The Federal Trade Commission at 100: Recommendations for Improving Agency Performance

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Abstract

This article pays tribute to Bill Kovacic's vision for the Federal Trade Commission, as well as his influence on the author's career path leading up to her current role as an FTC Commissioner. No project better speaks to Bill's tireless efforts at improving agency performance than his 2009 report on the FTC at 100. Many of the positions taken by the author since becoming a Commissioner reflect her efforts to put into action the underlying principles and philosophy of the FTC at 100 Report. Looking ahead to the FTC's next 100 years, this article makes several recommendations for improved agency performance: (1) more clearly tie enforcement goals to the FTC's mission; (2) use the right tool for the task at hand; (3) stay focused on the agency's core competency of improving the antitrust laws; (4) clarify the scope of the agency's unfair methods of competition authority before invoking it; (5) expand FTC authority over communications common carriers; and (6) continue to pursue international cooperation and convergence.

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* The views expressed in this article are solely those of the author and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

I. Introduction

I am truly honored to have the opportunity to contribute to this volume, which pays tribute to Bill Kovacic, one of the great antitrust teachers, scholars, and visionaries. Having had the good fortune to have known Bill in all three of these roles, I would like to address how Bill's vision for the Federal Trade Commission ("FTC" or "Commission") and his influence on my career path have shaped my views of the proper role and functioning of the FTC, an agency about which we both care deeply.

I started night classes at the George Mason University School of Law in 1987, which, in those days, was a lesser-known law and economics school that was housed in a converted department store. To be honest, for me the "economic" appeal of the school was primarily to my budget as the mother of a young family with limited resources. As a state school, I could attend Mason for four years at night for less than the cost of one year of night school at the other, more famous "George" law schools across the Potomac River. Little did I know, however, that I would get one of the world's best bargains in that old department store when Professor Kovacic stepped up to the podium.

Bill is a highly gifted teacher, not just for his grasp of antitrust law and its institutions, which is second to none, but also because of the encouragement he gave and continues to give to his students. Bill has enthusiasm not just for the subject but, more importantly, for conveying his knowledge of and love for the subject to succeeding generations of practitioners and scholars, including those, like myself, who may not necessarily fit the mold of the traditional antitrust lawyer. At crucial points throughout my career, Bill encouraged me to raise my aim: to apply for a federal clerkship, to move into a senior staff role at the FTC, and finally to follow him as a Commissioner. To put it simply, Bill dreamed more for me than I had dared to dream for myself.

Thus, one of the most satisfying opportunities in my career was when Bill was Chairman and I was the Director of the Office of Policy Planning at the FTC, and he asked me to oversee an agency self-assessment in anticipation of the Commission's centennial in 2014. The report of that self-assessment—The Federal Trade Commission at 100: Into Our 2nd Century, The Continuing Pursuit of Better Practices ("FTC at 100 Report" or "Report")[1]—released in early 2009, represented an effort to create a framework for assessing the Commission's performance and to identify where and how the agency may improve as it moves into its second century. The FTC at 100 Report drew upon Bill's abilities as a teacher, scholar, and visionary, and I am confident it will be an important part of his enduring legacy for the Commission.

Personally, there could have been no better training for my role as Commissioner than the work I did with Bill in crafting the FTC at 100 Report. In fact, many of the views I have expressed and positions I have taken since becoming a Commissioner reflect

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1 William E. Kovacic, Chairman, Fed. Trade Comm'n, The Federal Trade Commission at 100: Into Our 2nd Century, The Continuing Pursuit of Better Practices (Jan. 2009), *available at* http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf.

my efforts to put into action the underlying principles and philosophy of the FTC at 100 Report. By applying these principles, I hope to follow the course set out by my former professor to pursue better agency performance.

To provide some background for readers of this article, I will first describe the main conclusions of the FTC at 100 Report. I will next highlight some matters in which these principles have guided my actions as a Commissioner. I will also look ahead to identify some areas for improvement in anticipation of the Commission's next one hundred years. Finally, I will discuss how Bill's vision has influenced the course of my career and helped prepare me to take on a leadership role at the Commission.

II. The FTC at 100 Report

The FTC at 100 Report asked two fundamental questions. First, how well is the agency fulfilling the role that Congress foresaw when it created the agency in 1914? Second, what type of institution should the FTC aspire to be as it starts its second century in 2014?

To answer these questions, I and several of my FTC colleagues undertook a seven-month review that solicited the views of practitioners and scholars, as well as current and former government officials, in the U.S. and around the world. The result was the FTC at 100 Report, a comprehensive 200-page document that combined these views with scholarly research on agency functioning to craft a set of recommendations for our agency. Among other things, these recommendations addressed what resources the FTC will need in the future, how the agency can better select its priorities for exercising its powers, how to strengthen the Commission's processes for implementing its programs, and how to improve links with other government bodies and nongovernmental organizations. Although all of these recommendations are important, I would like to highlight a few that have thus far had the greatest relevance in my tenure as a Commissioner.

The FTC at 100 Report stated that a fundamental requirement is that the FTC clearly articulate its mission. In its most basic terms, this mission is to prevent business practices that are anticompetitive or deceptive or unfair to consumers, to enhance informed consumer choice and public understanding of the competitive process, and to accomplish these goals without unduly burdening legitimate business activity.[2] As the Report observes, "[T]he improvement of consumer welfare is the proper objective of the agency's competition and consumer protection work . . . and not the status of specific firms or collections of enterprises . . . ."[3] This obligation goes beyond creating a mission statement and requires the agency to articulate clearly not just what it is

2 *See* Fed. Trade Comm'n, Draft FTC Strategic Plan, FY2014—FY2018 4 (July 16, 2013), *available at* http://www.ftc.gov/reports/draft-federal-trade-commission-strategic-plan-fiscal-year-2014-through-fiscal-year-2018.

3 FTC at 100 Report at iii.

doing when it takes enforcement action or issues guidance but also to explain why these activities will further the agency mission.

Another key recommendation in the Report is that the Commission use all of its tools to further its mission and to evaluate carefully what tool or collection of tools is appropriate for any given perceived problem. The Report puts it succinctly, saying: "The Commission best fulfills its destiny when it uses a problem-solving approach that applies the most effective mix of the agency's portfolio of policy instruments, which include law enforcement, administrative adjudication, advocacy, the collection of data, the preparation of reports, and rulemaking."[4]

The Report further argues that the Commission must pay close attention to outcomes, rather than simply tallying outputs, and to examine whether agency activity is actually improving consumer welfare and whether it can be done more effectively. In particular, the FTC should focus on "outcomes for the public (for example, preserving competitive markets or preventing fraud), rather than agency inputs or outputs (for example, number of staff employed or cases filed)."[5]

Finally, the FTC at 100 Report counsels the Commission to continue to build and maintain support for the FTC's mission throughout the administration, Congress, the states, industry, and the public at large. The agency can accomplish this through outreach to other institutions and groups and by providing careful explanations of what the agency is doing and why. This outreach should also encompass engagement with international organizations and individual countries both to enhance coordination in law enforcement efforts and to promote sound competition and consumer protection policy around the world. The Report observes that these "relationships impact the agency's performance in various ways, and each requires a slightly different approach by the FTC to maintain the relationship."[6]

III. Principles in Action

At my official swearing-in as an FTC Commissioner in April 2012, I invoked the FTC at 100 Report as a guide for my work as a Commissioner.[7] During my tenure thus far, there have been countless instances in which I supported agency action that was consistent with these recommendations, such as closing the Google search investigation because the evidence suggested that the conduct at issue on balance benefitted consumers, despite the complaints of some of Google's competitors who argued they

4 *Id.*

5 *Id.*

6 *Id.* at viii.

7 *See* Maureen K. Ohlhausen, Remarks of Maureen K. Ohlhausen on the Occasion of Her Swearing-in as Commissioner, Federal Trade Commission, at 2-3 (Apr. 16, 2012), *available at* http://www.ftc.gov/speeches/ohlhausen/120416ohlhausenswearingin.pdf.

were disadvantaged.[8] Because things are typically better seen in contrast, however, I will discuss a few high-profile matters in which I did not support the Commission's actions because I believed they were inconsistent with the fundamental principles undergirding the Report's recommendations.

In particular, one of the themes that recurs throughout the Report is the importance of transparency and predictability. From the core requirement of clearly articulating its mission to measuring why it is fulfilling that mission to the task of building support for that mission, the Report emphasizes the vital need for the Commission to clearly state what it is doing and why. Transparency about how and why the FTC enforces the law is vitally important to the Commission, to parties subject to our authority, and to the state of antitrust law more generally. Having a clear mission helps guide FTC staff's activities, and by providing guidance to market participants on how to comply with the antitrust laws, we build support for our mission by offering predictability, which can also foster increased compliance with the law. Thus, to maintain the support of consumers, the business community, Congress, and other stakeholders, the FTC must be transparent and predictable in its enforcement activities. Although they may not always agree with the agency's action in every matter, these groups need to understand why we take certain enforcement actions and why we decide not to take such action or to use one of our many non-enforcement tools instead. Their support is critical to our ability to function effectively. In short, increased transparency and predictability improves the effectiveness and credibility of the FTC.

Because of the great importance of transparency and predictability to maintaining support for the FTC's mission, I opposed the Commission's withdrawal of its policy statement on seeking disgorgement in competition cases in July 2012.[9] Noting that the long-standing policy statement had a strong bipartisan pedigree, I was concerned that the majority's decision to withdraw the statement—and not replace it with any new guidance beyond what may be found in the case law—worked against the goals of transparency and predictability. I expressed concern that by "moving from clear guidance on disgorgement to virtually no guidance on this important policy issue" we were leaving those subject to our jurisdiction without sufficient guidance about the circumstances in which the FTC will pursue the remedy of disgorgement in antitrust matters.[10]

I again raised concerns about transparency and predictability in two other high-profile matters, which involved fair, reasonable, and non-discriminatory ("FRAND") licensing commitments on standard-essential patents ("SEPs"). In 2012, I supported the Commis-

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8 *See* Statement of the Federal Trade Commission Regarding Google's Search Practices, *In re* Google Inc., FTC File No. 111-0163 (Jan. 3, 2013), *available at* http://www.ftc.gov/public-statements/2013/01/statement-federal-trade-commission-regarding-googles-search-practices; Statement of Commissioner Maureen K. Ohlhausen, *In re* Google Inc., FTC File No. 111-0163 (Jan. 3, 2013), *available at* http://ftc.gov/os/2013/01/130103googlesearchohlhausenstmt.pdf.

9 *See* Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), *available at* http://www.ftc.gov/os/2012/07/120731ohlhausenstatement.pdf.

10 *Id.* at 2.

sion's testimony to Congress explaining some of our concerns about the possibility of SEP holders exerting market power to increase prices for licensees after a standard has been chosen. Chairwoman Ramirez, delivering the Commission's testimony, said: "Simply put, the FTC is concerned that a patent holder may use the threat of an [International Trade Commission] exclusion order, or an injunction issued in district court, to 'hold up' or demand higher royalties or other more costly licensing terms after the standard is implemented than could have been obtained before its [intellectual property] was included in the standard."[11] Although I agreed with my fellow Commissioners that SEP hold-up is a theoretical possibility that other decision makers should consider in their analysis, in keeping with my philosophy of transparency, predictability, and fairness, I broke with the other Commissioners when it came to two FTC enforcement actions on this issue.

In the first matter, *Robert Bosch GmbH (Bosch)*,[12] the agency investigated a proposed acquisition by Bosch that raised competitive concerns in the market for certain automotive air conditioning repair equipment. During the course of the investigation, FTC staff uncovered evidence indicating that the acquired company, SPX Service Solutions ("SPX"), had sought injunctive relief against competitor firms that were interested in licensing certain SPX patents that may have been standard-essential and that SPX allegedly had offered to license on RAND terms. The FTC settled this matter with Bosch, requiring Bosch to divest certain assets to address the proposed merger. To address the alleged patent-related conduct, the FTC required Bosch, first, to agree not to seek injunctions on its SEPs against parties that are willing to license such patents, and, second, to license those patents on a royalty-free basis.[13]

In the second matter, the FTC investigated and ultimately entered a settlement with Google and its recently acquired subsidiary, Motorola Mobility.[14] As in *Bosch*, the FTC alleged that Google and Motorola violated Section 5 of the FTC Act—but not the antitrust laws—by seeking injunctive relief against competitors that were willing to license certain SEPs that Motorola had agreed to license on RAND terms through its participation in several standard-setting organizations. In *Google/MMI*, the remedy imposed by the FTC was more complex than the flat prohibition on seeking injunctive relief imposed in *Bosch*. Rather, the FTC's consent order established a multi-step process that Google must go through before it is permitted to seek injunctive relief on its SEPs.[15]

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11 Prepared Statement of the Federal Trade Commission before the U.S. Senate Committee on the Judiciary concerning "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents," at 1 (July 11, 2012), *available at* http://ftc.gov/os/testimony/120711standardpatents.pdf.

12 *In re* Robert Bosch GmbH, FTC File No. 121-0081.

13 *See* Analysis of Agreement Containing Consent Orders to Aid Public Comment, at 4-5, *In re* Robert Bosch GmbH, FTC File No. 121-0081 (Nov. 26, 2012), *available at* http://www.ftc.gov/os/caselist/1210081/121126boschanalysis.pdf.

14 *In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120.

15 *See* Analysis of Proposed Consent Order to Aid Public Comment, at 6-8, *In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120 (Jan. 3, 2013), *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.

In my dissents in the *Bosch* and *Google/MMI* matters, I took issue with, among other things, the lack of transparency and predictability that these decisions provided patent holders and others subject to our jurisdiction.[16] In particular, I raised concerns about the FTC enforcing Section 5 of the FTC Act without providing sufficient guidance about the relationship between that statutory provision and the antitrust laws, including the Sherman and Clayton Acts. Without this guidance, it is unclear what the term "unfair method of competition"[17] ("UMC") means or how the Commission will use its prosecutorial discretion to enforce Section 5. I argued that the lack of clarity in the FTC Act makes it even more important that we provide meaningful limiting principles to the application of Section 5.

In addition, when we rely on Section 5 of the FTC Act, which only the FTC enforces, rather than the antitrust laws, which both the FTC and the Justice Department enforce, we risk creating two different standards for patent holders, depending on which agency happens to review the alleged misconduct. These conflicts, whether real or perceived, create confusion in the market and undermine predictability for market participants who hold or use SEPs.

IV. Recommendations for the Next 100 Years

As the FTC turns one hundred years old in 2014, we should use this opportunity not just to celebrate this milestone but to evaluate our strengths and weaknesses so that we can build on our successes and learn from our mistakes. From our administrative litigation to our internal resource allocation to our very jurisdiction under the FTC Act, we should evaluate everything we do, including how we measure success. That is not to say that such assessments and other evaluation efforts do not happen occasionally. Our centennial, however, provides a perfect opportunity for a systematic, agency-wide effort to assess and improve all facets of our performance. Drawing upon the insights of the FTC at 100 Report and Bill Kovacic's teachings, I would like to respectfully suggest some areas for improvement in our agency's performance.

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16 *See* Statement of Commissioner Maureen K. Ohlhausen, at 3, *In re* Robert Bosch GmbH, FTC File No. 121-0081 (Nov. 26, 2012) ("Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition . . . ."), *available at* http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf; Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 5, *In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120 (Jan. 3, 2013) ("I disagree with my colleagues about whether the alleged conduct violates Section 5 but, more importantly, believe the Commission's actions fail to provide meaningful limiting principles regarding what is a Section 5 violation in the standard-setting context, as evidenced by its shifting positions in *N-Data*, *Bosch*, and this matter."), *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.

17 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful.").

1. More Clearly Tie Enforcement Goals to Our Mission

Looking ahead, the FTC should focus its efforts on preventing clear harm to consumers. In the consumer protection area, this means continuing to prioritize the pursuit of fraudulent conduct that costs consumers real money, especially in tough economic times. In enforcing the antitrust laws, this means focusing on anticompetitive conduct and transactions that cause or threaten to cause significant consumer harm. In both areas, a focus on consumer harm can help avoid unduly burdening legitimate business—particularly in high-tech and other rapidly innovating industries that expand consumer choice and spur job growth. When we concentrate our scarce agency resources instead on speculative harms or harm to individual competitors, we may end up making consumers and competition worse off.[18]

2. Use the Right Tool for the Task

The FTC should always consider the many non-enforcement tools it can use to help stop consumer harm before it arises, thus sparing consumers and businesses unnecessary losses and saving the taxpayer money that we would otherwise spend on litigation. Our non-enforcement tools include policy research and development, competition advocacy, and consumer and business education. Also, letting self-regulation work, or encouraging industry best practices, may be the best tool to deploy in certain circumstances. Sometimes the FTC may not be the right actor to address an issue, and the market or another part of government is better suited to address the problem. In short, our yardstick for success must be whether we make consumers better off, not simply whether we bring a lot of cases.

3. Stay Focused on Our Core Competency

Despite recurring interest in the FTC's unfair methods of competition authority under Section 5, in my view, our real success as an agency has come from using our administrative litigation function and our competition policy tools to develop the antitrust laws, particularly in the cases of novel or factually complex conduct. More specifically, conducting competition policy R&D (by holding workshops and issuing reports) to assess the economic impact of a particular business practice and then, if warranted, using an administrative trial and potentially a Commission opinion to pursue such practice as a violation of the antitrust laws is an extremely valuable means for developing those laws.

Accordingly, the Commission should focus primarily on improving the implementation of the antitrust laws, as we have done in matters such as the recent Supreme Court decision in *Phoebe Putney*[19] and the Fourth Circuit decision in *North Carolina Dental*,[20]

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18 *See, e.g.*, Ohlhausen *Google/MMI* Dissent, *supra* note 16, at 4-5 & n. 22 (objecting to use of Section 5 in case lacking evidence of substantial consumer harm, as opposed to perceived harm to particular competitors).

19 *See* FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013).

20 *See* N.C. State Bd. of Dental Exam'rs v. FTC, 717 F .3d 359 (4th Cir. 2013), *dismissing appeal from In re* N.C. State Bd. of Dental Exam'rs, --- FTC --- (2011) (Comm'n opinion), *available at* http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf.

which clarified the proper scope of the state action doctrine. Other valuable contributions to the development of the antitrust laws include the Commission's *Unocal*[21] opinion in the *Noerr-Pennington* area, the Commission's *Three Tenors*[22] and *Realcomp*[23] opinions in the joint conduct area, and the Commission's *Rambus*[24]opinion in the monopolization area.

In sum, the FTC has contributed significantly to developing the antitrust laws through its unique characteristics of policy and research tools as well as its administrative litigation capability. Going forward the Commission should measure its success by looking at how it may continue to make valuable contributions to the antitrust laws.

4. Clarify the Scope of the FTC's UMC Authority Before Invoking It

As I mentioned previously, there is an ongoing discussion about the scope of the agency's authority under Section 5 of the FTC Act to prevent unfair methods of competition. Although I believe the FTC should devote its efforts to improving the antitrust laws, should the agency wish to bring cases based on its UMC authority, I believe the principles of transparency and predictability demand that the Commission first provide guidance on the scope of this authority through a policy statement. Accordingly, I recently presented my views on the scope of Section 5.[25]

As I stated in my *Bosch* dissent, I believe that we should proceed under a philosophy of "regulatory humility," by which I mean the agency should investigate certain conduct outside the antitrust laws with great caution and careful consideration.[26] In my July 2013 Section 5 speech, I offered for thought and discussion six factors that should guide the FTC whenever it reviews conduct beyond the reach of the antitrust laws.[27] These are as follows:

Factor 1: Substantial Harm to Competition

The FTC's UMC authority should be used solely to address substantial harm to competition or the competitive process, and thus to consumers. We should refrain from attempting to use Section 5 for policing non-competition violations or achieving social goals.

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21 *In re* Union Oil Co. of Cal., 138 FTC 1 (2003) (*Unocal*) (Comm'n opinion).

22 *In re* PolyGram Holding, Inc., 136 FTC 310 (2003) (Comm'n opinion), *appeal dismissed*, PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

23 *In re* Realcomp II, Ltd., --- FTC --- (2009) (Comm'n opinion), *available at* http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf, *appeal dismissed*, Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011).

24 *In re* Rambus, Inc., --- FTC --- (2006) (Comm'n opinion), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf, *rev'd*, Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

25 *See* Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, Section 5: Principles of Navigation (July 25, 2013), *available at* http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf.

26 *See* Ohlhausen *Bosch* Statement, *supra* note 16, at 2 ("[T]his enforcement policy appears to lack regulatory humility. The policy implies that our judgment on the availability of injunctive relief on FRAND-encumbered SEPs is superior to that of these other institutions.").

27 *See* Ohlhausen, *supra* note 25, at 7-15.

Factor 2: Lack of Procompetitive Justification/Disproportionate Harm Test

To impose the least burden on society and avoid reducing businesses' incentives to innovate, the FTC should challenge conduct as an unfair method of competition only where: (1) there is a lack of any procompetitive justification for the conduct; or (2) the conduct at issue results in harm to competition that is disproportionate to its benefits to consumers and to the economic benefits to the defendant, exclusive of the benefits that may accrue from reduced competition.

Factor 3: Avoiding/Minimizing Institutional Conflict

The FTC should avoid or minimize conflict with the Department of Justice and other agencies. We also should always ask whether the FTC is the right agency to address the issue of concern.

Factor 4: Grounding UMC Enforcement in Robust Economic Evidence

Any effort to expand Section 5 beyond the antitrust laws should rely on robust economic evidence that the challenged conduct is anticompetitive and reduces consumer welfare.

Factor 5: Use of Non-Enforcement Tools as Alternatives to UMC Enforcement

Prior to using Section 5, the FTC should consider addressing a competitive concern via its many non-enforcement tools, such as conducting research, issuing reports and studies, and engaging in competition advocacy.

Factor 6: Providing Clear Guidance on UMC

The FTC must provide clear guidance and seek to minimize the potential for uncertainty in the UMC area, giving businesses a reasonable ability to anticipate before the fact that their conduct may be unlawful under Section 5. Fundamentally, this means that a firm must be reasonably able to determine that its conduct would be deemed unfair at the time it undertakes the conduct and not have to rely on an after-the-fact analysis of the impact of the conduct that was not foreseeable.

5. Expand FTC Authority over Communications Common Carriers

Despite my concerns about expansive use of our UMC authority, I believe there may be instances in which expanding our existing statutory authority would be in the public interest. For example, the FTC has nearly a century of experience protecting consumers but the exemption from our jurisdiction for communications common carriers frustrates effective consumer protection with respect to a wide variety of activities—including privacy, data security, and billing practices—in the increasingly important telecommunications industry. With the convergence of telecom, broadband, and other technologies, it is time for Congress seriously to consider removing this antiquated limitation on our jurisdiction and putting these competing technologies on an equal footing.

The Commission has testified in favor of repealing this exemption several times in the past,[28] and, as I recently testified before Congress, I support such a repeal.[29]

6. Continue to Pursue International Cooperation and Convergence

Finally, the FTC should continue to pursue international cooperation and convergence over the next one hundred years. Inter-agency cooperation on competition cases is critical given the global nature of many businesses and transactions and the interconnected nature of the global economy. Although this does not necessarily mean consistent results in every case, cooperation among competition authorities benefits the agencies involved in the cooperative efforts, the businesses and other parties subject to competition laws, and the economies of the countries involved in the cooperation by allowing agencies to identify issues of common interest, improve their analyses, and avoid inconsistent outcomes. Cooperation on cases helps businesses around the globe by providing more consistent outcomes on a particular case, as well as enhanced certainty, which in turn facilitates greater investment and innovation by all businesses. Finally, cooperation facilitates the effective and efficient enforcement of competition laws, which helps to maintain competitive markets and thus a more attractive investment climate.

Another, related goal for the FTC to continue to pursue is greater convergence upon substantive competition norms, procedural standards, and operational techniques. Convergence does not mean the establishment of identical policies and enforcement mechanisms around the world. As with coordination, total convergence is not a realistic or necessarily proper goal. Nonetheless, as with case coordination, substantive convergence can benefit the agencies involved in such efforts, businesses subject to those agencies' laws, and competition law and policy more generally.

Sound competition analysis, consistent outcomes, and convergence toward best practices benefits U.S. consumers and ensures that U.S. businesses receive fair and equal treatment from competition regimes around the world. Standardization also can reduce unnecessary costs associated with competition enforcement by, for example, simplifying the regulatory review process faced by merging parties. Moreover, the same benefits accrue to any country that seeks increased harmonization of its competition regime with its foreign counterparts. Convergence efforts can also yield benefits of increased cooperation. Finally, increased convergence in

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28 *See, e.g.*, Prepared Statement of the Federal Trade Commission on Consumer Privacy before the U.S. Senate Committee on Commerce, Science, and Transportation, at 24-26 (July 27, 2010), *available at* http://www.ftc.gov/os/testimony/100727consumerprivacy.pdf; Prepared Statement of the Federal Trade Commission on Prepaid Calling Cards before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Representatives, at 9-11 (Dec. 3, 2009), *available at* http://www.ftc.gov/os/2009/12/P074406prepaidcc.pdf; Prepared Statement of the Federal Trade Commission before the U.S. Senate Committee on the Judiciary on FTC Jurisdiction over Broadband Internet Access Services, at 9-11 (June 14, 2006), *available at* http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf.

29 *See* Supplementary Materials of FTC Commissioner Maureen K. Ohlhausen Concerning "The FTC at 100: Where Do We Go from Here?" before the Commerce, Manufacturing, and Trade Subcommittee of the Committee on Energy and Commerce, U.S. House of Representatives, at 4-5 (Dec. 3, 2013), *available at* http://www.ftc.gov/public-statements/2013/12/supplemental-materials-maureen-k-ohlhausen-ftc-100-where-do-we-go-here.

procedure and substantive policy encourages competitive markets, investment, a greater understanding and respect for competition laws, and thus greater compliance with those laws by businesses.

V. Conclusion

Having highlighted how Bill Kovacic's vision for the agency embodied in the FTC at 100 Report has shaped my analysis of matters before me as a Commissioner and influenced my thoughts on how the agency should continue to improve in the future, I would finally like to address how Bill's vision has also impacted my career path and helped prepare me to take on a leadership role at the Commission.

First, as necessary as it is for a successful agency to have a clear understanding of its mission, I have also found it important as an individual to have a clear sense of direction. For me, inspiring law professors, such as Bill, and Judge Douglas Ginsburg of the U.S. Court of Appeals for the D.C. Circuit and former head of the Antitrust Division, sparked my interest in antitrust law and the FTC. This interest helped guide my steps early in my career, so that when I finished my clerkship at the U.S. Court of Appeals for the D.C. Circuit, I chose to join the FTC's general counsel office. This allowed me to learn the agency from the ground up and laid an excellent foundation for my future roles at the agency, from being an attorney advisor to Commissioner Orson Swindle, to heading the Office of Policy Planning, and finally to serving as a Commissioner.

Second, the importance of using all of the agency's tools also has been a key factor in my experience at the FTC. For example, my interest in the Commission as an institution motivated me to take on a wide variety of projects during my career, including working on task forces to improve the state of antitrust law, such as those examining the state action and *Noerr-Pennington* doctrines, as well as heading the Commission's Internet Access Task Force. Also, as Director of the Office of Policy Planning, I headed up the agency's competition advocacy program, which deploys a variety of policy tools, most notably legal and economic research and policy guidance, in situations where enforcement is not a feasible means to address a particular competitive problem. My role as the head of the advocacy program underscored for me the vital role of outreach to other law enforcement agencies, both federal and state, as well as the need to build support with Congress, consumer groups, industry, the legal community, and academia.

Finally, as I hope this article has illustrated, another key facet of my FTC experience has been a focus on measuring agency performance. For example, I oversaw the drafting of the Commission's strategic plan for 2006 to 2011.[30] Clearly, the culmination of this interest was my oversight of the FTC at 100 project and Report under Bill Kovacic's leadership. The FTC at 100 Report was a project that I was honored to work

30 *See* Fed. Trade Comm'n, Strategic Plan: Fiscal Years 2006-2011 (Sept. 30, 2006), *available at* http://www.ftc.gov/reports/2006-2011-strategic-plan.

on out of loyalty to Bill, who, as I have recounted above, was one of the most important influences on my legal career. It has become clear to me in the years since the Report's release that it was one of the best investments of my career—one that has already paid extensive dividends for me as a Commissioner and for the FTC as an institution.