

competition and consumers in the United States. 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

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).

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 ondemand 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.

5

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" and already regulated at that time by an agency known as the Interstate Commerce Commission (ICC, for short).⁸

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

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

The FCC's jurisdiction over telecommunications common carriers is

against "common carriers engaged in wire or radio communication or radio transmission of energy." 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

Authorizations, WT Dkt. No. 11-65 (F.C.C., Wireless Telecomm. Bureau, Nov. 29, 2011), available at

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

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. 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 field²⁸—

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-

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 Act³⁴ and

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*

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)).

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. 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." The Report further warned that any regulation, applied

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*. Nevertheless, there are arguable drawbacks to a regulatory approach, including the potential risks of rent-seeking, 1 agency capture, 2 and perhaps less political independence from the White House. Regarding the last drawback, I do recognize that the FCC was designed to be

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 o(e)-2g(ne6 r joT a jo)3hg s80 6((51)(e)-5.4002 TcM.3

- 17 -	-	1	7	-
--------	---	---	---	---

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

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 agenci

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