

### BACKGROUND

Over the years, the United States has implemented various forms of net neutrality, but the goal is always the same: policing unfair discrimination or other harmful practices online that either limit consumer choice or stifle competition. This goal has long had bipartisan support.

In 2004, Michael Powell, then-Chairman of the Federal Communications Commission (FCC), outlined his vision for net neutrality, which focused on protecting four key “Internet Freedoms.” Specifically, he argued that consumers should have the freedom to: 1) access lawful content; 2) use the applications of their choice; 3) use the devices of their choice; and 4) obtain transparent service plan information.<sup>1</sup>

Since then, there has been and continues to be substantial agreement about the goal of net neutrality and the types of freedoms it is designed to protect. There is also substantial agreement about the types of practices that threaten these freedoms and would therefore violate net neutrality.

### CLEAR VIOLATIONS OF NET NEUTRALITY

While violations of net neutrality have been few and far between, there are some practices that are generally recognized as being harmful to consumers’ Internet freedoms. For example, intentionally blocking or throttling access to lawful content or applications harms both consumers (as it constrains their freedom) and competition (as it forecloses open and fair access to markets). Accordingly, both FCC rule-makers and legislators in Congress have sought to ban these practices outright.

### CASE-BY-CASE CONSIDERATION

However, some practices may violate net neutrality in some circumstances and reinforce it in others. For exam-

### SUMMARY

- Net neutrality is designed to protect users’ rights and ensure fair competition online by policing unfair discrimination or other harmful practices that either limit consumer choice or stifle competition.
- Intentionally blocking or throttling access to lawful content harms both consumers and competition, so the practice should be a categorical violation of net neutrality.
- Depending on the context, however, prioritization can be harmful or beneficial and thus should be assessed case by case.
- The FCC and FTC must work together to police net neutrality throughout the Internet ecosystem.

ple, depending on the context, prioritizing some content or applications over others can be harmful or beneficial. For example, a broadband network prioritizing one video or voice application over another would violate net neutrality because it would harm competition among providers of those applications. However, prioritizing all video or voice applications over all email (or other applications that are insensitive to latency or other service disruptions) would not. Done in the right way, such prioritization can benefit consumers of video and voice applications. And, it can do so without hindering competition among application providers or harming consumers of email and other similar applications.

Thus, in order to maximize efficiency and consumer benefit, practices like prioritization must be assessed case by case rather than unilaterally, such that harmful practices can be banned while beneficial practices can flourish.

1. See Remarks of Michael K. Powell, Chairman, Fed. Communications Commission, “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age,” Silicon Flatirons Symposium, Feb. 8, 2004. <https://www.fcc.gov/michael-powells-speeches>.

## NET NEUTRALITY ENFORCEMENT

The FCC and the Federal Trade Commission (FTC) have both dabbled in net neutrality enforcement, using the general standards provided to them by Congress and specific rules aimed at particular practices.

For example, the FTC has used its general authority in the FTC Act to pursue cases of deceptive throttling against [multiple wireless carriers](#). The FCC has also used its general authority in the Communications Act both to pursue specific cases of [blocking](#) and [throttling](#), as well as to pass specific rules banning those practices and others.

[In 2010, the first FCC rulemaking](#) required transparency and prohibited blocking and “unreasonable discrimination” more generally. Later, in 2015, the FCC expanded its net neutrality rules to include specific bans on throttling and [“paid prioritization”](#). However, after legal challenges and a change in administration, the FCC kept only the transparency rule while repealing the others and [transferred enforcement responsibility](#) for net neutrality to the FTC.

## THE FUTURE OF NET NEUTRALITY

Initially an obscure concept, in recent years, net neutrality has become increasingly prominent, garnering tens of millions of public comments in 2017. But, the ongoing experimentation with different types of net neutrality enforcement at the FCC and FTC is counterproductive. Lingering uncertainty will reduce investment, raise prices and depress innovation throughout the Internet ecosystem, all of which ultimately harm consumers and competition. Accordingly, for the sake of economic growth and prosperity—for the very future of the Internet ecosystem—Congress should resolve this debate by codifying net neutrality into law.

Reasonable minds can debate what the respective roles of the FCC and FTC should be and how the balance should be struck between specific rules and flexible standards. However, the optimal framework will surely involve a mix of both.

The FCC can provide unique insight into engineering practices and other technical issues that may impact consumers or competition online. By contrast, the FTC has less expertise in the communications industry but more expertise in the applications and device industries. Somehow, these two agencies must find a way to work together to protect consumers and competition by policing net neutrality throughout the Internet ecosystem.

## CONTACT US

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