

Testimony of

# The Honorable William E. Kovacic

June 14, 2006

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.  
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## 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.

The Federal Trade Commission is the only federal agency with general jurisdiction over consumer protection and competition in most sectors of the economy. 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. With respect to its competition enforcement 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. 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. The Commission is on record as opposing the common carrier exemption in the FTC Act.

Certain types of Internet access services, including Digital Subscriber Line (DSL) Internet access provided by non-facilities-based Internet Service Providers (ISPs) 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"), in which the agency reclassified wireline broadband Internet access service by facilities-based carriers as an information service. That same Order, 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. 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 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.

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. For example, the 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. 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 or Comcast content and closed the investigation. 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).

#### 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. 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.

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. 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. 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. We believe the exemption is outdated and a harmful obstacle to good 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. In that case, AT&T and Sprint carried the calls that connected the consumers' computers to the defendants' servers. 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.

#### 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.