

Information Technology and Innovation Foundation
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August 20, 2018

Donald Clark
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

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

Dear Secretary Clark,

The Information Technology & Innovation Foundation (ITIF) is pleased to submit these comments in response to the request for comment (RFC) from the Federal Trade Commission (FTC) on whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy.¹

ITIF is a nonprofit, non-partisan public policy think tank committed to articulating and advancing a pro-productivity, pro-innovation and pro-technology public policy agenda internationally, in Washington, and in the states. Through its research, policy proposals, and commentary, ITIF is working to advance and support public policies that boost innovation, e-transformation, and productivity.

Please find our response to the following topic:

COMPETITION AND CONSUMER PROTECTION ISSUES IN COMMUNICATION, INFORMATION, AND MEDIA TECHNOLOGY NETWORKS

Competition and consumer protection issues are rightly under the ambit of a generalist enforcement agency—the FTC. For most all consumer protection and competition issues, the FTC should treat Internet Service

¹ “Hearings on Competition and Consumer Protection in the 21st Century,” Federal Trade Commission, n.d.
<https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

Providers (ISPs) no differently than other similar actors it oversees. We as a nation should generally work to move away from sector-specific competition and consumer protection regulations. Generalist enforcement agencies are resilient to capture, make for more efficient enforcement, and eliminate duplicate efforts across the government. The narrow exception is where the expertise and foresight of a sector-specific agency could improve outcomes.

With the Federal Communications Commission's (FCC) recent decision to classify broadband Internet access service as a lightly regulated "information service" under the Communications act, the FTC finds itself with an important new oversight role with respect to ISPs. The FTC is well-equipped to oversee ISPs and other participants in the Internet access system for most all competition and consumer protection issues, including privacy for all actors in the broader Internet system. However, ITIF has argued that the FCC is better suited to the role of enforcing network neutrality.² Congress should address the question of the proper agency to oversee broadband providers through legislation that also settles the controversy over the regulatory structure for broadband and net neutrality generally.³ Should Congress agree that the FCC is better suited to enforce network neutrality issues, the FTC should cede this ground to the sector-specific agency.

In the meantime, while the FTC maintains oversight of these issues, we urge the FTC to take a relatively permissive stance when it comes to paid prioritization schemes, as many of these are likely to functionally enhance the performance of the Internet without making other users worse off.⁴ As long as best-effort traffic continues to be the predominant use of broadband, as it likely will, the applications that legitimately benefit from prioritization (which is a narrower class than generally assumed) should not swamp the open Internet.

Real-time services that do not tolerate delay but also require reliable performance to justify investment development, such as robotics control, haptic feedback mechanisms, and high-quality VR or AR, do not work well over the open Internet as it functions today. Basic tradeoffs around delay and reliability are built into the basic protocols of the Internet—both reliability and low-latency can only be provided with traffic differentiation. Considering the varying demand for these resources from different applications, prioritization can be provided without an offsetting loss. For example, nobody really notices if an email packets arrive a

² Doug Brake, "Why We Need Net Neutrality Legislation and What it should Look Like" (Information Technology and Innovation Foundation, 2018), <https://itif.org/publications/2018/05/07/why-we-need-net-neutrality-legislation-and-what-it-should-look>.

³ Ibid.

⁴ Doug Brake, "Paid Prioritization: or Why We Should Stop Worrying and Enjoy the Fastlane" (Information Technology and Innovation Foundation, 2018), <https://itif.org/publications/2018/07/30/paid-prioritization-why-we-should-stop-worrying-and-enjoy-fast-lane>.

tenth of a second later than it otherwise would, but that same delay in a video conference results in choppy video.

The FTC should step in if a provider functionally blocked or unduly slowed legal Internet traffic, or did not otherwise abide by its transparency disclosures. But prioritization techniques that provide better than best-effort traffic are unfairly maligned by net neutrality activists, and as long as paid prioritization is offered on a non-exclusive basis, with similar terms offered to similar users, the risks of over-enforcement outweigh the risks of under-enforcement.

Net neutrality is one key flashpoint, and a primary tussle between different actors in the broader Internet system. As a general matter, the FTC should hew toward traditional antitrust analysis, and treat broadband networks similar to other parts of the economy, analyzing the costs and benefits of enforcement and the impact to dynamic innovation before intervening generally. For example, under the previous administration the FCC attempted to place heightened privacy restrictions on ISPs as compared to other sectors, which was ill advised. ITIF welcomed the comments of FTC staff, who argued for similar treatment compared to other large networked platforms.

Sincerely,

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