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Protect the open internet

By Catherine J.K. Sandoval

Imagine an internet where your internet service provider (ISP) could enter into undisclosed deals to speed up select content or block legal sites based on the ISP's business interests. The Federal Communications Commission and the U.S. Court of Appeals for the D.C. Circuit in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), recognized that ISPs have both the financial incentive and technical ability to engage in paid prioritization. Such deals are barred by FCC "Open Internet" rules adopted in 2015, but FCC Chairman Ajit Pai proposes to repeal those rules. His proposal asks whether ISPs should be allowed to manage internet networks based on their own business justifications, and whether industry self-regulation or voluntary promises are preferable to enforceable FCC rules. All Americans should be concerned about this proposal's implications for democracy, the economy, security and competition.

Self-regulation and voluntary policies provide no recourse in contract law and may not be enforceable under the FCC's proposal. Many major ISPs post policy statements on their websites proclaiming that the ISP does not block or throttle data, but these policies are excluded from their consumer contracts. These statements are neither written in the language of promise nor condition, nor are they integrated into user agreements, rendering them unenforceable in contract. Verizon lists in its terms of service page a hyperlink to its "Open Internet Policy." Clicking on that hyperlink leads to a message "Access Denied, You are not authorized to access this page." We can only hope that this link was accidentally broken and that Verizon soon restores public access to its open internet policy highlighted in its terms of service.

Even if ISPs included no blocking, throttling or paid prioritization promises in their contracts, most ISPs reserve the right to modify their internet service contract at their discretion and contend that continued use of the service constitutes agreement. The FCC found that most Americans have only one or two choices for wireline high-speed internet providers, and many wireless services impose data caps. Internet users lack a competitive market in which to shop

around restrictive contract terms or policies. The FCC proposal would repeal the requirement that ISPs interconnect their network to competitors, rendering competition less likely. The proposed rollback of the open internet rules doesn't require ISPs to extend or build networks, or create sufficient incentives to do so, particularly in higher cost rural and mountainous areas.

The FCC asks whether we should rely on antitrust laws instead of bright-line rules to deter internet blocking, throttling or paid prioritization. The prospect of antitrust enforcement deters some anti-competitive conduct, but may not be sufficient or timely to prevent harms to competition and innovation. Internet service providers could raise rivals' costs to the detriment of small or independent publishers, producers and others who use the internet to distribute content that competes with the services of the ISP or its affiliates. Repeal of ex ante discrimination rules would add to questions about whether a merger increases the ISPs' ability and incentive to engage in anticompetitive behavior. The Federal Trade Commission Act prohibits unfair and deceptive trade practices — duplicity in advertising that harms competitors or consumers. The FTC act does not confer jurisdiction to adopt forward looking rules such as the FCC's open internet protections.

Antitrust and unfair competition laws provide a remedy for antitrust-injury type harms to competition, but not for public interest harms. How can we safeguard our democracy, economy and national interest if no rules or laws prohibit ISP blocking, data throttling or paid prioritization and ISPs drop their voluntary policies not to engage in such practices? Could the messages of American families, businesses, church and civic organizations, or government agencies be muted by fast lane deals offered to some deep-pocket entities, but not to all? What happens to our democracy if candidates for political office or their supporters, domestic or foreign, could enter into undisclosed special deals for fast internet access or thwart contesting messages? Media deals once done through personal relationships are now often done online. When I was the General Counsel for Z-Spanish Media Company in the early 2000s, I knew the buyer for McDonalds who sought to place ads on our Spanish and English



Ajit Pai in his office in Washington, D.C., Aug. 16, 2013.

New York Times News Service

language radio stations and websites. Could repeal of the FCC's open internet protections enable online deals to speed or prioritize internet traffic or block other user's data, even if the highest bidder represents foreign interests? We need legally enforceable open internet rules to protect American democracy and our national interests.

Many ISPs publicly state that they support an open internet but argue for repeal of the FCC's 2015 rules that classified ISPs as common carriers under Title II of the Communications Act. Internet service provider Verizon led the charge in *Verizon* against the FCC's 2010 broadband framework that prohibited blocking and throttling under Title I of the Communications Act and Section 706 of the Telecommunications Act of 1996. The *Verizon* decision overturned the FCC's 2010 rules on the grounds that they imposed common carrier-like nondiscrimination obligations characteristic of Title II without adopting Title II as the legal basis for those rules.

Following the *Verizon* decision, the FCC 2015 open internet proceeding asked whether the FCC should allow ISPs to engage in individualized bargaining for private and potentially exclusive fast-lane deals, or whether ISPs should be classified as common carriers. While serving as a commissioner of the California Public Utilities Commission, I filed comments in that proceeding highlighting the crucial role of the open internet rules for public safety, public health, national security and critical infrastructure such as electric, water, gas and communications services. Electric and gas utilities use the internet to ask customers to reduce demands on the electric grid to prevent blackouts, or locate natural gas leaks. The open internet allowed a California inventor to develop a technology to detect gas leaks at a rate 1000 times more sensitive than previous methods. Such innovation requires that

all Americans have access to an open internet. The FCC decided in 2015 that ISPs were engaged in common carrier activity, and that Title II classification was appropriate to protect the open internet. The D.C. Circuit last year upheld the FCC's 2015 open internet rules, and this year declined to rehear that case en banc, based on *Chevron* deference to the FCC's judgment that the open internet rules protect the virtuous cycle of innovation internet access enables.

The internet is essential to our economy, services and security, and is increasingly the town square of democracy. It enables health care information and monitoring to extend from the doctor's office to the home, making open internet access at home crucial to health, safety and controlling health care costs. President Donald J. Trump's executive order on cybersecurity and critical infrastructure adopts "an open, interoperable, reliable, and secure internet" as the policy of the executive branch. The FCC's proposal to rollback open internet protections undermines the president's policies and the internet's power to spur our economy, and safeguard our democracy. We need legally enforceable rules to protect access to the open internet. The FCC's 2015 open internet rules do just that and merit continued support.

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