



United States of America
Federal Trade Commission

**Statement of FTC Acting Chairman
Maureen K. Ohlhausen¹**

**Net Neutrality and the Role of Antitrust:
Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law
of the House Judiciary Committee**

November 1, 2017

Chairman Marino, Ranking Member Cicilline, and members of the Subcommittee, I appreciate this opportunity to appear before you today to discuss network neutrality and the role of antitrust.

Ten years ago, a bipartisan FTC approved a staff report that analyzed competition and consumer protection issues related to net neutrality and cautioned against regulation.² Applying economic and antitrust analysis, our report explained that banning non-neutral behavior could harm consumers more than it helps them. Instead, the report noted, the FTC could assess whether broadband ISPs' practices are anticompetitive, unfair, or deceptive, on a case-by-case basis. The report also recommended that ISPs clearly disclose the material terms of broadband internet access, particularly any traffic-shaping practices. This report remains highly relevant today and, where the evidence has changed, it shows the broadband market is more competitive than it was in 2007, strengthening the report's conclusions.

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

² See, *FTC Issues Staff Report on Broadband Connectivity Competition Policy*, June 27, 2007 ("The Commission vote to approve the report was 5-0, with Commissioner Jon Leibowitz issuing a separate concurring statement."), <https://www.ftc.gov/news-events/press-releases/2007/06/ftc-issues-staff-report-broadband-connectivity-competition-policy>; FED. TRADE COMM'N, *BROADBAND CONNECTIVITY COMPETITION POLICY 52* (2007) [hereinafter "2007 BROADBAND REPORT"], <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

More recently, FTC staff filed a comment to the FCC detailing our expertise in this area and recommending that the FCC reclassify broadband as a Title I, non-common carrier service.³

I agree with that recommendation and filed my own comment to that effect.⁴

As the 2007 report and subsequent comments state, the FTC’s antitrust and consumer protection tools help ensure that consumers can pursue their preferences in the marketplace, whether for prioritized services or for equal treatment of all data by ISPs.

The FTC has addressed a wide range of anticompetitive behavior, including the kinds of behavior that concern net neutrality advocates. For example, the FTC has sued companies for foreclosing rival content in an exclusionary or predatory manner.⁵ We have challenged problematic access,⁶ discrimination,⁷ pricing,⁸ and bundling⁹ practices. And we have conditioned¹⁰ vertical mergers that would have foreclosed competition in a downstream market.

Antitrust enforcement, by protecting the competitive process, can promote net neutrality— if that is what consumers want.¹¹ Advocates of net neutrality regulation often argue that

³ Comment of the Federal Trade Commission Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics, WC Docket No. 17-108 (filed July 17, 2017) [hereinafter “Bureau Comment”], <https://www.ftc.gov/policy/advocacy/advocacy-filings/2017/07/comment-staff-bureau-consumer-protection-bureau-competition>.

⁴ Comment of Federal Trade Commission Acting Chairman Maureen K. Ohlhausen, WC Docket No. 17-108 (filed July 17, 2017), [hereinafter “Ohlhausen Comment”], <https://www.ftc.gov/public-statements/2017/07/acting-chairman-maureen-k-ohlhausen-comment-fcc>.

⁵ See, e.g., Realcomp II Ltd., FTC File No. 061-0088, <https://www.ftc.gov/enforcement/cases-proceedings/061-0088/realcomp-ii-ltd-matter>.

⁶ See, e.g., McWane, Inc., and Star Pipe Products, Ltd., FTC File No. 101-0080b, <https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter>.

⁷ See, e.g., America Online, Inc., and Time Warner Inc., FTC File No. 001-0105, <https://www.ftc.gov/enforcement/cases-proceedings/0010105/america-online-inc-time-warner-inc>.

⁸ See, e.g., Polygram Holding, Inc.; Decca Music Group Limited; UMG Recordings, Inc.; and Universal Music & Video Distribution Corp (Three Tenors), FTC File No. 001-0231, <https://www.ftc.gov/enforcement/cases-proceedings/0010231/polygram-holding-inc-decca-music-group-limited-umg-recordings>.

⁹ See, e.g., Toys R Us, Inc., FTC File No. 091-0082, <https://www.ftc.gov/enforcement/cases-proceedings/091-0082/toys-r-us-inc>.

¹⁰ See, e.g., General Electric Company, FTC File No. 131-0069, <https://www.ftc.gov/enforcement/cases-proceedings/131-0069/general-electric-company-matter>.

¹¹ See generally Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119 (2016).

consumers value the equal treatment of data by broadband ISPs.¹² If so, then any ISP that systemically degrades applications and content that its subscribers demand will certainly face a backlash. On the other hand, consumers may desire and benefit from certain non-neutral broadband ISP practices, such as streaming services bundles or prioritization of telemedicine services. Case-by-case antitrust enforcement focused on competitive harm will allow ISPs and content providers to experiment in ways that benefit consumers, while guarding against arrangements that foreclose access to edge providers.

Supporters of net neutrality regulation also commonly assert that the retail broadband market lacks competition.¹³ But measuring competition isn't a simple exercise of counting how many wireline ISPs in an area provide broadband at a certain speed threshold. It requires careful product and market definitions and analysis of the disciplining effect of substitutes and potential entrants. The evidence of growing competition, such as improving speeds, the expansion of mobile broadband, and vigorous pricing competition, must also be considered when determining whether net neutrality regulation is necessary.¹⁴

Like our antitrust tools, the FTC's consumer protection authority can help address concerns that consumers are not getting what they expected from their ISP. Our deception authority bans companies from offering consumers one product or service but providing them something different. And if ISPs promise to adhere to net neutrality principles, the FTC can hold them to those promises. Our deception authority also requires companies to disclose material

¹² See, e.g., James K. Willcox, "Survey: Consumers Favor Strong Net Neutrality Rules," Sept. 27, 2017, <https://www.consumerreports.org/net-neutrality/most-consumers-still-want-strong-net-neutrality-rules/>.

¹³ See, e.g., John Bergmayer, *We Need Title II Protections in the Uncompetitive Broadband Market*, April 26, 2017, <https://www.publicknowledge.org/news-blog/blogs/we-need-title-ii-protections-in-the-uncompetitive-broadband-market>. The word "monopoly" appears in 1,136,605 comments in the FCC's Restoring Internet Freedom docket, WC Docket No. 17-108, as of Oct. 31, 2017.

¹⁴ See, Ohlhausen Comment at 6-7; Mike Dano, *Cost of Wireless Service Falls 13%, Biggest Decline in 16 Years: Labor Dept.*, May 22, 2017, <http://www.fiercewireless.com/wireless/cost-wireless-service-falls-13-biggest-decline-16-years-labor-dept>.

information – for example, blocking or throttling practices – if not disclosing it would mislead a reasonable consumer.

The FTC’s unfairness authority prohibits practices where the actual or likely consumer injury is substantial, unavoidable, and not outweighed by benefits to consumers or competition. The FTC has used this authority to sue companies that unilaterally violated their past promises to consumers.¹⁵ Indeed, the FTC is currently challenging as unfair and deceptive AT&T Mobility’s alleged practice of throttling wireless data plans, which they advertised as unlimited.¹⁶

Case-by-case enforcement against particular instances of harm to consumers or competition is the right approach when we know that a type of practice typically benefits consumers and spurs competition. In contrast, a *per se* prohibition is appropriate only where we have evidence that a specific practice nearly always harms consumers without corresponding benefits.

In short, the FTC has tools that are capable of protecting consumers and competition online. Thank you and I look forward to your questions.

¹⁵ *Orkin Exterminating Co., Inc.*, 108 F.T.C. 263 (1986); *aff’d.*, *FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988).

¹⁶ FEDERAL TRADE COMM’N, *FTC Says AT&T Has Misled Millions of Consumers with ‘Unlimited’ Data Promises*, <https://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data>.