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The Heavy Burden of a Lighter Touch Framework

The Inadequacy of Antitrust Laws as a Substitute for Net Neutrality

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Introduction

How many choices for broadband internet does the typical American consumer have? A recent report issued by the Federal Communications Commission ("FCC") surveying advanced telecommunications capability[1] across the country found that only 38 percent of Americans have more than one choice of providers for fixed advanced telecommunications capability.[2] "The competitive options for advanced telecommunications capability are even more limited for Americans living in rural areas, with only 13 percent having more than one choice of providers of these services."[3] The significant market power of internet service providers ("ISPs") in the internet

1. The term "advanced telecommunications capability" is defined by Congress as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Telecommunications Act of 1996, Pub. L. 104-104, §706, 110 Stat. 56 (1996).

2. *See* In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act, 31 FCC Rcd. 699, 702 ¶ 6 (2016) [hereinafter 2016 Broadband Progress Report].

3. *Id.*

marketplace gives ISPs the ability and incentive to adopt anticompetitive practices favoring the content of their affiliate content providers.[4]

In 2015, the FCC adopted a regulatory framework "protecting and promoting the open internet," the 2015 Open Internet Order ("2015 Order"),[5] commonly known as "net neutrality" rules.[6] These rules prevented ISPs from exercising their gatekeeper power in ways that excluded or prioritized edge provider content, harming competition. The FCC provided detailed studies demonstrating ISPs significant gatekeeper power and the need to curb this power to support its implementation of bright-line conduct rules. These rules prohibited broadband providers from engaging in three types of conduct that the FCC found harmful to an open internet: blocking, throttling, and paid prioritization.[7] The FCC addressed the inability of antitrust alone to curb exclusionary conduct by ISPs,[8] finding that "case-by-case enforcement [was] cumbersome for individual consumers or edge providers, and that there is no practical means to measure the extent to which edge innovation and investment would be chilled"[9] without conduct rules. Instead, antitrust enforcers would work in concert with the new bright-line conduct rules to ensure competition in the marketplace.[10] To allay concerns voiced by ISPs during the comment period, the final 2015 Order adopted a "light touch" approach, making over 700 codified rules applicable to Title II common carriers inapplicable to ISPs.[11] This was a "carefully tailored application of only those Title II provisions found to directly further the public interest in an open internet."[12]

In 2017, Commissioner Ajit Pai, a vehement dissenter of the 2015 Order, was designated Chairman of the FCC. Soon after, the FCC issued a Notice of Proposed Rulemaking suggesting the repeal of the clear, bright-line conduct rules of the 2015 Order and replacing them with the case-by-case enforcement the FCC had declared impractical only three years earlier.[13]

The Restoring Internet Freedom Order of 2018 ("2018 Order") in effect today relies solely on antitrust enforcement and mandatory disclosures by

4. *See infra* Part I.D.1.

5. In the Matter of Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) [hereinafter 2015 Order].

6. *See infra* Part I.A.

7. 2015 Order, *supra* note 5, at 5607–8 ¶¶ 14–18.

8. *See infra* Part I.D.1.

9. 2015 Order, *supra* note 5, at 5608 ¶ 19.

10. *Id.* at 5693 ¶ 203.

11. *Id.* at 5612 ¶ 37.

12. *Id.*

13. *See* Restoring Internet Freedom, 82 Fed. Reg. 25568 (proposed June 2, 2017).

ISPs of their exclusionary conduct, to prevent the harms to competition posed by ISPs' gatekeeper power. It does so without presenting hard evidence to rebut the FCC's previous findings that antitrust enforcement alone is insufficient, and that conduct rules are necessary to protect the open internet market.[14]

This note posits that the 2015 Order's "light touch framework" correctly found that bright-line conduct rules are necessary to regulate ISPs' gatekeeper power and prevent them from engaging in exclusionary conduct. It further argues that the FCC correctly determined that case-by-case antitrust enforcement alone is not a practical solution for preventing ISPs from abusing their power. This note proceeds in the following manner: Part I explains the history of the concept of net neutrality and the events leading up to the 2015 Order. It then details the regulations of the 2015 Order and the FCC's support for these regulations. Part II examines the 2018 Order's changes as well as the justifications, or lack thereof, provided to support these changes. Part III explores the principal argument that antitrust enforcement is unable to substitute the clear, bright-line conduct rules of the 2015 Order. It does so by first examining the conduct at issue, vertical agreements and "single firm" exclusionary conduct, and addressing the historical lack of legal development and enforcement in this area. It then gives a brief overview of the ideological underpinnings of the Chicago School literature, often credited with influencing the inattention to vertical conduct in antitrust. The note proceeds by examining the difficulties inherent in both private and public enforcement, and why such actions will not provide remedies for the harms caused by anticompetitive behavior in the internet marketplace. The note then uses vertical mergers, one sub-type of the vertical agreements at issue, to demonstrate the permissive view antitrust discourse generally takes toward vertical arrangements. It examines two vertical merger cases from the past decade. The AT&T-Time Warner merger case exemplifies this permissive view of vertical mergers between an ISP and a content provider even after regulatory protections of the 2015 Order were repealed. Then, the Comcast-NBCU merger demonstrates the ineffectiveness of the conduct remedies put in place when a court finds a vertical merger problematic. Finally, this note concludes that antitrust is an insufficient substitute for the conduct rules of the 2015 Order.

14. *See generally* 2015 Order, *supra* note 5.

I. Net Neutrality

> Without strong competition, [broadband] providers can (and do) raise prices, delay investments, and provide sub-par quality of service. When faced with limited or nonexistent alternatives, consumers lack negotiating power and are forced to rely on whatever options are available. In these situations, the role of good public policy can and should be to foster competition and increase consumer choice."[15]
>
> — Former President Barack Obama January 14, 2015

The FCC first attempted to address ISPs' anticompetitive conduct in 2010.[16] The 2010 Open Internet Order ("2010 Order") prevented ISPs from intentionally blocking or throttling any content by imposing "disclosure, anti-blocking, and anti-discrimination requirements on broadband providers."[17]

A. What is Net Neutrality?

The term "network neutrality" gained popularity in a 2003 law review article by Tim Wu,[18] examining whether an internet service provider should be required to treat all data and content it delivers equally.[19] Wu's article suggests that a regulatory regime treating all content equally will serve to "prevent a distortion in the market for internet applications"[20] without "imping[ing] the ability of broadband carriers to earn a return from their infrastructure investments."[21] Today, net neutrality is commonly defined as

15. EXEC. OFFICE OF THE PRESIDENT, *Community Broadband Solutions: The Benefits of Competition and Choice for Community Development and Highspeed Internet Access*, p. 3–4 (Jan. 14, 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf.

16. *See generally* In the Matter of Preserving the Open Internet Broadband Indus. Practices, 25 FCC Rcd. 17905 (2010) [hereinafter 2010 Open Internet Order].

17. KEVIN E. MCCARTHY, OLR BACKGROUNDER: APPELLATE COURT DECISION ON NET NEUTRALITY 3 (2014), https://www.cga.ct.gov/2014/rpt /pdf/2014-R-0033.pdf. *See* 2010 Open Internet Order, *supra* note 16, at 17906, 17936–50.

18. *See* TIM WU, A PROPOSAL FOR NETWORK NEUTRALITY 1 (June 2002), http://www.timwu.org/OriginalNNProposal.pdf.

19. *Id*. at 2–3.

20. *Id*. at 6.

21. *Id*. at 9.

prohibiting prioritization of internet traffic, with or without compensation.[22] "Edge providers," also known as content providers, provide content for the internet, [23] including applications, video content, websites, and services an end user of the internet seeks to access.[24] The major commercial content providers include, for example, Amazon, Facebook, Google, Netflix, and Skype. ISPs are broadband providers that handle traffic flow from edge providers ultimately delivering the content to the end-user, the consumer.[25] Examples of these include AT&T, Comcast, and Verizon.

The net neutrality debate has two prevailing sides. Opponents of net neutrality regulations take the position that allowing for different data treatment and charging structures for certain content providers allows them to invest in faster service and better technological developments.[26] On the other hand, proponents of net neutrality rules argue that such regulation of ISPs is necessary insurance for the maintenance of consumer choice, and prevents ISPs from becoming the gatekeepers of end-user content.[27]

B. The Development and Importance of Net Neutrality Rules

1. Title I and Title II Classifications

The legal framework for the 2015 Order has its roots in the Communications Act of 1934, which combined and organized federal regulation of telephone, telegraph, and radio communications, as well as created the FCC to oversee and regulate these industries.[28] The Act differentiates between "general information services" and "common carriers," the term "common carrier" referring to "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio."[29] Under Title II, the Commission has the authority to ensure that common carriers do not engage in unjust and unreasonable practices or preferences.[30] In 1968, the FCC applied Title II regulation to telephone

22. Shane Greenstein, et al., *Net Neutrality: A Fast Lane to Understanding the Tradeoffs*, 30 J. ECON. PERSP. 127, 128 (2016).

23. 2010 Open Internet Order, *supra* note 16, at 17907 note 2 (defining an edge provider as providers of content, applications, services, and devices).

24. 2015 Order, *supra* note 5, at 5607.

25. *Id*.

26. Greenstein, et al., *supra* note 22, at 128.

27. *Id*.

28. 47 U.S.C. § 151 *et seq*.

29. 47 U.S.C. § 153.

30. 2015 Order, *supra* note 5, at 5894.

companies, requiring that they allow customers to use equipment of their choice on the network.[31] As a common carrier service, telephone companies were required to provide services to businesses of all kinds, even ones they saw as potential competitors.[32] This authority was used as a legal basis for the bright-line conduct rules in the 2015 Order.

2. History

The issue of how to classify broadband internet under the Communications Act first arose in the courts in 2000.[33] The Ninth Circuit held that "cable modem service is a telecommunications service to the extent that the cable operator provides its subscribers internet transmission over its cable broadband facility, and an information service to the extent the operator acts as a conventional ISP."[34] This meant that cable broadband internet providers would be subject to regulations of a Title II-classified service, meaning that they could not throttle or prioritize content. Then, in 2002, the FCC classified broadband internet providers as Title I service providers, subjecting them to minimal regulation.[35]

In 2010, Comcast throttled down the speed of Netflix video, and demanded that Netflix either enter into a paid peering arrangement with Comcast or upgrade its transit network, prompting the FCC to issue the 2010 Order.[36] The order regulated ISPs by prohibiting blocking, throttling, and "'unreasonable discrimination' against lawful network traffic."[37] The goal of these rules was to "preserve the internet as an open platform for innovation, investment, economic growth, [and] competition."[38] The FCC recognized this openness created a "virtuous cycle of innovation"[39] in which "new uses

31. *See* In the Matter of Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C. 2d 420, 423–24 (1968).

32. Reply Comments of Public Knowledge, Restoring Internet Freedom, WC Docket 17-108 (Aug. 30, 2017), https://ecfsapi.fcc.gov/file/1083005674359/PK_Net_Neutrality_Reply_Comments_2017.pdf.

33. *See* AT&T Corp. v. City of Portland, 216 F.3d 871, 880 (9th Cir. 2000).

34. Nia Chung Srodoski, *A Balancing Act: the Virtue of a "Light Touch" Regulatory Framework in the 2015 Open Internet Order*, 17 MINN. J.L. SCI. & TECH. 517, 536 (2016) (citing *City of Portland*, 216 F.3d 871).

35. *See* Press Release, *FCC Classifies Cable Modem Service as "Information Service,"* FCC (Mar. 14, 2002), http://transition.fcc.gov/Bureaus/Cable/News_Releases/2002/nrcb0201.html.

36. 2010 Open Internet Order, *supra* note 16, at 17905, 17926. *See also* Srodoski, *supra* note 34, at 518.

37. *Id.* at 17906 ¶ 1.

38. *Id.*

39. *Id.* at 17910 ¶ 14.

of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses."[40] These rules were a regulatory response to a change in the internet ecosystem from the first decade of the public internet, "when dial-up was the primary form of consumer internet access."[41] In contrast to the days of dial-up, broadband providers "have the incentives to interfere with the operation of third-party internet-based services" that compete with the providers' own services.[42]

Much of the 2010 Order was struck down in 2012 by the D.C. Circuit in *Verizon v. F.C.C.*[43] The court determined that because broadband providers were classified as an "information service" by the FCC in its 2002 rulemaking, broadband service providers could not be regulated as a "telecommunications service" or "common carrier" under Title II.[44] The court did not rule that the Commission was unable to enforce such rules, however. The *Verizon* Court acknowledged the FCC's power to define how these services should be classified.[45] But, in order to enforce the regulations it proposed, the FCC needed to reclassify ISPs as a Title II common carrier, because these regulations were inconsistent with the light regulatory authority of a Title I service.[46] While the D.C. Circuit's ruling in *Verizon* left ISPs free from the 2010 Order's conduct rules,[47] such freedom was only temporary. A few years later, the FCC would ultimately succeed in enacting these rules.

C. The Internet Service Provider Market

1. Structure of the Market

It is important to note the features of the ISP market, as it currently stands, to provide better context for the necessity of net neutrality rules. Similar to telephone line expansion, cable companies began to build infrastructure across the U.S. by approaching local governments for permission to build and invest in infrastructure, in exchange for exclusive

40. *Id*. at 17910–11 ¶ 14.
41. *Id*. at 17916 ¶ 22.
42. *Id*.
43. *See* Verizon v. F.C.C., 740 F.3d 623, 628 (D.C. Cir. 2014).
44. *Id*.
45. *Id*.
46. *Id.* at 623–624.
47. *Id.* at 628.

rights to provide cable services in the area.[48] Increasing prices in cable services and minimal competition led to the Cable Television Consumer Protection and Competition Act, which marked the end of this pattern of setting up exclusive regional franchises.[49] However, by this time, the cable companies already built the sole cable infrastructure in their regional area.

During the first decade of the public internet, "dial-up was the primary form of consumer internet access."[50] Independent companies such as America Online and Prodigy provided access to the internet[51] over companies' phone lines.[52] Eventually, broadband became the internet service of choice because of higher speeds, fast enough to stream video.[53] As broadband replaced dial-up, telephone and cable companies, rather than independent companies, emerged as the main providers of internet access service.[54]

2. Proposed Pro-Competitive Solutions

Some argue that more independent companies should build competing infrastructure, and that greater broadband deployment across the United States is hindered because of local governments imposing regulatory costs, sometimes referred to as "pre-deployment barriers."[55] However, city

48. *See* Mat Honan, *Why the Government Won't Protect you from Getting Screwed by Your Cable Company*, GIZMODO (Aug. 15, 2011), https://gizmodo.com/5830956/why-the-government-wont-protect-you-from-getting-screwed-by-your-cable-company.

49. *See* EV EHRLICH, A BRIEF HISTORY OF INTERNET REGULATION (2014), https://www.progressivepolicy.org/wp-content/uploads/2014/03/2014.03-Ehrlich_A-Brief-History-of-Internet-Regulation.pdf.

50. 2010 Open Internet Order, *supra* note 16, at 17916.

51. *Id*.

52. Independent internet provider companies were able to use telephone company's lines to provide dial-up internet service because telephone companies were required to lease their lines to competitors under the Telecommunications Act of 1996, which instated "mandatory unbundling of telephone services and rigid price controls." Telephone service and dial-up internet can be contrasted with the later broadband internet service, classified as an "information service" under the Telecommunications Act, and was not subject to mandatory unbundling requirements. *See* EHRLICH, *supra* note 49.

53. *See* Christopher Jon Sprigman, *Net Neutrality is Great, but it Won't Make Broadband Cheaper*, THE NEW YORKER (June 21, 2016), https://www.newyorker.com/business/currency/net-neutrality-is-great-but-it-wont-make-broadband-cheaper (discussing the unrealistic nature of building competing internet networks).

54. 2010 Open Internet Order, *supra* note 16, at 17916.

55. See Berin Szoka, Jon Henke & Matthew Starr, *Don't Blame Big Cable. It's Local Governments that Choke Broadband Competition*, WIRED (July 16, 2013, 9:30 AM), https://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/.

planning, safety, environmental, and engineering costs may justify these regulatory costs.

Replicating a cable company's local network is, for the most part, uneconomic, though some have tried. Verizon attempted to launch its own fiber network ("FiOS") but eventually had to abandon the project.[56] The cost of tearing up streets to lay fiber optic cable, or stringing cable on utility poles, was prohibitively expensive, except in the densest urban areas.[57] Even Google, the technological behemoth, was unable to build out substantial competing networks.[58]

The duplication of efforts in broadband infrastructure is not economically feasible for any competitive upstart. The reality is that the internet marketplace needs either conduct rules that control anticompetitive conduct by ISPs, or it needs local loop unbundling.[59] "Local loop unbundling" refers to regulations requiring cable companies to lease access to their hardware, the copper and fiber-optic cables, switches, and local offices that connect the internet to homes and buildings.[60] Such unbundling was implemented in the Telecommunications Act of 1996, requiring telephone companies to lease access to their phone lines to competitors at below-market prices.[61]

When the D.C. appellate court upheld the FCC's decision to reclassify broadband access as a telecommunications service, the FCC had the ability to pursue a mandate on local loop unbundling;[62] however, it instead chose net neutrality rules as its regulatory option. As discussed in the next section, the decision to forgo local loop unbundling was a policy choice made by the 2015 FCC.[63] Therefore, for purposes of this paper, the 2015 Order's net neutrality rules will be viewed as the primary alternative to the FCC's current internet regulatory framework under the 2018 Order.

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56. Sprigman, *supra* note 53.

57. *Id*.

58. Id.

59. *Id*.

60. *See* Sprigman, *supra* note 53 (referring to local loop unbundling as: "an awkward term of art that essentially means forcing cable companies to lease access, for a price and on terms set by the F.C.C., to the copper and fiber-optic cables, switches, and local offices that connect the main arteries of the Internet to individual homes and buildings").

61. *See* EHRLICH, *supra* note 49. These unbundling provisions contained a sunset provision in the early 2000s.

62. *Id*.

63. *See infra* Part I.D.1.

D. The Open Internet Order of 2015

1. A ”Light Touch” Framework

In enacting the 2015 Order, the FCC recognized that ISPs are gatekeepers. ISPs have “significant bargaining power in negotiations with edge providers [that] depend on access to their networks because of their ability to control the flow of traffic into and on their networks.”[64] This significant bargaining power puts ISPs in the position of gatekeeper, meaning that “regardless of the competition in the local market for broadband internet access, once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber.”[65] As gatekeepers, “[ISPs] can block access altogether; target competitors, including competitors to their own video services; and they can extract unfair tolls.”[66] Additionally, ISPs have “powerful incentives to accept fees from edge providers, either in return for excluding their competitors, or for granting them prioritized access to end users.”[67] The FCC noted that while “the ability of [ISPs] to exploit this gatekeeper role could be mitigated if consumers could easily switch broadband providers,”[68] the evidence in the record suggested that consumers could not easily switch broadband providers.[69] A switch in providers was impossible in large part because “45 percent of households have only a single provider option for 25 Mbps/3 Mbps broadband service.”[70] This indicates that “45 percent of households do not have any choices to switch to at this critical level of service.”[71] To keep this gatekeeper power in check, the FCC adopted bright-line bans on blocking, throttling, and paid prioritization, the three specific practices that the Commission found “invariably harm[ed] the open internet.”[72] The prohibition on blocking prevented an ISP from “block[ing] [consumer access

64. 2015 Order, *supra* note 5 at 5629 ¶ 80.

65. *Id*.

66. 2015 Order, *supra* note 5, at 5609 ¶ 20.

67. *Id*. at 5608 ¶ 19.

68. *Id*. at 5680–1 ¶ 80.

69. *Id*.

70. To qualify as broadband service, the FCC’s broadband benchmark speeds are 25 megabits per second (Mbps) for downloads and 3 Mbps for uploads. *See 2015 Broadband Progress Report*, FCC (Feb. 4, 2015), https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2015-broadband-progress-report.

71. *Id*. at 5681 ¶ 81.

72. *Id*. at 5607 ¶ 14.

to] lawful content, applications, services, or non-harmful devices"[73] "Throttling" refers to the "degradation of lawful content, applications, services, and devices."[74] The FCC found the ban on throttling "necessary [to] avoid gamesmanship designed to avoid the no-blocking rule by, for example, rendering an application effectively, but not technically, unusable."[75] "'Paid prioritization' refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic . . . in exchange for consideration (monetary or otherwise) from a third party, or to benefit an affiliated entity."[76] In addition to the bright-line conduct rules, the FCC adopted a catch-all standard generally prohibiting ISPs from engaging in any unreasonable interference or unreasonable disadvantage to consumers or edge providers.[77]

The FCC found that "case-by-case enforcement can be cumbersome for individual consumers or edge providers,"[78] choosing instead to adopt bright-line conduct rules to regulate ISP behavior. The conduct rules would be a "regulatory backstop . . . prohibiting common carriers from engaging in unjust and unreasonable practices" and the FCC's regulatory and enforcement oversight would be "complementary to vigorous antitrust enforcement."[79]

The FCC recognized the concern that "a swath of utility-style provisions" may harm ISPs' profitability and therefore decrease investment in infrastructure.[80] Thus, the FCC chose to apply Title II in a focused way, making inapplicable to ISPs over 700 codified rules otherwise applicable to Title II common carriers, including: "no [local loop] unbundling, no tariffing, [and] no rate regulation." It referred to this focused application of Title II as a "light-touch" approach, "apply[ing] only those Title II provisions found to directly further the public interest in an open internet."[81]

73. *Id*. ¶ 15.
74. *Id*. ¶ 16.
75. *Id*. ¶ 17.
76. *Id*. at 5607–8 ¶ 18.
77. *Id*. at 5609 ¶¶ 21-2.
78. *Id*. at 5608 ¶ 19.
79. *Id.* at 5963 ¶ 203.
80. *Id*. at 5612 ¶ 38.
81. *Id*. ¶ 37.

II. The Restoring Internet Freedom Order

The era of a mandatory open internet ended with the final Restoring Internet Freedom Declaratory Ruling ("2018 Order"),[82] released January 4, 2018. The 2018 Order again reclassified broadband internet services as an "information service" under Title I of the Communications Act. It additionally eliminated the conduct standards and the rules prohibiting blocking and throttling.[83] Finally, the 2018 Order shifted the regulatory oversight of ISP practices from the FCC to the Federal Trade Commission ("FTC"). The sections that follow explore each of these changes.

A. The "Lighter Touch" Framework

1. Title II to Title I

By reclassifying ISPs as an "general information service" under Title I of the Communications Act, the agency gave itself only light regulatory power over the actions and pricing of ISPs,[84] such as the ability to impose disclosure requirements. In turn, the FCC deprived itself of the regulatory authority to impose bright-line conduct rules for ISPs in the future. The justification for this change was to "increase investment and encourage deployment of internet services to underserved areas and encourage upgrading of facilities in already served areas."[85] According to the FCC, the Title II regime "chilled investment" and prevented such deployment because it caused regulatory uncertainty.[86] The FCC additionally cited the concern of "regulatory creep," stating that regulators did not know how the 2015 Order would be interpreted.[87]

The FCC supported its conclusion by relying on two studies looking at the change in ISP investments since enactment of the 2015 Order. Both studies concluded that aggregate ISP investment had decreased since the

82. *See generally* In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) [hereinafter 2018 Order].

83. *Id*.

84. Nia Chung Srodoski, *A Balancing Act: the Virtue of a "Light Touch" Regulatory Framework in the 2015 Open Internet Order*, 17 MINN. J.L. SCI. & TECH. 517, 543 (2016).

85. 2018 Order, *supra* note 82, at 492 ¶ 308.

86. *Id*. at 368 ¶ 99 (stating that uncertainty of what is allowed and what is not allowed under the Title II regime has caused ISPs to "shelve projects that were in development, pursue fewer innovative business models . . . or delay rolling out new features or services").

87. 2018 Order, *supra* note 82, at 369–70 ¶ 101 (citing statement of former FCC Chairman Tom Wheeler).

adoption of the 2015 Order, one finding that aggregate investment in 2016 decreased a total of three percent from 2014 levels. However, the rulemaking also accurately acknowledged that declines in capital investment can change depending upon the industry and the business cycle.[88] Such comparative studies, the FCC noted, are "only suggestive"[89] since they do not account for other factors such as evolving technology and the fact that "large investments often occur in discrete chunks rather than being spaced out evenly over time."[90] Additionally, the 2015 Order had specifically tailored the common carrier obligations of Title II to lessen potential burdens to ISPs,[91] shielding them from aspects of Title II that ISPs claimed would hurt investment such as rate regulation and unbundling requirements,[92] and replacing burdensome regulating with three, bright-line conduct rules that ISPs themselves stated would not discourage them from investment.[93] Nevertheless, the FCC concluded that Title II regulation has led to a downward trend in investment,[94] and thus was too burdensome on ISPs, supporting a change back to Title I.

2. Reliance on FTC Consumer Protection Laws and Antitrust

a. Shifting Regulatory Oversight to the FTC

Another major change the FCC made in the 2018 Order was the shifting of regulatory oversight of broadband ISPs' conduct to the FTC. The FTC enforces federal consumer protection laws that prevent fraud, deception and

88. *See* S. DEREK TURNER, IT'S WORKING: HOW THE INTERNET ACCESS AND ONLINE VIDEO MARKETS ARE THRIVING IN A TITLE II ERA 88–9 (May 2017), https://www.freepress.net/sites/default/files/2018-06/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf.

89. 2018 Order, *supra* note 82, ¶ 92.

90. *Id.*

91. 2015 Order, *supra* note 5, at 5603 ¶ 5.

92. *Id*. at 5818, 5849-50 ¶¶ 458, 513.

93. *Id.* at 5795-6 ¶ 416. ("Tellingly, major infrastructure providers have indicated that they will in fact continue to invest under the framework we adopt, despite suggesting otherwise in their filed comments in this proceeding. For example, Sprint asserts in a letter in this proceeding that . . . 'Sprint does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services.' Verizon's chief financial officer, Francis Shammo, told investors in a conference call in response to a question about the effect of 'this move to Title II,' that 'I mean to be real clear, I mean this does not influence the way we invest.'") (internal citation omitted).

94. 2018 Order, *supra* note 82, ¶ 92.

unfair business practices.[95] The FTC also enforces federal antitrust laws that prohibit anticompetitive mergers and other business practices that could lead to higher prices, fewer choices, or less innovation.

The FTC has the authority to protect consumers from "unfair or deceptive acts or practices" under Section 5 of the FTC Act.[96] An unfair or deceptive act or practice is one that creates substantial consumer harm, is not outweighed by countervailing benefits to consumers, and that consumers could not reasonably have avoided.[97] Private citizens and businesses cannot enforce the FTC Act because there is no private right of action; however, consumers and other businesses may file a complaint with the FTC about a business's conduct, triggering an investigation. Then, once the FTC finds there to be a violation of the law, it may enter into a consent order with the company or begin an administrative proceeding.[98]

b. The Transparency Rule

The 2018 Order adopted a revised transparency rule, requiring "[a]ny person providing broadband Internet access service [to] publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband internet access services."[99] The revised transparency rule is as follows:

> Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission. [100]

95. *The Enforcers*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers (last visited Mar. 5, 2019).

96. 2018 Order, *supra* note 82, at 606 ¶ 141 (stating that "The FTC has broad authority to protect consumers from 'unfair or deceptive acts or practices'" and that "[a]s the nation's premier consumer protection agency, the FTC [can] exercise its authority, which arises from Section 5 of the FTC Act, to protect consumers in all sectors of the economy").

97. *Id; see also* 15 U.S.C. § 45 (2006).

98. *The Enforcers*, *supra* note 95.

99. 2018 Order, *supra* note 82, at 645 ¶ 215.

100. *Id.* at 440 ¶ 220.

All ISPs are specifically required to disclose blocking, throttling, affiliated prioritization,[101] congestion management,[102] application-specific behavior,[103] and device attachment rules.[104]

The FCC claimed that the new transparency rule would help achieve their goal of identifying and addressing potential market entry barriers.[105] The next section explains why this is an unrealistic prospect.

c. Change in Authority in the 2018 Order

An additional change the FCC made in the 2018 Order is the shifting of regulatory oversight of broadband ISPs' conduct to the FTC. The FCC deemed the regulation of ISPs under 2015 Order "unnecessary to address conduct that harms internet openness," and instead chose to rely on "antitrust law and the FTC's authority under Section 5 of the FTC Act to prohibit unfair and deceptive practices."[106]

The 2018 Order relied on the voluntary commitment of the largest ISPs, such as AT&T and Comcast, not to block or throttle legal content.[107] The FCC stated that the FTC's Section 5 authority makes such voluntary commitments by ISPs enforceable because it "prohibits companies from selling consumers one product or service but providing them [with] something different."[108] In the event that an ISP acts in a manner inconsistent with its disclosures, such an act could arguably be seen as an unfair act or

101. "Affiliated Prioritization" is defined as: "Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate." *Id*.

102. "Congestion Management" is defined as pertaining to: "Descriptions of congestion management practices, if any. These descriptions should include the types of traffic subject to the practices; the purposes served by the practices; the practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, including any usage limits triggering the practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate." *Id*.

103. "Application-Specific Behavior" is defined as: "Whether and why the ISP blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications." *Id*.

104. "Device Attachment Rules" are defined by as: "Any restrictions on the types of devices and any approval procedures for devices to connect to the network." *Id*.

105. 2018 Order, *supra* note 82, at 653 ¶ 233.

106. *Id*. at 393–4 ¶ 140.

107. *Id.*

108. *Id.* at 394–5 ¶ 141 (citing Acting Chairman Ohlhausen Comments at 10-11).

practice. [109] The FCC asserted that the FTC can "enforce these promises" not to block or throttle by bringing an enforcement action using its authority to prevent unfair or deceptive acts or practices under Section 5 of the FTC Act.[110] This case-by-case ex post regulation, the FCC contended, is "better suited for regulating a dynamic industry like the internet."[111] Additionally, it reasoned, should ISPs decide not to make these voluntary promises, consumers and edge providers will resist any attempt by ISPs to undermine the openness of the internet.[112]

The FCC's arguments for changing this regulatory authority are flawed for several reasons. For one thing, the FCC gives the impression that the FTC will aggressively go after ISPs who break their voluntary promises. Even if the FTC does aggressively monitor ISPs, simply enforcing promises in an industry lacking competition is ineffective, because the ISPs can stop making voluntary promises without being faced with market pressures such as the "resistance" of consumers and edge providers.[113] As mentioned above, most consumers are limited to one broadband provider,[114] so once ISPs stop making these promises, consumers and edge providers will be powerless to resist, and without remedy. There will no longer be a promise for the FTC to enforce, and ISPs will be free to engage in anticompetitive behavior.

3. *Reliance on Antitrust Laws to Prevent Blocking, Throttling, and Paid Prioritization*

The FCC additionally justified repealing the 2015 Order by relying on the ability of both the FTC and private citizens to bring antitrust actions challenging any anticompetitive conduct in the internet sector.[115] The FTC enforces three laws with respect to antitrust law: the Sherman Act, the FTC Act, and the Clayton Act. These are the three core federal antitrust laws in effect today. The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." The standard for assessing business conduct under the Sherman Act is a two-pronged approach: (1) per se illegality if the conduct is considered "so harmful to

109. *Id.* at 395–6 ¶ 142.
110. *Id*. at 396 ¶ 142 n.512.
111. *Id*.
112. *Id*. at 396 ¶ 142.
113. *Id*.
114. *See supra* Part I.C.1.
115. *Id.*

competition that they are almost always illegal;" and (2) rule of reason analysis if the conduct does not fall into an established anticompetitive category articulated under law.[116]

The 2018 Order relies on the threat of liability under Sections 1 and 2 of the Sherman Act to prevent ISPs from making agreements amongst themselves to block, throttle, or discriminate against internet content.[117] Section 2 of the Sherman Act prohibits exclusionary conduct by a firm with the dangerous probability of achieving monopoly power.[118] Section 2 additionally prohibits vertically integrated ISPs from anticompetitively favoring their content or services over other unaffiliated edge providers' content or services. The 2018 Order posits that many of the net neutrality violations cited in the 2015 Order could have been investigated as antitrust violations.[119] The 2018 Order does not, however, address whether such antitrust violations would actually be challenged by a federal agency or a private individual, or the likelihood of success in litigation. The FCC stated the possibility of finding antitrust liability, without addressing the concerns the 2015 Order originally raised regarding feasibility of regulation through case-by-case enforcement. Part III of this paper examines the weaknesses of case-by-case antitrust enforcement, on which the FCC principally relies.

B. Standard of Review for Challenging Administrative Agency Rulemakings

When an administrative agency makes a change to its regulations and such a change is challenged, a reviewing court must only set aside agency action when it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[120] Indeed, since the 2018 Order took effect, lawsuits have been filed alleging that the FCC's regulatory changes were arbitrary and capricious.[121] Whether the 2018 Order might be set aside

116. Jennifer E. Gladieux, *Towards a Single Standard for Antitrust: The Federal Trade Commission's Evolving Rule of Reason*, 5 GEO. MASON L. REV. 471, 473 (1997).

117. 2018 Order, *supra* note 82, at 395 ¶144.

118. 15 U.S.C. § 2.

119. *Id*.

120. 5 U.S.C. § 706.

121. For a recent challenge to the 2018 Order, see Brief for Petitioner, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. Feb. 22, 2018). Various petitioners including activist groups and state governments challenged the 2018 Order, alleging it violated the Communications Act and is otherwise arbitrary and capricious in violation of the Administrative Procedure Act. They also argued the 2018 Order did not fully assess issues such as market concentration and how the antitrust and consumer protection laws would function in the absence of regulation by the Commission. The D.C. Circuit invoked the Supreme Court's holding in *Nat'l Cable & Tele. Ass'n v. Brand X Internet*

under this standard of judicial review is beyond the scope of this paper. Yet, one important point also raised in recent litigation is whether the FCC has fully assessed and supported how the consumer protection laws and antitrust alone would function in the absence of regulation by the FCC.[122] The next part of this paper addresses this concern, looking specifically at the weaknesses of reliance on antitrust.

III. Antitrust Enforcement is Not the Answer to the Anticompetitive Harms the Net Neutrality Rules Sought to Fix

A. Anticompetitive Vertical Conduct is the Main Focus of Net Neutrality Rules

As mentioned in Part II, ISPs' strong economic bargaining power puts them in a gatekeeper position, and the ability of ISPs to exploit this gatekeeper role cannot be mitigated by the ability of consumers to switch broadband providers.[123] This power "distinguishes [ISPs] from other participants in the internet marketplace who have no similar control [over] access to the internet for their subscribers and for anyone wishing to reach those subscribers."[124] Ultimately, ISPs have a strong incentive to engage in exclusionary conduct, whether such conduct is through "accepting fees from edge providers. . .in return for excluding their competitors or for granting them prioritized access to end users"[125] or through blocking or throttling the content of rival content providers that competes with an affiliate of the ISP.

Vertical conduct refers to dealings between two companies operating in the same sector, but along different points in the supply chain.[126] The three types of exclusionary conduct that the 2015 Order prohibited, blocking, throttling, and paid prioritization, all qualify as vertical conduct because they each concern ISPs exercising control over edge providers. ISPs and edge

Services, which affirms the FCCs authority to classify broadband internet services as information services. *See* Paul Werner & Imad Matini, *D.C. Circuit Hears Challenge to Federal Communications Commission's 2018 Restoring Internet Freedom Order*, FCC LAW BLOG (Feb. 4, 2019), https://www.fcclawblog.com/2019/02/articles/fcc/challenge-to-fcc-2018-order/.

122. *See* Paul Werner & Imad Matini, *supra* note 121.

123. *See supra* Part I.D.1.

124. 2015 Order, *supra* note 5, at 5630 ¶ 80.

125. 2015 Order, *supra* note 5, at 5608 ¶ 19.

126. *Versus Trump: Trump the Trustbuster (Interview with Lina Khan)*, TAKE CARE BLOG (Nov. 30, 2017), https://takecareblog.com/blog/versus-trump-trump-the-trustbuster-interview-with-lina-khan.

providers are both participants in the internet marketplace, but while one provides the broadband service connection, the other provides the content, applications, and services an end user of the internet seeks to access,[127] therefore putting them at different points in the supply chain.

While vertical conduct between ISPs and edge providers is not, by itself, anticompetitive, the FCC in its 2015 Order recognized that, due to the ISPs' substantial market power, "the threat of harm is overwhelming."[128] A recognized term for this situation in antitrust law is "single firm conduct", or conduct that often involves exclusion by a dominant firm.[129] Such "single firm conduct" occurs when a company has such a strong position in the marketplace that their behavior may no longer be subject to competitive pressures.[130] The vertical nature of the exclusionary conduct at issue presents unique challenges in terms of antitrust enforcement, which are discussed in the following sections.

B. Anticompetitive Harm from Vertical Conduct is Viewed with Skepticism

1. Possible Harms Resulting from Exclusionary Vertical Conduct

ISPs can engage in several different forms of exclusionary conduct that results in harming competition in the internet market. These include imposing constraints on rival conduct,[131] and engaging in vertical agreements to sell an exclusionary right to rivals.[132] An ISP can directly constrain rivals by imposing costs or reducing rivals' access to customers.[133] Constraints can be more obvious, such as when an ISP blocks or degrades access to unaffiliated online video to their broadband subscribers.[134] Constraints can also be slightly more subtle, but equally harmful. Take, for

127. *See generally* 2015 Order, *supra* note 5.

128. 2015 Order, *supra* note 5, at 5608 ¶ 19.

129. Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 529 (2012); *see also Single Firm Conduct*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct (last visited Mar. 31, 2019) (describing single firm conduct as actions of a single firm with market power "to the point where their behavior may not be subject to common competitive pressures").

130. *See Single Firm Conduct*, *supra* note 129.

131. Baker, *supra* note 129, at 537.

132. *Id*. at 539.

133. *Id*. at 537.

134. 2015 Order, *supra* note 5, at 5632 ¶ 81.

example, "zero rating," which is the process of choosing not to count a specific content provider's packets against a customer's data cap.[135] As noted in the 2015 Order, data caps or allowances "can negatively influence customer behavior and the development of new applications."[136] In fact, we have already seen ISPs engage in this behavior prior to enactment of the 2015 Order.[137]

Additionally, ISPs can engage in vertical agreements to sell an exclusionary right to certain edge providers, "either in return for excluding their competitors or for granting them prioritized access to end users."[138] This creates "fast lanes" for those edge providers able to afford it, and "slow lanes" for others.[139] "By interfering with the transmission of third parties' internet-based services or raising the cost of online delivery for particular edge providers, [ISPs] can make those services less attractive to subscribers in comparison to [rival] offerings."[140]

Unfortunately, due to the historical and ideological context of the antitrust laws, the cost, difficulty, and unpredictability in litigation, and the ineffectiveness of common behavioral remedies, antitrust law is unable to rectify the harms resulting from the anticompetitive exclusionary conduct of ISPs, as explored in detail below.

2. Historically, Vertical Conduct Issues Have Been a Low Priority for Antitrust Enforcement

Modern antitrust discourse has focused mainly on horizontal conduct, neglecting the area in which exclusion primarily arises, vertical agreements.[141] Since 1980, substantially more cases involving horizontal restraints have been brought in the U.S. than cases where exclusion is likely involved, such as monopolization and vertical agreements.[142] It is rare that

135. *Id*.

136. *Id*.

137. In 2014, AT&T created a policy under which edge providers could pay to be exempt from data caps on streaming. *See* Jon Brodkin, *AT&T Turns Data Caps into Profits with New Fees for Content Providers*, ASRTECHNICA (Jan. 6, 2014, 10:24 AM), http://arstechnica.com/business/2014/01/att-turns-data-caps-into-profits-with-new-fees-for-content-providers/ ("Basically, the price of data is being charged to content providers instead of consumers.").

138. 2015 Order, *supra* note 5, at 5609 ¶ 21.

139. *Id*.

140. 2010 Open Internet Order, *supra* note 16, at 17918.

141. Baker, *supra* note 129, at 527.

142. *Id*. at 576.

agency challenges to vertical mergers reach completion.[143] Moreover, the long outdated 1984 Vertical Merger Guidelines emphasize the harms of reduced market entry prospects and the facilitation of collusion, while neglecting the impacts of "foreclosure" and receiving little attention from the courts.[144] The antitrust enforcement agencies have "emphasiz[ed] collusion over exclusion in articulating enforcement priorities."[145] Indeed, according to a former FTC chairman, it is "uncontroversial . . . that non-merger antitrust enforcement should focus on horizontal activities"[146]

Vertical arrangements were not always neglected in antitrust discourse. In fact, for many years, antitrust agencies took a prophylactic approach to both horizontal and vertical arrangements, relying on bright-line rules and structural presumptions in their enforcement standards through the 1970s.[147] However, a group of scholars, often referred to as the "Chicago School,"[148] emerged as critics of this prophylactic approach, and their ideologies gained popularity in the lower courts, ultimately influencing the antitrust enforcement we have today.[149]

This influential scholarship signaled a large change in antitrust enforcement; a shift in the approach to vertical arrangements was one component.[150] Chicago School scholars attacked vertical merger enforcement as economically irrational.[151] These scholars' influence created a shift in thinking from what once was a general skepticism of vertical arrangements, to a presumption that vertical arrangements should generally be legal and viewed as efficient and pro-competitive.[152]

In arguing that foreclosure is illusory, Chicago School scholars essentially assert that the vertical integration of, or agreements between,

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143. *See* Thomas L. Greaney & Douglas Ross, *Navigating Through the Fog of Vertical Merger Law: A Guide to Counselling Hospital-Physician Consolidation Under the Clayton Act*, 91 WASH. L. REV. 199, 201 n.5 (2016).

144. *Id*. at 201 n.6 (citing 1984 Merger Guidelines, 49 FR 26823-03).

145. Baker, *supra* note 129, at 528.

146. *Id*.

147. Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. 960, 966–7 (June 4, 2018).

148. Lina M. Khan, *Amazon's Antitrust Paradox,* 126 YALE L.J. F. 710, 719 n.29 (2017). "'The Chicago School' refers to the group of legal scholars and economists, primarily based at the University of Chicago, who developed neoclassical law and economics in the mid-twentieth century." *Id.*

149. Khan, *supra* note 147, at 965–6.

150. TAKE CARE BLOG, *supra* note 126.

151. Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1963 (May 2018).

152. *Id*.

firms from different points in the supply chain do not present the risk of excluding rivals from inputs and customers. In other words, because these companies are not competing directly in the same sector, there is not actually a reduction in competition.[153] However, we know that this is not the case in the internet market, because ISPs hold gatekeeper power, enabling them to avoid additional competitive pressure on their affiliated services by interfering with the transmission of third parties' internet-based services. Indeed, "the concepts of anticompetitive foreclosure and leverage are not empty and illogical, and exclusionary strategies can profit firms and harm competition."[154] Nonetheless, this prevailing ideology permeates through antitrust enforcement, and has led to overall inattention to vertical restraints.

C. Private Antitrust Litigation Does Not Offer Adequate Remedies for Edge Providers

The 2018 Order finds that "most of the net neutrality violations discussed in the 2015 Order could have been investigated as antitrust violations,"[155] focusing on whether the ISP was engaging in anticompetitive foreclosure to preserve monopoly power. Acting Federal Trade Commission Chairman Maureen Olhausen, an opponent of net neutrality rules, argued that antitrust can accommodate net neutrality concerns, stating that "antitrust would forbid efforts by ISPs with significant market power to foreclose rival content."[156] How accurate is this promise?

The FTC can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act.[157] An FTC investigation into a business's conduct may be triggered by correspondence from consumers or other businesses. Then, once the FTC finds there to be a violation of the law, it may enter into a consent order with the company. If a company signs a consent order, it must agree to stop the disputed practices outlined in an accompanying complaint.[158] Such consent orders, as well as consent decrees,

153. TAKE CARE BLOG, *supra* note 126.

154. Baker, *supra* note 129, at 532.

155. 2018 Order, *supra* note 82, at 364 ¶ 88.

156. HAL J. SINGER, PAID PRIORITIZATION AND ZERO RATING: WHY ANTITRUST CANNOT REACH THE PART OF NET NEUTRALITY EVERYONE IS CONCERNED ABOUT 7 (2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf, (citing Maureen K. Olhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119, 136 (2012)).

157. Vertical restraints are typically covered by Section 1 of the Sherman Act.

158. *The Enforcers*, *supra* note 95.

are discussed below.[159] Private parties, both individuals and businesses, can also bring suits enforcing the antitrust laws and seeking damages for violations of the Sherman or Clayton Acts.[160] In fact, private antitrust enforcement vastly exceeds public enforcement, with roughly ten private federal cases brought for every one case brought by either the Department of Justice or the FTC.[161] Given the lack of attention agencies give to vertical restraints, this portion of the paper looks specifically at private antitrust litigation.

Vertical restraints are generally judged under the rule of reason.[162] The rule of reason balances efficiencies and anticompetitive effects, requiring a plaintiff to show harm to competition.[163] An important question, then, is whether there would be a cognizable antitrust violation for the vertical restraints contemplated by the 2015 Order under the rule of reason. Economist Hal. J. Singer answers this question in the negative.[164] In his article critiquing the ability of antitrust to reach net neutrality concerns, Singer poses a hypothetical case in which an ISP offers preferential treatment for an online content supplier's packets for a fee. The arrangement is discriminatory; however, there is no exclusion of other content suppliers, as they still have access to the ISP's customers, just with less favorable treatment.[165] Additionally, by offering preference to a single content provider while still carrying the packets of other providers, the ISP has at most diverted eyeballs from rival content providers' sites.[166] Such a mild preference likely would not raise a content rival's cost. Without price or output effects, a complainant would have difficulty demonstrating anticompetitive effects.[167]

The harm identified in Singer's hypothetical is potential loss of innovation.[168] The 2015 Order referred to this as disruption to the "virtuous cycle of innovation."[169] Rival content providers in a paid prioritization scenario would be discouraged from investing in R&D and developing superior content if they believed the playing field was slanted toward a rival

159. *See infra* Part III.C.

160. *The Enforcers*, *supra* note 95.

161. Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1179 (2008).

162. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc. 551 U.S. 877 (2007).

163. SINGER, *supra* note 156, at 1, 5.

164. *Id.* at 9.

165. SINGER, *supra* note 156, at 5.

166. *Id.*

167. *Id.*

168. *Id.* at 6.

169. 2015 Order, *supra* note 5, at 5627 ¶ 77.

content provider.[170] Harm to innovation, however, though recognized by antitrust law as an anticompetitive injury, is difficult to prove.[171] From an antitrust perspective, harm to the consumer is the primary concern,[172] and without immediate price or output effects, the harm inflicted on the rival content providers likely would not be considered an antitrust violation. Then, even if harm to consumers is proven, the harm must be balanced against possible efficiencies in a rule of reason analysis. Even Olhausen acknowledged that there may be no antitrust violation if an "edge provider partners with an ISP that agrees to prioritize its content over lesser alternatives,"[173] the very conduct the net neutrality rules were aimed to prevent.

Antitrust agencies do not typically bring harm-to-innovation cases, instead focusing resources on restrictions limiting or excluding firms from working with horizontal rivals.[174] This leaves the private litigant to bring a case on a difficult to prove antitrust harm. In addition to the difficulty in bringing the case, there are practical impediments to prevailing in court. Antitrust cases move slowly. The Georgetown study of private antitrust litigation conducted in the early 1980s found that antitrust cases take, on average, about three times longer than other federal cases from initiation of the lawsuit to disposition.[175] Although this study is older, the average time from filing of an antitrust case to trial has only increased, from over 18 months in 1996, to over 24 months in 2007.[176] Additionally, private litigants will be unlikely to want to bring an antitrust suit given the low likelihood of prevailing. One percent of all private federal antitrust cases reach a jury trial and most cases are either disposed of procedurally through motions for summary judgment or dismissal or through settlements.[177] The possibility of receiving compensation is distant due to the lengthy time frames of antitrust litigation, and, given the low rate of success, it is unlikely.

170. SINGER, *supra* note 156, at 5.

171. *Id.*

172. *See* Khan, *supra* note 147, at 963–4 ("[T]he current "consumer welfare" approach [holds] that output maximization is the proper goal of antitrust.").

173. SINGER, *supra* note 156, at 7 (citing Maureen K. Olhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119, 136 (2012)).

174. *Id*. at 6.

175. Daniel A Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 691–2 (2010).

176. *Id*. at 692.

177. ABA SECTION OF ANTITRUST LAW, CONTROLLING COSTS OF ANTITRUST ENFORCEMENT AND LITIGATION (2012), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/2013_agenda_cost_efficiency_kolasky.pdf.

Moreover, because of the extended timeline of antitrust cases, there may not be adequate remedies under antitrust law to cure the loss of innovation at the edge caused by the anticompetitive conduct. As Singer concludes, "offering foreclosed content providers, at least some of which are startups, a venue that could take multiple years and millions of dollars in litigation expenses is tantamount to offering no relief at all."[178]

D. Vertical Mergers as an Example of Antitrust Law's Permissive View of Vertical Conduct

Vertical mergers, one subsect of vertical agreement in which vertical restraints and other exclusionary behavior may arise, provide a demonstrative window into the permissive view antitrust discourse generally takes toward vertical arrangements. It is rare that agency challenges to vertical mergers reach completion.[179] Moreover, the long outdated 1984 Vertical Merger Guidelines emphasize the harms of reduced market entry prospects and the facilitation of collusion, while neglecting the impacts of "foreclosure" and receiving little attention from the courts.[180] Even supposing antitrust agency enforcement occurs, courts may still be reluctant to find that such vertical arrangements are illegal. A recent example of this is the AT&T-Time Warner merger.

1. The Merger Between AT&T and Time Warner

In November of 2017, the U.S. Department of Justice ("DOJ") brought a civil action to prevent AT&T from acquiring Time Warner because the effect "may be to substantially lessen competition" in violation of Section 7 of the Clayton Act.[181] The Government alleged that the newly combined firm would likely "use its control of Time Warner's popular programming as a weapon to harm competition."[182] In June of 2018, Judge Richard Leon of the U.S. District Court of the District of Columbia approved the vertical merger between AT&T and Time Warner.[183] The approved deal combines one of the

178. SINGER, *supra* note 156, at 6.

179. *See* Thomas L. Greaney & Douglas Ross, *Navigating Through the Fog of Vertical Merger Law: A Guide to Counselling Hospital-Physician Consolidation Under the Clayton Act*, 91 WASH. L. REV. 199, 201 n.5 (2016).

180. *Id*. at 201 n.6 (citing 1984 Merger Guidelines, 49 FR 26823-03).

181. *See generally* United States v. AT&T Inc., 310 F. Supp. 3d. 161 (D.D.C. 2018), *aff'd sub nom.* United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019).

182. Complaint at 2, United States v. AT & T Inc., 310 F. Supp. 3d. 161 (D.D.C. 2018).

183. *AT&T Inc.*, 310 F. Supp. 3d. at 161.

world's largest telecom carriers with one of the world's largest media organizations. It was approved barely six months after the repeal of the 2015 Order's conduct rules.

The DOJ made several arguments in opposition of the merger. First, the DOJ argued that the merger would enable the merged firm to charge AT&T's rival video distributors higher prices for popular Time Warner content.[184] This would lead video distributors to either pass on this higher price to consumers by raising their own prices, or to no longer provide Time Warner content at all, which would result in loss of customers to the rival distributor.[185] Judge Leon dismissed this argument, stating that the government did not meet its burden of proof in demonstrating that the merged firm would be able to charge higher prices for Time Warner content.[186] The DOJ's second argument was that the merger would substantially lessen competition by creating an increased risk that the merged firm would act either unilaterally or in coordination with Comcast-NBCU to foreclose other multichannel video programming distributors (MVPDs) from entering the market.[187] In response to this argument, Judge Leon noted that "the benefits associated with AT&T customers accessing virtual MVPD content continue to accrue even when they use DirecTV Now's competitors like Sling and YouTube TV."[188] Video content, no matter the source, would be using data on the AT&T network that the ISP could charge consumers for. In other words, AT&T would lack the incentive to foreclose competing video content because all video content would equally add to a consumer's data usage. Finally, the government argued that the merged firm could harm competition between content distributors by preventing AT&T's rival distributors from using the offer of Time Warner's HBO programming as a promotional tool to attract and retain customers.[189] The Judge found that the DOJ failed to show that there were no adequate or equally-priced substitutes for HBO content.

While critics have called the DOJ's arguments weak,[190] they do still get to the heart of the issues facing vertical merger enforcement in the realm of net neutrality: exclusion.

184. *Id.* at 164.

185. *Id.* at 194.

186. *Id.*

187. *Id.*

188. *Id*. at 244.

189. *Id*. at 194.

190. *See* Nilay Patel, *The Court's Decision to Let AT&T and Time Warner Merge is Ridiculously Bad*, THE VERGE (June 15, 2018) https://www.theverge.com/2018/6/15/17468612/att-time-warner-acquisition-court-decision.

The AT&T-Time Warner Merger case provides a real-life example of the flaws persistent in the Chicago School's justifications for lax treatment of vertical mergers. The merger presents a serious foreclosure concern, namely that the merged firm will raise the prices of Time Warner content, or withhold that content, from other video distributors.

One additional argument the DOJ did not make is that the merged firm could easy engage in paid prioritization arrangements with other content providers, by engaging the content providers, either voluntarily, or through coercion, to commit to paying fees to exclude other content providers.[191] This type of exclusionary conduct by a merged firm is especially salient in the wake of the FCC's repeal of the net neutrality rules. Without the 2015 Order's non-discrimination provisions, there is no ban on prioritization and throttling of rival content. An ISP is thus not only able, but is incentivized, to throttle back streaming and downloading speeds of all rival, non-affiliated content, and raise the prices of access to their distribution network. Ultimately, however, given the presumption of legality imbued on vertical mergers,[192] courts are still going to be reluctant to find vertical mergers illegal. The ability for ISPs to merge with content providers magnifies the incentive for ISPs to engage in restraining rivals by imposing costs or otherwise reducing rivals' access to consumers. The repeal of the 2015 Order's conduct rules allows for ISPs to engage in this anticompetitive behavior.

While such an argument based on the repeal of the 2015 Order may have been a missed opportunity in the AT&T-Time Warner merger challenge,[193] it can be posed in future merger challenges involving ISPs and content providers.

2. Conduct Remedies are Ineffective

What if Judge Leon had indeed found the AT&T-Time Warner merger to be anticompetitive? Would the remedies imposed by the court effectively prevent the harms to innovation at the edge that the net neutrality rules sought to prevent? Such a question involves a closer look into typical methods of redress.

When the DOJ or FTC determines that a merger is anticompetitive, it must usually choose between two options: seek to block the merger in court, or negotiate a remedy that will allow merging parties to continue the

191. *Id.*

192. *See supra* Part III.A.

193. Patel, *supra* note 190.

transaction, if they agree to conditions that are intended to protect competition.[194] When cases involve allegations of exclusive dealing, a rule of reason analysis is required. Rather than trying to meet the burden of establishing a "full causal mechanism" under the rule of reason, it has been easier for agencies to settle with merging firms, imposing remedies while allowing the merger to go through.[195] "Merger remedies take two basic forms: one addresses the structure of the market, the other the conduct of the merged firm."[196] "Structural remedies" may be imposed, under which the combining entities must divest certain of their assets to a new competitor associated with one of their overlapping business lines.[197] Alternatively, "behavioral remedies," also known as conduct remedies, "allow parties of a merger to integrate fully, but then impose operating rules on their business behavior in order to prevent competition from being undermined or compromised."[198] Recently, the DOJ has looked more fondly upon behavioral remedies, specifically endorsing them for vertical mergers.[199] The 2011 Remedies Guide states that in vertical cases, conduct remedies "often" address competitive concerns,[200] and that conduct remedies are a "valuable tool" for preserving efficiencies of a merger while remedying competitive harm.[201]

One form of conduct relief suitable for addressing possible anticompetitive behavior by an ISP merged with a content provider is fair dealing provisions.[202] Fair dealing provisions are those that encompass equal access, equal efforts, and non-discrimination.[203] Nondiscrimination

194. Philip A. Proger & J. Bruce McDonald, *Federal Antitrust Enforcers Taking More Regulatory, but More Flexible, Approach to Merger Remedies*, JONES DAY (June 2010), https://www.jonesday.com/federal_antitrust_enforcers/.

195. JOHN KWOKA, REVIVING MERGER CONTROL: A COMPREHENSIVE PLAN FOR REFORMING POLICY AND PRACTICE 44 (Oct. 9, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf.

196. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (Oct. 2004), http://www.justice.gov/atr/public/guidelines/205108.pdf [hereinafter 2004 REMEDIES GUIDE].

197. Proger & McDonald, *supra* note 194.

198. John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 THE ANTITRUST BULL. 979, 982 (2012).

199. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf, superseding 2004 REMEDIES GUIDE [hereinafter 2011 REMEDIES GUIDE].

200. 2011 REMEDIES GUIDE, *supra* note 199, at 4.

201. *Id*. at 6–7.

202. 2004 REMEDIES GUIDE, *supra* note 196, at 22.

203. *Id*.

provisions prevent discriminatory conduct between two downstream producers, and would effectively prohibit paid (or unpaid) prioritization of content by ISPs.

Nondiscrimination provisions, however, require extensive time and resources by the agencies to enforce against the merged firm.[204] The DOJ's favorable view of conduct remedies in the 2011 Remedies Guide fails to account for the substantial cost posed by conduct remedies.[205] Prohibiting or requiring certain actions to be taken by a firm "does not negate its incentive to pursue profit or its interest in circumventing the prohibition."[206] Therefore, behavioral remedies require ongoing oversight, monitoring, and compliance enforcement by the government, all of which impose substantial costs and strain on the agencies,[207] making it difficult for agencies to keep up with monitoring efforts. The outcome of the recent Comcast-NBCU merger demonstrates these difficulties.

a. The Comcast-NBCU Merger

In 2009, Comcast, the largest cable company in the United States, sought to enter a joint venture with General Electric (GE) to acquire NBC, a network that controls multiple popular cable networks including Bravo, Syfy and the USA network.[208] Additionally, NBC controlled other programming such as nightly news and the Olympics, which it aggregated and sold to distributors.[209] The DOJ was concerned that distributors competing with Comcast would be at a disadvantage after the merger, because the merged firm would be able to raise fees on all of the NBC-controlled content it sold to other distributors.[210] The DOJ brought an action to enjoin the merger under the Clayton Act, alleging these anticompetitive effects of the merger, and additionally alleging that the merged firm could also damage online video distributors (OVDs) by restricting access to its programming.[211] Instead of

204. *Id.* at 8.

205. Kwoka & Moss, *supra* note 198, at 983–984 (noting that "although [the costs of implementing behavioral remedies] were central to the 2004 Remedies Guide approach [of favoring structural remedies], that discussion is deleted without explanation of the basis for changed thinking").

206. *Id.* at 997.

207. *Id.*

208. Complaint at 7 ¶ 16, United States v. Comcast Corp., 808 F. Supp. 2d 145, 147 (D.D.C. 2011).

209. *Id.* at 5, ¶ 8.

210. United States v. Comcast Corp., 808 F. Supp. 2d 145, 147 (D.D.C. 2011).

211. *Id.*

litigating the case, the government came to an agreement with Comcast via consent decree, allowing the merger to go through, subject to over 100 conduct conditions imposed by a consent decree with the DOJ and the FCC.[212]

There is consensus that the behavioral conditions in this deal failed, as Comcast has repeatedly been found violating conditions. One condition in the deal that was violated was a "neighbor-hooding provision" prohibiting Comcast-NBC from discriminating against rival channels, making sure they are not made more difficult to access.[213] Comcast was cited by the FCC in 2011 for failing to offer Bloomberg news network with the same high definition offerings that were available with MSNBC and CNBC. Comcast settled with the FCC for $800,000 in 2012; however, other smaller companies were facing this same disparate treatment but were not coming forward with their complaints.[214] Generally, Bloomberg, a larger player, was unable to receive equal treatment from Comcast, so there was a chilling effect in the market, where other smaller players were not necessarily bringing their complaints forward.[215] The consent decree required that the merged firm provide OVDs with access to the NBC programming at the same rates offered to Comcast, with fair licensing terms.[216] Additionally, the consent decree required that Comcast, as an ISP, shall not engage in prioritization of its own content over any other content.[217] Comcast has been caught setting caps on unaffiliated online content several different times, in different service areas throughout the country.[218]

Research also supports the inadequacy of such merger remedies, showing that such provisions do little to remedy the competitive harms posed by vertical mergers. A study by economist John Kwoka found that mergers subject to divestiture remedies resulted in price increases of about 5.6 percent.[219] This differed very little from the price increases seen in mergers that were allowed to proceed unquestioned.[220] Conduct remedies, as present in the Comcast-NBCU merger, fared even worse, resulting in an average

212. TAKE CARE BLOG, *supra* note 126.

213. *Id*.

214. *Id*.

215. *Id*.

216. Modified Final Judgment at 9–10, United States v. Comcast Corp., 808 F. Supp. 2d 145 (D.D.C. 2011), https://www.justice.gov/file/492176/download.

217. *Id*.

218. *Comcast: A History of Broken Promises*, CONSUMER REPORTS (Mar. 1, 2014), https://advocacy.consumerreports.org/research/comcast-a-history-of-broken-promises/.

219. KWOKA, *supra* note 195, at 47.

220. *Id*.

price increase of above 13 percent.[221] FTC research shows that structural remedies successfully restored lost competition in only a minority of cases.[222] While conduct remedies have increasingly become the remedy of choice for vertical mergers, studies have shown that both structural and behavioral remedies are "at best only partially effective in constraining firms that have been allowed to merge.[223]

To the extent conduct remedies are used, they take the form of consent decrees, and we have seen that such decrees don't work to address the anticompetitive harms of a vertical merger. The internet industry is most vulnerable to exclusionary conduct through vertical arrangements. In a where vertical arrangements are viewed permissively, it becomes even more likely that exclusionary conduct will occur. If such conduct is challenged, it will often be subject to ineffective conduct remedies that are demonstrably easy for internet service providers to violate.

Conclusion

ISPs' possession of gatekeeper power in the internet marketplace incentivizes them to adopt anticompetitive practices favoring the content of their affiliate content providers and profiting through establishment of fast and slow lanes. In 2008, the FCC filed its first major action against an ISP for slowing down internet traffic (also known as "throttling").[224] In 2012, Verizon was caught blocking application downloads.[225] That same year, AT&T was found to have blocked Facebook access to its customers with Apple devices.[226] These were the types of harms the 2015 Order addressed.

The net neutrality rules of the 2015 Order provided an administrative approach to ensuring the efficient ordering of relationships between distribution and media. It provided bright-line conduct rules under Title II

221. *Id*.

222. *See* FTC, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf.

223. *See* Kwoka & Moss, *supra* note 198, at 98.

224. *See* In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C. Rcd. 13028, 13034, ¶ 13 (2008).

225. Consent Decree, In the Matter of Cellco Partnership d/b/a Verizon Wireless, 20 F.C.C. Rcd. 8936, ¶¶ 2,4 (2012), https://www.google.com/search?client=safari&rls=en&q=In+the+Matter+of+Cellco+Partnership+d/b/a+Verizon+Wireless,+20+F.C.C.+Rcd+8936&ie=UTF-8&oe=UTF-8.

226. David Kravets, *Net Neutrality Groups Challenge AT&T FaceTime Blocking*, WIRED (Sept. 18, 2012), https://www.wired.com/2012/09/factime-fcc-flap/.

authority, giving ISPs clear guidance as to what they were permitted to do. However, despite scant evidence that harm was unlikely, the FCC went forward with deregulating internet service providers, putting all trust in the FTC and the antitrust laws to combat anticompetitive behavior by ISPs.

This note has argued that the “lighter touch framework” of the 2018 Order provides an illusion of control, while exposing the internet marketplace to the risk of anticompetitive harms that were effectively dealt with in the 2015 Order. Repealing the conduct rules in favor of case-by-case antitrust enforcement ultimately puts the burden on the consumer and the edge provider to enforce ISP wrongdoing, an outcome the net neutrality rules sought to prevent.