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CODIFYING NET NEUTRALITY THROUGH BIPARTISAN LEGISLATION

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INTRODUCTION

In the realm of telecom policy, no debate has been as heated and intractable over the past decade as the fight over Net Neutrality. The lingering debate over the issue in the United States has generated substantial regulatory uncertainty, which ultimately harms American consumers in the form of reduced investment, higher prices, and less innovation among broadband providers and throughout the Internet ecosystem. Without federal legislation, the Federal Communications Commission (FCC), Federal Trade Commission (FTC) and states will continue to wrestle with each other and implement various forms of Net Neutrality. This will create an even more fractious and uncertain regulatory environment.

For these reasons, it is up to Congress to avoid this outcome by codifying Net Neutrality into law, which will require members of both political parties to agree upon a bipartisan compromise. Fortunately, there is a lot of middle ground between the FCC's 2015 *Open Internet* order¹ and its more recent 2017 *Restoring Internet Freedom* order,² so members of Congress have several compromise proposals to consider when crafting the necessary bipartisan legislation. Accord-

ingly, the present study first identifies the issues and terms of the debate, and then outlines three potential compromise proposals that could resolve it once and for all.

BACKGROUND: WHAT IS NET NEUTRALITY?

One reason for the longstanding impasse over Net Neutrality is that the term has no precise definition. Frequently, this leads advocates on both sides of the debate to talk past one another. Argument over the issue has also ranged widely in scope over the years, from structural-separation and non-discrimination requirements to technical restrictions and oversight of interconnection pricing. Thus, before considering potential legislative proposals, it is useful to first clarify the appropriate terms.

The debate traces back decades,³ but the term "Net Neutrality" was not coined until 2003, in law professor Tim Wu's article "Network Neutrality, Broadband Discrimination."⁴ As the title suggests, at its most basic level, the Net Neutrality debate is about how to regulate unfair discrimination by broadband providers.⁵ Such discrimination can impact different areas and take the following forms.

Third-Party Devices and Services

Arguably, the origin of Net Neutrality was harmful discrimination by Ma Bell (a.k.a., the Bell System), against third-party devices in the late 1950s. By claiming that attaching third-party telephones or other devices would harm its network, Ma Bell used its control of the telephone network to monopolize the adjacent, vertical market in network equipment. This harmed consumers by limiting their choices and stifled investment and innovation in the burgeoning market for consumer devices that could be used on the network. However, an entrepreneur — the maker of the "Hush-A-Phone" — challenged this practice in court wherein it was struck down as unreasonably discriminatory because it prohibited use of the network that was "privately beneficial without being publicly detrimental."⁶ The FCC later extended this principle in its *Carterfone* order,⁷ and over time this has become the first principle of Net Neutrality: "Consumers should be allowed to use whatever devices they want to on the network, unless the network owner can demonstrate that those devices will harm the network."⁸

Later, Net Neutrality expanded from third-party devices to include third-party *services*. Advances in computer science and electrical engineering enabled a variety of "enhanced" services that used Ma Bell's network in new and innovative ways. Consumers benefited tremendously from these new services, including voicemail, call-waiting and dial-up Internet access. But, as with devices, Ma Bell could have tried to monopolize the adjacent, vertical markets for enhanced services that relied on access to its network by unfairly

discriminating against them. Thankfully, the FCC again intervened and established a framework in its Computer Inquiries rulemakings to police such conduct.⁹ This became the second principle of Net Neutrality: “Consumers should be allowed to use whatever applications and services they want to on the network, unless the network owner can demonstrate that those services will harm the network.”¹⁰

Many things have changed in the past few decades, but the crux of Net Neutrality remains the same: Unfair discrimination by broadband providers with respect to third-party devices or services. Moreover, these basic principles have long enjoyed bipartisan support, although Republicans often refer to them by the term “Internet freedoms” instead.¹¹ The question is what regulatory framework should protect these principles.

Traffic Management and Interconnection Pricing

The principles of Net Neutrality and the scope of the debate are relatively easy to identify. It is comparatively more difficult to establish the exact forms such discrimination may take, and more difficult still to say when that discrimination becomes unfair and harmful. However, broadly speaking, there are two ways that broadband providers may engage in unfair discrimination: traffic management and interconnection pricing.

Traffic management on broadband networks is highly technical, but Net Neutrality arguments about “blocking,” “throttling,” and “prioritization” (or “fast lanes” and “slow lanes”) are all related to discriminatory traffic management.¹² The Internet is a general-purpose Network of networks designed to support a variety of different applications and services, so the Internet Protocols were designed with tools that allow network operators to discriminate between different types of traffic.¹³ These traffic management tools can help consumers — for example, by prioritizing E-9-1-1 emergency services, telemedicine or VoIP calls over email, software updates and other traffic that is either less important or less sensitive to service disruptions.¹⁴ However, they can also harm consumers — for example, by blocking access to certain devices or unfairly prioritizing some services over others.

Interconnection pricing is also rather complex, but Net Neutrality arguments about “paid” prioritization, and even some arguments about blocking and throttling, are about how much broadband providers are allowed to charge for the service of carrying traffic over their networks. To recover the costs of deploying and upgrading their networks, broadband providers charge both subscription fees to users and interconnection fees to those sending traffic onto their networks. When the traffic comes from fellow broadband providers, these are called “peering” deals. When the traffic comes from edge providers (e.g., Facebook or Netflix) or transit providers

(e.g., Level 3 or Akamai), these are called “transit” deals.

The FCC has a long history of regulating interconnection among telephone and cable providers, but it has never regulated interconnection practices among broadband providers.¹⁵ Broadband providers have experimented with different forms of interconnection, including multiple varieties of “zero-rating,”¹⁶ and there have been few problems.¹⁷ Interconnection fees in peering and transit deals can help broadband providers manage their operating costs and keep users’ subscription fees affordable, but those fees can cause harm if they are too high or if they discriminate in favor of some services over others, as this limits consumer choice online. Likewise, zero-rating programs can enable users to consume more data for less money and offer other benefits like promoting access to local news, government services and health information. However, if those programs are too restrictive, they can likewise cause more harm than good. Thus, some regulatory oversight of interconnection is warranted. The question is what form that oversight should take.

THREE PROPOSALS TO RESOLVE THE ISSUE

Having defined the terms, the key question that must be answered is how unfair discrimination online should be policed. Unfortunately, there is no easy answer, as it requires the consideration of several other sub-questions: Should we use an *ex ante* approach with specific rules codified into law, or would an *ex post* approach with flexible standards that can evolve and change over time be better? A mix of specific rules and flexible standards could also be utilized, with some practices banned outright while others are assessed case by case.

Additionally, the proper entity to do the policing is also up for debate. Should it be left to the FCC — an expert in network engineering and the telecom industry — or to the FTC — an expert in economics and competition throughout the rest of the Internet ecosystem? Alternatively, if there are roles for both of them to play, how should those roles be defined?

Finally, how should we decide what discrimination is unfair? Are there types of discrimination that we can ban outright or does it always depend on factual circumstances that are impossible to know in the abstract? What should the test be for determining when discrimination is unfair? Is it harm to consumers or competition (like the FTC’s consumer welfare test)? Or, something broader (like the FCC’s public interest one)? Reasonable minds can disagree on the answers to these questions, but one way or another, they must be answered if the fight over Net Neutrality is to be resolved.

The good news is that there is more than one way to resolve the fight, as shown by the various different forms of Net Neutrality that other countries have developed,¹⁸ and indeed, by the different forms that the United States has tried over the

years. At times, the FCC has imposed general regulations and specific prohibitions on broadband providers,¹⁹ while currently only a transparency rule and the FTC's authority in Section 5 of the FTC Act governs Net Neutrality.²⁰ Many Democrats consider the current Net Neutrality framework to be unacceptable, while many Republicans felt similarly about the framework adopted in 2015. Both approaches may be legally sustainable, but neither approach is politically so, which means the fight will continue to rage on until Congress can settle on a bipartisan compromise. Thankfully, there are at least three viable proposals that could resolve the fight once and for all.

Give the FTC More Authority and Resources

One proposal would be to leave Net Neutrality at the FTC, but to bolster its authority and resources to help it handle the task. The FTC's main source of authority is Section 5 of the FTC Act, which prohibits all "unfair methods of competition" and all "unfair or deceptive acts and practices" in or affecting commerce.²¹ Accordingly, the FTC has authority to issue specific rules that define a certain practice as categorically "unfair" or "deceptive,"²² but its rulemaking process is significantly slower and more burdensome than the FCC's, which is governed by the Administrative Procedure Act's (APA) informal rulemaking process.²³ This forces the FTC to rely primarily on case-by-case adjudication, rather than rule-making, in its effort to protect consumers and competition.

However, Congress has previously also given the FTC the authority to use APA rulemaking in certain key areas.²⁴ It could do the same for Net Neutrality. Alternatively, Congress could incorporate specific Net Neutrality rules into statute and direct the FTC to enforce those rules in addition to its flexible Section 5 standards. Either of these two options would bolster the FTC's ability to police unfair discrimination online.

Keeping Net Neutrality at the FTC, where it was for years in the early 2000s,²⁵ would ensure that broadband providers and other actors in the Internet ecosystem — including transit providers, device makers and application developers — are all governed under a consistent regulatory framework. In theory, doing so would eliminate any market distortions caused by having two different agencies with vastly different standards govern separate parts of the Internet ecosystem. This could, in fact, make the FTC's regulatory framework an overall superior choice for Net Neutrality.²⁶ Any lack of technical expertise over broadband at the FTC could also be easily fixed by hiring more computer scientists and engineers on staff.

However, despite these benefits and the FTC's work on the matter,²⁷ some still doubt whether it can effectively regulate Net Neutrality. Others may insist on the FCC for different

reasons, such as superior expertise or broader standards. Along those lines, there are also multiple options.

Remove Outdated Provisions from Title II

A second proposal would be to give Net Neutrality back to the FCC under Title II of the Communications Act, but with the outdated provisions removed. Title II gives the FCC ample authority to enforce Net Neutrality and police any unfair discrimination that broadband providers engage in. In fact, the problem is that it arguably has too much authority. This is because Title II includes 48 sections, over 200 subsections and thousands of rules, most of which were designed for a bygone telephone monopoly. The full breadth of Title II is far more than necessary for Net Neutrality, as shown by the FCC's 2015 *Open Internet* Order, which relied on only a handful of sections from that Title while forbearing from all the rest.²⁸

Among the Title II provisions that the FCC refrained from using, but which remain on the books and could be utilized by a future FCC, are some very onerous requirements, like tariffs²⁹ and mandatory wholesaling.³⁰ These provisions were appropriate for regulating Ma Bell and local telephone monopolies, but they have no place in a competitive broadband environment. Thus, by removing all of the outdated and onerous provisions from Title II, Congress could put Net Neutrality on solid ground without unduly stifling broadband investment and deployment. The core provisions of Title II, in Section 201, which require all charges and practices to be "just and reasonable,"³¹ and Section 202, which prohibits "unjust or unreasonable discrimination" in charges or practices,³² would remain intact, and the FCC could enforce them directly, case by case, or use them as authority for new rulemaking.

Like the first proposal, this one too has significant benefits and drawbacks. For example, it would allow the FCC to use its substantial experience and expertise to regulate broadband providers directly, instead of having to advise the FTC on such matters. However, if the FCC's regulations that govern broadband providers are significantly more or less restrictive than Section 5 of the FTC Act, then the disparity between regimes could distort the Internet ecosystem and stifle investment in one industry or another. Such disparity could be avoided or at least minimized if Congress clarified the scope of Sections 201 and 202, or otherwise provided "guardrails" on the FCC's Title II authority to limit any potential abuses. In any event, to maintain separate regulatory frameworks would inevitably lead to some inconsistencies between them.

Given that the FTC lacks jurisdiction over "common carriers,"³³ which includes parties classified under Title II of the Communications Act,³⁴ this proposal may also cause problems for privacy and cybersecurity regulation. If the

FCC regulates broadband under Title II, then the FTC would be unable to police the privacy and cybersecurity practices of broadband providers, despite being the relative expert in those areas.³⁵ That problem could be avoided if this proposal were paired with new authority for the FTC to regulate common carriers' privacy and cybersecurity practices, but this too would raise other concerns about jurisdictional overlaps and regulatory conflicts that would also need to be resolved through some system of enforcement coordination. This may be more trouble than it is worth. Thankfully, there is also a less complicated way to give Net Neutrality to the FCC.

Give FCC New Authority Outside of Title II

A third proposal would be to give Net Neutrality back to the FCC, but outside of Title II. The FCC already has some such authority, in Title I of the Communications Act³⁶ and in Section 706 of the Telecommunications Act,³⁷ which has been used to support a broadband transparency rule.³⁸ A comprehensive Net Neutrality framework, however, would likely require further authority from Congress. This could be added to Title I, as proposed in the bill introduced late last year by Representative Marsha Blackburn (R-Tenn.),³⁹ or new authority could be included as part of a new Title in the Communications Act specifically designed for broadband, which could draw from language in Title II or Section 5 of the FTC Act. It could also be drawn up from scratch, with any balance of specific rules and flexible standards.

As with the previous proposal, Congress could try to minimize potential market distortions by designing the FCC's new authority to closely resemble the FTC's authority in Section 5, but some regulatory inconsistencies would be inevitable. Jurisdictional overlaps and regulatory conflicts would also need to be resolved somehow, such as through ongoing enforcement coordination or clear legislative delineation of responsibilities.

This proposal would allow the FCC to use its experience and expertise to regulate traffic management and interconnection practices, while also allowing the FTC to use its experience and expertise to regulate all privacy and cybersecurity. In that sense, this proposal would allow both agencies to play to their greatest strengths. Ultimately, legislation along these lines may well be the most viable political compromise.

CONCLUSION

There are no easy answers to the ongoing fight over Net Neutrality. The questions that must be answered are numerous and multi-faceted, and the subject matter is both arcane and complex. On top of this, emotional arguments from both sides of the aisle have muddied the waters and brought much more heat than light to the debate. Thus, it is no surprise that the fight continues to drag on.

However, for the sake of the American people, it must be resolved. The three proposals presented herein each have their own benefits and drawbacks, but they all have the potential to do just that. Hopefully members of Congress from both political parties can agree to pass one of them into law sooner rather than later.

ABOUT THE AUTHOR

Tom Struble is technology policy manager and a policy analyst with the R Street Institute, where he leads R Street's work on telecom, antitrust, privacy and data-security issues. His role also calls for him to meet with policymakers and stakeholders, file regulatory comments and amicus briefs, and write op-eds, coalition letters and white papers.

Tom joined R Street in May 2017 from TechFreedom, where he worked as policy counsel focused mostly on telecom and consumer-protection issues, with an eye toward antitrust and market-oriented policy solutions. He previously worked as a law clerk for the Competitive Carriers Association and for the mobility division of the Federal Communications Commission's Wireless Telecommunications Bureau. Earlier in his career, he interned with the office of then-U.S. Rep. Jerry Moran (R-Kan).

ENDNOTES

1. U.S. Federal Communications Commission, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, Mar. 12, 2015 (hereinafter 2015 *Open Internet* Order). <https://goo.gl/QafQCE>.
2. U.S. Federal Communications Commission, *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, Jan. 4, 2018 (hereinafter *Restoring Internet Freedom* Order). <https://goo.gl/mDD9mr>.
3. See, e.g., Tom Struble, "The FCC's Computer Inquiries: The Origin Story Behind Net Neutrality," *Morning Consult*, May 23, 2017. <https://goo.gl/2WePFZ>.
4. Tim Wu, "Network Neutrality, Broadband Discrimination," *Journal on Telecommunications and High Technology Law* 2:141 (2003), pp. 141-80. <https://goo.gl/2x3JuN>.
5. *Ibid.*
6. *Hush-a-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956).
7. U.S. Federal Communications Commission, *Use of the Carterfone Device in Message Toll Telephone Service*, Order, 13 FCC 2d 420 (1968). <https://goo.gl/wSPIUS>.
8. Republicans often prefer to use the term "Internet Freedom" rather than "Net Neutrality," but the basic principles are essentially the same. For example, Republican FCC Chairman Michael Powell included this principle in his list of four "Internet Freedoms" that consumers were entitled to. Remarks of Michael K. Powell, Chairman, U.S. Federal Communications Commission, "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," Silicon Flatirons Symposium, Feb. 8, 2004, p. 5. <https://goo.gl/xlWVRI>.
9. See Robert Cannon, "The Legacy of the Federal Communications Commission's Computer Inquiries," *Federal Communications Law Journal* 55:2 (2003), pp. 167-206. <https://goo.gl/kECW71>.
10. Powell, p. 5.
11. *Ibid.*
12. For example, the FCC's enforcement action against Comcast in 2008 was based on alleged throttling by Comcast of BitTorrent, a third-party, peer-to-peer file-sharing service. See U.S. Federal Communications Commission, "Commission Orders Comcast to End Discriminatory Network Management Practices," Press Release, Aug. 1, 2008. <https://goo.gl/p2ZDER>. The Federal Trade Commission's recent enforcement action against AT&T Mobility was also brought for allegedly unfair and deceptive throttling. See U.S. Federal Trade Commission, "Complaint for Permanent Injunction and Other Equitable Relief," *Federal Trade Commission v. AT&T Mobility LLC*, (N.D. Cal. 2014). <https://goo.gl/bxFK2N>.

13. See, e.g., Tom Struble, “On the Relationship Between QoS and QoE: Why Differential Traffic Management on the Internet is Not a Zero-Sum Practice,” *Telecommunications Policy Research Conference* 44 (2016). <https://goo.gl/ciHGSG>.
14. *Ibid.*
15. In the 2015 *Open Internet Order*, the FCC claimed authority to regulate unfairly discriminatory interconnection practices *ex post*, but the agency never exercised that authority and has since relinquished it. See *Protecting and Promoting the Open Internet*. <https://goo.gl/QafQCE>.
16. Zero-rating plans exempt certain applications and services from counting towards users’ data caps, sometimes in exchange for payment and sometimes on an exclusive basis.
17. There was a high-profile interconnection dispute between Netflix and Comcast in early 2014. It was highlighted by the late-night comedian Jon Oliver, but it was revealed later that year that transit provider Cogent was actually the one responsible for the poor streaming experience of Netflix users on Comcast’s network. See Dan Rayburn, “Cogent Now Admits They Slowed Down Netflix’s Traffic, Creating a Fast Lane & Slow Lane,” *Streaming Media*, Nov. 5, 2014. <https://goo.gl/kYpm1M>.
18. See, e.g., Michael Koziol, “Countries Around the World Tackled Net Neutrality in Different Ways,” *IEEE Spectrum*, Dec. 7, 2017. <https://goo.gl/RE2DvZ>.
19. *Protecting and Promoting the Open Internet*. <https://goo.gl/QafQCE>.
20. 15 U.S.C. § 45. See also *Restoring Internet Freedom*. <https://goo.gl/mDD9mr>.
21. 15 U.S.C. § 45(a)(1).
22. 15 U.S.C. § 57a.
23. 5 U.S.C. § 553.
24. “Chapter Seven: Rulemaking,” *Federal Trade Commission Operating Manual*, 2018, pp. 1–2. <https://goo.gl/gUJEAA>.
25. See “Broadband Connectivity Competition Policy,” U.S. Federal Trade Commission, June 2007. <https://goo.gl/Jo14aG>.
26. See, e.g., Maureen K. Ohlhausen, “Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously,” *Colorado Technology Law Journal*, 15:1 (2016), p. 119. <https://goo.gl/yzPnE9>.
27. *Ibid.*; See also, Roslyn Layton and Tom Struble, “Net Neutrality Without the FCC?: Why the FTC Can Regulate Broadband Effectively,” *Federalist Society Review* 18 (2017), p. 132. <https://goo.gl/m9besB>.
28. 2015 *Open Internet Order*, ¶¶ 493–527.
29. 47 U.S.C. §§ 203, 204.
30. 47 U.S.C. §§ 251, 252, 256.
31. 47 U.S.C. § 201(b).
32. 47 U.S.C. § 202(a).
33. 15 U.S.C. § 45(a)(2).
34. 15 U.S.C. § 44.
35. See, e.g., Tom Struble, “Resolving Cybersecurity Jurisdiction Between the FTC and FCC,” R Street Policy Study No. 116, October 2017. <https://goo.gl/xL7qrs>.
36. 47 U.S.C. §§ 151–62.
37. 47 U.S.C. § 1302.
38. Broadband providers have been subject to a Net Neutrality transparency rule since 2010, as that part of the 2010 *Open Internet Order* survived judicial review in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
39. H.R. 4682, *Open Internet Preservation Act*, 115th Congress. <https://goo.gl/n8FJ3F>.