

broa dba nd access m ark ets are com petitive .⁴ T o e va lu ate thos e com petitive condi ti ons and to tai lor appropriate regulatory polici es that could encourage additional competition, the FCC may wish to rely on the competition analysis framework used by the FTC that is contained in the FTC/DoJ Horizontal Merger Guidelines. Consumer protection policy works hand-in-hand with competition

¹ The American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. (2009), Pub. L. 111-5 – Tax, Unemployment, Health, State Fiscal Relief, and Other Provisions, Title VI – Broadband Technology Opportunities Program § 6001(k)(1)-(2) (Feb. 17, 2009) [“Recovery Act”].

² Federal Communications Commission, A National Broadband Plan for Our Future, Notice of Inquiry [“FCC NOI”], 24 FCC Rcd 4342 (Apr. 8, 2009).

The FTC enforces laws prohibiting unfair methods of competition

⁹ FTC Broadband Report, supranote3, at 120-37.

¹⁰ Pew Study, supranote4, at 9.

¹¹ FCC High-Speed Services Report, supranote4, at 11, 22, Tables 6 & 16.

Pew Study, supra note4, a

Order”), aff’d, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Petition of AT&T Inc. For
Forbearance from Title*

²² The FCC has taken varied approaches to product market definition in the context of last-mile broadband facilities. For example, in some cases the FCC has defined product markets to separately identify different capacity levels (e.g., voice grade, DS-1, DS-3, and OC-3 and higher level circuits). See, e.g. Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of incumbent Local Exchange Carriers, 20 FCC Rcd 2533, ¶ 166 (2005) (“Triennial Review Remand Order”), aff’d, *Covad Communications Corp. v. FCC*, 453 F.3d 528 (D.C. Cir. 2006). By contrast, in other cases the FCC has conflated all of these capacity levels for last-mile access and treated them as a single product market, with no Merger Guidelines-type analysis of the extent to which buyers would shift between these different capacity circuits in the event of a price increase. See, e.g., *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶ 27 n.90 (2005) (“SBC/AT&T Merger Order”).

²³ Past FCC decisions have assessed competition in broadband markets using different geographic definitions without explaining the differences. See, e.g., *SBC/AT&T Merger Order*, ¶ 28 (defining each individual customer premise as a separate geographic market); *Triennial Review Remand Order*, ¶¶ 80, 156 (defining geographic markets based on individual routes between particular ILEC central office h000, TD (L)Tj 5.7600 @100E1 D280pt.0000

E.g, *FTC v. Cyberspace.com LLC*, 453 F.3d 1196 (9th Cir. 20

Because the provision of broadband Internet access is not a common carrier service, see, e.g., Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), the FTC and FCC have

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The question becomes whether currently available disclosures by providers of broadband service provide clear and meaningful information to consumers. And if not, how these types of information can be disclosed clearly and conspicuously so that they are meaningful to consumer purchase decisions. Given the complex, multi-dimensional nature of Internet service offers, consumers frequently may find it difficult to understand key features and costs of broadband options.

²⁸ See James M. Lacko & Janis K. Pappalardo, Federal Trade Commission, Bureau of Economics Staff Report, THE EFFECT OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT (Feb. 2004) available at <http://www.ftc.gov/os/2004/01030123mortgagefullrpt.pdf>; James M. Lacko & Janis K. Pappalardo, Federal Trade Commission, Bureau of Economics Staff Report, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS (June 2007) available at <http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf>.

²⁹ For example, in the context of lifetime service contracts used by an exterminator, the Commission challenged unilateral changes of material terms of the contract by the company as unfair trade practices. See *Orkin Exterminating*, 849 F.2d at 1363-66; see also *FTC v. Certified Merch. Servs., Inc.*, No. 4:02:cv44 (E.D. Tex. Dec. 30, 2002) (final judgment and order), available at <http://www.ftc.gov/os/2003/01/cms.pdf>.

Matter of Nations Title Agency, Inc., FTC Docket No. C-4161 (June 19, 2006); In the Matter of DSW Inc., FTC Docket No. C-4157 (Mar. 7, 2006); In the Matter of Superior Mortgage Corp., FTC Docket No. C-4153 (Dec. 14, 2005); In the Matter of BJ's Wholesale Club, Inc., FTC Docket No. C-4148 (Sept. 20, 2005); In the Matter of Nationwide Mortgage Group, Inc., FTC Docket No. 9319 (Apr. 12, 2005); In the Matter of Petco Animal Supplies, Inc., FTC Docket No. C-4133 (Mar. 4, 2005); In the Matter of Sunbelt Lending Servs, Inc., FTC Docket No. C-4129 (Jan. 3, 2005); In the Matter of MTS Inc., d/b/a Tower Records/Books/Video, FTC Docket No. C-4110 (May 28, 2004); In the Matter of Guess?, Inc., FTC Docket No. C-4091 (July 30, 2003); In the Matter of Microsoft Corp., FTC Docket No. C-4069 (Dec. 20, 2002); In the Matter of Eli Lilly & Co., FTC Docket No. C-4047 (May 8, 2002).

³⁷ U.S. Department of Agriculture, Rural Utility Service and the U.S. Department of Commerce, National Telecommunications and Information Administration, Notice of ~~Order (01-12-03) 312482400000~~ 0.0000 TD (m)Tj 7.unds (g)Tj 8 12

nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.

FCC, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement on Broadband Internet Access, 20 FCC Rcd 14986 (2005).

³⁹ Joseph Farrell, Open Access Arguments: Why Confidence is Mis-Placed, in NET NEUTRALITY OR NET NEUTERING, SHOULD BROADBAND INTERNET SERVICES BE REGULATED? 195 (Thomas M. Lenard & Randolph J. May eds., 2006) (discussing the uncertainty surrounding the economic incentives of broadband network platforms in relation to the content and applications that they enable). See also Joseph Farrell & Philip J. Weiser, Modularity, Verticality

practices that reduce consumer welfare also generally would be expected to reduce consumer demand for their own network, *ETD (cs) T4* 4.4800 0.0000j 4.3200 i0000 TD (ork)Tj 15.84 11.8800 0.0000 T

⁴⁰ See *id.*

⁴¹ See FCC NOI *supra* note 1, at ¶ 65.

⁴² FTC Broadband Report, *supra* note 3, at 130.

⁴³ FTC, FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising [“FTC Behavioral Advertising Staff Report”] (Feb. 2009) at 23-24.

⁴⁴ For example, some industry organizations have developed new self-regulatory principles covering businesses engaged in online behavioral advertising. Also, a number of companies have developed new policies and procedures to inform consumers about online tracking and provide additional protections and controls over the practices. Such developments include new tools to allow consumers to opt out of receiving targeted online advertisements, as well as new versions of Internet browsers that allow users to not save browsing and search

histories, cookies, form data, or passwords, and which will automatically clear the browser cache at the end of each session. Other steps being taken include educational programs to inform consumers about online tracking and new policies to reduce the length of time companies store personal data collected about online searches.

⁴⁵ See FTC Behavioral Advertising Staff Report, *supra* note 43.

An example

Because cloud computing reduces the need for businesses and consumers to purchase, operate, and maintain software and hardware themselves, it may be a less costly way for them to manage, store, and use data. Cloud computing is an emerging business model, and the FTC is analyzing the privacy and data security implications for consumers.⁴⁸

C. The Need for Additional Learning

The extent to which network management practices may affect competition and consumers is likely to vary, depending on the particular factual circumstances.⁴⁹ The FTC suggests that the Broadband Plan affords an opportunity to develop a firmer understanding of the facts relevant to network management practices and their effects on consumers. Empirical data to answer the following questions, among others, may help illuminate the competitive and consumer impact of these practices.

1. What network management practices are used when network capacity is not constrained? What benefits or efficiencies are associated with these practices?
2. What network management practices are used when network capacity is constrained, due to congestion or other factors? What benefits or efficiencies are associated with these practices?
3. Are there alternatives other than network management (e.g., increasing network capacity), to remedy capacity constraints? To what extent are such alternatives practical and economically feasible?
4. Do network operators have incentives to limit network capacity, for example, in order to sell prioritized data transmission or other types of quality of service assurances?
5. To what extent have network management practices been used to block or degrade data transmission, either when capacity is constrained or under other circumstances?
6. How do providers of online content and applications currently compensate network operators for Internet access and the transmission of their content?

⁴⁸ For example, the FTC is currently considering a petition submitted by the Electronic Privacy Information Center that raises data security concerns about Google's provision of cloud computing services to consumers. EPC Complaint Before the FTC, In the Matter of Google, Inc. and Cloud Computing Services (Mar. 19, 2009) available at <http://epic.org/privacy/cloudcomputing/google/ftc031709.pdf>.

⁴⁹ See generally Howard A. Shelanski, Network Neutrality: Regulating With More Questions Than Answers, 6 J. TELECOMM. & HIGH TECH. L. 23 (2007) (exploring several unanswered questions in this area and discussing their implications for broadband Internet policy).

8. Are there ways that some content andom