination of Internet traffic by BIAPs, CCIA urges the FTC to be vigilant and conduct robust enforcement to preserve the open Internet ecosystem. CCIA expects the FTC to increase resources devoted to preventing abuses due to the lack of competition among BIAPs. CCIA also encourages the FTC to change its previous antitrust enforcement pattern concerning this industry.