

Agency Boundaries and Network Neutrality

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Abstract: The Federal Communications Commission's latest network neutrality regulations, released in 2015, have been the subject of compliment and critique by a varied set of politicians, industry leaders, and scholars. But a potentially surprising font of criticism for these new rules lies within the administration itself: During the FCC's rule-making proceeding, the Federal Trade Commission cautioned that the FCC could undermine the FTC's authority to sanction unfair and anticompetitive conduct in broadband industries by activating its powers under Title II of the Communications Act. Simultaneously, members of the FTC argued that it, rather than the FCC, was better suited to address network neutrality harms. This interagency competition gives rise to a novel, descriptive account of executive coordination among independent agencies: The White House responded to the network neutrality proceeding with comments strongly supporting the use of Title II powers—effectively favoring the allocation of authority to the FCC. The White House's intervention is analogous in many respects to the resolution of other interagency disputes, but takes places among independent, rather than executive, agencies. Moreover, the choice to favor the FCC over the FTC has important effects on the substantive choice between communications regulation and the more general (and thus less specific) principles of the antitrust laws.

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INTRODUCTION

In May 2014, the Federal Communications Commission (FCC) launched a network neutrality rule-making proceeding in response to the D.C. Circuit's decision in *Verizon v. FCC*.¹ To say that the Commission's proceeding sparked a debate would be a vast understatement: The FCC's proposal² caused the agency to confront a record larger than had ever been amassed in its history.³

Among the many submissions to the FCC, some stand out. The White House, for example, expressly asked the FCC to "implement the strongest possible rules to protect net neutrality."⁴ Specifically, the Obama Administration urged the FCC to "reclassify consumer broadband service" as a telecommunications service, thereby making it subject to the provisions of Title II of the Communications Act.⁵ Indeed, the FCC's 2015 Open Internet Order issued regulations that rely primarily on these Title II powers.⁶

The White House was not the only section of the federal government to file comments with the FCC. The Federal Trade

¹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

² Protecting and Promoting the Open Internet, 29 FCC Rcd. 5561, 5564 (2014) (notice of proposed rulemaking) [hereinafter 2014 Open Internet NPRM].

³ See Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5603–04 (2015) (report and order on remand, declaratory ruling, and order) [hereinafter 2015 Open Internet Order].

⁴ The Obama Administration's comments were conveyed through the National Telecommunications and Information Administration (NTIA), an agency within the Department of Commerce that is charged with developing Executive Branch telecommunications policy. 47 U.S.C. § 902(b)(2)(H) (2012). NTIA's filing does not add any policy views, other than those of the President. Compare Letter from Lawrence E. Strickling, Assistant Sec'y for Commc'ns & Info., Dep't of Commerce, to Marlene Dortch, Sec'y, Fed. Commc'ns Comm'n on Ex Parte Filing 3 (Nov. 10, 2014) (on file with the FCC), <http://apps.fcc.gov/ecfs/comment/view?id=60000979242> [hereinafter Letter on Ex Parte Filing], and 2015 Open Internet Order, *supra* note 3, at 5603, with *Net Neutrality: President Obama's Plan for a Free and Open Internet*, THE WHITE HOUSE, <https://www.whitehouse.gov/net-neutrality> (last visited May 2015). Indeed, NTIA often serves as the conduit between the President and the FCC. Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 86 (2008).

⁵ Letter on Ex Parte Filing, *supra* note 4, at 3.

⁶ 2015 Open Internet Order, *supra* note 3, at 5603, 5614–16.

Commission (FTC) also opined on the possible exercise of the FCC's Title II powers. It, however, had a starkly different take: The FTC cautioned the FCC against invoking authority under Title II of the Act, noting that to do so would curtail the FTC's authority to sanction unfair conduct by broadband carriers.⁷ Some members of the FTC went further, suggesting that it, rather than the FCC, was "particularly well suited for . . . addressing the important issues raised in the net neutrality debate."⁸ Viewed altogether, the FTC seemed to suggest that it was the better agency for addressing network neutrality-related

⁷ Comment of the Federal Trade Commission (filed Sept. 19, 2014), *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in Reasonable and Timely Fashion, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd. 1375 (2015) (notice of inquiry) (FCC Docket No. 15-10), https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-comment-federal-communications-commission-regarding-privacy-security/140919privacybroadband.pdf; see also Edward Wyatt, *Edith Ramirez Is Raising the FTC's Voice*, N.Y. TIMES, Dec. 21, 2014 (noting, by citing the comment *supra*, that the "FTC has recently warned . . . that the FCC's net neutrality ruling might infringe on the trade commission's ability to protect consumers[]"); see also Press Release, FTC, FTC Provides Comment to Federal Communications Commission on Consumer Privacy and Data Security Issues and Broadband Internet Services (Sept. 22, 2014), <https://www.ftc.gov/news-events/press-releases/2014/09/ftc-provides-comment-federal-communications-commission-consumer> (noting that the FTC voted unanimously to file the comment cited *supra*).

⁸ Net Neutrality: Is Antitrust Law More Effective Than Regulation in Protecting Consumers and Innovation?: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 1 (June 20, 2014), https://www.ftc.gov/system/files/documents/public_statements/409571/140620antitrust_testimony.pdf [hereinafter Wright 2014 Testimony] (statement of Joshua D. Wright, Former Comm'r of FTC); Brian Fung, *The FTC Doubles Down on Its Net Neutrality Ambitions*, THE SWITCH-WASH. POST (Sept. 29, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/29/the-ftc-doubles-down-on-its-net-neutrality-ambitions> (noting comments by Commissioner Ohlhausen that "reflect a belief in antitrust law to police Internet providers"); see also Hon. Maureen K. Ohlhausen, *The FCC's Knowledge Problem: How to Protect Consumers Online*, 67 FED. COMM'NS L.J. 203, 212-14, 229-31 (2015); Joshua D. Wright, Comm'r, FTC, *Broadband Policy & Consumer Welfare: The Case for an Antitrust Approach to Net Neutrality Issues at the Information Economy Project's Conference on US Broadband Markets at George Mason University School of Law* (Apr. 19, 2013), available at https://www.ftc.gov/sites/default/files/documents/public_statements/broadband-policy-consumer-welfare-case-antitrust-approach-net-neutrality-issues/130423wright_nn_posting_final.pdf ("[T]he FTC's core competencies as an antitrust and consumer protection agency make it equal to the task [of addressing the concerns raised in the longstanding debate surrounding net neutrality].") [hereinafter Wright BPCW Speech]; Joshua D. Wright, Comm'r, FTC, *Net Neutrality Meets Regulatory Economics* 101 (Feb. 25, 2015) [hereinafter Wright 2015 Speech].

harms—but warned that reclassification would upend the FTC’s jurisdiction over broadband Internet access.

The White House’s intercession into the network neutrality proceeding, set against the backdrop of this interagency conflict, provides a novel account of executive coordination among independent agencies. The White House’s intervention into the dispute between the FCC and the FTC echoes a form of presidential coordination that is typically seen as reserved for executive—rather than independent—agencies.⁹ To be sure, there is little that is unusual about presidential *advocacy* before independent agencies, such as the FTC and the FCC.¹⁰ Yet, it is significant that the White House not only propounded a particular policy outcome, but it also helped to resolve a conflict among these agencies by implicitly favoring the allocation of substantive authority to the FCC.

Moreover, the specific choice to vest network neutrality jurisdiction with the FCC has implications for the long-running competition between antitrust enforcement and industrial regulation.¹¹ The decision to activate the FCC’s power to regulate broadband providers as common carriers, indeed, undermines the FTC’s jurisdiction,¹² and likely affects the permissible scope of antitrust enforcement.¹³ Yet the preference for such regulation also reflects a sensible policy view. Modern antitrust doctrine is not ideally suited to counter the competition harms that network neutrality regulation has historically targeted. Rather, the specific market conditions associated with broadband carriage and Internet applications suggest that the industry presents an appropriate candidate for regulation.

⁹ See Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013) (noting “a sort of constitutional force field around independent agencies”).

¹⁰ See, e.g., Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. (forthcoming 2016) (Social Science Research Network, Research Paper No. 12, 2015); Peter M. Shane, ‘*Undue Influence?*’ *Congressional Attacks on FCC-White House Links*, BNA BLOOMBERG, Mar. 3, 2015, <http://www.bna.com/undue-influence-congressional-n17179923581>.

¹¹ See generally, e.g., STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 233 (1982); ALFRED KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 9 (1971).

¹² 15 U.S.C. § 45(a) (excepting common carriers from the FTC’s jurisdiction).

¹³ See, e.g., *Credit Suisse Sec. (USA), LLC v. Billing*, 551 U.S. 264, 267 (2007) (interpreting regulatory regime as “implicitly precluding the application of the antitrust laws”); *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411–12 (2004).

I. INTERAGENCY COMPETITION

It is an open secret that the FCC and the FTC have engaged in an ongoing jurisdictional battle over the authority to regulate broadband.¹⁴ The significant overlap between the agencies' domains has caused them to compete over the authority to regulate the unfair billing practices of telephone and broadband carriers; data security and privacy; and, more recently, network neutrality. The gradual swell of these interagency disputes, cresting with the FTC's view of network neutrality regulation by the FCC, provides important context to the White House's intervention in the FCC's regulatory proceeding.

The interagency clash between the FTC and FCC dates to the regulation of telephone service. For example, over a decade ago, the two agencies sparred over the authority to enforce the "Do-Not-Call" registry, which allows telephone subscribers to opt-out of telemarketing calls.¹⁵

More recently, both agencies have asserted the authority to police unfair billing practices by telephone operators. Both the FTC and the FCC have sanctioned wireless companies for adding "unauthorized charges on . . . [a customer's] telephone bill"—a practice known in

¹⁴ *E.g.*, David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1466 n.91 (2014) (citing Reconsidering Our Communications Laws: Ensuring Competition and Innovation: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of William E. Kovacic, Comm'r, FTC) ("The deployment of broadband has triggered a struggle between the Federal Communications Commission and the FTC over which agency will exercise regulatory authority for this technology."); Wyatt, *supra* note 7 (noting tension and turf battles between the FTC and the FCC); *see also* Kathryn Bachman, *FCC vs. FTC — A New Privacy Turf War*, KATY ON THE HILL, Mar. 30, 2015, <http://katyonthehill.com/fcc-vs-ftc-a-new-privacy-turf-war>; Erin Mershon, *The Latest Tech Turf War: FCC vs. FTC*, POLITICO MORNING TECH., Oct. 30, 2014, <http://www.politico.com/morningtech/1014/morningtech15888.html>; Jeff John Roberts, *Why a DC Turf War May Have Played a Part in the Timing of the FTC's Mobile Data Lawsuit Against AT&T*, GIGAOM, Oct. 28, 2014, <https://gigaom.com/2014/10/28/why-a-dc-turf-war-may-have-played-a-part-in-the-timing-of-the-ftcs-mobile-data-lawsuit-against-att>. Indeed, these jurisdictional battles have lingered for over decade. *See* Vanderbilt University Press, "Do Not Call" Controversy Likely to Turn Into Agency Turf Battle, NEWSWISE, Oct. 8, 2003, available at <http://www.newswise.com/articles/do-not-call-controversy-likely-to-turn-into-agency-turf-battle> (recounting interview with Professor Christopher S. Yoo).

¹⁵ Vanderbilt University, *supra* note 14 (noting the possibility of a "turf battle over whether the do not call list will be enforced by the Federal Trade Commission or the Federal Communications Commission"). For details on the Do-Not-Call Registry, see 15 U.S.C. § 6151 (2012) and 16 C.F.R. § 310.4(b)(1)(iii)(B) (2015).

industry jargon as “cramming.”¹⁶ In October 2014, the FTC and the FCC jointly reached a \$105 million settlement with AT&T for alleged cramming violations.¹⁷ Meanwhile, the FCC pursued additional actions against T-Mobile to the tune of \$90 million,¹⁸ and against Verizon and Sprint for a combined \$158 million.¹⁹ While some of this work between the agencies was almost certainly cooperative,²⁰ as in the case of joint settlement with AT&T,²¹ officials also admitted to some interagency “tension” as each “bulk[ed] up enforcement efforts” in these matters.²²

¹⁶ *Cramming - Unauthorized Charges on Your Phone Bill*, FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/guides/cramming-unauthorized-misleading-or-deceptive-charges-placed-your-telephone-bill> (last visited June 2015).

¹⁷ Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227-HLM (N.D. Ga. Oct. 8, 2014); *AT&T Mobility LLC Unauthorized Third Party Billing Charges*, 29 FCC Rcd. 11803 (2014) (order); *see also* Press Release, FTC, AT&T to Pay \$80 Million to FTC for Consumer Refunds in Mobile Cramming Case (Oct. 8, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case>; Press Release, FCC, AT&T Mobility to Pay \$105 Million to Settle Wireless Cramming and Truth-in-Billing Investigation (Oct. 8, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-329830A1.pdf.

¹⁸ T-Mobile USA, Inc. Unauthorized Third Party Billing Charges, 29 FCC Rcd. 15111 (2014) (order); *see also* Press Release, FCC, T-Mobile to Pay \$90 Million to Settle Investigation into Mobile Cramming and Truth-In-Billing Practices (Dec. 19, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-331156A1.pdf.

¹⁹ *Cellco P'ship Verizon Wireless Unauthorized Third Party Billing Charges*, 30 FCC Rcd. 4590 (2015) (order); *Sprint Corp. Unauthorized Third Party Billing Charges*, 30 FCC Rcd. 4575 (2015) (order); *see also* Press Release, FCC, Verizon & Sprint to Pay \$158 Million to Settle Mobile Cramming Investigations (May, 12, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-333427A1.pdf.

²⁰ Indeed, all the settlements included cooperation from state attorneys general, and the settlements with Verizon and Sprint also included participation from the Consumer Financial Protection Bureau. *See, e.g.*, Press Release, FCC, Verizon & Sprint to Pay \$158 Million to Settle Mobile Cramming Investigations (May 12, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-333427A1.pdf (“The settlements were negotiated in coordination with the Consumer Financial Protection Bureau and the attorneys general of all 50 states and the District of Columbia.”).

²¹ *E.g.*, Press Release, FCC, AT&T Mobility to Pay \$105 Million to Settle Wireless Cramming and Truth-in-Billing Investigation (Oct. 8, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-329830A1.pdf (“This settlement, a joint effort between the FCC, FTC and all 50 states and the District of Columbia, is a prime example of government agencies working together on behalf of American consumers.”).

²² Mershon, *supra* note 14.

The FTC and the FCC have also sparred over their jurisdictional border on matters that extend beyond telephone regulation and unfair billing practices. The FTC, for example, is often thought to be the “most influential regulating force on information privacy in the United States.”²³ Strikingly, however, it is the FCC—not the FTC—that has imposed the largest civil penalty for a consumer privacy violation: In 2015, AT&T paid \$25 million to settle allegations that employees in its call centers illicitly accessed the personal information of almost 280,000 U.S. customers.²⁴ The FCC’s privacy-related settlement with AT&T follows shortly after similar actions against other telephone carriers, including Verizon, in late 2014.²⁵

Some commentators have suggested that the FCC’s data privacy- and security-related enforcement actions rankled the FTC, causing it to respond in-kind by taking the lead against “misdeeds [that normally] fall to its sister agency.”²⁶ Specifically, the FTC sued AT&T over its practice of throttling²⁷ wireless broadband service when an “unlimited mobile data plan customer exceeds the limit set by [AT&T] during a billing cycle,” alleging that such conduct constituted a

²³ Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585-86 (2014).

²⁴ AT&T Services, Inc., 30 FCC Rcd. 2808 (2015) (order); see also Press Release, FCC, AT&T to Pay \$25 Million to Settle Consumer Privacy Investigation (Apr. 8, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-332911A1.pdf. As noted *supra*, AT&T paid \$25 million to resolve the FCC’s investigation. Prior to that, the largest such penalty was \$22.5 million—paid by Google to resolve a FTC investigation. See Solove & Hartzog, *supra* note 23, at 605.

²⁵ Verizon Compliance with the Commission’s Rules and Regulations Governing Customer Proprietary Network Information, 29 FCC Rcd. 10303 (2014) (adopting order); Terracom, Inc. and Yourtel America, Inc., 29 FCC Rcd. 13325 (2014) (notice of apparent liability for forfeiture); see also Press Release, FCC, FCC Plans \$10 Million Fine for Carriers that Breached Consumer Privacy (Oct. 24, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-330136A1.pdf.

²⁶ Roberts, *supra* note 14; see also Brendan Sasso, *Net Neutrality Has Sparked an Interagency Squabble Over Internet Privacy*, NATIONAL JOURNAL, Mar. 9, 2015, <http://www.nationaljournal.com/tech/the-future-of-broadband/net-neutrality-has-sparked-an-interagency-squabble-over-internet-privacy-20150309>.

²⁷ In this context, throttling means slowing. See 47 C.F.R. § 8.7 (2015) (Throttling means to “impair or degrade lawful Internet traffic.”); 2015 Open Internet Order, *supra* note 3, at ¶ 120 (The no-throttling rule bans conduct that “inhibits the delivery of particular content . . .”).

violation of the FTC Act.²⁸ Only a few months before the FTC filed its complaint, the FCC launched an informal investigation into Verizon's plans to similarly throttle Internet access for those consumers subscribing to "unlimited" plans that used an unusually large amount of data.²⁹ That is, both the FTC and the FCC each targeted similar broadband-related conduct by wireless carriers. And commentators remarked that the FTC's actions may have been motivated not only by the desire to ensure that "companies liv[e] up to the commitments they make," but also "to undermine the FCC."³⁰

Much of this interagency competition occurred against the backdrop of the FCC's network neutrality proceeding. In January 2014, the D.C. Circuit invalidated much of the FCC's 2010 Open Internet Order and the network neutrality rules contained therein.³¹ On remand, the FCC opened a new regulatory docket and approved a Notice of Proposed Rulemaking that sought comment on a variety of alternative legal bases for new network neutrality regulations.³² In particular, the FCC sought comment on Section 706 of the Telecommunications Act of 1996,³³ on Title II of the Communications Act,³⁴ and on several "hybrid" proposals.³⁵ The FCC's proceeding

²⁸ Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. AT&T Mobility, LLC*, 87 F.Supp.3d 1087 (N.D. Cal. 2015) (No. C-14-4785 EMC), 2014 WL 5454646.

²⁹ Letter from Tom Wheeler, Chairman, FCC, to Daniel S. Mead, President and CEO, Verizon Wireless (July 30, 2014), available at <http://cdn1.vox-cdn.com/assets/4837852/FCCLettertoVerizon.pdf>.

³⁰ Roberts, *supra* note 14. Interestingly, the FCC would eventually also target AT&T's throttling practices: In June 2015, the FCC announced plans to fine AT&T \$100 million for failing to adequately notify customers subscribing to unlimited data plans that their Internet access could be throttled based on usage. *AT&T Mobility, Inc.*, 30 FCC Rcd. 6613 (2015) (notice of apparent liability for forfeiture and order); see also Press Release, FCC, FCC Plans to Fine AT&T \$100 Million for Misleading Consumers About Unlimited Data Plans, Violating Transparency Obligations (June 17, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0617/DOC-333877A1.pdf. Perhaps notably, the FCC specifically alleges that AT&T violated the aspects of the 2010 Open Internet (network neutrality) Order that survived scrutiny in *Verizon v. FCC. Id.*

³¹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (vacating most, but not all, of Preserving the Open Internet, 25 FCC Rcd. 17905 (2010) (report and order)).

³² 2014 Open Internet NPRM, *supra* note 2.

³³ 47 U.S.C. § 1302 (2012).

³⁴ 47 U.S.C. § 201 *et seq.* (2012).

sparked a nationwide debate, as nearly four million citizens, corporations, and advocacy organizations, among others, filed comments with the FCC.

Notably, the FTC was among the many interested parties to comment on the FCC's choice among substantive rules and bases of legal authority.³⁶ In particular, the FTC emphasized that its own oversight "promotes competition" and "provides an incentive for companies to act responsibly and fairly;" and the FTC further described several successful enforcement actions against Internet-related companies under Section 5 of the FTC Act.³⁷ Indeed, the FTC squarely asserts its Section 5 authority in its complaint against AT&T's throttling practice³⁸ (itself a network neutrality matter³⁹).

But the FTC's comment also explicitly noted that its continued jurisdiction over broadband carriers hinged on the FCC's regulatory decisions: If the FCC were to classify broadband carriers as common carriers (thereby invoking Title II of the Communications Act), the FTC's Section 5 jurisdiction would practically evaporate.⁴⁰ Stated simply, the FTC emphasized its success in "requir[ing] companies to market their products truthfully and to refrain from engaging in harmful business practices," but warned that the FCC could

³⁵ 2014 Open Internet NPRM, *supra* note 2, at ¶¶ 151-52; *see also* Tejas N. Narechania & Tim Wu, *Sender Side Transmission Rules for the Internet*, 66 FED. COMM. L.J. 467 (2014).

³⁶ Technically, the FTC's comment (discussed in detail above) was filed in a parallel, but closely related, proceeding. *See* Comment of the FTC, *supra* note 7, at 1. Nevertheless, the FTC's filing was widely seen as a comment on the FCC's network neutrality proposals. *See* Wyatt, *supra* note 7; Brian Fung, *The FCC Wants to Police Your Internet Provider. But So Does the FTC.*, THE SWITCH-WASH. POST (Sept. 23, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/23/both-the-fcc-and-the-ftc-want-to-police-your-internet-provider>.

³⁷ Comment of FTC, *supra* note 7, at 3-4.

³⁸ Complaint, *supra* note 28.

³⁹ AT&T Mobility, LLC, 30 FCC Rcd. 6613 (2015) (notice of apparent liability for forfeiture and order); *see also* Press Release, FCC, FCC Plans to Fine AT&T \$100 Million for Misleading Consumers About Unlimited Data Plans, Violating Transparency Obligations (June 17, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0617/DOC-333877A1.pdf (alleging that AT&T violated the transparency provisions of the Commission's 2010 network neutrality rules).

⁴⁰ *Id.* at 3 (citing 15 U.S.C. § 44, 45(a)(2) (2012)).

undermine these accomplishments if it pursued a regulatory path that relied on Title II of the Communications Act.⁴¹

Some individual members of the FTC offered further thoughts on the FCC's options for network neutrality regulation. Commissioner Ohlhausen, for example, has expressed serious concern that the FCC's approach could truncate the FTC's regulatory jurisdiction.⁴² Moreover, in statements that preceded the release of the 2014 Open Internet NPRM and postdated the 2015 Open Internet Order, Commissioner Ohlhausen argued explicitly that the FTC is best equipped to address network neutrality harms.⁴³ Commissioner Wright echoed these sentiments: In testimony before Congress, Commissioner Wright stated that the FTC was "particularly well suited for . . . addressing the important issues raised in the net neutrality debate."⁴⁴ To be sure, some past and present members of the FTC seemed to believe that the agency was ill-suited to address the harms that network neutrality regulation aimed to resolve,⁴⁵ and seemed glad to cede authority to the

⁴¹ *Id.*

⁴² Ohlhausen, *supra* note 8, at 229–31; *see also* Fung, *supra* note 8 (noting comments by Commissioner Ohlhausen that "reflect a belief in antitrust law to police Internet providers"); Sasso, *supra* note 26.

⁴³ Ohlhausen, *supra* note 8, at 205 ("To the extent the government is involved, the Federal Trade Commission (FTC) model of enforcement, advocacy, and industry and consumer education is the better model . . ."); Hon. Maureen K. Ohlhausen, *Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, And Not More Regulation, Could Protect Innovation on the Web*, 14 ENGAGE 81 (Feb. 2013), https://www.ftc.gov/system/files/documents/public_statements/telecommunications-electronic-media-net-neutrality-vs.net-reality-why-evidence-based-approach-enforcement-not-more-regulation-could-protect-innovation-web/140204ohlhausennetneutrality.pdf; *see also* Harry Phillips, *Ohlhausen: FTC Best Placed to Ensure Net Neutrality*, GLOBAL COMPETITION REVIEW, Feb. 7, 2014, available at <http://globalcompetitionreview.com/news/article/35198/ohlhausen-ftc-best-placed-ensure-net-neutrality> ("The US Federal Trade Commission, rather than any other regulator, is in the best position to ensure that internet service providers are not harming consumers by discriminating against rivals' content, FTC commissioner Maureen Ohlhausen said in a speech . . .").

⁴⁴ Wright 2014 Testimony, *supra* note 8; Wright BPCW Speech, *supra* note 8 ("[T]he FTC's core competencies as an antitrust and consumer protection agency make it equal to the task [of addressing the concerns raised in the longstanding debate surrounding net neutrality.]"); Wright 2015 Speech, *supra* note 8.

⁴⁵ For the views of former Commissioners, see J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Some Reflections on the Future of the Internet: Net Neutrality, Online Behavioral Advertising, and Health Information Technology*, Remarks at the U.S. Chamber of Commerce Telecommunications & Ecommerce Committee Fall Meeting (Oct. 26, 2009);

FCC.⁴⁶ Yet, the agency's official comment to the FCC and the public statements of at least two of its Commissioners are suggestive of a shift towards a more intense interagency competition for the mantle of network neutrality.

II. EXECUTIVE COORDINATION

This conflict between the FCC and the FTC adds important context to another notable filing in the network neutrality docket. In November 2014, the White House itself intervened into the FCC's proceeding. Notably, President Obama explicitly asked the agency to "implement the strongest possible rules to protect net neutrality," urging the FCC to classify broadband providers as common carriers and invoke its powers under Title II of the Communications Act.⁴⁷

The FCC would take the White House's advice: In its final order, the FCC issued regulations that closely hew to the policies outlined in the President's statement, and the Commission grounded these rules in the authority conferred by Title II.⁴⁸ Commentators noted that the White House's intervention seemed to have charted the course for the FCC's network neutrality regulations, setting aside other alternatives.⁴⁹ Set against the backdrop of the interagency competition

J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Broadband Access Policy: The Role of Antitrust*, Remarks at the Broadband Policy Summit IV: Navigating the Digital Revolution (June 13, 2008) ("I doubt that antitrust can address many, if any, of the problems cited by network neutrality proponents."); Federal Trade Commission, *Broadband Connectivity Competition Policy* (June 2007) (Jon Leibowitz, Comm'r, concurring) ("[T]here is little chance that antitrust would prevent such a scheme [as the one in *Madison River* case] except after a 'rule of reason' analysis, which — at least in these types of cases — is likely to be drawn out, uncertain and expensive."). For views of Commissioners sitting at the time of the FCC's proceeding, see Anne L. Kim, *FTC Commissioners Also Talk Net Neutrality at CES*, Roll Call Blog (Jan. 8, 2015), <http://blogs.rollcall.com/technocrat/ftc-commissioners-also-talk-net-neutrality-at-ces> (noting views of two other Commissioners who disagree with the view that the FTC, alone, can address network neutrality through the antitrust laws).

⁴⁶ Rosch, *Some Reflections on the Future of the Internet*, *supra* note 45, at 3 ("I am glad that the FCC, instead of the FTC, is handling this hot potato.").

⁴⁷ Letter on Ex Parte Filing, *supra* note 4, at 3.

⁴⁸ 2015 Open Internet Order, *supra* note 3, at ¶¶ 5, 41, 49–50 (2015).

⁴⁹ See, e.g., Gautham Nagesh, *Net Neutrality: How White House Thwarted FCC Chief*, WALL ST. J., Feb. 4, 2015 ("The president's words swept aside . . . months of work by [FCC Chairman] Wheeler toward a compromise.").

between the two regulatory commissions, the White House's comments seem to have done more than advocate for (and achieve) a particular policy outcome. They further helped to resolve the conflict between the FTC and the FCC. Although the comments do not explicitly address the interagency competition, the White House's proposal favoring the common carrier designation had the significant effect of truncating the FTC's authority to sanction broadband carriers under Section 5 of the FTC Act,⁵⁰ and likely limited the scope of permissible antitrust enforcement.⁵¹ That is, the White House's intervention implicitly favored FCC oversight for network neutrality matters.

In some respects, this is unremarkable. The executive routinely adjudicates interagency disputes through a variety of institutional mechanisms.⁵² In some cases, the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA) coordinate among agencies with overlapping jurisdiction.⁵³ In other instances, the Department of Justice's Office of Legal Counsel (OLC) informally mediates disputes among agencies, or issues formal decisions that resolve interagency conflicts.⁵⁴

Aside from exercising control through OMB, OIRA, or OLC, specialized offices within the White House will sometimes become directly involved in an interagency conflict.⁵⁵ For example, the White

⁵⁰ 15 U.S.C. § 45(a) (excepting common carriers from the FTC's jurisdiction).

⁵¹ See, e.g., *Credit Suisse Sec. (USA) v. Billing*, 551 U.S. 264, 267 (2007) (interpreting regulatory regime as "implicitly precluding the application of the antitrust laws"); *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411–12 (2004).

⁵² Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1173–81 (2012) ("describ[ing] some of the well-established coordination instruments that are uniquely available to the President, including centralized White House review.").

⁵³ See, e.g., J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2298 (2005) ("The most important player in coordinating regulatory action across multiple executive agencies may be [OIRA] . . ."); Freeman & Rossi, *supra* note 52, at 1178.

⁵⁴ See, e.g., Freeman & Rossi, *supra* note 52, at 1175–76 ("[T]he President relies in the normal course on the Office of Legal Counsel (OLC) in DOJ to help resolve jurisdictional disputes among agencies.").

⁵⁵ See, e.g., Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1849 (2013) ("In important but unusual cases, a White House policy office will initiate a process . . . to help coordinate discussions . . . Such

House's Office of Science and Technology Policy (OSTP) interceded into a dispute between the Patent and Trademark Office and the National Institutes of Health regarding the patentability of DNA molecules.⁵⁶ Indeed, the intervention into the dispute over network neutrality fits this latter mold precisely: Accounts of the White House's involvement in the network neutrality proceeding describe how OSTP took a particular interest in network neutrality and coordinated policy discussions among interested participants.⁵⁷

Notably, however, both the FCC and FTC are *independent* agencies, while the PTO and NIH are *executive* agencies. This is a potentially important distinction: While the "traditional description of an executive agency is one that is subject to plenary control," independent agencies are typically thought to be protected from such influence.⁵⁸ To be sure, there is some precedent for executive intervention in interagency disputes that include independent commissions.⁵⁹ Such cases are relatively rare, however, and the White House's intervention into the network neutrality proceeding offers a unique and potentially important example of executive coordination among independent regulators.⁶⁰

a process is especially likely to occur if an initiative is a presidential priority or otherwise of interest to the President and his closest advisers.”).

⁵⁶ See Arti K. Rai, *Biomedical Patents at the Supreme Court: A Path Forward*, 66 STAN. L. REV. ONLINE 111, 114–15 (2013); Arti K. Rai, *Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 DUKE L.J. 1237, 1253 n.64, 1259 n.94 (2012); see also Sunstein, *supra* note 55, at 1849.

⁵⁷ Nagesh, *supra* note 49.

⁵⁸ Datla & Revesz, *supra* note 9, at 813; see also *id.* at 774; Freeman & Rossi, *supra* note 52, at 1175, 1179 n.237 (“Presidents are typically less able to direct action by independent agencies than action by executive agencies . . .”).

⁵⁹ *Train v. Colo. Pub. Interest Research Grp.*, 426 U.S. 1, 24 n.20 (1976) (describing the allocation of authority between the EPA and the Atomic Energy Commission—now the Nuclear Regulatory Commission (NRC)) (citing AEC-EPA Memoranda of Understanding, 38 Fed. Reg. 24936, 32965 (1973)); *Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Comm'n*, 598 F.2d 759 (3d Cir. 1979) (upholding the independent NRC's moratorium, imposed in deference to President Carter's stated nonproliferation strategy of informal rulemaking and related licensing proceedings involving the recycling of spent nuclear fuel); see also Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 183 (2011); Datla & Revesz, *supra* note 9, at 824 n.313.

⁶⁰ See Datla & Revesz, *supra* note 9, at 823–24; Freeman & Rossi, *supra* note 52, at 1174 (“The President may be able to mediate among agencies faced with related and interacting delegations to steer the policy course he prefers, in some cases even exerting influence over

III. A SENSIBLE POLICY CHOICE

The White House's response to the FCC's regulatory proceeding thus not only advocated for a particular outcome, but also had the important effect of quelling an interagency jurisdictional dispute. At least one important question emerges from the White House's intervention:⁶¹ Was the choice to allocate authority over network neutrality to the FCC, and, thereby, rely on communications regulation, sound? Focusing especially on the rule banning conduct that favors affiliated entities, the decision to rely on *ex ante* regulation, rather than *ex post* antitrust enforcement, seems a sensible policy choice.

The FCC's 2015 Open Internet Order explicitly bans conduct that "favor[s] some [Internet] traffic over other traffic . . . to benefit an affiliated entity."⁶² That is, the new rules prevent Comcast (for example) from favoring services that it owns, such as Hulu,⁶³ at the expense of competitors, such as Netflix. This type of competition concern, that carriers would favor the traffic of their own affiliates to exclude competitors,⁶⁴ has long served as one motivation for network neutrality regulation.⁶⁵

independent agencies, which otherwise tend to elude his control."); *see also id.* at 1201 n.312.

⁶¹ Several other questions emerge from the White House's intervention, including whether such executive coordination among independent agencies is lawful or desirable. *E.g.*, Datla & Revesz, *supra* note 9, at 774 (arguing that "the President can constitutionally take any action with respect to independent agencies that he could with respect to the executive agencies unless a statutory provision says otherwise[]"); *see also* Watts, *supra* note 10, at 46-47 ("Obama's overt involvement [in the network neutrality proceeding] furthers notions of political accountability and transparency . . ."); Shane, *supra* note 10 ("The FCC's independent agency status does not by itself make White House contacts improper."). I set these matters to one side for the purposes of this essay, noting only that the network neutrality example demonstrates that such executive influence is (at least occasionally) empirically observable.

⁶² 47 C.F.R. § 8.9(b); 2015 Open Internet Order, *supra* note 3, at ¶ 18; *see also* 2014 Open Internet NPRM, *supra* note 2, at ¶ 126 ("[W]e propose to adopt a rebuttable presumption that a broadband provider's exclusive (or effectively exclusive) arrangement prioritizing service to an affiliate would be commercially unreasonable.").

⁶³ *NBCUniversal: NBCUniversal Cable Networks, COMCAST*, <http://corporate.comcast.com/our-company/businesses/nbcuniversal> (last visited May 16, 2015) ("Among the diverse digital media properties of NBCUniversal [is] . . . Hulu . . .").

⁶⁴ *See* Tejas N. Narechania, *Network Nepotism and the Market for Content Delivery*, 67 STAN. L. REV. ONLINE 27, 29-30 (2014). For a sampling of works that explore exclusion as a competition concern more generally, *see* Steven C. Salop, *Economic Analysis of*

For example, the FCC's first significant network neutrality decision sanctioned Madison River, a telephone company, for blocking online voice applications (using voice-over-Internet-Protocol, or VoIP, technology) that competed with its existing services.⁶⁶ AT&T has likewise restricted the availability of competing VoIP services.⁶⁷ On other occasions, mobile operators have, after affiliating with one mobile payment services provider, blocked access to competing services.⁶⁸ More recently, the Department of Justice investigated allegations that broadband carriers used data caps (i.e., limits on consumer use) to advantage affiliated cable television products and their Internet-enabled counterparts.⁶⁹ Additionally, Verizon once restricted third-party applications that competed with its own mobile data offerings.⁷⁰

This varied set of examples, stretching over a decade and across both wireline and wireless providers, suggests that broadband carriers, in fact, seek to discriminate among applications to favor affiliated services. That is, the possibility of exclusion presents a real

Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark, in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* 141 (Robert Pitofsky ed., 2008); Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013); C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013); and Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

⁶⁵ See, e.g., Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 142 (2003) ("Government regulation in such contexts invariably tries to help ensure that the short-term interests of the owner do not prevent the best products or applications becoming available to end-users.").

⁶⁶ Madison River Commc'ns, LLC, 20 FCC Rcd. 4295 (2005) (order).

⁶⁷ Preserving the Open Internet, 25 FCC Rcd. 17905, 17925 (2010) (report and order) [hereinafter 2010 Open Internet Order]; see also *Free Press Concerned About AT&T's Plan to Charge for FaceTime*, FREE PRESS, July 17, 2012, <https://www.freepress.net/press-release/98878/free-press-concerned-about-att%E2%80%99s-plan-charge-facetime>.

⁶⁸ Verizon v. FCC, 740 F.3d 623, 648 (citing 2010 Open Internet Order, *supra* note 67, at 17925); David Goldman, *Verizon Blocks Google Wallet*, CNNMONEY, Dec. 6, 2011, http://money.cnn.com/2011/12/06/technology/verizon_blocks_google_wallet.

⁶⁹ Thomas Catan & Amy Schatz, *U.S. Probes Cable for Limits on Net Video*, WALL ST. J., June 13, 2012, <http://online.wsj.com/news/articles/SB10001424052702303444204577462951166384624>.

⁷⁰ Cellco P'ship, 27 FCC Rcd. 8932, 8936 (2012) (order).

concern for those that seek to compete with the applications and services offered by network operators and broadband carriers themselves.⁷¹

Despite this set of empirical examples suggesting—in the context of broadband applications—that the threat of foreclosure presents a serious threat to fair competition, antitrust has tended to “downplay[] exclusion,”⁷² and, thereby, tends to be relatively permissive with regard to the market arrangements that threaten to impose such competitive harms.⁷³

As noted above, however, it is empirically demonstrable that broadband carriers seek to profitably discriminate against competitors to favor affiliates. Indeed, courts and scholars have explained that such exclusionary conduct can be lucrative for platform owners, such as broadband carriers, that leverage their gatekeeper power to hinder new innovations while making space for affiliated services.⁷⁴ The costs imposed by such anticompetitive conduct are significant: Because many broadband applications benefit from network effects and from first-mover advantages, exclusionary conduct can give the favored rival a significant advantage while stunting economic growth and innovation more broadly.⁷⁵ Because antitrust’s sieve may fail to catch important instances of exclusionary conduct,⁷⁶ a strong regulatory presumption against affiliate-based exclusionary behavior is well-

⁷¹ Cf. James A. Keyte & Kenneth B. Schwartz, *Getting Vertical Deals Through the Agencies*, 29 ANTITRUST 10, 12–15 (Summer 2015) (describing examples of FTC and Department of Justice action in cases presenting analogous threats to competition).

⁷² Baker, *supra* note 64, at 531.

⁷³ Wright BPCW Speech, *supra* note 8, at 9-10; Baker, *supra* note 64, at 534-35; *see also generally* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991).

⁷⁴ *Verizon v. FCC*, 740 F.3d 623, 646-49 (D.C. Cir. 2014); Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 73 (2003); *see also* Baker, *supra* note 64, at 561-62; Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 413 (2009).

⁷⁵ Baker, *supra* note 64, at 559-62.

⁷⁶ *See, e.g.*, FTC, BROADBAND CONNECTIVITY COMPETITION POLICY (June 2007) (Jon Leibowitz, Comm’r, concurring) (“[T]here is little chance that antitrust would prevent such a scheme [as the one in *Madison River* case] except after a ‘rule of reason’ analysis, which — at least in these types of cases — is likely to be drawn out, uncertain and expensive.”).

grounded in theory and experience, given the particular characteristics of broadband carriers and related services.⁷⁷

CONCLUSION

The Federal Communications Commission's network neutrality proceedings garnered interest and commentary from a wide set of policymakers, technology companies, and scholars—among others. Some of the most notable and salient comments, however, came from within the administration itself. The FTC warned that the FCC could truncate FTC regulatory jurisdiction by choosing to invoke its authority under Title II of the Communications Act, setting the stage for an interagency battle for the authority to regulate network neutrality. The White House, however, advocated strongly in favor of the FCC's Title II powers. Thus, the White House's intervention not only proposed a particular policy outcome, but also mediated an interagency dispute among independent agencies. Moreover, prophylactic regulation by the FCC better addresses the harms historically targeted by network neutrality rules, given the dynamics of competition in broadband and related industries.

⁷⁷ Stated slightly different, even if many such market arrangements (often, vertical agreements) are efficient *in general*, such arrangements *with broadband carriers* tend strongly to be anticompetitive. Thus, it is the limited context in which the regulatory rule applies that justifies the imposition of an *ex ante* restraint. *Cf.* *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 19–20 (1979) (per se rule appropriate where conduct “always or almost always tend to restrict competition”).

It is also particularly notable that most, if not all, broadband carriers have explicitly disavowed any interest in engaging in the types of prioritization that might favor an affiliated service. *E.g.*, Alina Selyukh, *Comcast, AT&T Seek to Reassure on No Plans For Internet 'Fast Lanes'*, REUTERS, Oct. 30, 2014 (noting letters from AT&T, Comcast, and Verizon to Senator Leahy disavowing interest in forms of traffic prioritization that would violate network neutrality rules). This fact would seem to suggest that the error cost calculation of a flat regulatory prohibition cuts decidedly in favor of such a rule (because the rate of Type I [false positive] error should be *zero*).

