Federal Trade Commission

Neutral on Internet Neutrality:
Should There Be a Role for the Federal Trade Commission?

Remarks of J. Thomas Rosch*
Commissioner, Federal Trade Commission

before the

Global Forum 2011: Vision for the Digital Future

Brussels, Belgium

November 7, 2011

I have been asked to speak to you today about the role of antitrust and competition law in ensuring internet neutrality. More specifically, I will talk about whether there should be a role for the U.S. Federal Trade Commission, as an antitrust enforcement and consumer protection agency, to play in this arena. I have publicly addressed this question before and my views generally

* 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 these remarks.

have not changed.[1] Since I last spoke on this subject, however, there have been some new developments in the U.S. that are the subject of these updated remarks.

I. The State of Play

I will first describe where we in the U.S. are right now with respect to the regulation of internet neutrality, and how we got to this point.

A.

In June 2007, the FTC issued a report entitled *Broadband Connectivity Competition Policy*, prepared by our Internet Access Task Force under the leadership of Maureen Ohlhausen, then the Director of the FTC's Office of Policy Planning.[2] (I will refer to this report as the "*Broadband Report*.") As

---

[1] *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Some Reflections on the Future of the Internet: Net Neutrality, Online Behavioral Advertising, and Health Information Technology, Remarks for the U.S. Chamber of Commerce Telecommunications & E-Commerce Committee Fall Meeting (Oct. 26, 2009), http://www.ftc.gov/speeches/rosch/091026chamber.pdf [hereinafter Rosch, *Net Neutrality*]; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Broadband Access Policy: The Role of Antitrust, Remarks Presented at the Broadband Policy Summit IV: Navigating the Digital Revolution (June 13, 2008), http://www.ftc.gov/speeches/rosch/080613broadbandaccess.pdf [hereinafter Rosch, *Broadband Access*]; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Forces Driving (and Impeding) Convergence: What Can the FTC (and Like Agencies) Contribute?, Global Forum 2007: Global Convergence 2.0 – Integration & Innovation 5 (Nov. 5–6, 2007), http://www.ftc.gov/speeches/rosch/0711056venice.pdf [hereinafter Rosch, *Convergence*].

[2] 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.

the *Broadband Report* noted,[3] in 2002 the Federal Communication Commission ("FCC") classified broadband internet service provided by cable companies as an "information service," and not as a "telecommunications service" that would be subject to mandatory, common-carrier regulation under Title II of the Communications Act of 1934.[4] This classification was subsequently affirmed in 2005 by the U.S. Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*.[5]

Because *Brand X* upheld the FCC's classification of broadband internet service as an "information service"—as opposed to a "telecommunications service" subject to the FCC's common-carrier regulation, some people, including the FTC staff that authored the *Broadband Report*, have interpreted the decision to mean that the FTC may therefore properly exercise enforcement jurisdiction over broadband internet service.[6] Under

---

[3] BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 2, at 3, 44–45.

[4] *In re* High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4822–23, ¶¶ 38–39 (2002) (often referred to colloquially as the 2002 *Cable Modem Order*). *See* 47 U.S.C. §§ 153(20), 153(43) & 153(46) (2009) (defining "information service," "telecommunications," and "telecommunications service," respectively).

[5] 545 U.S. 967, 1000 (2005), *affirming In re* High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4822–23, ¶¶ 38–39 (2002). *Brand X* reviewed only the FCC's classification of one principal form of broadband internet service—namely, cable modem service. But the FCC's classification of the other principal form of broadband internet service—namely, digital subscriber line ("DSL") service—as an "information service" has similarly been upheld in court. *See* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205, 220 (3d Cir. 2007), *affirming* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14862–65, ¶¶ 12–17 (2005) (often referred to colloquially as the 2005 *Wireline Broadband Order*).

[6] *See* BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 2, at 3 ("[T]hese decisions have served to reinforce and expand FTC jurisdiction over broadband Internet access services.… The regulatory and judicial decisions … confirmed that the larger categories of broadband Internet access services, as information services, are not exempt from FTC enforcement of the FTC Act.").

their reasoning, although the FTC's jurisdiction to enforce Section 5 of the Federal Trade Commission Act does not extend—by historical design[7]—to "common carriers" that are subject to FCC regulation under the Communications Act,[8] such as, for example, providers of "telecommunications services,"[9] this exemption would not apply to providers of broadband internet service to the extent that the service is classified instead as an "information service." Assuming that this is a proper interpretation of *Brand X*—and it is debatable whether it is[10]—it would imply that the FTC has potentially more than a limited role to play in ensuring internet neutrality.

Despite the implications flowing from the above-described reading of *Brand X*, however, the FTC did not immediately jump into the fray. Rather, the 2007 *Broadband Report* preached caution when evaluating proposals from businesses, interest groups, and commentators that we regulate broadband internet service because "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

---

[7] *See infra* notes 35–39 and accompanying text.

[8] 15 U.S.C. §§ 44 & 45(a)(2) (2010).

[9] *See* 47 U.S.C. § 153(44) (2009) (defining a "telecommunications carrier" as a provider of "telecommunications services" and making clear that a "telecommunications carrier" is to be "treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services").

[10] *See infra* notes 40–42 and accompanying text.

marketplace."[11] 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.[12] And this is debatable as well.

B.

With respect to the brewing legal and political debate over internet neutrality, the FTC has thus chosen to hunker down in the trenches, but with our antitrust and consumer protection enforcement guns locked and loaded, ready to stave off any assault on consumer welfare. Meanwhile, our sister agency, the FCC, has marched directly into the line of fire with its rulemaking process, aimed at articulating and enforcing certain principles deemed essential to a "free and open Internet," subject only to the countervailing principle of "reasonable network management."

Specifically, in October 2009, under the leadership of newly appointed Chairman Julius Genachowski,[13] the FCC issued a Notice of Proposed Rulemaking, through which it sought public comment on a proposed set of rules on internet neutrality.[14] Commissioners Robert McDowell and Meredith

---

[11] BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 2, at 10.

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

[13] Chairman Genachowski was sworn in to his post in June 2009.

[14] Notice of Proposed Rulemaking, Preserving the Open Internet, Broadband Industry Practices, 74 Fed. Reg. 62,638 (Fed. Commc'ns Comm'n Nov. 30, 2009) (FCC 09-93, adopted Oct. 22, 2009) (to be codified at 47 C.F.R. pt. 8), *full text available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf [hereinafter Open Internet NPRM]. *See id.*

Baker each dissented in part, however. Both of them were not convinced that the factual record before the FCC showed a demonstrable problem with internet access that required fixing[15] but they nonetheless agreed that the proper way for the agency to proceed—assuming there was a problem—was through the rulemaking process.[16]

In December 2010, the FCC concluded its rulemaking process with the issuance of a Report and Order that adopted a set of final rules on internet

---

at 65–66, Appx. A. (Unless otherwise indicated, citations herein are to the full text of the Notice and not the synopsis that was published in the Federal Register.) As the Notice explained, the proposed rules were intended to codify four Internet principles that the FCC had previously articulated in its 2005 *Internet Policy Statement*, namely, principles against *blocking* (1) access by consumers to lawful content of their choice, (2) operation and use by consumers of applications and services of their choice, subject to law enforcement considerations, (3) connection by consumers to legally approved devices of their choice that do not harm the network, and (4) enjoyment by consumers of the benefits of competition among network providers, application and service providers, and content providers. *Id.* at 3. The proposed rules also sought to codify a principle of *nondiscrimination* with respect to lawful content, applications and services, and a principle of *transparency* with respect to the disclosure of network management and other practices to consumers. *Id.* at 5. All of these principles would be subject to the principle of *reasonable network management*, as well as the needs of, and limitations relating to, law enforcement, public safety, and national or homeland security. *Id.*

[15] *Id.* at 96 (McDowell, Comm'r, concurring in part & dissenting in part) ("I do not share the majority's view that the Internet is showing breaks and cracks, nor do I believe that the government is the best tool to fix it.") & 105 (Baker, Comm'r, concurring in part & dissenting in part) ("I dissent in part today because, as a threshold matter, I am not convinced that there is a sufficient record to establish that a problem exists that should be addressed by Commission rules. As I have said previously, we should not adopt regulations to address anecdotes where there is no fact-based evidence that persuasively demonstrates the presence of a problem."). Commissioner McDowell also questioned whether the FCC had the jurisdictional authority to regulate internet access service in this manner, since it had previously classified internet access service as an "information service" and not a "telecommunications service" under Title II of the Communications Act. *Id.* at 96 & 98 n.2 (McDowell, Comm'r, concurring in part & dissenting in part).

[16] *Id.* at 101 (McDowell, Comm'r, concurring in part & dissenting in part) ("Although I respectfully disagree with the factual and legal predicates that have produced this item today, I agree that if we are to have rules the proper way to proceed is a notice of proposed rulemaking containing the text of proposed rules.") & 106 (Baker, Comm'r, concurring in part & dissenting in part) ("Although I am not convinced that rules are necessary or useful at this time, I am now equally convinced that it is reasonable to take a step back and ask tough and probing questions about the Internet as it exists today and about where we want it to be tomorrow.").

neutrality, which I will refer to as the "*Open Internet Order*."[17] The rules were published in the Federal Register in September 2011, and they are scheduled to take effect later this month, on November 20, 2011.[18] Commissioners McDowell and Baker again dissented, this time in full. Both dissents expressed concern not only with the absence of a demonstrable problem in the broadband marketplace that needed to be fixed through the adoption of the internet neutrality rules,[19] but also with the FCC's resolve to bring its rulemaking process to a conclusion, despite being told by the D.C. Circuit, only eight months earlier in *Comcast Corp. v. FCC*,[20] that the agency did not

---

[17] 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) (to be codified at 47 C.F.R. pt. 8), *full text available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf [hereinafter Open Internet Order]. *See id.* at 88–96, Appxs. A (substantive rules) & B (procedural rules). (Unless otherwise indicated, citations herein are to the full text of the Report & Order and not the synopsis that was published in the Federal Register.)

[18] *Id.* at 85, ¶ 161 (providing that the rules take effect 60 days after their publication in the Federal Register); *see also* 76 Fed. Reg. at 59,192.

[19] *Id.* at 147–48 (McDowell, Comm'r, dissenting) ("Nothing is broken in the Internet access market that needs fixing.") (citing, *inter alia*, the FTC's "unanimous and bipartisan conclusion" in its 2007 report that there was no evidence of concentrations or abuses of market power), & 182–84 (Baker, Comm'r, dissenting) ("There is no factual basis to support government intervention.") (also citing the FTC's 2007 report that there was no evidence of significant market failure or demonstrated consumer harm). In response, the FCC majority rejected the notion that the conclusions of the FTC and the Department of Justice were dispositive, asserting that the FCC's "statutory responsibilities are broader than preventing antitrust violations or unfair competition." *Id.* at 27 n.141. In making this point, the majority quoted then Commissioner Leibowitz's statement that "there is little agreement over whether antitrust, with its requirements for *ex post* case by case analysis, is capable of fully and in a timely fashion *resolving* many of the concerns that have animated the net neutrality debate." *Id.* (quoting Leibowitz, *supra* note 2, at 3).

[20] 600 F.3d 642, 644 (D.C. Cir. 2010) (rejecting the FCC's assertion that it could regulate Comcast's network management practices for internet service—in the absence of any express statutory authority from Congress over such practices—by falling back on its authority to take any action that "is reasonably ancillary to the … effective performance of its statutorily mandated responsibilities, "*see* 47 U.S.C. § 154(i) (2009); Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005)).

have the necessary statutory jurisdiction from Congress to regulate internet access service in this manner.[21] Both dissents raised other concerns as well—and I will come back to some of them later in my remarks—but suffice it to say, the FCC's *Open Internet Order* has triggered a firefight, not only with litigants already challenging its validity in court,[22] but with Congress as well.[23]

---

[21] Open Internet Order, *supra* note 18, at 148–50, 153–72 (McDowell, Comm'r, dissenting) (expressing the view that the *Open Internet Order* "is designed to circumvent the D.C. Circuit's *Comcast* decision, but this new effort will fail in court as well"), & 188–92 (Baker, Comm'r, dissenting) (expressing the view that "Congress has never given the [FCC] authority to regulate Internet network management, a fact validated by the court in *Comcast*" and that this "effort to establish Net Neutrality rules should have been a non-starter").

[22] *See* Cecilia Kang, *Verizon Sues FCC Over Net Neutrality Rules*, WASH. POST BLOG (Sept. 30, 2011, 6:16 PM), http://www.washingtonpost.com/blogs/post-tech/post/verizon-sues-fcc-over-net-neutrality-rules/2011/09/30/gIQAFUP0AL_blog.html. Verizon had actually filed suit challenging the *Open Internet Order* shortly after its issuance by the FCC, but this suit was dismissed as premature by the D.C. Circuit because rulemaking documents are subject to judicial review only upon their publication in the Federal Register. *See* Verizon Commc'ns Inc. v. FCC, Nos. 11-1014 & 11-1016, 2011 U.S. App. LEXIS 6908 (D.C. Cir. Apr. 4, 2011).

[23] Indeed, the House Judiciary Committee's Subcommittee on Intellectual Property, Competition, and the Internet held two days of hearings—on February 15, 2011, and May 5, 2011—to consider various views on the FCC's *Open Internet Order*. Chairman Genachowski and Commissioner McDowell testified at the second hearing. *Ensuring Competition on the Internet: Net Neutrality and Antitrust: Hearings Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. (2011) (Ser. Nos. 112-13 & 112-40), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg64583/pdf/CHRG-112hhrg64583.pdf & http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66157/pdf/CHRG-112hhrg66157.pdf. Furthermore, both the House and the Senate separately introduced joint resolutions disapproving the *Open Internet Order*; the House version has passed the full House on April 8, 2011, and has been placed on the Senate legislative calendar. H.R.J. Res. 37, 112th Cong. 2011, *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hjres37pcs/pdf/BILLS-112hjres37pcs.pdf; S.J. Res. 6, 112th Cong. (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112sjres6is/pdf/BILLS-112sjres6is.pdf; *see also* DISAPPROVING THE RULE SUBMITTED BY THE FEDERAL COMMUNICATIONS COMMISSION WITH RESPECT TO REGULATING THE INTERNET AND BROADBAND INDUSTRY PRACTICES, H.R. REP. NO. 112-51 (2011) (report with dissenting views to accompany House Joint Resolution 37), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt51/pdf/CRPT-112hrpt51.pdf. Both Commissioners McDowell and Baker anticipated that the *Open Internet Order* would put the FCC in conflict with Congress. *See* Open Internet Order, *supra* note 18, at 145 (McDowell, Comm'r, dissenting) ("[T]he FCC has provocatively charted a collision course with the legislative branch."), & 192 (Baker, Comm'r, dissenting) (noting that "[t]he [FCC]

C.

I, for one, am glad that the FTC is not in the middle of this legal and political maelstrom. I will get to my reasons in a moment. But who knows how long we will be content to sit on the sidelines?

For one thing, one of the core internet neutrality principles articulated in the FCC's *Open Internet Order* is transparency—that "fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services."[24] As our current Chairman, Jon Leibowitz, has repeatedly observed, transparency makes internet neutrality a consumer protection issue, which implicates one of the main areas of the FTC's enforcement agenda.[25] While I don't disagree with that,[26] the harder question is whether

---

adopts rules that are almost word-for-word a draft bill under consideration in Congress," and that this decision blurs "the line between legislator and regulator" and "raises broader concerns about [the] agency's institutional credibility").

[24] Open Internet Order, *supra* note 18, at 2.

[25] Leibowitz, J., Chairman, Fed. Trade Comm'n, Remarks as Prepared for Delivery to the FCC Workshop: Consumers, Transparency, and the Open Internet at 2 (Jan. 19, 2010), http://www.ftc.gov/speeches/leibowitz/100119leibowitzfccworkshop.pdf ("At the FTC we have been working on issues that involve transparency and disclosure to consumers for many years; these technologies are very familiar to us."); Grant Gross, *FTC Chairman: Agency May Enforce Net Neutrality*, PCWORLD (May 11, 2009, 12:40 PM), http://www.pcworld.com/article/164679/ftc_chairman_agency_may_enforce_net_neutrality.html ("Asked about the change of attitude [at the FTC], Leibowitz said net neutrality is a consumer protection issue, and consumer protection is one of the main functions of the FTC."); Leibowitz, *supra* note 2, at 1 ("Of course, [the Freedom to choose Internet service plans with sufficient information about those plans] is particularly important to us at the FTC. It implicates some of the most important issues regarding consumer rights on the Internet—transparency and disclosure.").

[26] Rosch, *Broadband Access*, *supra* note 1, at 5 ("Requiring clear and conspicuous disclosure about material terms is, of course, one of the hallmarks of the Commission's consumer protection mission, and our efforts to date in the Internet service provider area are no exception.").

internet neutrality is, or should be, an antitrust issue.[27] On this question, I would observe that Chairman Leibowitz is a longtime friend of FCC Chairman Genachowski. Indeed, they play basketball together on the weekends and talk with each other from time to time[28]—perhaps about whether the two agencies could have a shared role in regulating broadband internet access from the standpoint of both consumer protection and competition.

There is another development that may change how the FTC looks at internet neutrality. Maureen Ohlhausen, who as I said oversaw the preparation of the Commission's 2007 *Broadband Report*, has been nominated by President Obama to the Commission vacancy created by the departure of Commissioner Bill Kovacic, whose term ended in September 2011.[29] Assuming that her nomination will be confirmed by the U.S. Senate, it will be interesting to see what views on internet neutrality she will bring to the Commission table—four years after the issuance of the *Broadband Report*.

---

[27] *Id.* at 6 ("In short, Commission authority to curb unfair and deceptive acts and practices in the broadband Internet access services area is fairly straightforward and non-controversial. However, I don't think the same could be said for antitrust.").

[28] Bob Garfield, *FTC Chairman on Privacy, Net Neutrality and the Future of News: Transcript*, ON THE MEDIA PODCAST (Apr. 23, 2010), http://www.onthemedia.org/2010/apr/23/ftc-chairman-on-privacy-net-neutrality-and-the-future-of-news/transcript/ (interview of FTC Chairman Leibowitz).

[29] Press Release, President Barack Obama, President Obama Announces Another Key Administration Post (July 19, 2011), http://www.whitehouse.gov/the-press-office/2011/07/19/president-obama-announces-another-key-administration-post.

II. Reasons for Staying Out of It

Here are three reasons why I think the FTC should stay out of the business of regulating internet neutrality.

A.

First, our jurisdiction over broadband internet service remains debatable, given the common-carrier exception built into Section 5 of the FTC Act. As I noted earlier in these remarks, some people have read the Supreme Court's 2005 *Brand X* decision, and indeed, the D.C. Circuit's 2010 *Comcast* decision, as suggesting that the FTC can broadly regulate internet neutrality.[30] But *Brand X* and *Comcast* considered only the FCC's jurisdiction—that is, to what extent can the FCC regulate network management practices associated with broadband internet service, given its classification of the service as an "information service" and not as a "telecommunications service" under Title II.[31] The fact that the FCC has chosen to deregulate broadband internet service in its 2002 *Cable Modem*

---

[30] *See, e.g.,* Aruna Viswanatha, *Could the FTC Regulate Net Neutrality?*, Main Justice Blog (Apr. 12, 2010, 5:45 PM), http://www.mainjustice.com/2010/04/12/could-the-ftc-regulate-net-neutrality/ ("The appellate ruling last week [in *Comcast*] made clear that, under the current framework, broadband is not considered a transport service—an opportunity that might allow the FTC to try its hand at regulating broadband.").

[31] *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975–79 (2005) (explaining the history of the FCC's classification of cable modem services that provide internet access differently from telecommunications services that merely provide transmission of information between or among points specified by a user without changing the form or content of the information); Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010) (accepting as a given that the FCC, through its 2002 *Cable Modem Order* affirmed by *Brand X*, had classified broadband internet access service as neither a telecommunications service under Title II nor a cable service under Title VI).

Order and 2005 *Wireline Broadband Order*[32] does not necessarily mean that the service is therefore subject to regulation by another agency such as the FTC. Importantly, like the FCC, we get our jurisdiction directly from Congress,[33] or from courts interpreting the scope of our enabling legislation,[34] but not from another agency.

In my view, our ability to regulate broadband internet service is arguably constrained by Section 5(a)(2) of the FTC Act, which expressly exempts from our jurisdiction "common carriers subject to the Acts to regulate commerce."[35] Section 4 of the FTC Act defines as one of "the Acts to regulate commerce" the Communications Act of 1934.[36] This exemption was a product of institutional design; when Congress created the FTC in 1914, it did not intend for the new agency to enforce Section 5 against common

---

[32] *See Brand X*, 545 U.S. at 1001–02 (upholding as rational the FCC's conclusion that "'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.'" (quoting *In re* High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4802, ¶ 5 (2002))); Am. Council of Education v. FCC, 451 F.3d 226, 230–31 (D.C. Cir. 2006) (noting that the FCC's classification of broadband internet access service as an "information service" was consistent with the deregulatory scheme under the Telecommunications Act of 1996, which was enacted as an amendment to the Communications Act of 1934).

[33] *See, e.g.,* 15 U.S.C. §§ 5711(c) & 5721(c) (2010) (granting the FTC limited jurisdiction over communications common carriers for purposes of enforcing its rules relating to pay-per-call services and telephone-billed purchases under the Telephone Disclosure and Dispute Resolution Act); Ramirez v. Dollar Phone Corp., 668 F. Supp. 2d 448, 463–64 (E.D.N.Y. 2009) (discussing Section 5(b) of the proposed Prepaid Calling Card Consumer Protection Act of 2009 before Congress, which would have given the FTC jurisdiction over prepaid calling card service providers, through a carve-out of the common-carrier exemption).

[34] *See, e.g.,* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 765–69 (1999) (construing the phrase "for its own profit or that of its members" in the definition of "corporation" under Section 4 of the FTC Act).

[35] 15 U.S.C. § 45(a)(2) (2010).

[36] 15 U.S.C. § 44 (2010).

carriers because these entities were already subject to regulation by another agency, namely, the Interstate Commerce Commission ("ICC"), under the Interstate Commerce Act of 1887.[37] Thus, in a congressional scheme intended to avoid interagency conflict, the ICC retained jurisdiction over telephone common carriers (as well as railroads) until 1934, when Congress enacted the Communications Act that created the FCC and transferred the ICC's jurisdiction over telephony to this new agency.[38] Thus, in its near-century of existence, the FTC has arguably never been given plenary jurisdiction over telephone common carriers by Congress.[39]

Furthermore, Section 5 case law suggests two reasons why we should not rely on the FCC's regulatory classification of broadband internet service to inform our own jurisdiction. First, the FCC's classification was indisputably tied to the regulatory scheme that that agency is charged with administering under the Communications Act. In other words, the classification considered the question whether an entity that provides broadband internet service would be considered a "telecommunications carrier" under Title II of the Communications Act.[40] It did not necessarily

---

[37] FTC v. Verity Int'l Ltd., 443 F.3d 48, 57 (2d Cir. 2006).

[38] *Id.*

[39] *But see, e.g.,* 15 U.S.C. §§ 5711(c) & 5721(c) (2010) (granting the FTC limited jurisdiction over communications common carriers for purposes of enforcing its rules relating to pay-per-call services and telephone-billed purchases under the Telephone Disclosure and Dispute Resolution Act).

[40] *See* 47 U.S.C. § 153(44) (2009) (defining a "telecommunications carrier" as a provider of "telecommunications services" and making clear that a "telecommunications carrier" is to be

answer, however, the question whether such an entity is a "common carrier" under Section 5 of the FTC Act—a question that one appellate court has told us must be answered by looking to the common law at the time Congress enacted the FTC Act, and not to the circular definition of "common carrier" in the subsequently enacted Communications Act.[41]

Second, the FCC's regulatory classification was of a particular business activity—namely, broadband internet service—and not of an entity that provides broadband internet service. In other words, the FCC did not declare, in its 2002 *Cable Modem Order* and 2005 *Wireline Broadband Order*, that all entities providing broadband internet service are henceforth not classified as "common carriers." Rather, the FCC declared only that broadband internet service, via cable modem or digital subscriber line ("DSL"), is classified as an "information service" and not as a "telecommunications service." This distinction is important because two appellate courts have told us that the applicability of the common-carrier exemption under Section 5(a)(2) of the FTC Act is based on an entity's status as a "common carrier," and not its

---

"treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services").

[41] *Verity*, 443 F.3d at 57 ("As explained below, we determine that 'common carrier' under the FTC Act is properly defined by reference to the common law of carriers and not to the Communications Act, even though the common law definition does not meaningfully differ from the Communications Act definition for the purposes of this appeal.") & 58 (holding that the common law imposed two definitional requirements of a common carrier: "(1) the entity holds itself out as undertaking to carry for all people indifferently; and (2) the entity carries its cargo without modification"). *Cf.* 47 U.S.C. § 153(10) (2009) (defining a "common carrier" for purposes of the Communications Act as "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, …").

engagement in activities that may be subject to regulation under statutes governing "common carriers."[42] Accordingly, the FCC's classification of broadband internet service does not necessarily answer the question of whether an entity providing this service has the status of a "common carrier" under the FTC Act.

B.

There is another reason why I think the FTC should stay out of the business of regulating internet neutrality. It is not altogether clear to me that antitrust principles can be applied to advance the goals of internet neutrality.[43] To be sure, the *Broadband Report* suggested a number of antitrust theories under the broad headings of exclusive dealing, vertical integration, and unilateral conduct that its authors thought might be applied to promote internet neutrality.[44] But successful antitrust enforcement requires more than theories; both the facts and the law must be arguably on our side.

---

[42] *Compare* Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 923 (2d Cir. 1980) (holding that the FTC had jurisdiction over Reuben H. Donnelley Corp., which published the *Official Airline Guide*, because Donnelley was not an air carrier, and it was irrelevant that Donnelley's publication of airline schedules affected competition among air carriers subject to regulation by the Federal Aviation Act), *with* FTC v. Miller, 549 F.2d 452, 455 (7th Cir. 1977) (holding that Morgan Drive Away, as a common carrier engaged in the business of transporting mobile homes, was exempt from investigation by the FTC because "[t]he exemption is in terms of status as a common carrier subject to the Interstate Commerce Act, not activities subject to regulation under that Act").

[43] *See* Rosch, *Broadband Access*, *supra* note 1, at 6 ("Speaking as an antitrust litigator, I doubt that antitrust can address many, if any, of the problems cited by network neutrality proponents.").

[44] BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 2, at 121–28.

I will illustrate this point with a couple of examples. The first is *Madison River Communications, LLC*,[45] a 2005 FCC consent decree in which the respondent, Madison River Communications, agreed not to "block ports used for VoIP applications or otherwise prevent customers from using VoIP applications."[46] This decree resolved a complaint that Madison River had allegedly denied Vonage, a competitor in telephone service, access to its DSL network for internet access. If this allegation had been dressed up as an antitrust claim, it likely would have been to charge Madison River with unilaterally refusing to deal with Vonage in the adjacent market for DSL internet service, in order to gain some undue advantage in the telephone service market in which they both compete. As I have said before, as an antitrust litigator, I would not relish taking the allegations of *Madison River* to court in the form of a Sherman Act Section 2 claim because I am not confident that such a claim would survive a motion to dismiss in some jurisdictions.[47]

My second example concerns the direction in which our law under Section 2 of the Sherman Act seems to be headed. Suffice it to say, claims of monopolization and attempted monopolization based on unilateral refusals to deal or the essential facilities doctrine appear unlikely to succeed after the

---

[45] 20 F.C.C.R. 4295 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf.

[46] *Id.* at 4297, ¶ 5.

[47] Rosch, *Broadband Access*, *supra* note 1, at 9.

U.S. Supreme Court's decisions in *Verizon Communications Inc. v. Trinko*[48] and *Pacific Bell Telephone Company, Inc. v. linkLINE Communications, Inc.*[49] In *Trinko*, Justice Scalia questioned the role of antitrust in enforcing sharing obligations by putative monopolists that have invested in "an infrastructure that renders them uniquely suited to serve their customers."[50] He added that in an industry like telecommunications that is already subject to regulation, the benefits of antitrust enforcement are likely to be small and outweighed by the costs.[51] In *linkLINE*, Chief Justice Roberts repeated the same institutional concerns regarding antitrust enforcement of a duty to deal or to share, as furnishing an additional ground for rejecting the claim that AT&T had engaged in an anticompetitive "price squeeze" by charging competing providers of DSL internet service a high wholesale price for access to its DSL network, and customers a low retail price for its own DSL internet service.[52]

In summary, the law under Section 2 of the Sherman Act appears to be moving in a direction that does not favor antitrust enforcement of internet

---

[48] Verizon Commc'ns Inc. v. Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[49] Pac. Bell Tel. Co. v. linkLINE Commc'ns, Inc., 555 U.S. 438 (2009).

[50] *Trinko*, 540 U.S. at 407–08 ("Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion."). *See also id.* at 415 ("An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.").

[51] *Id.* at 411–14.

[52] *linkLINE*, 555 U.S. at 1120–22.

neutrality principles. As I have said before, internet neutrality boils down to an argument over the terms and conditions of internet access, which I think has to take into consideration the interests of an owner of a network infrastructure in recouping its investment and protecting its innovation in the "pipes."[53] This consideration raises the question whether the owner may lawfully engage, for example, in price discrimination based on traffic load or usage frequency for the information flowing through its pipes. *Trinko* and *linkLINE* tell us that an antitrust court may not be well suited to provide a judgment on this type of question and to provide continuing supervision over network management practices.[54]

C.

A third reason why I think the FTC should stay out of the business of regulating internet neutrality is that this arena is arguably too political and too regulatory an environment for us to act effectively, given our institutional design as an independent, expert agency. One has only to look at the current battle that the FCC has walked into with the issuance of its *Open Internet Order* to appreciate how regulation-intensive and politically charged the subject of internet neutrality is.[55]

---

[53] Rosch, *Net Neutrality*, *supra* note 1, at 3; Rosch, *Broadband Access*, *supra* note 1, at 3.

[54] *Cf.* Open Internet Order, *supra* note 18, at 146 (McDowell, Comm'r, dissenting) (observing that deciding what constitutes "reasonable" behavior with respect to internet access is fraught with subjectivity; it is "perhaps the most litigated word in American history").

[55] *See supra* notes 14–24 and accompanying text.

Congress created the FTC to be an independent, non-partisan agency, free from political influence.[56] Our primary agenda is the enforcement of Section 5 of the FTC Act against unfair methods of competition, and unfair and deceptive acts and practices, which we do as an "expert body" drawing on experience.[57] Our judgment regarding violations of Section 5 is to be given great weight by the courts, particularly when we have studied and assessed the economic effects of the challenged methods, acts or practices on competition and consumers.[58]

Given its institutional design, the FTC may not be well suited to deal with the subject of internet neutrality. As FCC Commissioners McDowell and Baker suggested in their dissents to the issuance of the *Open Internet Order*, the FCC's rulemaking appears to have been undertaken to fulfill a particular

---

[56] Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935) ("The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.").

[57] FTC v. Texaco Inc., 393 U.S. 223, 226 (1968); FTC v. Cement Institute, 333 U.S. 683, 702 (1948); FTC v. R.F. Keppel & Bros., Inc., 291 U.S. 304, 314 (1934).

[58] *Texaco*, 393 U.S. at 226 (crediting the FTC's prior study and assessment of the competitive effects of the challenged sales arrangement for marketing tires, batteries and accessories); *Cement Institute*, 333 U.S. at 720 ("We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty."); *Keppel*, 291 U.S. at 314 (quoting the legislative history of the FTC Act regarding Congress' intent to create "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected," S. REP. NO. 63-597, at 9 (1914)). *Cf.* Atl. Refining Co. v. FTC, 381 U.S. 357, 390 (1965) (Goldberg, J., dissenting) ("Finally, it must be remembered that the Commission is an expert administrative body set up by Congress in order to provide adequate economic fact finding and analyses of complicated problems such as the ones here presented. The integrity of this congressional scheme is violated by the Commission's entering and the courts' affirming broad industry-wide orders the meaning and bases of which are unclear and the factual and economic analysis of which is inadequate.").

political agenda.[59] If we are to act independently as Congress intended, then we should not succumb to a similar temptation "to make policy choices for purely political reasons,"[60] especially choices that either lack a reasoned basis in law and fact, or go beyond our core competencies as an antitrust and consumer protection agency.

Furthermore, as both Commissioners McDowell and Baker asserted in their dissents, the FCC's rulemaking ostensibly ignores the admonition in our 2007 *Broadband Report* against enacting regulation for the sole purpose of preventing anticipated future harm.[61] This kind of regulation may potentially do more harm than good.[62] If the FTC were to join the FCC in regulating internet neutrality, then we would also risk damaging our own institutional credibility with Congress and the courts because we would be attempting to impose our enforcement agenda under Section 5 in a relatively

---

[59] Open Internet Order, *supra* note 18, at 145–46 (McDowell, Comm'r, dissenting) (characterizing the rulemaking as involving "extreme measures, defying the D.C. Circuit, Congress, and undermining the public comment process … deployed to deliver on a misguided campaign promise) & 181 (Baker, Comm'r, dissenting) (suggesting that the "only plausible reason left" for concluding the rulemaking "is to deliver on one of the President's campaign promises").

[60] FCC v. Fox Television Stations, Inc., 556 U.S. 502, –, 129 S. Ct. 1800, 1829 (2009) (Breyer, J., dissenting) (noting that independent agencies (like the FCC) are supposed to be free from political agenda).

[61] Open Internet Order, *supra* note 18, at 148 (McDowell, Comm'r, dissenting) (quoting from the Broadband Report) & 183–84 (Baker, Comm'r, dissenting) (also quoting from the Broadband Report).

[62] *Id.* at 150–52 (McDowell, Comm'r, dissenting) ("The Commission's rules will cause irreparable harm to broadband investment and consumers.") & 186–87 (Baker, Comm'r, dissenting) ("The Order may inhibit the development of tomorrow's Internet.").

young industry in which we have not yet fully assessed the impact of various methods of competition, acts or practices on consumer welfare.[63]

* * *

Let me close with one final observation, which is that Vice-President Neelie Kroes of the European Commission, although she has been an ardent advocate of internet neutrality as part of the Digital Agenda, has adopted a wait-and-see attitude towards any legislation or regulation in this arena: "We must act on the basis of facts, not passion; acting quickly and without reflection can be counterproductive."[64] I agree.[65]

---

[63] BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 2, at 157 ("Policy makers should be wary of calls for network neutrality regulation simply because we do not know what the net effects of potential conduct by broadband providers will be on 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."). *Cf.* Open Internet Order, *supra* note 18, at 192 (Baker, Comm'r, dissenting) (voicing the long-term concern that "a pattern of action to seek out perceived harms beyond our core competencies may erode the trust in the Commission to be an expert agency on those things for which Congress has given us clear statutorily mandated responsibilities").

[64] David Meyer, *Kroes Attacks Dutch Net-Neutrality Rules*, ZDNET UK (Oct. 3, 2011, 12:46 PM), http://www.zdnet.co.uk/news/regulation/2011/10/03/kroes-attacks-dutch-net-neutrality-rules-40094084/.

[65] *See* Rosch, *Broadband Access*, *supra* note 1, at 1 ("My focus is on law enforcement rather than what the law should be. As a result, I don't want to take a position on net neutrality legislation although I'll admit that I generally favor a wait-and-see approach lest the legislation do more than good.").