

**Before the FEDERAL TRADE COMMISSION
Washington, D.C. 20024**

Hearings on Competition and Consumer Protection in the 21st Century

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

Comment

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Introduction

In response to the Federal Trade Commission’s request for comments in its Competition and Consumer Protection in the 21st Century hearing series, we would like to offer comment on Topic Two with a focus on Part (c) the application of the FTC’s Section 5 authority to the broadband internet access service business.

Proponents of the Federal Communications Commission’s 2015 Title II Order, claim that utility style regulation is the only way to preserve “net neutrality.” In reality, the fear that Internet Service Providers will institute policies of blocking,¹ throttling,² or paid prioritization³ to access content online⁴ are just the sorts of policies that the Federal Trade Commission is equipped to evaluate though the lens of consumer welfare even if no new regulations are implemented.

When the FCC approved RIF, proponents of regulating the internet under Title II of the Communications Act forewarned imminent death, societal decay, and loss of civil rights.⁵

¹ “any practice...that blocks or otherwise prevents end-user access to lawful content, applications, service, or non-harmful devices, including a description of what is blocked.” See *Id.*

² any practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful internet traffic on the basis of content, application, service, user or use of a non-harmful device, including a description of what is throttled.” See *Id.*

³ “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, in exchange for consideration, monetary or otherwise.”
See *Id.*

⁴ Restoring Internet Freedom, Declaratory Ruling Report and Order, and Order WC Docket No. 17-108, FCC 17-166. Para 220.

⁵ See e.g. Farhad Manjoo, *The Internet is Dying. Repealing Net Neutrality Hastens that Death*, NEW YORK TIMES, (Nov. 29, 2017) available at <https://www.nytimes.com/2017/11/29/technology/internet-dying-repeal-net-neutrality.html>, See also Julie Moreau, *Internet a ‘lifeline for LGBTQ people’: Advocates slam net neutrality*

These predictions were a bit extreme to say the least. The FCC is not attempting to destroy the internet. On the contrary, the FCC is pursuing the best strategy to ensure a free and open internet. It is the same course we have been on for the last few decades that brought magnitudes of societal and economic growth through connectivity. The FCC, by passing the RIF Order, has correctly decided that heavy-handed regulation using an archaic telecom statute remains unnecessary.⁶

The FCC made the case that the Title II Order did not actually prevent companies from blocking, throttling, or paid prioritization – the primary asks of net neutrality advocates.⁷ In fact, under the Title II Order, by merely disclosing its activities, a company could proceed at will.⁸ Rather than promoting “net neutrality,” the Title II Order expanded the federal, state, and local governments power to raise fees, interfere with network upgrades, and determine rates.⁹

RIF reverses intrusive government micromanagement of network infrastructure and returns to the light-touch regulatory framework agreed to by the Clinton Administration and a Republican Congress.¹⁰ RIF, hands back oversight of corporate conduct in this area to the FTC,¹¹ and expands upon the transparency and disclosure rules of the 2015 Title II Order to assist with FTC investigations.¹²

This paper seeks to address the concerns raised by proponents of Title II regulation and demonstrates how giving enforcement of ISPs’ conduct back to the FTC is putting the best “cop on the beat.”¹³

Federal Trade Commission

The FTC,¹⁴ under the Sherman Antitrust Act, was granted the authority to protect against “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices.”¹⁵ Over the past few decades, the Federal Trade Commission has demonstrated their ability to resolve consumer harm and unfair competition cases across many sectors

repeal, NBC, Dec. 18, 2017 available at <https://www.nbcnews.com/feature/nbc-out/internet-lifeline-lgbtq-people-advocates-slam-net-neutrality-repeal-n830826>, see also *FCC set to Roll Back Digital Civil Rights with Thursday’s Vote to Repeal Net Neutrality*, Democracy Now, Dec. 13, 2017, available at https://www.democracynow.org/2017/12/13/fcc_set_to_roll_back_digital

⁶Restoring Internet Freedom, Declaratory Ruling Report and Order, and Order WC Docket No. 17-108, FCC 17-166.

⁷ Restoring Internet Freedom, Statement of Chairman Ajit Pai, WC Docket No. 17-108

⁸ Restoring Internet Freedom, Declaratory Ruling Report and Order, and Order WC Docket No. 17-108, FCC 17-166

⁹ *Id.* at 209

¹⁰ *Id.*

¹¹ *Id.*

¹² *About the FTC*, Federal Trade Commission, Bureau of Consumer Protection, available at <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection> (last visited April 23, 2018)

¹³ See, *Restoring Internet Freedom*, Statement of Chairman Ajit Pai, WC Docket No. 17-108

¹⁴ 15 U.S.C. §41

¹⁵ 15 U.S.C. §45(a)(1)

including: pharmaceuticals, healthcare, technology, and manufacturing. The FTC has the appropriate infrastructure and skill set to remedy anti-competitive and anti-consumer behavior on a case-by-case basis supported by an “ample body of precedent.”¹⁶

All angles of the political spectrum argue that regulation should be technology neutral. Many of the issues we face with the Telecommunications Act of 1996 come from the fact that laws and regulations are based off of technologies and platforms, rather than parameters that apply without a “thumb on the scale.” The FTC’s case-by-case approaches toward antitrust, and consumer harm have been applied regardless of industry and will apply to ISPs and Edge Providers, as well.

Antitrust Law

Acting Chairman of the FTC, Maureen Ohlhausen said, “antitrust law is a formidable tool for promoting public interest,” and “antitrust [law] is well positioned to tackle” cases of “harmful exclusion, throttling, or paid prioritization.”¹⁷

A fear of Title II advocates, is that Edge Providers¹⁸ may get blocked or throttled by an ISP because the Edge Providers service competes with a service also provided by the ISP - ISPs like Comcast, AT&T or Verizon slowing or blocking Edge Providers like Netflix, Amazon, or YouTube because the video programming from the Edge Providers competes with on demand or other traditional television services.

However, should a company attempt to block another from accessing the market, the FTC has two different tracks for determining whether or not anti-competitive behavior occurred. In April 2000, the Federal Trade Commission and the Department of Justice published a guideline and framework to the case-by-case approach to handle antitrust disputes. The FTC first looks to one of two analytical frameworks: “per se illegal” or “rule-of-reason.”¹⁹

Per Se Illegal

In some cases, the FTC will look at a business’s conduct, and will immediately challenge it as “per se illegal,” inherently illegal by statute, constitution or case law. A per se violation under the Sherman Act, which governs the FTC, looks at the agreement and presumes it to be illegal without inquiring into the practice’s purpose; actual effect on the market; or intent of the parties engaged. Examples of this are agreements among competitors that

¹⁶ Restoring Internet Freedom, Declaratory Ruling Report and Order, and Order WC Docket No. 17-108, FCC 17-166. Para 244.

¹⁷ Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119 (2016)

¹⁸ “Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.” See, 47 CFR 8.2 (b)

¹⁹ *Antitrust Guidelines for Collaborations Among Competitors*, FTC & DOJ (April 2000) See also, *National Soc’y of Prof’l. Eng’rs v. United States*, 435 U.S. 679, 692 (1978). Pg. 3, Sec. 1.2.

result in price fixing or dividing markets by allocating customers and territory.²⁰ These “agreements are so likely to harm competition and have no significant pro-competitive benefit that they do not warrant...particularized inquiry.”²¹

Salt Co. v. United States is but one of many examples of the Supreme Court’s use of the ‘per se illegal’ standard to challenge a business’s practice.²² In this case, Salt Co. refused to lease salt dispensing machines unless the lessee also purchased all salt used from Salt Co. The Court held this practice violated §1 of the Sherman Antitrust Act as the conduct was “unreasonable, per se, to foreclose competitors from any substantial market.”²³ One could extrapolate this to the instance of an ISP *requiring* all customers purchasing their internet service to use and access only that provider’s content, thus blocking market access for both the general consumer and other content companies. These types of tying arrangements that foreclose a substantial portion of commerce are one of the many different types of agreements that are per se illegal, without courts conducting a full rule-of-reason analysis.²⁴

Rule-of-Reason

For other agreements that warrant a “particularized inquiry,” the court employs a rule-of-reason approach, to determine the “overall competitive effects.”²⁵ This analysis compares the level of competition both with and without the agreement, and examines the question of “whether the relevant agreement likely harms competition by increasing the ability or incentive profitability to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”²⁶ The inquiry is limited in scope to these factors, and undertakes only a narrow factual inquiry.²⁷ It is important to note that this flexible inquiry does not rely on a single dispositive factor; it varies depending on the agreement and its circumstances.²⁸

The analysis typically starts by examining the nature of the agreement.²⁹ If an agreement demonstrates an absence of anticompetitive harm, then it will not be challenged; however,

²⁰ *Id.*

²¹ *Id.*

²² *Salt Co. v. United States*, 332 U.S. 392, 396 (1947)

²³ *Northern Pacific Railway Company and Northwestern Improvement company, Appellants, v. United States of America*, 356 U.S. 1, 8 (1958) citing *Salt Co v. United States*, 332 U.S. 392, 396 (1947)

²⁴The American Bar Association defines a tying agreement as “an agreement between a seller and a buyer under which the seller agrees to sell a product or service to the buyer only on the condition that the buyer also purchases a different product from the seller or buyer agrees not to purchase the tied product from any other seller.” Kate Wallace, *The Wonderful World of Tying*, The American Bar Association, available at https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_wonderful_world_of_tying.html (last viewed 04/02/18)

²⁵Antitrust Guidelines for Collaborations Among Competitors, FTC & DOJ (April 2000) See also, *National Soc’y of Prof’l. Eng’rs v. United States*, 435 U.S. 679, 692 (1978). Pg. 3, Sec. 1.2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

if it is evident, or a harm has resulted, the agency may challenge the agreement without conducting a market analysis.³⁰ If the agreement indicates a competitive concern it would not be challenged but for a detailed analysis. Then the agreement will be reviewed in greater detail.³¹ The agency will then examine relevant factors to identify participant collaboration, and any incentive to compete independently as part of the agreement. If this does not lead to any finding for potential anti-competitive harm, The FTC shall end the investigation.³² However, if a potential harm is found, the FTC will explore a cost-benefit analysis to determine whether there is actual harm.³³ This approach is individualized and has the flexibility to handle rapidly evolving ISP and edge provider business practices.

On May 1, 2000, the FTC announced a settlement with the five major CD distributors.³⁴ The FTC alleged that these companies responsible for 85% of all CD sales engaged in illegally modifying their advertising to induce retailers into raising prices for CDs, allowing distributors to raise their own prices.³⁵ The music companies required retailers to advertise CDs at or above the “minimum advertised price” “set by the distribution company, in exchange for substantial cooperative advertising payments.” The FTC estimated that consumers paid \$480 million more than they should have for music because of these practices.³⁶ The FTC stated it has a “reason to believe that the arrangements... violate[d] the antitrust laws in two respects.”³⁷ First... the arrangements constitute[d] practices that facilitate[d] horizontal collusion among distributors” violating Section 5 of the FTC Act.³⁸ Second, “each distributors arrangement” (viewed individually) constituted “an unreasonable vertical restraint of trade under the rule of reason.”³⁹ Each new case the FTC tackles adds resources to their expansive toolkit to address all potential antitrust violations.⁴⁰

Consumer Harm

The FTC has a demonstrated ability to resolve consumer harm across industry: this includes the internet ecosystem.⁴¹ For example, the “FTC has sued companies for

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Record Companies settle FTC Charges of Restraining Competition in CD Music Market*, Federal Trade Commission, (May 10, 2000) available at <https://www.ftc.gov/news-events/press-releases/2000/05/record-companies-settle-ftc-charges-restraining-competition-cd>

³⁵ *Id.*

³⁶ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *FTC Says AT&T Has misled Millions of Consumers with ‘Unlimited’ Data Promises*, Federal Trade Comm’N, available at <https://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data> (last visited April 20, 2018)

foreclosing rival content in an exclusionary or predatory manner,” And dealt with issues including discrimination, bundling, vertical mergers and downstream markets.⁴²

Unfair Acts or Practices:

Section 5(n) of the Federal Trade Commission Act states that an act is considered unfair if:

The act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition ... [T]he Commission may consider established public policies as evidence ... [but] public policy considerations may not serve as a primary basis for such determination.⁴³

Through a three-step process that can apply across any industry, the FTC examines unfair acts or practices on a case-by-case basis. Under Section 5 of the FTC Act, an unfair act or practice is one that “causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves, and “not outweighed by countervailing benefits to consumers and competition.”⁴⁴ In short, the FTC asks 1) was there injury? If yes, 2) was it reasonably avoidable? If not, 3) was there a countervailing benefit? If there was unavoidable injury with no countervailing benefit, then there is an unfair act or practice causing consumer harm.

In *FTC v. Neovi, Inc.*, Qchex, a company owned by Neovi, enabled users to create and send unverified checks through their website.⁴⁵ The system was vulnerable to con-artists and fraudsters enabling them to easily obtain personal information and draw fraudulent checks.⁴⁶ In the company's existence 13,750 accounts were frozen for fraud and almost 155,000 fraudulent checks were issued worth more than \$402 million.⁴⁷ The FTC challenged Qchex under Section 5 of the FTC Act.⁴⁸

The District Court held that the FTC does have broad powers to prevent businesses from engaging in unfair acts and practices, and that QChex was liable for the “unfair creation and delivery of unverified checks.”⁴⁹ Qchex had “reason to believe” that unauthorized checks were being drawn, and, despite this, continued issuing checks without verification facilitating and providing substantial assistance to a multiple of deceptive schemes.⁵⁰ The

⁴² Maureen K Olhausen, Putting the FTC Cop Back on the Beat, Remarks at the Future of Internet Freedom

⁴³ 15 U.S.C. § 45(n)(1994)

⁴⁴ J. Thomas Rosch, *Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence*, Federal Trade Commission (May, 2007)

⁴⁵ *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1151 (9th Cir. 2010)

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

9th Circuit court held that Qchex engaged in behavior that “was, *itself*, injurious to consumers.”⁵¹

The FTC defines a substantial injury as something that “does a small harm to a large number of people,” or “raises a significant risk of concrete harm” to anyone.⁵² This does not include emotional injury or distress.⁵³ Consumer harm can be either a direct or indirect harm “contemplated by the FTC Act in a variety of ways.”⁵⁴ In assessing that “harm,” the FTC looks to the “deceptive nature of the practice, but the absence of deceit is not dispositive, nor is actual knowledge of the harm a requirement under the Act.”⁵⁵ The 9th Circuit held in *FTC v. Neovi* that the FTC had met its burden of establishing a substantial injury as individuals, businesses, large institutions and government agencies, whether they had an account with Qchex or not, ‘were injured by a practice for which they did not bargain.’⁵⁶

In determining avoidability, a court will look at whether the consumer’s injury was reasonably avoidable, and whether they had a “free and informed choice.”⁵⁷ Avoidability depends on whether customers “understand the necessity of actually taking those steps”, not just “whether people know the physical steps to take in order to prevent it.”⁵⁸ In *FTC v. Neovi*, the District Court described in detail the aggravation caused by trying to reverse undisclosed payments.⁵⁹ “Regardless of whether a bank eventually restored consumers’ money, the consumer suffered unavoidable injuries that could not be fully mitigated.”

Balancing countervailing benefits to consumers or competition compared to injury serves to determine whether or not conduct is unfair. These offsets may include lower prices, or greater availability of goods and services. The costs of remedying the injury to determine whether the act or practice is unfair will be taken into consideration.⁶⁰ For the cost-benefit analysis the Commission looks at the potential costs and proposed remedy to determine what it would “impose on the parties.”⁶¹ The harms caused by fraud and Qchex lack of effort to prevent it, outweighed any benefit of being able to establish an account and send checks more easily.

The Commission on occasion will also consider public policies, although it is not dispositive. This serves as “an important check on the overall reasonableness of the

⁵¹ *Id.*

⁵² In the matter of International Harvester Company, 104 F.T.C. 949

⁵³ *Id.* at 1073

⁵⁴ *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1153 (9th Cir. 2010)

⁵⁵ *Id.*

⁵⁶ *Id.* citing *Windward Marketing*, 1997 WL at *11 (citing *Orkin Exterminating Co.*, 849 F.2d at 1364-65).

⁵⁷ *Am. Fin. Servs. Ass’n v. F.T.C.* 767 F.2d at 976 (D.C. Cir. 1985)

⁵⁸ J. Thomas Rosch, *Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence*, Federal Trade Commission (May, 2007)

⁵⁹ See *FTC v Neovi, Inc* (cite)

⁶⁰ *Id.*

⁶¹ *Id.*

commission's action." ⁶² The FTC in its unfairness policy statement describes statutes or other sources of public policy that may "affirmatively allow for a practice that the Commission tentatively views as unfair."⁶³

Unfairness Challenges at the FTC

The following examples further illustrate conduct that would likely trigger an unfairness challenge and an FTC investigation. In 2009, the FTC filed an antitrust challenge against Accusearch for selling customers personal data and phone records.⁶⁴ The FTC argued that there selling phone records obtained through their website caused substantial injury. As a result customers were forced to change phone providers to avoid unwanted calls. There was no "reasonable means" to avoid the injury. Some consumers were left with only the option to cease "telephonic communication all together."⁶⁵ The FTC asserted that there was no countervailing benefit to consumers.

The FTC may on occasion rely on other statutes or laws to challenge the practice of an entity. For example, in *FTC v. Accusearch* the FTC used the Telecommunications Act to demonstrate unfair practices. "The FTC alleged that Accusearch's trade in telephone records (which are protected from disclosure under Section 702 of the Telecommunications Act of 1996, 47 U.S.C. § 222 (2006)) constituted an unfair practice in violation of section 5(a) of the Federal Trade Commission Act (FTCA)."⁶⁶ The court responded that the FTC Act "enables the FTC to take action against unfair practices that have not yet been contemplated by more specific laws."⁶⁷ The FTC is not limited or constrained by any one statute. The FTC's independence enables the agency to address a multitude of issues across all industries. As a result, the FTC is able to keep up with changes in technology, society, law and public policy. The FTC continues to adapt its framework to any foreseeable and unforeseeable situations regardless of existing laws or precedent.

The FTC may also consider public policy when it is so clear that it may "independently support a Commission action. ⁶⁸This occurs when the policy itself will be a sufficient determinant of consumer injury, leaving little need for separate analysis by the Commission."⁶⁹ The announcement of a policy is a determination that an injury exists and

⁶² See *The FTC's Use of Unfairness Authority: Is rise, fall, and Resurrection*, J Howard Beales, The Marketing and Public Policy Conference Washington, D.C., FTC, Available at <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection>

⁶³ FTC Policy Statement on Unfairness

⁶⁴ *FTC v. Accusearch Inc.*, 570 F.3d 1187, ___ (10th Cir. 2009)

⁶⁵ *Id.*

⁶⁶ 47 U.S.C. §222 states: "Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier." See also [15 U.S.C. § 45\(a\)](#)

⁶⁷ *Id.*, See also *Speigel, Inc. v. FTC*, 540 F.2d 287,291-94 (7th Cir. 1976).

⁶⁸ *Id.*

⁶⁹ FTC Policy Statement on Unfairness, Appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984). See 15 U.S.C. § 45(n).

does not need to be proved in each instance.⁷⁰ Public policies being considered should be clear and well established through statute, judicial decisions, or the Constitution.⁷¹ A general sense of national values is insufficient.⁷²

In 2000, former FTC Commissioner, Thomas Leary, said that the “flexibility and adaptability of unfairness make it suitable to combat the new permutations of fraudulent behavior that the internet is likely to spawn.” He emphasized that unfairness in cyberspace bears “striking similarities” to other types of unfair conduct.⁷³ In the last two decades the technology has evolved, and the FTC has evolved with it.

The FTC has applied its unfairness analysis in a variety of cases including consumer privacy.⁷⁴ The FTC and the New Jersey Attorney General charged Vizio with “tracking what consumers were watching and transmitted that data back to its servers without consent.”⁷⁵ Vizio retroactively installed tracking software onto old devices remotely.⁷⁶ This was done without notifying or getting consent from consumers.⁷⁷ Vizio was engaged in the collection of 100 billion data points from millions of TVs.⁷⁸ Vizio monetized this data by selling the viewing histories and IP addresses to third parties that could then track and target consumers across devices.⁷⁹ In the complaint filed, Vizio hid this practice behind a feature called “Smart Interactivity” that “enables program offers and suggestions.”⁸⁰

The FTC alleged that Vizio added a feature to its smart devices that tracked and targeted consumers across devices.⁸¹ The “Smart Interactivity” disclaimer informed consumers that Vizio shared other non-personal identifiers with the television and “recognize[d] onscreen content.”⁸² However, this was not an accurate representation. The software captured far more data from external devices including “DVD players, streaming devices, and over-the-air-broadcasts.”⁸³ The complaint also alleged that the software collected personal online data including IP addresses, MAC Addresses, Wi-Fi signal strength, and location of nearby Wi-Fi access points.⁸⁴ The FTC challenged Vizio for engaging in an unfair practice and for

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Thomas Leary, *Unfairness and the Internet*, Federal Trade Commission, available at <https://www.ftc.gov/public-statements/2000/04/unfairness-and-internet>

⁷⁴ Lesley Fair, *What Vizio was doing behind the TV Screen*, Federal Trade Commission Business Blog, (Feb 6, 2017), available at <https://www.ftc.gov/news-events/blogs/business-blog/2017/02/what-vizio-was-doing-behind-tv-screen>

⁷⁵ *Vizio to pay \$2.2 Million to FTC, State of New Jersey to Settle Charges it Collected Viewing Histories on 11 Million Smart Televisions without users' Consent*, Federal Trade Commission, (Feb. 6, 2017) available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3024/vizio-inc-vizio-inscape-services-llc>

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Complaint at para. 14 *Federal Trade Commission v. Vizio Inc.* (D. N.J. 2017)

⁸² *Id.* at para. 20

⁸³ *Id.* at para. 14

⁸⁴ *Id.* at para. 16

violating Section 5 of the FTC Act by collecting and sharing of consumers viewing data.⁸⁵ Vizio paid \$2.2 million to settle the charges with the FTC and the Office of the New Jersey Attorney General. Additionally, the order required Vizio to “prominently disclose and obtain affirmative express consent for its data collect and sharing practices, and prohibits misrepresentations about privacy, security, or confidentiality of consumer information.”⁸⁶

As a thought experiment, what would happen if an ISP decided to block access to a legal popular internet streaming service? The FTC could employ their consumer harm analysis to challenge the ISPs conduct. The injury would be the denial of access to legally available online content, and this action may promote the use of the ISPs own content over others. An action not entirely dissimilar from that decided in *Salt Co. v. United States*.⁸⁷ There would be no consumer benefit that would outweighs the blocking of access to legal online content like Hulu, Netflix, or Amazon Prime.

Apple announced at the end of 2017 that they “slowed down” old iPhones to preserve battery life.⁸⁸ In response, 59 separate lawsuits were filed alleging that Apple slowed down the phones intentionally to encourage customers to upgrade their devices.⁸⁹ A plaintiff could allege that throttling phone batteries is a substantial injury created by causing a small harm to a large number of people. Also arguing that this is not easily avoidable as their only recourse is to pay for a replacement battery or replace the phone entirely. However, Apple has already stated that that their action was to preserve battery life. Had Apple not have slowed down devices, the battery performance would have been worse, and consumers would have been in a worse situation with the older generation of iPhones. The FTC has not challenged this practice, nor are we suggesting that they should, but serves as good example of one way the consumer harm analysis could be applied where the perceived harms were actually a countervailing benefit to consumers.

Deceptive Practices:

As stated above, Section 5 of the FTC Act prohibits entities from engaging in deceptive practices.⁹⁰ A practice is considered deceptive if it “involves a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, and the representation, omission, or practice is material.”⁹¹ The FTC’s deceptive practice framework also uses a similar a case-by-case approach that gives the FTC more flexibility to address consumer harms, without limiting or restraining the market.⁹²

⁸⁵ 15 USC §45

⁸⁶ *Id.*

⁸⁷ *Salt Co. v. United States*, 332 U.S. 392, 396 (1947)

⁸⁸ Tripp Mickle and Kristen Grind, *Apple Faces Multiple Lawsuits Over Slowed-Down iPhones*, WALL ST. JOURNAL (Mar 29, 2018), available at <https://www.wsj.com/articles/apple-faces-multiple-lawsuits-over-throttled-iphones-1522229400>

⁸⁹ *Id.*

⁹⁰ 5 U.S.C §45(a).

⁹¹ *See*, 2007 Broadband guidance; see also 5 U.S.C §45(a).

⁹² FTC Policy Statement on Deception, 103 F.T.C. 110,174 (1984)

Deception involves written misrepresentations, oral misrepresentation, or an omission of material information.⁹³ When looking at a deceptive practice case the FTC will consider: a representation, omission, or practice that may mislead the consumer.⁹⁴ (These include “false oral or written representations, misleading price claims, or sales of hazardous or systematically defective products or services without adequate disclosures”). There must be an examination of the practice from the perspective of a reasonable consumer under the circumstance.⁹⁵

For example, In *FTC v. Ross* the defendant, Ross, was accused of placing popup advertisements on websites claiming to have discovered malware on computers.⁹⁶ The advertisements offered to fix the issues for a fee ranging between \$30-\$100 depending on the ‘severity’ of the ‘virus’.⁹⁷ These advertisements targeted customers whose computers were free of malware.⁹⁸ The sham scans and advertisements were found to be deceptive as they misled customers into believing that their computers were infected, and the only remedy was their product.⁹⁹ In reality, there was no infection, or solution required from the defendants product.¹⁰⁰

One of the biggest concerns of Title II advocates is that the FTC is left unable to challenge a service provider for deceptive practices. A case that has gone up and down through the 9th Circuit is *FTC v. AT&T Mobility, LLC*.¹⁰¹ In this case, the FTC challenged AT&T’s practice of advertising an unlimited data plan without disclosing terms that addressed diminished or impaired services of customers who use more than a specified amount of data, by imposing a “significant and material data speed restrictions on unlimited” plans on customers who use more than a fixed amount in a billing cycle.¹⁰² This case was first heard in 2016 by a three-judge panel in the 9th Circuit that held that as a common carrier AT&T was preempted from an FTC Challenge.

However, the case was reheard en banc and overturned the prior ruling that the FTC could not bring a challenge. The entire 9th Circuit held that the common carrier exemption applied only to common carrier activities, not the entire business that may engage in a common carrier practice. The 9th Circuit then decided in favor of the FTC by holding that AT&T’s conduct of data throttling (slowing down unlimited data plan subscribers data speeds) without notice was subject to antitrust challenge under the “unfair or deceptive acts or practices guidelines.”¹⁰³ This decision reiterates the FTC’s ability to police conduct in line with so-called net neutrality principles.¹⁰⁴

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *FTC v. Ross*, 897 F. Supp 2d 369, 378 (2012)

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *FTC v. AT&T Mobility, LLC*, D.C. No. 15-16585 (9th Cir. 2018).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

In both the unfair, and deceptive practice context, the FTC employs a case-by-case analysis to ensure that the FTC is able to maintain a flexible framework that can be applied in any context. This creates a 'common law' of precedent for the FTC to utilize and evolve to remedy consumer harm issues across all industries, and technologies. Through the FTC's case-by-case approach can consumers feel confident that unfair and deceptive blocking or throttling will be challenged. The FTC, which is less influenced by political winds, is the best cop on the beat to ensure a free and open internet.

Conclusion:

The FTC has a proven track record of addressing unfairness, and deceptive practice cases. As the FTC continues it will continue making progress towards achieving its goal of "promoting competition and consumer welfare" by positively shaping antitrust law and policy.¹⁰⁵

Now the FCC will no longer police ISPs as common carriers, they will be treated as any other business and subject to the Sherman Act, and other FTC regulations. Through methods, anti-trust, consumer harm, and transparency rules, the FTC is already policing versions of net neutrality principles in markets in cases of causing consumer harm The FTC is best able to protect consumers, while maintaining a competitive market place, and a free and open internet that has evolved and flourished over the last two decades.

¹⁰⁵ The FTC's Role in Shaping Antitrust Doctrine, Remarks of Joshua D Wright, FTC Commissioner (sept. 24, 2013).