

**TESTIMONY OF
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SUBMITTED TO THE
U.S. SENATE COMMITTEE ON THE JUDICIARY
REGARDING "RECONSIDERING OUR COMMUNICATIONS LAWS:
ENSURING COMPETITION AND INNOVATION"
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I would like to begin by thanking Chairman Specter and the members of the committee for the invitation to submit written testimony. The Senate Judiciary Committee is particularly apt to take up communications issues because increasingly this industry should be supervised by general competition policy laws instead of the specialized regulation of the Federal Communications Commission. You have already heard a wide array of perspectives on the need for communications legislation and about what should be the substance of that legislation. My counsel is very direct: let the Federal Trade Commission supervise broadband services. Ignore calls for comprehensive net neutrality legislation, as was reported out by the House Judiciary Committee, and let the FTC act under authority it already claims to police unfair competition and consumer fraud.

The major legislative proposals before Congress -- the COPE bill passed by the House last week, and Senator Stevens's bill currently before the Senate Commerce Committee -- each marry the unlikely issues of 'net neutrality' and franchise reform. There is absolutely no reason for these issues to be tied together, so let me take them separately.

Video Franchise Reform

Reforming – or better yet eliminating – the current local video franchising process should be a self-apparently good thing for competition, for lowering entry barriers and for consumers. A video franchise is the appendix of the regulatory world – a vestigial organ with absolutely no purpose in the converged communications space. But, like the appendix, it can cause trouble if it is not removed. Franchising dates from the days of local monopoly pay-video providers and the franchise existed as a regulatory compact to constrain each local monopoly. Over time, the franchise acquired different purposes, primarily as a taxation device. While local reliance interests may require some taxation vestige of video franchising remain, there is absolutely no reason in the future to keep the costly entry barriers and impediments to competition in place. Accordingly, the franchise reform portion of current legislation is a no-brainer, and if anything, should only be made stronger.

Net Neutrality and Competition Policy

Turning now to the issue that provokes this Committee's interest, net neutrality. It has burst its rather esoteric regulatory roots into the political scene.

The Committee is right to pay attention to the issue. For, properly conceived, the concerns of net neutrality are a subset of broader competition policy issues in the digital space. Digital age industries share the characteristics of high-fixed and low marginal costs, the presence of 'network effects,' and of fast-paced Schumpeterian innovation. This means that there will rarely be a surfeit of firms in a given market, that price discrimination will have to be rampant in these industries as a means to recover fixed costs, and that market definitions themselves will change as firms innovate and create new markets in Internet time.

For the regulator, then, the nature of the digital space pulls in different directions. On the one hand, vigilance must be heightened because few firms will be in a given market (like broadband, OS platforms or search engines). On the other hand, pricing freedom to recover fixed costs must be maximized to encourage investment in the sector. Further, what looks like a monopoly can quickly be subverted by a new product or a new way of doing old things (Voice-over-Internet protocol to landline voice, wireless broadband to wired-broadband, TiVo to traditional broadcast television). All this is to say that competition policy in the digital sphere is quite difficult, and the error costs can be quite high. What should Congress do then about an issue like "net neutrality"? Nothing.

Two months ago, FTC Chairman Majoras replied to a request from House Judiciary Committee Chairman Sensenbrenner describing the current law of broadband, and FTC Commissioner William Kovacic elaborated on her points in testimony before your committee on June 14th. In brief, after the Supreme Court's *Brand X* decision¹ and the FCC's *Wireline Broadband Internet Access Order*² determined that broadband Internet is not a "common carrier" service. Accordingly, the statutory exclusion of common carriers from FTC jurisdiction is not applicable, and the FTC has jurisdiction within its competition policy and consumer protection mandates. Under the former jurisdiction, the FTC can address net neutrality concerns about anticompetitive leveraging. Under the latter, it can stop practices where consumers are being deceived. *This is the state of the law right now.* Because the FTC has these powers, I think the nation's broadband future will be better off if we forbear and simply let the agency do its job. This will be salutary for three reasons.

First, the FTC is an agency dedicated to competition policy and consumer welfare. Claims for regulatory intervention into broadband will thus have to be grounded in claims of real harm, not competitive disadvantage. Unfair competition and consumer fraud laws involve broad standards, but also have definite meaning to regulators schooled in the economics of competition policy. This means the law applied by the FTC to broadband will be more definite in

¹ *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Services*, Sup. Ct. Docket No. 04-277 (June 27, 2005).

² *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33 et al., Report and Order and Notice of Proposed Rulemaking (rel. Sept. 23, 2005).

meaning and deferential to markets absent clear harm to consumer welfare.

Second, as an agency of general jurisdiction, the FTC is less prone to interest-group capture and the intense rentseeking that besets the FCC and Congress. The FTC's mandate extends across the economy. Accordingly, narrow interest groups – be they self-professed 'consumer' groups or industry – will find it much more difficult to 'capture' the FTC's regulatory agenda.

Third, the FTC is largely an enforcement agency that focuses on investigation and redressing of specifically alleged and proven harms to consumer welfare. The agency tends to focus on specifically proven facts and evidence of harm, as opposed to general surmise. After-the-fact regulation also has the strength of cabining regulatory errors to a given set of facts. By contrast, the before-the-fact rulemaking regulation can err across entire industry sectors.

To be sure, the FTC is far from perfect. Its conditions imposed upon the AOL-Time Warner merger look preposterous in retrospect. (But so too do the FCC's conditions on that merger). A strong-willed regulator can accomplish quite dubious things within the breadth of the FTC's statutory standards. However, the progressive-era presumptions of regulation and antitrust seem well-contained in the existing FTC, and for reasons stated above there is less reason to fear their reawakening with this agency than with other regulatory bodies.

By doing nothing, Congress would leave broadband supervised by an agency that would be more accommodating of business models that might increase broadband uptake, for example by finding the inframarginal customers who are indispensable to high fixed/low marginal cost industries; it would be less susceptible to the rentseeking and regulatory capture that afflict the FCC; it would be less innovation-stifling to latency-sensitive applications and technical improvements of the Internet; and, finally, it would be less likely to morph into the encompassing regulation that could come back to bite the Internet in the rear.

I would be remiss if I did not mention that Senator DeMint's Digital Age Communications Act bill (S. 2113) takes just such a competition policy approach. That bill would have the FCC apply the FTC's normative legal standards and adopt the FTC's ex post adjudicatory methods to regulate the converging communications platforms. A similar competition policy-based approach was sketched recently by the new moderate Democrat-leaning think tank, the Information Technology and Innovation Foundation.³ As the Committee looks to models for comprehensive communications reform, I would commend the DeMint bill as a worthy model. I would also direct the Committee to a primer on net

³ Robert D. Atkinson and Philip J. Weiser, "A 'Third Way' on Network Neutrality," The Information Technology and Innovation Foundation, May 30, 2006. While I have some reservations about how aggressive this regime might be, it's important to note that there is a bipartisan consensus that a competition policy approach is what should drive the analysis here.

neutrality that fellows at The Progress & Freedom Foundation recently have authored. That primer, presented in Q&A format, is attached.

I believe that a law of general applicability applying competition policy principles will give more certainty, better allow markets to develop and flourish, and be less prone to regulatory capture. The answer to net neutrality is not “yes” or “no,” but “maybe” in given, specific circumstances. By allowing the FTC to work under its current jurisdiction, we can have an agency look at particular circumstances, based on particular proof, to decide the right outcome for consumers.

Once again, I thank you for the invitation to submit this testimony.