

March 24, 2015

The Honorable Bob Goodlatte, Chairman
Judiciary Committee
House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Ranking Member
Judiciary Committee
House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

In the recent debate around net neutrality, there has been substantial confusion as to the relationship between regulations and antitrust law in crafting policies to ensure continued access to an open internet. We are writing to clarify that these two tools are complementary to promoting competition, consumer protection, and the virtuous cycle of a healthy open internet. However, while both occupy important roles, neither is sufficient on its own to address all of the critical policy considerations in the broadband age.

As a general matter, antitrust and regulation occupy complementary positions in policymaking. Both the Federal Trade Commission (FTC) and (Federal Communications Commission (FCC) are vitally and equally necessary to protect consumer welfare and promote competition in the digital arena. But antitrust is specifically tailored to protect competition in markets by preventing conditions that weaken or undermine competition. In this regard, it operates in an *ex post* manner, after abuses have already occurred to competition and consumers, with the hope that corrective action will dissuade future bad behavior.¹

In contrast, the FCC is designed not just to ameliorate harms that have occurred, but to prevent harms to competition and consumers before they take place. To this end, it operates in an *ex ante* fashion, making it much more prophylactic. It is the cop on the beat to the FTC's firehose. Furthermore, the FCC serves another, even more important function - it can implement positive, forward-thinking policies that actively promote network deployment, competition, and innovation. One classic example is the responsibility to "ensure the active deployment of broadband" - something that might not happen if the FCC does not provide incentives for private companies to do so.

The instant debate over net neutrality rules exemplifies this tension well. The FCC's recent rulemaking was an important step in restoring its ability to adopt flexible consumer protection and pro-competition policies that had been stripped from it in the *Verizon* decision. The FTC can play an important role. But the type of protective rules the FCC can

¹ The exception to this is the merger review process, which allows the DOJ and FTC to block mergers before they take place if they are deemed likely to result in harmful reduction in competition.

implement are particularly important in an ecosystem like the internet, which depends on the continuing “virtuous cycle” for its success. Absent *ex ante* protections, it might not be apparent what harms might have been prevented in retrospect - where, for example, barriers to entry prevent disruptive new technologies or content creators from ever seeing the light of day. Consumers can’t miss what they never knew was possible. While some anticompetitive actions could sometimes trigger antitrust concerns, a law predicated first and foremost on market analyses is not well-suited to the balancing of social and economic factors that impact the virtuous cycle.

In addition, the FCC’s jurisdiction over broadband also extends to many important policies that go beyond pure net neutrality, which the FTC is similarly ill-suited to address. Universal service funding, consumer privacy, emergency services, and accessibility for those with disabilities are but a few of the issues that rely on the FCC as the expert agency for direction in the rapidly developing broadband marketplace.

As Congress continues its review of the new open internet rules in the larger debate over a possible Communications Act update, we urge you to keep in mind this broader picture. It is not an exaggeration to say that the ongoing success of modern communications has rested on this dual oversight of the industry. Antitrust is no doubt important to ensure healthy marketplaces in many sectors of our economy. But the FCC is specifically charged with the central goals of communications policy: achieving universal service, protecting consumers, promoting competition and innovation, ensuring a communications platform that supports a diversity of viewpoints. Only combined market oversight will ensure digital communications platforms capable of promoting social and economic empowerment necessary to support a robust democracy.

Sincerely,

Common Cause

Color of Change

Daily Kos

Engine Advocacy

Fight for the Future

Internet Freedom Business Alliance

National Hispanic Media Coalition

Open Technology Institute

Public Knowledge