



Testimony of Gigi B. Sohn, President
Public Knowledge

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing On:
“Ensuring Competition on the Internet: Net Neutrality and Antitrust”

Washington, DC
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Chairman Goodlatte, Ranking Member Watt, and Members of the Subcommittee, thank you for this opportunity to discuss the importance of network neutrality for consumer protection and for competition on the Internet. My name is Gigi Sohn and I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in preserving an open Internet.

Introduction

An open Internet is vitally important to political discourse, societal interactions, commercial transactions, innovation, entrepreneurship, and job creation in the United States. However, past actions by incumbent broadband Internet access providers have threatened the preservation of an open Internet resulting in the need for clear enforceable baseline network neutrality rules. The Federal Communications Commission (FCC) recently acted last year to establish baseline rules, but critical protections are still needed to truly ensure an open Internet, especially in wireless broadband access.

Network Neutrality rules are necessary to protect consumers against the monopoly and duopoly behavior of broadband Internet access providers in our country. Contrary to assertions by industry incumbents that consumers enjoy competition when it comes to broadband access choice and can simply switch, the FCC's National Broadband Plan reported that 13% of Americans have only one broadband access provider and 78% of Americans have only two broadband Internet access providers¹. In other words nearly 91% of all Americans reside either within monopoly or duopoly broadband markets.

Given this reality on the ground, it is important that this Committee work to enact and preserve open Internet policies that promote competition between Internet application and service providers. Public Knowledge has and will continue to advocate for enforceable network neutrality rules that ensure:

- Broadband Internet access providers offer a minimum level of broadband service to all broadband consumers and are not allowed to create a “private Internet” that grants exclusive access to higher bandwidth levels to certain providers selected by the network operator.
- Paid prioritization is presumptively unreasonable and is applicable to all broadband access services.
- Broadband Internet access providers are not forced to obtain government pre-approval to manage their networks.
- The rules can be enforced through a simple complaint process in which the network operator must bear the burden of demonstrating that any interference with traffic is necessary to support a lawful goal.

¹ FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 37 (2010).

Recent action by the Department of Justice (DoJ) on the Comcast-NBCU merger demonstrates the role of antitrust in network neutrality

Antitrust law's focus on protecting consumers from anticompetitive conduct, such as raising prices above what a truly competitive market would allow and ensuring that incumbents in the market do not take actions that stifle innovation, are part of what network neutrality rules seek to address. Recently the DoJ, in its review of the Comcast-NBCU merger, highlighted the antitrust harms to online video distributors (OVDs) the merger presented. Unlike traditional multichannel video programming distributors (MVPDs), OVDs do not own distribution infrastructure, and instead must rely on unfettered access to the Internet to compete. In its Competitive Impact Statement, the DoJ laid out plainly the competitive harms to OVDs that were matters of anti-trust and how they warranted network neutrality protections².

OVDs represent an emerging class of competitors to traditional cable services such as Comcast. Although many new competitors have entered on a national level, traditional incumbent cable services such as Comcast remain dominant in their regions. Indeed, as DoJ explained, Comcast's share of the video market at the local level can remain as high as 70%. Because OVDs are able to provide service in any geographic area, they are a source of direct competition to Comcast (and other traditional MVPDs) in the geographic areas in which it is dominant.

² Competitive Impact Statement of Department of Justice, *United States v. Comcast Corp.*, No. 1:11-cv-00106 (D.C. Cir. Jan. 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.pdf>.

At the same time, because of the profit margins from subscription video services, Comcast and other traditional MVPDs have a strong incentive to interfere with the ability of OVDs to compete. As the DoJ observed, *over 94%* of Comcast's revenue prior to the merger came from the sale of cable services. Even after the merger, when Comcast would receive NBCU's 51% programming revenue through the joint venture (the other 49% going to NBCU's former parent, GE), Comcast will earn more than three times as much revenue from selling cable subscriptions as from distributing programming. Accordingly, Comcast has a much greater incentive to prevent the emergence of rival video subscription services such as OVDs than it does to cultivate OVDs as customers for video service. Comcast simply cannot hope to make up lost revenues caused by cable subscribers "cutting the cord" through the sale of programming to OVDs.

These twin incentives, the desire to maintain local dominance in video subscription and the importance of subscription video to profit margins, give Comcast and other MVPDs that are also broadband Internet access providers strong incentive to interfere with the ability of broadband subscribers to download either streaming video or other video programming such as iTunes (the latter competing with MVPD video on demand services). Network Neutrality, such as the conditions imposed by the DoJ on Comcast, works against this anticompetitive danger. Without regulation in place, broadband providers that are also MVPDs – and nearly all broadband providers are also MVPDs – would have the same strong incentive to interfere with a broadband subscriber's online experience to protect their subscription video revenue.

While the DoJ was speaking specifically about Comcast, these antitrust concerns apply across the broadband market. A customer may wish to “cut the cord” and drop their cable subscription, but the monopoly or duopoly broadband Internet access provider also offering a video package will be able to prevent this by interfering with the delivery of online video. The ability to switch to a DBS provider or a telephone company-operated MVPD will not help the consumer seeking to save money (a key benefit of competition) by dropping the more expensive traditional MVPD service in favor of online video.

It is also important to note that these same competitively harmful incentives that exist for video competition also exist for competition over telephony services. Indeed, the first instance of blocking content by a provider, the *Madison River* case, involved a local telephone provider blocking competing voice-over-IP (VOIP) services. In many markets, the chief broadband competitor to the local cable provider is the local exchange carrier (LEC). Just as the incumbent cable provider has a strong incentive to interfere with broadband delivery of competing video, LECs have a strong incentive to degrade competing voice traffic. Such degradation need not be as crude as blocking. LECs trying to preserve their traditional dominance in voice can discourage switching to VOIP by dropping calls at random or making the audio quality poor enough that the majority of would-be VOIP subscribers are frustrated enough to remain LEC customers.

An extensive record produced by the FCC demonstrates that an open and free Internet was threatened without baseline rules

Cable and telephone incumbents have asserted that Network Neutrality rules are unnecessary and that the market has never demonstrated the need for rules. However, there is a documented history of harmful actions taken by broadband Internet access providers. In its December *Report and Order* on network neutrality, the FCC summarized a number of actions in the broadband market as indicators that anti-competitive incentives exist and action under its public interest authority were warranted.

The Commission observed that it had acted on two high profile incidents of blocking, but recounted evidence of numerous other incidents where broadband providers subsequently acknowledged that they had blocked or degraded traffic.³ It is therefore simply not true that the only known cases of blocking are the *Madison River* case in 2005, where a rural telephone provider blocked competing VOIP services, and the *Comcast/BitTorrent* case, where Comcast blocked access to BitTorrent and other peer-2-peer applications. In addition, AT&T blocked certain applications, such as SlingBox video streaming, Skype and Google voice, from its mobile network while permitting its own streaming and voice products to use the same network. Cox and RCN both admitted to slowing or degrading Internet traffic at various times. Both providers deny wrongdoing and claim that these practices were designed to handle congestion, but in neither case did providers disclose their traffic management practices to subscribers. It is ironic that providers which publicly proclaim they have no intention of ever actually blocking or

³ *Preserving the Open Internet*, Docket No. 09-191 ¶¶35-36 (released December 23, 2010).

degrading content routinely include statements in their terms of service that would allow them to engage in precisely these practices – and without prior notice to consumers.

Congressional Review Act (CRA) repeal of the FCC's network neutrality rules would end an open Internet

While I understand this is not the focus of today's Committee hearing and not a matter under its jurisdiction, I want to mention Public Knowledge's concerns with recent discussions in Congress to invoke the Congressional Review Act (CRA) to repeal the recent FCC network neutrality rules. Should the Congress decide to undergo a repeal of the current FCC rules through the CRA, it will result in long-term damage to the Internet economy.

Prior to the FCC's December decision, broadband Internet access providers recognized that anticompetitive actions would be subject to public scrutiny and that public outcry have prompted consumer focused responses by the FCC. However, enactment of a CRA repeal of the FCC's network neutrality rules would virtually eliminate the agency's authority to protect an open Internet and would not just repeal its recently enacted rules. As currently implemented, a CRA repeal would prohibit the federal agency from adopting the same or substantially similar rules until a new act of Congress was passed. This type of repeal would have the negative effect of hindering the FCC's ability to address any issue that touched on preservation of an open Internet, a necessary component to preserving competition in the Internet marketplace.

I urge members of the Committee to recognize the significant collateral damage that would occur through a CRA repeal and to resist utilizing it as a vehicle for repeal.

Conclusion

As Congress continues to focus on policies that promote job creation, I firmly believe that a policy that permanently preserves an open Internet will be an enormous driver for economic growth and job creation for our country. I urge members of the Committee to recognize that the economic benefits of the Internet are entirely based on ensuring that it remains an open and free marketplace and that the federal government has an integral role to play in that regard.

Thank you again for inviting Public Knowledge to testify before the Committee. I look forward to your questions.