Net Neutrality Without the FCC?: Why the FTC Can Regulate Broadband Effectively

By Roslyn Layton & Tom Struble

Note from the Editor:

This article argues that the FTC has jurisdiction over broadband and the tools to regulate it, and that it would do a better job of regulating it than the FCC.

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• Abigail Slater, *The FTC and Net Neutrality's Plan B*, The Regulatory Review (Aug. 16, 2017), https://www.theregreview.org/2017/08/16/slater-ftc-net-neutrality/.

• Anant Raut, *Unlike FCC, FTC cannot protect net neutrality*, The Hill (Aug. 21, 2017), http://thehill.com/blogs/pundits-blog/technology/347363-unlike-fcc-ftc-cannot-protect-net-neutrality.

• Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, The Antitrust Source (Aug. 2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf.

• Susan Crawford, *The FCC Is Leading Us Toward Catastrophe*, Wired (Apr. 17, 2017), https://www.wired.com/2017/04/the-fcc-is-leading-us-toward-catastrophe/.

• Gigi Sohn, *The FCC's plan to kill net neutrality will also kill internet privacy*, The Verge (Apr. 11, 2017), https://www.theverge.com/2017/4/11/15258230/net-neutrality-privacy-ajit-pai-fcc.

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The sale of broadband internet access service (broadband) to consumers was subject to Federal Trade Commission (FTC) jurisdiction until 2015. In 2015, the Federal Communications Commission (FCC) issued the second Open Internet Order, which reclassified broadband as a "telecommunications service" under Title II of the Communications Act.[1] This reclassification subjected broadband providers to the FCC's "common carrier" authority, preempting the jurisdiction of the FTC.[2] Former FTC Commissioner Joshua Wright colorfully described this incident as the FCC taking the FTC's "jurisdictional lunch money[.]"[3]

The FCC used its new authority to impose certain rules and regulations on broadband providers, with the goal of promoting "Internet openness" and "net neutrality." While these terms lack precise, internationally-agreed definitions, they suggest notions of all internet traffic being treated equally, and thus all discrimination being unlawful.[4] The resulting Open Internet Order rules, and the Title II framework that supports them, are a set of price and traffic controls that amounts to a centrally planned broadband network under government supervision.[5] These contrast sharply with the notion of "Internet Freedom," the FCC's first attempt to provide guiding principles for the broadband industry.[6] Internet Freedom suggests that users should be free to use the applications and devices they want to, and access the content of their choosing.[7] Necessarily, that implies that any action by a broadband provider to abridge those freedoms would be illegal, but there are no proscriptive rules or rigid constraints that deny network providers the freedom to compete and innovate.[8]

Shortly after the new presidential administration took office in January 2017, Commissioner Ajit Pai was elevated to Chairman of the FCC. The newly constituted FCC has since proposed to undo the FCC's 2015 Open Internet Order and restore the previous classification of broadband as an "information service" under Title I of the Communications Act.[9] If the FCC follows through with this Restoring Internet Freedom proposal,

1 *See* Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28 (Mar. 12, 2015) [2015 Open Internet Order], *available at* https://goo.gl/QafQCE.

2 *See id.* at ¶ 283.

3 Joshua Wright (@ProfWrightGMU), Twitter (Mar. 29, 2017, 1:55 PM), *available at* https://goo.gl/697SCS.

4 Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecomm. & High Tech. L. 141 (2003), *available at* https://goo.gl/Gxgiaj (describing the general contours of a proposed framework for Net Neutrality).

5 Roslyn Layton & Bronwyn Howell, *How Title II Harms Consumers and Innovators*. Am. Enterprise Inst. (July 2017), *available at* https://goo.gl/KZQXuT.

6 Michael Powell, Chairman, Fed. Commc'ns Comm'n, *Preserving Internet Freedom: Guiding Principles for the Industry*, Silicon Flatirons Symposium (Feb. 8, 2004), *available at* https://goo.gl/xlWVRl.

7 *Id.* at 5.

8 *Id.* at 5.

9 Restoring Internet Freedom, *Notice of Proposed Rulemaking*, WC Docket No. 17-108 (May 23, 2017) [RIF NPRM], *available at* https://goo.gl/d4E1Wh.

the FTC's jurisdiction will cover broadband once again.[10] This would restore the pre-2015 status quo that had been in place since the dawn of the commercial Internet, and allow the FTC to use its broad authority under Section 5 of the FTC Act to protect consumers from any anticompetitive behavior or unfair or deceptive practices.[11]

In spite of decades of experience with this regime, including both successful enforcement actions and thoughtful industry guidance, some claim that the FTC is unable to adequately police the harms described in the FCC's Open Internet Order, or to regulate broadband more generally.[12] This article reviews four common arguments supporting the claim that the FTC is not competent to regulate broadband and shows why they are either unfounded or unpersuasive. We therefore conclude that restoring FTC jurisdiction over broadband will not create a regulatory vacuum or endanger the future of the internet as suggested by opponents of the move, and indeed that the FTC will be able to deter harms and police abuse while also supporting the innovation and investment that have been stymied by the FCC.

I. The FTC Will Soon Have Jurisdiction Over Broadband Once Again

While the FTC currently lacks jurisdiction over broadband, through action of either the FCC, courts, or Congress, the FTC may soon have jurisdiction over broadband once again. The FTC's jurisdiction is constrained by Section 5(a)(2) of the FTC Act, which expressly exempts all "common carriers subject to the Acts to regulate commerce."[13] Historically, this meant the telephony services that the FCC regulated under Title II were outside the FTC's jurisdiction. Former FTC Commissioner Rausch explained that this exemption was a:

> [P]roduct of institutional design; when Congress created the FTC in 1914, it did not intend for the new agency to enforce Section 5 against common carriers because these entities were already subject to regulation by another agency, namely, the Interstate Commerce Commission ("ICC"), under the Interstate Commerce Act of 1887. Thus, in a congressional scheme intended to avoid interagency conflict, the ICC retained jurisdiction over telephone common carriers (as well as railroads) until 1934, when Congress enacted the Communications Act that created the FCC and transferred the ICC's jurisdiction over telephony to this new agency.[14]

Reversing the reclassification of broadband as a common carrier service, as the FCC has proposed to do,[15] would restore the FTC's authority over broadband.

However, jurisdiction could continue to shift between the two agencies if a future FCC reverses course and reclassifies broadband as a Title II common carrier service once again, so broadband jurisdiction won't be truly settled unless Congress intervenes or the courts settle the matter in a legal challenge. Although the 2015 Open Internet Order was upheld by the D.C. Circuit and *en banc* rehearing was denied, seven petitions for a writ of certiorari are pending at the Supreme Court.[16] These petitions argue that the order is illegal on administrative law, separation of powers, and First Amendment grounds.[17] Broadly, they maintain that the FCC's interpretations underlying the Title II reclassification should be rejected because the fundamental approach to broadband regulation is such a major question of economic and political significance that typical *Chevron* deference is inapplicable.[18] If the Supreme Court grants these petitions and overturns the Title II reclassification, the FTC will once again have plenary jurisdiction over broadband, and a future FCC will likely be unable to reinstate the 2015 order.

Even with the Title II reclassification undone, the FTC may still run into jurisdictional problems in the 9th Circuit, due to a panel's broad interpretation of the FTC Act's common carrier exemption in a case last year.[19] In *FTC v. AT&T Mobility LLC*, the panel concluded that the exemption prohibits the FTC from regulating any *firm* that offers common carrier services, rather than merely prohibiting the agency from regulating those common carrier *services*; in other words, it took a status-based approach to determining jurisdiction rather than the more typical activities-based approach.[20] This is significant with respect to firms such as Verizon, Comcast, and Google/Alphabet—which provide some common carrier services, but also many digital services that do not resemble common carriage—as it could potentially remove FTC jurisdiction over all of their actions. The *en banc* 9th Circuit—which has granted review—or the Supreme Court may overturn that panel decision and determine that the common

10 Although an ongoing case in the 9th Circuit could potentially disrupt this outcome. *See* FTC v. AT&T Mobility LLC, 835 F.3d 993 (9th Cir. 2016).

11 Federal Trade Commission Act, Pub. L. No. 63-311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45).

12 *See* Wu, *supra* note 4.

13 15 U.S.C. § 45(a)(2); *see also* 15 U.S.C. § 44 (defining "Acts to regulate commerce" to mean, inter alia, "the Communications Act").

14 J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Remarks Before the Global Forum 2011: Vision for the Digital Future, *Neutral on Internet Neutrality: Should There Be a Role for the Federal Trade Commission?* (Nov. 7, 2011), *available at* https://goo.gl/hfRB5T (citing FTC v. Verity Int'l Ltd., 443 F.3d 48, 57 (2d Cir. 2006)) (internal citations omitted).

15 *See* RIF NPRM, *supra* note 9.

16 *See* Aurora Barnes, *Petitions of the Day*, SCOTUSblog (Oct. 31, 2016), *available at* https://goo.gl/8wQu8x.

17 *See* Adam White, et al., *Litigation Update: United States Telecom Association v. Federal Communications Commission*, Federalist Soc'y Telecomm. Prac. Group Podcast (June 6, 2017), *available at* https://goo.gl/Yju7ho.

18 *Id.*

19 *See AT&T Mobility LLC*, 835 F.3d at 998 (concluding that the common carrier exemption is status-based, rather than activities-based).

20 *Id.* at 995.

carrier exemption is based on the activity, rather than the status, of the firm in question.[21] If the *AT&T Mobility LLC* decision is overturned and the FCC reverses the Title II reclassification, the FTC will once again have authority to regulate broadband, even where broadband services are provided by a firm that also provides common carrier services, such as telephony. Otherwise, complex and costly structural separation orders would be necessary to force firms to segregate their common carrier services from non-common carrier services, allowing the FCC to regulate the former and the FTC to regulate the latter.

But given the long debate over net neutrality at the FCC and the impending court decisions, ideally Congress would resolve this lingering uncertainty through legislation. A first step would be to repeal the common carrier exemption, or at least clarify that the exemption is activities-based, not status-based. The exemption is anachronistic, particularly in the context of modern communications markets. Assumptions of common carriage are obsolete in the converged world because technological progress has overcome earlier perceived barriers to competition. Common carrier regulation typically assumed a communication infrastructure with zero marginal costs and undifferentiated demand, but that has not been the case for communication networks for decades.[22]

Congress should also clarify the respective roles of the FCC and FTC in regulating broadband. The last time Congress addressed broadband regulation was over twenty years ago, when it noted that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[23] Lawmakers sought to update the Communication Act as recently as 2014,[24] but the process was disrupted by the FCC's third attempt to create net neutrality rules.[25] Congress should clarify that FCC regulation of broadband under Title II—a framework of price and traffic controls developed to regulate a nationalized monopoly telephony network—is unlawful. Technology advances in broadband delivery allow us to overcome natural monopolies and foster a competitive environment,[26] so the FTC's general purpose competition and consumer protection framework is a far better fit than the FCC's common carrier framework.

II. The FTC's Enforcement Tools Can Ensure a Free and Open Internet

The FTC's substantial authority to prohibit "unfair methods of competition" and "unfair or deceptive acts and practices," along with its numerous enforcement tools, can adequately ensure consumers and entrepreneurs continue to benefit from a free and open Internet. However, some commenters question this assertion. For example, Tim Wu, who coined the term "net neutrality," recently observed on Twitter, "In the language of American telecommunications policy, invoking antitrust as an alternative is a polite code for doing nothing."[27] But antitrust law was used successfully in telecom to break up the Bell monopoly in the 1980s, although some more recent attempts have been rejected by the courts.[28] However, the FTC's consumer protection authority remains a potent force. Wu himself, while working at the New York Attorney General's office, vigorously applied state consumer protection laws against broadband providers, recently charging two cable companies for failing to deliver promised speeds to consumers.[29] With the FTC's authority restored, it can cooperate with both the U.S. Department of Justice and state attorneys general to jointly pursue these types of investigations and enforcement actions, providing more layers of law enforcement than what is available at the FCC.

Enforcement of net neutrality and internet openness under the rubric of transparent traffic management and speed disclosures is the modus operandi for Europe's net neutrality regime.[30] Wu's seminal paper showing the need for net neutrality used a set of contract disclosures as evidence.[31] In essence, broadband is a

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21 *See, e.g.*, John Eggerton, *Ninth Circuit to Review FTC v. AT&T Mobility*, Broadcasting & Cable (May 9, 2017), *available at* https://goo.gl/Wjtevx.

22 *See, e.g.*, Mark A. Jamison & Janice A. Hauge, *Do Common Carriage, Special Infrastructure, and General Purpose Technology Rationales Justify Regulating Communications Networks?* 10 J. of L., Econ. & Org. 475 (Feb. 24, 2014), *available at* https://goo.gl/PDnwQ6; Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 Houston L. Rev. 545 (2013), *available at* https://goo.gl/eVPRJd.

23 Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 138 (1996) (codified at 47 U.S.C. § 230(b)(1)).

24 U.S. House of Representatives, Energy & Commerce Committee, *#CommActUpdate* (last visited Oct. 28, 2017), *available at* https://goo.gl/vQwcMj.

25 2015 Open Internet Order.

26 *See, e.g.*, Alfred E. Kahn, Economics of Regulation: Principles and Institutions (1988). Indeed, one of the leading texts on telecom regulation describes its objective to end ex ante sector-specific, common carrier regulation. The textbook's authors observe, "No matter how capable and well-intentioned regulators are, they will never be able to produce outcomes as efficient as a well-functioning market." *See* International Bank for Reconstruction and Development, World Bank, InfoDev, and International Telecommunication Union, *The Telecommunications Regulation Handbook* (2011), *available at* https://goo.gl/tiBVgg.

27 Tim Wu (@SuperWuster), Twitter (July 6, 2017, 11:11 PM), *available at* https://goo.gl/2L4das.

28 *See, e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004) (rejecting a complaint brought under the Sherman Act alleging anticompetitive practices on the part of AT&T in its line-sharing arrangement with Verizon).

29 Press Release, A.G. Schneiderman Announces Lawsuit Against Spectrum-Time Warner Cable and Charter Communications for Allegedly Defrauding New Yorkers Over Internet Speeds and Performance (Feb. 1, 2017), *available at* https://goo.gl/ryjX32.

30 European Parliament & Council, *Regulation 2015/2120 of the European Parliament and of the Council of 25 November 2015 Laying Down Measures Concerning Open Internet Access and Amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services and Regulation No. 531/2012 on Roaming on Public Mobile Communications Networks Within the Union* (Nov. 25, 2015), *available at* https://goo.gl/h9W8jb; *see also* the Body of European Regulators for Elec. Commc'ns, *Net Neutrality Assessment Methodology* (Oct. 5, 2017), *available at* https://goo.gl/oxBXgo.

31 Wu, *supra* note 4, at 158–62 (reviewing various contractual terms in broadband contracts).

service with a set of terms and conditions, which buyer and seller freely agree to in a contract. These contracts are enforceable under the FTC's consumer protection authority without any need for ex ante regulation.

The 9th Circuit's aforementioned *AT&T Mobility LLC* case illustrates how such enforcement actions can work in practice. Both the FCC and the FTC charged the company with unlawfully throttling users on its "unlimited" plans; the FCC relied on its 2010 Open Internet Order, and the FTC relied on its consumer protection authority in Section 5 of the FTC Act. In 2015, the FCC Enforcement Bureau charged AT&T Mobility with a violation of its 2010 Open Internet Order's transparency rule, arguing that the practice of labeling a mobile data plan as "unlimited" was misleading and inaccurate because customers experienced speed reductions after passing a certain data threshold, and that AT&T did not provide sufficient disclosure of the practice.[32] As punishment, the FCC proposed to levy a $100 million fine.[33] The item was voted out 3-2 along party lines; then-Commissioner Ajit Pai dissented, saying that AT&T had engaged in the practice since 2007 and repeatedly made clear disclosures to customers.[34] AT&T challenged the action in court and the fine was never collected;[35] the FCC eventually bowed out to allow the FTC to pursue its parallel action on the same issue, which predated the FCC's action.[36] The FTC's enforcement action against AT&T began in 2014 with a unanimous 5-0 vote, charging that the company misled consumers with its "unlimited" plans beginning in 2011, which constituted a "deceptive" practice.[37] AT&T Mobility continues to fight that case, but only on jurisdictional grounds. Separately, the FTC also required AT&T to send $88 million in refunds to 2.7 million customers who were victims of "mobile cramming," when unauthorized charges of third party fees were added to their mobile bills.[38]

These enforcement actions illustrate that not only does the FTC have the necessary authority to punish broadband providers that engage in anti-consumer or anti-competitive behavior, but it also has the enforcement tools to order specific consumer redress, such as refunds and disgorgement of ill-gotten gains.[39] The FCC, by contrast, can only issue fines, and its statute of limitations for bringing an enforcement action is one year, compared with five years for the FTC.[40]

Some net neutrality advocates may concede these points, but still claim that the FTC is incapable of policing broadband. These advocates claim that ex ante rules are required, because allegedly harmful practices like "paid prioritization" must be banned outright. Competition law would recognize that "paid prioritization" agreements—the idea that parties could contract for different quality of service levels for data delivery—are a type of vertical restraint, which are not inherently harmful, and may on net be beneficial for both consumers and competition. Therefore, such arrangements would be assessed case by case, with anti-competitive and anti-consumer harms being weighed against pro-competitive and pro-consumer benefits. For the net neutrality advocates who take the idea literally and believe that all data should be treated equally regardless of effects on consumers, arrangements for so-called "fast lanes" are inherently harmful and discriminatory. However, similar priority arrangements in other sectors of the economy are found to benefit both consumers and innovators alike, so they may be beneficial in broadband too.[41]

It seems that many net neutrality advocates are simply opposed to the idea of a free market for broadband, in which different technologies and services compete for superiority and consumers decide the parameters of their broadband experience.[42] In such a free market, there is a limited role for an ex ante regulator. And while the FCC asserted that such ex ante provisions are necessary to protect "openness," some question their true motives. For example, Brent Skorup and Joseph Kane suggest that the advent of new technologies put the FCC on a path to obsolescence, but the agency used net neutrality to resuscitate the notion of common carriage and thus extend its life repositioned as a social regulator.[43] Whether or not that theory is true, the FTC does have adequate enforcement tools to police net neutrality and pursue other broadband regulation goals; whether claims to the contrary are ideologically-driven pretexts or based on sincere concerns, they should be rejected.

III. The FTC's Regulatory Framework Would Weigh the Costs and Benefits of Paid Prioritization

Some net neutrality advocates believe that paid prioritization—the practice of individually negotiating for dedicated bandwidth or other forms of preferential treatment for broadband traffic associated with a particular service or

32 In re AT&T Mobility LLC, *Notice of Apparent Liability for Forfeiture and Order*, EB-IHD-14-00017504 (June 17, 2015), *available at* https://goo.gl/JBkgCU.

33 *Id.* at 6613 ¶ 2.

34 *Id.* at 6629.

35 David McCabe, *How the FCC's $100 Million Fine Against AT&T Faded Away*, Axios (June 22, 2017), *available at* https://goo.gl/yYmV6j.

36 Press Release, FTC Says AT&T Has Misled Millions of Consumers with "Unlimited" Data Promises (Oct. 28, 2014), *available at* https://goo.gl/Gk3mqe.

37 *Id.*

38 Press Release, FTC Providing Over $88 million in Refunds to AT&T Customers Who Were Subjected to Mobile Cramming (Dec. 8, 2016), *available at* https://goo.gl/Cir0n4.

39 *See, e.g.*, Joshua D. Wright, *Wrecking the Internet to Save it? The FCC's Net Neutrality Rule*, Testimony Before the U.S. House of Representatives, Committee on the Judiciary at 17 (Mar. 25, 2015), *available at* https://goo.gl/c7SE3Z.

40 *Id.*

41 *See, e.g.*, Bruce M. Owen, *Antitrust and Vertical Integration in "New Economy" Industries with Application to Broadband Access*, 38 Rev. of Indus. Org. 363 (2011), *available at* https://goo.gl/Aco6z6.

42 *See* Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 Colo. Tech. L. J. 119 (2016) (explaining how antitrust can protect against anticompetitive violations of net neutrality).

43 Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 Minn. J. L. Sci. & Tech. 631 (2017), *available at* https://goo.gl/yeqBwM.

providers—is so harmful that it needs to be banned outright. Such a ban is justified, in their minds, because the risks of preventing all possible and even improbable harm outweigh the benefits of welfare enhancing arrangements. Of course, the FTC could find that paid prioritization agreements do cause significant harm to consumer welfare, and establish binding precedent declaring such agreements to be unlawful, but only if it has substantial evidence showing actual or likely harm to consumers or competition. The FCC, on the other hand, banned paid prioritization outright in its 2015 Open Internet Order by simply asserting that such practices are harmful, without giving any real-world examples.[44]

Conjuring of theoretical doom that will result if not for regulatory intervention can have a powerful effect on an agency, especially one like the FCC with goals as broad as "the public interest." Mark Lemley and Lawrence Lessig, in their paper re-interpreting the end-to-end principle of engineering as an argument for ex ante regulation, observed, "To say there is no reason to use a seatbelt because there is always the care of an emergency room is to miss the extraordinary costs of any ex post remedy."[45] This analogy is inapt because, unlike the FCC's precautions against merely hypothetical broadband harms, seat belt use is known to prevent harm based upon an empirical and verifiable dataset,[46] and seat belt rules were made through legislation.[47] The FCC's 2015 net neutrality rules were not grounded in either.

Lemley and Lessig's ultimate goal was to make the case for mandated wholesale access to network infrastructure (what they call "open access"), specifically the forced unbundling of cable networks from the broadband service provided over them. Lemley and Lessig asserted that "allowing such bundling will compromise an important architectural principle that has governed the Internet since its inception: the principle of 'end-to-end' design ('e2e'). Nothing less than the structure of the Internet itself is at stake in this debate."[48] When presented with the issue of cable bundling in *NCTA v. Brand X Internet Services*, the Supreme Court disagreed with this analysis.[49] The six-Justice majority found reasonable the FCC's determination that cable broadband can be offered as a bundled or integrated information service, and not a service with separate information and telecommunications service components, which denied resellers the privilege to obtain mandatory wholesale access to cable infrastructure at regulated rates.[50] Some believe the net neutrality movement was born as a result of this dispute as another way to achieve regulation of access to privately owned networks.[51]

Interestingly, "paid prioritization" did not enter the FCC's lexicon until the 2015 Open Internet Order, and it only reflects a theoretical discussion that appears to have been catalyzed by a bill from Senator Wyden, the Internet Nondiscrimination Act of 2006, in which:

> [N]etwork operators would be prohibited from charging companies for faster delivery of their content to consumers over the internet or favoring certain content over others. "Creating a two-tiered system could have a chilling effect on small mom and pop businesses that can't afford the priority lane, leaving these smaller businesses no hope of competing against the Wal-Marts of the world."[52]

While Wyden provided no examples of broadband providers offering such tiered services, the practice has been commonplace among transit providers and in the content delivery network (CDN) industry, in which service providers store copies of popular content in caches close to end users.[53] The 2015 Open Internet Order carved out CDNs from regulation by regulating only the "last mile" of broadband networks,[54] a fact that dissenting commissioner Mike O'Rielly used to show the inconsistency of the rules.[55]

The FCC has never provided any examples of broadband providers deterring innovation or blocking new startups from entering the marketplace because they are able to treat different content differently. However, there is a real-world example of the FCC's rules deterring innovation and blocking a startup: Daniel Berninger's HelloDigital, which seeks to use voice to enable a ubiquitous process of facilitating user commentary on the web—basically, replacing comment threads on websites with real-time discussions between users. Berninger sued the FCC because the ban on paid prioritization effectively makes his service illegal. Senior Justice Stephen Williams noted in oral arguments that

44 2015 Open Internet Order, ¶ 125.

45 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, 956 (2000), *available at* https://goo.gl/BnTDdN.

46 *See, e.g.*, Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts: Lives Saved in 2015 by Restraint Use and Minimum-Drinking-Age Laws* (Aug. 2016), *available at* https://goo.gl/umF1vg.

47 Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966).

48 Lemley & Lessig, *supra* note 45, at 928.

49 *See* NCTA v. Brand X Internet Servs., 545 U.S. 967 (2005).

50 *Id.*

51 *See, e.g.*, Gerald R. Faulhaber, *Economics of Net Neutrality: A Review*, 3 Commc'ns & Convergence Rev. 53, 54 (2011), *available at* https://goo.gl/p522RW ("'Network Neutrality' became the new policy advocated by those previously in favor of open access.").

52 Press Release: Wyden Moves to Ensure Fairness of Internet Usage with New Net Neutrality Bill (Mar. 2, 2006), *available at* https://goo.gl/R7mHhB.

53 *See, e.g.*, Alex Balford, *Akamai Introduces New Performance Enhancements with Media Delivery 4.5*, Akamai Community (Aug. 21, 2017), *available at* https://goo.gl/cWHQk6 (describing Akamai's latest enhancements to its CDN).

54 2015 Open Internet Order, ¶ 418 ("Some opponents argue that classifying broadband Internet access services as telecommunications services will necessarily lead to regulation of Internet backbone services, CDNs, and edge services, compounding the suppressive effects on investment and innovation throughout the ecosystem. Our findings today regarding the changed broadband market and services offered are specific to the manner in which *these particular* broadband Internet access services are offered, marketed, and function. We do not make findings with regard to the other services, offerings, and entities over which commenters raise concern, and in fact explicitly exclude such services from our definition of broadband Internet access services.") (internal citations omitted).

55 *Id.* at 392.

paid prioritization "can be utterly reasonable."[56] The judge likened paid prioritization to refrigerated cars on a train: "Some packets require prioritization. Some packets are inherently time-sensitive. Latency and jitter are important . . . So that there should be a channeling of services that need prioritization and others that don't."[57] He noted:

> The ultimate irony of the Commission's unreasoned patchwork is that, refusing to inquire into competitive conditions, it shunts broadband service into the legal track suited for natural monopolies. Because that track provides little economic space, for new firms seeking market entry or relatively small firms seeking expansion through innovations in business models or in technology, the Commission's decision has a decent chance of bringing about the conditions under which some (but by no means all) of its actions could be grounded—the prevalence of incurable monopoly. . . . This obvious point explains why Berninger is a petitioner here.[58]

The ban on paid prioritization essentially prohibits entrepreneurs like Berninger from deploying their innovations, which require priority treatment and ultra-low latency in order to function. In fact, the record evidence in Berninger's lawsuit, one of the seven petitions seeking review at the Supreme Court,[59] shows the opposite of what the FCC claims—prohibiting paid prioritization can actually harm consumers and deter innovation. Thus, the claim that the harms from paid prioritization always outweigh the benefits is unpersuasive.

And if an instance of harmful paid prioritization were to arise, to the detriment of consumers or competition, the FTC would be better able to detect and address it than the FCC, given its superior enforcement tools and experience dealing with vertical restraints like priority distribution agreements and bundling. For example, in 2009 the FTC charged that Intel was using anticompetitive tactics to cut off rivals' access to the marketplace, thereby depriving consumers of choice and innovation in the microchips used for computers' central processing units.[60] In a settlement, Intel was prohibited from "conditioning benefits to computer makers in exchange for their promise to buy chips from Intel exclusively or to refuse to buy chips from others; and retaliating against computer makers if they do business with non-Intel suppliers by withholding benefits from them."[61] Similar remedies could be used to address any harmful paid prioritization arrangements should they emerge.

IV. The FTC Can Detect the Harms Targeted by Net Neutrality Rules

Finally, some have claimed that the FTC's competition and consumer protection framework in Section 5 of the FTC Act cannot detect the harms the FCC's 2015 net neutrality rules sought to prevent. Republican FTC Commissioner Rosch expressed doubt about the agency's abilities here, noting that the Sherman Act is not generally conducive to policing access conditions and citing recent cases rejecting the FTC's attempts to enforce antitrust law in industries that were already heavily regulated by other agencies.[62] Similarly, economist Hal Singer, though no fan of the FCC, observes that antitrust cannot accommodate net neutrality violations nor other mild forms of discrimination on the Internet, and he suggests that a separate "Internet tribunal" should be established to police the issue.[63] These concerns are legitimate, but ultimately unpersuasive.

Net neutrality regimes have taken many forms across different countries over the past decade. Rules have been promulgated in a variety of ways, including by legislation, regulation, code of conduct, and multi-stakeholder dialogue. Legal disputes have been adjudicated by telecom regulators, competition authorities, arbitration boards, and courts.[64] The FCC has adequate authority and resources to enforce net neutrality, but it isn't the only, or even the preferred option. Indeed, the pernicious problem of regulatory capture actually makes the FCC an unfavorable venue for adjudication of net neutrality disputes in a converged world. Broadband regulation at the FCC has been and would continue to be extremely politicized,[65] compromising the independence of the agency and quality of its judgement.[66] In fact, Denmark, a top digital nation for years, recently disbanded its telecom authority for the very purpose of reducing regulatory capture.[67] Former regulatory employees say that Danish telecom policy today is more effective as a result.[68] Denmark also managed to implement

56 Oral Argument, U.S. Telecom Assoc. v. FCC, 825 F.3d 674 (DC Cir. 2016), *available at* https://goo.gl/8Bwe8i.

57 *Id.*

58 *U.S. Telecom Assoc.*, 825 F.3d at 769–78.

59 *See* Petition for Writ of Certiorari, Berninger v. FCC (Sept. 27, 2017), *available at* https://goo.gl/1RTTBj.

60 *See* Press Release: FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), *available at* https://goo.gl/F262fv.

61 *Id.* The FTC agreed to the settlement unanimously.

62 *See* Rosch, *supra* note 14, at 16–18 (citing Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Pac. Bell Tel. Co. v. linkLINE Commc'ns Inc., 555 U.S. 438 (2009)).

63 *See* Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone is Concerned About*, Antitrust Source (Aug. 2017), *available at* https://goo.gl/F6JkVv.

64 Roslyn Layton, *Which Open Internet Framework Is Best for Mobile App Innovation?: An Empirical Inquiry of Net Neutrality Rules Around the World*, Aalborg University Copenhagen (2017), *available at* https://goo.gl/7ydQeg.

65 Roslyn Layton, *Dominated by the Digital Elite: Net Neutrality Supporters are Drowning out the Voices of Underserved Communities*, US News & World Report (Aug. 8, 2017), *available at* https://goo.gl/XEgbmq.

66 Roslyn Layton, *Net Neutrality: A Numbers Game*, Am. Enterprise Insit. (July 25, 2016), *available at* https://goo.gl/KE66PB.

67 Roslyn Layton & Joseph Kane, *Alternative Approaches to Broadband Policy: Lesson on Deregulation from Denmark*, Mercatus Ctr. Working Paper (Mar. 22, 2017), *available at* https://goo.gl/UsiIUI.

68 Anders Henten & Morten Falch, *The Future of Telecom Regulation: The Case of Denmark*, Paper presented at ITS, Brussels, Belgium, (June 23,

net neutrality successfully via self-regulation five years before the EU law came into effect, and now administers broadband regulation via the Danish Energy Agency.[69] With its broad grant of jurisdiction and its general mandate to police competition and protect consumers, the FTC is less likely to be captured than a sector-specific agency like the FCC, where interested parties can more easily target their advocacy and lobbying efforts to gain influence with regulators and win preferred outcomes in rulemakings and adjudications.[70]

The FTC also has substantial experience with the harms to consumers and competition that net neutrality rules seek to deter. In 2007, three years before the FCC's first Open Internet Order, FTC staff published a 170-page report examining the effects of various hypothetical broadband practices—such as discrimination, blocking, degradation, vertical integration, and data prioritization—and the likely effects these practices would have on consumer welfare and on competition among broadband, application, and content providers.[71] Acting FTC Chairman Maureen Ohlhausen, who worked on the 2007 report, also recently described at length how the FTC's antitrust authority is capable of addressing "non-economic goals like free speech and democratic participation" by protecting the "competitive process, which delivers the qualities that consumers demand."[72]

More recently, in comments filed with the FCC, FTC staff specifically noted its ability to take action against firms that engage in "unfair methods of competition," including any contractual agreement deemed to substantially reduce competition.[73] Acting Chairman Ohlhausen reiterated these points when testifying on this topic before the U.S. House of Representatives' Committee on the Judiciary in a hearing titled, "Net Neutrality and the Role of Antitrust."[74] FTC staff detailed how its authority under the Sherman Act could be used to regulate broadband:

> In conducting an antitrust analysis, the ultimate issue would be whether broadband Internet access providers engage in unilateral or joint conduct that is likely to harm competition in a relevant market, depriving customers and consumers of the benefits of a free market. There is no reason to assume that Internet-related firms are any more or less willing or able to engage in anticompetitive behavior than firms in other economic sectors.
>
> Internet-related markets may be susceptible to a number of practices that traditionally raise antitrust issues. Unilateral conduct on the part of broadband providers—for example, foreclosing rival content in an exclusionary or predatory manner—may be challenged under Section 2 of the Sherman Act. Section 1 of the Sherman Act could be used to analyze contractual relationships that may block access to the Internet by content or applications providers or discriminate in favor of a supplier with whom the broadband provider has an affiliated or contractual relationship under exclusive dealing theories. Vertical integration into content or applications markets by broadband providers would be analyzed under the merger laws.[75]

While the FTC would not *assume* that net neutrality harms are going to arise, its antitrust authority would be perfectly capable of addressing such harms if they do arise, if and when the FCC's 2015 Open Internet Order is undone.[76]

The FTC's authority to police all "unfair or deceptive acts or practices," could also be used to protect consumers even in cases where no competitive harm can be shown, such as with fraud, deceptive advertising, or unauthorized billing practices.[77] This authority has been crucial to the FTC's considerable work in the areas of privacy and data security.[78] The FTC has regulated the advertising, marketing, and billing practices of broadband providers since long before the FCC's Order, including bringing charges against America Online (AOL), Prodigy, and CompuServe.[79] The FTC challenged Juno Online Services for deceptive representations about the actual cost to consumers of the company's free and fee-based dial-up broadband services and the company's failure to honor cancellations during a purported free trial period.[80] The FCC then brought another case against AOL and CompuServe, which continued to bill broadband subscribers who had asked that their service be cancelled, and failed to timely deliver $400 rebates.[81] More recently, similar to its ongoing case against AT&T, the FTC challenged TracFone Wireless, the largest prepaid mobile provider in the United States, for deceiving consumers with regard to its "unlimited"

2014), *available at* https://goo.gl/QP66Kh.

69 Danish Energy Auth., *Report to European Union on Open Internet*, 1 (June 13, 2017), *available at* https://goo.gl/YWrkii.

70 Roslyn Layton, *Protecting the Public Interest, Not the Special Interest, at the FCC*, Am. Enterprise Inst. (Mar. 8, 2017), *available at* https://goo.gl/hfb6Gz.

71 Fed. Trade Comm'n, *Staff Report: Broadband Connectivity Competition Policy* (June 2007), *available at* https://goo.gl/Jo14aG.

72 *See* Ohlhausen, *supra* note 42, at 119.

73 Restoring Internet Freedom, *Comments of the Staff of the Federal Trade Commission*, WC Docket No. 17-108, 27 (July 17, 2017) [RIF FTC Staff Comments], *available at* https://goo.gl/FwU7MT.

74 Fed. Trade Comm'n, Prepared Statement Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Judiciary Committee, U.S. House of Representatives, *Net Neutrality and the Role of Antitrust* (Nov. 1, 2017), *available at* https://goo.gl/T6t6bt.

75 RIF FTC Staff Comments, *supra* note 73, at 25.

76 *Verizon Commc'ns Inc.*, 540 U.S. at 406.

77 RIF FTC Staff Comments, at 21–23.

78 *Id.* at 3–21.

79 Press Release: America OnLine, Compuserve and Prodigy Settle FTC Charges over "Free" Trial Offers, Billing Practices (May 1, 1997), *available at* https://goo.gl/zqJ36g.

80 Press Release: Juno Online Settles FTC Charges Over Internet Service Advertisements (May 15, 2001), *available at* https://goo.gl/2aAAnu.

81 Press Release: AOL and Compuserve Settle FTC Charges of Unfair Practices (Sept. 23, 2003), *available at* https://goo.gl/aH9fgj.

data service. TracFone eventually agreed to pay $40 million in consumer refunds to settle the case.[82]

These examples and the FTC staff's own comments and reports show that, if broadband providers were to engage in any practices that harm consumers or competition in the Internet ecosystem, the FTC's Section 5 authority would be perfectly able to address such conduct. Moreover, its superior enforcement tools and statute of limitations makes it a better choice than the FCC for regulating net neutrality. All claims to the contrary should be rejected.

V. Conclusion: The FTC Can Regulate Broadband Effectively

Some commenters continue to argue that the FTC lacks the jurisdiction or the ability to regulate the broadband industry, but this paper shows that such arguments are either weak or unfounded. Jurisdictional gaps with regard to the application of the FTC Act's common carrier exemption to broadband will soon be resolved, but that arbitrary, obsolete distinction should be removed by Congress as soon as possible. Once its jurisdiction is restored, the FTC will be perfectly able to regulate broadband and protect consumers and competition from any harmful net neutrality violations.

The FTC's broad authority, strong toolkit, and wealth of experience in both antitrust and consumer protection law should make it a better regulator for broadband than the FCC. While the FTC would necessarily bring an open mind to practices such as paid prioritization and other vertical restraints on trade, assessing them case by case under the rule of reason, it could take action against any practice found to harm consumers or competition, and there is no net neutrality violation that could not be detected by the FTC. Moreover, FTC jurisdiction works in complement with the Department of Justice and state attorneys general, offering more layers of enforcement and adjudication. Altogether, these considerations suggest that, not only can the FTC regulate broadband effectively—it is the preferred agency for the job.

82 Press Release: Prepaid Mobile Provider TracFone to Pay $40 Million to Settle FTC Charges it Deceived Consumers About "Unlimited" Data Plans (Jan. 28, 2015), *available at* https://goo.gl/KKxX3U.