



UNITED STATES OF AMERICA
Federal Trade Commission

“Not Neutrality”

Remarks of Commissioner Noah Joshua Phillips*

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Thanks, Andrea, for the kind introduction. And thanks to the International Institute of Communications for inviting me here.

Before I begin, I want to take a brief moment to note that today is a national day of mourning, on which we remember and honor the life and service of George Herbert Walker Bush, the 41st President of the United States. President Bush was a patriot, a war hero, and a lifelong public servant. He was also a devoted family man who embodied dignity, grace, and decency. We mourn his passing, with gratitude for the life he led and the profound impact it had on our country, and the world.

Introduction

The technological means through which we as human beings communicate have developed over millennia, and the policy conversations we have about communication necessarily involve technology, and vice versa. The breadth of issues under discussion yesterday and today – from privacy to online platforms to 5G to

* The views expressed below are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

democracy itself – testifies to the fact that, as Marshall MacLuhan famously observed, “the medium is the message”.¹ Perhaps no aspect of the medium has been as thoroughly messaged – for and against – than “net neutrality”, the topic on which I want to focus today.

First, a caveat: my remarks are my own and do not necessarily reflect the views of my fellow Federal Trade Commissioners.

As you may have heard, the Federal Communications Commission’s 2017 Restoring Internet Freedom Order reclassified broadband internet service providers (“broadband providers” or “broadband ISPs”) under Title I of the Communications Act and, in doing, restored authority to the FTC.² So, whether you, or I, like it, or not, net neutrality is coming to the FTC.

With that in mind, today I have two goals. First, I want to give FTC watchers a little net neutrality context by revisiting the concerns that animate the debate. Second, I want to talk to folks in the communications space about the FTC: our mission and the tools we can bring to bear. We’re the cop on the beat, so we ought to do some policing.

Net Neutrality Revisited

I sometimes marvel that the question whether to classify broadband internet service provision under Title I or Title II of the Communications Act captures public attention, and even inflames passions; but – in truth – it’s not surprising. The

¹ MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN 23 (2d ed. 1964).

² Restoring Internet Freedom, 33 FCC Rcd. 311 (2017); FED. COMMUNICATIONS COMM’N & FED. TRADE COMM’N, MEMORANDUM OF UNDERSTANDING: RESTORING INTERNET FREEDOM 1 (2017), <https://www.ftc.gov/policy/cooperation-agreements/restoring-internet-freedom-fcc-ftc-memorandum-understanding>.

Internet is at the core of our modern economy, generating trillions of dollars of economic activity and innovation, and our society more broadly, facilitating unprecedented access to and creation of information, and new means of social, cultural, and political participation. It continues to hold great promise; but the Internet also generates concern, including with regard to the competition and consumer protection at the heart of the FTC's mission.

The concept of net neutrality goes back to the late 1990s and early 2000s, with seminal work from professors Lawrence Lessig, Mark Lemley, and Tim Wu.³ I hear Professor Wu has a book out, but I digress. This early work established the principle of non-discrimination with respect to content – the notion that a core value of the Internet is its blind and equal treatment of every data packet, regardless of source or destination. This feature, the argument goes, is essential to preserving the free expression and persistent innovation the Internet unleashed.

Net neutrality soon received attention from regulators. In 2004, Michael Powell, then Chairman of the FCC, discussed scholarship indicating that broadband providers “might face incentives to begin restricting some uses of their platforms in certain cases” and that “[a] few troubling restrictions have appeared in broadband

³ See, e.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (using the term “end-to-end” or “e2e” to refer to net-neutrality principles); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV 925 (2001); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003); Ex parte letter from Tim Wu, Associate Professor, University of Virginia School of Law, and Lawrence Lessig, Professor of Law, Stanford Law School, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 22, 2003), http://www.timwu.org/wu_lessig_fcc.pdf.

service plan agreements.”⁴ While acknowledging the worries, he cautioned against what he called “intrusive government regulation” in the absence of persuasive evidence that the feared abuses were widespread.⁵

The following year, in *Brand X*, the Supreme Court agreed with the FCC’s classification of broadband Internet services provided by cable companies as an “information service”, rather than a “telecommunications service”.⁶ Under its Title I authority, the FCC in 2008 ordered Comcast to cease manipulating packet headers to suppress BitTorrent, a peer-to-peer application.⁷ The D.C. Circuit rejected that approach, holding that Title I did not give the FCC authority to regulate ISPs’ network management practices.⁸ The FCC maintained its “information service” classification in its 2010 Open Internet Order, which required public disclosures by broadband providers and prohibited them from blocking or unreasonably discriminating against content.⁹ In 2014, however, the D.C. Circuit held that the agency lacked authority under Title I to impose these regulations.¹⁰ In 2015, the FCC, under Chairman Wheeler, issued the 2015 Open Internet Order, which the D.C. Circuit upheld the following year.¹¹

⁴ Michael K. Powell, Chairman, Fed. Communications Comm’n, Preserving Internet Freedom: Guiding Principles for the Industry, Silicon Flatirons Symposium: The Digital Broadband Migration 4 (Feb. 8, 2004) (transcript available at <https://docs.fcc.gov/public/attachments/DOC-243556A1.pdf>)

⁵ *Id.* at 6.

⁶ Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967 (2005).

⁷ Comcast Corp., 23 FCC Rcd. 13028 (2008)

⁸ Comcast Corp. v. Fed. Communications Comm’n, 600 F.3d 642 (D.C. Cir. 2010).

⁹ Preserving the Open Internet, 25 FCC Rcd. 17905 (2010).

¹⁰ Verizon v. Fed. Communications Comm’n, 740 F.3d 623 (D.C. Cir. 2014).

¹¹ Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015); U.S. Telecomm. Ass’n v. Fed. Communications Comm’n, 825 F.3d 674 (D.C. Cir. 2016).

While the net neutrality debate is also about bigger things, it concerns a set of business practices, specifically broadband providers blocking (including access charges), throttling, or favoring particular content or applications.

Blocking occurs when a broadband provider denies end users lawful content, applications, services, or non-harmful devices on its network. In practice, a provider blocks by refusing access or by charging the undesired edge providers prohibitively high access fees. Throttling, the conduct at issue in the 2008 Comcast case, stops short of blocking and instead degrades certain Internet traffic. Net neutrality proponents fear that the freedom to block or throttle gives broadband providers too much power to control online speech and innovation.¹² Favoritism can include paid prioritization, wherein a broadband provider prioritizes the traffic of edge providers that pay, or zero rating, where an edge provider pays a mobile broadband provider to allow its end users to access its online services or content at no cost. For some, favoritism not only presents concerns along the lines of blocking and throttling, it also disadvantages poorer firms relative to wealthier ones.¹³

All of these practices have animated the debate from the 1990s to today, and the regulations in the 2015 Open Internet Order addressed them. While some of the net neutrality debate concerns whether these practices warrant condemnation, much of it – including the back-and-forth between the 2015 Open Internet Order and the 2017 Restoring Internet Freedom Order – concerns how best to deal with

¹² See, e.g., Wu, *supra* note 3; Lemley & Lessig, *supra* note 3.

¹³ See, e.g., Katheryn Thayer, *Tim Wu Makes A Bid For Net Neutrality*, FORBES (June 17, 2014), <https://www.forbes.com/sites/katherynthayer/2014/06/17/tim-wu-makes-a-bid-for-net-neutrality/#1f15539e6596>.

them. Should we apply *ex ante* regulation, or competition, with *ex post* enforcement where laws are violated?

Advocates for *ex ante* regulation highlight the Internet's critical role as both market and public forum, and the immense gatekeeping power that broadband providers wield. They argue that the harms from an unfree, segmented, and unequal Internet are too great, and that broadband providers' practices are too complex and difficult to detect for anything short of blanket rules. They also dismiss *ex post* enforcement as too slow, limited, and uncertain.¹⁴

Skeptics of the regulatory approach, some of whom endorse *ex post* enforcement of antitrust and consumer protection law instead, argue that regulation is appropriate in the face of market failure. They note that the number of broadband Internet providers varies from market to market, suggesting that market conditions do not generally lead to the natural monopolies that have justified intrusive regulation in the past. Competition among broadband providers, they continue, incentivizes the provision of services that consumers want, not including blocking or throttling. If end users value certain content and applications, competing broadband providers will work to satisfy those preferences.¹⁵

¹⁴ See, e.g., Lawrence Lessig, *The Internet Under Siege*, FOREIGN POL'Y (Nov. 16, 2009), <http://foreignpolicy.com/2009/11/16/the-internet-under-siege/>; Kaleigh Rogers, *We Can't Rely on the FTC to Defend Net Neutrality*, MOTHERBOARD (Nov. 29, 2017), https://motherboard.vice.com/en_us/article/j5dek8/net-neutrality-ftc-rules; Lemley & Lessig, *supra* note 3.

¹⁵ See, e.g., Joshua D. Wright, Commissioner, Fed. Trade Comm'n, *Neutrality Meets Regulatory Economics 101*, Federalist Society Media and Telecommunications Practice Group Event: The Future of Media (Feb. 25, 2015) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/626591/150225wrightfedsoc.pdf); Maureen K. Ohlhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119; Michael L. Katz, *Wither U.S. Net Neutrality Regulation?*, 50 REV. INDUS. ORG. 441 (2017).

Net neutrality proponents argue that paid prioritization and other favoritism may competitively disadvantage innovative but small firms, many of which would not exist absent the Internet's level playing field. Established edge providers with deeper pockets, the theory goes, will pay for preferential treatment, crowding out emergent rivals that might have spurred meaningful innovation.¹⁶ Other arguments against favoritism, particularly those attacking zero rating, worry that the digital divide will widen and that the poor will be relegated to an inferior Internet.¹⁷

Net neutrality skeptics worry that banning practices like paid prioritization may do more harm than good. They cite economic research showing that vertical agreements between upstream and downstream firms rarely hurt consumers and often benefit them, by generating efficiencies, aligning incentives, and preventing free-riding. If broadband providers cannot leverage the size of their user base to extract value from edge providers, the former have less incentive compete for end users' business or to invest in expanded access. If one really cares about the poor, skeptics claim, allowing favoring of content may facilitate providers offering broadband packages at a variety of price points, making internet access more broadly affordable.¹⁸

¹⁶ See, e.g., BARBARA VAN SCHEWICK, T-MOBILE'S BINGE ON VIOLATES KEY NET NEUTRALITY PRINCIPLES (2016), <http://cyberlaw.stanford.edu/downloads/vanSchewick-2016-Binge-On-Report.pdf>; Nicholas Economides, *Don't Gut Net Neutrality*, Wired (Jan. 1, 2017), <https://www.wired.com/2017/01/dont-gut-net-neutrality-good-people-business/>.

¹⁷ See, e.g., Mahesh Murthy, *Internet.org Is Just a Facebook Proxy Targeting India's Poor*, TECH2 (Apr. 17, 2015), <https://www.firstpost.com/tech/news-analysis/internet-org-is-just-a-facebook-proxy-targeting-indias-poor-3666881.html>.

¹⁸ See, e.g., Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006); Joshua D. Wright, Commissioner, Fed. Trade Comm'n, *The Case for an Antitrust*

This policy debate is far from over, but as a legal matter we are now in an *ex post* enforcement world, which brings me to the FTC.

The FTC and Net Neutrality

The FTC's mission is to protect consumers and promote competition, by ending unfair or deceptive practices in the marketplace, and by challenging anticompetitive business practices and mergers that could lead to reduced output, higher prices, lower quality, and less innovation. My view is that, no matter how you feel about the *ex ante* / *ex post* question, the FTC can and should police practices that violate the law and hurt consumers.

The FTC is no stranger to broadband. Beginning with the Internet Access Task Force in 2006, we have been considering these issues for over a decade. The resulting report in 2007, on Broadband Connectivity Competition Policy, identified principles that continue to frame a useful analysis. It called for close monitoring of competition in broadband Internet markets, noting that, over time, competition produces the best results for end users. It also acknowledged uncertainties about the amount of consumer harm regulation would prevent and raised the potential of regulation to generate adverse and unintended consequences, which ought to be weighed against the expected benefits. It concluded: "in evaluating whether new

Approach to Net Neutrality Issues, Information Economy Project's Conference on US Broadband Markets in 2013 (Apr. 19, 2013) (transcript available at https://www.ftc.gov/sites/default/files/documents/public_statements/broadband-policy-consumer-welfare-case-antitrust-approach-net-neutrality-issues/130423wright_nn_posting_final.pdf); Ohlhausen, *supra* note 15; Katz, *supra* note 15.

proscriptions are necessary, we advise proceeding with caution before enacting broad, *ex ante* restrictions in an unsettled, dynamic environment.”¹⁹

The FTC has brought numerous cases relating to broadband access and consumers’ use of the Internet. Take our two recent throttling cases, which address directly one of the business practices at issue in the net neutrality debate. In 2015, the FTC settled charges that TracFone, a large prepaid wireless provider, failed to disclose that it throttled the speeds of consumers on “unlimited” data plans. The company paid \$40 million in consumer refunds.²⁰ The FTC is currently in litigation against AT&T Mobility, in which we allege that the company unfairly throttled the speeds of consumers on plans advertised as “unlimited”. The complaint also alleges that AT&T failed to disclose this practice.²¹ At the beginning of this year, the FTC scored a major legal victory in that case, when it persuaded the Ninth Circuit to uphold the agency’s jurisdiction over mobile internet service providers, even if they also provide separate common carrier services.²²

These are deception cases, which we brought under our consumer protection authority to ban “unfair or deceptive acts and practices”. A deception case requires us to show a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances. Markets work where consumers

¹⁹ FED. TRADE COMM’N, BROADBAND CONNECTIVITY COMPETITION POLICY STAFF REPORT 9 (2007), <https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

²⁰ Stipulated Order for Permanent Injunction and Monetary Judgement, *FTC v. TracFone Wireless, Inc.*, 2015 U.S. Dist. LEXIS 42805 (N.D. Cal. 2015) (No. C15-0392 EMC).

²¹ Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. AT&T Mobility LLC*, 87 F. Supp. 3d 1087 (N.D. Cal. 2015) (No. C-14-4785 EMC).

²² *Fed. Trade Comm’n v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018).

have the information they need, and this authority allows us to bring actions against firms that inhibit that information flow. The 2017 Restoring Internet Freedom Order builds on this fundamental intuition. Under the recently modified the Transparency Rule, broadband providers now must disclose, on the web, certain network management practices, commercial terms, and performance characteristics, identifying (if they occur) practices like throttling, blocking and prioritization.²³ The FCC will ensure that companies make the disclosures, the FTC will investigate whether companies do what they say; and if they are not, the FTC will bring enforcement actions.

To those who believe that transparency is not an effective mechanism, recall Louis Brandeis' observation that "[s]unlight is said to be the best of disinfectants".²⁴ An analogy to our securities laws may also help. U.S. capital markets have a lot to them, but at their core are the 1933 Securities Act, which mandates certain disclosures by public companies, and the 1934 Securities and Exchange Act, which creates liability for fraud. There's a lot more to both than my pithy summary, but the point is that transparency and civil law enforcement combine to allow market forces to work pretty well.

So I expect the new transparency rules to be important. The FTC should examine behavior that may constitute an unfair or deceptive act or practice. And we must keep up to date on the markets and technology for internet service, and

²³ 47 C.F.R. § 8.1 (2018).

²⁴ LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

encourage market participants and consumer advocates to flag behavior within our jurisdiction that concerns them.

Increased transparency and, if necessary, enforcement, will help consumers. It should give us a better sense of what is going on in the market, and a better opportunity to catch bad actors. Transparency may also help resolve some of the debates we've been having. If the practices we fear are, in fact, endemic, we may have a market failure. I would be interested in seeing, for example, how evidence of blocking, throttling, and favoritism line up with levels of competition in broadband service. Are the bad practices more common where competition is less intense?

Switching gears from consumer protection to competition, the FTC has expertise in enforcing the antitrust laws across all industries, including rapidly evolving, high-technology industries. Indeed, excluding the time during which the FCC's 2015 order was in effect, the FTC has had antitrust jurisdiction over broadband internet markets as well, although the DOJ's Antitrust Division has handled the lion's share of enforcement in cable and telecommunications in recent years.

Whether assessing unilateral or joint conduct by broadband providers, antitrust analysis asks whether the activity in question is likely to harm competition, to the detriment of consumers. For example, if a broadband provider that also generates content attempts to foreclose a rival edge provider on its network through predatory or exclusionary practices, it may face liability under Section 2 of the Sherman Act. Agreements among competitors that substantially

reduce competition, such as agreements to keep certain edge providers off of networks, may be challenged under Section 1 of the Sherman Act.

The merger laws, the other part of our antitrust regime, are designed to prevent substantial reductions of competition from consolidation, including in broadband internet markets. They also reach vertical integration between, say, an edge provider and a broadband provider, if such integration is likely to substantially limit rivals' competitive opportunities or create incentives to disadvantage rivals in ways that ultimately leave end users worse off.

Conclusion

The FTC has a crucial role to play in protecting consumers in our dynamic modern economy. That applies to net neutrality. We should not remain neutral. We must leverage the new transparency, our partnership with the FCC, and the tools, expertise, and talent we have long employed to address business practices that harm end users and threaten competition in broadband internet markets. Most of all, we must remain vigilant. The Internet, which we hope will remain both open and free, demands it.

Thank you very much.