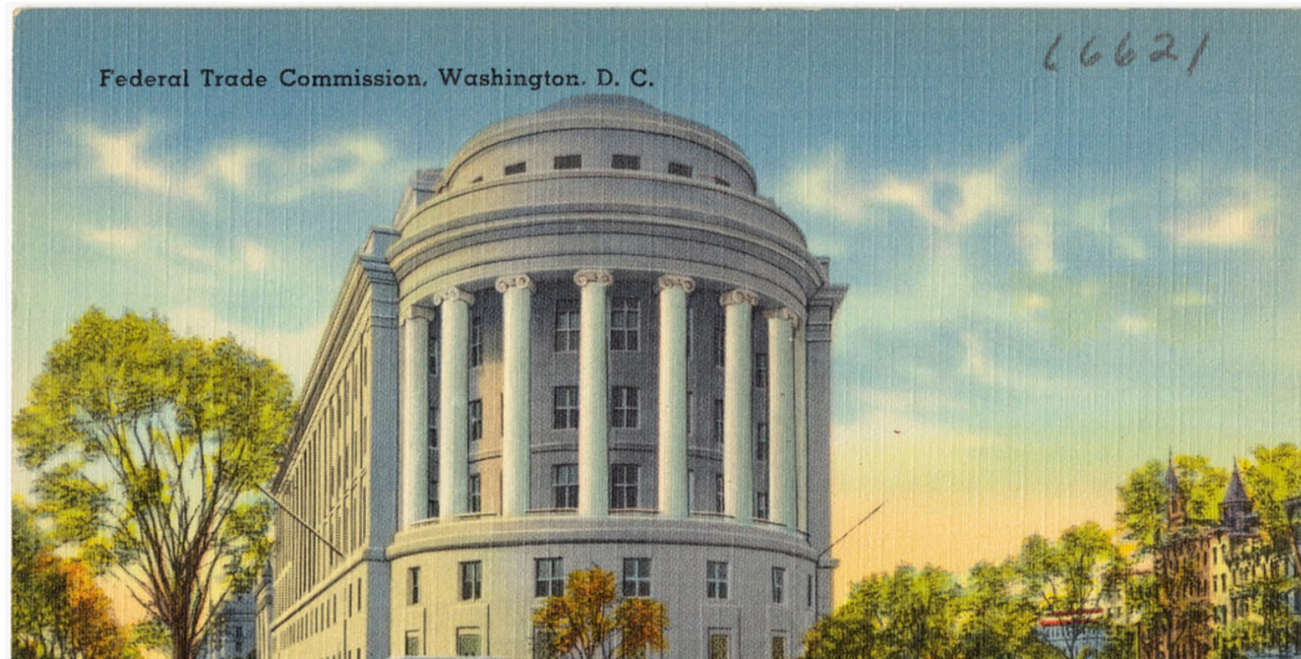


# FTC divided over agency role in net neutrality

Nihal Krishan 19 July 2017

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The staff of the Federal Trade Commission and acting chairman Maureen Ohlhausen said on Monday that they supported the Federal Communications Commission returning jurisdiction over broadband providers to the FTC.

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But Commissioner Terrell McSweeney, a Democrat and the only other sitting FTC commissioner, opposed the FTC's role in net neutrality, saying there are limitations to antitrust remedies for companies that violate net neutrality agreements and that the agency should defer to the current Open Internet Order the FCC has in place.

In 2015, the FCC [stripped](#) the FTC of its authority over broadband internet access services by designating broadband providers as common carriers; under current law, the FTC cannot regulate common carrier activities.

The FTC's staff within the bureaus of consumer protection, competition, and economics submitted [joint comments](#) in favour of a proposal to return jurisdiction over Broadband Internet Access Service (BIAS) to the FTC. The proposal to restore the FTC's jurisdiction was set out in the FCC's [Notice of Proposed Rulemaking on Restoring Internet Freedom](#), first published in May.

The FTC staff argued that it has the necessary expertise in enforcing antitrust laws across all industries, including broadband internet, and that for years prior to 2015 it "enforced the antitrust laws for the benefit of consumers in BIAS markets, just as it does throughout the economy."

The staff also said that when conducting an antitrust analysis of BIAS markets, "the ultimate issue would be whether broadband Internet access providers engage in unilateral or joint conduct that is likely to harm competition in a relevant market." However, staff also suggested there is no reason to assume that there will be any more or less anticompetitive behaviour from internet-related companies than organisations in other industries.

Chairman Ohlhausen echoed the FTC staff's sentiments in her own [comment](#) on the subject.

She cited a 2007 [FTC Staff Report](#) regarding laws or regulations related to net neutrality, specifically highlighting one section of the report: "Policymakers should be wary of calls for network neutrality regulation simply because we do not know what the net effects of potential conduct by broadband providers will be on consumers."

Ohlhausen also cited the staff report's general assessment of FTC's approach to enforcing the antitrust laws. The report said that "because the various conduct and business arrangements

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at issue in the broadband area have both procompetitive and anticompetitive potential,” the FTC would analyse the effect of particular conduct on consumer welfare on a case-by-case basis.

The chairman argued that antitrust not only protects price and output in an industry but also competition, which she said means delivering “the qualities that consumers demand.” She said that “antitrust can help protect any feature or quality that consumers demand, including free speech and democratic participation.”

Tad Lipsky, the former acting director of the FTC's bureau of competition, also supported the agency's heightened role in net neutrality. He [said](#) in May that the FTC through antitrust laws would be vigilant in pursuing anticompetitive practices in the internet services market.

However, in a separate comment, Commissioner Terrell McSweeney [opposed](#) the rule change.

McSweeney said the FTC is an expert in consumer protection and competition enforcement, but that it has limits to its effectiveness “in policing non-discrimination on networks and protecting competition in markets that are already highly concentrated.”

She argued that the FTC's jurisdiction over common carriers remains unclear – currently the FTC Act exempts common carriers from enforcement – and internet service providers are “free to change their terms of service regarding nondiscrimination on their networks without violating the FTC Act's ban on deception so long as they provide clear notice of changes.”

McSweeney also alleged that “there are significant shortcomings to relying only on antitrust law enforcement to protect content providers' access to the internet.” She said that determining whether to allow ISPs to interfere with consumer expression and speech requires non-economic factors that current antitrust law does not address.

Democratic Senator Al Franken, who sits on the Senate antitrust subcommittee, also [commented](#) in opposition to the FCC's proposed rule change and its proposal to reverse the Open Internet Order of 2015.

Franken said that antitrust enforcement alone would be insufficient to preserve net neutrality and urged the FCC to maintain and fully enforce the Open Internet Order.

He said that “net neutrality is not just about maintaining a fair marketplace for commerce – it’s also about preserving a free and open marketplace for ideas.”

He further argued that “antitrust enforcement in the United States has thus far been largely limited to preventing economic harms to competitors and consumers,” but that strong net neutrality rules should also serve the broader public's interest in regards to free speech and civic participation.

The FCC’s notice is open for public comment till 16 August.

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