



MYTH VS. FACT IN THE NET NEUTRALITY DEBATE

The FCC's December 2017 "Restoring Internet Freedom Order" grants internet service providers (ISPs) unmitigated freedom to violate net neutrality principles, while severely infringing upon Americans' right to fair internet access and endangering the innovation economy. The order killed net neutrality, but industry lobbyists claim a legal neutrality mandate is unnecessary because ISPs will treat consumers fairly. History and the law say otherwise.

Industry lobbyists are spreading wildly misleading and outright false information to block state action on net neutrality. This includes distributing an anonymous "fact sheet" to Massachusetts lawmakers. It appears that the persons or corporations who produced and distributed this document do not want to be publicly associated with its misleading claims—or held to them in court.

The ACLU of Massachusetts is proud to put its name on this point by point rebuttal.

FACT: Net neutrality has been dismantled.

The misleading claim: "Net Neutrality isn't going away. The FCC voted to repeal a small number of net neutrality rules that had been in place only two years. These rules were based on Title II, an outdated regulation designed for "public utilities" and not on today's competitive landscape. But net neutrality itself – the basic principle that prohibits internet service providers (ISPs) from blocking, slowing or otherwise harmfully discriminating against internet content – will continue to be enforced by the Federal Trade Commission (FTC). This is the same agency that addresses other concerns about harms to consumers or competition."

The reality:

The claim that net neutrality rules had "been in place only two years" is flat out wrong. The FCC adopted an Open Internet Order (OIO) in 2010, which was net neutrality under Title I. Verizon sued the FCC and got the OIO struck down in 2014. Then, in recognition of the central role the internet plays in modern life, the FCC reclassified broadband as a utility under Title II and adopted net neutrality in 2015. Some version of net neutrality has been in place since 2010. Before then, the internet communicated substantially less video, so the impact of not having net neutrality was far less significant.

The claim that net neutrality "will continue to be enforced by the [FTC]" is also incorrect. Former Verizon employee and current FCC chairman Ajit Pai has also made this erroneous claim, but the reality is that the FCC has no control over the extent to which the FTC will enforce net neutrality type rules. The FTC is focused on consumer protection and unfair and deceptive business practices, and most of what net neutrality protected was not based on consumer protection or unfair or deceptive practices. For example, an ISP could announce tomorrow that it will throttle certain content, and as long as it discloses that to consumers, there will be no consumer protection or unfair or deceptive practices angle for the FTC (or state attorneys general) to enforce.

FACT: We need net neutrality rules to protect the open internet.

The misleading claim: *“For 20 years prior to 2015, the internet was open and protected without Title II. The FCC’s 2017 Order simply means that the internet will no longer be subject to the kind of heavy-handed government regulations reserved for “public utility services” (as it was only from 2015-2017), and instead it will once be again subject to targeted, light-touch oversight by the FTC and FCC.”*

The reality:

Before Title II protections were established in 2015, the FCC sought to regulate ISPs through a range of methods. After facing stiff resistance for years, it became clear that the only way the FCC could meaningfully regulate ISPs was through Title II authority. Because the 2017 FCC order dissolves net neutrality and reverts ISPs to Title I status, ISPs will be able to block, throttle, and implement paid prioritization. There will not be light-touch oversight; **there will be no oversight.**

Furthermore, the internet twenty years ago, in the pre-Open Internet Order era, was a totally different creature than today’s high-speed, video-heavy internet. During that era, there was barely any video or live streaming, making the absence of net neutrality rules less significant.

FACT: Net neutrality fosters innovation, and consumers need its protections.

The misleading claim: *“The FCC’s recent actions rescind rules that were only in effect for less than two years and restores the ruled by which the internet was governed for more than two decades. Returning to an era of less federal control of the internet will lead to increased competition and more innovation. Both the FCC and FTC will continue to protect consumers from unfair or anti-competitive practices by internet service providers.”*

The reality:

As discussed above, the FCC’s recent actions will plunge us into a new age of unprecedented deregulation. Though the current FCC asserts that less federal control will promote competition, the reality is that the industry is heavily monopolized. The majority of Americans only have one viable choice for high-speed internet access of 100 mbps and up. As a result, many consumers are unable to take their business elsewhere in the event that ISPs engage in blocking, throttling, or paid prioritization.

The claim that the dissolution of the net neutrality rules “will lead to increased competition and more innovation” is flat out wrong. Net neutrality’s ban on paid prioritization protects a strong innovation economy like ours in Massachusetts, by ensuring an equal playing field for small companies. If start-up companies enter the marketplace at a disadvantage to large firms that can pay to deliver their content at higher speeds, their services may never get off the ground.¹ For states like Massachusetts, the economic consequences of this anti-competitive deregulation could be severe.

Additionally, ISPs’ track records suggest that they will *not* act in a fair way that promotes competition. In 2012, AT&T restricted access to Facetime for all consumers except those who purchased their new,

¹ Martin Giles, “The Demise of Net Neutrality Will Harm Innovation in America,” December 7, 2017, MIT Technology Review. <https://www.technologyreview.com/s/609594/the-demise-of-net-neutrality-will-harm-innovation-in-america/>.

more expensive data plans. The company later admitted that it “was using [this blockage] as a lever to get users to switch over to the new plans which charge for data usage in tiers.”² Also in 2012, Comcast charged customers for using competitors’ streaming services in an effort to gain more viewership on its own streaming services. In 2007, Comcast interfered with traffic and hindered customers’ ability to download.³

There are just a few examples of ISPs violating net neutrality principles in the absence of binding regulation to enforce them through federal regulation. Contrary to the claims made on the erroneous “fact sheet” distributed at the State House, there is no reason to believe the ISPs will be on better behavior now that the FCC has killed the net neutrality rules.

FACT: Existing law is insufficient to protect consumers and the open internet.

The misleading claim: *“It is illegal under existing competition, consumer protection and antitrust laws for broadband providers to engage in behavior that harms competition or consumers. Any ISP that engages in illegal behavior that harms the open internet will immediately face fierce consumer backlash and an FTC enforcement action.”*

The reality: As outlined above, ISPs have blocked and throttled content in the past, and there is no reason to believe they will stop now. The ISP lobby claims consumer backlash and FTC enforcement action are capable of serving as effective oversight mechanisms; this is false. As established above, in the event that an ISP blocks, throttles, or implements paid prioritization on a consumer’s internet connection, there are in many cases insufficient alternative ISP options for consumers to turn to in protest. Further, although the current FCC Chairman, former Verizon lawyer Ajit Pai, claims the FTC can prevent and punish abuse, the FTC can only take action when an ISP has deceived consumers. In other words, as long as an ISP does not promise its customers it won’t block, throttle, or implement paid prioritization, the ISP may do any of these things without fear of facing FTC (or state attorney general) action. The current FCC plans to require ISPs to disclose their actions so that the FTC can take action against deceptive practices is wholly insufficient to protect the open internet, because it does not prohibit exploitative behavior as long as the behavior is not represented in a deceptive manner.

In short, the FCC cannot do anything to prevent ISPs from engaging in violations of net neutrality principles; it may only take on specific cases after an ISP has engaged in such behavior, and ***only if the action constitutes a deceptive business practice***. Because the FTC’s actions are reactive and not preventative, the FTC cannot sufficiently protect consumers. Additionally, even in the few cases in which it may intervene, the FTC’s power is curtailed by its severely limited resources, and may be further restricted.

FACT: The death of the net neutrality regulations is bad for consumers.

² Electronic Frontier Foundation, Letter to California Legislature *Re: Federal Communications Commission’s December 14, 2017 decision to end oversight over Internet Service Provider industry and its impact on privacy and network neutrality*, January 11, 2018. <https://www.eff.org/document/eff-letter-california-legislature-isp-privacy-and-network-neutrality>.

³ Ibid.

The misleading claim: *“The new order aims to encourage competition and expand consumer choice—both of which will allow companies to provide consumers with the services they want, and not overcharge for services they don’t want.”*

The reality: As discussed above, ISPs have a clear history of charging consumers more to use certain features (e.g. AT&T and FaceTime) and placing additional charges on their competitors’ services (e.g. Comcast). Due to the 2017 FCC Order, ISPs are no longer legally prohibited from engaging in this activity. Despite claims from ISPs, consumers want strong net neutrality rules—not vague promises from an industry that has demonstrated it is not worthy of our trust.⁴

FACT: Net neutrality helped low-income and rural communities.

The misleading claim: *“Excess regulation that makes deployment more expensive hits rural and low-income communities the hardest. A return to light-touch approach will encourage broadband deployment in those communities.”*

The reality: Without net neutrality, ISPs can charge users more for access to certain websites and services. The increased costs will undoubtedly disproportionately affect economically disadvantaged consumers, and harm innovation in rural America.⁵

A 2017 study by Free Press found that in the two years after the FCC’s 2015 Open Internet Order, capital investment by publicly traded ISPs actually increased by more than 5 percent.⁶ The net neutrality rule did not harm investment.

FACT: The 2017 FCC Order has major consequences.

The misleading claim: *“Consumer rights and protections continue to be critically important. While the FCC Order changes the legal classification of internet service, it does not impact federal, state, and local service obligations regarding universal service, infrastructure deployment, and disability access. And it returns to the FTC its long-standing role as the protector of consumer privacy.”*

The reality: The FCC’s Universal Service Fund provides subsidies for the productions of telecommunications services so that low-income Americans can access these utilities. With Title II classification, the Fund also provided subsidies to broadband networks so that low-income Americans could use the internet. Without the Title II classification, these subsidies will be eliminated, and many

⁴ James Willcox, “Survey: Consumers Favor Strong Net Neutrality Rules; Majority of respondents think internet providers should be barred from discriminating against lawful content,” September 27, 2017, Consumer Reports. <https://www.consumerreports.org/net-neutrality/most-consumers-still-want-strong-net-neutrality-rules/>.

⁵ Matt Dunne, “Eliminating net neutrality would hurt rural America,” December 12, 2017, the Hill. <http://thehill.com/opinion/technology/364417-eliminating-net-neutrality-would-hurt-rural-america>.

⁶ S. Derek Turner, “It’s Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era,” May 2017, Free Press. <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-ii-era.pdf>.

people will lose access to the internet because they will be unable to afford it.⁷ The service will not be universal.

The removal of Title II classification will also obstruct smaller broadband service providers from installing necessary infrastructure on utility poles. Title II sought to protect competition by mandating “legacy telecommunications carriers to provide non-legacy broadband service providers...nondiscriminatory access to poles and other rights of way owned by utilities.”⁸ Without this protection, large ISPs can use their resources to hinder and prevent smaller companies’ infrastructure deployment.

Additionally, Title II classification mandates that ISPs “broadband providers must make their network compatible for consumers with disabilities.” The loss of the Title II classification also infringes upon consumers’ privacy. Under its Title II authority, the FCC prohibited ISPs from selling sensitive information about consumers’ online activity without their permission. Though Congress later killed this rule, the FCC still maintained the right to “enforce broadband privacy.” It could hear consumers’ privacy-related complaints and take action against ISPs. The FCC cannot do this without the Title II classification.⁹

ISPs have a long history of violating consumers’ privacy. In 2008, Charter created customer profiles by tracking users’ internet activity.¹⁰ In 2011, many ISPs sought to generate more revenue by “search hijacking.” Users’ internet searches were tracked and rerouted so that they were forced to view advertisements. AT&T, Sprint, and Mobile installed “Carrier IQ” on their consumers’ phones so that the companies could track everything their customers did online via their mobile devices. In 2014, Verizon “tagged every one of its mobile customers’ HTTP connections with a semi permanent super-cookie, and used those ‘super-cookies’ to enable third parties such as advertisers to target individual customers. Verizon’s ‘super-cookie’ allowed unaffiliated third parties to track an individual, no matter what steps you took to preserve your privacy.”¹¹ If there are no legal protections to prohibit this activity, there is no reason to believe it won’t continue.

FACT: The states have a role to play in protecting the open internet.

The misleading claim: *“The Internet is inherently interstate and international. It can’t be regulated state-by-state, with users in one state accessing content in another, via a company in yet a third. The only way to address the internet is with a national broadband policy. The FCC Order protects both consumers and internet entrepreneurs from having to navigate a confusing patchwork of state-by-state internet guidelines.”*

The reality: This claim is a little like saying, “Your honor, I may have killed my parents, but go easy on me for I’m now an orphan.” The ISPs worked diligently to eradicate federal net neutrality and privacy

⁷ Yosef Getachew, “Beyond Net Neutrality: The Importance of Title II for Broadband,” May 2, 2017, Public Knowledge. <https://www.publicknowledge.org/news-blog/blogs/beyond-net-neutrality-the-importance-of-title-ii-for-broadband>.

⁸ Ibid.

⁹ Ibid.

¹⁰ EFF letter to California legislature.

¹¹ Ibid.

regulations under Title II. Now they are turning to the states and warning that these are federal matters and the states should stay out of the way.

But in absence of state level action, consumers in Massachusetts are left totally unprotected. The current federal regulations on both net neutrality and ISP privacy are woefully inadequate to protect an open internet and consumer privacy rights. The current rules leave also internet entrepreneurs extremely vulnerable due to the barriers that they will inevitably face in their attempts to enter a monopolized market, where paid prioritization is legal. Massachusetts lawmakers must act, where possible, to protect net neutrality and consumer internet privacy.