Federal Trade Commission

Is There a Compelling Case for Regulatory Convergence?
A U.S. Perspective

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before the

Global Forum 2012: Shaping a Connected Digital Future

Stockholm, Sweden

November 12, 2012

Good morning. Thank you for inviting me to participate in this year's keynote opening session regarding visions for our digital future. As some of you know, I have served as a Commissioner on the U.S. Federal Trade Commission (FTC, for short), a federal law enforcement agency charged with protecting

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in preparing this paper.

competition and consumers in the United States.[1] My comments today on our digital future will therefore come from a public enforcement perspective.

I.

A driving principle behind our digital future has to be—in a word—convergence. In the not-so-distant past, consumers had different electronic devices for information processing and storage—namely, desktop personal computers and various storage media; communication—namely, telephones, walkie-talkies, and pagers; and entertainment—namely, televisions, radios, and stereos. Now these functions are readily available to consumers in a single electronic device of virtually any size and configuration; witness the ever-growing panoply of smartphones, tablets, netbooks, and laptops. Tapping into the same wireless spectrum, an electronic device today can leverage the immense processing and storage capacities of servers in a cloud; provide clear, real-time, voice-and-video telephony using Internet protocol; and stream or download movies, music, and webcasts at blazing, broadband speeds.

The significance of convergence as a driving principle behind our digital future makes me wonder whether we should have multiple

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[1] If you are looking at my official biography, http://www.ftc.gov/commissioners/rosch/index.shtml, you will see that my term expired in September 2012. While that is correct, the custom and practice, as provided by statute, has been for an outgoing Commissioner to stay in his or her office until a successor has been nominated by the President and confirmed by the Senate. *See* 15 U.S.C. § 41 (2011).

agencies[2]—as we still do in the United States—overseeing the protection of competition and consumers in respect to different, but interrelated, elements of the digital landscape, namely, the digital pipes versus the digital content. Take, for example, the legal arena of merger review and enforcement. In 2011, we saw the AT&T–T-Mobile merger reviewed (and challenged) by the U.S. Department of Justice's Antitrust Division (DOJ, for short) and the U.S. Federal Communications Commission (FCC, for short).[3] Then, earlier this year (2012), the FTC reviewed (and cleared) the related acquisitions involving Sony–EMI in music publishing and UMG–EMI in recorded music.[4]

Both the AT&T–T-Mobile and dual EMI acquisitions could be said to have an equally great impact on the digital future of consumers. Yet, we continue to have different agencies applying their own public-interest standards to the digital pipes, on the one hand, as seen in the DOJ and FCC's review of the AT&T–T-Mobile acquisition, and the digital content, on the other hand, as seen in the FTC's review of the EMI acquisitions. In

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[2] I have posed this question of the potential benefits of agency convergence in other speeches. *See, e.g.,* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Forces Driving (and Impeding) Convergence: What Can the FTC (and Like Agencies) Contribute?, Remarks at the Global Forum 2007: Global Convergence 2.0 – Integration & Innovation, Consumer Protection Symposium (Nov. 5–6, 2007), http:// www.ftc.gov/speeches/rosch/0711056venice.pdf.

[3] *See* Complaint, United States v. AT&T Inc., No. 1:11-cv-01560-ESH (D.D.C. Aug. 31, 2011), *available at* http://www.justice.gov/atr/cases/f274600/274613.pdf; Order, Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Dkt. No. 11-65 (F.C.C., Wireless Telecomm. Bureau, Nov. 29, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A1.pdf.

[4] *See* Press Release, Fed. Trade Comm'n, FTC Closes Its Investigation into Sony/ATV Music Publishing's Proposed Acquisition of EMI Music Publishing (June 29, 2012), http://www.ftc.gov/opa/2012/06/sonyemi.shtm; Press Release, Fed. Trade Comm'n, FTC Closes Its Investigation into Vivendi, S.A.'s Proposed Acquisition of EMI Recorded Music (Sept. 21, 2012), http://www.ftc.gov/opa/2012/09/emi.shtm.

particular, I wonder whether drawing a distinction between pipes and content for purposes of merger review makes sense in this day and age—especially since digital content may be shifting from an "ownership" model, in which consumers purchase, download, store, and play content on their own electronic devices, to an "access" model, in which consumers license, access, share, and play content whenever and wherever they want, from remote sources via the pipes.[5]

Put another way, arguably one cannot properly evaluate the competition and consumer protection issues associated with markets for digital content without also considering the availability, affordability, and quality of the digital pipes that are responsible for delivering that content. This is true whether one is talking about computing resources for processing and storing information remotely; telephony equipment and services for real-time, virtual-presence communication; or equipment and services for on-demand delivery and display of entertainment. In each case, the pipes are arguably as crucial and integral to the existence of a viable consumer good or service as the content is. Differentiating between pipes and content may therefore be a false dichotomy.

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[5] I say "may be shifting" because industry observers (for example, in digital music) are still divided over whether one model will prove to be superior over the other in the long run. *Compare* Mark Mulligan, *Why the Access Versus Ownership Debate Isn't Going to Resolve Itself Anytime Soon*, MUSIC INDUS. BLOG (Dec. 9, 2011), http://musicindustryblog.wordpress.com/2011/12/09/why-the-access-versus-ownership-debate-isnt-going-to-resolve-itself-anytime-soon/, *with* Glenn Peoples, *Access Over Ownership? It's Happening in Video*, BILLBOARD.BIZ (Aug. 9, 2011), http://www.billboard.biz/bbbiz/industry/tv-film/access-over-ownership-it-s-happening-in-1005308952.story.

II.

That said, the distinction between pipes and content that underlies the assignment of the AT&T–T-Mobile and EMI acquisitions to different U.S. agencies for merger review can be historically traced to the separate jurisdictions of the FCC and the FTC, as delimited by the United States Congress. When Congress created the FTC in 1914, it gave the new agency law enforcement jurisdiction over persons, partnerships, and corporations that engage in "unfair methods of competition" in commerce.[6] Excluded, however, were business entities like railroad, telephone, and telegraph companies that were regarded as "common carriers"[7] and already regulated at that time by an agency known as the Interstate Commerce Commission (ICC, for short).[8]

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[6] Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 37 Stat. 717, 719 (1914). Section 5 of the FTC Act was subsequently amended in 1938 to proscribe "unfair or deceptive acts or practices" as well. Federal Trade Commission Act Amendments of 1938 (Wheeler–Lea Act), Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938).

[7] Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 37 Stat. at 719. Also excluded from the FTC's law enforcement jurisdiction were banks.

[8] As the FTC Act made clear, "common carriers" were already subject to the "Acts to regulate commerce," a term that referred to the Interstate Commerce Act, 24 Stat. 379 (1887), which created the Interstate Commerce Commission. *See id.*, § 4, 37 Stat. at 719; *see also* H.R. REP. NO. 63-533, at 7–8 (1914); ICC v. Baltimore & Ohio R. Co., 145 U.S. 263 (1892). In 1995, however, the ICC was abolished and its enforcement responsibilities under the Interstate Commerce Act were transferred to the Surface Transportation Board. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

The Second Circuit held in *FTC v. Verity International, Ltd.*, 443 F.3d 48 (2d Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007), that the meaning of the term "common carrier," as used—but nowhere defined—in both the FTC Act and the Interstate Commerce Act, is the ordinary, common-law usage, which referred to an entity that "holds itself out as undertaking to carry for all people indifferently," and "carries its cargo without modification." *Id.* at 58.

Congress subsequently created the FCC with its passage of the Communications Act of 1934.[9] It gave this new agency jurisdiction over, among other entities, common carriers "engaged in interstate or foreign communication by wire or radio,"[10] thus transferring common-carrier jurisdiction over telephone and telegraph companies from the ICC to the FCC.[11] Accordingly, when Congress had its first occasion to amend the Federal Trade Commission Act in 1938,[12] it made clear that the FTC's law enforcement jurisdiction would not extend to common carriers that were now subject to the Communications Act and under the FCC's jurisdiction.[13]

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[9] Communications Act of 1934, ch. 352, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. ch. 5 (2011)).

[10] 47 U.S.C. § 152(a) (2011); *see generally* 47 U.S.C. ch. 5, subch. II (2011) (regulation of common carriers). For the definitions of a "common carrier" and a "telecommunications common carrier" under the Communications Act of 1934, see 47 U.S.C. §§ 153(11) & 153(51) (2011). In *Verity International*, the Second Circuit rejected the argument that the FTC Act's common-carrier exemption is to be defined by reference to the (circular) meaning given in the Communications Act. 443 F.3d at 57. *See also* note 8 *supra*.

[11] *See To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate and Foreign Commerce*, 75th Cong. 24 (1937) (statement of Harvey Hoshour, Gen. Solicitor, Am. Tel. & Tel. Co.) (noting that Section 602(b) of the Communications Act of 1934 repealed the Interstate Commerce Act insofar as communications carriers were concerned). *See also Verity International*, 443 F.3d at 57–58 (recounting the history of the common-carrier exemption).

[12] Federal Trade Commission Act Amendments of 1938 (Wheeler–Lea Act), Pub. L. No. 75-447, 52 Stat. 111 (1938).

[13] *Id.*, § 2, 52 Stat. at 111 (amending the definition of "Acts to regulate commerce" to include "the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto"). This clarifying amendment was first introduced as part of Senate Bill 1077 on March 29, 1937. S. 1077, 75th Cong., at 2, lines 21–25 (as passed by Senate, Mar. 30, 1937); 81 CONG. REC. 2806 (1937) (amendment offered by Senator White without objection from Senator Wheeler and passed by Senate). Congress entertained the clarifying amendment after hearing the repeated pleas of industry representatives, who feared that telephone and telegraph companies would now be subject to overlapping enforcement jurisdiction by the FCC and the FTC. *See To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate and Foreign Commerce*, 75th Cong. 23–27, 67–68 (1937) (statements of Harvey Hoshour, Gen. Solicitor, Am. Tel. & Tel. Co.); *To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate and Foreign*

The FCC's jurisdiction over telecommunications common carriers is plenary, and includes both consumer protection[14] and competition issues.[15] Mergers between telecommunications carriers like AT&T and T-Mobile are reviewed by the FCC as applications to transfer control of agency-issued licenses and authorizations, which it may approve only after finding that the proposed transfer will serve the "public interest, convenience, and necessity."[16] One dimension of the FCC's rather broad, public-interest analysis is whether the merger would lead to anticompetitive effects in violation of Section 7 of the Clayton Act,[17] which it has jurisdiction to enforce

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Commerce, 75th Cong. 28–29 (1937) (statement of Alfred L. Geiger, Gen. Att'y, U.S. Indep. Tel. Ass'n); *Federal Trade Commission Act Amendments: Hearing on S. 3744 Before the H. Comm. on Interstate and Foreign Commerce*, 74th Cong. 61–65 (1936) (statement of E.S. Wilson, Am. Tel. & Tel. Co.). For its part, the FTC, represented in the House Committee hearings by Commissioner Ewin Davis, objected to the amendment as unnecessary because it seemed already clear that the FTC had no jurisdiction over common carriers. *See To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate and Foreign Commerce*, 75th Cong. 61–62 (1937) (statement of Ewin L. Davis, Comm'r, Fed. Trade Comm'n); *Federal Trade Commission Act Amendments: Hearing on S. 3744 Before the H. Comm. on Interstate and Foreign Commerce*, 74th Cong. 82–83 (1936) (statement of Ewin L. Davis, Comm'r, Fed. Trade Comm'n).

[14] *See, e.g.,* 47 U.S.C. § 201(b) (2011) (requiring that all charges, practices, classifications, and regulations for and in connection with a communication service to be just and reasonable); 47 U.S.C. § 226 (2011) (regulating common carriers that are involved in providing telephone operator services); 47 U.S.C. § 228 (2011) (regulating common carriers that are involved in the provision of pay-per-call services).

[15] *See, e.g.,* 47 U.S.C. § 251 (2011) (imposing a duty on each telecommunications carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers); 47 U.S.C. § 253 (2011) (prohibiting state and local statutes and regulations from acting as barriers to entry that would prevent an entity from providing an interstate or intrastate telecommunications service).

[16] 47 U.S.C. §§ 214(a), 310(d) (2011). The U.S. Supreme Court has more than once recognized that the public-interest standard set forth in the Communications Act of 1934 is intended to be "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). *Accord* FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981).

[17] 15 U.S.C. § 18 (2011). *See, e.g.,* Staff Analysis & Findings ¶ 5, Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and

against "common carriers engaged in wire or radio communication or radio transmission of energy."[18] The DOJ separately reviews such mergers under Section 7, but it focuses only on the potential anticompetitive effects, and not on other public-interest considerations that are unique to the FCC's analysis.[19]

The FCC's exclusive, common-carrier jurisdiction over telecommunications companies that provide the digital pipes does not mean that the FTC has played no role whatsoever in this field. For example, the FTC promulgates and enforces a rule that implements the Telephone

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Authorizations, WT Dkt. No. 11-65 (F.C.C., Wireless Telecomm. Bureau, Nov. 29, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A2.pdf.

[18] 15 U.S.C. § 21 (2011). Section 602(d) of the Communications Act of 1934 amended Section 11 of the Clayton Act to include the FCC as one of the federal agencies with independent Clayton Act enforcement authority. As the D.C. Circuit made clear, however, in *United States v. FCC*, 652 F.2d 72, 81–88 (D.C. Cir. 1980) (en banc), this amendment did not make the FCC's enforcement of the Clayton Act's competition policy mandatory. Rather, like other antitrust enforcement agencies, the FCC wields prosecutorial discretion, and its public-interest analysis includes, but is not necessarily dictated by, federal antitrust policy. *See* FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 93 (1953) ("The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications.").

[19] *See, e.g.,* Complaint, United States v. AT&T Inc., No. 1:11-cv-01560-ESH (D.D.C. Aug. 31, 2011), *available at* http://www.justice.gov/atr/cases/f274600/274613.pdf; Staff Analysis & Findings ¶ 4, Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Dkt. No. 11-65 (F.C.C., Wireless Telecomm. Bureau, Nov. 29, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A2.pdf.

Although the FCC is not limited to antitrust concerns in its public-interest analysis, it has been observed to agree with, and defer to, the DOJ's Clayton Act analysis in recent years. *See, e.g.,* Staff Analysis & Findings ¶ 5, *supra* ("We likewise now conclude, as reflected in the details of the analysis and findings below, that the Applicants have failed to meet their burden of demonstrating that the competitive harms that would result from the proposed transaction are outweighed by the claimed benefits. Staff thus finds, as has DOJ, that the proposed transaction would likely lead to a substantial lessening of competition in violation of the Clayton Act. A transaction that violates the Clayton Act would not be in the public interest.").

Disclosure and Dispute Resolution Act of 1992.[20] This rule regulates the advertising, manner of delivery, and billing of pay-per-call services. The FTC's jurisdiction intersects with that of the FCC in this area because the latter agency regulates the conduct of common carriers that deal with providers of pay-per-call services.[21]

As the case of *FTC v. Verity International, Ltd.*[22] illustrates, although the FTC's enforcement jurisdiction under Section 5 does not extend to common carriers involved with pay-per-call services, the question whether an entity is a common carrier subject only to FCC jurisdiction must be answered by looking at what that entity actually does instead of what it is authorized by the FCC to do.[23] In the case of the defendant Automatic Communications, Ltd. (ACL, for short) in *Verity International*, the Second Circuit concluded that it was not involved in the carriage of the telephone calls at issue, either as the originating carrier (which was AT&T, and later, Sprint) or the transit

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[20] FTC Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. pt. 308 (2012) (implementing Titles II and III of that Act).

[21] 47 U.S.C. § 228 (2011). For example, Section 228(c)(1) calls for the FCC to impose, by regulation, an obligation on the part of any common carrier that assigns, say, a 1-900-number to a pay-per-call service provider, to require by contract or tariff that the provider comply with the Telephone Disclosure and Dispute Resolution Act and the FTC's Trade Regulation Rule. *Id.* § 228(c)(1).

[22] 443 F.3d 48 (2d Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007).

[23] *Id.* at 60.

carrier (which was AT&T U.K./Viatel).[24] Instead, ACL simply brought together these two carriers as part of the billing system that it operated.[25]

The FTC and the FCC also share jurisdiction over the practice of "cramming," which refers to the placement of unauthorized, misleading, or deceptive charges on a consumer's telephone bill. The FCC combats this practice with the promulgation of Truth-in-Billing rules that require telephone companies to make their bills easier for consumers to read and understand.[26] The FTC combats this practice by charging incidents of "cramming" as unfair and deceptive practices in violation of Section 5.[27]

In summary, the FTC's rich enforcement experience and expertise involving products and services in the telecommunications field[28]—

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[24] *Id.* at 59.

[25] *Id.*

[26] *See generally FCC Encyclopedia: Truth-in-Billing*, FED. COMMC'NS COMM'N, http://www.fcc.gov/encyclopedia/truth-billing (last visited Nov. 5, 2012).

[27] *See generally Facts for Consumers: Cramming: Mystery Phone Charges*, FED. TRADE COMM'N, http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro18.shtm (last visited Nov. 5, 2012).

[28] *See generally Phone Products & Services*, FED. TRADE COMM'N, BUREAU OF CONSUMER PROTECTION, http://www.ftc.gov/bcp/menus/consumer/phone/products.shtm (last visited Nov. 6, 2012).

For example, the FTC also brings enforcement cases against unfair or deceptive claims made by providers of prepaid calling cards. *See* FTC v. Millennium Telecard, Inc., No. 11-2479-JLL, 2011 U.S. Dist. LEXIS 74951 (D.N.J. filed July 12, 2011) (granting the FTC's motion for a preliminary injunction); Fed. Trade Comm'n, FTC Consumer Alert: When Minutes Matter: Choosing a Prepaid Phone Card (July 2010), http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt183.pdf. The FTC has also brought unfair practice claims against entities that allegedly have sold personal information contained in telephone records, in contravention of Section 702 of the Telecommunications Act of 1996, 47 U.S.C. § 222 (2011). In *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), the Tenth Circuit held that there could be an unfair practice violation under Section 5 of the FTC Act even though the defendant itself was not a common carrier subject to liability under Section 702 of the Telecommunications Act, and even though the FTC does not have jurisdiction to enforce notwithstanding the passage of the Communications Act of 1934 and the creation of the FCC—arguably suggests why it might not be so simple or practicable to divvy up agency jurisdiction based on pipes and content. Digital goods and services invariably need some means to find their way to consumers, which necessarily implicates the involvement of entities that may or may not be common carriers in the ordinary, common-law understanding.[29] If we are concerned about developing a consistent, unified vision of our digital future, it may make more sense to vest jurisdiction over these matters to a single expert agency.

III.

Another reason why agency convergence may be a good thing is that the FTC and the FCC have taken markedly different approaches to protecting consumers and competition, in the digital world as well as the physical world. The FTC is, first and foremost, a law enforcement agency charged with protecting consumers and competition from "unfair methods of competition" and "unfair and deceptive acts and practices."[30] Under Section 5, the FTC

Section 702 itself. *Id.* at 1194 (holding that Section 5 "enables the FTC to take action against unfair practices that have not yet been contemplated by more specific laws").

[29] In the physical world, the common-law understanding of common carriage relates to an entity, like a railroad, that provides transportation to everyone who wants it, and does not have anything to do with the passengers or goods that it is transporting. But the digital world may arguably be different. Here an entity that provides the pipes for transporting digital content may itself be offering competing or complementary content. Or its terms of service, quality of transmission, or other attributes may be integral to the digital content that it is transporting.

[30] 15 U.S.C. § 45(a) (2011). *See generally* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, The Federal Trade Commission as a Law Enforcement Agency, Lecture Given to a Class on

acts only when it (that is, a majority of the voting Commissioners) has reason to believe that a violation of law has occurred or is occurring, and that filing a complaint (either in court or in its own administrative forum) would be in the public interest.[31] Appellate courts, which sit in judgment of the FTC's decisions,[32] have arguably taken the view in the past that the FTC should not use Section 5 to make competition "better" in the absence of an articulable and provable violation of antitrust law that can be remedied.[33]

In contrast, the FCC is a thoroughgoing regulatory agency. This means that the FCC generally acts by adopting rules that are supposed to define what it thinks is required by the public interest. Indeed, the Telecommunications Act of 1996 made clear that the FCC has a different competition mandate from the FTC; instead of merely *protecting* competition, as the FTC does through its enforcement of Section 5 of the FTC Act[34] and

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Antitrust Economics, ECON 420, Spring 2012, University of Virginia (Apr. 23, 2012), http://www.ftc.gov/speeches/rosch/120423uvalecture.pdf.

[31] 15 U.S.C. § 45(b) (2011).

[32] 15 U.S.C. § 45(c) (2011).

[33] *See* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 138–39 (2d Cir. 1984) ("holding that Section 5 cannot be applied to proscribe unilaterally adopted, but interdependent, business practices among manufacturers of antiknock compounds absent evidence of collusive, coercive, predatory, exclusionary, or oppressive conduct; otherwise it would open the door for the Commission, "whenever it believed that an industry was not achieving its maximum competitive potential, [to] ban certain practices in the hope that its action would increase competition"); Boise Cascade Corp. v. FTC, 637 F.2d 573, 582 (9th Cir. 1980) (holding that the application of Section 5 to a widespread use of delivered pricing without a finding of either collusion among plywood producers or anticompetitive effect on plywood prices "would be to blur the distinction between guilty and innocent commercial behavior").

[34] 15 U.S.C. § 45(a) (2011) (proscribing unfair methods of competition).

Section 7 of the Clayton Act,[35] the FCC is charged by Congress with *promoting* competition in the provision of telecommunications service, which may mean, in some cases, *forbearing* from enforcing a provision or regulation.[36]

This tack is also consistent with the Supreme Court's pronouncement that the FCC wields broad discretion from Congress in determining how best to achieve the goal of securing the maximum benefits of wire and radio communications to all the people of the United States.[37] The Supreme Court has also pointed out that the FCC may sometimes base its decision "on judgment and prediction rather than pure factual determinations."[38] Such a decision, although it may lack complete factual support, is neither arbitrary nor capricious because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."[39]

A prime example of the FCC's regulatory approach is its December 2010 Report and Order in the matter of *Preserving the Open*

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[35] 15 U.S.C. § 18 (2011) (prohibiting acquisitions that have the likely effect of substantially lessening competition or tending to create a monopoly).

[36] Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128 (1996) (codified at 47 U.S.C. § 160 (2011)).

[37] FCC v. WNCN Listeners Guild, 450 U.S. 582, 594 (1981). *See* 47 U.S.C. § 151 (2011) (stating Congress' purpose behind creating the FCC).

[38] *WNCN Listeners Guild*, 450 U.S. at 594.

[39] FCC v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978) (quoting FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961)).

Internet, Broadband Industry Practices,[40] which I will refer to as the *Open Internet Order*. As many of you probably know, the *Open Internet Order* articulates a set of what the FCC considers to be core internet neutrality principles—namely, transparency in the provision of broadband Internet access service sufficient to allow consumers to make informed choices and to allow content, application, service, and device providers to market their offerings;[41] no blocking of lawful content, applications, services, or non-harmful devices, and no blocking of access to lawful websites or competing applications for voice or video telephony services;[42] and no unreasonable discrimination in the transmission of lawful network traffic.[43]

Commentators have questioned whether a regulatory approach to the issue of internet neutrality is really better than an antitrust (that is, law enforcement) approach.[44] In contrast to the FCC, and consistently with its institutional design as a law enforcement agency as opposed to a regulatory

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[40] Report & Order, Preserving the Open Internet, Broadband Industry Practices, 76 Fed. Reg. 59,192 (Fed. Commc'ns Comm'n Sept. 23, 2011) (FCC 10-201, adopted Dec. 21, 2010) (codified at 47 C.F.R. pt. 8 (2011)), *full text available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf [hereinafter Open Internet Order].

[41] 47 C.F.R. § 8.3 (2011).

[42] 47 C.F.R. § 8.5 (2011).

[43] 47 C.F.R. § 8.7 (2011).

[44] *See, e.g.,* Babette E.L. Boliek, *FCC Regulation vs. Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1683–86 (2011) (expressing a concern that a regulatory approach could lead to overreaching by the responsible agency that sees opportunities to expand the scope of its jurisdiction); Gerald R. Faulhaber, *"Solving" Net Neutrality: Regulation, Antitrust, or More Competition*, CPI ANTITRUST CHRON., Mar. 2012, at 8–10 (expressing a concern that a regulatory approach could lead to rent-seeking, i.e., petitioning of the responsible agency by market participants for action against others, namely, their rivals, in order to obtain a market advantage or to advance a personal agenda).

agency, the FTC took a more cautious approach to the issue of regulating broadband Internet access service when it last studied this issue in 2007.[45] In particular, the FTC observed in its *Broadband Connectivity Competition Policy* Report that "we do not know what the net effects of potential conduct by broadband providers will be on all consumers, including, among other things, the prices that consumers may pay for Internet access, the quality of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace."[46] The Report further warned that any regulation, applied prospectively in a relatively young and dynamic industry to business conduct that has not been shown to have resulted in market failure or consumer harm, could have potentially adverse and unintended effects.[47]

As I sit here today in 2012, looking at the issue of broadband Internet access service, it is not altogether clear to me which approach is better. But it does present us with an important choice to make—one that may well take us on divergent paths to a digital future. The traditional premise for adopting a regulatory approach instead of a law enforcement approach is "the belief that

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[45] FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY (2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf. The FTC vote to issue the report was 5–0, with then Commissioner Jon Leibowitz (currently our Chairman) issuing a separate concurring statement. *See* Press Release, Fed. Trade Comm'n, FTC Issues Staff Report on Broadband Connectivity Policy (June 27, 2007), http://www.ftc.gov/opa/2007/06/broadband.shtm; Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Leibowitz Concurring Statement Regarding the Staff Report: "Broadband Connectivity Competition Policy" (June 27, 2007), http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf.

[46] BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 45, at 10.

[47] *Id.* at 11. *See also id.* at 155, 157, 159–60.

competition cannot be trusted to do the job of regulation in that particular industry which competition does in other sectors of the economy."[48] Moreover, the Supreme Court has held that Congress made that judgment (in favor of a regulatory approach) when it passed the Communications Act of 1934 and vested plenary jurisdiction in the FCC to regulate companies doing business in the fields of wire and radio communication.[49]

So perhaps the FCC is proceeding correctly with its issuance of the *Open Internet Order*.[50] Nevertheless, there are arguable drawbacks to a regulatory approach, including the potential risks of rent-seeking,[51] agency capture,[52] and perhaps less political independence from the White House. Regarding the last drawback, I do recognize that the FCC was designed to be

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[48] United States v. FCC, 652 F.2d 72, 87 (D.C. Cir. 1980) (en banc) (quoting Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 777 (D.C. Cir. 1974)).

[49] FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 93 (1953) ("[A]s to the [communications] industry before us in this case, there has been serious qualification of competition as the regulating mechanism. The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications.").

[50] I should note that the House of Representatives, in response to the FCC's issuance of the *Open Internet Order*, passed a joint resolution disapproving of the FCC's policymaking and declaring the rules to be null and void. That resolution was then placed on the Senate calendar, and to my knowledge, nothing further has come of it. H.R.J. Res. 37, 112th Cong. (as passed by the House, Apr. 8, 2011, and placed on the Senate calendar), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hjres37pcs/pdf/BILLS-112hjres37pcs.pdf.

[51] *See* Faulhaber, *supra* note 44, at 8–10.

[52] This term refers to a situation in which a regulatory agency is "uniquely susceptible to domination by the industry [it is] charged with regulating." Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997). In my view, one reason that an agency may be susceptible to capture is if its expenses are being paid (in the form of collected fees) by the industry it regulates.

an independent, bipartisan agency similar to the FTC.[53] Nevertheless, I think there is less independence from the Executive branch when an agency is setting regulatory policy, as opposed to bringing cases, because it may be getting its marching orders, policy-wise, from the White House.

Moreover, an acknowledgment of the FCC's institutional primacy in the field of telecommunications still does not explain the wisdom of having two different agencies reviewing mergers involving digital pipes and digital content.[54] So far there has been no complaint, to my knowledge, by the parties, the FCC, or the DOJ regarding the fact that the FTC reviewed the EMI transactions involving music publishing and recorded music. I am not sure why there was not, since many of the arguments made against the transactions (in particular, the UMG–EMI acquisition in recorded music)

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[53] *See* 47 U.S.C. §§ 154(a), 154(b)(5) & 154(c) (2011); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 540 (2009) ("With the view that broadcast regulation 'should be as free from political influence or arbitrary control as possible,' . . . Congress established the FCC with the same measure of independence from the Executive that it had provided the FTC. Just as the FCC's commissioners do not serve at the will of the President, . . . its regulations are not subject to change at the President's will.") (citations omitted).

[54] There is a doctrine in U.S. law known as the doctrine of "primary jurisdiction" that defines the relations between the administrative agencies and the courts. "That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353 (1963). It does not help answer, however, the question whether we should have two administrative agencies—both expert in their respective spheres—involved in merger review. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b), 110 Stat. 56, 143 (1996) (striking the FCC from the list of agencies identified in Section 7 of the Clayton Act, 15 U.S.C. § 18, that may authorize the consummation of mergers in their respective fields of jurisdiction and thereby immunize them from Clayton Act review). *See also* FTC v. Verity Int'l, Ltd., 443 F.3d 48, 60–61 (2d Cir. 2006) (rejecting the argument that the FTC's case should have been referred to the FCC because it raised "complex questions of telecommunications policy"; holding that the issues of deceptiveness, unfairness, and common-carrier status under the FTC Act were not issues for which the FCC had special expertise or some measure of discretion), *cert. denied*, 549 U.S. 1278 (2007).

focused on potential harms to the creation of new business models for digital music services.[55] It seems to me that for these business models to evolve and flourish, the pipes are going to be just as important as the content.

IV.

In closing, my remarks today can be distilled down to the following points, which I think may allow us to move more confidently towards a cross-border, global approach to creating a digital future for consumers everywhere.

First, differentiating between digital pipes and digital content is arguably a throwback to the days of common carriage, when some entities merely provided transportation to all comers and nothing more. In the digital world today, carriage via the pipes may be on its way to becoming an essential aspect of the product or service, because consumers—not just in the U.S., but around the globe—have come to expect on-demand, round-the-clock access to content and information sources, and interconnectivity with one another. And firms are responding to that demand by moving beyond their traditional spheres of business—witness Google's expansion from mere search (arguably a form of carriage) into vertical silos of owned content. Accordingly, perhaps there are now commercial scenarios where, given the increasing consumer demand for bandwidth, the pipes can no longer afford to

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[55] *See, e.g., The Universal Music Group/EMI Merger and the Future of Online Music: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. 114–19, 194–200 (2012) (statements of Edgar Bronfman, Jr., Dir., Warner Music Grp., & Gigi B. Sohn, President, Public Knowledge, respectively), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76045/pdf/CHRG-112shrg76045.pdf.

be "dumb," but instead need to be "smart" and responsive to the type of content they are carrying.[56] In such scenarios, the traditional distinction between pipes and content would seem to break down.

Second, the notion of administrative agencies that have particular industry focus and expertise is no longer unique to the U.S. We have seen the rise and proliferation of expert agencies in the European Commission and its Member States, for example. However, if consumers around the globe are to derive maximum benefit from the wisdom and insight of expert agencies, then we should not let Procrustean distinctions and border disputes hamper the work of those agencies, so long as the work that they do is consistent with and in furtherance of the public interest.

Third, the U.S. remains one of the few jurisdictions in the world with a well-defined, law-enforcement approach to matters such as competition and consumer protection. Such an approach may not be well-suited, however, to the development of a robust digital agenda that can accommodate a diversity of viewpoints, issues, and concerns besides competition or consumer protection (take, for example, First Amendment concerns about freedom of speech). From that standpoint, perhaps a regulatory approach is superior. But we should always be vigilant of the risks, which include agency capture

[56] For example, streaming movies consumes considerably more bandwidth than other uses. Principles of "reasonable network management," as defined by the FCC, *see* 47 C.F.R. § 8.11(d) (2011), may therefore require that pipes be "smart." Indeed, we are already seeing this evolution in public utilities, which are moving to "smart" systems that can better manage consumption to avoid dangerous peaks that can overtax the grid.

and undue political influence, that can diminish the utility and effectiveness of a regulatory approach.