Citing an “Enforcement Gap,” FTC Seeks Rehearing En Banc of Dismissal of AT&T “Throttling” Case

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On October 13, 2016, the Federal Trade Commission (FTC) filed a petition in the U.S. Court of Appeals for the Ninth Circuit requesting a rehearing *en banc* of the court’s decision in the FTC’s case against AT&T alleging that the company dramatically reduced – or “throttled” – data speeds for certain customers on unlimited data plans once those customers had used a certain level of data. A three-judge panel for the Ninth Circuit determined in August 2016 that the case should be dismissed because AT&T was not subject to an FTC enforcement action due to the company’s *status* as a common carrier. As we noted in a previous blog post, this case could reset the jurisdictional boundaries between the FTC and the Federal Communications Commission (FCC) with respect to phone companies, broadband providers and other common carriers.

As expected, the FTC asked the Ninth Circuit to rehear the case *en banc*. The request, if granted by the court, would result in the full contingent of judges hearing the case, likely early next year. The FTC advances three primary arguments in support of rehearing, but the most interesting by far is its claim of a gap in consumer protection jurisdiction as a result of the ruling.

The FTC’s lead argument is that the decision allegedly “creates an enforcement gap” because “no other federal agency has the FTC’s breadth of authority to protect consumers from many unfair or deceptive practices across the economy and to obtain redress for consumer harm.” In support, the FTC argues that the FCC’s jurisdiction “is limited to matters ‘for and in connection with’ common-carrier service” and, unlike the FTC, the FCC cannot collect consumer redress and is subject to a one year statute of limitations. The FTC further argues that the Ninth Circuit panel’s status-based approach to determining FTC jurisdiction has wide-reaching implications for any company who can claim to be a “common carrier” in some aspect of its business to avoid enforcement actions for non-common-carriage activities. (We noted this open question in our previous post as well.) Such entities – which the FTC identified to include large cable companies, satellite service providers, internet companies and energy utilities – may manipulate their common carrier status to avoid FTC jurisdiction. Finally, the FTC claims that the ruling “threatens the FTC’s ability to enforce other important consumer protection statutes including the Children’s Online Privacy Protection Act, the Telemarketing and Consumer Fraud and Abuse Act, and the Restore Online Shoppers’ Confidence Act, and several others.”

Notably, the FTC’s position was previewed by FTC Chairwoman Edith Ramirez in her written testimony for an FTC oversight hearing before the Senate Committee on Commerce, Science and Transportation on September 27, 2016. As we predicted, Chairwoman Ramirez argued that the case

supported the FTC's long-time effort to repeal the common carrier exception, stating in part that following the Ninth Circuit's ruling, coupled with the FCC's 2015 decision to reclassify broadband Internet access as a common carriage service, "[a]ny company that has or acquires the status of a common carrier will be able to argue that it is immune from FTC enforcement against *any* of its lines of business by virtue of its common carrier status."

Whether the FCC agrees with the FTC's characterization of its jurisdiction is yet to be determined. Nevertheless, the fault line is clearly identified in the FTC's filing. We will continue to monitor this case and will post any new developments here.