

H.R. 1096 vs. H.R. 1644

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EXECUTIVE SUMMARY

This week, the House will vote on H.R. 1644, introduced by Rep. Mike Doyle, which would reinstate the net neutrality protections of the FCC's 2015 Open Internet Order as of January 19, 2017. H.R. 1096, a competing measure introduced by Rep. Cathy McMorris Rodgers, purports to restore the Open Internet Order's rules against blocking, throttling and paid prioritization, as well as the transparency rule.

Both bills have been touted as means to restore comprehensive net neutrality protections for all Americans.

A comparison of the bills' protections shows that only H.R. 1644 would achieve that goal.

H.R. 1644 restores all of the 2015 net neutrality rules, as well as the important protections and clarifications that were codified in the text of the 2015 Open Internet Order which explained the rules and closed known loopholes.

H.R. 1096 does not include all of the 2015 net neutrality rules or any of the protections included in the text of the 2015 Open Internet Order.

As a result, H.R. 1096 creates significant loopholes and drastically reduces the level of protection compared to the FCC's 2015 net neutrality protections that the bill is designed to replace. That leaves Americans unprotected against known net neutrality violations.

H.R. 1096 misses key net neutrality protections. For example:

- H.R. 1096 allows Internet service providers (ISPs) – the phone and cable companies that connect us to the Internet – to use zero-rating to advantage themselves and distort competition. H.R. 1644 closes this loophole.
- H.R. 1096 allows ISPs to circumvent the bill's net neutrality protections at the point where data enters their networks, just as they did from 2013 to 2015. H.R. 1644 prohibits them from doing so.

The net neutrality protections H.R. 1096 does include are incomplete. For example:

- H.R. 1096 appears to allow ISPs to charge websites fees for access to the ISPs' subscribers and block those that don't pay. H.R. 1644 prohibits these fees.
- H.R. 1096 fails to adequately address throttling by appearing to allow ISPs to speed up websites and throttle classes of applications. H.R. 1644 prohibits ISPs from doing so.

Additionally, H.R. 1096 does not address the factors that really hinder broadband deployment. H.R. 1644 restores the FCC's ability to support deployment, particularly in rural areas.

Missing Net Neutrality Protections

Zero-rating

H.R. 1096 allows ISPs to use zero-rating to advantage themselves and distort competition. H.R. 1644 closes this loophole.

H.R. 1096: Zero-rating is the practice of not counting certain websites and services against a consumer's monthly data cap. The bill does not put any limits or restrictions on zero-rating and leaves the FCC without authority to review even the most egregious zero-rating offerings.

Why it matters: 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. Thus, harmful zero-rating is just another tool that lets ISPs give some websites an advantage over others and pick winners and losers online.

For example, an ISP could exempt its own application from subscribers' monthly data caps, but still count competing applications against their caps. It could also offer zero-rating to websites or apps in exchange for a fee. AT&T Wireless and Verizon Wireless do both; they exempt their respective video services, DirectTV and Go90, from users' data caps, and offer zero-rating as a paid service to other companies.

The nation's largest ISPs have been buying up some of the nation's largest content providers, including Comcast's purchase of NBCUniversal and AT&T's recent acquisition of Time Warner. As a result, the threat of zero-rating to competition and user choice continues to grow.

So, for instance, if AT&T expands its current zero-rating plan to its newly acquired sites, AT&T Wireless customers with a 3GB cap could watch as much CNN as they want but watch only 9 minutes of video a day from providers AT&T doesn't own. That's not a meaningful choice for users and makes it impossible for other voices to compete and be heard.

Curtailing harmful zero-rating schemes not only expands users' choices, it leads to better data plans. When harmful zero-rating plans were prohibited in other countries, consumer data caps rose dramatically and the monthly price for unlimited data plans fell.

Ultimately, harmful zero-rating has the same effect as harmful technical forms of discrimination such as blocking, throttling and paid prioritization and creates the same problems for the open Internet. That means any bill that does not address zero-rating is fundamentally incomplete.

How H.R. 1644 addresses the problem: H.R. 1644 allows the FCC to prohibit harmful forms of zero-rating. That's because the 2015 Open Internet Order gave the FCC the ability to review zero-rating plans case-by-case under the general conduct rule. When the FCC looked into existing zero-rating programs in a 2017 report (later discarded by Chairman Pai), it found that AT&T and Verizon's flavor of zero-rating violated net neutrality.

Interconnection

H.R. 1096 allows ISPs to circumvent the bill's net neutrality protections at the point where data enters their networks. H.R. 1644 prohibits them from doing so.

H.R. 1096: H.R. 1096 does not address interconnection and leaves the FCC powerless to address it later. As a result, the bill would allow ISPs to circumvent the bill's net neutrality protections at the point of interconnection where data enters their networks. Thus, instead of blocking a website as it is transported over the ISP's network, the ISP can just block or slow it down as it enters the ISP's network. So Comcast could effectively slow down all competing online video applications at the edge of its network to give itself a competitive advantage.

Why it matters: Allowing ISPs to circumvent the net neutrality protections at the point of interconnection would create a known loophole that ISPs have exploited in the past. The FCC's 2010 Open Internet rules did not apply to the point of interconnection. From at least 2013 to 2015, major ISPs serving more than 75 percent of American broadband customers deliberately let connections into their networks congest in order to extract fees from the Internet companies delivering data to the ISPs' Internet service customers – data these customers had requested.

As a result, customers of these ISPs experienced significant performance problems in the afternoon and evening: Internet applications, websites and services entering the ISPs' networks through these congested connections became effectively unusable, even though customers had paid their ISPs for good connections to the Internet. Employees couldn't connect to their company's network. Schools couldn't upload their payload data. Skype calls dropped. And online video stuttered.

These problems only ended when affected companies decided to pay (as Netflix did in early 2014) or, for those that refused to pay, when the FCC's 2015 Open Internet Order went into effect. In response to these problems, the FCC decided to include oversight over interconnection in the 2015 Open Internet Order.

How H.R. 1644 addresses the problem: H.R. 1644 prevents ISPs from using interconnection practices to circumvent the bill's net neutrality protections. The FCC's 2015 Open Internet Order declared that the FCC would review ISPs' interconnection practices case-by-case under Sections 201 and 202 of the Communications Act, which prohibit ISPs from engaging in unjust and unreasonable practices and unjust and unreasonable discrimination.

The text of the Order clarified that the FCC would use this case-by-case review to ensure that last-mile ISPs cannot use practices related to interconnection to evade or circumvent the FCC's network neutrality protections. H.R. 1644 restores this approach.

Incomplete Net Neutrality Protections

Access Fees

H.R. 1096 appears to allow ISPs to charge websites fees for access to the ISPs' subscribers. H.R. 1644 prohibits these fees.

H.R. 1096: While H.R. 1096 includes a no-blocking rule, it does not explicitly prohibit ISPs from charging websites fees for access to users. That leaves open the question of whether an ISP could charge sites, apps or services for access to an ISP's subscribers.

Without such a ban, ISPs like Verizon, AT&T or Comcast could start charging every website a fee just to be visible to the ISP's subscribers and block those websites that don't pay the fee. So if the Wall Street Journal hasn't paid Verizon a fee, it would not be accessible to customers of Verizon's Internet service. If your school has not paid your ISP a fee, you would not be able to get to its website.

Why it matters: ISPs have long wanted to charge such access fees, as a way to get paid both by their Internet service customers and by the sites and services these customers want to use. When Verizon challenged the FCC's 2010 Open Internet Order in court, it explicitly told the court that it should have the right to charge access fees and block sites and services that didn't pay up, and asked the court to strike down the ban on these fees in the 2010 Order. Verizon added that a no-blocking rule without an explicit ban on access fees would not prohibit them from charging such fees.

These fees have never existed in the U.S. Consumers pay their ISP to get access to the entire Internet – not just to the websites that have paid the consumers' ISPs. Companies that reach their customers online simply pay for their own access to the Internet, without paying additional fees to every ISP their customers use.

If ISPs began charging access fees, they would increase costs in every sector of the economy, which would be disastrous for startups, small businesses and speakers without deep pockets.

How H.R. 1644 addresses the problem: H.R. 1644 prohibits access fees, as the 2015 Open Internet Order retained the 2010 Order's explicit ban on such fees as a form of blocking and throttling.

Throttling

H.R. 1096 fails to adequately address throttling by appearing to allow ISPs to speed up websites and throttle classes of applications. H.R. 1644 prohibits ISPs from doing so.

H.R. 1096: H.R. 1096’s no-throttling rule prohibits ISPs from “impairing or degrading lawful internet traffic on the basis of internet content, application, or service.” It does not explicitly prohibit ISPs from slowing down whole *classes of applications*, such as all online gaming or all online voice calls.

Conversely, the rule appears to allow ISPs to *speed up* an application or class of applications, so AT&T could speed up YouTube while all other video is buffering – or speed up all online gaming while online phone calls break up.

Why it matters: Allowing ISPs to slow down whole classes of applications means that ISPs would be free to slow down all Internet telephony applications that let users make calls over their Internet connection, like Skype or Vonage, in order to keep people paying for the ISPs’ expensive calling plans. Or they could limit the amount of bandwidth available to online video services, but not to other kinds of online services.

That’s not a minor distinction. When they weren’t prohibited from doing so, ISPs have often targeted whole classes of applications. For example, AT&T for years blocked all online telephony applications on its cellular network, while Comcast interfered with all peer-to-peer applications.

An ISP can distort competition and interfere with user choice by slowing down applications they want to disadvantage, or by speeding up the applications they want to favor. Thus, allowing ISPs to speed up websites, applications or services makes the ban on slowing down websites, applications or services meaningless.

How H.R. 1644 addresses the problem: H.R. 1644 prohibits ISPs from slowing down and speeding up applications and classes of applications. That’s because the text of the 2015 Open Internet Order, like the 2010 Order before it, explicitly prohibited positive and negative discrimination against applications and classes of applications.

Competition, Deployment and Consumer Protection

Universal Service and Pole Attachments

H.R. 1096 does not address the factors that really hinder broadband deployment. H.R. 1644 restores the FCC’s ability to support deployment, particularly in rural areas.

H.R. 1096: The bill does not grapple with new broadband providers’ inability to access utility poles, or with the high costs of deployment in rural areas.

Why it matters:

Pole attachments: Currently, broadband-only ISPs are unable to rely on 47 U.S.C. 224 to get access to utility poles and other rights of ways. That means incumbent phone and cable companies can make it difficult or impossible for new broadband-only competitors to build out their networks. That hurts broadband deployment because difficulties getting access to utility poles and other rights of ways prevent new, independent ISPs from flourishing.

Universal Service: The current regime makes it hard to address the high costs of broadband deployment in rural areas by giving money from the Universal Service Fund directly to broadband providers, and makes it impossible to give money from the Universal Service Fund to broadband-only providers. This excludes some of the most promising candidates for building out broadband in underserved areas from receiving Universal Service funding.

How H.R. 1644 addresses the problem: H.R. 1644 restores the right of all broadband providers, including broadband-only providers, to get access to utility poles and other rights of way under 47 U.S.C. 224. It also allows the FCC to provide Universal Service funds to broadband providers that are not telephone companies.

Consumer Protection and Broadband Privacy

H.R. 1096 leaves the FCC powerless to address any problematic behavior by ISPs that is not prohibited by the bill’s rules against blocking, throttling or paid prioritization. By contrast, H.R. 1644 allows the FCC to protect consumers against new problematic ISP practices as they occur. For example, this would allow the FCC to intervene if an ISP set data caps so low that it would be impossible for people to “cut the cord” and cancel their cable subscription.

In addition, H.R. 1644 restores protections for broadband privacy in 47 U.S.C. 222, while H.R. 1096 does not address privacy at all.

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