CPI's North America Column Presents:

FTC Hearing on Broadband

By Steven P. Vaughn

(McDermott Will & Emery)[1]

COMPETITION POLICY INTERNATIONAL

April 2019

The tenth of the FTC's Hearings on Competition and Consumer Protection in the 21st Century, held at the FTC Constitution Center in Washington, D.C. on March 20, 2019, focused on competition and consumer protection issues in U.S. broadband markets. The panelists addressed developments in U.S. broadband markets, technology, and law since the FTC staff's 2007 Broadband Connectivity Competition Policy report and the FTC staff's 1996 Competition Policy in the New High-Tech, Global Marketplace report.

Four panels of industry experts broadly discussed: (i) how the FTC should identify and evaluate advertising claims by internet service providers (ISPs) with respect to delivery speed; (ii) how broadband networks and markets have evolved since the *2007 Broadband Report*; and (iii) how the FTC should identify and evaluate anticompetitive conduct in the broadband industry.

Speed Advertising Claims; Substantiation; and Section 5

David Clark, Senior Research Scientist at the MIT Computer Science and Artificial Intelligence Laboratory, said that, as to speed, "more is better, up to a point." First, speed is difficult to measure. Most people do not know how fast their connection is. And there are many factors in the network that can hamper speed, including the home network, the consumer's devices, and the host. Additionally, as bandwidth increases, the tools of the past for measuring speed become outdated. Second, in the future, speed might not prevail as the best barometer of quality. Consumers have no practical use for 1-gigabit access speed. While 100-megabit speed is probably plenty for the average consumer, more and more providers are advertising to consumers an access speed that consumers are unlikely to obtain.

Nick Feamster from Princeton University added that speed has many facets, including upstream and downstream throughput, latency, jitter, and packet loss. Additionally, there are several factors that can limit a client-based speed test. For example, Mr. Feamster said the iPhone 5 will never reach 1gb of speed. Instead, consumers are more often concerned with startup delay, video resolution, and buffering. However, as speeds get faster, the speed tests get harder to perform.

Laura Brett, director of the National Advertising Division, noted that while the higher speeds provide a competitive advantage for firms, it also provides additional complications for consumers. Consumers with unlimited data plans will experience slower service because unlimited plans get de-prioritized during times of heavy network congestion.

Deborah Ringold, JELD-WEN Professor of Free Enterprise and Dean Emeritus with the Atkinson Graduate School of Management at Willamette University, countered that consumers distrust subjective advertising claims. Consumers, she said, use advertising claims to form working hypotheses that they test in a variety of ways. Consumers also band together against producers to shape the value chain. However, echoing the sentiments of the other panelists, Ms. Ringold said that a whole host of factors can affect speed, including the particular devices that consumers use, the number of devices they employ, how they use those devices, their network setup, and their geography.

Joshua Stager, Senior Policy Counsel with the Open Technology Institute (OTI), added that concentration in the broadband market has left consumers without meaningful choices. Consumers do not know what precisely it is that they are paying for, he added, and the industry would benefit from a broadband-tailored “nutrition label” that would better inform consumers about the typical speeds of the service they purchase.

A Closer Look at Recent Broadband Market Developments

With respect to the recent market developments in the broadband industry, Matthew A. Brill from Latham & Watkins LLP noted that broadband is essentially available to all consumers today. Speeds have substantially increased since the FTC’s 2007 report, and prices have dramatically declined. Accordingly, consumers have obtained the benefits of enormous investments by market participants in this particularly capital-intensive industry.

Thomas A. Whitaker from Shentel—a broadband service provider in the Virginia, West Virginia, Pennsylvania, and Maryland areas—noted that rural broadband remains competitive, but it also remains burdensome for small entities. Scaling is difficult, he said, and service technicians are limited geographically to a handful of service calls per day. Mr. Whitaker also discussed the broadband service provider’s goal of getting the “node” closer to the subscriber—the point in the network where energy converts from optical to RF energy, and then to coaxial into the user’s home. The closer the node, the better the experience. These complexities are typical of rural broadband service providers, which can make it difficult to compete with consumers’ 4G unlimited mobile plans.

John Bergmayer from Public Knowledge added that consumers lack both significant choices in home broadband service providers and the industry knowledge necessary to distinguish between competing providers. Where consumers do have choices (e.g., mobile), they experience high switching costs. Since most consumer devices cannot handle the high speeds frequently advertised, they are left with a “perceived consumer harm.”

With respect to what actions the FTC should take in response to these market developments, Mr. Brill suggested that the FTC intervene only when necessary and based on a showing of demonstrable consumer harm. He argued that merely hypothesizing about consumer impact is not enough, because the harm may never materialize. Mr. Bergmayer suggested that the FTC focus not so much on specific methods of discrimination but on the consumer effects. He also added that the communications industry also involves constitutional questions of freedom of expression that cannot be viewed entirely through an economic lens. KC Claffy from the University of San Diego added that a “nutrition label” solution is a bit idealistic: technology changes so rapidly that the labels would need updating so frequently that their utility would be undermined.

FTC’s Role in Identifying and Addressing Broadband Market Issues

Gigi Sohn of the Georgetown Law Institute for Technology & Policy suggested that the FCC should have the primary, though not exclusive, role in overseeing broadband markets. She noted that Section 5 of the FTC Act may sufficiently address blocking and throttling, but it might be insufficient to address paid prioritization or zero rating. On the other hand, she noted, 19 states have laws prohibiting communities from building their own broadband networks or expanding their existing ones, which would be an anticompetitive problem that the FTC could address.

Mitch Stoltz of the Electronic Frontier Foundation addressed some basic confusion at the level of first principles. For example, agencies and industry experts may not share consumers’ basic expectations about what internet access means. And there are open questions about whether the FTC has jurisdiction to address the harms discussed thus far (e.g., whether broadband is a common carrier service).

Tom Struble with R Street Institute explained that there is plenty that the FTC can do under current authority. They can convince state and local governments to lower the barriers to entry as a way to promote competition. The FTC can also look at market definition using the modern antitrust lens of the SSNIP test—namely, whether a content provider can profitably institute a small but significant non-transitory increase in price. Mr. Struble also suggested that the FTC should provide clarity to industry participants as to whether in-home broadband and wireless services are indeed separate markets.

Tejas N. Narechania of University of California, Berkeley, School of Law added that the FTC can play an important advocacy role before public utility commissions and state courts in cases relating to broadband deployment. Mr. Narechania argued that the FTC should intervene when state or local policy might inhibit competition.

Relevant Antitrust Issues In-Depth via a Series of Hypotheticals

The fourth panel attempted to address some of the difficulties that the FTC will face when addressing the competition and consumer protection issues discussed above. William Blumenthal, partner at Sidley Austin LLP, argued that antitrust is the default mechanism that we use to regulate markets, and the FTC should not deviate from that model unless it is for a specified and well defined purpose. Echoing points made by other panelists, Mr. Blumenthal argued that the methodology used to define markets in every other industry is the SSNIP test, which is widely adopted by courts and agencies around the world. He also added that relevant market doctrine with the clarity of common law has yet to develop in the broadband industry, and that it may take a while to do so.

Michael L. Katz, University of California, Berkeley, Haas School of Business, argued against using Section 5 to achieve net neutrality. Mr. Katz noted that paid prioritization is not necessarily discriminatory or anticompetitive, and banning paid prioritization can have the effect of precluding a market entrant who would otherwise prefer to purchase a different quality of service as a way to differentiate itself as an edge provider to obtain a foothold in the market.

Howard Shelanski, professor at Georgetown University Law Center and partner at Davis Polk & Wardwell LLP, explained that claims of blocking or throttling by an ISP should be addressed like any other anticompetitive conduct—by looking at the alternatives and elasticities of demand. He noted that some claims that might appear anticompetitive on first-glance might be purely a network management issue. But if an ISP uses a pretext to block a competitor's access, the FTC can address these claims under the antitrust rubric.

Conclusion

The panelists appeared to generally agree that consumers are not likely to obtain the benefits of current, lofty, advertising claims (e.g., 1-gigabite of speed). The panelists also largely agreed that consumers are ill-equipped to evaluate service providers' advertising claims with respect to speed. In-home routers, consumer devices, and other network connections can significantly affect speed. Yet, in the end, consumers are likely to blame their service provider if they experience interruptions.

The panelists seemed to disagree somewhat as to the FTC's role in regulating broadband markets. However, most of the panelists agreed that the FTC's current authority under Section 5 is sufficient to address any anticompetitive conduct by broadband market participants. As Mr. Shelanski put it, the FTC's task going forward is to "assume the hard cases are coming." The FTC must think deeply about its theoretical underpinnings for conceptualizing consumer harm in broadband markets, and it must align those theories with reliable antitrust doctrine or, at least, a theory of Section 5 enforcement that admits of a limiting principle. "All other cases will be conventional. It's the harder versions that test authority."

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[1] Steven Vaughn is an Associate at McDermott Will & Emery LLP's Chicago office.