

Take Net Neutrality Regulations off the Table for Good

Light-Touch Regulation Makes a Free and Open Internet Possible

By Jessica Melugin*

Congress should eliminate the looming threat of net neutrality regulations to Internet service providers (ISPs). Regulation deters investment and the coronavirus health crisis has revealed that ample bandwidth is vital for working and learning at home. Net neutrality regulations are at odds with encouraging infrastructure investment and with the flexibility of network management that has proved so crucial in keeping Americans online. Additionally, broadband infrastructure is a significant economic contributor and will aid in the country's financial recovery from this unprecedented financial shock.¹

Investment in broadband infrastructure declined beginning in 2015 after the Federal Communications Commission (FCC) adopted heavy-handed public utility-style regulation of the Internet, under Title II of the Communications Act of 1934.² Investment shrunk by \$500 million between 2014 and 2015 and by \$2.7 billion between 2015 and 2016.³

Investment Rebounds. In late 2017 the FCC reversed course under a new administration and lifted the utility-style regulations. Investment increased by \$2.1 billion between 2016 and 2017 and to \$3.1 billion between 2017 and 2018. Broadband speeds are up by approximately 85 percent since the end of 2016.⁴ Robust spending in the years since regulations were repealed ensured the resiliency of the nation's broadband network under the recent increased demand. Eliminating the threat of investment-detering regulations would likely spur continued and increased investment in broadband infrastructure.

Similarly, eliminating the threat of a 50-state patchwork of state net neutrality laws would likely incentivize spending for an even more robust network. More than 30 states have made legislative moves toward instituting their own net neutrality regulations since the federal repeal.⁵ Not only are state proposals ripe for interstate commerce challenges, they are a real threat to return on investment for broadband providers.⁶ Congress should act to preempt these state laws.

Light-Touch Regulation Yields More Infrastructure Investment. Much of the broadband industry was ready to trade away the right to employ certain business practices in exchange for regulatory certainty, preemption of state net neutrality laws, and a rejection of utility-style Title II regulations at the federal level.⁷ But broadband performance in the

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United States and the European Union during the health crisis should make both industry and Congress reconsider that tradeoff.

Europe provides an illuminating contrast to the U.S.'s light-touch regulatory approach. The EU has taken a more utility-style, heavy regulatory approach to broadband.⁸ Accordingly, the EU has less per-capita investment in Internet infrastructure.⁹ Like Americans across the pond, European citizens stayed home to slow the spread of COVID-19 and increased stress on their telecommunications network. Their regulators began to worry that the broadband infrastructure could not handle the increased demand. At the request of EU officials, Netflix, Facebook, Disney, and Amazon all agreed to reduce the quality of their content or delay launches of new services in order to prevent potential Internet congestion in Europe.¹⁰ Meanwhile, U.S. broadband networks have been handling their demand surge handily.

The better performance of U.S. networks, as compared to their strained European counterparts, recommend the American light regulatory approach.

The second insight gleaned from seeing how the two different regulatory approaches play out in a crisis lies in the EU fix. European officials asked content providers to deliberately slow their content. This practice is known as throttling and can be done by edge providers or ISPs. But it is illegal for ISPs to do so under EU net neutrality laws and it is one of the practices that would be outlawed by proposed U.S. net neutrality legislation. Banning ISPs from doing the same thing that regulators would end up asking content providers to do is clearly incoherent public policy. Stateside, politicians and regulators should learn from Europe's mistake and not ban business practices that may come in handy one day, under unforeseen circumstances. Lawmakers cannot see the future, as European regulators have discovered during this crisis.

And who is to say the same will not be true for the other two practices net neutrality regulations seek to ban, namely, blocking and paid prioritization? Net neutrality regulations would ban Internet providers from blocking any legal content. The reasoning for such a ban is dubious. After all, broadband companies own their private lines and should be able to choose what goes over them. That raises the question: Do consumers really need the government dictating a no-blocking policy that so tramples on Internet service providers property rights?¹¹ Furthermore, there is scant evidence that ISPs have ever intentionally blocked access to legal content since the practice was legalized in 2017.¹²

Similarly, net neutrality regulations would prevent broadband companies from accepting payment from content providers in exchange for moving their data across the network more quickly. This is known as paid prioritization. Can we envision how paying more for some critical services to be delivered faster over networks might be beneficial for consumers? Remote surgeries and telehealth applications come to mind these days.¹³ Consumers benefit from more options at different price points. Paid prioritization on broadband service is no exception.

Conclusion. Congress should pass federal legislation preempting state net neutrality regulation and codifying the Internet's classification as an information service, but not

outlawing the potentially beneficial practices of blocking, throttling, or paid prioritization. This would encourage investment in U.S. broadband infrastructure by eliminating the threat of state and federal regulation. More robust networks will benefit American citizens and businesses in the difficult struggle for economic recovery ahead.

Notes

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² Federal Communications Commission, “In the Matter of Protecting and Promoting the Open Internet,” GN Docket No. 14-28, FCC 15-24, Report and Order on Remand, Declaratory Ruling, and Order, Adopted: February 26, 2015 Released: March 12, 2015,

https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

³ Patrick Brogan, “Broadband Capex Growth Propels Deployment,” USTELECOM, Broadband Association, July 31, 2019, <https://www.ustelecom.org/u-s-broadband-capex-growth-propels-deployment/>.

⁴ FCC Commissioner Brendo Carr, Twitter post by @BrendanCarrFCC, February 20, 2020, 2:24 PM, <https://twitter.com/BrendanCarrFCC/status/1232023583569956864?s=20>.

⁵ Heather Morton, “Net Neutrality Legislation in States,” National Conference of State Legislatures, January 23, 2019, <https://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx>.

⁶ Jessica Melugin, “U.S. Justice Department Challenges California Net Neutrality Rules,” *OpenMarket*, Competitive Enterprise Institute, October 1, 2018,

<https://cei.org/blog/us-justice-department-challenges-california-net-neutrality-rules>.

⁷ Klint Finley, “Republicans in Congress Are Talking Net Neutrality; At Least,” *Wired*, February 7, 2019, <https://www.wired.com/story/republicans-congress-are-talking-net-neutrality-at-least/>.

⁸ Body of European Regulators for Electronic Communications, “All You Need to Know About Net Neutrality Regulations in the EU,” accessed April 27, 2020, <https://berc.europa.eu/eng/netneutrality/>.

⁹ Patrick Brogan, “Utility Regulation and Broadband Network Investment: The EU and US Divide,” USTELECOM, Broadband Association, April 25, 2017, <https://www.ustelecom.org/research/utility-regulation-and-broadband-network-investment-the-eu-and-us-divide/>.

¹⁰ Laura Kayali, “EU Industry Chief: Corona Crisis Could Be Turning Point for Big Tech,” *Politico*, March 25, 2020, <https://www.politico.com/news/2020/03/25/eu-industry-chief-coronavirus-crisis-could-be-turning-point-for-big-tech-149755>.

¹¹ For a more detailed explanation and defense of all three activities banned under proposed net neutrality regulations, see Jessica Melugin, “No, the Internet Is Not About to be Destroyed,” *USA Today*, December 13, 2017, <https://www.usatoday.com/story/opinion/2017/12/13/blocking-throttling-paid-prioritization-how-net-neutrality-unfair-broadband-jessica-melugin-column/949095001/>.

¹² Marguerite Reardon, “Net Neutrality Battle Lives On; What You Need to Know After the Appeals Court Decision,” CNET, October 13, 2019, <https://www.cnet.com/news/net-neutrality-battle-lives-on-what-you-need-to-know-after-the-appeals-court-decision/>.

¹³ Caroline Frost, “5G Surgery Could Transform Healthcare Industry,” *Business Insider*, August 16, 2019, <https://www.businessinsider.com/5g-surgery-could-transform-healthcare-industry-2019-8>.