

QFR Response to Ranking Member John Thune

1) Is the recent T-Mobile cramming case the first time the FTC has taken enforcement action against a telecommunications carrier?

The T-Mobile case is the first enforcement action the FTC has brought against a telecommunications carrier for deceptive or unfair practices under the FTC Act.

2) Do you believe the exemption from the FTC's jurisdiction of communications common carriers inhibits the FTC's consumer protection mission? Please explain your answer.

While the FTC's jurisdiction over telecommunications companies when they are engaged in non-common carrier activities like billing for third-party services is well supported, the exemption encourages telecommunications companies to contend otherwise, leaving the matter open to litigation. Furthermore, non-common-carrier activities can be mingled with common-carrier activities (such as pricing and advertising of bundled services). These issues can inhibit our consumer protection mission. The common carrier exemption can also frustrate effective consumer protection under FTC principles when dealing with advertising, marketing, and billing practices for common carrier activities.

3) Do you believe the communications common carrier exemption is outdated or should be repealed?

Yes, the common carrier exception was implemented in the 1930s, at a time when telephone companies provided basic services that were heavily regulated monopolies. That economic and regulatory model no longer applies. Today, consumers would be better served by the repeal of the common carrier exemption. As communications technologies and platforms have continued to evolve, market participants may offer a range of communications-related services to consumers, some of which are subject to common carrier requirements under the Communications Act but many of which are not. Consumers should expect and receive the same protections against unfair or deceptive acts or practices in the context of common carrier services as in other services.

4) Would repealing the communications common carrier exemption lead to duplicative jurisdiction with the FCC? Why or why not? Please explain your answer.

The FTC and the FCC already share concurrent jurisdiction in certain areas, such as mobile cramming by telecommunications companies. The two agencies cooperate and coordinate with one another, which furthers consistency and allows each agency to use its own statutory tools to combat serious problems like mobile cramming that have caused many millions of dollars of harm. For example, the FTC Act provides the FTC with the authority to seek equitable injunctive and monetary relief for consumers – including refunding money that was unfairly or unjustly taken, while the Communications Act gives the FCC authority to impose monetary forfeiture on a party that is paid to the U.S. Treasury.

5) Wouldn't repealing the communications common carrier exemption lead to potentially inconsistent enforcement activities by the FTC and the FCC, which could undermine effective guidance to industry and ultimately the protection of consumers of telecommunication services? Please explain your answer.

The FTC and the FCC coordinate with each other to make sure that we are sending consistent messages to the industry and maximizing the effective use of our resources. Further, in areas that cause serious consumer harm, such as mobile cramming, it is important that each agency has the ability to use the different tools in its arsenal to combat the problem, such as consumer redress for the FTC and civil penalties for the FCC. It is important to note that concurrent jurisdiction is common. For example, we share jurisdiction with the CFPB over a wide swath of industries. We coordinate by, for example, notifying each other of investigations and other activities to avoid "double-teaming" a particular target. The presence of two agencies acting to address serious consumer protection issues has worked well, providing "more cops on the beat." For example, just last month the FTC and the CFPB announced a joint federal and state law enforcement sweep, which targeted companies peddling fraudulent mortgage relief schemes to distressed homeowners. By combining resources, the agencies were able to engage in more robust enforcement in an area causing significant consumer injury. Similarly the two agencies coordinate with each other to provide guidance to industry. For example, in June 2013, the FTC and the CFPB co-hosted a roundtable to examine the flow of consumer data throughout the debt collection process. In a similar fashion, we also work cooperatively with the FDA and the Department of Justice in areas where we have concurrent jurisdiction.

6) The FTC's complaint in the T-Mobile case states that the FTC and the FCC have "concurrent enforcement jurisdiction over mobile telephone companies' billing and collection of third-party charges for non-telecommunications services," but does not cite to any authority for this statement. During the hearing, you stated that this authority is established by "relevant case law," but did not specify any cases.

Please provide citations to any and all statutes, regulations, and case law that you believe establish the FTC's authority, and explain why the FTC believes these cases, statutes, and regulations establish the FTC's authority to sue T-Mobile notwithstanding the common carrier exemption.

I expect this issue to be fully briefed in the *T-Mobile* litigation depending on the arguments raised by the defendant. In the interim, I am attaching the brief filed by the agency in *FTC v. Verity Int'l Ltd.*, 194 F. Supp. 2d 270 (S.D.N.Y. 2002) that discussed this issue. In that case, the court found that the FTC has jurisdiction over a billing aggregator placing charges on consumers' telephone bills, explaining that "the better considered authorities . . . agree that whether an entity is a common carrier for regulatory purposes depends on the particular activity at issue." *Id.* at 274-75; *aff'd* 443 F.3d 48 (2d Cir. 2006).

7) Two of your colleagues on the Commission, Commissioner Wright and Commissioner Ohlhausen, have indicated they believe that "the FTC's competencies as an antitrust enforcement and consumer protection agency, combined with the expertise it has

developed in matters related to the Internet and broadband access, position the FTC well to deal with the difficult legal, economic, and technological issues related to net neutrality.” Do you agree with this statement? Please explain your answer.

The issue of net neutrality raises a host of complicated legal, technical, and economic issues. We look forward to seeing how the FCC addresses them in its proceeding. While antitrust enforcement is vital to protecting a competitive marketplace, it is not always the most effective way to address policy issues in the economy. Sometimes the public interest is best protected through a combination of antitrust enforcement and well-designed regulation.