

## **Republicans' Alternate Reality of Net Neutrality**

Trump Republicans would rather fabricate alternate realities than face facts. They insist that humans do not cause global warming, Russia did not meddle in our presidential election, tax cuts for corporations and the wealthy pay for themselves, and the Affordable Care Act is ruining the economy. Trump Republicans also maintain that net neutrality kills innovation and investment in the internet. This claim is central to the Republican-controlled Federal Communications Commission's quest to repeal net neutrality rules established in 2015.

The Trump FCC wants to return us to the internet of 2002. It was a pivotal year in the debate over net neutrality, for in 2002, the FCC declared that internet service providers (ISPs)—Comcast, AT&T, Verizon, etc.—should *not* be regulated as common utilities like telephone companies.<sup>1</sup> The agency reasoned that ISPs provided essential data processing services such as email, access to news groups, ability to create personal web pages, and so forth, that were essential add-on services. Because these add-on services were integrated with the transmission of data to and from internet endpoints, the FCC reasoned that ISPs were different from telephone companies. Internet users in 2002 had little choice but to rely on their ISPs for data processing services.

In 2015, however, the FCC reversed course and ruled that ISPs *should* be regulated as utilities. The reasoning was that by 2015 internet users had access to numerous alternative platforms for email, web pages, and other operations. They no longer had to depend solely on their ISPs. Consumers could use Gmail or Yahoo, for example, instead of Comcast's email service.

### **Then and Now**

What was the internet like in 2002? First, there was very little broadband cable service in the U.S. More than 85 percent of American homes accessed the internet through their phone lines with dial-up modems.<sup>2</sup> Second, there were very few "edge" providers—entities that provide content, application, or service over the internet. In 2002 there was no Netflix, Facebook, YouTube, or Gmail. Wix, Weebly, and WordPress did not exist in 2002. Wikipedia was newly founded in 2001, and Google had yet to make an initial public offering of its stock.

The FCC justified its net neutrality rules in 2015 by noting that "times and usage patterns have changed," and that "broadband Internet access service is fundamentally understood by customers as a transmission platform through which consumers can access third-party content, applications, and services of their choosing."<sup>3</sup> Given the dramatic growth of edge providers between 2002 and 2015, coupled with consumers' preferences for using third party providers instead of their ISPs for basic services, the FCC concluded that ISPs in 2015 were not much different than telephone companies. The essential function of ISPs for most Americans was simply to transfer bits and bytes into and out of their homes and businesses.

## **An Environment for Growth**

What kind of regulatory environment encouraged the extraordinary growth of edge providers? Contrary to the Trump FCC's narrative, the phenomenal growth of the internet occurred in a period when net neutrality policies were largely in place. During much of the 2002-2015 period—under both Republican and Democratic administrations—the FCC implemented net neutrality policies through a variety of regulatory tools, including cease and desist orders, policy statements, and notice-and-comment rulemaking.

In March 2005, the FCC issued an order preventing Madison River Communications in North Carolina from blocking Vonage for offering phone service through its cables.<sup>4</sup> Later that year, the FCC issued a general policy statement establishing principles of net neutrality, including the right of consumers to “access the lawful Internet content of their choice” and “to run applications and use services of their choice.”<sup>5</sup> In 2008, the FCC ordered Comcast to refrain from blocking subscribers' access to BitTorrent.<sup>6</sup> In 2010, the FCC issued its first net neutrality regulations, *Preserving the Open Internet*, explaining that anti-blocking measures were necessary to encourage investment and competition among edge-providers such as Amazon, Google, and YouTube.<sup>7</sup> Even though the 2008 Comcast order and the 2010 regulations were struck down in federal court, the FCC had in place either a policy guidance or an actual law requiring net neutrality for nine of the 14 years between 2002 and 2015.

The Trump FCC maintains that net neutrality is unnecessary because there were only a “handful of incidents that purportedly affected Internet openness” between 2002 and 2015.<sup>8</sup> A more accurate claim, however, would be that only a handful of ISPs were willing to risk enforcement action by the FCC for blocking or throttling content. Most telecommunications companies think better of incurring large legal bills by fighting the FCC's policies, especially when those policies are quite clear. In truth, the patchwork quilt of net neutrality policies the FCC had in place between 2002 and 2015 effectively deterred most blocking and throttling of content—and the internet thrived.

## **Alternate Reality**

The reality of net neutrality is that the rapid growth of edge providers since 2002 has threatened the ability of ISPs to monopolize the internet. For this reason, the Trump FCC, beholden to ISPs rather than to everyday Americans who use the internet, is intent on killing net neutrality. Yet the Trump FCC's arguments are deeply flawed. Lacking sound policy arguments, the agency has simply created an alternate reality. The Trump FCC would have us believe that the remarkable development of the internet between 2002 and 2015 occurred because net neutrality was not in effect, when in fact it mostly was. It's so much easier to fabricate an alternative reality than face facts.

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<sup>1</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Inquiry. 2002. FCC 02-77.

<sup>2</sup> The U.S. Broadband Problem, Charles H. Ferguson, July 31, 2002, The Brookings Institution.

<sup>3</sup> *Protecting and Promoting the Open Internet*. Report and Order on Demand, Declaratory Ruling, and Order. FCC 15-24. 2015. ¶43 and ¶46.

<sup>4</sup> *Madison River Communications, LLC and Affiliated Companies*. Consent Decree, DA 05-543, 2005.

<sup>5</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, FCC 05-151. 2005.

<sup>6</sup> *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."* Memorandum and Opinion Order, FCC 08-183. August 1, 2008.

<sup>7</sup> *Preserving the Open Internet: Broadband Industry Practices*. Report and Order, FCC 10-201. 2010.

<sup>8</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, FCC 17-166. 2018. ¶110.

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