The American Antitrust Institute

June 27, 2014

Representative Spencer Bachus
Chairman
House Judiciary Committee
Subcommittee on Regulation Reform,
Commercial, and Antitrust Law
2138 Rayburn House Office Building
Washington, DC 20515

Representative Hank Johnson
Ranking Member
House Judiciary Committee
Subcommittee on Regulation Reform,
Commercial, and Antitrust Law
2240 Rayburn House Office Building
Washington, DC 20515

Re: Why FCC Regulation Is Superior to Current Antitrust Law for Protecting the Open Internet

Dear Chairman Bachus and Ranking Member Johnson,

The American Antitrust Institute[1] respectfully responds to whether open internet policy, also known as "network neutrality," can best be accomplished through application of the existing antitrust laws or through regulation by the Federal Communications Commission (FCC). Antitrust law has a critical role to play in policing mergers, collusion, and exclusion that threaten competition among internet service providers (ISPs), content providers, and other players on the internet. The Federal Trade Commission (FTC) should also use its broad statutory authority under Section 5 to protect competition in this important area. Aggressive antitrust enforcement is especially vital in markets characterized by network effects and rapid technological innovation. But while antitrust enforcement should complement regulation, we believe that FCC action should continue to play the lead role in maintaining an open internet.

I. The Aim of Open Internet Regulation Is More Expansive than the Focus of Modern Antitrust Law

a. Open Internet Policy Promotes Both Economic and Non-Economic Objectives

Open internet policy seeks to promote both economic and non-economic objectives. These goals include competitive markets for content and a vibrant realm of free expression.

Such a policy would be intended to ensure that all firms—new and old, large and small—can compete against each other on the merits. It would prevent vertically integrated firms, those that

[1] The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org. The AAI's Board of Directors alone has approved this filing. The individual views of members of the AAI Advisory Board may differ from the AAI's position.

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both provide broadband access and own content, from discriminating against competing, non-affiliated content. For example, Time Warner Cable would not be allowed to throttle streaming speeds for Netflix as a means of promoting its own Time Warner TV services. Likewise, Comcast could not boost the loading and video playback speeds of its own MSNBC.com at the expense of Foxnews.com.

Powerful content owners would also not be able to pay to obtain preferential access on broadband networks. They would not be allowed to insulate themselves from competition using their existing size and greater ability to pay broadband providers. In early 2006, for example, Google launched Google Video to compete with Microsoft's MSN Video and, more importantly, with a popular month-old startup, YouTube.[2] If Google or Microsoft had been able to pay for faster streaming speeds, YouTube may have withered on the vine, despite offering what users perceived as a superior service. Many of these concerns are in line with the goals of antitrust—ensuring competitive prices and maximizing consumer choice, for example—though they could be addressed through FCC regulation.

But open internet policy aims to protect more than just a competitive and innovative content market. It aspires to maintain an internet that supports a free and robust exchange of ideas. An open internet policy seeks to ensure that ISPs, who are gatekeepers between users and content, cannot stifle ideas they do not like. Many Americans do not have a choice of broadband providers,[3] and, for those that do, long-term contracts and penalties for early termination create significant switching costs.[4] Even consumers who enjoy a choice of providers do not have a realistic option of switching to a competitor if their current provider throttles a single, favored website. Though it may be an extreme example, absent open internet rules, nothing would prevent an ISP from blocking its subscribers' access to the campaign website of a politician who refused to support its favored policies. With such power, a provider can silence the voice of "unwelcome" speakers with a mere flick of the switch.

While these harms may seem merely speculative, they are not. In fact, such abuses have already happened—in both the wireline and wireless markets. In 2005, Telus, a Canadian ISP, was involved in a labor dispute with the Telecommunications Workers Union, and locked out the union members. It proceeded to block access to a website organizing and supporting the locked-out workers to all

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[2] Kevin J. Delaney, *Google in Talks to Buy YouTube for $1.6 Billion*, WALL ST. J., Oct. 7, 2006, *available at* online.wsj.com/news/articles/SB116014813857884917; Gavin O'Malley, *YouTube is the Fastest Growing Website*, ADAGE.COM, July 21, 2006, *available at* adage.com/article/digital/youtube-fastest-growing-website/110632.
[3] Twenty-eight percent of American households have only one choice in broadband. Zach Epstein, *Almost One-Third of U.S. Households Have No Choice for Broadband Internet Service*, NEWS.YAHOO.COM, Mar. 14, 2014, https://news.yahoo.com/almost-one-third-u-households-no-choice-broadband-124510155.html.
[4] *See, e.g.*, Nicholas Economides, *Broadband Openness Rules are Fully Justified by Economic Research*, 84 COMM. & STRATEGIES, 4th Q., 2011, at 1, 12; *see also* *Verizon Commns. Inc. v. FCC*, 740 F.3d 623, 664 (D.C. Cir. 2014) (finding such long-term contracts ancillary to their analysis).

subscribers in western Canada.[5] In a similar vein, in 2007 AT&T contracted to be the presenting sponsor and sole provider of streaming services to a concert by the rock band Pearl Jam. During the stream, AT&T shut off the sound when the lead singer, Eddie Vedder, criticized President Bush, denying subscribers their ability to hear his speech.[6] Also in 2007, Verizon Wireless cut off access to an internet and text messaging program of NARAL Pro-Choice America, and stated it would not serve any group "that seeks to promote an agenda or distribute content that, in its discretion, may be seen as … unsavory."[7] In a 2014 survey, one in four European consumers reported experiencing content blocking by their provider.[8] Open internet policy seeks to prevent such abuses, and a suitably broad rule could be crafted by the FCC.

b. *Modern Antitrust Law Does Not Aim to Advance Political and Social Goals*

The non-economic aims of open internet policy go beyond the scope of modern antitrust law. Antitrust law, as it is currently applied, focuses strictly on economic goals; it rejects any consideration of social policy.[9]

Antitrust law, like open internet policy, is concerned with competition on the merits. As presently interpreted by most courts, antitrust law seeks to promote economic goals like competitive prices, abundant consumer choices, and dynamic product innovation. Some of the economic problems described above—vertically integrated firms blocking competitors or large incumbents using their size to drive out smaller innovators—could be challenged through an antitrust suit. But the second set of open internet concerns, relating to an internet where ideas can be spoken and heard freely, is not within the ambit of modern antitrust law.[10]

In the past, antitrust law addressed social and political goals, as courts interpreted the laws as intending to combat all the adverse effects of concentrated markets. Cases like *Brown Shoe Co. v. United States*[11] and *Associated Press v. United States*[12] upheld the intention of Congress that antitrust laws address social harm as well as economic dysfunction. But those days are over. Following writings by such scholars as Richard Posner and Robert Bork, the Supreme Court has narrowed the focus of the

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[5] Ian Austen, *A Canadian Telecom's Labor Dispute Leads to Blocked Web Sites and Questions of Censorship*, N.Y. TIMES, Aug. 1, 2005, *available at* www.nytimes.com/2005/08/01/business/worldbusiness/01telus.html.
[6] Jon Healey, *AT&T Drops Pearl Jam's Call*, L.A. TIMES BIT PLAYER, Aug. 8, 2007, *available at* http://opinion.latimes.com/bitplayer/2007/08/att-drops-pearl.html.
[7] Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, *available at* http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=0.
[8] European Commission, *E-Communications and Telecom Single Market Household Survey*, Report 414, 114–20 (Mar. 2014), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_414_en.pdf.
[9] *See, e.g.*, Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013); *see generally* Symposium, *The Goals of Antitrust*, 81 FORDHAM L. REV. 2151 (2013).
[10] For a dissenting analysis, *see* Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy*¸42 CONN. L. REV. 101 (2009); Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).
[11] 370 U.S. 294, 316 & fn.28 (1962) (recognizing the importance of local control over industry and the maintenance of small businesses).
[12] 326 U.S. 1, 20 (1945) (finding Sherman Act vital to maintaining a free press against private restrictions).

antitrust laws. Decisions in National Society of Professional Engineers v. United States,[13] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,[14] and Continental Television, Inc. v. GTE Sylvania, Inc.[15] have held that the Sherman Antitrust Act now addresses solely economic concerns. Neither censoring Pearl Jam nor, for that matter, blocking access to a politician's election website, presents the kind of "competitive injury" that can be regulated by contemporary antitrust law.

If antitrust law alone were used to promote an open internet, ISPs could stifle speech that they find distasteful without violating the law. This approach would necessarily leave one of the goals of open internet policy, as outlined above, unmet. Given the current state of antitrust law, only FCC action can ensure that both goals are achieved.

II. Current Antitrust Law Is Not Doctrinally Equipped to Preserve an Open Internet

Leaving aside its focus on strictly "economic" considerations, antitrust law today does not have the doctrinal tools necessary to protect the open internet. Two recent Supreme Court decisions have weakened antitrust law's applicability to violations of open internet norms. They have raised the standards for refusal-to-deal claims and created the possibility that natural monopolies are not subject to a duty to share. In light of the Supreme Court's uncritical deference to dominant firms, ISPs may not be liable for choking off their direct competitors in content. Even if the so-called essential facilities doctrine survives these two rulings, it is a flawed means by which to preserve an open internet. An aggressive application of the essential facilities doctrine would, at most, maintain openness for only select types of content and in only parts of the country.

a. Supreme Court Hostility to Refusal-to-Deal Claims

Content owners could bring refusal-to-deal claims against broadband providers that fail to provide access to their networks, or provide access on discriminatory terms. While businesses have broad discretion as to whom they deal with, this discretion is not unlimited, especially in the context of dominant firms.[16] The Court once held that dominant firms that refuse to deal with rivals should present an efficiency justification for their conduct; otherwise they would face antitrust liability.[17] In recent years, however, the Supreme Court has made it difficult for plaintiffs to win refusal-to-deal claims. Two decisions in the past decade have questioned the earlier rulings on refusals-to-deal and suggested these claims are unlikely to succeed.

[13] 435 U.S. 679, 692 (1978) ("The purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether the policy favoring competition is in the public interest.").
[14] 509 U.S. 209, 220 (1993) (finding that "Congress did not intend to outlaw price differences that result from or further the forces of competition.").
[15] 433 U.S. 3656–59 (1977) (upholding vertical price restraints and market divisions because of theoretical increase in interbrand competition).
[16] United States v. Colgate & Co., 250 U.S. 300 (1919).
[17] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).

The Supreme Court decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* limited the scope of refusal-to-deal liability.[18] To what extent is unclear, however. The Court held that it would not recognize antitrust refusal-to-deal claims simply because a refusal-to-deal violated regulatory requirements.[19] The FCC had brought remedial action against Verizon for its failure to share its network on non-discriminatory terms with rival phone carriers.[20] Because the FCC could resolve the particular dispute, the Court stated that where a regulatory "structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[21]

Troubling dicta in *Trinko* suggest the decision could have broad implications for refusal-to-deal claims. In his majority opinion, Justice Scalia asserted that requiring monopolists to share their facilities with rivals could have dire economic consequences. *Trinko* states that the prospect of monopoly profits is "what attracts 'business acumen' in the first place . . . [and] induces risk taking that produces innovation and economic growth."[22] Given this extraordinary view of monopoly in the economy,[23] the Court stated that mandated sharing of monopoly infrastructure, in addition to requiring judges to act as regulators, could reduce incentives to innovate and might even promote collusion.[24]

In *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, the Court affirmed that FCC sharing obligations do not create an analogous duty-to-deal under the antitrust laws.[25] While the plaintiffs' complaint alleged that the defendant engaged in a price squeeze[26] rather than a refusal to deal, the Court held that "[t]here is no meaningful distinction between the 'insufficient assistance' claims we rejected in *Trinko* and the plaintiffs' price-squeeze claims in the instant case."[27]As in *Trinko*, the Court ruled that the plaintiffs had not stated a cognizable claim under the Sherman Act.[28] Similarly, it stated that regulators are more capable of addressing the plaintiff's price squeeze claim.[29] Even as it acknowledged that refusals-to-deal could, in theory, give rise to antitrust liability, the Court stated that "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[30]

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[18] 540 U.S. 398 (2004).
[19] *Id.* at 406–07.
[20] *Id.* at 403–04.
[21] *Id.* at 412.
[22] *Trinko*, 540 U.S. at 407.
[23] Per Justice Scalia's view, firms would enter markets only if they had the possibility of obtaining monopoly power. Markets everywhere, however, suggest that monopoly power is not a necessary "carrot" for entry.
[24]*Id.* at 407–08.
[25] 555 U.S. 438, 457 (2009).
[26] A vertically integrated firm engages in a price squeeze when it raises its wholesale price and lowers its retail price, thereby making it uneconomical for non-integrated firms to compete. *See United States v. Aluminum Co. of Am.*, 148 F.2d 415, 437–38 (2d Cir. 1945) (Learned Hand, J.).
[27] *Id.* at 450.
[28] *Id.* at 457.
[29] *Id.* at 452–53.
[30] *Id.* at 448.

b. Limits of the Essential Facilities Doctrine

The Court in Trinko did not officially eliminate the essential facilities doctrine. It noted that it has never recognized the essential facilities doctrine by name but stated that it did not see a need to officially repudiate it either.[31]

The essential facilities doctrine requires the sharing of natural monopoly-type infrastructure. In one of the leading cases applying the doctrine, the Seventh Circuit held that a facility is "essential" and has to be shared if:

(1) A monopolist controls the facility;
(2) A competitor cannot practically duplicate the facility;
(3) A competitor is denied access to the facility; and
(4) The facility can be shared feasibly.[32]

The court in MCI also suggested a fifth factor. A plaintiff may also have to prove that the owner of the essential facility denied access as a means of extending its monopoly power into a separate market.[33]

The doctrine has historically been applied to assets with strong natural monopoly characteristics. Courts have directed firms controlling the following facilities, among others, to grant access to competitors on non-discriminatory terms:

(1) Electric transmission lines;[34]
(2) News reports of a dominant wire service;[35]
(3) Railroad bridges and terminals;[36] and
(4) Telephone local loops.[37]

In theory, the doctrine could be applied to broadband providers today. If a neighborhood, city, or state has only one broadband provider, that entity's network may qualify as an essential facility. And if this monopolist provider blocks users from accessing particular content, or degrades the delivery of content, injured consumers or the injured competitor may have a colorable essential facilities claim. An essential facilities claim is most likely to have traction if the broadband provider is blocking non-affiliated content to promote its own content. For example, a broadband provider that

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[31] Trinko, 398 U.S. at 410–11. To our knowledge, at least one court has held after Trinko that the essential facilities doctrine can still be the basis for a Section 2 claim. See Nobody in Particular Presents, Inc. v. Clear Channel Commns, Inc., 311 F. Supp. 2d 1048, 1114 (D. Colo. 2004) (denying defendant's motion for summary judgment on plaintiffs' essential facility claim).
[32] MCI Commns. Corp. v. AT&T Co., 708 F.2d 1081, 1132-33 (7th Cir. 1982).
[33] Id. at 1132.
[34] Otter Tail Power Co. v. United States, 410 U.S. 366, 368 (1973).
[35] Assoc. Press, 326 U.S. at 1.
[36] United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).
[37] MCI, 708 F.2d at 1081.

restricts access to a popular third-party video service to aid its own streaming service may be most vulnerable to antitrust liability.[38]

While an essential facilities claim may be viable against a monopolistic broadband provider, it is much less likely to succeed in markets with multiple providers. In parts of the country, residential customers can select from multiple providers. For example, in some neighborhoods in Washington, D.C., residents can choose from Comcast, RCN, and Verizon FiOS. Under these circumstances, the essential facilities doctrine may be unavailable. The MCI test requires monopolistic control of a facility. In areas with multiple providers, no entity, by definition, has monopolistic control over broadband service. In this type of market, a single provider that blocks access to content is not likely to be found liable under the antitrust laws. Even if competing broadband providers adopt a similar content restriction policy in parallel, antitrust enforcers would have to show some evidence of collusive agreement between them.[39]

Absent a doctrinal reevaluation, even an aggressive application of the essential facilities doctrine is unlikely to preserve a fully open internet. A monopolistic broadband provider could be liable for blocking access to a direct content rival but not for blocking access to content that it deems objectionable for non-economic reasons. Moreover, the essential facilities doctrine may protect an open internet in areas with only a single broadband provider, but not in places with some token choice. Under the most optimistic scenario, an open internet policy premised on the essential facilities doctrine is likely to produce a legal patchwork: some content providers and some consumers would enjoy non-discriminatory access while others would not.

III. Institutional Considerations Favor FCC Action over an Antitrust Law Approach

Institutional considerations also suggest that regulatory action is better suited to preserving an open internet than antitrust litigation. Antitrust is backward looking and intended to resolve specific disputes. The costly and protracted nature of antitrust litigation, along with the risk of reprisal by broadband providers, may also mean that many content owners are unable or unwilling to vindicate their rights to non-discriminatory treatment. In contrast, FCC regulation is forward looking and can apply on an industry-wide basis.

Antitrust litigation is intended to resolve discrete instances of anticompetitive behavior that have occurred or are likely to occur. In the context of non-discriminatory network access, content providers can bring a claim only when a broadband provider has degraded, or has threatened to degrade, access to their site. If a broadband provider does block select content, the content provider will have to initiate legal process to obtain redress.

[38] For the reasons discussed in Section I, a monopolistic broadband provider that blocks access to content for purely political or social reasons may not run afoul of the essential facilities doctrine today.
[39] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Because courts today generally insist on conducting an open-ended economic inquiry, modern antitrust litigation is a costly and drawn-out affair.[40] Plaintiffs typically have to engage in extensive discovery and hire economic experts to establish liability and prove damages. With the flurry of Supreme Court decisions that have tilted procedural rules in favor of defendants,[41] plaintiffs may invest significant time and money in a case only to lose on a motion-to-dismiss or a motion for summary judgment. Even for meritorious claims, the chances of success for plaintiffs are very low.[42] Plaintiffs may spend hundreds of thousands or even millions of dollars litigating a case only to obtain an unfavorable result. Contemporary antitrust process favors large, powerful incumbents over small competitors and new entrants.

A successful antitrust suit only has precedential value if it produces a published opinion. And even then a district court opinion does not carry the same weight as an appellate, let alone Supreme Court, decision. Cases that do survive a defendant's motion for summary judgment are often settled. While a pro-plaintiff decision on summary judgment does yield positive precedent, a single district court decision may not greatly affect business behavior. Take for example a district court decision that denies a broadband provider's motion for summary judgment on a content owner's essential facility claim. Other broadband providers will certainly be put on notice that content discrimination could run afoul of the antitrust laws. Yet, until a more substantial body of legal precedent is developed, broadband providers may feel confident that they can engage in content discrimination without incurring liability.

An antitrust-only approach to internet openness is likely to have adverse effects on competition and innovation in content markets. The uncertainty of future marketability can deter new entry. Internet entrepreneurs may ask themselves: why risk money on a content venture that could be marginalized with impunity by a broadband provider's network practices? In light of the expense and uncertainty of antitrust litigation, the possibility of redress under the antitrust laws is not likely to provide comfort to would-be entrants.

For example, a broadband provider may be able to stifle an emerging third-party content provider in a short period of time through discriminatory tactics. Slow download speeds and other forms of degraded access are likely to result in a significant loss of popularity and revenues from advertising and subscriptions. By the time the antitrust process has been resolved, the content provider may be out of business. Even an outright legal victory is unlikely to revive a departed entrant. In short, a

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[40] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1460–65 (2009).
[41] Many of these decisions have arisen from antitrust claims. *See, e.g.*, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (lowering legal standards for granting defendants' motions for summary judgment); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (lowering legal standards for granting motions-to-dismiss); American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (ruling that bilateral arbitration clauses in standard form contracts should be enforced even if individual arbitration is economically infeasible).
[42] William F. Adkinson, Jr., et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice* app. 5, 14–15 (Working Paper, FTC, 2008), *available at* http://ftc.gov/os/sectiontwohearings/docs/section2overview.pdf ("Of the 539 [Section 2] cases reviewed, 344 (64 percent) were found to have a judicial resolution of all of plaintiff's section 2 claims. *Of these, 335 cases were decided for defendants, and nine were decided for plaintiffs.*") (emphasis added).

protracted process is one of the incumbent's best friends. Under these circumstances, internet ventures are much less likely to attract entrepreneurial initiative and financial support than they would in an environment with guaranteed non-discrimination.

While far from a panacea, FCC action offers important advantages over antitrust litigation in preserving an open internet. The agency can issue forward-looking rules that cover all broadband providers. The result would be a much more comprehensive protection of the internet than antitrust law can realistically provide. We do not intend to suggest that FCC regulation would be flawless or that antitrust law should be displaced in this important area. The FCC would still likely rely on third party complaints in large measure. And the regulatory enforcement process would not resolve disputes overnight. Antitrust enforcement should remain very much involved in protecting competition on the internet. But in an environment subject to forward-looking, industry-wide FCC rules, internet ventures would enjoy greater economic certainty than in one governed exclusively by present antitrust law. Due to the doctrinal state of modern antitrust law, regulation provides the better short-term way to protect important economic, political, and social values.

We would be pleased to discuss this matter further with you or your staff.

Sincerely,

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