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Federal Trade Commission

Putting the FTC Cop Back on the Beat

*Remarks at The Future of Internet Freedom
An R Street Institute and Lincoln Network Event*

Maureen K. Ohlhausen¹
Acting Chairman, U.S. Federal Trade Commission

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I'm very pleased to be here today to talk about how the FCC's Restoring Internet Freedom proposal revives and even enhances the FTC's ability to protect broadband consumers. Back in 2014, I warned that regulating broadband providers as Title II common carriers would create an enormous consumer protection gap, cutting out not just the FTC's active privacy enforcement but also removing our ability to challenge any deceptive or unfair practice by broadband providers. For consumers' sake, I am therefore pleased that the proposed order would return to broadband customers the FTC protections they had before 2015.

But what does this mean for net neutrality? The term "net neutrality" today is an expansive, amorphous concept. It is commonly used to mean protecting consumers and Internet companies from a variety of bad actions by broadband providers. In other words, net neutrality advocates are concerned about protecting consumers and promoting competition.

Now, if those two goals sound familiar, it might be because Congress assigned those twin missions to the FTC.

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.

We have a long history of actively protecting consumers and promoting competition across a wide range of industries. This includes highly technical industries such as microprocessors and pharmaceuticals, where we study the competitive dynamics of a complex industry to evaluate a company's practices. We have brought a multitude of cases against companies big and small, stopping anticompetitive behavior and saving consumers billions of dollars. We've reviewed mergers involving ISPs and online content, such as AOL/Time-Warner,² and brought consumer protection cases against companies like Apple,³ AT&T,⁴ Dish,⁵ Facebook,⁶ Google,⁷ T-Mobile,⁸ and many others. Indeed, the FTC closely watched the behavior of the early on-ramps to the Internet and brought cases against AOL, Compuserve, Juno, and Prodigy for deceiving consumers about their services.⁹ And we have an ongoing case against

² See, FEDERAL TRADE COMM'N, *FTC Approves AOL/Time Warner Merger with Conditions*, <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>. The merger conditions included prohibitions on interfering with content passed along the cable broadband system.

³ See, FEDERAL TRADE COMM'N, *Apple Inc. Will Provide Full Consumer Refunds of At Least \$32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent*, <https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million>.

⁴ See, FEDERAL TRADE COMM'N, *FTC Providing Over \$88 Million in Refunds to AT&T Customers Who Were Subjected to Mobile Cramming*, <https://www.ftc.gov/news-events/press-releases/2016/12/ftc-providing-over-88-million-refunds-att-customers-who-were>.

⁵ See, FEDERAL TRADE COMM'N, *FTC and DOJ Case Results in Historic Decision Awarding \$280 Million in Civil Penalties against Dish Network and Strong Injunctive Relief for Do Not Call Violations*, <https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil>.

⁶ See, FEDERAL TRADE COMM'N, *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises*, <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

⁷ See, FEDERAL TRADE COMM'N, *Google to Refund Consumers at Least \$19 Million to Settle FTC Complaint It Unlawfully Billed Parents for Children's Unauthorized In-App Charges*, <https://www.ftc.gov/news-events/press-releases/2014/09/google-refund-consumers-least-19-million-settle-ftc-complaint-it>.

⁸ See, FEDERAL TRADE COMM'N, *T-Mobile to Pay At Least \$90 Million, Including Full Consumer Refunds To Settle FTC Mobile Cramming Case*, <https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds>.

⁹ See, e.g., FEDERAL TRADE COMM'N, *America OnLine, Compuserve and Prodigy Settle FTC Charges Over "Free" Trial Offers, Billing Practices*, <https://www.ftc.gov/news-events/press-releases/1997/05/america-online-compuserve-and-prodigy-settle-ftc-charges-over>; FEDERAL TRADE COMM'N, *Juno Online Services Settles FTC Charges Over Internet Service Advertisements*, <https://www.ftc.gov/news-events/press-releases/2001/05/juno-online-services-settles-ftc-charges-over-internet-service>; see also, FEDERAL TRADE COMM'N, *AOL and Compuserve Settle FTC Charges of Unfair Practices*, <https://www.ftc.gov/news-events/press-releases/2003/09/aol-and-compuserve-settle-ftc-charges-unfair-practices>.

AT&T Mobility for allegedly unfairly and deceptively throttling broadband speeds on unlimited wireless data plans.¹⁰ Wireless provider TracFone settled with us for similar behavior.¹¹

The FTC is also the primary enforcer of online consumer privacy and data security. In fact, I was at the FTC when we brought the first online privacy case against GeoCities in 1998.¹² The FTC has brought more than 500 privacy- and security-related enforcement actions and held more than 20 workshops and events on privacy and data security topics.¹³

And that leadership continues. Just this morning, we released the agenda for our December 12 informational injury workshop, where we will examine the types of harm from the exposure or misuse of consumers' personal information, including harms from stalking and discrimination.¹⁴ As a related aside, I've been dismayed that some who feel passionately about net neutrality have been willing to invade the privacy of officials with whom they disagree.

But, back to the FTC. The FTC's ability to protect consumers and promote competition in the broadband industry isn't something new and far-fetched. We have a long-established role in preserving the values that consumers care about online, including the consumer protection and competition issues that concern net neutrality advocates. In fact, ten years ago, a bipartisan FTC

¹⁰ See, 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>.

¹¹ See, FEDERAL TRADE COMM'N, *Prepaid Mobile Provider TracFone to Pay \$40 Million to Settle FTC Charges It Deceived Consumers About 'Unlimited' Data Plans*, <https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc>.

¹² See, FEDERAL TRADE COMM'N, *Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case*, <https://www.ftc.gov/news-events/press-releases/1998/08/internet-site-agrees-settle-ftc-charges-deceptively-collecting>.

¹³ See generally, FEDERAL TRADE COMM'N, *Workshops*, <https://www.ftc.gov/news-events/audio-video/ftc-events/workshops>; FEDERAL TRADE COMM'N, *All Events*, <https://www.ftc.gov/news-events/events-calendar/all> (search using "privacy" keyword).

¹⁴ FEDERAL TRADE COMM'N, *FTC Releases Agenda for Workshop on Informational Injury*, <https://www.ftc.gov/news-events/press-releases/2017/11/ftc-releases-agenda-workshop-informational-injury>.

report analyzed net neutrality concerns and cautioned against prescriptive regulation.¹⁵ The report’s legal and economic analysis concluded that banning certain business models could harm consumers more than it helps them. Many such arrangements could actually benefit broadband consumers, saving them money and prioritizing services they care about. And, the report noted, the FTC can assess whether broadband ISPs’ practices are anticompetitive, unfair, or deceptive, on a case-by-case basis.

Indeed, the FTC has regularly addressed the kinds of anticompetitive behaviors that concern net neutrality advocates. For example, the FTC has sued companies for foreclosing rival content in an exclusionary or predatory manner. We have challenged problematic access, discrimination, pricing, and bundling practices. And we have conditioned vertical mergers that would have foreclosed competition in a downstream market.¹⁶

Antitrust enforcement protects the competitive process and therefore can promote net neutrality—if that is what consumers want. Advocates of net neutrality regulation often argue that consumers value the equal treatment of data by broadband ISPs.¹⁷ If so, then expect a public backlash against any ISP that degrades applications or limits access to content that its subscribers demand. On the other hand, consumers may desire and benefit from arguably non-neutral practices, such as streaming services bundles, money-saving free data programs, or prioritization of telemedicine services. Although the 2015 rules purported to be about consumer choice, they

¹⁵ 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 REPORT 52 (2007) [hereinafter “2007 BROADBAND REPORT”], <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

¹⁶ See generally, *Statement of FTC Acting Chairman Maureen K. Ohlhausen, Net Neutrality and the Role of Antitrust: Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Judiciary Committee*, nn 5-10 and accompanying text (Nov. 1, 2017), <https://www.ftc.gov/public-statements/2017/11/statement-ftc-acting-chairman-maureen-k-ohlhausen-net-neutrality-role>.

¹⁷ 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/>.

likely *limited* the options available to the consumer. This point is worth emphasizing: in the marketplace, companies seek to deliver what *consumers* want. But under prescriptive regulation, companies seek to deliver what *regulators* want. Case-by-case antitrust enforcement focused on competitive harm will allow ISPs, edge providers, and content providers to **all** experiment with innovative business models that will face the ultimate marketplace test: whether they benefit consumers.

Like our antitrust tools, the FTC's consumer protection authority can 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. Notably, our 2007 report recommended that ISPs clearly disclose the material terms of broadband Internet access, particularly any traffic-shaping practices.¹⁸ Thus, I am very pleased to see that Chairman Pai's proposed order adopts vigorous transparency requirements. Under the order, ISPs must publicly disclose a wide range of practices, including blocking, throttling, or prioritization. ISPs won't be able to hide their practices. Consumers will know what they are getting up front. If an ISP's practices deviate from their disclosures, or if they fail to disclose important information, the FTC can sue. Also, the FTC can stop unfair practices even where there is no deception. Indeed, as I previously mentioned, the FTC is currently challenging as unfair and deceptive AT&T Mobility's alleged practice of throttling unlimited wireless data plans.

Now some criticize the FTC's enforcement-based approach. But, as our bipartisan 2007 report concluded, case-by-case enforcement is the best tool for the types of practices that often

¹⁸ 2007 BROADBAND REPORT at 129-134.

benefit consumers but might harm consumers in certain instances.¹⁹ This approach allows beneficial practices while curbing abuse. In contrast, *per se* prohibitions – the inflexible approach taken by the FCC in 2015 – prevent beneficial practices, and, because rules don’t enforce themselves, government would *still* have to bring specific cases to address any abuses.

In short, the FTC has tools that are capable of protecting consumers and competition online. We’ve done so across the economy, throughout the Internet, and until 2015, we did so for broadband consumers as well. Yet in the last week, I’ve read a lot of anxious theorizing over the future of the Internet. But the Internet was a success long before the 2015 regulations. And the FCC’s repeal of those regulations doesn’t mean that neutral practices will disappear. Indeed, where consumers desire neutrality, they’ll get it through market competition, facilitated by the FCC’s transparency rules and by antitrust and consumer protection law enforced by the FTC, DOJ, state attorney generals, and private plaintiffs. And companies across the entire Internet ecosystem will remain free to experiment with innovative business models that benefit consumers. Thank you.

¹⁹ See generally, *id.* at VII.