has a role to play in broadband and Internet markets. At the same time, I recognize that there are other perspectives of equal and even greater importance. Internet access, like access to traditional forms of media and communication, touches on broader public policy goals than economic ecode to playcenda, tr

[2] See, e.g., FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY (2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf (The agenda, transcript, and other information related to the underlying two day workshop are available at http://www.ftc.gov/opp/workshops/broadband/index.shtml); FED. TRADE COMM'N, Municipal Provision of Wireless Internet (2006) *available at* http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf.

[3] Roger O. Crockett, *At SBC, It's All About 'Scale and Scope'*, BUSINESS WEEK (Nov. 7, 2005) ("The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!").

See, e.g., FTC v. Cyberspace.com, Nei2800 0.0000 TDg

taken the position that a unilateral change of material contract terms may be an unfair practice.[9] In short, Commission authority to curb unfair and deceptive acts and practices in the broadband Internet access services area is fairly straightforward and non-controversial. However, I don't think the same could be said for antitrust.

II. The Role of Antitrust

Speaking as an antitrust litigator, I doubt that antitrust can address many, if any, of the problems cited by network neutrality proponents.[10] At the outset, I'd suggest that Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade, and Section 7 of the Clayton Act, which prohibits acquisitions or mergers that threaten to "substantially lessen competition" are of limited application. To be sure, Section 7 may be invoked to block a merger of network operators that threatens to create market power on the theory that the merged entity would be able to restrict Internet access. Indeed, agency approval of network operator mergers have been conditioned in the past on the merged entity's agreement to carry the content of third parties.[11] But after a merger has occurred, antitrust statutes arguably do not operate to prevent or control single firm conduct, which is at the root of the net neutrality debate.

Section 2 of the Sherman Act prohibits single firm conduct that creates or maintain monopoly power or constitutes an attempt to monopolize. The challenge in using Section 2 to

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[9] Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1363-66 (11th Cir. 1988).

[10] My friend and colleague Commissioner Leibowitz has made a similar observation. Commissioner Jon Leibowitz, Concurring Statement Regarding the Staff Report: "Broadband Connectivity Competition Policy (June 2007) *available at* http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf ("In my view, the Report demonstrates that while our consumer protection authority may be adequate to the task, the same may not be true with respect to antitrust law.").

[11] In re American Online, Inc. & Time Warner Inc., FTC Docket No. C-3989 (2000) *available at* http://www.ftc.gov/os/caselist/c3989.shtm.

address these problems is probably best understood by walking through a few examples. Let's start with the much discussed case of *Madison River*.[12] You all know the ones but let me briefly summarize the facts that are salient to an antitrust analysis. Vonage, a VoIP provider, complained that its service was blocked in rural North Carolina by Madison River, a DSL service provider – that is, Madison River's DSL customers were unable to access Vonage. The speculation was that Madison River was motivated by its desire to protect its wireline phone service from the competitive threat posed by Vonage. The FCC acted quickly, and less than a month after Vonage's complaint it announced a consent decree under which Madison River agreed to "not block ports used for VoIP applications or otherwise prevent customers from using VoIP applications."[13] The complaint and Vonage's allegations raised quite an uproar when it was reported in early 2005 – and it continues to play a role in the debate today. Indeed, it is the rare article or paper on net neutrality that fails to mention this case.

Most, if not all, commentators roundly applauded the FCC's action in *Madison River*. I must admit that this seemingly widespread consensus surprised me as an antitrust lawyer. The allegations in Madison River, if brought as an antitrust complaint, would most likely have been a refusal to deal claim under the Sherman Act. Madison River allegedly denied Vonage access to its DSL network – it essentially refused to deal with Vonage. Vonage was a competitor to Madison River in an adjacent market – telephone service. The antitrust complaint would have alleged that Madison River's conduct in one market, DSL broadband service, would have redounded to its benefit in another market, telephone service. These sorts of claims have always

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[12] In re Madison River Communs., LLC 20 FCC Rcd 4295, 4297 (2005) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf.

[13] Id.

[14] Ken Fisher, *Verizon flip-flops on censoring "unsavory" political group SMS messaging*

jurisprudence is laced with concerns about the costs and burdens of antitrust litigation.[19] So-called non-horizontal practices or "leveraging" claims – that is, conduct in one market having effects in

[19] See, e.g., Bell Atlantic Corp. v. William Twombly et. al., 127 S.Ct. 1955, 1966-1967, 1975 (2007) (writing in dissent, Justice Stevens observed that "[t]wo practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions."); Leegin Creative Leather Prods. v. PSKS, Inc., 127 S. Ct. 2705, 2723 (2007) ("In sum, it is a flawed antitrust doctrine that serves the interests of lawyers."); Credit Suisse Sec. LLC v. Billing, 127 S. Ct. 2383 (2007).

[20] See, e.g., Testimony of Hew Pate, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Hearings of Refusals to Deal Transcript at 31 (July 18, 2006) available at website at http://www.ftc.gov/os/sectiontwohearings/docs/60718FTC.pdf ("With respect to refusals to deal, or as I prefer to think of it, duties to assist competitors, all have the right to take a different tack. I think in the wake of Trinko, as we have seen lower courts try to make sense of, and cabin the Aspen decision, that the time has come for Aspen to be overruled, and that the law would be better with it off the books."); Testimony of Rick Rule, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Conclusion of Hearings, Transcript at 122-123 (May 8, 2007) available at http://www.ftc.gov/os/sectiontwohearings/docs/070508trans.pdf; Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 ANTITRUST L.J. 841 (1989).

[21] Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[22] See, e.g., Jonathan E. Nuechterlein, Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate, (Feb. 25, 2008).

[23] linkLine Comm'n v. Pacific Bell Telephone Co., 503 F.3d 876 (9th Cir. 2007).

[24] Brief for the United States as Amicus Curiae, Pacific Bell Telephone Co. d/b/a AT&T California v. linkLine Comm'n, No. 07-512 (May 2008) *avail us ea/d/beDebcd/b eAn I*

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[25] Statement of the Federal Trade Commission on the Petition for a Writ of Certiorari in Pacific Tel. Co. d/b/a AT&T California v. linkLine Comms., Inc. (No. 07-512) (May 23, 2008) *available at* http://www.ftc.gov/os/2008/05/P072104stmt.pdf.

[26] See 15 U.S.C. § 13; see also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 496 (6th ed. 2007); Metro Communs. Co. v. Ameritech Mobile Communs., Inc., 984 F.2d 739, 745 (6th Cir. 1993) (holding that Robinson-Patman Act does not apply to sale of cellular telephone service).

[28] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

[29] See Boise Cascade v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides

III. Conclusion

In conclusion, let me stress that I consider the current debate about net neutrality to be a legitimate debate. But I have concerns that we not over-promise what antitrust enforcement can contribute to that debate. That said, I am also concerned that legislation based on speculation or misinformation may surrender to the law of unintended consequences. For the moment, perhaps the best course is rigorous enforcement of our consumer protection laws requiring upfront disclosure of all material facts.