

Before the Federal Trade Commission

In re:

Competition and Consumer Protection in the
21st Century Hearings

Topic 2: Competition and consumer
protection issues in communication,
information, and media technology networks

Project No. P181201

Docket No. FTC-2018-0049

Comments of the R Street Institute

In response to the Federal Trade Commission's request for comments dated June 20, 2018, the R Street Institute respectfully submits the following comments. Submitted in advance of the hearings planned to be held, these are intended to identify topics for those hearings and will likely be supplemented by more detailed analysis afterward.

This comment is one of several that R Street is submitting, pursuant to the Commission's request of a separate comment per topic. This comment relates to Topic 2 on competition and consumer protection issues in communication, information, and media technology networks.

R Street supported reinstituting the Commission's jurisdiction over broadband Internet access service ("broadband"),¹ and is encouraged by the readiness it has shown to be a "cop on the beat."² The Commission is well situated to evaluate broadband and other communications, information and media services through the lens of consumer welfare, which can ensure that the Internet remains free and open to users and entrepreneurs alike.

In the upcoming hearings, we therefore encourage the Commission to consider at least the following topics.

Broadband Consumer Protection Authority. Having regained authority over broadband,³ the Commission will once again be tasked with protecting broadband consumers from any unfair or deceptive acts or practices.⁴ Of course, this is nothing new to the Commission, as it has been exploring these issues and protecting consumers online for decades.⁵ And just recently, when

¹ "Comments of R Street Institute to the Federal Communications Commission," WC Docket No. 17-108, July 17, 2017. <https://goo.gl/xLQFxo>.

² Maureen K. Ohlhausen, Acting Chairman, U.S. Federal Trade Commission, "Putting the FTC Cop Back on the Beat," Remarks at The Future of Internet Freedom: An R Street Institute and Lincoln Network Event, Nov. 28, 2017. <https://goo.gl/oQTgX9>.

³ Federal Communications Commission, *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, Jan. 4, 2018. https://docs.fcc.gov/public/attachments/FCC-17-166A1_Rcd.pdf.

⁴ 15 U.S.C. § 45(a)(1).

⁵ See, e.g., Ohlhausen, p. 4. <https://goo.gl/oQTgX9>.

AT&T Mobility deceived consumers over the details of its unlimited data plans, it was the Commission that successfully brought an enforcement action on behalf of consumers.⁶ Indeed, the Commission should be perfectly capable of policing net neutrality and protecting consumers from any harmful blocking, throttling or prioritization online.⁷ This also offers the benefit of a uniform approach focused on harm to consumers regardless of where in the Internet ecosystem that harm originates. However, since the Commission's 2007 report, some developments in broadband and other communications, information and media industries may warrant reexamination.⁸

As Commissioner Ohlhausen has explained, "[t]he report's legal and economic analysis concluded that banning certain business models could harm consumers more than it would help them."⁹ That conclusion surely remains true, but it would be helpful to consider recent developments that may potentially lead to consumer harm. For example, the Commission recognized that "[h]igh resolution video files and streaming video applications are examples of bandwidth-intensive content and applications that some observers suggest are already challenging the Internet's capacity."¹⁰ How much strain is the dramatic rise of over-the-top video streaming services and other bandwidth-intensive applications putting on broadband providers? How will changes in consumers' habits impact the broadband, information and media industries, as well as the dynamics between them? Where are the flashpoints likely to be, and should the Commission offer any guidance beforehand for how to resolve them with minimal consumer harm? For example, should they arise, how will the Commission handle interconnection disputes in the context of general Internet traffic exchange or a managed service? Are there any forms of prioritization that the Commission would expect to be particularly harmful or beneficial?

Broadband Competition Authority. How the Commission's competition authority will apply to broadband is quite uncertain. It has made clear that it covers acts or practices that would violate the antitrust laws or contravene the spirit of them and likely would result in a violation if allowed to proceed.¹¹ The Commission also offered three guiding principles for assessing whether a given act or practice constitutes an unfair method of competition.¹² However, how this ultimately will apply to broadband is still unclear. Antitrust claims have been brought against broadband providers before, but the Supreme Court in *Trinko*¹³ — and again in *Credit*

⁶ *Federal Trade Commission v. AT&T Mobility LLC*, 883 F.2d 848 (9th Cir. 2018) (en banc). <https://goo.gl/AhUqTY>.

⁷ See Roslyn Layton and Tom Struble, "Net Neutrality Without the FCC?: Why the FTC Can Regulate Broadband Effectively," *Federalist Society Review* 18 (2017), pp. 132–39. <https://goo.gl/oSRqVq>.

⁸ Federal Trade Commission, Staff Report, "Broadband Connectivity Competition Policy," June 2007. <https://goo.gl/Jo14aG>.

⁹ Ohlhausen, p. 4. <https://goo.gl/oQTgX9>.

¹⁰ "Broadband Connectivity Competition Policy," p. 28. <https://goo.gl/Jo14aG>.

¹¹ Federal Trade Commission, "Statement on Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," Aug. 13, 2015. <https://goo.gl/tfkpCX>.

¹² *Ibid.*

¹³ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

*Suisse*¹⁴ — declined to apply the antitrust laws in areas governed by a more specific “regulatory structure designed to deter and remedy anticompetitive harm.”¹⁵ With that structure now gone, how will the Commission assess future complaints of anticompetitive behavior?

There may be some thought to reviving the essential-facilities doctrine, a jurisprudential and economic relic not utilized for decades,¹⁶ and the *Trinko* court rejected the plaintiff’s essential-facilities argument while insisting that the Supreme Court “has never recognized such a doctrine[.]”¹⁷ Nevertheless, it may once again be drawn upon by either a competing broadband provider or a provider of online services or applications as a way of trying to force a duty to deal upon the broadband provider. How would the Commission handle such a complaint? Would the harms to broadband providers and consumers — in the form of reduced investment in broadband facilities¹⁸ — be different if the firm seeking access to the broadband provider’s network is a fellow broadband provider or a provider of online services and applications?

Also, how will the Commission address potential complaints about zero-rating or sponsored-data programs, which discounts data generated by certain online services and applications from consumers’ data caps, where and when such data caps are in place? Can the Commission provide any guidance on how it will evaluate such programs?

Broadband Technical Expertise. The Office of Technology Research and Investigation helps advise the Commission’s enforcement in various complex and high-tech industries,¹⁹ so it can cover broadband, too, especially with the advice and assistance of the FCC.²⁰ Even so, it may help to elevate the Commission’s technical expertise into a formal Bureau of Technology; an idea recently endorsed by Commissioner Slaughter.²¹ While such a proposal may require additional appropriations from Congress, having record support that demonstrates the potential benefits to the Commission’s technical understanding would help make the transition easier to sell. Therefore, the Commission should explore this option moving forward.

* * *

¹⁴ *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).

¹⁵ *Verizon Communications Inc.*, 540 U.S. at 412.

¹⁶ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985).

¹⁷ *Verizon Communications Inc.*, 540 U.S. at 410–11..

¹⁸ Testimony of R. Hewitt Pate, United States Telecom Association, “Refusals to Deal and Essential Facilities,” DOJ/FTC Hearings on Single-Firm Conduct, July 18, 2006, p. 4. <https://goo.gl/Z7TjTe>.

¹⁹ Neil Chilson, Federal Trade Commission, Acting Chief Technologist, “How the FTC Keeps up on Technology,” *Tech@FTC*, Jan. 4, 2018. <https://goo.gl/NzZyMT>.

²⁰ Federal Communications Commission and Federal Trade Commission, “Restoring Internet Freedom FCC-FTC Memorandum of Understanding,” Dec. 14, 2017. <https://goo.gl/fbTK7b>.

²¹ Rebecca Kelly Slaughter, Commissioner, Federal Trade Commission, “Raising the Standard: Bringing Security and Transparency to the Internet of Things?,” Remarks at Open Technology Institute, July 26, 2018, p. 5. <https://goo.gl/GfPiL3>.

R Street thanks the Federal Trade Commission for the opportunity to submit these comments, and recommends that the Commission pursue the above-identified areas in its ongoing work on promoting competition and innovation.

Respectfully submitted,

/s/

Tom Struble
Tech Policy Manager

Jeff Westling
Tech Policy Associate

Joe Kane
Tech Policy Fellow

R Street Institute
1212 New York Ave, NW
Suite 900
Washington, DC 20005
tstruble@rstreet.org

August 14, 2018