

**Before the Economic Matters Committee
Maryland House of Delegates**

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**In Support of
House Bill 957, Maryland Net Neutrality Act of 2020**

February 26, 2020

Chairman Davis, Vice Chair Dumais and members of the Committee,

Thank you for allowing me to submit written testimony on House Bill 957, the Maryland Net Neutrality Act of 2020.¹ My name is Barbara van Schewick. I am a Professor at Stanford Law School and direct the Center for Internet and Society there. I am a lawyer, but I also have a PhD in computer science. I am testifying as an independent academic, who has worked on net neutrality for twenty years.² The FCC's 2010 and 2015 Open Internet Rules relied heavily on my work, as did the Indian and Canadian Orders on zero-rating and the European Union's net neutrality guidelines.

In December 2017, the Federal Communications Commission (FCC) under Chairman Ajit Pai voted to eliminate all net neutrality protections, declaring that the FCC had no role to play in ensuring that the companies we pay to get online do not interfere with what we choose to do online.

The net neutrality repeal was a radical break from FCC history and a fundamental departure from how the Internet has operated for the past 30 years.

Net neutrality protections did not suddenly appear in 2015. Although the FCC formally adopted network neutrality rules for the first time in 2010, we have always had a de facto network neutrality regime in the U.S. – first, through the architecture of the Internet, and later, through a mix of formal and informal FCC regulation and action. This de facto regime prevented or at least deterred blocking and discrimination.

Since its inception, Internet access in the U.S. has been guided by one basic principle: ISPs that provide the on-ramps to the Internet should not control what happens on the Internet.

Originally, this principle was built into the architecture of the Internet. In the mid-1990s, however, technology emerged that allowed ISPs to interfere with the applications, content, and services on their networks.

Net neutrality is not new or partisan.

In the face of this threat, the FCC has strongly supported Open Internet principles since 2004, including when Republicans Michael Powell and Kevin Martin helmed the agency. The FCC has expressed its expectation that Internet service providers would live by these principles, and taken enforcement actions that stopped discriminatory conduct.³

¹ My testimony draws heavily on my existing writings on net neutrality.

² I have not been retained or paid by anybody to submit testimony. Additional information on my funding is available here: <http://cyberlaw.stanford.edu/about/people/barbara-van-schewick>.

³ <https://fortune.com/2017/11/22/net-neutrality-fcc-ajit-pai-verizon-comcast-att/>.

Until 2005, DSL providers were directly banned from blocking and unreasonable discrimination under Title II of the Communications Act. In addition, the FCC imposed binding net neutrality conditions on corporate mergers, attached net neutrality requirements to stimulus grants for broadband services and to certain parts of the wireless spectrum, and, in 2010 and 2015, promulgated enforceable net neutrality rules.

The FCC's decades-long commitment to and enforcement of this basic principle – that ISPs don't get to pick winners and losers on the Internet – means Internet users in the U.S. haven't had to worry about whether ISPs might block or discriminate against certain kinds of content or applications. Entrepreneurs who have an idea for a new application have not needed permission from ISPs in order to innovate and have been able to realize their ideas at a low cost.

This was a well-oiled free market at work.

The FCC took us backwards to a broken European model.

By contrast, from 2009 to 2015, European law allowed blocking and discrimination, as long as it was disclosed. ISPs engaged in widespread blocking and discrimination, such as prohibiting Skype to protect their traditional voice revenue.

That's the regime now governing the United States.

The repeal allows ISPs to charge websites for access to the ISPs' customers, block those that don't pay, and build pay-to-play fast lanes. This is a radical departure from how the Internet has operated over the past 30 years and would allow ISPs to increase costs for businesses across the entire economy.

In the U.S., companies that use the Internet to reach their customers have always simply paid for their own access to the Internet. They have never had to pay any additional fees to their customers' ISPs.

ISPs have wanted to change that since 2006, and Chairman Pai has finally allowed them to do so.

Verizon told a federal court in 2013 that it should have the right to charge any website any fee Verizon liked – and if, for instance, the Wall Street Journal didn't pay up, Verizon should be allowed to block its site.

ISPs also want to be able to offer fast lanes that would give better service to companies that pay ISPs when their data travels to the ISPs' customers over the ISPs' networks. Websites that don't pay would receive a slower speed.

But the FCC, lawmakers and the public have long pushed back against access fees and fast lanes, and in 2010, the FCC formally prohibited them for cable and DSL providers and expanded those prohibitions to mobile in 2015.

These fast lanes and fees for access to ISP customers would hurt every single sector of the economy.

Today, almost every company relies on the Internet one way or the other. Large corporations that pay these fees will have higher costs, so their customers will be forced to pay higher prices for products and services. Small businesses and startups that can't afford a fast lane will find it harder to compete; those that can't afford the access fees won't be able to compete at all.

Thus, the repeal of net neutrality protections allows ISPs to distort the well-greased free markets that rely on the Internet and tax businesses in every single sector of the economy.

ISPs are now free to block, speed up or slow down websites, applications, and services; charge online companies for access to an ISP's customers and block those that don't pay; and to enter into deals with online companies to put them in a fast lane to the ISP's customers. All of these were prohibited by the 2015 Open Internet Order.

Is there really no other option than state action?

Chairman Pai defended the removal of the existing net neutrality protections, arguing that the FTC can effectively police ISPs.

But the FTC doesn't have the power and tools to adequately protect consumers and businesses against net neutrality violations. And whatever the merits of a federal legislative solution, Congress has been too gridlocked to pass a net neutrality bill.

The Federal Trade Commission is not capable of protecting net neutrality.

Chairman Pai claims that the FTC can protect the open Internet now that the FCC has eliminated all protections and classified ISPs as an information service under Title I of the Communications Act.

But even when the FCC and FTC shared oversight of ISPs before 2015, the FTC never enforced any net neutrality protections. That's always been done by the FCC. For example, the FCC stopped DSL provider Madison River from blocking the Internet telephony service Vonage in 2005;⁴ prohibited Comcast from blocking peer-to-peer file-sharing applications in 2008;⁵ and

⁴ <https://www.cnet.com/news/telco-agrees-to-stop-blocking-voip-calls/>.

⁵ https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

forced Verizon Wireless to stop interfering with customers' ability to use their mobile phones as wireless hotspots.⁶

By contrast, the FTC focused on ISPs deviating from their published privacy policies and deceptively advertising "unlimited" Internet plans that were not actually unlimited.

That is not surprising.

The FTC lacks the power and tools to police net neutrality violations.⁷ The FTC can intervene if a company violates its stated policies. But if a company discloses that it has paid fast lanes, charges online companies for access to users, and blocks those that don't pay, there is nothing the FTC can do.

Beyond that, the FTC's role is limited to protecting consumers against practices that "harm competition," a term of art in antitrust law, after the fact. As a result, the FTC cannot adopt rules proactively.

Nor can it adequately protect against threats to innovation and free speech. For instance, the FCC's net neutrality protections banned broadband providers from creating fast lanes to their customers for websites that pay the ISPs a fee. These fast lanes tilt the market in favor of deep-pocketed companies and speakers, making it harder for startups, small businesses, and low-cost speakers to compete and be heard. While clearly harmful to innovation and free speech, that's not an antitrust violation.

In fact, FTC Chairman Joseph Simons in an April 2019 speech at the National Press Club admitted this, saying "The FTC is, principally, a law enforcement agency. It is not a sector regulator like the FCC," and that "blocking, throttling, or paid prioritization would not be per se antitrust violations."⁸

House Bill 957 restores all of the key net neutrality protections of the 2015 Open Internet Order.

Like the 2015 Open Internet Order, House Bill 957 ensures that ISPs like Comcast, AT&T, and Verizon can't use their power over the on-ramps to the Internet to interfere with the free markets that depend on the Internet. The bill protects the Internet Age's version of the American dream by making sure that new businesses can innovate cheaply and without the permission of big ISPs.

⁶ <https://www.cnet.com/news/what-verizons-fcc-tethering-settlement-means-to-you-faq/>.

⁷ <https://cyberlaw.stanford.edu/downloads/ProfessorLetterToFTC-20150129.pdf>.

⁸ https://www.vice.com/en_us/article/8xyyzb/the-ftc-makes-it-clear-it-cant-wont-protect-net-neutrality.

Most importantly, House Bill 957 ensures that all Marylanders – no matter the size of their wallets, the color of their skin, or their political leanings – have an equal chance to reach people online and participate in our democracy.

The bill does this by prohibiting ISPs from blocking, speeding up or slowing down websites, applications, and services; charging online companies for access to an ISP's customers and blocking those that do not pay; and from entering into deals with online companies to put them in a fast lane to the ISP's customers.

The bill also ensures that ISPs cannot circumvent these protections. For example, ISPs have slowed down some websites' data as it entered the ISPs' network – causing mysterious slowdowns for ISP customers who paid for a fast connection. Like the 2015 Open Internet Order, House Bill 957 closes this loophole.

Incomplete net neutrality protections are no protection at all.

ISPs have many ways to pick winners and losers online. To be effective, a net neutrality law needs to protect against all of them.

Some state-level attempts to legislate have just copied the two-pages of text of the FCC's 2015 net neutrality rules. But that's not sufficient. It ignores the 2015 Open Internet Order, which accompanied the rules, explained what the rules meant and included important protections and clarifications. If those protections are left out, as other state net neutrality laws did, ISPs would have significant and known loopholes to exploit.

California's SB 822 was the first state-level net neutrality law in the country to incorporate the 2015 Open Internet Rules *and* the important protections and clarifications in the text of the 2015 Open Internet Order. That's what made it so special.

House Bill 957 follows the careful work of SB 822, fully restoring the level of protection that Maryland residents had when the FCC voted to remove all net neutrality protections.

House Bill 957 protects websites from being charged fees by ISPs.

The 2010 and 2015 Orders explicitly banned ISPs from charging websites simply so they would load for an ISP's customers. That closed a loophole that AT&T and Verizon publicly said they wanted to use in order to charge websites tolls and block those that didn't pay.

Those kinds of tolls would increase the cost of business in every sector of the economy and give ISPs enormous power over which websites users get to see and use.

House Bill 957, like SB 822, follows the Open Internet Order and bans access fees.

House Bill 957 bans circumvention via interconnection and zero-rating.

From 2013 to 2015, the nation’s six largest ISPs exploited a loophole in the 2010 Open Internet Order and were able to circumvent the protections where data entered their network (known as the point of interconnection). The largest ISPs allowed the doorways into their networks to get congested, which slowed down the internet for tens of millions of Americans and countless websites. Remote workers couldn’t do their jobs, schools couldn’t upload their payroll files, and online video and games became unusable.

ISPs would only relieve the congestion once websites and delivery networks paid them, and for those that didn’t pay, the congestion did not stop until the FCC declared in the 2015 Open Internet Order that it would not allow ISPs to use interconnection agreements and practices to evade net neutrality.

Similarly, ISPs can use zero-rating schemes as a non-technical way to interfere with user choice. Zero-rating is the practice of not counting some data, but not all, against a user’s data allotment. Most people are worried about hitting their data cap, so they will prefer websites and apps that do not eat up their data over those that do.

In an age where mega-corporations like AT&T and Comcast own the content and the pipes that deliver the content, ISPs have the means, motive and opportunity to tilt the internet in their favor at the expense of everyone else, from startups to communities of color.

House Bill 957 bans anti-competitive forms of zero-rating, such as an ISP zero-rating its own video site while counting the data used on all other sites. However, it explicitly allows consumer-friendly zero-rating, such as not counting data used between midnight and 6 a.m. when network usage is low.

The bill is on firm legal ground.

While the FCC's 2017 Order explicitly banned states from adopting their own net neutrality laws, that preemption is invalid. According to case law, an agency that does not have the power to regulate does not have the power to preempt. That means the FCC can only prevent the states from adopting net neutrality protections if the FCC has authority to adopt net neutrality protections itself.

But by re-classifying ISPs as information services under Title I of the Communications Act and re-interpreting Section 706 of the Telecommunications Act as a mission statement rather than an

independent grant of authority, the FCC has deliberately removed all of its sources of authority that would allow it to adopt net neutrality protections. The FCC's Order is explicit on this point.

Since the FCC's 2017 Order removed the agency's authority to adopt net neutrality protections, it doesn't have authority to prevent the states from doing so, either.

In October 2019, the D.C. Circuit Court of Appeals struck down the FCC ban on state net neutrality laws in the 2017 net neutrality repeal order.

Until Congress or a new FCC restores comprehensive net neutrality protections, it is up to the states to protect their citizens.

House Bill 957 will do just that.