GEORGETOWN LAW
Center on Privacy & Technology

January 9, 2018

The Honorable Marsha Blackburn, Chairman
The Honorable Jan Schakowsky, Ranking Member
Committee on Energy & Commerce
Subcommittee on Communications and Technology

The Honorable Bob Latta, Chairman
The Honorable Michael Doyle, Ranking Member
Committee on Energy & Commerce
Subcommittee on Digital Commerce and Consumer Protection

Dear Chairman Blackburn, Chairman Latta, Ranking Member Doyle, and Ranking Member Schakowsky:

Thank you again for inviting me to testify in the November 29, 2017 hearing on "Algorithms: How Companies' Decisions About Data and Content Impact Consumers." Below please find my responses to the additional questions for the record.

Sincerely,

Laura M. Moy

Attachment

1. **As you know, online bias—racial or otherwise—is not limited to websites. If left unchecked, broadband providers also have the power to make decisions that skew our national dialogue and harm free speech. These choices can be driven by economic considerations or even forced through political pressure.**

   To shield against these problems, FCC adopted strong net neutrality protections in 2015. These rules ensure that consumers can decide for themselves what they see online. But for some reason, the Trump FCC is now planning to wipe out these critical safeguards. Do you believe that FCC's proposal to eliminate net neutrality could lead to more bias online?

The FCC's elimination of net neutrality rules could indeed lead to more bias online. Net neutrality rules would have prevented Internet service providers (ISPs) from turning Internet access into a pay-for-play service, where content may be blocked, throttled, or prioritized based on ISPs' own judgments about what they want Internet users to see.

Without the rules, ISPs may choose to prioritize some viewpoints expressed online over others based on which online speakers can afford to pay for increased access to Internet users. This would lead to greater bias online.

2. **Many Congressional Republicans have cheered on FCC's efforts to destroy net neutrality. They argue that eliminating these important protections will somehow benefit consumers. Republicans are actually making some of the very same arguments that they used earlier this year to justify the elimination of FCC's privacy rules using the Congressional Review Act. I am curious whether those arguments ended up panning out the way Republicans claimed at the time. I know you have been following the privacy debate for a long time. From your perspective, are consumers better off as a result of the Republicans' elimination of FCC's privacy rules?**

Consumers are not better off as a result of the 2017 Congressional Review Act resolution that eliminated federal broadband privacy regulations. At the time Congress voted to eliminate those consumer protections, Energy and Commerce Committee Chairman Greg Walden said, "Once these rules are reversed, the FCC can again work effectively with the FTC to ensure that our privacy framework allows the internet to flourish while truly protecting consumers."[1] Communications and Technology Subcommittee Chairman Marsha Blackburn said, "Today's action takes us one step closer to restoring the FTC's role as America's expert agency on privacy."

But since broadband privacy rules were eliminated, the FCC and FTC have not worked to protect the privacy of broadband subscribers. In December the agencies released a memorandum of understanding outlining their approach to protecting consumers and the public interest online.[2] The word "privacy" does not appear in the memorandum.

A year ago, consumers were the beneficiaries of strong prospective rules that clearly outlined what ISPs could and could not do with their customers' private information. Today, no such rules exist. If the recent repeal of the 2015 reclassification order stands, in the future the FTC may take enforcement action against ISPs that violate their own privacy policies. But this does not provide consumers with any confidence that an ISP with which they have no choice to share highly private information—information about where they go and what they do online—will not be used in ways that consumers find invasive and offensive.

3. **The Federal Communications Commission (FCC) Chairman has often relied on a solitary justification for eliminating FCC's net neutrality protections. He claims that broadband providers' investments have decreased because of net neutrality. I've seen data that was submitted to FCC that shows the opposite is true.**

    a. **What is the difference between what broadband providers told FCC regarding their investment under the net neutrality rules versus what they are telling their investors and the SEC?**

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[1] House Energy & Commerce Committee, *Press Release: House Advances Resolution Rolling Back FCC's Flawed ISP Privacy Rules* (Mar. 28, 2017), https://energycommerce.house.gov/news/press-release/house-advances-resolution-rolling-back-fcc-s-flawed-isp-privacy-rules/.

[2] Fed. Trade Comm'n and Fed. Communications Comm'n, *Restoring Internet Freedom: FCC-FTC Memorandum of Understanding*, https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf.

ISPs told the FCC that complying with net neutrality rules would harm their ability to invest in the network. On the contrary, ISPs' capital investments *increased* over the two years following the FCC's February 2015 Open Internet Order in February 2015. This is detailed in depth in a robust study of ISP-industry companies' own reports to their investors and to the Securities and Exchange Commission, published last year by Free Press.[3] According to that report, "The total capital investment by publicly traded ISPs was 5 percent higher during the two-year period following the FCC's Open Internet vote than it was in the two years prior to the vote."[4] In addition, "None of the firms that saw declines [in capital spending] attributed them to any FCC action."[5]

b. Does the Draft FCC Order account for the increase in investment by other companies that use the internet to deliver their services?

The FCC Order also does not account for capital investments made by non-ISP-industry companies following the 2015 Open Internet Order. Companies that use the Internet to deliver their services appear to have increased their investments under strong net neutrality rules. This increase in investments may even be attributable to net neutrality, because net neutrality rules increased edge providers' confidence that the Internet would remain a neutral playing field.

This is also detailed in the study published by Free Press, which explains, "Capital investments in edge-computing industry sectors grew dramatically in the wake of the FCC's restoration of its authority to protect these nondiscriminatory telecom services."[6]

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[3] S. Derek Turner, Free Press, *It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era*, https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf.
[4] *Id.* at 4.
[5] *Id.*
[6] *Id.* at 7.