

Unintentional Antitrust: The FCC’s Only (and Better) Way Forward with Net Neutrality after the Mess of *Verizon v. FCC*

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I. INTRODUCTION

The principal, alternative vision to network neutrality rules has always been antitrust. Opponents of the Federal Communications Commission's use of Communications Act regulatory authority (if any it had) to create nondiscrimination rules have long argued that competition law is both an adequate and a superior way to address any concerns over ISP actions against content and applications providers. On the other hand, network neutrality advocates have argued that antitrust is neither doctrinally nor institutionally adequate for the task. In adopting its *Open Internet Rules*,¹ the FCC expressly rejected antitrust as well.

The recent decision of the U.S. Court of Appeals for the D.C. Circuit in *Verizon v. FCC*² somewhat ironically puts the FCC in the position of turning to antitrust. After the court granted a partial win to the FCC, recognizing its authority to regulate Internet carriers even if they do not provide "telecommunications services," the court also held that such regulation must stop short of "common carrier" regulation.³ The FCC's quest, therefore, is how to address nondiscrimination without going so far as to impose common carriage. Indeed, although the court's opinion does not expressly state that conclusion, I believe that, short of reclassifying broadband services as telecommunications services, the FCC's only path forward is to adopt antitrust-like rules. It is the only way to make sense of the court's holding that the FCC has "some" authority under section 706.⁴ Moreover, I believe that such an approach is preferable to any of the other alternatives the FCC might consider. Doctrinally, a competition law-based rule would better fit with the D.C. Circuit's explanation of the FCC's section 706 authority and would fall short of the forbidden zone of common carrier rules. As a policy matter, the FCC could address the core concern of net neutrality arguments: that ISPs would alter content or distribution markets by discriminating among content providers. And this approach would be better than reclassification, a scenario that would require the FCC to begin a lengthy process of calibrating numerous, outdated regulatory rules.

1. Preserving the Open Internet, *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905 (2010) [hereinafter *2010 Open Internet Order*], *aff'd in part, vacated in part sub nom.* *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

2. 740 F.3d 623 (D.C. Cir. 2014).

3. *Id.* at 649.

4. To be clear, I have previously written (and still believe) that section 706 does not create any affirmative authority in the Commission to regulate broadband markets, except through the limited regulatory tools identified in the section. See generally James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. ON TELECOMM. & HIGH TECH. L. 101 (2010); James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15 (2003). That is, I think Judge Silberman's dissent adopted the better reading of the statute. *Verizon*, 740 F.3d at 659 (Silberman, J., dissenting).

The FCC in fact does seem to be moving in the path of a competition-law like standard, although as we go to press, its final path has not been decided.

If the foregoing reasoning is right, and the FCC has the authority to address discrimination by ISPs but the FCC's rules must mimic antitrust principles, then the remaining question is whether the FCC should bother with this path. The FCC could decide to leave such a scheme to the Department of Justice ("DOJ") or the Federal Trade Commission ("FTC"). After all, those agencies have long-standing, principal expertise in competition law. FCC action would likely be duplicative and perhaps not as competent as an approach led by the antitrust agencies. I think this challenge is wrong. The FCC likely has relevant technical and industry expertise that the antitrust agencies may not possess. More importantly, as an administrative agency, the FCC is empowered to make rules based on predictive judgments.⁵ Though I am no defender of some of the FCC's more fanciful theories of the past, I do think, given the likelihood that broadband access markets will remain significantly concentrated, that a specialized agency should have the authority to impose certain behavioral requirements on the basis of predicted competitive effects.

Although all of this may be an acceptable policy result, *Verizon* also reveals the very serious dysfunction that plagues telecommunications policy. Flowing from the Supreme Court's willingness to permit FCC regulation of cable systems at a time when the Communications Act said nothing about them, the courts have long accommodated Congress' absence from communications policy. Even if Congress cannot or will not act, the Telecommunications Act of 1996 should have pointed toward common carrier regulation plus forbearance, not toward the building of a new edifice of uncertain regulatory powers.

II. NET NEUTRALITY REJECTS ANTITRUST

The fault line between net neutrality rules and antitrust is well-established. Net neutrality rules focus on nondiscrimination—that is, they make the act of discriminatory treatment illegal, absent any particularized showing that specific acts of discrimination have caused particular harms.⁶ By contrast, an antitrust rule condemns discrimination only in instances in which discrimination has a particular effect: the likely foreclosure of competition.⁷

5. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) ("The 'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments and interim regulations.").

6. *Verizon*, 740 F.3d at 633 (The "*Order* imposes an anti-discrimination requirement").

7. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (antitrust laws are designed to protect "competition, not competitors").

The FCC's *Open Internet Order* quite explicitly stated that an antitrust rule would not serve the Commission's purposes: "We also reject the argument that only 'anticompetitive' discrimination yielding 'substantial consumer harm' should be prohibited by our rules."⁸ The Commission explained that its purpose of maintaining an open Internet ecosystem "cannot be achieved by preventing only those practices that are demonstrably anticompetitive or harmful to consumers."⁹ Applications and content providers needed assurance that "broadband providers [w]ould not pick winners and losers on the Internet – even for reasons that may be independent of providers' competitive interests or that may not immediately or demonstrably cause substantial consumer harm."¹⁰

To be sure, a particular rule can occupy the space between the substantive poles of nondiscrimination and antitrust. The *Open Internet Rules* forbade only "unreasonable discrimination,"¹¹ as do the common carrier provisions of the Communications Act.¹² Indeed, as discussed below, the Communications Act hardly forbade all discrimination.¹³ Common carriers were permitted to offer different services to different customers; indeed, sometimes carriers were required to discriminate to advance other goals (such as universal service). The more that the "unreasonableness" of any discrimination is based on notions of competitive markets, the more such a rule resembles antitrust as a conceptual matter.

If a nondiscrimination rule were based on antitrust thinking, then its principal difference from antitrust enforcement would be institutional, a point to which I will return below. For now, however, note that institutional differences were also one of the FCC's grounds for rejecting antitrust as the best mode. When the FCC expressed its concern that an antitrust rule would not control behaviors that "may not immediately or demonstrably cause substantial consumer harm,"¹⁴ it meant that it wanted more *ex ante* assurance than a more antitrust-like rule—one that relied on *ex post* determinations—might provide.

III. THE D.C. CIRCUIT REJECTS COMMON CARRIER NONDISCRIMINATION

The D.C. Circuit's decision in *Verizon v. FCC* puts the Commission on a Goldilocks-like quest to find broadband regulation that is "just right." The D.C. Circuit ruled that section 706 gave the FCC significant authority to regulate broadband markets, just so long as the FCC stopped short of

8. 2010 *Open Internet Order*, *supra* note 1, at para. 78.

9. *Id.*

10. *Id.*

11. *Id.* at paras. 77–79.

12. 47 U.S.C. § 202(a) (2006).

13. *See infra* notes 53–55 and accompanying text.

14. 2010 *Open Internet Order*, *supra* note 1, at para. 78.

requiring common carrier rules.¹⁵ In its *Order*, the FCC had rejected two narrower interpretations of section 706. First, it rejected its earlier view that section 706 was merely hortatory, that the FCC should use whatever authority it otherwise had to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”¹⁶ Second, it rejected the view that section 706 was limited to the narrow list of regulatory tools set forth in the end of the section, including “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹⁷ Instead, the FCC said that section 706 authorized it to take any measure that could increase infrastructure investment (by forbidding anything that might serve as a barrier to investment).¹⁸ Given the recent breadth of the Supreme Court’s *Chevron* cases,¹⁹ the D.C. Circuit was more or less compelled to approve.²⁰

But while the court recognized the FCC’s regulatory authority over ISPs, it also said that the FCC could not—so long as it classifies ISPs as information service providers—subject them to common carrier regulation.²¹ The court leaned heavily on *Midwest Video II*,²² a 1979 opinion in which the Supreme Court held that FCC cable access rules improperly imposed common carriage regulation on cable television companies.²³

15. *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014) (“Even though the Commission has general authority in this area, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such.”).

16. *2010 Open Internet Order*, *supra* note 1, at para. 120 (quoting Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706(a) (codified at 47 U.S.C. § 1302(a))).

17. *2010 Open Internet Order*, *supra* note 1, at paras. 120-121. This view of course treated the concluding clause as meaning only those tools functionally equivalent to those specifically listed, *ejusdem generis*.

18. *Id.*

19. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013) (holding that the FCC was entitled to *Chevron* deference even on jurisdiction-expanding interpretations of the Communications Act); *see also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004) (arguing that agency jurisdictional decisions should receive only lesser *Skidmore* deference).

20. *Verizon*, 740 F.3d at 635 (“As the Supreme Court recently made clear, *Chevron* deference is warranted even if the Commission has interpreted a statutory provision that could be said to delineate the scope of the agency’s jurisdiction.”).

21. *Id.* at 628.

22. *See generally FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

23. *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014) (“For our purposes, perhaps the seminal case applying this notion of common carriage is *Midwest Video II*.”); *id.* at 654 (“The Commission advances several grounds for distinguishing *Midwest Video II*. None is convincing.”).

IV. REJECTING THE IDEA OF NONDISCRIMINATION WITHOUT COMMON CARRIAGE

The core of the D.C. Circuit's decision was that the FCC's actions under section 706 could not impose "common carrier" regulation; the important extension was its holding that the Open Internet Order's nondiscrimination and no-blocking rules constituted such forbidden common carrier regulation. In the face of such a decision, one standard administrative law move would be to ask whether the FCC could take another bite at the apple—that is, could the FCC attempt to explain further why the nondiscrimination rules it had adopted were not actually common carrier regulation, but rather something else short of it? The D.C. Circuit left this sort of path open in the *Comcast* case. Although the court rejected the FCC's attempt to regulate Comcast, it invited the FCC to better explain its authority for regulating broadband.²⁴

In this case, although the history of common carrier regulation could support an argument that the FCC's nondiscrimination rules stopped short of "common carrier" regulation, the D.C. Circuit's decision appears to effectively foreclose that argument. The argument that nondiscrimination rules alone might not be common carriage requires first stepping back to definitional principles. The statutory language at issue forbids the treatment of non-common carriers as common carriers, and of course the FCC has classified broadband as a non-common carrier service.²⁵ One interpretive difficulty arises from distinguishing the oft-noted circularity of the definition of a common carrier with the obligations of common carriers. The first issue is one of status: is the carrier or the service common carriage? Then, the second issue addresses the regulatory treatment that attends such status.

Status as a common carrier service (or telecommunications service) arises principally (but not exclusively as discussed below) from "an undertaking to carry for all people indifferently."²⁶ The D.C. Circuit decided that the nondiscrimination and no-blocking rules required Internet providers to offer service indifferently, and therefore treated them as common carriers. In so doing, the court leaned on *Midwest Video II*, which similarly held that the FCC had gone too far in regulating cable television companies when

24. *Comcast Corp. v. FCC*, 600 F.3d 642, 658–61 (D.C. Cir. 2010).

25. *See* 47 U.S.C. § 153(51) (2006) ("A telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services" (emphasis added)).

26. *NARUC v. FCC*, 533 F.2d 601, 608–09 (D.C. Cir. 1976) ("[T]he primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently. This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users.").

those companies were similarly granted statutory protection from being subject to common carrier regulation.²⁷

But in so holding, the D.C. Circuit seemed to ignore both the second test for status as common carriage and the FCC's decisions holding that Internet providers were not common carriers. In addition to serving the public generally, the controlling case law holds that "[a] second prerequisite to common carrier status [is] . . . that the system be such that customers 'transmit intelligence of their own design and choosing.'"²⁸ The FCC relied on this characteristic in holding that Internet providers' offering of general services such as DNS and caching meant that Internet service was not common carrier service—and the courts have upheld the FCC's decision.²⁹ The FCC's reliance on DNS service as a mode of transforming user inputs as opposed to merely providing transport service is somewhat suspect, but the D.C. Circuit could not, given *Brand X*, forbid the classification.³⁰

Given that the D.C. Circuit did not confront the definitional issue head-on, it seems more likely that the court was saying that the nondiscrimination and no-blocking rules amounted to the application of common carrier obligations to non-common carriers and were therefore impermissible. This seems to be the better reading of section 153(51) in all events, for the section states that "[a] telecommunications carrier shall be treated as a common carrier . . . *only* to the extent that it is engaged in providing telecommunications services."³¹ Moreover, if the FCC may not apply common carriage regulation to a telecommunications company's non-telecommunications activities, surely it cannot regulate as a common carrier a company that provides no telecommunications services whatsoever. But this then raises the question of whether it would be possible to treat a nondiscrimination and no-blocking requirement as a regulatory regime short of common carriage.

The history of common carriage and the history of the Communications Act support an argument that common carriage involves more than just nondiscrimination requirements. The Communications Act's scheme—borrowed of course from the Interstate Commerce Act's regulation of railroads³²—required common carriers to provide service upon request, to charge only just and reasonable rates (along with just and reasonable terms and conditions), and not to engage in unreasonable discrimination.³³ In support of these substantive requirements, Congress created "an

27. See generally *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

28. *NARUC*, 533 F.2d at 609.

29. *NCTA v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 974, 977–78, 987 (2005).

30. See *Id.*

31. 47 U.S.C. § 153(51) (2006).

32. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 *FED. COMM. L.J.* 225, 262–64 (2002).

33. 47 U.S.C. §§ 201-203 (2006).

administrative agency whose task was to oversee an industry.”³⁴ Privately owned common carriers were required to file tariffs describing all of their rates, terms, and conditions, and the agency was empowered to suspend, investigate, and cancel tariffed offerings.³⁵

The FCC might have argued that only this complete ecosystem—incorporating tariff-filing, rate control, and nondiscrimination—constitutes “treat[ment] as a common carrier under this chapter.”³⁶ Tariff filing and ex ante rate control would, of course, be the most significant differences, for the Open Internet Order’s nondiscrimination rules were meant to echo section 202’s ban on “unreasonable discrimination.”³⁷ But these are significant differences. Tariff filing was the central tool of the regulated industries regime under the Interstate Commerce Act and the Communications Act. “The duty to file rates with the Commission . . . and the obligation to charge only those rates . . . have always been considered essential to preventing price discrimination and stabilizing rates.”³⁸ Tariff filing provided not only the means by which the expert agency could superintend the carriers, but tariffs became the inflexible contract between the carriers and the public: carriers were forbidden to deviate from the tariffs and even intended deviations were illegal and unenforceable. “This extraordinarily strict rule, which would eventually be called the ‘filed rate doctrine,’ was deemed necessary” to achieve the goals of nondiscrimination and rate regulation.³⁹ Although the Open Internet Order required transparency, this rule is distinct from tariff filing, for it does not afford the agency an opportunity to review carriers’ terms and conditions before they become effective.⁴⁰ Similarly, the Order does not contemplate any review of rates to ensure they are “just and reasonable”⁴¹ or any ex ante review of rates. To be sure, nondiscrimination

34. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325 (1998).

35. 47 U.S.C. §§ 204-205 (2006).

36. 47 U.S.C. § 153(51) (2006).

37. 2010 *Open Internet Order*, *supra* note 1, at para. 77.

38. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (citations omitted); *see also* *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932) (“In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and [makes] these the legal rates; that is, those which must be charged to all shippers alike.”); Kearney & Merrill, *supra* note 34, at 1331–32 (discussing importance of tariffing).

39. Kearney & Merrill, *supra* note 34, at 1331–32; *see also* *Maislin*, 497 U.S. at 126–27 (“Given the close interplay between the duties imposed by §§ 10761-10762 and the statutory prohibition on discrimination, this Court has read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff.” (citations omitted)).

40. The Communications Act does not require the FCC to approve tariffs before they become effective; rather, carriers must file them and the FCC has the authority to suspend or deny them. If the FCC does not act, the tariff goes into effect. 47 U.S.C. §§ 203-205.

41. As compared to 47 U.S.C. § 201(b).

rules can affect rates by eliminating rate differentials.⁴² But the Order did not contemplate the cost-of-service regulation that so dominated the traditional model of common carrier regulation.

The FCC might even have found support in *Midwest Video II*, even though the D.C. Circuit relied on it in deciding that the Open Internet Rules constituted impermissible common carrier regulation. In *Midwest Video II*, the Supreme Court held that the FCC had improperly attempted to impose common carrier regulation on cable companies.⁴³ The opinion undoubtedly focused on the nondiscrimination requirement there: “With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status.”⁴⁴ However, the FCC’s actual decision imposed not only nondiscrimination rules, but also service rules and rate regulation:

The access rules plainly impose common-carrier obligations on cable operators. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis. Operators are prohibited from determining or influencing the content of access programming. And the rules delimit what operators may charge for access and use of equipment.⁴⁵

Most importantly, the Court made clear it was proceeding on a case-by-case basis: “Whether less intrusive access regulation might fall within the Commission’s jurisdiction . . . is not presently before the Court.”⁴⁶

In the *Open Internet Order*, the FCC actually said very little about why its rules did not constitute common carriage.⁴⁷ The agency focused on the consumer end users and said that “with respect to those customers, a broadband provider may make individualized decisions.”⁴⁸ As such, it said, section 153(51) was “not relevant to the Commission’s action here.”⁴⁹ The court easily dismissed this rationale, noting that as in *Midwest Video II*, a nondiscrimination rule with respect to content and applications providers would forbid the carrier’s choice of carriage.⁵⁰

42. The FCC said as much. *2010 Open Internet Order*, *supra* note 1, at para. 5. *See also* C. Scott Hemphill, *Network Neutrality and the False Promise of Zero-Price Regulation*, 25 *YALE J. ON REG.* 135, 142 (2008).

43. *See* *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“*Midwest Video II*”).

44. *Id.* at 700–01.

45. *Id.* at 701–02 (citations omitted).

46. *Id.* at 705 n.14.

47. *See generally* *2010 Open Internet Order*, *supra* note 1.

48. *Id.* at para. 79.

49. *Id.*

50. *Verizon v. FCC*, 740 F.3d 623, 652–54 (D.C. Cir. 2014).

Because the FCC said so little about common carriage, and because courts have frequently noted the difficulty of applying the definition of common carriage, the FCC might, as a matter of administrative law, have been given the opportunity to further explain its rules; only if a statute is unambiguous does the agency lose interpretive primacy under the *Chevron* doctrine.⁵¹ The D.C. Circuit did not make clear whether its holding came under step one or step two of *Chevron*. The presence of *Midwest Video II* allowed it to avoid using the *Chevron* analysis, given that Supreme Court interpretations of statutes made pre-*Chevron* are binding on agencies post-*Chevron*.⁵² But if the D.C. Circuit had treated *Midwest Video II* as less controlling (as I have suggested it might have), then the agency both should have received *Chevron* deference and should now have an additional chance to explain itself.

Setting aside these seeming technicalities of administrative law and the debate over the breadth of *Midwest Video II*, the broader context of the Communications Act suggests that the FCC should have been able to define its rules as non-common carriage for two reasons. First, even the traditional regime of common carrier regulation under the 1934 Act had a very context-specific definition of nondiscrimination.⁵³ The statute outlawed only “unreasonable discrimination,” and regulators frequently allowed common carriers to engage in value-of-service pricing to ensure universal service and the coverage of the carrier’s capital costs.⁵⁴ In fact, regulators frequently required discrimination in order to provide universal service (or, perhaps more accurately, to provide cheap residential service).⁵⁵ As competition came to telecommunications markets, the FCC allowed contract-like tariffs to be developed, under which the carriers could define customer characteristics in such a way as to effectively discriminate among classes of customers. The technical requirement of nondiscrimination was met because

51. See, e.g., *NCTA v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 982 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a ‘presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.’”) (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1996)).

52. See *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843–44 (2012).

53. See James B. Speta, *Supervising Discrimination: Reflections of the Interstate Commerce Act in the Broadband Debate*, 95 MARQ. L. REV. 1195, 1200 (2012).

54. *Id.* at 1198 (emphasis added).

55. *Id.* at 1196.

each package was open to any customer that could meet the described characteristics.⁵⁶

Second, and more fundamentally, the Telecommunications Act of 1996 gave the FCC the authority to eliminate the mandatory provisions of common carrier regulation, even as to those carriers that are unambiguously common carriers. The forbearance authority, now codified in section 10 of the Act,⁵⁷ means that Congress has given the agency the broad authority to determine the content of common carrier regulation. In fact, the Telecommunications Act of 1996 included this provision in part because the Supreme Court had held that tariffing was mandatory under the common carrier provision, notwithstanding that the FCC had found that competition meant that tariffing was no longer required.⁵⁸ To be sure, the FCC must make specific findings when granting forbearance,⁵⁹ but the authority to forbear further blurs the line between regulation that is common carriage and regulation that is not.

To be clear, I think all of the foregoing is relevant *only* after the court decides that the FCC has affirmative authority to regulate the Internet under section 706 and that the only effective limit on that authority is that the FCC may not impose common carrier regulation. I think, in fact, that the foregoing reveals that the court is and will be engaged in the same sort of ad hoc analysis that would inhere in recognizing FCC “ancillary” authority over the Internet—where the agency is given substantial authority subject only to a judgment by the court that particular actions are “too much.” Either *Chevron* will be ignored as necessary, or the court will soon get out of the business of trying to limit the FCC’s authority over Internet and information services providers. As I said above, all of this confirms to me that Congress cannot have intended to give the FCC authority to regulate the Internet at all—that is, so long as the FCC maintains the notion that Internet service is not telecommunications service.

V. WHY THE FCC MUST NOW BE AN ANTITRUSTER—AND WHY THAT’S NOT A BAD THING

Given that the FCC probably cannot attempt to define nondiscrimination rules as less-than-common-carriage, the FCC’s best way forward to address the concerns that it cited as the basis for the Open Internet Order⁶⁰ is to adopt an antitrust-like framework. This framework would forbid Internet carrier actions that foreclosed competition. Because the focus would

56. See *Competitive Telecomm. Ass’n v. FCC*, 998 F.2d 1058, 1063–64 (D.C. Cir. 1993) (upholding these tariff packages).

57. 47 U.S.C. § 160 (2006).

58. *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (holding that the FCC did not have authority to waive tariffing requirements on common carriers).

59. 47 U.S.C. § 160(a) (2006).

60. *2010 Open Internet Order*, *supra* note 1.

be on competitive effects and not on discrimination itself, an antitrust-like framework would differ from a nondiscrimination rule while addressing the FCC's underlying concerns. Moreover, such rules would more clearly fall within the D.C. Circuit's holding that FCC rules must remove "barriers to investment."⁶¹ The FCC is an appropriate institution for such rules, even though we already have two antitrust agencies (the DOJ and the FTC), because the FCC can use its expertise and agency standing to conduct appropriate inquiries and adopt appropriate (albeit hopefully limited) prophylactic rules.

The heart of the FCC's justification for the *Open Internet Rules* was the concern that ISPs could use discrimination to foreclose competition in two markets.⁶² The Commission's principal focus, of course, was on ISP actions that reduced "openness" and competitive opportunities for "content, applications, services, and devices access over or connected to broadband access service ('edge' products and services)."⁶³ The Commission also emphasized (as was important to the court affirming the rules) that discrimination had the potential to stifle overall investment in Internet infrastructure and limit competition in telecommunications markets.⁶⁴

Antitrust-like rules can address these concerns; indeed, foreclosure of competition is the touchstone of competition law.⁶⁵ Apart from the limited scope of the *per se* rules, antitrust requires the showing of anticompetitive effect: under the rule of reason used in section 1 cases, the first requirement is that the plaintiff show an anticompetitive effect.⁶⁶ Monopolization cases similarly require a demonstration that competition has been foreclosed.⁶⁷ Several examples from antitrust cases in utility industries show that antitrust can address these concerns. For example, the antitrust litigation against the integrated Bell System contended that AT&T used its control over local access monopolies to stifle entry in the related markets of long distance and customer premises equipment.⁶⁸ This parallels the FCC's allegations that ISPs might use their control over local distribution to reduce entry into

61. *Verizon v. FCC*, 740 F.3d 623, 661–62 (D.C. Cir. 2014).

62. *2010 Open Internet Order*, *supra* note 1, at paras. 5-6.

63. *Id.*

64. *Id.*

65. *See, e.g., Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." (citations omitted)).

66. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) ("The rule of reason requires the fact-finder to weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets." (internal quotations omitted)).

67. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (discussing burden to show anticompetitive effect in monopolization cases).

68. *United States v. AT&T Co.*, 552 F. Supp. 131, 135–36 (D.D.C. 1982).

content and applications markets. Similarly, the Bell System consent decree imposed equal access conditions—essentially nondiscrimination requirements—both in the hope of inducing entry into the long distance market and that such entry would eventually contribute to competition in local markets.⁶⁹ This last rationale parallels the FCC’s expectation that ISP nondiscrimination would enhance demand for broadband and infrastructure investment. Similarly, in the famous *Otter Tail*⁷⁰ and *Terminal Bridge*⁷¹ cases, antitrust was used to open bottlenecks to enable competition in the electricity and railroad markets. Today, antitrust doctrine might not embrace the results of those cases, given the Supreme Court’s reluctance in *Trinko*⁷² to embrace antitrust supervision of interconnection arrangements.⁷³ But even if antitrust litigation could not impose the *Otter Tail* and *Terminal Bridge* results, the competition-law reasoning of those cases remains.

Antitrust, however, is classically an ex post remedy, so any antitrust-like framework employed by the FCC will differ. The FCC expressed concern that the new enterprises that are key to the Internet’s innovative ecosystem needed assurance that their entry would be unrestricted,⁷⁴ and a strong, ex ante nondiscrimination rule certainly provides more assurance in that regard. Many network neutrality advocates, in fact, thought the FCC’s rules were not strong enough, given the focus on “unreasonable” discrimination.⁷⁵ But an antitrust approach is not necessarily inconsistent with rules, so long as the agency employs competition-law reasoning to determine their content. Moreover, as Phil Weiser has argued, case-by-case steps in this area can also help to preserve the flexibility needed as new network technologies and business models develop.⁷⁶

The focus on foreclosure also seems more consistent with the D.C. Circuit’s clear holding that “any regulations [adopted pursuant to section 706] must be designed to achieve a particular purpose: to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”⁷⁷ The FCC’s theory was that the regulations would “remove barriers to infrastructure investment.”⁷⁸ These are market-oriented measures, and antitrust law’s focus on eliminating

69. *Id.* at 194–95.

70. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

71. *United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912).

72. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

73. *See, e.g.*, Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Hidden Side of Trinko*, 107 COLUM. L. REV. 1822, 1825 (2007).

74. *See supra* notes 60-64 and accompanying text.

75. *See, e.g.*, Adam Candeub & Daniel McCartney, *Law and the Open Internet*, 64 FED. COMM. L.J. 493, 496–97 (2012) (arguing that the “normative principle of ‘reasonable discrimination’ as the legal standard for Internet regulation” is a “fatally narrow” regulatory approach).

76. Philip J. Weiser, *Towards a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41 (2003).

77. *Verizon v. FCC*, 740 F.3d 623, 640 (D.C. Cir. 2014).

78. *2010 Open Internet Order*, *supra* note 1, at para. 117.

market-foreclosing activities directly furthers these goals. Indeed, although it opted for nondiscrimination rules, the FCC's rationale was almost entirely about competitive effects.⁷⁹

Finally, the FCC is an appropriate focus for competition-law based rules, even though both the DOJ and the FTC are the principal antitrust enforcers. The DOJ only has the authority of an enforcement agency—apart from mergers—to attack market foreclosing activities after the damage has been done.⁸⁰ This role is important: strongly punishing foreclosures gives additional assurance and perhaps compensation to entrants that actions taken by market incumbents will be contained. But *ex post* remedies will only be part of the solution, especially as markets continue to be characterized by concentration. The FTC, for its part, does have rulemaking authority, but that authority has been cabined by statute and judicial decision.⁸¹ The FTC's more general authority⁸² does give comfort that it might not be as captured by industry-specific politics, but may also suggest less attention to broadband markets.

The FCC, by contrast, will be entitled to adopt *ex ante* rules and make “predictive judgments” concerning practices that might result in foreclosure.⁸³ The FCC might also experiment with the shape of competition law, for example, by borrowing the “abuse of dominance” notion from European Competition laws.⁸⁴ In that domain, a dominant firm has a “special responsibility . . . not to allow its conduct to impair genuine undistorted competition.”⁸⁵ While the focus remains on competitive effects, E.U. law does not require as strict a showing of foreclosure as U.S. antitrust. The point is that the FCC, as an administrative agency pursuing its authority under

79. See *supra* notes 53-60 and accompanying text. The FCC also contended that Internet openness would further free speech and other noneconomic values, but the threat to those values generally arose from ISPs' possible anticompetitive actions. *2010 Open Internet Order*, *supra* note 1, at paras. 15-22.

80. See generally EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 10-14 (2d ed. 2011) (providing an overview of the United States' antitrust laws and remedial structure).

81. See *id.* at 11, n.11 (noting that “[t]he only substantive rule related to competition that the FTC ever enacted was pursuant to its special authority to define price discrimination under 15 U.S.C. §13(a), and has since been rescinded.”).

82. 15 U.S.C. § 45 (2012).

83. See *Verizon v. FCC*, 740 F.3d 623, 644 (D.C. Cir. 2014) (“When assessing the reasonableness of the Commission’s conclusions, we must be careful not to simply ‘substitute [our] judgment for that of the agency,’ especially when the ‘agency’s predictive judgments about the likely economic effects of a rule’ are at issue.”) (quoting *NTCA v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983))); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 521 (2009) (“the agency’s predictive judgment . . . merits deference”).

84. See Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C 326) 47.

85. Pierre LaRouche, *Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to Section 2 of the Sherman Act*, 45 LOY. U. CHI. L.J. (forthcoming 2014).

section 706,⁸⁶ will be free to consider competition in a broader context. The danger, of course, is that the FCC will not use competition law, but will revert to a public interest standard. Nothing in *Verizon*⁸⁷ prevents that. But, given the structure of the Open Internet Order,⁸⁸ one has hope that competition law is the most appealing approach.

In short, a competition-law approach to the underlying concerns of network neutrality is likely the FCC's best way forward. It is likely the only way open to the agency, given the D.C. Circuit's decision, and it will address many of the same concerns.

In fact, the FCC appears to be pointed in this direction to a degree, in its post-*Verizon* Notice of Proposed Rulemaking in the Open Internet Docket.⁸⁹ The Commission's revised proposal, however, introduces a requirement that any individualized agreements between carriers and edge providers be "commercially reasonable."⁹⁰ In its first formulation, the rule appears not to move beyond "openness" or "nondiscrimination," as the FCC says that "[i]t would prohibit as commercially unreasonable those broadband providers' practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects."⁹¹ But the FCC has also said that the principle should be fleshed out by several factors, and the lead factor (proposed, to be sure, not yet adopted) is the "impact on present and future competition."⁹²

The FCC believes that "this competition inquiry [would] extend beyond an application of antitrust principles to include, for example, the predicted impact on future competition."⁹³ This makes too much of the difference: as discussed above, an FCC analysis guided by competition law and economics could make predictive judgments. The FCC points at other factors that would be considered in a competition analysis: vertical integration⁹⁴ and effects on consumer choice.⁹⁵ To be sure, the FCC also identifies considerations that are not typical of antitrust analysis, such as free speech effects.⁹⁶ But the important point is that the FCC does seem more focused on finding a rule that is grounded in a more nuanced effects-based analysis than the "nondiscrimination" focus of the rejected rules—and this is more like antitrust analysis.

86. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706 (codified at 47 U.S.C. § 1302(a)).

87. 740 F.3d 623 (D.C. Cir. 2014).

88. 2010 *Open Internet Order*, *supra* note 1.

89. Protecting & Promoting the Open Internet, *Notice of Proposed Rulemaking*, FCC 14-61, 29 FCC Rcd. 5561 (2014).

90. *Id.* at para. 116.

91. *Id.*

92. *Id.* at para. 124.

93. *Id.*

94. *Id.* at para. 126.

95. *Id.* at para. 129.

96. *Id.* at para. 131.

VI. CODA: WHERE I REJECT THIS WHOLE BUSINESS

At bottom, this entire business is a mess. That we find ourselves in this position as a matter of making rational telecommunications policy is entirely regrettable. To my mind, each of the government players bears some responsibility. As the Internet developed, the FCC was faced with a regime of fairly stringent common-carrier regulation, and as a policy matter it chose to classify Internet services under the information services construct to avoid those strict rules (even if the technical and statutory rationales for doing so were rather unconvincing).⁹⁷ The FCC believed that it would have some regulatory authority to address any serious problems that arose, and this belief was reasonable given the history of the Supreme Court's permitting the agency to have "ancillary jurisdiction" over communications services not directly addressed in the Act.⁹⁸

Indeed, in some regards, *Verizon* feels like a replay of the Supreme Court's recognition of the FCC's ancillary jurisdiction as cable television came to be an important service.⁹⁹ There was a growing communications service, an important one in its own right, and one that was likely to affect the services at the core of the Communications Act (which Congress had clearly indicated should be regulated). And yet Congress was not updating the Act to account for cable television. So the Court found a way to give the FCC authority, subject to judicial review at the boundaries.¹⁰⁰ The same seems to have been the D.C. Circuit's intent in *Verizon*.¹⁰¹ Forcing the FCC to treat the Internet as a common carrier service (by revisiting its classification decision) was foreclosed by the Supreme Court's own permissive approach to that question in *Brand X*.¹⁰² Conversely, holding that the FCC had no authority to superintend this important communications market also seemed untenable. Section 706 was at hand. I do not think the players necessarily evaluated the case in these meta-terms; I do think this was an honest (if incorrect) exercise in statutory interpretation. But everyone understood the stakes.

If one were writing on a blank slate, granting the FCC authority to regulate the Internet but cabining that authority to something short of full-blown common-carrier regulation is not a bad place to be, especially if the result is that the FCC's regulation of the Internet is based strongly on competition law. But I doubt that the courts will be able to find a competition-law limit in the current Act, and I suspect the court's vigor in

97. See *Verizon v. FCC*, 740 F.3d 623, 631 (D.C. Cir. 2014) (summarizing the FCC's approach to classifying internet service providers as information services).

98. See, e.g., *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

99. 740 F.3d 623.

100. *Midwest Video Corp.*, 406 U.S. at 649.

101. 740 F.3d 623.

102. *NCTA v. Brand X Internet Servs., Inc.*, 545 U.S. 967 (2005).

challenging the agency's choice of regulatory tools will wane. Thus, I think it likely we end up with the FCC regulating the Internet "in the public interest, convenience, and necessity."¹⁰³

Congress needs to act. The FCC's classification decision—and the courts' accommodation of it and of the FCC's regulatory authority over information services—have taken the legislature off the hook. One can worry about whether Congress can or will make rational communications policy, for Congress has a history of poorly-timed and politically-expedient interventions in the Act. But the rule of law envisions that Congress will act in making these very fundamental decisions.

Short of new congressional action, the Telecommunications Act of 1996—Congress's last major intervention—actually pointed to the better way forward. Verizon argued to the D.C. Circuit that regulating the Internet was a fairly significant policy decision, one which Congress would have made more clearly if it had intended to grant the FCC expansive authority.¹⁰⁴ As part of its response, the court said that Congress probably did intend the FCC to continue to superintend broadband carriers—but under the common carrier rules of Title II.¹⁰⁵ If that is right, then Congress gave the FCC the authority to regulate broadband, but in a different way than common carriage—through the forbearance authority.

In sum, *Verizon v. FCC* is decidedly a mixed bag. Out of its tortured statutory interpretation may come a reasonable policy approach—that the FCC has some authority to regulate Internet carriers, but it must do so under a competition-law approach. But it is another example of the courts empowering the FCC to be a regulator of "all communications" without clear direction from Congress.

103. *NBC v. United States*, 319 U.S. 190, 204 (1943).

104. *See Verizon*, 740 F.3d 623, 638–39 (D.C. Cir. 2014).

105. *Id.* at 638–39 ("Indeed, one might have thought, as the Commission originally concluded, that Congress clearly contemplated that the Commission would continue regulated Internet providers in the manner it had previously.").

