Federal Trade Commission

Broadband Policy & Consumer Welfare:
The Case for an Antitrust Approach to Net Neutrality Issues

Remarks of Joshua D. Wright*
Commissioner, Federal Trade Commission

at the

Information Economy Project's
Conference on US Broadband Markets in 2013

George Mason University School of Law
Arlington, VA

April 19, 2013

Good morning. Thank you for the kind introduction. I am delighted to be here today. I am particularly happy to be among so many familiar faces here at George Mason—a truly fantastic institution that has played an important part in my career and a place where I have developed a number of close friendships over the years. Thank

---

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my advisor, Jan Rybnicek, for his invaluable assistance in preparing this speech.

you to the Information Economy Project for putting together this terrific conference, and to Professor Tom Hazlett for the invitation to share my views.

Today I would like to talk about competition and regulation in broadband markets from a consumer welfare perspective. The consumer welfare perspective is the lodestar of competition policy and antitrust analysis generally, and of course, guides decision-making at enforcement agencies like the Federal Trade Commission ("FTC"). Specifically, I hope to make the case for why antitrust is particularly well suited for addressing the concerns raised in the longstanding debate surrounding net neutrality in a manner that best serves consumers, and to explain why I believe the FTC's core competencies as an antitrust and consumer protection agency make it equal to the task.

In doing so, I plan to highlight several of the economic problems with the current regulatory scheme found in the Federal Communications Commission's ("FCC") net neutrality rules, and to discuss how antitrust's "rule of reason" framework can be used to analyze business practices in the broadband sector to separate socially beneficial practices from those that are harmful in order to achieve the best result for consumers. I also will highlight some of the FTC's institutional advantages in dealing with issues related to broadband competition.

But before I get too far along, I should mention that the views I express today are my own and not necessarily those of the Commission or any other Commissioner.

With that disclaimer out of the way, let me begin by briefly setting the stage and summarizing the state of play in the net neutrality debate.

I. State of Play in the Net Neutrality Debate

As many of you know, in December 2010, over the dissent of two commissioners, the FCC released a final order regulating broadband providers ("Net Neutrality Order").[1] The FCC's Net Neutrality Order has three primary components. First, the Order includes a "transparency" provision that seeks to improve visibility into broadband provider practices by requiring network providers to explain their services to customers. Second, the Order contains a "no blocking" provision that requires broadband providers to permit customers to use whatever computers, mobile devices, or other applications they desire with the network access they purchase. Third, the Order includes a "no unreasonable discrimination" provision that imposes restrictions on how broadband providers price and package their services.

The first in this regulatory trio has only generated modest controversy. The second and third provisions, however, have created a firestorm over both the FCC's legal jurisdiction and the ultimate economic effect of the regulations. These latter regulations are intended in large part to address concerns that broadband providers might adopt business strategies and practices to disadvantage rivals and ultimately to

[1] *In re Preserving the Open Internet*, 25 FCC Rcd 17,905 (2010) [hereinafter FCC NN Order].

harm competition and therefore also to leave consumers worse off.[2] Proponents of net neutrality fear, for example, that a broadband provider could enter into a contract with one online video site to deny a rival video site's access to the provider's subscribers.[3] Exactly how tightly the regulations contained in the Net Neutrality Order will be enforced and in what scenarios they will apply remains unclear, but the Net Neutrality Order gives the FCC wide latitude to challenge all manner of network management if deemed "unreasonable" and enforcement efforts to date do little to assuage concerns that the regulation's scope categorically bars various forms of efficient and consumer welfare-enhancing economic integration.[4]

Now, the FCC's attempt at imposing net neutrality regulations is hardly unprecedented. Indeed, only eight months prior to issuing the Net Neutrality Order the D.C. Circuit struck down the FCC's first attempt at invoking far-reaching ancillary jurisdiction over Internet network providers.[5] That ruling stemmed from the FCC's

---

[2] *Id.* at 17,915 ¶ 21.

[3] *Id.* at 17,918 ¶ 23.

[4] The Order provides several examples of suspect conduct. *Id* at 17,925-26 ¶¶ 35-36. One example involves when "[a] major mobile broadband provider prohibits use of its wireless service for downloading movies using peer-to-peer file sharing services and VoIP applications." *Id.* at 17,926 ¶ 36 (internal quotations omitted). This example apparently refers to MetroPCS, the nation's fifth largest mobile operator, which offers consumers a choice between a more expensive plan on its 4G network and a less expensive plan on its older 2G network that excludes video streaming other than through YouTube. Although rival sites are disadvantaged by the arrangement, because MetroPCS does not have market power, this arrangement cannot cause anticompetitive foreclosure. Rather, the consumer benefits inherent in offering a lower cost plan to consumers are intuitively obvious. Nonetheless, MetroPCS's pricing plan became the first target of a complaint filed under the Order.

[5] *See Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

issuance of a policy statement in 2005[6] that first outlined the principles eventually adopted in the 2010 Net Neutrality Order.[7] The FCC later sought to enforce those principles by sanctioning Comcast for managing network traffic by differentiating data speeds for certain peer-to-peer file sharing applications. Comcast appealed the order to the D.C. Circuit, challenging the FCC's authority to regulate the Internet network providers. In a striking rebuke of the FCC's claim of ancillary jurisdiction, the D.C. Circuit held the FCC lacked any statutorily mandated authority to enforce its net neutrality rules. That, of course, was not the end of the story.

Significantly, the FCC employed a substantially similar ancillary jurisdiction theory as the one rejected in *Comcast* to adopt the Net Neutrality Order. The Commission's latest rulemaking unsurprisingly has become embroiled in yet another round of litigation—this time with Verizon and MetroPCS—regarding the agency's authority to regulate the Internet.[8] The outcome of that litigation, which currently is again before the D.C. Circuit, may determine whether the FCC ultimately stays on as the top cop on the Internet beat or whether that responsibility may fall to someone else.

---

6 *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14986 (2005) (policy statement).

7 *See* FCC NN Order, *supra* note 1, at 17,907 ¶ 5 (stating rules adopted in the Net Neutrality Order "follow directly from the Commission's bipartisan Internet Policy Statement, adopted unanimously in 2005").

8 *Verizon et al v. FCC*, No. 11-1355 (D.C. Cir. filed July 2, 2012).

Now, I won't bore you with the details of the parties' jurisdictional arguments or speculate about the likely outcome of the case—you all are at least as well, if not better, positioned than I am to play that game. What I will say is that I think the Net Neutrality Order is a strikingly poor policy when analyzed from a consumer welfare perspective, not least of all because it is premised upon the not so subtle irony that the best way to preserve the Internet as an open and competitive platform is by imposing a set of far-reaching regulations never before imposed on it. But even more concerning is that the Net Neutrality Order deploys a set of relatively blunt and rigid rules to deal with complex legal and technological problems in a manner that ultimately may prevent precisely the type of investment and innovation that has fueled the Internet's growth to date and improved user experience.[9]

Of course, none of this is to say that competition in broadband markets should be immune from the kind of scrutiny given to other areas of the economy. Indeed, I agree with net neutrality proponents that it is at least theoretically possible that a broadband provider might enter into an arrangement that could potentially harm competition and consumers under certain circumstances. And I also firmly believe that where there is sufficient evidence to show that such arrangements have been used anticompetitively to harm consumers, there should be a regulatory regime tasked with policing and

[9] *See generally* Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 Ind. L. Rev. 767 (2012).

prohibiting such arrangements. The critical question, however, is not whether anticompetitive arrangements should be barred – on that I think there is broad consensus – it is instead whether we can identify the best regulatory regime for addressing this concern.[10]

As I will discuss in a moment, I think that antitrust quite clearly offers a far superior approach to addressing potential anticompetitive practices in broadband markets than the rules currently embodied in the Net Neutrality Order. To understand why, I want to spend some time talking about the tensions between the FCC's Net Neutrality Order and the economic and empirical evidence related to vertical restraints, as these practices are generally referred to within the economics literature.

II. Net Neutrality from an Economic Perspective

At its heart, the Net Neutrality Order seeks to prohibit broadband providers from entering into vertical contractual relationships out of fear that they have an incentive to disadvantage rivals and ultimately harm competition.[11] Support for this fear comes from the modern vertical foreclosure theory emerging from "raising rivals' costs" literature, which outlines the conditions under which a monopolist can

---

[10] *See* Howard A. Shelanski, *Network Neutrality: Regulating With More Questions Than Answers*, 6 J. Telecomm & High Tech. L. 23 (2007) (examining claims by opponents and proponents of net neutrality, and arguing for a middle ground that restricts some kinds of network discrimination while allowing other types).

[11] FCC NN Order, *supra* note 1, at 17,915 ¶ 21.

disadvantage rivals, reduce competition, and thus harm consumers.[12] Students of antitrust will recognize that these economic concerns are identical to those animating antitrust rules governing vertical relationships. And indeed, while there is little dispute among industrial organization economists that vertical restraints might be used anticompetitively, that possibility represents but one side of the consumer welfare ledger. The fundamental failing of the Net Neutrality Order is that it creates a categorical prohibition against vertical contracts without acknowledging the vast economic literature and empirical evidence that support the view that such vertical arrangements are usually procompetitive.

Although it is well-accepted that vertical contracts occasionally can lead to anticompetitive foreclosure under certain specific conditions, it is equally clear and has long been understood that such arrangements often are part of the regular competitive process and can generate significant efficiencies that enhance consumer welfare.[13] Indeed, the economic literature is replete with procompetitive explanations for vertical contracts. For instance, such arrangements can create efficiencies by reducing double marginalization, preventing free riding on manufacturer-supplied investments, and

---

[12] *Id.* at 17,918 ¶ 23 n. 59 (citing Steven C. Salop & Thomas Krattenmaker, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 214 (1986)).

[13] *See, e.g.*, Oliver E. Williamson, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. Pa. L. Rev. 953 (1979).

aligning incentives of manufacturers and distributors.[14] In fact, vertical contracts are frequently observed between firms lacking any meaningful market power, implying that there must be efficiency justifications for these practices. These efficiencies are at least partially passed on to consumers in the form of lower prices, increased output, higher quality, and greater innovation.

In addition to the theoretical economic literature, there is considerable empirical evidence that strongly supports the view that vertical contracts are more often than not procompetitive. Over the last twenty-five years there has been a concerted effort to pair a robust set of empirical evidence with the various economic models of vertical restraints. These studies undeniably paint a picture that vertical restraints are typically procompetitive, and cut sharply against the idea that vertical contracts in the broadband markets likely, much less generally, are used in a way that harms competition. One survey of the existing empirical literature conducted by a group of economists at the FTC and Department of Justice observes that "empirical analyses of vertical integration and control have failed to find compelling evidence that these practices have harmed competition, and numerous studies find otherwise," and while "some studies find evidence consistent with both pro- and anticompetitive effects,"

---

[14] *See, e.g.*, Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & Econ. 421 (2007); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 Antitrust L.J. 473 (2007); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & Econ. 265 (1988); Howard Marvel, *Exclusive Dealing*, 25 J.L. & Econ. 1 (1982).

"virtually no studies can claim to have identified instances where vertical practice were likely to have harmed competition."[15] Another survey of empirical studies reaches a similar conclusion: finding that "it appears that when manufacturers choose to impose restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision . . . the evidence thus supports the conclusion that in these markets, manufacturer and consumer interest are apt to be aligned."[16] Another analysis of three more recent studies concludes that, "with few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons," and supports "a fairly strong prior belief that these practices are unlikely to be anticompetitive in most cases."[17]

Admittedly, an overwhelming majority of these studies deal with markets unrelated to broadband, cable, or wireless markets. But there is no evidence that sufficiently shows that vertical contracts in broadband markets should be treated differently or that they are more likely to be anticompetitive than procompetitive.[18] Indeed, the handful of anecdotal examples of foreclosure by broadband providers over

---

[15] James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 Int'l J. Indus. Org. 639, 18 (2005).

[16] Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi ed., 2009).

[17] Daniel O'Brien, *The Antitrust Treatment of Vertical Restraint: Beyond the Possibility Theorems*, *in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73 (2008).

[18] *See* Hazlett & Wright, *supra* note 9, at 811-34 (discussing why the economic arguments fail to support the claim that anticompetitive foreclosure threatens to disrupt broadband markets).

the course of nearly a decade, even when the cases are viewed in a light most favorable to net neutrality proponents, evinces the pervasively procompetitive nature of vertical contracts.[19] In the FCC Net Neutrality order, the FCC responded to the need to cite an economic analysis demonstrating vertical foreclosure in broadband with a single study—and it was not concerning broadband services, but cable video.[20] And, it should be further noted, this one paper merely suggested that anticompetitive vertical integration might occur, but could not document it in the data examined.[21]

Moreover, the marketplace experience demonstrates that "non-neutral" business models deployed by broadband providers have often proven highly efficient. Take for example "walled gardens," which have played an essential part of the Internet's development by bolstering incentives for investors and spurring innovation.[22] In the mid-1990's, when most web content appealed to mass-market consumers, AOL paid brand name media companies, such as *TIME Magazine* and the *New York Times*, to

---

[19] *See* Gerald R. Faulhaber, *Economics of Net Neutrality: A Review*, 3 Comm. & Convergence Rev. 53, 57 (2011) (observing that "by any standard, four complaints about an entire industry in over a decade would seem to be cause for a commendation, not for restrictive regulations").

[20] FCC NN Order, *supra* note 1, at 17,918 ¶ 23 n. 60 (citing Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*, Paper for the FCC 31-32 (Sept. 5, 2007)).

[21] *See* Hazlett & Wright, *supra* note 9, at 817-834 (discussing why the Goolsbee study fails to make a sufficient economic case in support of the Net Neutrality Order).

[22] *See* Hazlett & Wright, *supra* note 9, at 785-796 (exploring the widespread use of non-neutral business practices among Internet service providers). Net neutrality proponents argue that evidence that the market has migrated away from "walled gardens," such as AOL, Prodigy, and CompuServe, suggests that regulation is necessary. This argument proves too much as it demonstrates that in an unregulated Internet integrated models survive and fail on their own merits.

launch a new business model that offered custom content exclusively to its subscribers. This fueled competition with rival Internet service providers and gave AOL the incentive to aggressively market its services to new customers, which ultimately resulting in the distribution of some 250 million disks with AOL software and thus rapidly increased consumers access to the Internet. Preferential deals with Internet service providers also have spurred innovation among web browsers. In 2002, a fledging Google was able to strategically achieve economies of scale by beating out its competition in a bid to become the default search engine on AOL, then the country's leading Internet service provider, by offering a substantial financial guarantee.

To be clear, once again, the economic literature and empirical evidence does not claim that vertical contracts never generate foreclosure and create competitive concerns. There clearly can be disagreement about the likelihood of competitive harm from a specific vertical arrangement in any given case. What the theoretical literature and empirical evidence demonstrates, however, is that vertical contracts, including those captured by the Neutrality Order, are not always anticompetitive and in most cases are procompetitive. This is a critical observation for answering the question: "what kind of regulatory regime and legal rules governing this behavior will best serve consumers?" The Net Neutrality Order clearly does consumers a disservice by employing an overly rigid, one size fits all, categorical ban on broadband providers' ability to enter into vertical contractual arrangements that are potentially—if not probably—efficiency enhancing. The question then, which I will turn to next, is whether antitrust can offer a superior alternative to the blunt approach required by the Net Neutrality Order.

III. Antitrust, the FTC, and Broadband Competition

a. "Rule of Reason" Approach to Net Neutrality Issues

Vertical contracts pose a more complex problem for fashioning an efficient legal rule than many other types of business conduct. Whereas it is relatively easy to establish rules to address conduct that is either presumptively anticompetitive, such as cartels, or nearly always procompetitive, such as above cost price reductions, vertical contracts have ambiguous welfare effects. Lacking any method for identifying network discrimination that should be barred as anticompetitive or absolved because they are procompetitive, the FCC chose a blanket proscription that bars all vertical arrangements by broadband providers.

What approach has antitrust taken to the same problem? Significantly, what has been a novel dilemma for the FCC is a problem that antitrust has been grappling with for over a century and for which, fortunately, it offers a clear solution. Indeed, over the course of the last century, antitrust jurisprudence has evolved a highly sophisticated "rule of reason" balancing approach for investigating and adjudicating various types of vertical arrangements. The rule of reason requires that each vertical arrangement be assessed on a case-by-case basis by marshaling the available economic literature and empirical evidence available at the time to evaluate the evidence of actual competitive harm under the specific circumstances of the case. Indeed, antitrust law initially adopted and ultimately rejected—largely based upon the development of the economic and empirical literature discussed above—a categorical prohibition not unlike the one adopted by the Net Neutrality Order to various vertical restraints throughout its history.[23]

In assessing whether antitrust's rule of reason framework offers a superior alternative to net neutrality regulations it is first necessary to identify the features of a desirable rule. As I have previously mentioned, I believe that any rule governing competition policy, including competition in broadband markets, must focus upon consumer welfare. Now, a legal rule that maximizes consumer welfare requires an analytical framework that takes three factors into account. First, the framework must assess the probability that the challenged business arrangement is anticompetitive. Second, any rule will lead inevitably to errors. Under the Net Neutrality Order's categorical prohibition, instances of procompetitive conduct will be erroneously condemned from a consumer welfare perspective. Under the rule of reason, two types of errors will occur—false positives in which procompetitive conduct is mistakenly condemned, and false negatives where antitrust fails to condemn conduct that is

[23] *See, e.g.*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (applying rule of reason to minimum resale price maintenance); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (applying rule of reason to maximum resale price maintenance); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 54-57 (1977) (applying rule of reason to non-price vertical restraints).

actually anticompetitive. A sensible framework must evaluate the magnitude of the social cost of both types of errors. Third, the framework must acknowledge the administrative costs of implementing the alternative legal rules.[24] A bright-line prohibition is clearly less costly to administer than a case-by-case analysis.

The framework I've described above for assessing legal rules is often called the "error-cost" approach. Importantly, it allows for the use of new evidence to update regulators' prior beliefs about the procompetitive or anticompetitive nature of a specific business practice as the theoretical and empirical understanding of the practice evolves over time or with case-specific information. A rule that focuses upon minimizing the social costs of false positives, false negatives, and administrative costs is most likely to generate the highest rate of return for consumers.

When would a categorical prohibition on a business practice make economic sense for consumers under such a framework? A blanket rule or per se prohibition would be appropriate only if vertical contracts were overwhelmingly, but not necessarily always, likely to cause competitive harm and the ability to engage in a more fact-intensive inquiry to identify instance of procompetitive vertical contracts provided a sufficiently small marginal benefit to consumers.[25] Thus, for net neutrality to generate

---

[24] Hazlett & Wright, *supra* note 9, at 798.

[25] Gavil et al., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY 103-06 (2d ed. 2008).

consumer welfare gains relative to antitrust's rule of reason, it simply must be the case that there is a substantial basis in economic literature and empirical evidence upon which to conclude that vertical contracting is nearly always anticompetitive.[26] As I've discussed, the economic theory and empirical evidence decidedly does not support the conclusion that vertical contracts generally, or those under the net neutrality umbrella specifically, are nearly always anticompetitive.

Now, proponents of net neutrality often argue that the fact that antitrust analysis might not prohibit all use of vertical contracts is a bug rather than a feature. They in effect argue that the rule of reason is too restrictive because it only goes after instances of foreclosure or discrimination in which harm to consumers can be demonstrated. My response to that is, well, yes, that's precisely what the rule of reason does.

While the affirmative case for antitrust over net neutrality on consumer welfare grounds is clear, the fact that antitrust might not "work" in all cases does not default to the position that net neutrality is the superior approach. The critical question is not which approach captures all of the potentially anticompetitive arrangements, but rather which approach best enhances consumer welfare. I am quite confident that if the

---

[26] Net neutrality proponent may argue that considerations other than consumer welfare justify the adoption of the Net Neutrality Order and outweigh any consumer welfare losses associated with its adoption. However, the Order itself appears to be grounded in the notion that it will protect competition in broadband markets and generate gains for consumers. *See* FCC NN Order, *supra* note 1, at 17,906 ¶ 1 (stating net neutrality "rules, applied with the complimentary principle of reasonable network management, will empower and protect consumers and innovators while helping ensure that the Internet continues to flourish, with robust private investment and rapid innovation at both the core and the edge of the network").

antitrust regime, after 121 years of trying and developing institutional capacity and expertise in its application, has trouble applying the "rule of reason" in the context of vertical contracts by broadband providers, then it is difficult to imagine another approach doing any better.

b. The FTC and Broadband Competition

Having made the case for why I think antitrust offers a superior approach for addressing net neutrality issues, I'd like to spend the last few minutes discussing some of the FTC's institutional advantages that make it uniquely capable of both tackling complex questions related to competition in broadband markets and nimbly sidestepping the often perilous political debate surrounding net neutrality.

First, as my colleague Commissioner Ohlhausen has pointed out, the FTC's core competencies as an antitrust enforcement and consumer protection agency, combined with the expertise it has developed in matters related to the Internet and broadband access, position the agency well to deal with the difficult legal, economic, and technological issues related to net neutrality.[27] For example, in 2007, Commissioner Ohlhausen—then Director of the FTC's Office of Policy Planning—led a taskforce in investigating issues related to internet connectivity and net neutrality. The taskforce

[27] Maureen K. Ohlhausen, Commissioner, Fed. Trade. Comm'n, Remarks before the MaCCI Law and Economics Conference on the Future of the Internet, The Open Internet: Regulating to Save the Unregulated Internet? (Oct. 26, 2012), *available at* http://www.ftc.gov/speeches/ohlhausen/121026mannheim.pdf

brought together consumer advocates and experts from business, government, academia, and the technology sector to explore competition and consumer protection issues relating to the broadband Internet access. The investigation culminated in the issuance of a comprehensive staff report that represents the agencies vast learning on broadband access and net neutrality issues.[28]

The FTC also has had considerable experience in other areas that touch on net neutrality. For instance, the FTC has analyzed a number of vertical arrangements similar to those falling under the net neutrality umbrella. In fact, several recent cases brought by the FTC show that the agency is perfectly capable of bringing cases based upon vertical theories.[29] In addition, as former Chairman Jon Leibowitz has observed, the focus upon increased visibility into broadband provider practices makes net neutrality very much a consumer protection issue that may best be addressed by relying on the FTC's vast experience with transparency and disclosure issues.[30] Lastly, by placing the consumer protection and antitrust enforcement aspects of net neutrality under one roof at the FTC, we can eliminate inefficient overlapping jurisdictions.

---

[28] Fed. Trade Comm'n, Broadband Connectivity Competition Policy, FTC Staff Report (2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf.

[29] *See, e.g.*, Transitions Optical, Inc., 2010 WL 1804580 (FTC 2010); Intel Corp., 2010 WL 3180281 (FTC 2010).

[30] *See, e.g.*, Jon Leibowitz, Chairman, Fed. Trade Comm'n, Remarks as Prepared for Delivery to the FCC Workshop: Consumers, Transparency, and the Open Internet at 2 (Jan. 19, 2010), *available at* http://www.ftc.gov/speeches/leibowitz/100119leibowitzfccworkshop.pdf.

Second, the FTC's rigorous and well-established consumer welfare analysis constrains the ability of politics to encroach on the agencies' competition and consumer enforcement mission. This is a particular important feature for tackling an issue as thorny and politically charged as net neutrality.[31] The FTC's recent track record supports the view that it can be trusted to assess the merits of a case based on the weight of the evidence not the weight of political pressure. Indeed, earlier this year, just before I joined the Commission, the FTC closed its investigation of Google for employing alleged anticompetitive search practices. This was by no means the easy decision. There was enormous public pressure demanding that the FTC issue an enforcement action against Google. But, in contrast to the debate over whether the Internet should become increasingly more regulated, the FTC at the end of the day put politics aside and focused its analysis upon an evaluation of the competitive effects of Google's search algorithm decisions and ultimately determined that a case was not warranted.

IV. Conclusion

While the FTC's role in regulating broadband markets remains unclear at the moment, suffice it to say that we are up to the task of addressing competition and

[31] *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Remarks Before the Global Forum 2011: Vision for the Digital Future, Neutral on Internet Neutrality: Should There Be a Role for the Federal Trade Commission, at 18-20 (Nov. 7, 2011), *available at* http://www.ftc.gov/speeches/rosch/111107globalforum.pdf (arguing the FTC should stay out of net neutrality because the "arena is arguably too political and too regulatory an environment").

consumer protection issues arising in Internet markets generally, and more specifically, of applying our considerable experience and expertise in analyzing the vertical issues to the net neutrality context.

Thank you once again to Professor Hazlett and the Information Economy Project for having me. I am happy to take your questions.

* * * * *