



The Energy and Technology Committee

Public Hearing, February 13, 2018

Office of Consumer Counsel

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Testimony of Elin Swanson Katz

Hearing on Net Neutrality

Good morning, Chairman Winfield, Chairman Formica, Chairman Reed, and distinguished members of the Committee. Thank you for the opportunity to testify on the important topic of net neutrality.

If you are wondering about the link between net neutrality and my office, as the Consumer Counsel for the State of Connecticut, I head the Office of Consumer Counsel (OCC), which serves as the public advocate on matters relating to electricity, water, natural gas, and telecommunications. Within the OCC, by statute, is the Connecticut State Broadband Office. I also serve as Governor Malloy's designee to the Federal Communications Commission's (FCC) Intergovernmental Advisory Committee (IAC), and serve as its Chair. I am also the President of the National Association of State Utility Consumer Advocates (NASUCA), an association of 44 consumer advocates in 40 states and the District of Columbia, that has supported net neutrality. I also represent NASUCA on the FCC's Joint Board for Universal Service. On January 30, 2018, at the request of the chairs, I testified before the United States

House of Representatives Subcommittee on Communications and Technology hearing entitled “Closing the Digital Divide: Broadband Infrastructure Solutions.” I thus have responsibility for representing consumers on telecommunications issues, and my interest and experience on these topics, including net neutrality, is substantial. I have been asked to “set the stage” on this topic, and it is my honor to do so.

What is net neutrality?

Net neutrality is the concept that internet service providers (ISP) are required to provide consumers equal access to all content online, and not discriminate or charge differently by user, content, website, platform, application, type of attached equipment, or method of communication. In other words, ISPs following net neutrality principles would not intentionally block, slow down, or charge money for specific websites and content. The net neutrality concept derived from the traditional regulated services provided by common carriers, such as taxicabs, railroads, airlines, and traditional phone companies, who provided services to the public without discrimination, but with regulation, often including regulation of rates. This is why some critics (and some supporters) of net neutrality describe the concept as trying to regulate ISPs like utilities.

Generally, we have enjoyed net neutrality to date--it is the internet we know. We simply have not had an expectation to date that our ISP, typically a big corporation, might speed up, slow down, or even block access to content.

The FCC net neutrality rules prohibited the following practices:

- **BLOCKING** Internet service providers could not discriminate against any lawful content by blocking websites or apps.

- **THROTTLING** Service providers could not slow the transmission of data based on the nature of the content, as long as it is legal.
- **PAID PRIORITIZATION** Service providers could not create an internet fast lane for companies and consumers who pay premiums, and a slow lane for those who don't. Consumers could suffer from pay-to-play deals. Without rules prohibiting paid prioritization, a fast lane could be occupied by big internet and media companies, as well as affluent households, while everyone else would be left on the slow lane.
- **SELLING THE INTERNET IN BUNDLES** Many consumer advocates have argued that if the rules get scrapped, broadband providers will begin selling the internet in bundles, not unlike how cable television is sold today. In other words, the concern was that providers could “split the net” and allow access only to pieces and at a price, as has already happened in other countries without net neutrality protections. Want to access Facebook and Twitter? Under a bundling system, getting on those sites could require paying for a premium social media package.

What are ISPs? Who are the major ones?

ISPs provide consumers with access to the internet. If you think of the internet as a superhighway, ISPs provide the entrance ramps for consumers to access information. The major ones in the U.S. include Comcast XFINITY, AT&T Internet, Verizon FIOS, Charter Spectrum, CenturyLink, Frontier, and others. In Connecticut this often means your realistic wired internet choices are Comcast (or other local cable company) and Frontier. ISPs are distinct from “edge providers,” an edge provider is a

website, web service, web application, online content hosting or online content delivery service that customers connect to over the internet. Edge providers, which include Google, Amazon, Netflix and Facebook, use the customer's ISP to deliver content.¹ The FCC's net neutrality rules do not apply to edge providers.

Note that many of the big telecom companies are now saying that they support net neutrality, but it appears to be a version of net neutrality that allows for paid prioritization, a potentially large revenue source for ISPs.

What is the history of net neutrality regulation?

After several years of legal battles to try to preserve net neutrality in different ways, in 2015, the FCC, with the support of President Obama, classified broadband as a telecommunication service under Title II of the Communications Act of 1934 and Section 706 of the Telecommunications Act of 1996. This treats broadband providers as common carriers and prevents them from discriminating, thus preserving net neutrality. FCC's regulations in this area went into effect June 12, 2015. Then-FCC Chairman Tom Wheeler was a champion of the net neutrality effort.

Most recently, on December 14, 2017, the FCC's new Republican majority, including Chairman Ajit Pai, a former Verizon lawyer, voted 3-2 to scrap the 2015 net neutrality regulations and the classification of broadband as a telecommunication service.²

¹ WhatIs.com, "Edge Provider." <http://whatis.techtarget.com/definition/edge-provider> (Feb. 12, 2018).

² SaveTheInternet.com. <https://www.savetheinternet.com/sti-home#why> (February 12, 2018).

What are the primary concerns about net neutrality repeal?

1. The "gatekeeper" issue is perhaps the most realistic short-term concern. Repeal could become a potentially giant new revenue source for the big ISPs at the expense of users and content providers like Netflix and applications providers like Amazon and EBay (and really, their present and future smaller competitors), who have generally supported net neutrality. For example, content and application providers could be required to pay to get out of the ISPs' "slow lane." ISPs can also gain by favoring certain content in a number of ways, including by establishing that certain content does not count against a customer's data bandwidth limit. While that may in a way sound like a benefit for the customer, overall it is still the ISP that is in charge, setting up a virtual "toll booth" and letting only certain content of its choosing through for free.

2. Free speech advocates are concerned that certain content will be blocked or rendered difficult or expensive to access. Oftentimes, advocates point out that the internet is today's town hall, and there are obvious potential problems for our democracy if it can no longer be used for the free exchange of competing views.

3. Some raise competition and innovation concerns. There are some who are concerned that the big content/app providers, who can afford fast lanes, might squeeze out potential new competitors. So, for example, some point to the fact that YouTube, once a small start-up, was able to overcome a challenge from Google Video. Without net neutrality and with increasing technological ability of ISPs to set up fast lane/slow lane, it is easy to see how a similar situation today might have the opposite result. (Sources: Wikipedia, Huffington Post, thehill.com)

The repeal of the net neutrality rules is not final, so we have not yet seen their impact. I do not, however, expect to see immediate and rampant violations of the net neutrality principles, because of enormous consumer concern and pushback. However, there have been numerous instances of ISPs blocking or throttling content, including the blocking of competitors, blocking of competing technologies like Skype, and even blocking an effort to raise funds for an abortion-rights organization, based on the content of the message.³ So we have reason to be concerned.

How do proponents of the repeal of net neutrality defend their view?

FCC Chairman Ajit Pai has asserted that investment in broadband infrastructure has gone down as a result of net neutrality rules, and that repealing them would spur innovation and broadband deployment. However, virtually every indicator has shown an ever-increasing investment in broadband infrastructure by the major ISPs. Opponents often question the need for the regulation, given the small number of negative examples of ISP non-neutral behavior occurring before the regulations. This argument ignores the fact that technological means of exploiting a lack of net neutrality have advanced. They refer to the need to return to a "free market" (even though consumer choices, particularly on the residential side, for wired internet, are quite limited) and claim that net neutrality rules will stifle innovation and competition.

³ "The 5 worst net neutrality violations in history," Aaron Sankin, The Daily Dot, DailyDot.com, December 14, 2017. <https://www.dailydot.com/layer8/net-neutrality-violations-history/> ; "Net Neutrality Violations: A Brief History," Timothy Karr, Free Press, FreePress.com, April 25, 2017. <https://www.freepress.net/blog/2017/04/25/net-neutrality-violations-brief-history> .

Are there federal efforts to restore net neutrality?

The short answer is yes. There are various bills floating around Congress to restore net neutrality rules. There is a resolution being pushed by Democratic Senators and Republican Senator Susan Collins (R-Maine) and Senator John Thune (R-SC) that has more than thirty sponsors, enough to force a floor vote on the issue.⁴ There is also an effort in the House proposed by Rep. Mike Doyle, D-Penn. As of February 2, that bill had 110 sponsors, all Democrats.⁵ However, such efforts probably face long odds at the moment, as any proposal would have to get through the Senate, the House, and be signed by President Trump.

What are states doing about net neutrality?

- **Attorneys General Lawsuit**

A coalition of 21 state attorneys general (all Democrats), including Connecticut Attorney General George Jepsen, and led by New York Attorney General Eric Schneiderman, argues the FCC's decision to reverse net neutrality less than three years after adopting them is a violation of the Administrative Procedures

⁴ Business Insider, "The effort to block the FCC's repeal of net neutrality just hit an important milestone." January 9, 2018. <https://www.aol.com/article/news/2018/01/09/the-effort-to-block-the-fccs-repeal-of-net-neutrality-just-hit-an-important-milestone/23328749/>

⁵ CourtHouseNews.com, "With FCC Poised to Publish Net Neutrality Rule, Efforts to Block It Grow." February 5, 2018. <https://www.aol.com/article/news/2018/01/09/the-effort-to-block-the-fccs-repeal-of-net-neutrality-just-hit-an-important-milestone/23328749/>

Act, which bans federal agencies from making “arbitrary and capricious rules.”⁶

There are also actions being filed by other stakeholders, including by a lobbying group for big tech companies including Facebook, Google, and Netflix.⁷

- **State Legislative Actions**

Various states, including California, New York, Nebraska, Montana, Rhode Island, Washington, and now Connecticut, are considering legislative action.

These bills and debates include:

- Consumer protection provisions that classify a violation of net neutrality as a violation of the state’s consumer protection laws (in Connecticut, that might be the Connecticut Uniform Trade Practices Act (CUTPA));
- Prohibitions on state contracts with any ISP that does not adhere to net neutrality principles;
- Conditioning access to utility poles and other regulated public-rights-of-way on adherence to net neutrality principles;
- Restoring internet privacy rules repealed by Congress last year;
- “Dig-once” policies, that encourage or require the laying of broadband conduit when roads are opened, with access to the conduit conditioned on adherence to net neutrality principles.

⁶ Wired.com, “States and Cities Keep the Battle for Net Neutrality Alive,” January 23, 2108.

<https://www.wired.com/story/states-and-cities-keep-the-battle-for-net-neutrality-alive/>

⁷ New York Times, NewYorkTimes.com, “States Push Back After Net Neutrality Repeal,” January 11, 2018.

<https://www.nytimes.com/2018/01/11/technology/net-neutrality-states.html>

- **Executive Actions**

The Governors of Montana, New Jersey, and New York have issued executive orders requiring ISPs to follow net neutrality principles in order to receive government contracts.

What about preemption? Can states take these actions?

This is a hotly debated issue, and there are scholars and commentators on both sides making passionate arguments for and against states' right to regulate net neutrality. In repealing the 2015 order, the FCC said that it was blocking state and city governments from creating their own net neutrality laws. It is unclear, however, that the FCC can do that, or whether it requires an act of Congress to declare a blanket preemption. In 2016, a federal court ruled against the commission's effort to preempt state laws related to municipal broadband networks.⁸ There are also inconsistencies in the FCC's legal position: if it lacks authority to regulate net neutrality (per its recent order), how does it then nonetheless have authority to preempt state action? Chairman Pai has also in other contexts been very insistent that the FCC lacks jurisdiction to preempt state regulation of intrastate communications services.⁹

There is also really no question that broadband involves interstate commerce, raising questions to the impact of the Commerce Clause of the Constitution. However, states heavily regulated telephone service without running afoul of the Commerce Clause. The best argument in support of state action was summarized by telecom scholar Harold Feld:

⁸ New York Times, *id.*

⁹ WetMachine.com, "Can The States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes," Harold Feld, February 6, 2018. <http://www.wetmachine.com/tales-of-the-sausage-factory/can-the-states-really-pass-their-own-net-neutrality-laws-heres-why-i-think-yes/>

The question is whether Congress has used its power over interstate commerce to preempt the states (directly or by delegating that power to the FCC), or whether Congress has so pervasively regulated the field so as to effectively preempt the states, or whether the state law — while framed as a permissible intrastate regulation — impermissibly regulates interstate commerce (aka the “dormant commerce clause” doctrine). Additionally, certain types of state action, such as the action of the state as a purchaser of services, are exceedingly difficult (if not impossible) to preempt.¹⁰

It is reasonable to expect that any state laws passed by this body would likely face a challenge from the telecom industry, which has in recent times certainly raised preemption issues. In the Public Utilities Regulatory Authority’s (PURA) development of a cybersecurity plan for utilities, for example, the state’s telecom companies refused to participate, saying PURA has no jurisdiction over them in this area:

The majority of telecommunications companies responding to the draft of this report expressed the view that the proposed meetings and guidelines for information reporting would, in fact, be compulsory and comprise a mandate, *which they consider to be in conflict with federal policy* preference for voluntary mechanisms. While it has been PURA’s goal that all public utilities and telecommunications service providers operating in Connecticut participate in the state’s cybersecurity oversight program, most telecommunications companies to date have refused to join the effort.¹¹

¹⁰ *Id.*

¹¹ Connecticut Public Utilities Cybersecurity Action Plan, Public Utilities Regulatory Authority, Docket no. 14.-05-12 (April 5, 2016), page 2 (emphasis added).
http://www.ct.gov/pura/lib/pura/electric/cyber_report_April_6_2016.pdf

CONCLUSION

I think there is good reason to have grave concerns about the FCC's repeal of the net neutrality rules, and I support and would work with you all to find solutions of any kind to preserve this important protection for consumers.