



**PREPARED STATEMENT  
OF THE FEDERAL TRADE COMMISSION**

**before the**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**on**

**FTC JURISDICTION OVER  
BROADBAND INTERNET ACCESS SERVICES**

**by**

**William E. Kovacic**

**Commissioner**

**Washington, D.C.**

**June 14, 2006**

## I. INTRODUCTION

Mr. Chairman, Mr. Leahy, and members of the Committee, I am Bill Kovacic, Commissioner of the Federal Trade Commission (“FTC” or “Commission.”). I am pleased to present the Commission’s testimony on protecting the interests of consumers and competition in the offering of broadband Internet access services.<sup>1</sup>

The Federal Trade Commission is the only federal agency with general jurisdiction over consumer protection and competition in most sectors of the economy.<sup>2</sup> We enforce laws that prohibit business practices that are anticompetitive, deceptive, or unfair. The FTC’s combination of consumer protection and competition authority allows us to take action in appropriate circumstances with a uniquely well-rounded perspective on market processes.

The FTC is well-versed in consumer protection and competition issues raised by the offering of Internet access services. For nearly a decade, the FTC has investigated and brought enforcement actions against Internet service providers for allegedly deceptive marketing, advertising, and billing of Internet access services.<sup>3</sup> With respect to its competition enforcement

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<sup>1</sup> This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily represent the views of the Commission or any other Commissioner.

<sup>2</sup> The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. With certain exceptions, the statute provides the agency with jurisdiction over nearly every sector of the economy. Certain entities, such as depository institutions and common carriers, as well as the business of insurance, are wholly or partly exempt from FTC jurisdiction. In addition to the general enforcement authority under the FTC Act, the agency has enforcement responsibilities under more than 40 additional statutes and more than 30 rules governing specific industries and practices.

<sup>3</sup> In connection with various law enforcement initiatives, the FTC has worked closely with the Federal Communications Commission (“FCC”). This is particularly true in the implementation and enforcement of the Do Not Call provisions of the Telemarketing Sales Rule, and, in recent months, in challenges to the illegal sale of consumers’ confidential telephone records.

mission, the FTC has investigated and brought enforcement actions under the antitrust laws in matters involving access to content via Internet access services and where appropriate has coordinated these investigations with the Federal Communications Commission (“FCC”). We are concerned, however, that any explicit or implicit diminution of the FTC’s existing jurisdiction would restrict our ability to continue to play the integral role we have in protecting consumers from harm and ensuring robust competition in this vital and expanding market. As more and more U.S. consumers access the Internet through broadband connections, it is important that consumers and businesses know that the FTC will remain vigilant on their behalf when they use this important medium. The FTC has a proven record of effective law enforcement, consumer and business education, and other policy initiatives involving both consumer protection and competition matters related to Internet access. We believe this record supports the preservation of its existing authority in this area.

In this testimony, I will describe the legal basis for the Commission’s jurisdiction over most broadband Internet access services and the Commission’s experience handling matters involving Internet access services. I will discuss the Commission’s recommendation that Congress eliminate the FTC Act exemption for common carriers subject to the Communications Act of 1934. Finally, I will urge that any legislation relating to broadband Internet access not restrict our ability to protect consumers from harm and maintain robust competition.

## **II. FTC JURISDICTION OVER MOST TYPES OF BROADBAND INTERNET ACCESS SERVICES**

The Commission has jurisdiction under the FTC Act over broadband Internet access services offered on a non-common carrier basis, including cable modem services, wireless

Internet access services, non-facilities-based wireline broadband Internet access services, and any facilities-based wireline broadband Internet access service offered as an information service rather than on a common carrier basis.<sup>4</sup> The one type of broadband Internet access service over which the FTC may not have jurisdiction is facilities-based service offered as a telecommunications service, and therefore regulated as a common carrier service under the Communications Act.<sup>5</sup> The Commission is on record as opposing the common carrier exemption in the FTC Act.

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<sup>4</sup> The FTC Act provides that “common carriers subject to the Communications Act of 1934” as amended are exempt from the FTC Act. 15 U.S.C. §§ 45(a)(2), 44. At common law, common carriage is characterized by the offering of a service of carrying for the public generally and without modification of the content of what is carried. *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 640-642 (D.C. Cir. 1976) (“*NARUC I*”); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608-609 (D.C. Cir. 1976) (“*NARUC II*”); *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 57-58 (2d Cir. 2006). However, an entity is treated as a common carrier under the Communications Act only with respect to services it provides on a common carrier basis. *NARUC I*; *NARUC II*; see also 47 U.S.C. §§ 153(43), (44), (46) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services. . . .”). The Communications Act specifically distinguishes between “telecommunications services,” which are services provided on a common carrier basis, and “information services,” which are not. To the extent an entity provides non-common carrier services such as “information services,” the FTC considers the provision of those services to be subject to the FTC Act’s prohibitions against engaging in deceptive or unfair practices and unfair methods of competition. See *FTC v. Verity Int’l Ltd.*, 194 F. Supp. 2d 270, 274-277 (S.D.N.Y. 2002), (order denying defendants’ motion for judgment on the pleadings and granting plaintiff’s motion to extend preliminary injunction), *aff’d*, *FTC v. Verity Int’l, Ltd.*, 335 F. Supp. 2d 479, 494 (S.D.N.Y. 2004), *aff’d in part, rev’d in part*, 443 F.3d 48 (2d Cir. 2006).

<sup>5</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14853 (2005) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-150A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf); and see 47 U.S.C. §§ 153(43) (44) & (46).

Certain types of Internet access services, including Digital Subscriber Line (DSL) Internet access provided by non-facilities-based Internet Service Providers (ISPs)<sup>6</sup> and dial-up Internet access, have long been treated as non-common carrier services subject to FTC jurisdiction. Recent developments in the courts and at the FCC have clarified that certain other means of providing Internet access — specifically, cable modem services and facilities-based broadband wireline services offered on a non-common carrier basis — are information services rather than telecommunications services. These developments confirm the FTC’s view that it has jurisdiction over the provision of those services.

In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005), the Supreme Court upheld the FCC’s determination that cable modem Internet access service is an “information service” and not a common carrier service under the Communications Act. The Supreme Court reversed a Ninth Circuit decision that had found the service to be common carriage and had vacated the FCC’s determination on this point.

More recently, the FCC released the *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14853 (2005) (the “*Order*”),<sup>7</sup> in which the agency reclassified wireline broadband Internet access service by facilities-based carriers as an information service.<sup>8</sup> That same *Order*,

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<sup>6</sup> Non-facilities-based ISPs are those that do not themselves own the transmission facilities they use to provide Internet access.

<sup>7</sup> The *Order* is available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-150A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf).

<sup>8</sup> A consolidated appeal of the order is pending in the Third Circuit. *Time Warner v. FCC*, No. 05-4769 (3d Cir. filed Oct. 26, 2005).

however, permits facilities-based wireline carriers to elect to provide transmission for wireline broadband service on a common carrier basis. The common carrier exemption in the FTC Act may, therefore, preclude FTC jurisdiction over transmission services that a facilities-based wireline carrier elects to provide on a common carrier basis pursuant to the *Order*.

### **III. THE FTC'S EXPERIENCE WITH INTERNET ACCESS SERVICES**

As noted, some types of Internet access services have long been recognized as within the FTC's authority. Accordingly, for nearly a decade, the FTC has investigated and brought enforcement actions against Internet service providers, provided consumer education, and acted as a central resource for consumer inquiries and complaints about all forms of Internet-related activity.

#### **A. Enforcement Actions**

The FTC has brought a wide variety of cases against Internet service providers engaged in allegedly deceptive marketing, advertising, and billing practices.<sup>9</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. The settlement orders with each of the companies prohibit them from misrepresenting the terms or conditions of any online service trial offer. They also prohibit the companies from representing that an online

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<sup>9</sup> E.g., *FTC v. Cyberspace.com*, No. C00-1806L, 2002 U.S. Dist. LEXIS 25565, 2003-1 Trade Cas. (CCH) P73,960 (W.D. Wash. 2000) (appeal pending in the 9th Circuit); *In re America Online, Inc. & CompuServe Interactive Servs., Inc.*, FTC Docket No. C-4105 (Jan. 28, 2004) (consent order); *In re Juno Online Servs., Inc.*, FTC Docket No. C-4016 (Jun. 25, 2001) (consent order); *In re WebTV Networks, Inc.*, FTC Docket No. C-3988 (Dec. 8, 2000) (consent order); *In re AOL, Inc.*, FTC Docket No. C-3787 (Mar. 16, 1998) (consent order); *In re CompuServe, Inc.*, 125 F.T.C. 451 (1998) (consent order); *In re Prodigy, Inc.*, 125 F.T.C. 430 (1998) (consent order).

service is free, or that consumers need not pay for the online service, unless they disclose clearly and prominently in their instructional materials any obligation to cancel or take other action to avoid charges. In all other advertisements, the companies must include a statement directing consumers to where this disclosure is available. Although all of these cases involved the provision of dial-up Internet access, the orders are not limited by their terms to the offering of narrowband Internet access.

More recently, in the matter of *FTC v. Cyberspace.com*, No. C00-1806L, 2002 U.S. Dist. LEXIS 25565, 2003-1 Trade Cas. (CCH) P73,960 (W.D. Wash. 2002) (appeal pending in the 9th Circuit), the federal district court for the Western District of Washington granted summary judgment in favor of the FTC on the issue of liability. The court found that the defendants violated the FTC Act by mailing purported “rebate” or “refund” checks for \$3.50 to millions of consumers and businesses without clearly and conspicuously disclosing that by cashing the check those individuals and businesses would receive monthly charges on their telephone bills for defendants’ Internet access services. 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>10</sup>

With respect to competition enforcement, the FTC has investigated and brought enforcement actions under the antitrust laws, where appropriate, in matters involving issues of access to content via broadband and other Internet access services.<sup>11</sup> For example, the

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<sup>10</sup> The defendants have appealed on both the liability issue and the monetary award. The appeal was argued in the Ninth Circuit in March of this year.

<sup>11</sup> The FCC has a special role with respect to telecommunications services. In our view, the FCC’s role does not conflict with the FTC’s authority over consumer protection and

Commission challenged the merger between AOL and Time Warner and entered into a consent order that required the merged company to open its cable system for all content on a nondiscriminatory basis to competitor Internet service providers, including those offering broadband.<sup>12</sup> The order also prohibited the company from interfering with the content of non-affiliated ISPs and from interfering with the ability of non-affiliated providers of interactive TV services to access the AOL Time Warner system. Further, in Time Warner cable areas where affiliated cable broadband service is available, the company was required to market and offer AOL's DSL services to subscribers in the same manner and at the same retail pricing as it did in areas where affiliated cable broadband Internet access service was not available.

The FTC has addressed issues of Internet access in a number of other merger investigations, as well as related issues that often arise in horizontal mergers of cable TV systems and mergers of cable TV companies and content providers. These cases often raise issues of narrowband and broadband Internet access. For example, the FTC investigated the acquisition by Comcast and Time Warner of the cable assets of Adelphia Communications and a related transaction in which Comcast and Time Warner exchanged various cable systems. The FTC examined, among other things, the likely effects of the transactions on access to and pricing of content. A majority of the Commission concluded that the acquisitions were unlikely to foreclose competitor cable systems in any market or to result in increased prices for Time Warner

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competition issues relating to broadband Internet access. Like some specialized agencies, such as the Federal Energy Regulatory Commission and the banking agencies, the FCC also has certain nonexclusive authority to review mergers, potentially taking into account issues outside the antitrust laws.

<sup>12</sup> *In re America Online, Inc. & Time Warner Inc.*, FTC Docket No. C-3989 (Apr. 17, 2001) (consent order).

or Comcast content and closed the investigation.<sup>13</sup> *See also In re Cablevision Sys. Corp.*, 125 F.T.C. 813 (1998) (consent order); *In re Summit Commc'n Group*, 120 F.T.C. 846 (1995) (consent order).<sup>14</sup>

## **B. Consumer Education, Complaint Sharing, and Public Hearings**

As an important complement to its enforcement activity, the FTC offers extensive consumer and business education about a wide variety of Internet-related topics, including Internet access devices, the protection of personal computers from security threats and data intrusion, wireless security, and modem hijacking.<sup>15</sup> In addition, each week more than 20,000 consumers contact the FTC to obtain information or submit complaints covering the full range of consumer protection issues.

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<sup>13</sup> *See* Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan. 31, 2006) (FTC File No. 051 0151); *see also* Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part) Time Warner/Comcast/Adelphia (Jan. 31, 2006) (FTC File No. 051 0151). Both statements are available at <http://www.ftc.gov/opa/2006/01/fyi0609.htm>.

<sup>14</sup> The federal antitrust statutes are flexible and account for unique industry characteristics, including those aspects of network industries that differentiate them from some more traditional industries. The Department of Justice (DOJ) shares antitrust authority with the FTC regarding most sectors of the economy. The two antitrust agencies have long-standing coordination procedures that allow them to consider those complex issues and avoid inconsistent or duplicative efforts. The FTC's and DOJ's clearance procedures ensure that only one antitrust agency investigates a particular merger.

<sup>15</sup> *See, e.g.*, "Detect, Protect, Dis-infect: Consumers Online Face Wide Choices in Security Products" available at <http://www.ftc.gov/bcp/online/pubs/alerts/idsalrt.htm>; "Using Internet Access Products," available at <http://www.ftc.gov/bcp/online/pubs/alerts/accessalrt.htm>; "Securing Your Wireless Network," available at <http://www.ftc.gov/bcp/online/pubs/online/wireless.html>; "When Your Computer Calls Overseas Without Your OK," available at <http://www.ftc.gov/bcp/online/pubs/alerts/modmalrt.htm>.

The Commission also informs its law enforcement work through robust research and information gathering. The Commission will hold hearings later this year on consumer protection issues relating to global marketing and technology.<sup>16</sup> The hearings will bring together experts from diverse fields to explore the consumer protection issues and challenges arising from convergence in communications technology and the globalization of commerce. The hearings also will provide an opportunity to examine changes that have occurred in marketing and technology since the mid-1990's, when the FTC last conducted comprehensive hearings on these phenomena.<sup>17</sup> We expect various issues regarding broadband Internet access services to receive attention at the hearings. In addition, because of the importance of encouraging more broadband competition for consumers, the Commission's Office of Policy Planning is conducting an inquiry to educate the Commission on the issue of municipalities offering broadband services.

#### **IV. THE FTC'S LEGISLATIVE RECOMMENDATIONS**

During its two most recent reauthorization hearings, the Commission proposed eliminating the gap in its jurisdiction created by the telecommunications common carrier exemption.<sup>18</sup> We believe the exemption is outdated and a harmful obstacle to good

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<sup>16</sup> Information about the Commission's 2006 Hearings on Global Marketing and Technology, is available at <http://www.ftc.gov/bcp/workshops/globalmarketing/index.html>.

<sup>17</sup> See <http://www.ftc.gov/opa/1995/07/hearing1.htm>.

<sup>18</sup> *The Reauthorization of the Federal Trade Commission: Positioning the Commission for the Twenty-First Century: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2003) ("FTC 2003 Reauthorization Hearing") (statement of the FTC), available at <http://www.ftc.gov/os/2003/06/030611reauthhr.htm>; see also *FTC 2003 Reauthorization Hearing* (statement of Thomas B. Leary, FTC Commissioner), available at <http://www.ftc.gov/os/2003/06/030611learyhr.htm>; *FTC Reauthorization Hearing: Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on*

policymaking. 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 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.

Enforcement difficulties posed by the common carrier exemption are not speculative. A recent decision of the Second Circuit, *FTC v. Verity Int'l Ltd.*, 335 F. Supp. 2d 479 (S.D.N.Y. 2004), *aff'd in part, rev'd in part*, 443 F.3d 48 (2d Cir. 2006), offers an example of some defendants' attempts to thwart an FTC enforcement action by asserting that the common carrier exemption precluded FTC action. In that case, the Commission alleged that the defendants orchestrated a scheme that disconnected consumers' computers from their regular Internet service providers and reconnected their computers' modems to a Madagascar phone number for purposes of providing online entertainment. The line subscriber of the modem phone line was then charged between \$3.99 and \$7.78 per minute for the length of the connection.<sup>19</sup> In that case,

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*Commerce, Science and Transportation*, 107th Cong. (2002) (statement of Sheila F. Anthony, FTC Commissioner), available at <http://www.ftc.gov/os/2002/07/sfareauthtest.htm>.

<sup>19</sup> The FTC has brought half a dozen other cases alleging that various defendants have redirected consumers' modem connections and then charged consumers for unauthorized entertainment services. These cases are often referred to as "modem hijacking cases." See, e.g., *FTC v. Audiotex Connection, Inc.*, Civil Action No. C-97 0726 (DRH) (E.D.N.Y. 1997) (consent order); *In the Matter of Beylen Telecom Ltd.*, 125 F.T.C. 276 (1998) (consent order); *FTC v. RJB Telecom, Inc.*, Civil Action No. Civ. 00201-7 (Phx) (D. Ariz., 2000) (consent order); *FTC v. Ty Anderson*, Civil Action No. C00-1843P (W.D. Wa. 2000) (consent order); *FTC v. Sheinkin*, No. 2-00-363618 (D.S.C. 2000) (consent order); *FTC v. Alyon Technologies, Inc.*, Civil Action No. 1:03-CV-1297-RWS (N.D. Ga. 2003) (consent order).

AT&T and Sprint carried the calls that connected the consumers' computers to the defendants' servers.<sup>20</sup> Based on the common carrier exemption in the FTC Act, the defendants argued that because AT&T and Sprint carried the calls, the entertainment service for which consumers were billed was outside the FTC's jurisdiction. One defendant also claimed to be a common carrier and therefore exempt from the FTC's jurisdiction. Although both the District Court and the Court of Appeals rejected those arguments, the defendants have moved for reconsideration on the common carrier exemption issue, and the FTC continues to expend substantial time and resources litigating the issue.

Apart from the issue of the common carrier exemption, as Congress considers legislation to amend the Communications Act, the Commission believes that any new legislation should clearly preserve the FTC's existing authority over activities currently within its jurisdiction. In this regard, some recent legislative proposals would assign to the FCC specific competition and consumer protection authority. We are concerned that any new grant of authority to the FCC not be misread to oust the FTC from its established jurisdiction. The Commission does not believe that Congress intends to remove the FTC from the business of protecting consumers and maintaining competition in the broadband services industry.<sup>21</sup>

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<sup>20</sup> Although consumers allegedly were charged the tariffed rates for calls to Madagascar, the FTC alleged that the calls were actually carried to other countries with lower long distance rates for calls from the United States.

<sup>21</sup> Indeed, just last week, the House voted overwhelmingly (353 to 68) on an amendment to H.R. 5252, the Communications Opportunity, Promotion and Enhancement Act (COPE) that confirms FTC and DOJ antitrust authority in the telecommunications industry. Cong. Rec. H3582 (daily ed. June 8, 2006) (roll call vote No. 238).

## **V. CONCLUSION**

As discussed above, over the past decade, the FTC successfully has prosecuted a wide range of enforcement actions involving activities related to Internet access, which we alleged to have injured consumers and competition. Throughout these efforts, the FTC has coordinated with the FCC and discussed issues where our interests and jurisdictions intersect – such as Do Not Call and the pretexting of telephone records – or where potential mergers implicate each agency’s unique mandate. We have worked together effectively in the past, and will continue to do so. Access to the Internet has become a crucial part of our economy and of many consumers’ lives. The FTC is committed to maintaining competition and to protecting consumers from deceptive or unfair acts or practices relating to all Internet access services within its jurisdiction. We urge the Congress to ensure that the FTC’s capacity to address pressing consumer protection and competition issues is not diminished as it considers legislation regarding the provision of broadband services.