

**Statement of Ranking Member Frank Pallone, Jr.
Ranking Member, House Energy and Commerce Committee
Hearing on “Net Neutrality and the Role of Anti-Trust”**

November 1, 2017

The FCC’s current net neutrality protections provide the strongest protections for free speech and innovation online and have been upheld by the courts. Keeping these rules in place is the fastest and surest way to protect consumers. Unfortunately, the FCC is working to undo these protection at the behest of a few large corporations. I urge my colleagues to stand united in defense of these protections—that is the best option to ensure an open internet into the future.



**Statement for the Record for the
Center for Democracy & Technology**

**Ferras Vinh
Policy Counsel
Open Internet Project**

**House Judiciary Subcommittee on
Regulatory Reform, Commercial, and Antitrust Law**

**Hearing on Net Neutrality and the Role of Antitrust
November 1, 2017**

Chairman Marino, Vice Chair Farenthold, Ranking Member Cicilline, and Members of the Subcommittee,

The Center for Democracy & Technology (CDT) thanks the Subcommittee for the opportunity to submit this statement regarding the November 1, 2017 hearing on “Net Neutrality and the Role of Antitrust.” CDT appreciates the interest of the Subcommittee in protecting the principles of the open internet, but we have concerns about some of the legal and policy approaches under consideration in this hearing. In this statement, we will address some of the points raised by critics of the 2015 Open Internet Order (OIO) who argue for an alternative that relies exclusively on antitrust law.

First, some of the hearing witnesses claim that the net neutrality protections provided by the OIO are wholly unnecessary because the market for broadband in the United States is competitive.¹ However, this stands in stark contrast with the current reality for many American families. According to the most recent Internet Access Services report released by the FCC, 58 percent of census blocks do not feature more than one high-speed broadband provider.² As a result, many Americans are functionally forced to accept the terms of the sole broadband provider in their neighborhood, regardless of whether the

¹ Maureen K. Ohlhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 *Colo. Tech. L.J.* 119, 140 (“[E]veryone can agree that ISP markets are not natural monopolies. Hundreds of ISPs compete in the United States today. Competition between wireless broadband access providers is strong. True, wireline ISPs typically operate in concentrated markets, and some U.S. consumers enjoy limited choice between ISPs. Competition not only remains, however, it is growing.”).

² FCC Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2016* (April 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf (FCC Internet Access Services Report).

service provided is consistent with principles of net neutrality. Under these monopoly conditions, the OIO serves as a shield to protect the continued exchange of ideas and facilitate innovation.³

Second, critics of the OIO assert that formal net neutrality protections are wholly unnecessary because internet service providers (ISPs) have not taken actions that would constitute blocking, throttling, or paid prioritization.⁴ In the Notice of Proposed Rulemaking (NPRM) for the repeal of the OIO, FCC Chairman Ajit Pai initially claimed that no formal complaints had been filed regarding net neutrality violations.⁵ Yet after the NPRM was released, a Freedom of Information Act request revealed that at least 54,000 informal complaints had been filed with the FCC regarding alleged violations of the OIO that were seemingly not taken into consideration.⁶ Moreover, the OIO was predicated by a record of such violations, including the following:

- In 2008, the FCC ruled that the throttling of traffic from BitTorrent by Comcast was unlawful, based off of an Associated Press (AP) report that found that the ISP had “actively interfere[d] with attempts by some of its high-speed Internet subscribers to share files online.”⁷ The report found that Comcast’s conduct had a “drastic effect...on one type of traffic--in some cases blocking it rather than slowing it down.”⁸
- In 2011, in advance of the release of its new payment app, Isis Mobile Wallet, Verizon blocked the use of the competing Google Wallet application on its new Galaxy Nexus 4G LTE smartphone.⁹

³ In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Amended Comments of the Center for Democracy & Technology, at 14 (July 19, 2017) (CDT Comments) (Without these protections in place, ISPs may block or slow down access to third-party edge providers in order to help drive traffic to its own competing services, effectively suffocating access to internet users. And if an edge provider is able to develop a successful application, the ISP may levy taxes on the product through the use of paid prioritization.”).

⁴ Ohlhausen, *supra* note 1, at 140 (“[T]here is a dearth of evidence of paid prioritization, throttling, or exclusion that has demonstrably harmed the competitive process.”).

⁵ Jacob Kastrenakes, *As net neutrality dies, one man wants to make Verizon pay for its sins*, The Verge, Aug. 9, 2017, <https://www.theverge.com/2017/8/9/16114530/net-neutrality-crusade-against-verizon-alex-nguyen-fcc>.

⁶ Jon Brodtkin, *FCC makes net neutrality complaints public, but too late to stop repeal*, Ars Technica, Sept. 5, 2017, <https://arstechnica.com/tech-policy/2017/09/fcc-makes-net-neutrality-complaints-public-but-too-late-to-stop-repeal/>.

⁷ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13031, para. 7 (2008) (Comcast-BitTorrent Order).

⁸ *Id.*

⁹ David Goldman, *Verizon blocks Google Wallet*, CNN Money (Dec. 6, 2011, 2:26 PM), http://money.cnn.com/2011/12/06/technology/verizon_blocks_google_wallet/index.htm.

- In 2012, AT&T initially required iPhone users to subscribe to a plan with added fees to use the FaceTime video application over its cellular network.¹⁰

Third, some witnesses have argued that the OIO represents a form of regulation that unfairly subjects ISPs to a higher level of scrutiny than internet-based companies like Google, Facebook, or Twitter (also known as “edge providers”). For instance, Michael Romano of NTCA argues that retail broadband providers would be “subject to specialized, detailed requirements,” while edge providers would face a lower level of scrutiny despite the fact that they “typically hold great, if not greater, volumes of data.”¹¹ But this claim elides the fundamental differences between ISPs and internet-based companies in the broader internet ecosystem.

Whereas edge providers may provide content or an application, ISPs serve a central role as gatekeepers to the internet itself. As a result, providers have tremendous access to information about the entirety of customers’ online activities and communications, which comes with a corresponding responsibility to protect the privacy of that information. Additionally, the lack of competition in many markets for access means that consumers cannot choose between different high-speed broadband providers—they are compelled to subscribe to a particular ISP for lack of other options. In contrast, users can choose between different internet platforms regardless of their geographic location, and can comparison shop based upon their own privacy preferences. The significant distinctions between the roles served by ISPs and edge providers and the monopoly position of ISPs in many jurisdictions justifies the differences in oversight.¹²

Despite the unique central position that ISPs occupy, some of the majority witnesses also argue that the FTC is equipped to provide exclusive oversight and enforcement of ISPs through current antitrust law.¹³ For example, Romano asserts that the FTC is “far better-versed [sic] in such issues and expert in oversight of mass-market services” compared to the FCC.¹⁴ But although the FTC does have a number

¹⁰ David Kravets, *Net Neutrality Groups Challenge AT&T FaceTime Blocking*, *Wired*, Sept. 8, 2012, <https://www.wired.com/2012/09/factime-fcc-flap/>.

¹¹ *Hearing on Net Neutrality and the Role of Antitrust Before the H. Subcomm. on Reg. Reform, Commercial and Antitrust L. of the H. Comm. on the Judiciary*, 115th Cong. 5 (2017) (statement of Michael Romano, Senior Vice President, NTCA (The Rural Broadband Assoc.)).

¹² The dominant market position of ISPs in many locales is further fortified by high barriers to entry, including the costs of infrastructure build out. See, e.g., Susan Crawford, *Google Fiber Was Doomed From the Start*, *Wired*, (March 14, 2017) <https://www.wired.com/2017/03/google-fiber-was-doomed-from-the-start/> (“...80 percent of the cost of installing fiber is labor....The cost of that labor isn’t going down right now.”).

¹³ Ohlhausen, *supra* note 1, at 141 (arguing that consumers would still enjoy protection in a world without net neutrality, based upon the assumption that antitrust law alone is enough to protect the public interest).

¹⁴ Romano, *supra* note 11, at 4.

of enforcement tools at its disposal, it lacks the rulemaking ability and the deep subject matter expertise of the FCC to protect consumer rights.

Without the authority to make rules, the FTC can only pursue violations of net neutrality and consumer privacy after the fact. As FTC Commissioner Terrell McSweeney noted in her comment to the FCC, “these rules provide innovators with confidence that discriminatory network access will not threaten their chances for competitive success.”¹⁵ In comparison, a system that relies on enforcement after the fact cannot provide the same assurances because it would require detection, analysis, and a potentially lengthy rule-of-reason analysis.¹⁶

From a legal perspective, the authority of the FTC to protect consumers primarily stems from Section 5 of the FTC Act, which allows the agency to investigate “unfair and deceptive acts and practices in or affecting commerce.”¹⁷ More specifically, this means that the FTC can pursue violations on a case-by-case basis when (1) a company’s practices cause a substantial and unavoidable injury to consumers that is not outweighed by other benefits or (2) companies mislead consumers and fail to abide by their own privacy policies. As Commissioner McSweeney notes, under these terms, ISPs can still change their terms of service regarding net neutrality without violating the ban on deception so long as they provide clear notice of the changes.¹⁸

But it is not currently clear that the FTC has the legal authority to regulate many ISPs. Under an exemption in the FTC Act, the agency is barred from regulating common carriers.¹⁹ And in the recent case of *AT&T Mobility v. FTC*, the 9th Circuit found that this exemption extends to include all services of a company with a common carrier component.²⁰ If the decision is upheld on appeal, consumers would have no federal remedy for violations of privacy by ISPs with common carrier services.

Furthermore, the FTC is not as well-equipped as the FCC to handle many of the network engineering issues that will accompany its new oversight role. Consequently, protection of the fundamental rights of internet users would shift from a specialized agency with deep expertise in telecommunications policy to an agency with greater constraints on staff resources and less expertise in the field.

¹⁵ In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Comment of Terrell McSweeney, Commissioner, Federal Trade Commission, at 4 (July 17, 2017).

¹⁶ *Id.*

¹⁷ 15 U.S.C. § 45.

¹⁸ McSweeney, *supra* note 15, at 4.

¹⁹ 15 U.S.C. § 45(a)(2).

²⁰ *AT&T Mobility, LLC v. Federal Trade Commission*, No. 15-16585, at 2,9 (9th. Cir. 2016).

Detractors also argue that net neutrality protections will unduly burden the development of smaller ISPs.²¹ However, the OIO included a temporary exemption from its reporting requirements for ISPs with 100,000 or fewer subscribers when it was finalized in March 2015,²² which was renewed for another year in December 2015.²³ And from a practical perspective, the default configuration of networking equipment is consistent with net neutrality; setting a different configuration that violates those principles would actually require extra work on behalf of the ISP.²⁴ When complaints are made, the FCC estimates that it should only take 15 minutes for ISPs to respond.²⁵

Furthermore, the repeal of net neutrality protections could actually inhibit the growth and development of small ISPs. As Dane Jasper, the CEO of Sonic, points out, larger ISPs could use paid prioritization and ad-tracking policies to force smaller ISPs out of the market. The larger ISPs could use the revenue to discount their service and undercut smaller ISPs, forcing small ISPs to choose between offering a lesser version of broadband access or extinction.

Finally, critics allege that broadband infrastructure investment declined as a result of the OIO.²⁶ Yet, numerous ISPs explicitly and repeatedly told investors, the SEC, and the general public that the OIO had no negative effect on infrastructure investment during its implementation.

- In December 2014, Verizon CFO Francis Shammo explicitly said that reclassification under Title II “does not influence the way we invest” and that Verizon would continue to invest in network infrastructure.²⁷

²¹ See Romano, *supra* note 11, at 4 (NTCA has...expressed consistent concern regarding the prospect of heavy-handed, one-sided regulation and its particular impact on smaller and rural operators.”).

²² *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5609, paras. 23-24 (2015) (Open Internet Order).

²³ Lydia Beyoud, *FCC Extends Small Business Net Neutrality Reporting Exemption*, Bloomberg BNA, Dec. 15, 2015, <https://www.bna.com/fcc-extends-small-n57982065242/>. Additionally, former FCC Chairman Tom Wheeler was seeking to make the exemption permanent and was circulating a draft of a proposed rule in October 2016. Brendan Bordelon, *FCC Officials: Transparency Exemption for Small ISPs to Be Reinstated*, Morning Consult, Dec. 16, 2016, <https://morningconsult.com/2016/12/16/fcc-officials-transparency-exemption-small-isps-reinstated/>.

²⁴ Jacob Kastrenakes, *The FCC Says Net Neutrality Destroys Small ISPs. So Has it?*, The Verge, July 13, 2017, <https://www.theverge.com/2017/7/13/15949920/net-neutrality-killing-small-isps>.

²⁵ *Id.*

²⁶ *Hearing on Net Neutrality and the Role of Antitrust Before the H. Subcomm. on Reg. Reform, Commercial and Antitrust L. of the H. Comm. on the Judiciary*, 115th Cong. 9-12 (2017) (statement of Robert McDowell, Senior Policy Advisor, Mobile Future).

²⁷ Brian Fung, *Verizon: Actually, strong net neutrality rules won't affect our network investment*, Wash. Post, Dec. 10, 2014, <https://www.washingtonpost.com/news/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/>.

- In December 2015, AT&T CEO Randall Stephenson said that the OIO would not affect the business plans of the company,²⁸ noting that AT&T would deploy more fiber in 2016 than it did in 2015.²⁹
- In December 2016, Charter CEO Tom Rutledge said that Title II reclassification did not “hurt” the company.³⁰

The statements made by the ISPs are consistent with the nature of infrastructure investment, which involves careful decisions made years in advance.³¹ Accordingly, as the NCTA points out, it is unlikely that any decrease in investment over the last two years was a result of the OIO, as “[m]any of the investments were set into motion several years before and may not have accounted for the prospect of Title II regulation.”³²

²⁸ Interview by John Hodulik with Randall Stephenson, Chairman and CEO, AT&T Inc. at the UBS Global Media and Communications Conference (Dec. 8. 2015).

²⁹ *Id.*

³⁰ Jon Brodtkin, *Title II hasn't hurt network investment, according to the ISPs themselves*, Ars Technica, May 16, 2017, <https://arstechnica.com/information-technology/2017/05/title-ii-hasnt-hurt-network-investment-according-to-the-isps-the-mselfes/>.

³¹ See Gordon L. Clark et al., *The New Era of Infrastructure Investing*, 17 *Pensions: An Int'l Journal* 103 (May 2012) (arguing that institutional investors like insurance companies, pension funds, sovereign wealth funds, endowments, and foundations have a unique advantage in markets for long-term, illiquid assets like infrastructure because of the longer time horizon for such investments).

³² Rick Chessen, *Dear Harold Feld*, (June 13, 2017) <https://www.ncta.com/platform/public-policy/dear-harold-feld/>.

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

October 31, 2017

The Honorable Tom Marino, Chairman
The Honorable David Cicilline, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Marino and Congressman Cicilline:

As strong supporters of both net neutrality and the antitrust laws, Consumers Union, the policy and mobilization division of Consumer Reports, appreciates the Subcommittee's holding a hearing to bring further attention to the issue of how best to advance the goal of net neutrality.

With the internet becoming ever-more central to American life, it is essential that we not devolve into a two-tiered society where some get special preference over others. Consumers Union has long been a champion of strong net neutrality rules to ensure non-discriminatory treatment of internet traffic, and to prevent throttling or paid prioritization of web content. We supported the adoption of the FCC's 2015 Open Internet Order, and we have publicly stated our concern that the Commission's new proceeding¹ could weaken or abolish the net neutrality rules contained in the Order.

Evidence indicates that the majority of American consumers support keeping the current net neutrality rules. In partnership with our publication, Consumer Reports, in late July of this year we surveyed a representative sample of more than a thousand consumers about the role of the internet in their everyday lives, and whether they supported net neutrality.² The survey results confirm that 57 percent of Americans support the FCC's current net neutrality rules. Only 16 percent said they either strongly opposed or somewhat opposed the rules. Nor is net neutrality a partisan issue, with 61 percent of consumers identifying themselves as Democrats supporting the rules, and 48 percent of Republicans also responding in support, compared to only 13 percent of Democrats and 21 percent of Republicans opposed.

While supporting strong and effective net neutrality rules at the FCC, we have also supported thorough antitrust review of proposed mergers and other arrangements in this sector, to ensure they do not harm competitive access to the internet—including the proposed

¹ *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking (May 23, 2017) (*NPRM*).

² Reply Comments of Consumers Union, *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking (May 23, 2017) (filed August 30, 2017; see Appendix for CR Survey Report).

Comcast/ Time Warner Cable and AT&T/ Time Warner mergers, and Netflix's agreement to pay Comcast extra for more reliable streaming of Netflix content.

As the Subcommittee considers the role the antitrust laws can play in advancing the goals of net neutrality, we hope you will bear in mind that the antitrust laws address specific kinds of harmful marketplace conduct—agreements in restraint of trade, monopolization and attempts to monopolize, and mergers that may substantially lessen competition. However, there are other kinds of harmful marketplace conduct that the antitrust laws do not reach.

Net neutrality is one area where the antitrust laws cannot be counted on to provide the complete solution. An internet service provider raising prices on targeted content providers or on targeted consumers may or may not be violating the antitrust laws. But even if that conduct is not violating the antitrust laws, it is harming consumers, and it needs to be prohibited. That is why we support the FCC's vigorous use of its broader public interest authority in this area.

The principle of net neutrality reflects an overriding policy judgment that the benefits of the internet, for consumers and for the overall economy, are best achieved if the internet is available to everyone on equal, nondiscriminatory terms. We need a regulatory framework that can effectively achieve that goal. The antitrust laws are not inconsistent with that goal, and can also help promote it, but they are not by themselves sufficient to fully achieve it.

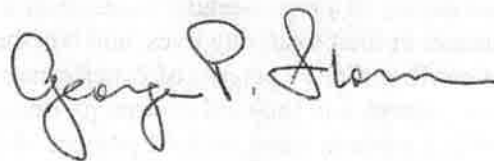
The 2015 Open Internet Order's net neutrality rules, and the Title II reclassification upon which they stand, were twice upheld in federal court, and they are serving consumers well. Because of those rules, consumers have the right of access to an open internet that is a level playing field free of blocking, throttling, and paid prioritization—core protections that preserve the benefits of a dynamic internet full of competition, new services, and innovation.

We strongly support the antitrust laws, but they are not a substitute for those rules.

Sincerely,

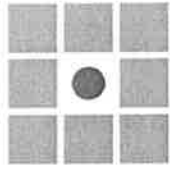


Jonathan Schwantes
Senior Policy Counsel



George P. Slover
Senior Policy Counsel

cc: Members, House Judiciary Committee



Public Knowledge

**Testimony of
Anant Raut
Visiting Fellow
Public Knowledge**

On Behalf of Public Knowledge

**Before the
U.S. House of Representatives
Committee on the Judiciary**

**Subcommittee on
Regulatory Reform, Commercial and Antitrust Law**

**Hearing on:
Net Neutrality and the Role of Antitrust**

**Washington, D.C.
November 1, 2017**

Can antitrust alone protect net neutrality? No. And I say this with the confidence of someone who has enforced the antitrust laws at both the Federal Trade Commission (FTC) and the Department of Justice. Antitrust cannot protect net neutrality because nothing in antitrust requires nondiscriminatory treatment of content by Internet service providers (ISPs).¹

The greatness of the Internet was never a foregone conclusion, but the result of deliberate policy choices made by the federal government to place all Internet content and services on an equal footing, and use its regulatory authority to foster interoperability, nondiscrimination, and innovation. Antitrust law complements these rules, but doesn't replace them.

Antitrust won't require ISPs to remain a neutral conduit for their customers to use the Internet. Antitrust preserves competition; it does not, nor was it ever intended to, protect individual competitors. Right now, I can see and use the same things on the Internet that you can, regardless of our respective ISPs, because of net neutrality regulations. Antitrust, on the other hand, would allow ISPs to sell faster load times, higher resolution, even exclusive access to some websites and services over others; content that you yourself may not choose, but would be powerless to change, because your ISP controls the drawbridge into your house.

Moreover, punting net neutrality enforcement to antitrust law, in practical terms, means that these cases would have to be brought one at a time, which favors the ISPs, as opposed to the consumer-friendly way it works now, where the blanket prohibition prevents the discriminatory activity from occurring in the first place. Eliminating net neutrality's bright line rules would shift the burden of enforcement against multi-billion dollar corporations onto beleaguered consumers.

¹ Anant Raut is a Visiting Fellow at Public Knowledge. He previously served as Counsel to two Assistant Attorneys General of the Department of Justice's Antitrust Division, as well as a staff attorney in the Federal Trade Commission's Bureau of Competition.

The closer one looks, the easier it is to see all the ways that the Federal Communications Commission's (FCC) deliberate abdication of net neutrality enforcement will help ISPs squeeze more dollars out of both ends of the Internet, but the harder it becomes to find any pro-consumer benefits. Acting FTC Chairman Maureen Ohlhausen has previously offered a slew of reassurances², but her arguments assume that the broadband market is competitive; that consumers who don't like preferential behavior by their ISPs will be able to a) notice it and b) switch easily to a different service; that markets are efficient; that giving ISPs the freedom to favor some content over other will create desirable new products and services for customers; and that because markets are efficient, any manipulation that customers don't want will be eliminated.

These arguments fall apart in the real world. The market for high-speed fixed broadband is not competitive at all. The FCC has previously concluded that over 75% of the home broadband market is highly concentrated³, and that only a quarter of Americans have more than one option for high-speed home broadband. Don't take my word for it, just ask your constituents - when they have a bad experience with their home broadband provider, how frictionless is it for them to switch to a better alternative?

Second, Ohlhausen assumes that going forward, all of the ways ISPs will favor certain content over others will be to improve the user experience, but she fails to appreciate that any theoretical improvements to the user experience will be incidental, because so many of those users are effectively captive. ISPs will be turning Internet service into a two-sided market in order to make as much money as possible from both ends. By analogy, taxicabs don't have to

² Ohlhausen, M., "Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously," COLO. TECH. L.J., Vol. 15.1 (2016).

³ Federal Communications Commission, "FCC Chairman: More Competition Needed in High-Speed Broadband Market (Sept. 4, 2014)," *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329160A1.pdf.

worry much about selecting the backseat advertisements that most enhance the user experience because by the time the passenger has climbed in, s/he is already a captive consumer.

Lastly, Ohlhausen frames this shift as a way of promoting the free market. But the Internet already is a free market, where content and service providers compete directly for users on a level playing field. Giving ISPs freedom to exploit their last-mile monopoly into users' homes to favor some content over other isn't how free markets work; it's how free markets are distorted by companies with monopoly power in adjacent markets.

While antitrust is rooted in price-based harms, the FCC has a more expansive public interest standard that allows it to protect things like diversity of viewpoints and freedom of speech. Eliminate net neutrality enforcement, and the largest, most democratic forum in human history becomes balkanized; your Internet experience may be very different from that of friends one town over who use a different ISP. In this era of rampant disinformation and echo chambers, do we now want to give ISPs the power to give preferential treatment to certain news providers over others?

Preserving net neutrality is about preserving the same Internet for everybody. It's not even about protecting the Netflixes, Googles, or Facebooks as much as giving the startups that could upend those companies a fair chance at reaching consumers without paying prohibitive tolls to every ISP. Net neutrality is essential to protecting online innovation and preserving the free market that exists between content providers and consumers. Antitrust alone can't do it.