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Why Consumers Won't Be Left Unprotected

by

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On Dec. 14, the Federal Communications Commission adopted its Restoring internet Freedom Order (RIF Order) repealing public utility-like regulations imposed on internet service providers in 2015 by the Obama administration FCC.

All too predictably, the FCC's order has been subjected to a seemingly endless stream of groundless attacks by pro-regulation advocates who claim consumers will be left unprotected by the Commission's action. These attacks, under the guise of preserving a supposedly sacrosanct version of "net neutrality," ignore two inconvenient truths.

Inconvenient Truth No. 1. The RIF Order did not give internet service providers (ISPs) any new power to block or throttle subscribers' access to internet content of their choice, or to prioritize internet traffic. This is because the now-repealed 2015 FCC regulations already permitted blocking, throttling, or prioritizing traffic by any ISPs that informed subscribers of their intent to do so.

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Inconvenient Truth No. 2. By repealing the classification of ISPs as public utilities, or “common carriers” in Communications Act parlance, the RIF Order restores the Federal Trade Commission’s legal authority to hold ISPs accountable for their promises to refrain from blocking, throttling, or prioritizing internet traffic.

The FTC had been divested of this authority by the FCC’s 2015 regulations because the FTC lacks jurisdiction over common carriers.

Only by ignoring these two inconvenient truths are pro-regulatory advocates able to falsely claim that the FCC has left consumers in danger of being denied any remedy for abusive or anti-competitive practices by internet service providers.

It’s clear that the FCC’s 2015 “net neutrality” order, which the pro-regulatory advocates now insist is gospel, actually allowed ISPs to engage in the very practices that they loudly proclaim the Commission has just now authorized. In May 2017, in *USTelecom v. FCC*, the full D.C. Circuit declined to rehear the June 2016 three-judge panel decision which had affirmed the FCC’s 2015 order.

Judges Sri Srinivasan and David Tatel, the two judges who comprised the panel majority, issued a concurring opinion to clarify the import of the court’s decision. In a key passage, Judge Srinivasan stated:

While the net neutrality rule applies to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content, the converse is also true: the rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway — i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP’s exercise of “editorial discretion.”

Quoting the FCC’s 2015 order, Judge Srinivasan observed that an ISP remains free to offer “edited” services without running afoul of the net neutrality requirements. Moreover, no party before the D.C. Circuit disputed that ISPs could exercise editorial discretion, thus taking themselves out of the purview of the “net neutrality” restrictions.

“In that sense,” declared Judge Srinivasan, “the rule could be characterized as ‘voluntary.’” This understanding that ISPs became subject to the FCC’s 2015 neutrality requirements only by voluntarily choosing to hold themselves out as “neutral” was key to refuting a claim that the mandates violated the First Amendment.

In other words, repealing the FCC’s 2015 public utility-like mandates did not give ISPs any new power they didn’t already possess to block or throttle internet content. What the order did is establish a different — and preferable — institutional mechanism for holding accountable ISPs that represent themselves as neutral conduits.

By repealing the public utility-like common carrier classification of ISPs, the order restored the FTC as the primary enforcement agency responsible for preventing unfair and deceptive trade practices involving broadband internet services.

Now, pursuant to the Restoring internet Freedom Order and a memorandum of understanding between the FCC and the FTC, the FTC will enforce ISPs' representations. All of the major ISPs, and almost all the others, presently promise not to block or throttle access to internet content of their subscribers' choosing, or to prioritize internet traffic in ways that are anticompetitive, and they have pledged to maintain those representations.

Going forward, ISPs that fail to follow their own terms of service regarding such practices will be subject to enforcement actions by the FTC under its authority to prohibit unfair and deceptive trade practices. Moreover, FTC enforcement will be aided by strong transparency requirements promulgated by the FCC that require ISPs to clearly disclose their practices.

These two inconvenient truths bear repeating: The FCC's Restoring internet Freedom Order does not actually give ISPs any new power to block or throttle access to internet content or to unfairly prioritize traffic. And the order restores the FTC's authority to hold ISPs to their promises to refrain from these practices if they make such representations.

So, in reality, the Restoring internet Freedom Order does not leave consumers unprotected. By repealing the Obama administration FCC's public utility regulatory regime, what the FCC has done is provide internet service providers with a measure of freedom to innovate and to invest in ways that will satisfy the always evolving consumer demands for the internet services of the future.

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