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**Are There Harms the Net Neutrality Order Would Have Prevented?  
A Look at Public Knowledge's Recent Claims**

by

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Since the Federal Communications Commission in 2017 replaced the *2015 Open Internet Order* (*2015 Order*) with the *Restoring Internet Freedom Order*, we should be interested in how things are turning out. Although, in my view, [economic theory suggested weaknesses in the 2015 Order](#), whether and how to regulate the pricing and provision of content over broadband networks ultimately should depend on the facts as they play out. (I took a retrospective approach to this question in looking at [economic rationales for the four episodes the FCC listed in the 2015 Order as violations of net neutrality principles](#).)

The policy advocacy organization Public Knowledge is keeping its eye out for conduct that, in its view, would have been proscribed by the *2015 Order*. It [recently alleged four instances](#) where it claims "broadband providers continue to take advantage" of consumers, presumably to their detriment, and that would not have been permitted under the *2015 Order's* "net neutrality protections." This is not Public Knowledge's first set of allegations. Others, notably the claim that Verizon throttled service to the Santa Clara Fire Department while fighting California wildfires, [have been addressed previously](#) by Daniel Lyons, a member of the FSF Board of Academic Advisors.

Each set of allegations merits an assessment. Whether the allegations are factually true is beyond the scope of my assessment, so for my purposes here, I will simply assume they are true. More important is what they imply about net neutrality policy even if they are true. To examine them, I'll present the instances from the Public Knowledge report (hyperlinks omitted) and discuss those implications.

1. "Consumers' real-time location data originating from cell phone providers, including T-Mobile, AT&T, and Sprint, is being sold to bounty hunters and others. Domestic abusers have used the easy availability of this geolocation data to stalk current and former partners. This data is also being resold on the black market. According to these wireless companies, this use of data goes against the company's policies, but when net neutrality rules were repealed, so too was the FCC's authority to regulate broadband privacy."

The need for the FCC to assert authority over broadband privacy was a byproduct of the "common carrier" Title II approach taken in the *2015 Order*. Because the Federal Trade Commission by statute lacks oversight authority over common carriers, it could no longer enforce its privacy rules against information service providers. Moreover, even before the FCC repealed much of the *2015 Order*, [Congress stripped the FCC of authority over broadband policy through its authority under the Congressional Review Act](#). With the repeal of the *2015 Order*, authority over privacy rests with the Federal Trade Commission, the agency with specific responsibility over privacy and data security. If selling data is leading to domestic abuse, the FTC is available to take action.

2. "Researchers from Northeastern University and University of Massachusetts Amherst found that almost all wireless carriers pervasively slow down internet speed for selected video streaming services. From early 2018 to early 2019, AT&T throttled Netflix 70% of the time as well as YouTube 74% of the time, but not Amazon Prime Video. T-Mobile throttled Amazon Prime Video in about 51% of the tests, but did not throttle Skype or Vimeo. While U.S. wireless carriers have long said they may slow video traffic on their networks to avoid congestion, one of the study's authors, David Choffnes, explained that these carriers are throttling content 'all the time, 24/7, and it's not based on networks being overloaded.' No throttling internet traffic is a core net neutrality principle."

Internet service providers conceivably might favor a vertically integrated content provider, but that does not appear to be the case in this claim. AT&T's alleged throttling of Netflix and YouTube occurred prior to AT&T's acquisition of Time Warner programming – an acquisition that survived a court challenge from the U.S. Department of Justice. T-Mobile had no such motivation then or now. Absent such motivations, wireless providers put themselves at a competitive disadvantage and reduce what they can charge for their services by degrading them, arbitrarily or otherwise. So, an argument for net economic harm is still missing. If there is one, the antitrust authorities are there to consider it, and treble damage awards from private antitrust suits also provide a pretty strong incentive for pursuing these claims.

3. "Broadband provider Cox Communications is offering a 'fast lane' for gamers who pay \$15 more per month. If net neutrality protections existed, broadband providers cannot set up 'fast lanes'—also known as 'paid prioritization'—to force users to pay more for prioritized access to the internet."

For those of us concerned with the elimination of paid prioritization in the *2015 Order*, this "fast lane" is a benefit of paid prioritization, not a cost. Forcing gamers to accept slower standard service presumably makes them worse off. It may well (and I hope would) have been permitted under the "specialized services" exemption under the *2015 Order*. Now, if there were evidence that, to foster demand from gamers, Cox had degraded standard service at all, and especially below the level of quality appropriate in a society where broadband communication is important, that might be another matter.

Moreover, it is not clear that paid prioritization has anything to do with Cox's practice. The *2015 Order* was about service to content providers, not end users. Even if it were in place, users could pay more for faster service, as they had been and do now. This example points out an ambiguity in the 2015 rules. That order carefully distinguished between keeping content providers from obtaining faster, lower latency service and end users. An interactive gamer may be both an end user and content provider, suggesting that were the *2015 Order* in place, it could well have crept beyond its nominal boundaries. This is particularly noteworthy in light of Public Knowledge's fourth claim.

4. "Frontier Communications is charging its customers a \$10 monthly modem rental fee even if they already own their modems. If users buy their own modem to avoid such fees, the ISP will still charge them as if they are renting one. The FCC used to have broadband oversight authority to address this problematic behavior, but without such authority, the FCC has told Congress that this is now the FTC's problem to deal with."

The FCC may wish that this were the FTC's problem, but it's probably not, since this does not involve unfair competition or a violation of the antitrust laws. Instead, this is essentially Frontier charging an extra \$10 for service that requires a modem. As such, it is not a net neutrality issue, having nothing to do with particular types of content, but an ISP service pricing issue. If this is regarded as a problem, it confirms what many suspected all along: the net neutrality fight is not about content but about establishing the FCC's authority under Title II to regulate ISP rates.

I'm skeptical of the feasibility of such regulation and, even if feasible, given the level of competition that already exists, and which is increasing, it's likely its costs outweigh its benefits. If one wants to discuss price regulation of ISP services to end users – federal or state – this should be done openly rather than hiding behind the mantle of preventing content-based discrimination.

The bottom line is that the latest set of practices identified by Public Knowledge fails to identify a violation of net neutrality rules that harm consumers or broadband networks as a whole. I genuinely applaud Public Knowledge for its vigilance. Perhaps in the future it will identify a practice that will lead to an appropriately targeted regulatory remedy in which the benefits exceed the costs and which enjoys sufficiently broad support.

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