

# Expert offers overview of net neutrality debate

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The internet is about to change dramatically. Unless it isn't.

On Dec. 14, the Federal Communications Commission is expected to approve a plan to reverse rules passed in 2015 that prevent [internet](#) service providers from blocking, throttling or prioritizing online content.

The repeal of net neutrality is seen as a victory for large telecommunication companies such as AT&T, Comcast and Verizon, which stand to benefit from less-stringent regulation, but it is opposed by many tech companies, entrepreneurs and concerned citizens. The FCC has received millions of public comments on the matter on its website, and nationwide protests are planned for Dec. 7.

Justin "Gus" Hurwitz, assistant professor of law and co-director of the Nebraska College of Law's Space, Cyber and Telecommunications Law program, researches the intersection between law and technology and the role of regulation in high-tech industries. In a recent interview with Nebraska Today, he said net neutrality is widely misunderstood and that the new plan should not be seen as an existential threat to the internet, but as a regulatory shift that could benefit [consumers](#) and businesses while maintaining a "cop on the beat" to take action should problems arise.

## What is net neutrality, and why should the average person care?

Net neutrality is basically the idea that ISPs should treat all data traversing their networks the same. The underlying concern is that, because there isn't a great deal of competition in the market for internet access, ISPs will be able to act anti-competitively to benefit themselves in ways that will harm consumers.

While these concerns are not entirely unreasonable, consumer concern about net neutrality dramatically exceeds either the likelihood or magnitude of potential harms. One reporter who has been covering these issues for several years recently explained this well, saying that concerns about net neutrality are similar to the alarm over the Y2K bug at the turn of the century: People were literally preparing for the end of society due to the Y2K bug, and there ended up being almost no actual effects.

This isn't to say that consumers are wrong to be concerned about a lot of what is going on with the internet, or that net neutrality isn't part of this matrix of issues. But the overwhelming majority of examples that folks point to to demonstrate why net neutrality is a problem are unrelated to net neutrality and are actually examples of things that have been good for consumers, or have been addressed by the government without need for strict net neutrality rules.

**Opponents of net neutrality say that current rules are heavy-handed and are stifling growth. Supporters say this repeal could mark the end of the open internet. How do you see the situation?**

The internet was "open" for decades prior to adoption of the 2015 rules, and things went pretty well. In fact, in most of the rest of the world, internet access was strictly regulated (or even run) by the government. The United States was the only major economy that expressly adopted a hands-off, competition-based approach in the 1990s, under President

Clinton – and today, nine of the 10 largest internet companies in the world are located here.

The 2015 rules were premised on a contentious idea called the "virtuous circle," which argues that strict rules would encourage more investment by "edge companies" to develop innovative internet services which, in turn, would increase consumer demand for internet access which, in turn, would encourage ISPs to invest more in building out bigger, better, faster networks. That is, if the theory of the 2015 rules is correct, we should have seen ISPs investing more in their networks since 2015.

In fact, if anything, we have seen the opposite. No credible studies show an increase in investment by ISPs since that time; other studies suggest that investment has decreased by a meaningful amount.

One of the most pressing issues we face today is building out more networks to un- and underserved communities. If the effect of the 2015 rules has been to decrease network investment, this means that the effect has been to slow down these efforts. Under the 2015 [rule](#), those who do not have sufficient [internet access](#) are less likely to get that access.

**Some are saying this new plan could lead to a tiered internet, with a fast lane and a slow lane (or several lanes). How likely do you think this is, and what might the consequences be?**

It's likely, and it's likely a good thing. This is actually an intensively studied question in the economics literature. In the early 2000s, there was basically a new subfield of economics developed to study just this question – the effects of paid prioritization on consumers. These studies consistently show that paid prioritization ("fast lanes") can be good for consumers. They also show that they can be bad for consumers and that

it's hard to tell beforehand what the outcome will be. But if the outcome is bad, any number of government entities and consumer groups can take action against ISPs to change course.

But there is something more important going on in the background: We already have a tiered internet. The major edge companies – Google, Netflix, Amazon, Facebook, etc. – invest hundreds of millions of dollars in private "content delivery networks." These are networks that they use to bypass the vast majority of the internet to offer consumers better service. In other words, they are already paying for prioritized access – they're just not paying the ISPs for it directly.

This puts startups at a serious competitive disadvantage. If your new service needs very high speed or low latency access, today there is no way for you to get that sort of service, short of paying a great deal of money to a content delivery network. Allowing ISPs to charge for prioritization actually could dramatically benefit startups by giving them a competitive alternative that is easier to implement and can offer even better service than what a [content delivery network](#) can offer. That is, paid prioritization can allow startups to overcome a competitive disadvantage that they face today, allowing more innovative services to be brought to consumers.

Several telecom companies have vowed to maintain an open internet regardless of the vote, but promises aren't guarantees. Is the FCC putting too much faith in these for-profit companies? What's to stop them from going back on their promises?

This is the key element of the proposed new rules: ISPs will still be subject to a transparency rule that requires them to disclose how they handle traffic traversing their networks. Both the Federal Trade Commission and state Attorneys General and consumer protection agencies have substantial legal authority to take action against firms that

engage in fraudulent or deceptive conduct. So those promises actually are guarantees.

An ISP could change its policy but would need to be up front about that. And this is a critical point: ISPs are hated, reviled companies. If they abuse this, there will be investigations at every level of government. If ISPs implement rules that are actually bad for consumers, Congress will take action. I almost never say that Congress will pass a law to do anything nowadays – this is an exception.

## **What about local communities that only have one or two viable options for internet service providers? How might they be affected?**

Most ISPs that service communities operate on a much larger geographic scale and set their policies on a systemwide basis. So even if a given community only has one or two ISPs, those ISPs likely operate in some areas where they compete with a few more. Even then, the market isn't robustly competitive – but it is more competitive than it appears on its face.

But even then, our goal should be to get more people more options for getting online. Even more important than areas with only one or two options are those with no ISP options. This brings us back to the question of investment. If we want telecom companies to build networks, it needs to be profitable for them to do so.

## **If the repeal passes, is that it? Or could net neutrality rules be reinstated?**

The new rules are almost certainly going to be challenged in court – and they'll almost certainly be upheld. For that matter, the judicial challenge

to the 2015 rules is actually still pending, with petitions for review before the Supreme Court. That's a stark reminder about how long the review process can take – easily three or four years.

That said, the way that the law currently works, federal agencies face relatively modest burdens when they want to change rules. This means that if there is a change of administration, the rules may change. And they may then change again, and again.

For many of us working in this area (myself included) this is the most important issue in [net neutrality](#). Most of the attention focuses on concerns about what ISPs may or may not do. As I've said, there is actually very little effect that these rules are likely to have on consumers. The rules' biggest effects are on the relationship between the FCC and ISPs, and how intrusive the FCC can be into ISPs' operations and business decisions. The bigger problem is that the Communications Act, which tells the FCC how to operate, is exceptionally unclear about how the FCC should deal with ISPs (unsurprisingly, given that it was written in the early 1990s). This alone creates a great deal of uncertainty (and costs), and the fact that the FCC can change its rules as the political winds change amplifies this uncertainty (and costs).

What we really need is for Congress to step in to give the FCC clearer guidance about how it is supposed to regulate the ISP market. There is also a great deal of discussion that we really need the courts to impose stricter review on agencies to make it more difficult for them to flip-flop between policies.

Provided by University of Nebraska-Lincoln

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