Why Can't You Sue Your Broadband Monopoly?

by Josh Srago, EFF Legal Fellow

Synopsis

The combination of Federal Communications Commission (FCC) regulations and Supreme Court decisions have created a circular regulatory regime wherein the FCC is the sole authority for making determinations regarding broadband internet services as well as the deferential authority for broadband competition and the result is people are left without legal recourse. The FCC determines the classification of broadband network services, which companies are allowed to provide said services, the amount of enforcement authority that will be enacted regarding those providing broadband services, and, in the event that a regional monopoly service provider takes any anticompetitive action, the FCC is also the sole authority to determine the appropriate response.

This paper examines how the FCC, along with two decisions of the Supreme Court of the United States, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* and *Credit Suisse Securities (USA) LLC v. Billing*, have created a market where all decisions regarding the regulation of broadband networks are deferred to the regulatory agency and restrict legal recourse for citizens that wish to pursue a claim under antitrust laws. Further, this paper will examine what the legal landscape would look like if there were Congressional action to overturn *Trinko* and *Credit Suisse* as envisioned in the recently published House Majority Staff Report on antitrust.[1]

[1] Jerrold Nadler, Chairman, Committee on the Judiciary, David N. Cicilline, Chairman subcommittee of the Judiciary on Antitrust Commercial and Administrative Law, *Investigation of Competition in Digital Markets.* (2020)

Background

Telecommunications Competition History

This is not the first time that the United States has faced monopoly issues in the telecommunications market. In 1913, AT&T agreed to a settlement with the Department of Justice known as the Kingsbury Commitment. The effect of which was to "ensure interconnection and provide at least basic telephone service to all Americans."[2] In exchange for those services, the government consented to AT&T operating as a monopolist. Throughout the 20th century, AT&T remained the dominant telephone services carrier. AT&T was broken up by the Department of Justice in the 1980s,[3] the result of which was the creation of several regional monopolies providing local telephone service.

After the breakup of AT&T and subsequent restructuring of the telecommunications market, Congress took additional action and passed the 1996 Telecommunications Act (the 1996 Act). The 1996 Act was a recognition by Congress that a post-AT&T model of regional monopolies for telecommunications services was not improving competition for consumers. As a part of the 1996 Act, Congress determined that the established regional monopolies that remained after AT&T, known as Incumbent Local Exchange Carriers (ILECs), should have newly imposed duties to facilitate competition by allowing for the interconnection of new competitors, or Competitive Local Exchange Carriers (CLECs). The duties imposed included, a duty to negotiate in good faith with the CLECs; a duty to provide interconnection with a CLEC's network that is at least equal in quality to the services the ILEC provides for itself; the duty to

[2] Jodie Griffin, *100th Anniversary of the Kingsbury Commitment*, Public Knowledge (December 19, 2013) https://www.publicknowledge.org/blog/100th-anniversary-of-the-kingsbury-commitment/
[3] *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 137 (D.D.C. 1982)

provide nondiscriminatory access to network elements; a duty of public notice; and a duty to provide nondiscriminatory equipment collocation to the CLECs.[4] Collectively, ILECs were forbidden from providing discriminatory services to the CLECs.[5]

Telecommunications and Modern Regulation – The 1996 Act and Classification

The 1996 Act has not only been the key law in ensuring that the telecommunications market is competitive, it has also been at the center of a great deal of debate when it comes to regulating the networks. In particular, the classification of broadband services as either a Title I or a Title II service is the underlying issue regarding the amount of authority available to the FCC to regulate broadband services. These designations stemmed from the *Computer II Order* that established the concept of basic or enhanced services. "[B]asic service [was] limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combine[d] basic service with computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information."[6] Basic services, or the parallel term telecommunications services,[7] were those subject to common carrier, or Title II regulations,[8] while enhanced services were services subject to Title I.

[4] 47 U.S.C § 251(c)
[5] *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 549 (2007)
[6] *Re Second Computer Inquiry*, 77 F.C.C.2d 384 § 5 (1980)
[7] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 995 (2005)
[8] The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier. 47 U.S.C. § 153(11)

The crucial determination as to whether broadband services are subject to Title I or Title II regulations establishes the ability of the FCC to promulgate rules over those services If the FCC determines that broadband is a Title I service, such services are exempted from the FCC's Title II authority under the 1996 Act to pass rules and regulations.[9] If the FCC determines that broadband is better classified as a Title II service, then it has greater rulemaking and oversight authority to ensure that the providers of broadband services are providing equal access to the networks for both content providers and consumers of the service, and could even go so far as to enact control over pricing of the services. Under Title II, the FCC can also forbear from enforcing its rules.[10]

When Congress passed the 1996 Act, regardless of whether a consumer accessed the internet via a telecommunications service or a cable internet service, the services were treated as Title II services. That changed under the Supreme Court's *Brand X* decision when the Court deferred to the FCC's determination that cable internet services should be designated as a Title I service while maintaining DSL (Digital Subscriber Line) services as Title II due to the changing market conditions.[11] In 2015, the FCC passed the Open Internet Order (2015 OIO)[12] which reclassified all broadband services under Title II of the 1996 Act along with the net neutrality rules. The FCC's basis for passing the rules was to "enact strong, sustainable rules grounded in multiple sources of legal authority to protect the Open Internet and ensure that Americans reap

[9] *Verizon v. F.C.C.*, 740 F.3d 623, 631 (D.C. Cir. 2014)
[10] Andrew Jay Schwartzman, *What is All This Talk about 'Forbearance?'* Benton Institute for Broadband & Society, (October 30, 2014) https://www.benton.org/blog/what-all-talk-about-forbearance
[11] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005)
[12] 30 FCC Rcd 5601 (7)

the economic, social, and civic benefits of an Open Internet today and into the future."[13] The authority to enact those rules stemmed from Title II of the 1996 Act:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[14]

The FCC's premise for the reclassification was "prevent[ing] specific practices we know are harmful to Internet openness – blocking, throttling, or paid prioritization – as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness."[15] The FCC had attempted to enforce more stringent rules without reclassification, but the United States Court of Appeals found that it lacked the authority to do so under Title I.[16]

The FCC recognized that as the infrastructure became faster and more advanced, the providers of services utilizing that infrastructure would also innovate. Even the broadband providers suing to prevent the FCC from enacting such regulation agreed that the end goal was to promote the "virtuous cycle of innovation and growth between that ecosystem and the underlying infrastructure—the infrastructure enabling the development and dissemination of Internet-based services and applications, with the demand and use of those services...driving

[13] FCC Description of the Open Internet Order. (Last viewed November 16, 2020) https://www.fcc.gov/document/fcc-releases-open-internet-order
[14] 47 U.S.C. § 202(a)
[15] 30 FCC Rcd 5601 (7) ¶ 4
[16] *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 661 (D.C. Cir. 2010)

improvements in the infrastructure which, in turn, support further innovations in services and applications."[17]

The Title II reclassification would be short-lived, as just two years later the FCC returned to a deregulated services model by retracting the 2015 OIO and returning broadband to a Title I classification. This light-touch oversight of broadband services has been generally favored by FCC Chairman Ajit Pai. When the FCC promulgated the Restoring Internet Freedom Order (RIFO)[18] in 2017 he touted that, "by returning to the light-touch Title I framework, we are helping consumers and promoting competition. Broadband providers will have stronger incentives to build networks, especially in unserved areas, and to upgrade networks to gigabit speeds and 5G. This means there will be more competition among broadband providers." [19] The key argument Chairman Pai made is that if broadband services are not heavily regulated, there will be increased competition and therefore avoiding regulation is in the public interest.

Judicial Deference to the FCC under *Chevron*

The FCC's back and forth battle over how to properly classify broadband services has been subject to high-profile court cases.[20] While it may seem strange that a federal agency can conclude that a service should be regulated under one classification to best protect the public interest and then two years later reclassify it under the prior classification, also to protect the public interest, it actually falls under the precedent set by the Supreme Court under the *Chevron*

[17] *Verizon v. F.C.C.*, 740 F.3d 623, 644 (D.C. Cir. 2014)
[18] 33 FCC Rcd 311 (1)
[19] Eric Johnson, *FCC Chairman Ajit Pai calls for a 'lighter touch' to internet regulation*, Vox (Updated May 4, 2017) https://www.vox.com/2017/5/3/15537762/ajit-pai-fcc-net-neutrality-internet-service-providers-donald-trump-recode-podcast
[20] See *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 690 (D.C. Cir. 2016), for the D.C. Appellate Court's decision regarding the 2015 Open Internet Order; *Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 70 (D.C. Cir. 2019) for the D.C. Appellate Court's decision regarding the 2017 Restoring Internet Freedom Order.

line of cases.[21] *Chevron* established a two-step analysis to determine whether the agency is acting within its authority. Under step one, the court will ask "whether Congress has directly spoken to the precise question at issue. Where the intent of Congress is clear that it is the end of the matter…the agency[] must give effect to the unambiguously expressed intent of Congress. [] If the statute is silent or ambiguous with respect to the specific issue,…the question for the court is whether the agency's answer is based on a permissible construct of the statute."[22] So long as the agency's interpretation of the statute is reasonable, the court will uphold the agency's determination. Both the 2015 OIO and the RIFO were challenged in court. In both cases, the Court of Appeals for the D.C. Circuit applied *Chevron*, and found that the FCC's action of classifying and then reclassifying broadband services under each interpretation of the 1996 Act was reasonable.

Beyond express authority from Congress, the other way in which the FCC can regulate the services under its jurisdiction is using its ancillary authority. In such instances, express statutory authority may not have been given by Congress, but the FCC is still authorized to act when "the Commission's general jurisdictional grant…covers the regulated subject and the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[23] The FCC can take action that is ancillary to a statutory delegation of authority, but not to a mere statement of policy.[24] "Although policy statements may illuminate that authority, it is Title II, III, or VI to which the authority must ultimately be ancillary."[25]

[21] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)
[22] *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 701 (D.C. Cir. 2016) citing *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967
[23] *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 646 (D.C. Cir. 2010)
[24] *Id.* at 654
[25] *Id.*

The regulation of telecommunications services, and broadband services in particular, under the 1996 Act is far-reaching. The 1996 Act was written broadly enough to encompass an ever-expanding world of telecommunications networks. As such, Congress did not necessarily speak directly to what could ultimately be a litany of matters, and it is up to the FCC to interpret the statute. If people disagree with that interpretation, then they can sue to stop the FCC from moving forward with the rulemaking. However, when determining if the FCC has the authority, the courts will take two actions. First, they will apply the *Chevron* framework, and so long as the FCC's interpretation of any ambiguous language in the statute was reasonable, the courts will defer to the authority granted to it by Congress. Second, if the FCC is attempting to take regulatory action in a way not expressly granted by statute, the court can examine whether the action is within the ancillary authority of the FCC. As such, the FCC holds a great deal of control to determine which parties will be able to participate in the broadband marketplace, the standard of service required, and, in particular, what oversight is appropriate when it comes to enacting authority over the market participants.

The 1996 Telecommunications Act and Antitrust Laws – *Trinko*

In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Supreme Court established a new relationship between the 1996 Act and antitrust laws.[26] The court confronted the question of whether "the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme that might be voiced by courts exercising jurisdiction under the antitrust laws."[27] The 1996 Act explicitly spoke to antitrust law in its

[26] 540 U.S. 398, 406 (2004)
[27] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004)

savings clause: "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of the antitrust laws."[28]

The Court applied the standards under Section 2 of the Sherman Act:[29] "A firm shall not monopolize or attempt to monopolize…this offense requires, in addition to the possession of monopoly power in the relevant market, the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident."[30] The Court emphasized that "mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. In order for monopoly power to be found unlawful, it must be accompanied by an element of anticompetitive conduct."[31]

The anticompetitive conduct alleged in *Trinko* concerned the obligation of an ILEC to provide access to unbundled network elements (UNE) to new entrants into the market under the 1996 Act. To create a competitive marketplace, Congress recognized that the infrastructure to provide telecommunications services carries with it a high cost of entry. To reduce barriers to entry and promote greater competition, Congress gave the ILECs, and other telecommunications providers in place when the 1996 Act became law, a duty to provide access to those UNE to new entrants into the marketplace. They were, however, not required to provide the UNE free of charge.[32] The plaintiff's claim in *Trinko* was that Verizon, an ILEC, was filling the orders of competitors on a discriminatory basis.

[28] 47 U.S.C. § 152 note (1996) (Applicability of Consent Decrees and Other Law)
[29] 15 U.S.C. § 2
[30] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)
[31] *Id.*
[32] 47 U.S.C. § 252(d)(1)(B)

The duty to cooperate under the 1996 Act elicited two questions. If the 1996 Act required cooperation with competitors, was that cooperation required to be equal to the services that the ILEC was providing to its affiliates? Second, was the refusal to cooperate and provide an equal service a violation of antitrust laws?

To determine the answer to the first question, the Court looked to a prior refusal to deal case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[33] In *Aspen Skiing* the court found that "[t]he unilateral termination of a voluntary course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."[34] In that case, it was the elimination of a competitive ski resort. The Court in *Trinko* distinguished *Aspen Skiing* because the cooperative dealing by Verizon was not voluntary, but rather was ordered by the 1996 Act.[35] The duty the 1996 Act imposed was, "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory,"[36] and the cost of which "may include a reasonable profit."[37] Further, it was up to the FCC to interpret the language of the statute and whether the behavior met the standard for nondiscriminatory access. This means that the ILEC, Verizon, was required to get FCC sign-off on the deal to provide UNE to the competitor. The Court determined that because the FCC oversight authority of both the market and the behavior in question already existed under the 1996 Act, the antitrust claim was precluded.

As to the second question raised regarding whether the refusal to cooperate was a violation of antitrust laws, the court ventured beyond its analysis of *Aspen Skiing* and concluded

[33] 472 U.S. 585
[34] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004)
[35] *Id.*
[36] 47 U.S. Code § 251(c)(3)
[37] 47 U.S. Code § 252(d)(1)(B)

that this claim should not result in a new exception to the duty to aid competitors because in *Trinko* there was already "the existence of a regulatory structure designed to deter and remedy anticompetitive harm."[38] The court reasoned that being an ILEC offering UNEs to new competitors, Verizon would already be under FCC oversight, leaving no need for antitrust. Failure to meet any FCC requirements could "be corrected, in the imposition of penalties, or in the suspension or revocation of…approval."[39] That the FCC had already responded to complaints by competitors[40] in *Trinko* and determined that Verizon had breached its sharing duties speaks to the very point the Court is making – that if the FCC was already monitoring for anticompetitive behavior, there was no need to turn to antitrust laws.

The end result is that the Court determined there was no antitrust claim available for the plaintiff in *Trinko* because Verizon's duty was imposed by statute and therefore a breach of that duty did not violate antitrust laws. Additionally, the Court held that where there was already a regulatory regime in place that had oversight authority over the practices of market participants, there was no need to look to antitrust as a solution because the 1996 Act imposed a greater duty, and the benefits of imposing antitrust laws would be minimal.

<u>*Trinko* Doctrine Expands Under *Credit Suisse*</u>

The decision in *Trinko* regarding the authority of regulatory bodies was expanded a few years later when the Court decided *Credit Suisse Securities (USA) LLC v. Billing*.[41] While the subject matter in *Credit Suisse* was securities rather than telecommunications, the principle that resulted from the decision affected all regulated industries.

[38] *Id.* at 412
[39] *Id*. at 413
[40] *Id.*
[41] 551 U.S. 264 (2007)

Credit Suisse presented the court with a case where the Securities Exchange Act was in direct conflict with antitrust laws. In determining which should take precedence, the Court laid out three determinative factors: (1) that the relevant securities law enables the Securities Exchange Commission (SEC) to monitor the challenged activities; (2) the history of Commission regulations suggests no laxity in the exercise of this authority; and (3) allowing an antitrust suit to proceed that is so directly related to the SEC's responsibilities would present a substantial danger that defendants would be subjected to duplicative and inconsistent standards.[42] A fourth factor, which operates more as a threshold question, is whether there is a serious conflict between antitrust and the regulatory regime.[43]

The Court's efforts to determine how best to resolve a conflict created another rule of deference to the interpretation of the overseeing agency. "[T]o distinguish what is forbidden from what is allowed requires an understanding of just when, in relation to the services provided, a commission is "excessive," indeed so "excessive" that it will remain permanently forbidden."[44] The concern was the "unusually high risk that different courts will evaluate similar factual circumstances differently,"[45] and having such different interpretations would cause harm to that market where there was already a diminished need for antitrust enforcement because the regulatory agency was already closely monitoring the activity.[46]

The Court's Deference to the FCC

Where does this leave us in regards to the FCC, its oversight authority, and antitrust claims? Under the *Chevron* framework, unless Congress expressly spoke to a given issue in a

[42] *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 274 (2007)
[43] *Id.* at 285
[44] *Id.* at 280
[45] *Id.* at 282-283
[46] *Id.* at 284

statute discussing a regulated industry, it will be left for the agency granted oversight authority to interpret the statute. So long as they do so reasonably, the courts will defer to the agency's interpretation and judgment. The 1996 Act provides for specific rules for telecommunications service providers. Under *Trinko*, and its expansion in *Credit Suisse*, we find that "the Supreme Court's decision prevents . . . courts from engaging in [an antitrust] inquiry at all for claims that push the boundaries of antitrust in the context of a regulated industry."[47] Telecommunications service providers must work with the FCC in order to offer the services in compliance with the 1996 Act and any other rules or regulations laid down by the FCC. As a result of telecommunications being a regulated market with agency oversight, including the ability to monitor for anticompetitive behavior and enforce penalties for such behavior, the courts will defer to the FCC's conclusions. Howard Shelanski, former Director of the Federal Trade Commission's (FTC's) Bureau of Economics put it most succinctly:

> By broadening the conditions under which regulation blocks antitrust enforcement, those cases redrew the boundary between antitrust and regulation and would likely have prevented the government from bringing, in previous decades, a number of important antitrust cases in regulated industries. Most notably, *Trinko* and *Credit Suisse* would likely have blocked the suit by the U.S. Department of Justice ("DOJ") that in 1984 broke up AT&T's monopoly over telephone service, considered among the most important antitrust enforcement actions in history.[48]

The Court's creation of antitrust immunity for regulated industries extends the premise that if an antitrust claim were to include conduct that has been approved by the regulating agency, any such enforcement of antitrust laws could be contrary to the enforced regulatory regime. The FTC drew upon this comparison in its amicus filing in *Credit Suisse* where it stated "the complaint's allegations must give rise to a reasonably grounded inference of an antitrust

[47] Howard A. Shelanski, The Case for Rebalancing Antitrust and Regulation, 109 MICH.L. REV. 704 (2011)
[48] Howard A. Shelanski, The Case for Rebalancing Antitrust and Regulation, 109 MICH.L. REV. 683 (2011)

violation without relying on conduct that was authorized under the regulatory scheme or inextricably intertwined with such immune conduct."[49] And further that, "the complaint must make clear that the claims alleged do not rest on impermissible inferences from protected conduct. A court should not permit discovery to go forward as a fishing expedition based on conclusory or ambiguous allegations that focus on immune conduct."[50] The Court agreed, stating that in order for the antitrust suit to be allowed, there must be, "a plain repugnancy between . . . antitrust claims and the federal . . . law."[51] Therefore, if the FCC establishes regulations that dictate that 1996 Act's competition policies are no longer applicable under its regulatory structure, the Court will be required to dismiss an antitrust claim as being implicitly precluded under the telecommunications laws, as to do otherwise would violate the authorized regulatory regime.

This antitrust enforcement reasoning is in direct conflict with the reasoning of the FCC in the retraction of net neutrality rules when they enacted RIFO. The FCC heavily leaned on the logic that the "antitrust and consumer protection laws would provide means for consumers to take remedial action if an Internet Service Provider (ISP) engages in behavior inconsistent with an open Internet."[52] However, RIFO is an express regulation dictating that broadband service providers must merely disclose their network management practices, performance, and commercial terms of service. The FCC's decision to determine which express regulation should be upheld would be subject to the *Chevron* deference. So long as the statute was ambiguous and the FCC's interpretation is reasonable, the Courts must defer to the FCC's judgment.

[49] Brief for the United States as Amicus Curiae Supporting Vacatur, *Credit Suisse Securities (USA) LLC, v. Billing*, 551 U.S. 264 (2007) No. 05-1157, (January 22, 2007)
[50] *Id.*
[51] *Credit Suisse Securities (USA) LLC, v. Billing*, 551 U.S. 264, 267 (2007)
[52] 33 FCC Rcd 311 (1) ¶ 4

Additionally, the FCC has jurisdiction over the matters defined in the 1996 Act, as was determined in *Trinko,* and under *Credit Suisse* the Court must imply an antitrust preclusion when there is a plain repugnancy with the federal law.

As such, the weight the FCC gave to antitrust being the better mechanism for consumer protection under the RIFO[53] is irrelevant, because the FCC has expressly decided to not regulate. That would mean that all conduct that falls outside of the transparency requirements would be protected conduct as part of the regulatory regime and prevent a claim under antitrust laws.

Collectively, this creates a significant barrier because a private actor, be it a person or municipality acting on behalf of its residents, has lost the private right of action to file a lawsuit under antitrust laws and seek legal recourse under the Sherman Act against a broadband service provider. They do have the option to file a complaint with the FCC to seek redress using the agency's procedures, however, any possible remedy would be available only through the FCC, pursuant to its granted authority and interpretation of the 1996 Act and any subsequent rulemaking it established. This includes refraining from acting based on its reasonable interpretation of the 1996 Act.

A World Without *Trinko* and *Credit Suisse*

Real-World Access

Under these precedents, consumers may have little recourse when broadband providers disserve them. Truckee, California is a small mountain town of with a population of 16,377.[54] A cursory search for broadband internet providers shows that there are six companies claiming to

[53] The word "antitrust" appears over 200 times throughout the Restoring Internet Freedom Order.
[54] United States Census Bureau citing 2018 American Community Survey 5-Year Estimates, (Last visited November 16, 2020) https://data.census.gov/cedsci/all?q=Truckee,%20CA

offer services to the town.[55] AT&T and Earthlink offer DSL connectivity with a download speed of up to 10 Mbps. This means that they don't technically qualify as a fixed broadband provider because they are below the FCC's standard of 25 Mbps download and 3 Mbps upload.[56] HughesNet and Viasat offer satellite services, advertising download speeds up to 25 Mbps, but whether satellite service is an equivalent to fixed wireline broadband is very much up for debate.[57] That leaves Oasis Broadband, a fixed wireless internet provider[58] advertising up to 100 Mbps,[59] and Suddenlink providing 1000 Mbps (1-Gig) over cable. When we take into consideration the actual real-world needs of modern broadband usage, the relevant market of choices is far more limited with only one fixed wireline choice for a broadband connection that provides a broadband service that is sufficient.[60] Under these circumstances, the relevant market is defined as broadband service providers offering a minimum connection of 100 Mbps download and 10 Mbps upload. Truckee is therefore subject to the monopoly of Suddenlink.

[55] HighSpeedInternet.com search for Truckee, CA (Last visited November 16, 2020) https://www.highspeedinternet.com/ca/truckee

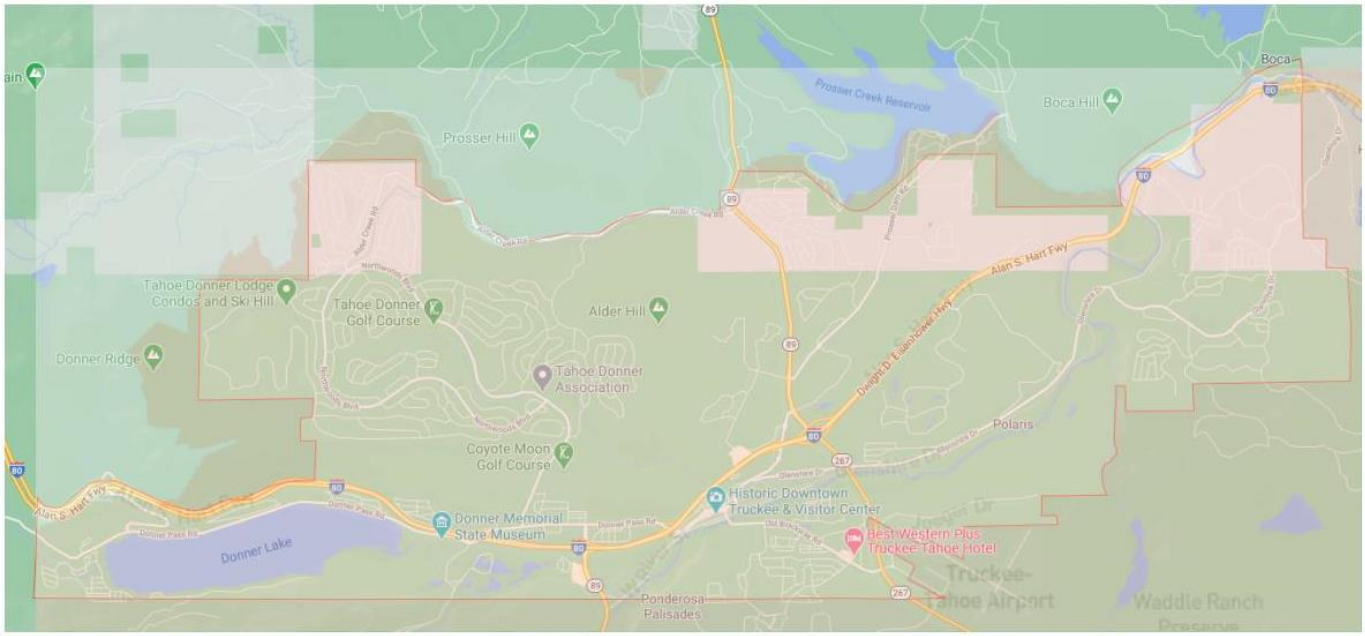
[56] Ernesto Falcon, *The American Federal Definition of Broadband is Both Useless and Harmful*, Electronic Frontier Foundation, (July 17, 2020) https://www.eff.org/deeplinks/2020/07/american-federal-definition-broadband-both-useless-and-harmful

[57] VantagePoint, *Satellite Broadband Remains Inferior to Wireline Broadband*, (September 2017) https://ecfsapi.fcc.gov/file/1090792953817/VPS-Satellite%20Broadband%20Remains%20Inferior%20to%20Wireline%20Broadband%2009-07-17.pdf

[58] Fixed Wireless Internet is provided using cellular LTE technology.

[59] Oasis offers seven packages on its webpage. Two high performance packages at 30Mbps/3Mbps ranging from $105 to $198 per month depending on whether the user signed up for a 450 GB data capped plan or an unlimited data plan. Three best value plans ranged from 20-30Mbps download and 2-3Mbps upload with data caps of 250GB, 350GB, or 800GB per month with relative pricing of $75, $95, or $115 a month. There are also two economy plans that do not meet the FCC standard for fixed wireline broadband. (Last Visited October 30, 2020) https://oasisbroadband.net/

[60] *Supra* n. 54



Map showing the city limits of Truckee, CA with the orange shade showing where Suddenlink provides service.[61]

The FCC has classified broadband as a Title I service, which means the agency has jurisdictional authority over the service under the 1996 Act, but under their own interpretation of the Act has elected to limit that authority to ensuring that the broadband services operate with transparency.[62]

Broadband is a complicated service to deploy. Under our hypothetical, we can assume that Suddenlink is in the process of upgrading its facilities in the region, and while it is claiming that it can hit 1000 Mbps download speeds, that is not the case for all homes until the upgrades are done. Consumers in the region begin signing up for the services, relying on the fact that this is the only advertised 1000 Mbps service in the region. However, due to costs, delays, or other factors, such as a lack of willingness to invest, the broadband service provider is unable to fulfill

[61] Sourced from Internet Provider Availability Map, Suddenlink Communications. (Last visited October 30, 2020) https://www.highspeedinternet.com/ca/truckee
[62] 33 FCC Rcd 311 (1) ¶ 3

the promised network speeds and instead is only able to provide its customers 250 Mbps downloads. A customer can file a complaint with the FCC, but as a Title I service, the FCC's authority over the provider is limited to ensuring that Suddenlink is being transparent with its existing and potential customers regarding its network management practices, performance and commercial terms of service.[63]

Further, the monopolist broadband provider, Suddenlink, has control of the local market and can charge a monopoly price. As the Court declared in *Trinko*, merely taking advantage of the monopoly position to charge more is not enough to violate antitrust laws. However, if Suddenlink were to use its position to restrict other parties from entering the market by undercutting pricing to the point where it was not feasible for a competitor to enter, the consumers would be suffering at the hands of a monopoly engaging in anticompetitive behavior and have no legal redress. This is because the decisions in *Trinko* and *Credit Suisse* provide that when a regulatory agency has oversight authority, the courts are to defer to the agency's interpretation because it has the broad enforcement powers, the specialized knowledge to know whether or not the practices in question are reasonable under the circumstances, and the authority to pass national regulations to ensure that there will not be confusion between jurisdictions, all under the statutory authority granted by Congress to make such determinations.

In the hypothetical, whether the consumer seeks to improve oversight of Suddenlink's transparency or whether they seek redress for the anticompetitive behavior of a monopoly, the consumers must turn to the FCC because it has deferential authority as the oversight agency of a regulated market. It doesn't matter whether it is regarding the practices of the service provider in

[63] *Id.*

a competitive market. Nor does it matter if broadband were classified as Title II and the consumers were asking for oversight enforcement as to unjust or unreasonable in a given circumstance. In either case, private actors have lost their access to seek legal remedies from the justice system.

This nuanced restriction calls for Congress to pass legislation that would overturn the decisions in *Trinko* and *Credit Suisse* and return a private right of action to people and municipalities to file claims against the broadband service providers for anticompetitive behavior. If Congress wishes to see improved competition in services under the 1996 Act, which was its original intent, then restoring the private right to enforce antitrust laws when broadband providers behave in an anticompetitive fashion falls in line with that end.

This was also addressed in the October 2020 report from the United States House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary's *Investigation of Competition in Digital Markets.*[64]As a part of the subcommittee's recommendations, it suggested that "Congress should consider overriding judicial decisions that have treated unfavorably essential facilities[65]- and refusal to deal-based theories of harm,"[66] specifically citing *Trinko* as well as *Pacific Bell Telephone Co. v. linkLine Communications, Inc*.[67]

---

[64] Jerrold Nadler, Chairman, Committee on the Judiciary, David N. Cicilline, Chairman subcommittee of the Judiciary on Antitrust Commercial and Administrative Law, *Investigation of Competition in Digital Markets.* (2020)
[65] As part of the *Trinko* decision, the Supreme Court rejected the essential facilities doctrine. "The…doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis." *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1128 (9th Cir. 2004). The Court's reasoning was that "where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should…be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004)
[66] *Id*. at VI.B.3.d.
[67] This case dealt with an incumbent digital subscriber line (DSL) provider allegedly charging high wholesale prices to other providers using its infrastructure, in an attempt to monopolize the regional market. The Court found that this

A Private Right of Action Is Not A Guarantee

The key action that can be taken to enact swift change and return a private right of action for people and municipalities to file claims against their broadband service providers under antitrust laws would be for Congress to write a law that would overturn the decisions in *Trinko* and *Credit Suisse.* This law could stand on its own and be a sweeping reform of regulatory authority, or it could be narrowly tailored and applicable to each regulated industry under the relevant act. In 2004, Representative James Sensenbrenner (R-WI) introduced a bill[68] that would narrowly amend the Clayton Act in order to close the gap created by the *Trinko* decision. The determination as to whether it is better to pursue all-encompassing or narrow legislation has far-reaching implications that need to be considered and would require examining a much broader body of law than is examined here.

The existing savings clause of the 1996 Act[69] states the protections should not "modify, impair, or supersede" the applicability of the antitrust laws. An express provision granting a private right of action would retract the *Trinko* decision, as the Court based its decision not on the availability of an antitrust claim, but rather on the fact that the actions taking place were also regulated by the 1996 Act. The *Trinko* decision binds the judiciary to defer to the regulators.[70] If Congress were to expressly grant the authority of a private right of action, the FCC and the Courts would be required to enforce it.

---

was not cognizable under the Sherman At, where companies had no antitrust duty to deal with the providers. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 450, 129 S. Ct. (2009).

[68] *Clarification of Antitrust Remedies in Telecommunications Act of 2004*. H.R.4412. 108th Congress (2003-2004)

[69] Telecommunications Act of 1996, SEC. 601(b)(1). "Except as provided in paragraphs (2) and (3) [regarding the GTE and McCAW Consent Decrees] nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."

[70] Howard A. Shelanski, The Case for Rebalancing Antitrust and Regulation, 109 MICH.L. REV. 704 (2011)

Merely providing a private right of action does not actually mean that there would be sweeping change in broadband services. In fact, an antitrust claim was brought post-*Trinko* to seek redress to supposed anticompetitive behavior in *Bell Atlantic Corp. v. Twombly*.[71] In that case, telephone and high-speed internet customers brought a claim alleging that Bell Atlantic conspired to restrain trade by inflating charges for the services by engaging in parallel conduct to inhibit growth of CLECs attempting to compete in the market using unfair agreements, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relationship with their customers.[72]

Twombly's result established the requirements that must be met regarding the initial pleading in a case. "The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action."[73] Specifically, in regards to a Sherman Act Section 1 claim,[74] there must be enough factual assertions, taken as true by the court, to show that an agreement was made, or, stated otherwise, that there must be enough facts to give rise to a reasonable expectation that evidence of an illegal agreement will be found at the point of discovery.[75] Demonstrating enough facts to show such an agreement exists without the benefit of discovery can be exceedingly difficult. The threshold to show a Sherman Act Section 2 claim may also be very difficult to meet, as it requires demonstrating that monopoly power exists and that the monopolist took improper action to maintain that power. As stated in *Trinko*, merely charging monopoly prices while having the advantage of monopoly power is not an unlawful act.

[71] 550 U.S. 544 (2007). The case never reached a decision regarding the antitrust claims, but rather was decided on the grounds that the pleading did not state enough facts to show that the claim for relief was plausible on its face.
[72] *Id.* at 550
[73] *Id.* at 555
[74] Prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."
[75] *Twombly,* 550 U.S. 544, 556 (2007)

The imbalance of access to information regarding possible anticompetitive behavior is one place where Congress could take action in overhauling antitrust regulation. While overturning *Twombly* could increase the number of frivolous lawsuits, there is room to expand access to broadband provider information under the 1996 Act's transparency requirements which would ultimately provide greater consumer protection.

Precedential Uncertainty and Regulatory Capture

Without the right to seek relief from the courts for anticompetitive behavior, people and municipalities are subject to the FCC's discretion. This is dangerous because the FCC's interpretations of law can change over time and provide no certainty as to how it might be interpreted in a specific circumstance. The courts establish precedent and then will often follow it under the doctrine of *stare decisis*, but the agencies have not been required to follow their prior decisions.

This principle was clearly demonstrated in the recent fight over net neutrality and the classification of broadband services. After the transition of power following the 2016 general election, the makeup of the FCC changed as well. The new FCC decided to undo the rulemaking of the prior regime regarding the classification of broadband services. This means that as the makeup of the commission changes, so too might the determinations as to what is and is not anticompetitive behavior. Removing that discretionary authority in order to provide consistency is in the public interest as it provides for more certainty when a claim is brought that there are established rules and principles that will be followed. That certainty exists in the courts and should be available to the public as they pursue redress for potential claims against broadband service providers which will likely have significantly more experience in dealing with the regulatory agency, not to mention greater resources at their disposal.

An additional factor to consider, particularly in regards to the FCC, is a history of regulatory capture where the FCC's actions have been to the benefit of the companies that it was created to oversee. As stated in 2004 by former FCC Chairman Michael Powell,[76] "[W]hen something happens that [the FCC] doesn't understand, kill it. We tried to kill cable. We tried to kill long-distance. When Bill McGowan started stringing out microwave towers that threatened AT&T, the FCC tried to stop him. The FCC tried to kill cable because it was going to threaten broadcasting."[77] As EFF pointed out in 2008,

> The FCC policy machine is led by unelected Commissioners, often able to ignore public opinion. The telephone and cable companies have deep, long-standing relationships with the FCC and lobby heavily to neuter, derail, or otherwise reverse the course of regulation that goes against their agenda. Many FCC officials treat their time at the Commission as a way station, looking forward to careers lobbying on behalf of the companies they are supposed to be regulating.[78]

There are currently 200 people that either came from a company overseen by the FCC now working there or have left the FCC in order to work for companies that it oversees.[79] While the FCC employs a total of 1454 employees,[80] that number demonstrates that there are close ties between telecommunications companies and the FCC.

Restoring Competition with Antitrust Laws

Restoring the ability to bring antitrust claims raises several possibilities. Municipalities, representing their citizens, would be able to bring a claim against a broadband services provider

[76] Current President of the National Cable & Telecommunications Association, the trade association for the broadband and pay television industries.
[77] Nick Gillespie, Jesse Walker, and Drew Clark, *The Reluctant Planner*, Reason, (December 2004 Issue, last visited November 16, 2020) https://reason.com/2004/12/01/the-reluctant-planner-2/
[78] Richard Esguerra, *The FCC and Regulatory Capture*, Electronic Frontier Foundation, (August 20, 2008) https://www.eff.org/deeplinks/2008/08/fcc-and-regulatory-capture
[79] OpenSecrets.org, Agency Search: Federal Communications Commission, (Last visited November 16, 2020) http://www.opensecrets.org/revolving/search_result.php?agency=Federal+Communications+Commission&id=EIFCC
[80] Employee Profile at the FCC, (July 30, 2019) https://www.fcc.gov/general/employee-profile-fcc

under Section 1 of the Sherman Act for collusion if they can show there was an agreement between providers to not compete in other local markets in exchange for other competitors electing to not compete in its local market. There is a threshold that must reach beyond mere allegations in the pleading for this claim to succeed, but restoring this cause of action for municipalities immediately creates a means to encourage competition in markets where there is currently only one service provider.[81] While competition in markets has been historically sparse for broadband providers, there are some companies that might be showing signs of bucking the previous trends to expand their offerings into new areas.[82]

Restoring private antitrust claims would also allow for municipalities and consumers to bring a claim under Section 2 of the Sherman Act. Were the existing broadband service provider that already has monopoly power in a given region to act in a way that demonstrated they were attempting to maintain or strengthen their existing monopoly, the private right of action provides for judicial examination of the behavior.

Municipalities having this tool at their disposal could provide a significant advantage when considering that there are at least 49.7 million Americans that are served by only one broadband provider.[83] The antitrust claims could be used as a way to ensure that a local monopoly is not engaging in anticompetitive pricing behavior or other practices allowing them to hold on to their monopoly, it could also be used to increase competition through the creation of municipal broadband services. Rather than relying on an outside company to come in and build

[81] The existence of broadband providers not competing with one another was highlighted in John Oliver's discussion of Net Neutrality on *Last Week Tonight* in 2014, (June 1, 2014) https://youtu.be/fpbOEoRrHyU?t=448
[82] CCGConsulting, *Comcast's Quiet Expansion*, POTs and PANs Broadband for All, (February 8, 2019) https://potsandpansbyccg.com/2019/02/08/comcasts-quiet-expansion/
[83] Christopher Mitchell and Katie Kienbaum, *Report: Most Americans Have no Real Choice in Internet Providers*, Institute for Local Self-Reliance, (August 12, 2020) https://ilsr.org/report-most-americans-have-no-real-choice-in-internet-providers/

out the network infrastructure, the municipality itself could build the infrastructure and begin providing the services to its citizens.[84]

Municipalities that find themselves continually underserved or entirely unserved by broadband providers could seek traditional remedies modeled after the ILEC/CLEC structure of the 1996 Act. If the municipality were to provide its own service using the infrastructure already put in place by the incumbent broadband provider, the courts would have a framework to understand how that remedy would function under the 1996 Act's requirements for ILECs and the provisioning of UNEs at wholesale costs.

This circumstance could become increasingly relevant in the near future with AT&T electing to discontinue its offering of DSL services for new customers.[85] While AT&T will retain the ownership of the networks, and provide DSL services to existing customers, those wishing to sign up for a new DSL service will be out of luck and forced to switch to a more expensive smartphone plan, also provided by AT&T, for access to network services.[86] [87] In such a case, the local municipalities would now have legal recourse under several different scenarios. First, the municipality can consider whether the forced transition is an exercise of monopoly power on the

[84] This would be subject to local and state laws as there are currently 19 states with restrictions on publicly owned networks. Katie Kienbaum, *19 States Restrict Local Broadband Solutions*, Institute for Local Self-Reliance (August 8, 2019) https://ilsr.org/preemption-detente-municipal-broadband-networks-face-barriers-in-19-states/

[85] Jon Brodkin, *AT&T kills DSL, leaves tens of millions of homes without fiber Internet*, ArsTechnica, (October 5, 2020) https://arstechnica.com/tech-policy/2020/10/life-in-atts-slow-lane-millions-left-without-fiber-as-company-kills-dsl/

[86] In a letter to the California Public Utilities Commission, an AT&T representative stated, "Starting October 1, 2020 AT&T offers AT&T Wireless Home Internet (AWI) service to customers that are within the current DSL footprint but are not within AT&T's fiber footprint. AWI provides equivalent or better service than ATM-based DSL. Customers may also seek another wireline or wireless provider for broadband service." https://www.publicknowledge.org/documents/att-response-letter-to-california-public-utilities-commission-re-terminating-dsl-service/

[87] Where AT&T has fiberoptic network services overlapping with the existing DSL services, AT&T is attempting to transition the current DSL customers to the fiber services. This happens only if the customer schedules an appointment to update their home connection. AT&T stated that the transition would be a "no-cost upgrade" but it is unclear if that offer was temporary. https://www.publicknowledge.org/documents/att-ipdsl-adsl-to-fiber-migration-and-dsl-sales-stop/

part of AT&T, harming competition in the region. Second, in the event that a company in the chain of service providers engages in any anticompetitive behavior, the municipality can take action. Examples of this could be AT&T licensing access to the existing infrastructure at such a high rate that it favors AT&T's wireless or fiber alternatives, or the next company to step in where AT&T has vacated takes advantage of its monopoly position as the only fixed wireline provider. Alternatively, if the municipality itself steps in to provide the services and fill that need, the access to an antitrust claim gives it protection and a path of redress in the event that the relationship with AT&T sours. This might occur after an initial investment on the part of the municipality to provide services to the region followed by an improper action by AT&T to undercut the municipality.

Conclusion

The conditions addressed in this paper have all focused on restoring the ability to bring an antitrust claim against a broadband service provider. This demonstrates that the FCC rules that have been put in place, be they to classify broadband as Title II and enforce net neutrality rules as adopted in the 2015 Open Internet Order or to classify broadband as Title I and retract enforcement authority as adopted in the 2017 Restoring Internet Freedom Order, can remain in place and be treated as a separate issue. The FCC retains the authority to monitor how network deployments are operating. It retains the jurisdictional authority to ensure that the practices of broadband services providers are just and reasonable. All of that can coexist, regardless of the political stance of the commission, along with restoring private rights of action for violations of antitrust laws. The narrow change that is being proposed is revoking the deference to regulatory agencies that the Supreme Court put in place in its *Trinko* and *Credit Suisse* decisions.

By revoking that deference, the potential for significantly increased competition in isolated and underserved markets could be realized because of greater opportunities for legal enforcement against antitrust violations by broadband service providers. Combine that with the opportunity for municipalities to take matters into their own hands to force competition and protect their residents from the encroaching monopolization of broadband access. Then, add in the situations where the seemingly unspoken agreements between broadband service providers to avoid competing may be subject to greater scrutiny. All of these would open the doors to more service providers to participate in the market. With the increase in competition, a decrease in price of the services will follow. Ultimately, that is the goal: to drive down the cost of some of the highest prices for broadband in the world,[88] making the services more affordable and more available in order to ensure equal access for everyone, and work to close the ever-widening digital divide.

[88] Catherine McNally, *How Much is Internet?* Reviews.org (March 9, 2020) https://www.reviews.org/internet-service/how-much-is-internet/