

developments driving the debate in 2007. (Chs. I & II) It then catalogs the various arguments for and against net neutrality. (Ch. III)

Next, the report analyzes the consumer welfare effects of potential conduct by internet service providers (ISPs). After examining various types of vertical integration of broadband with internet services (Ch. IV), the report concludes that, consistent with well-established antitrust and economic principles, vertical integration has the potential to benefit or harm consumers and competition, depending on the circumstances.¹¹ While integration could prompt blocking, degrading, and higher prices, it could also offer procompetitive and pro-consumer efficiencies, such as facilitating infrastructure investment and spurring the entry of new competitors. Similarly, after evaluating a wide variety of possible data prioritization techniques (Chs. IV & V), the report determines that such techniques promise significant benefits to consumers and competition but also have some risks depending on the specific technique and use.¹²

The report then evaluates the current and likely future state of competition in broadband internet access. (Ch. VI) At that time, as today, there was considerable debate about the level of competition in the broadband market. This is an important question. Many of the potential harms to consumers or competition are premised on market power, and nearly all arguments for net neutrality regulation assert a lack of sufficient broadband competition. The report emphasizes the importance of determining the state of competition through careful product and market definition, including analysis of the disciplining effect of substitutes and potential entrants.¹³

¹¹ *Id.* at 82.

¹² *Id.* at 96-97.

¹³ *Id.* 99-100, 104-05.

After cautioning against prescriptive regulation, the Report explains that the FTC will “continue to devote substantial resources to maintaining competition and protecting consumers

stakeholders on all sides of the issue recognized the negative impact a Title II approach would have on FTC jurisdiction and emphasized the importance of FTC jurisdiction over BIAS providers.³⁶

The 2007 FTC Staff Report warned about the potential adverse consequences of regulation. While a healthy debate rages about other effects of the 2015 Order, one negative side effect cannot be disputed: the 2015 Order stripped the FTC of jurisdiction over broadband providers, creating a consumer protection gap that remains unfilled.³⁷

Together, the developments over the past ten years demonstrate that the FTC was correct in its unanimous, bipartisan 2007 recommendation that regulators “proceed[] with caution before enacting broad, *ex ante* restrictions in an unsettled, dynamic environment.”³⁸ Today, there is still no evidence of sustained injury to consumers or to competition. Instead, the internet ecosystem has remained vibrant over the past decade. And the most indisputable side effect of the 2015 Order, the stripping of FTC jurisdiction, is a clearly an adverse outcome for consumers.

A unanimous, bipartisan FTC approved the 2007 FTC Staff Report. What was good advice in 2007 remains good advice ten years later. I reiterate that advice today by filing the Report as an attachment to this comment.

II. The FTC’s Tools are Capable of Protecting Consumers and Competition Online

The FTC’s dual mission is to protect consumers and promote competition. The essence of this mission is to ensure that consumers can efficiently pursue their many, varying market preferences, whether those preferences are for low prices, new goods, or certain features such as

³⁶ See generally Broadband Report at 138-40.

³⁷ In late 2016, the FCC adopted a set of privacy rules for BIAS providers, which never went into effect. Those rules

prohibits companies from selling consumers one product or service but providing them something different. It ensures consumers get what they were promised. Notably, many major BIAS providers have now explicitly promised to adhere to net neutrality principles.⁴⁵ These kinds of promises are enforceable by the FTC, assuming it has jurisdiction over the BIAS provider. Our deception authority also requires companies to disclose material information if not disclosing it would mislead the consumer.⁴⁶ Therefore, if a broadband provider failed to disclose blocking, throttling, or other practices that would matter to a reasonable consumer, the FTC's deception authority would apply.

In addition to deception, the FTC's unfairness authority prohibits practices, even absent any promise, where the actual or likely consumer injury is substantial, unavoidable by the consumer, and not outweighed by benefits to consumers or to competition. The FTC has used this authority to hold liable companies that unilaterally change their past promises to consumers even where there was no deception.⁴⁷

Indeed, the FTC is currently using both its deception and unfairness authority to address alleged practices similar to net neutrality violations. In its case against AT&T Mobility, the FTC alleges that the wireless provider deceptively and unfairly "misled millions of its smartphone customers by charging them for 'unlimited' data plans while reducing their data speeds, in some

⁴⁵ See John Eggerton, *NCTA Places 'Washington Post' Ad Committing to Open Internet*, BROADCASTING & CABLE (May 17, 2017), <http://www.broadcastingcable.com/news/washington/ncta-places-washington-post-ad-committing-open-internet/165896>. And the D.C. Circuit has suggested that if an ISP discloses that it is not a neutral, indiscriminate conduit to the internet, it is not subject to the rules in FCC's 2015 Order. *See* 855 F.3d at 389; *see also* Daniel Lyons, *Can ISPs Simply Opt Out of Net Neutrality?*, FORBES (May 15, 2017), <https://www.forbes.com/sites/washingtonbytes/2017/05/15/can-isps-simply-opt-out-of-net-neutrality/>.

⁴⁶ FEDERAL TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION 3 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

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cases by nearly 90 percent.”⁴⁸ That litigation continues, but provides a good example of the FTC’s willingness to apply our consumer protection authority to a complex technical practice of a network provider that harms consumers.

C. Advantages of Enforcement Approach

Both of these market-preserving tools – antitrust and consumer protection – have structural advantages over prescriptive rules. Both rely on case-by-case enforcement, applying general legal principles to specific facts, constrained by certain institutional features and a focus on addressing real harm. And in both areas, the FTC can take action where private litigants would lack the incentives or resources to bring a case.

competition, both when considering whether to bring a case and in calculating remedies.

Focusing on harm not only ensures that FTC enforcement actually makes consumers better off, it also creates more business certainty.

Some have criticized the FTC's case-by-case approach as reactive, with no capability to prevent future injuries. Yet civil law enforcement has always served as both a *corrective* for the specific behavior of the defendant as well as a *deterrent* against similar future actions by the same or other actors. Like the common law, the FTC's process of applying general principles to specific facts enables flexibility yet yields outcomes that serve as guidance for future compliance, as those familiar with the FTC's case law recognize.⁵⁰ Furthermore, even prescriptive rules must be enforced, and the outcomes of such enforcement actions are not

This comment (and my attached paper) further describe some of the market forces that
