

Oral Statement of Commissioner Terrell McSweeney
House Judiciary Committee
November 1, 2017

Good afternoon, I want to thank Chairman Marino and Ranking Member Cicilline for having me here today to speak about the role of antitrust as it relates to net neutrality.

I am speaking only for myself and not on behalf of the Commission.

I support the FCC's 2015 Open Internet Order because it establishes clear rules to protect consumers and entrepreneurs who are dependent on a few, very large broadband providers that serve as the gatekeepers to the internet.

For more than a decade, the status quo in the United States has been an open internet that supports thriving innovation.

I'm proud to serve at the Federal Trade Commission— but it is wrong to assume that a framework that relies solely on backward-looking consumer protection and antitrust enforcement can provide the same assurances to innovators and consumers as the forward-looking rules contained in the FCC's Open Internet Order.

While it is true that the FTC possesses a great deal of expertise in the areas of antitrust and consumer protection, it does not possess specialized subject-matter expertise in telecommunications, data network management practices, or in detecting instances of data discrimination. That expertise is housed at the FCC. These are very real and significant limits to the effectiveness of the FTC's tools in policing nondiscrimination on networks and protecting competition.

Moreover, antitrust tools are designed to protect competition. But broadband markets are highly concentrated. The majority of American consumers have little or no choice when it comes to wireline broadband. Competitive pressure cannot be counted on either to push ISPs to offer consumers better contract terms or quality of service or to limit discriminatory conduct.

Since most US consumers are dependent on a few big players to access the internet, the critical question is whether these companies have the incentive and ability to harm consumers and competition. Both DOJ and the FCC have recognized that they do.¹ For example, big

¹ In its review with the FCC of the proposed Comcast/Time Warner merger in 2015, DOJ concluded that the transaction would have reduced competition in the video and broadband markets, leaving consumers with less choice, higher prices, and lower quality. Press Release, Dep't of Justice, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable after Justice Department and The Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2015), <https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department> (observing both companies' presence in Video and Broadband).

The FCC's 2015 Open Internet Order relied on an extensive evidentiary record to reach the conclusion that "broadband providers (including mobile broadband providers) have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users." Fed. Communications Comm'n, Protecting and Promoting the Open Internet, WC Docket No. 14-28,

broadband companies also supply video programming. That means that their revenues are directly threatened when consumers use their broadband connections to access competing video providers or new entrants.

It is well established that appropriately tailored regulation can complement antitrust law in highly concentrated markets – particularly when vertically integrated incumbents have incentives to harm competitors.²

Absent clear rules, the detection of discriminatory conduct is costly, difficult, time-consuming, and hard to remedy. For example, let’s say that you are watching streaming video and your stream becomes slow or grainy. Is that caused by intentional data discrimination by your ISP? Or might it be a server issue related to the content provider? Perhaps a spotty wi-fi connection? Or maybe something else entirely? How would a typical consumer know? How would the FTC?

If the FTC were to detect a possibly anticompetitive practice, antitrust enforcement requires not only detection, but thorough investigation, prosecution, a potentially lengthy “rule of reason” analysis, and perhaps a multi-year appeals process. At the end of that process, we could not travel back in time to undo the harm to an excluded rival or reset the competitive evolution of the marketplace.

Moreover, the premise of internet openness is that consumers should be able to use their broadband connections to access the lawful content of their choosing. Non-economic values, such as freedom of expression and diversity of discourse, may not be easily reached under antitrust law.

Finally, the FTC’s jurisdiction over common carriers remains unclear. Even if the FCC reclassifies broadband as an information service, the major providers will continue to provide common carrier services, therefore remaining common carriers. Unless Congress repeals our common carrier exemption, we will continue to face challenges to our authority over common carriers.

Additional renovations in the FTC’s authority – for example, giving it more extensive tools to protect consumer data and privacy, making sure it has the proper resources, and giving it more leeway to challenge anticompetitive mergers in highly concentrated markets – would help the Commission keep pace with changes in the economy.

Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶ 78 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

² For example, earlier this year, the Commission authorized staff to submit a comment to the Federal Energy Regulatory Commission, voicing support for clear *ex ante* regulation to safeguard the competitiveness of power generation markets. Staff underscored the limitations of *ex post* enforcement by noting that “it could be costly, difficult, and time-consuming to detect and document” certain forms of anticompetitive discrimination by transmission system owners regarding interconnection to the electric grid. Comment of the Staff of the Federal Trade Commission, FERC Docket No. RM17-8-000, at 3-4 (Apr. 10, 2017), 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.

Earlier this year, Congress took the unfortunate action of repealing the FCC's Broadband Privacy rules – leaving consumers without important protections over how their data is used and shifting the risk of data security from industry giants onto American families.

Congress should not double down on this approach.

There is not an either-or choice that must be made between clear FCC rules to protect the open internet and FTC enforcement. By design, the agencies have different tools with different features. Both have a role to play when it comes to protecting consumers and ensuring an internet that fosters innovation.