



# Federal Trade Commission

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PREPARED STATEMENT OF

COMMISSIONER JOSHUA D. WRIGHT  
FEDERAL TRADE COMMISSION

ON

WRECKING THE INTERNET TO SAVE IT?  
THE FCC'S NET NEUTRALITY RULE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

WASHINGTON, D.C.  
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## I. INTRODUCTION

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, thank you for the opportunity to appear before you today. My name is Joshua Wright and I am a Commissioner at the Federal Trade Commission. I am pleased to join you to discuss the Federal Communications Commission's newest regulation of the broadband sector. Before diving into the issues, I want to make clear that the views I express today are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Today I will discuss my belief that the FCC's newest regulation does not make sense from an economic perspective. By this I mean that mean that the FCC's decision to regulate broadband providers as common carriers under Title II of the Communications Act of 1934 will make consumers of broadband internet service worse off, rather than better off. Central to my conclusion that the FCC's attempts to regulate so-called "net neutrality" in the broadband industry will ultimately do more harm than good for consumers is that the FCC and commentators have failed to identify a problem worthy of regulation, much less cumbersome public-utility-style regulation under Title II.<sup>1</sup>

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<sup>1</sup> In addition, the FCC's decision to regulate broadband providers under Title II is likely to increase state and local taxes for broadband consumers. See Robert Litan & Hal Singer, *Outdated Regulations Will Make Consumers Pay More for Broadband*, PROGRESSIVE POLICY INSTITUTE (Dec. 2014), available at <http://www.progressivepolicy.org/slider/outdated-regulations-will-make-consumers-pay-broadband/>.

Nevertheless, to the extent any threat to consumer welfare accrues as a result of broadband providers contracting with content providers to provide preferential service, it is my belief that the antitrust laws – and the federal agencies and private entities empowered to enforce those laws – are exceptionally well-suited to handle any such problems as they arise. These first two points establish that the FCC’s decision to regulate broadband providers under Title II is both unnecessary and misguided. Unfortunately, the decision will also have the troubling consequence of stripping the FTC of jurisdiction to enforce its broad consumer protection laws against broadband providers, depriving consumers of beneficial oversight.<sup>2</sup>

## **II. Net Neutrality From an Economic Perspective**

Before explaining why I believe antitrust enforcement is superior to net neutrality in promoting consumer welfare in the broadband industry, it is worthwhile first to discuss whether there are economic bases for regulating the broadband industry at all. What market failure, if any, is the FCC trying to solve with net neutrality regulations?

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<sup>2</sup> For additional discussion of the legal and economic issues concerning broadband competition, antitrust, and net neutrality regulation, see Joshua D. Wright, Comm’r, Fed. Trade Comm’n, *Net Neutrality Meets Regulatory Economics 101*, Remarks Before the Federalist Society’s Media and Telecommunications Practice Group Event (Feb. 25, 2015); Joshua D. Wright, *Broadband Policy & Consumer Welfare: The Case for an Antitrust Approach to Net Neutrality Issues*, Remarks at the Information Economy Project’s Conference on US Broadband Markets in 2013 (Apr. 19, 2013); Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767 (2012); Jonathan E. Nuechterlein, *Antitrust Oversight of An Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELCOMM. & HIGH TECH L. 20 (2009); Howard A. Shelanski, *Network Neutrality: Regulating With More Questions Than Answers*, 6 J. TELCOMM. & HIGH TECH L. 23 (2007).

Chairman Wheeler wrote in a recent article that “the fundamental problem [is] . . . allowing networks to act as gatekeepers.”<sup>3</sup> The word “gatekeeper” could have some relevant economic meaning. It is important, however, to pin down exactly what we think the Chairman means by the term. There are gatekeepers everywhere. Starbucks is the gatekeeper to my morning cup of coffee and the supermarket is the gatekeeper to your access to Cheerios breakfast cereal in the supermarket aisle.<sup>4</sup> A gatekeeper becomes an economic problem potentially worthy of regulation only when the gatekeeper stands between consumers and the *only* source of a desirable good or service. If consumers are able to get coffee from sources other than Starbucks, then Starbucks will be unable to manipulate consumers’ access to coffee in a way that makes consumers worse off because if it does, consumers are able to buy coffee from other sources. In short, it is *competition* that ensures that firms supply consumers access to the goods or services they want.

In other words, the “gatekeeper” issue identified by Chairman Wheeler is a problem worthy of regulation only insofar as the broadband industry is a natural monopoly or otherwise exhibits meaningful monopoly power – that is, the power to artificially increase market prices and decrease market output. The simple fact that

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<sup>3</sup> Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED.COM (Feb. 4, 2015), <http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/>.

<sup>4</sup> *Verizon v. FCC*, 740 F.3d 623, 663-64 (D.C. Cir. 2014) (Silberman, J., dissenting) (Noting that “all retail stores, for instance, are ‘gatekeepers.’ The term is thus meaningful only insofar as the gatekeeper by means of a powerful economic position vis-à-vis consumers gains leverage over suppliers.”).

there are multiple suppliers of both wired and wireless broadband internet renders this justification of regulation unpersuasive.<sup>5</sup> The “gatekeeper” justification for broad-sweeping net neutrality regulation cannot possibly justify those regulations because no broadband provider can be viewed as a gatekeeper to anything when there is viable competition from other broadband providers.

On the other hand, it could be that the desire “to preserve the internet as an open platform for innovation and free expression” reflects a concern about externalities rather than about natural monopoly or monopoly power more generally.<sup>6</sup> Indeed, Chairman Wheeler has touted that the latest net neutrality regulation will “ban paid prioritization, and the blocking and throttling of lawful content and services.”<sup>7</sup> Perhaps the concern is that the broadband provider and the content provider do not internalize all the costs associated with a contractual arrangement through which the content provider pays the broadband provider for priority use of the network. The argument would seem to be that there is some social interest in egalitarian access to all broadband

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<sup>5</sup> See *id.* at 662-667 (Silberman, J., dissenting) (explaining that the FCC failed to undertake analysis of whether broadband providers had market power in individual markets and noting that “[t]he Commission apparently wanted to avoid a disciplined inquiry focused on market power.”).

<sup>6</sup> See Timothy J. Brennan, *Network Neutrality or Minimum Quality? Barking Up the Wrong Tree – and Finding the Right One*, CPI CHRONICLE (Mar. 2012) (“The relevant market failure is not insufficient competition but failure to recognize the network externality in the broadband environment: the value of internet access to a content supplier depends upon its viewers’ ability to access links in its content. This market failure does not justify full net neutrality, in particular a non-discrimination rule. It does suggest a minimum quality standard . . .”).

<sup>7</sup> Wheeler, *supra* note 3.

providers' networks – in effect a one-size-fits-all contract between broadband providers and content providers – and that we cannot trust the marketplace to reach this outcome without regulatory intervention.

An argument that the broadband market ought to be regulated because of externalities not captured in the bargains between broadband providers and content companies may be economically coherent, but it lacks any basis in fact. At this point, the problems associated with giving certain content providers preferential access to the network – and by extension providing certain content providers with degraded access – are purely theoretical.

This concern about externalities requires consideration of the economics of the bargains between broadband providers and content providers. Broadband providers and content providers occupy different positions in the supply chain. The Netflix customer needs both content – supplied through Netflix – and broadband access – supplied through one of any number of broadband providers – in order to enjoy Netflix's video streaming product. An arrangement between Netflix and one broadband provider that ensures a certain level of speed for customers using the broadband provider's network to access Netflix is simply a vertical contractual arrangement between two entities operating as two links in the same supply chain. The world is full of these vertical contracts in all sorts of different industries. And industrial

organization economists have been studying these types of contractual arrangements for decades, so we know quite a bit about their marketplace effects generally.

It is now well accepted that vertical contracts occasionally can lead to competitive harm under certain conditions.<sup>8</sup> Proponents of net neutrality regulation traditionally have responded to this concern by favoring a rigid, categorical ban or other significant restrictions upon broadband providers' ability to enter into certain vertical contractual relationships. Indeed, the FCC's latest regulation includes such a ban.<sup>9</sup> Fearing that any network discrimination by broadband providers creates undue risk of competitive harm, net neutrality proponents argue for a categorical or "one-size-fits-all" approach. The problem is that such an approach defies modern economic learning in two ways. First, as I will explain in greater detail, the FCC's approach in its latest Order ignores the empirical economic research that demonstrates plainly that these sorts of contractual arrangements very rarely result in consumer harm. Second, economists have long understood that the types of business arrangements at issue here often provide substantial benefits for consumers.<sup>10</sup> For instance, such arrangements can

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<sup>8</sup> See Thomas Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 214 (1986).

<sup>9</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, para. 18 (Mar. 12, 2015); see also Wheeler, *supra* note 3 (explaining that the FCC's regulation will "ban paid prioritization, and the blocking and throttling of lawful content and services.").

<sup>10</sup> See, e.g., Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits"*, 12 GEO. MASON L. REV. 119 (2003); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953 (1979); OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975).

create efficiencies by reducing double marginalization, preventing free riding on manufacturer-supplied investments, and aligning incentives of manufacturers and distributors.<sup>11</sup> In fact, vertical contracts are frequently observed between firms lacking any meaningful market power, implying that there must be efficiency justifications for these practices rather than explanations that depend upon a firm with market power using them to exclude competitors. These efficiencies must be at least partially passed on to consumers in the form of lower prices, increased output, higher quality, and greater innovation. In other words, the monopoly explanation – that a monopolist uses vertical contracts to foreclose rivals from access to a critical input or a critical set of customers thereby raising the rivals’ costs<sup>12</sup> – cannot be the reason for most instances of these types of contracts.

As I mentioned, there is considerable empirical evidence that strongly supports the view that vertical contracts are more often than not procompetitive.<sup>13</sup> I have

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<sup>11</sup> See, e.g., Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265 (1988); Howard Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982).

<sup>12</sup> See Krattenmaker & Salop, *supra* note 8, at 230-31.

<sup>13</sup> Daniel O’Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73 (2008); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi ed., 2009); James C. Cooper, Luke M. Froeb, Daniel O’Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639 (2005).



summarized this body of literature in my own academic writing.<sup>14</sup> As one study puts it, “with few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons,” which supports “a fairly strong prior belief that these practices are unlikely to be anticompetitive in most cases.”<sup>15</sup> In my view, it is fair to say that there is a general consensus among empirical economists on this point. It is, in my view, impossible to reconcile the FCC’s approach with a reasonable interpretation of the best available economic theory and empirical evidence.

Furthermore, this analysis is wholly consistent with the FTC’s Report on the Broadband industry from 2007.<sup>16</sup> The Report, which was spearheaded by now-FTC Commissioner Maureen K. Ohlhausen, explained that vertical restraints “generally need not be anticompetitive or otherwise pernicious and [are] often driven by efficiency considerations”<sup>17</sup> The Report concluded that although in theory vertical restraints “could prompt Internet access providers to block or degrade content or applications or charge higher prices,” the “debate on net neutrality has not yet provided any good exposition of answers” to the question of whether pro- or anticompetitive outcomes are

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<sup>14</sup> See Hazlett & Wright, *supra* note 2, at 800 n. 218.

<sup>15</sup> O’Brien, *supra* note 13, at 72-73. There is a general consensus among empirical economists on this point.

<sup>16</sup> FED. TRADE COMM’N STAFF, BROADBAND CONNECTIVITY COMPETITION POLICY 70-82 (2007), available at <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

<sup>17</sup> *Id.* at 70.

likely to occur as a result of any particular vertical restraint.<sup>18</sup> Surely, given the state of the economics literature and the FTC's own Report, a categorical prohibition as adopted by the FCC is inappropriate.

Finally, to the extent the Order does not prohibit certain business arrangements outright, it creates substantial uncertainty through its broad "general conduct rule," which allows the FCC substantial discretion to decide whether "new practices" "harm consumers or edge providers."<sup>19</sup> The uncertainty associated with the general conduct rule is likely to deter firms from engaging in all sorts of pro-consumer economic activity.

### **III. The Advantages of Antitrust**

The FCC's latest attempt to ban paid prioritization and the blocking and throttling of lawful content is, as I have explained, a categorical prohibition on certain types of vertical contracts in the broadband industry. If there were strong evidence that the types of vertical contracts the FCC is seeking to ban harmed consumers, then a categorical ban could be justifiable on economic grounds. But, as I have explained, the best available evidence points in precisely the opposite direction: vertical contracts are far more likely to benefit consumers than to harm them. However, it is undeniably true

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<sup>18</sup> *Id.* at 82.

<sup>19</sup> Fed. Comm. Comm'n, Chairman Wheeler Proposes New Rules for Protecting the Open Internet (Feb. 4, 2015), available at <http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet>.

that vertical contracts *can* result in anticompetitive outcomes in some circumstances.<sup>20</sup> This raises an interesting question for the FCC: if an outright ban on vertical restraints in the broadband industry cannot be justified, yet there is a chance that vertical restraints could harm broadband consumers, then what should the FCC do? The answer is “nothing,” and the reason is that the FTC – my agency – is exceptionally well-equipped to pick up the slack. Were the efforts of the antitrust agencies not enough, the antitrust laws also provide for private rights of action and remedies – including treble damages – more than sufficient to put to rest concerns about inadequate enforcement. Indeed, President Obama’s current regulatory czar and former director of the FTC’s Bureau of Economics Howard Shelanski has noted that antitrust enforcement is often superior to broad regulation: “[e]ven if regulators have the authority to regulate, they may decide that forbearance from ‘gearing up the cumbersome, highly imperfect bureaucratic apparatus of classical regulation’ in favor of antitrust enforcement will be the better policy choice.”<sup>21</sup>

The problem with the FCC’s approach to net neutrality is that there is no way to identify the vertical contracts that are likely to be problematic *ex ante*. If the empirical economic evidence is correct or even reasonably accurate, then most contracts will

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<sup>20</sup> See Krattenmaker & Salop, *supra* note 8, at 224, 229.

<sup>21</sup> Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 719 (2011) (quoting Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1007 (1987)).

benefit consumers and some will generate a real risk of competitive harm. In other words, the FCC is faced with a lack of any reliable and economically sound method to identify prospectively network discrimination that should be barred as anticompetitive or absolved as procompetitive.

But what is a novel policy dilemma for the FCC is a problem that antitrust has been grappling with for over a century and for which it offers a clear solution. Over the course of the last century, antitrust jurisprudence has evolved a highly sophisticated “rule of reason” to adjudicate various types of vertical arrangements by analyzing their costs and benefits.<sup>22</sup> The rule of reason requires that each vertical arrangement be assessed on a case-by-case basis by marshaling the available economic literature and empirical evidence to evaluate the evidence of actual competitive harm under the specific circumstances of the case. Indeed, antitrust law initially adopted but ultimately rejected – largely based upon the development of the economic and empirical literature I discussed earlier – a categorical prohibition of certain vertical restraints not unlike the FCC’s prohibition on paid prioritization.<sup>23</sup>

The reason antitrust courts and agencies rejected the view underlying the President and the FCC’s ban is that a revolution injecting economic analysis and

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<sup>22</sup> See *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

<sup>23</sup> See, e.g., *Leegin Creative Leather Prods v. PSKS, Inc.*, 551 U.S. 877 (2007) (applying rule of reason to minimum resale price maintenance); *State Oil Co. v. Kahn*, 522 U.S. 3 (1997) (applying rule of reason to maximum resale price maintenance); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) (applying rule of reason to non-price vertical restraints).

method into antitrust law swept through its institutions in the 1960s and 1970s. The FCC need not catch up its understanding of industrial organization economics to the state of the art in 2015 to get this right; it only needs to embrace what was well understood by 1977 when the Supreme Court first accepted the basic economic principles that rejected categorical prohibitions of the sort embraced by net neutrality proponents.<sup>24</sup>

My view is that antitrust's rule of reason is far more likely to maximize consumer welfare in the broadband industry than the FCC's ban. As a general matter, any legal framework that seeks to maximize consumer welfare must take three factors into account. First, the framework must assess the probability that the challenged business arrangement is anticompetitive. Second, the framework must assess the probability that its application will result in errors, either false positives in which arrangements that benefit consumers are prohibited or false negatives in which arrangements that harm consumers are allowed. Third, the framework must acknowledge the administrative costs of implementing the system.<sup>25</sup> A rule that focuses upon minimizing the social costs of false positives, false negatives, and administrative costs is most likely to generate the highest rate of return for consumers.

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<sup>24</sup> See *GTE Sylvania*, 443 U.S. 36.

<sup>25</sup> Hazlett & Wright, *supra* note 2, at 798.

Under the FCC's categorical prohibition, there will be no false negatives, only false positives. Instances of procompetitive conduct will no doubt be erroneously condemned unless one thinks the empirical research on the effects of vertical restraints is all wrong, at least as applied to the broadband industry. It is true that the rule of reason is probably more costly to administer in the individual case than the FCC's blanket prohibition, but the administrative cost the FCC incurs in developing, defining, and defending, and re-defining whatever net neutrality order ultimately gets upheld by a court – and it has not been successful in this endeavor for a decade – is not trivial either.

Although the affirmative case for antitrust over net neutrality is clear on consumer welfare grounds, net neutrality proponents often assert that because antitrust might not “work” in all cases – that is the rule of reason might allow *some* vertical contracts that do in fact harm consumers – a blanket prohibition against all priority contracts is superior. This argument rejects a consumer-welfare based approach to regulation altogether by assuming – contrary to all available theory, evidence, and experience – that every instance of conduct prohibited by the FCC's plan will be harmful. The argument also seems to suggest that there is some category of harm to consumers that falls outside of the dimensions cognizable within antitrust and consumer protection law – price, output, quality, and innovation – that is both ubiquitous enough to justify categorical prohibition but also only observable to the

FCC. That should be enough make any student of regulatory law or economics nervous. I am quite confident that the antitrust regime, after more than a century of developing expertise in applying the rule of reason, will be able to apply it to the broadband industry.

#### **IV. Title II and Consumer Protection**

I will now turn from antitrust to the FTC's other enforcement priority: consumer protection. By reclassifying broadband internet providers as common carriers under Title II, the FCC threatens to strip the FTC of its jurisdiction to regulate broadband providers as part of its consumer protection mission. The FTC has been active in this space over the last 20 years, and the FCC's regulation would displace much pro-consumer activity. I believe reclassification under Title II will unequivocally harm consumers by depriving consumers of the FTC's activities in the broadband sector.

As a general matter, the FTC Act gives the FTC broad authority with regard to both competition and consumer protection matters in most sectors of the economy.<sup>26</sup> Section 5 of the FTC Act proscribes "deceptive" or "unfair" acts or practices in or affecting commerce. A company acts deceptively if it makes materially misleading statements or omissions. Such statements or omissions can be express or implied. A

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<sup>26</sup> Under the FTC Act, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," are prohibited, and the FTC has a general statutory mandate "to prevent persons, partnerships, or corporations," from engaging in such prohibited methods, acts, and practices. 15 U.S.C. § 45 (a).

company engages in unfair acts or practices if its practices cause, or are likely to cause, substantial injury to consumers that is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or to competition. Section 5's prohibition against deceptive or unfair practices plays an important role in protecting consumers: put simply, it requires companies to market their products truthfully and to refrain from engaging in harmful business practices. Section 5 also promotes competition on the basis of truthful claims and provides an incentive for companies to act responsibly and fairly in providing their products and services.

Although Section 5 contains an exemption for "common carrier" activities, this exemption does not apply to the provision of other services, even if offered by common carriers.<sup>27</sup> Accordingly, because broadband internet access services historically have not been offered on a common carrier basis,<sup>28</sup> the FTC has had jurisdiction over such services.<sup>29</sup> The FTC has used its full range of law enforcement authority to protect

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<sup>27</sup> 15 U.S.C. §§ 44, 45(a)(2). See *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 58-60, n.4 (2d Cir. 2006) (citing, *inter alia*, *SW Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994), and *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.3d 601, 608 (D.C. Cir. 1976)).

<sup>28</sup> *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014)); *Nat'l Cable Telecomm'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 993-95 (2005).

<sup>29</sup> The FCC's historical exercise of authority over non-common carrier broadband Internet access services pursuant to Title I of the Communications Act of 1934, 47 U.S.C. §§ 151-161, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, has no bearing on the scope of the FTC's jurisdiction, since, under Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) & 53(b), "the FTC may proceed against unfair practices even if those practices [also] violate some other statute...." *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009) (referring to Telecommunications Act provision). See also, FED. TRADE COMM'N STAFF, *supra* note 16, at 38-41 (2007) (analyzing the application of Section 5 of the FTC Act to broadband services).



consumers in the broadband sector, including obtaining injunctive relief and consumer redress where appropriate, and engaging in consumer and business education. The FTC has also pursued policy initiatives to address important consumer protection issues relating to broadband and Internet service, including requiring truthful, clear, and conspicuous disclosure of material terms of service, data security, and privacy.

Importantly, the FTC has certain enforcement tools at its disposal that are not available to the FCC. Unlike the FCC, the FTC can bring enforcement cases in federal district court and can obtain equitable remedies such as consumer redress.<sup>30</sup> The FCC has only administrative proceedings at its disposal, and rather than obtain court-ordered consumer redress, the FCC can require only a “forfeiture” payment.<sup>31</sup> In addition, the FTC is not bound by a one-year statute of limitations as is the FCC.<sup>32</sup> The FTC’s ability to proceed in federal district court to obtain equitable remedies that fully redress consumers for the entirety of their injuries provides comprehensive consumer protection and can play an important role in deterring consumer protection violations.

The FTC has done some remarkable consumer protection work in the broadband sector and, since the advent of the Internet, the FTC has been the primary federal enforcement agency identifying problematic practices relating to deceptive advertising,

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<sup>30</sup> See 15 U.S.C. Sec. 53(b). By contrast, the FCC cannot obtain consumer redress, only forfeiture.

<sup>31</sup> In the settlement of an administrative proceeding, a party may agree to pay consumer redress or to set up a compensation fund. However, the party cannot be compelled to do so.

<sup>32</sup> 47 U.S.C. § 503(b)(6).

privacy and data security, as well as enforcement actions designed to stop these practices and to deter others from adopting similar practices that harm consumers. Before reclassifying broadband services under Title II, and thereby outside the reach of the FTC, it is important to consider the ramifications of depriving broadband consumers of the FTC's specialized enforcement abilities as well as its accompanying decades of expertise.

A few recent enforcement efforts illuminate the types of protections consumers would lose with reclassification. For example, the FTC recently filed an action against AT&T in federal district court, charging that AT&T failed to adequately disclose to its customers on unlimited data plans that, if they reach a certain amount of data use in a given billing cycle, AT&T reduces – or “throttles” – their data speeds to the point that many common mobile phone applications – like web browsing, GPS navigation and watching streaming video – become difficult or nearly impossible to use.<sup>33</sup> The FTC complaint further alleges that, even as unlimited plan consumers renewed their contracts, the company still failed to inform them of the throttling program. When customers canceled their contracts after being throttled, AT&T charged those customers early termination fees, which typically amount to hundreds of dollars. The FTC also brought and settled a nearly identical case against Tracfone, the largest prepaid mobile

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<sup>33</sup> Press Release, Fed. Trade Comm'n, FTC Says AT&T Has Misled Millions of Consumers with 'Unlimited' Data Promises (Oct. 28, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data>.

provider in the U.S.<sup>34</sup> In that case, Tracfone agreed to pay \$40 million to the FTC for consumer redress to settle charges that it deceived millions of consumers with its promises of “unlimited” data service.

I am sure many of you are familiar with these recent Commission cases. These are very important cases to bring – they challenge deceptive practices that harm consumers not only by charging them for services they did not receive, but also by undermining the competitive landscape. However, it is important to recognize that the FTC is not new to these and other important consumer protection issues in the broadband sector. Indeed, the FTC has been on the forefront of such cases since the late 1990’s and it has continually brought a variety of cases against Internet service providers when it has had reason to believe that they have engaged in deceptive marketing and billing practices.<sup>35</sup>

For example, in 1997, the FTC separately sued America Online, CompuServe, and Prodigy, alleging that each company had offered “free” trial periods that resulted in unexpected charges to consumers.<sup>36</sup> The settlement orders reached in these matters

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<sup>34</sup> Press Release, Fed. Trade Comm’n, Prepaid Mobile Provider TracFone to Pay \$40 Million to Settle FTC Charges It Deceived Consumers About ‘Unlimited’ Data Plans (Jan. 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc>.

<sup>35</sup> See, e.g., *Am. Online, Inc. & CompuServe Interactive Servs., Inc.*, 137 F.T.C. 117 (2004); *Juno Online Servs., Inc.*, 131 F.T.C. 1249 (2001).

<sup>36</sup> See *Am. Online, Inc.*, 125 F.T.C. 403 (1998); *CompuServe, Inc.*, 125 F.T.C. 451 (1998); *Prodigy, Inc.*, 125 F.T.C. 430 (1998). One Prodigy advertisement, for example, touted a “Free Trial” and “FREE 1ST MONTH’S MEMBERSHIP” conspicuously, while a fine print statement at the bottom of the back panel of the advertisement stipulated: “Usage beyond the trial offer will result in extra fees, even during the first

prohibited the companies from, among other things, misrepresenting the terms or conditions of any trial offer of online service. Although all three matters involved dialup, or narrowband, Internet access, the orders are not limited by their terms to narrowband services.

In another early case, the FTC was granted summary judgment by a federal district court that the defendants had violated the FTC Act by mailing false or misleading purported rebate or refund checks to millions of consumers and businesses without disclosing, clearly and conspicuously, that cashing the checks would prompt monthly charges for Internet access services on the consumers' and businesses' telephone bills.<sup>37</sup> Following a trial on the issue of consumer injury, the court ordered the defendants to pay more than \$17 million to remedy the injury caused by their fraudulent conduct.<sup>38</sup>

Enforcement actions such as these not only protect consumers from financial injury, they are an important component in policing the marketplace and ensuring the flow of accurate and truthful information.

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month." Other alleged misrepresentations included AOL's failure to inform consumers that fifteen seconds of connect time was added to each online session (in addition to the practice of rounding chargeable portions of a minute up to the next whole minute), as well as its misrepresentation that it would not debit customers' bank accounts before receiving authorization.

<sup>37</sup> *FTC v. Cyberspace.com*, No. C00-1806L, 2002 WL 32060289 (W.D. Wash. July 10, 2002), *aff'd*, 453 F.3d 1196 (9th Cir. 2006).

<sup>38</sup> *Cyberspace.com*, 453 F.3d at 1196 (the Court of Appeals for the Ninth Circuit affirmed the trial court's liability).

The FTC's unique expertise extends to privacy and data security as well. The FTC has the authority -- under a handful of different laws -- to bring cases enforcing broadband service providers' obligations to protect the privacy and security of consumer data. Using its authority under Section 5, the FTC has brought privacy and security enforcement actions that have involved businesses in a wide variety of industries, including companies that sell mobile and Internet connected devices;<sup>39</sup> companies that provide Internet-related services;<sup>40</sup> social media companies;<sup>41</sup> and mobile app developers.<sup>42</sup> In addition to the FTC Act, other laws enforced by the FTC, such as the Fair Credit Reporting Act<sup>43</sup> ("FCRA"), and the Children's Online Privacy Protection Act<sup>44</sup> ("COPPA"), also prohibit entities including broadband operators from making deceptive claims in their representations to consumers about privacy and data security. Further, they impose a variety of other requirements that may apply to broadband providers engaging in certain activities.

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<sup>39</sup> HTC America, Inc., 155 F.T.C. 1617 (2013); TRENDnet, Inc., FTC Docket No. C-4426 (Jan. 16, 2014) (final decision and order), *available at* <https://www.ftc.gov/system/files/documents/cases/140207trendnetdo.pdf>.

<sup>40</sup> Google, Inc., 152 F.T.C. 435 (2011).

<sup>41</sup> Facebook, Inc., FTC Docket No. C-4365 (July 27, 2012) (final decision and order), *available at* <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

<sup>42</sup> Snapchat, Inc., FTC Docket No. C-4501 (Dec. 23, 2014) (final decision and order), *available at* <https://www.ftc.gov/system/files/documents/cases/141231snapchatdo.pdf>; United States v. Path, Inc., No. C-13-0448 (N.D. Cal. Feb. 8, 2013) (Stipulated Final J.), *available at* <http://www.ftc.gov/sites/default/files/documents/cases/2013/02/130201pathincdo.pdf>.

<sup>43</sup> 15 U.S.C. §§15 U.S.C. §1681-1681x.

<sup>44</sup> 15 U.S.C. §§ 6501-6506.

These enforcement actions clearly illustrate the expertise and the interest of the FTC in vigorously protecting consumers of broadband internet services. Consumers have been well served to the extent that this framework allows both the FTC and the FCC to challenge deceptive and unfair practices and thereby foster competition and protect consumers. As the Commission has pointed out many times, however, the common carrier exemption is outdated and a harmful obstacle to good policymaking.<sup>45</sup> As illustrated by the broadband Internet access marketplace, technological advances have blurred the traditional boundaries among telecommunications, entertainment, and high technology. As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to continue to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, and entertainment services. Reclassifying broadband internet services as common carrier services under Title II will create further obstacles to protecting consumers and fostering competition by depriving the FTC of its long-standing jurisdiction in this area

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<sup>45</sup> See, e.g., *Federal Trade Commission Reauthorization: Hearing before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. 12-13 (2008) (statement of William E. Kovacic, Chairman, Fed. Trade Comm'n); *FTC Jurisdiction Over Broadband Internet Access Services: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 9-11 (2006) (statement of William E. Kovacic, Comm'r, Fed. Trade Comm'n); *Reauthorization of the Federal Trade Commission: Positioning the Commission for the Twenty-First Century: Hearing before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce*, 108th Cong. 35-36 (2003) (statement of Thomas B. Leary, Comm'r, Fed. Trade Comm'n).

and threatening the robust consumer protection efforts that the agency has engaged in over the last two decades.

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Thank you for your time. I am happy to answer any questions.