

Ninth Circuit Decision in AT&T “Throttling” Case May Reset Boundaries Between FTC and FCC Jurisdiction

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On Monday, August 29, 2016, the Ninth Circuit Court of Appeals issued an [opinion](#) that may dramatically alter the boundaries between the Federal Trade Commission’s (FTC) and Federal Communications Commission’s (FCC) authority over phone companies, broadband providers, and other common carriers. The Ninth Circuit dismissed a case that the FTC brought against AT&T over its practices in connection with wireless data services provided to AT&T’s customers with unlimited data plans. The FTC had filed a complaint against AT&T for “throttling” the data usage of customers grandfathered into unlimited data plans. Once customers had used a certain level of data, AT&T would dramatically reduce their data speed, regardless of network congestion. The FTC asserted that AT&T’s imposition of the data speed restrictions was an “unfair act or practice,” and that AT&T’s failure to adequately disclose the policy was a “deceptive act or practice.”

The Ninth Circuit’s decision is the latest in a series of actions attempting to identify the jurisdiction over Internet access services and Internet-based services. As providers and regulators have struggled to identify the proper regulations applicable to such services, the Ninth Circuit’s decision could force significant shifts by both the FTC and FCC for at least a large segment of the industry.

Background

At issue before the Ninth Circuit was the scope of the FTC Act’s exemption of “common carriers” from the FTC’s authority. The FTC argued, and the trial court held, that the common carrier exemption only applied to the extent that the service in question is a common carrier service (i.e., an “activity-based” test that precluded FTC jurisdiction only where a common carrier is engaging in common carrier activities). Because the service that the FTC challenged (wireless broadband Internet access service (“BIAS”)) was not a common carrier service at the time that the FTC brought its action against AT&T, the trial court held AT&T was not engaging in common carrier activity and therefore the FTC had authority to bring its lawsuit.

AT&T appealed the decision, arguing that the FTC Act’s exemption of common carriers should be based on their status, and thus telecommunications service providers like itself are exempt from the FTC’s authority regardless of whether the activity at issue is a common carrier service.

The Ninth Circuit noted two things related to the dispute. First, the court noted that “it is undisputed that AT&T is and was a ‘common carrier[] subject to the Acts to regulate commerce’ for a substantial part of its activity.” Further, the court noted that, during the time period in question, AT&T’s mobile data service “was not identified and regulated by the FCC as a common carrier service” although,

since the [FCC's 2015 Open Internet Order](#), the FCC has classified the service as a common carrier service.

The Ninth Circuit sided with AT&T, and remanded the case for an entry of an order for dismissal. The court held that under the plain language of the statute, the exemption is based on a company's status and applies regardless of the activity at issue. The "literal reading of the words Congress selected," the court wrote, "simply does not comport with an activity-based approach [to the common carrier exemption]." The court compared the common carrier exemption to the other exemptions in the statute (for banks, savings and loan institutions, federal credit unions, air carriers and foreign air carriers) that are admitted by the FTC to be status-based, and to the exemption for meatpackers "insofar as they are subject to the Packers and Stockyards Act," which the court found to be activity-based. The court held that amendments enacted in 1958 to Section 5 - which added the "insofar as" language - indicated an activity-based exemption for that provision but affirmed status-based exemptions for the remainder "then and now."

Notably, the Ninth Circuit chose to address the status question, rather than addressing a more narrow issue of whether the FCC's 2015 reclassification of BIAS as a telecommunications service applied to AT&T's service retroactively.

Implications

The FTC issued a statement that it is "disappointed" and "considering [its] options," but it is unclear whether it will appeal the ruling to the Supreme Court. It is worth noting that, although the Ninth Circuit did not discuss the decisions, this is the third time that a court of appeals has faced status-based arguments relating to the common carrier exemption. The Seventh Circuit's 1977 decision in *U.S. v. Miller*, and the Second Circuit's 2006 decision in *FTC v. Verity Int'l, Ltd.*, both involved entities claiming common carrier status, although neither decision brought finality to the question. If the FTC pursues the issue further, industry and practitioners could receive welcome guidance on the issue.

More broadly, the FTC has openly called for the end of the common carrier exemption in the past few years. This decision may add fuel to the agency's efforts in that regard.

As is, the decision makes it more difficult for the FTC to bring an action against a company that can claim to be a common carrier. The Ninth Circuit's decision noted that AT&T unquestionably was a common carrier "for a substantial part of its activity" and at one point distinguished a case, noting that AT&T's status "is not based on its acquisition of some minor division unrelated to the company's core activities." Nevertheless, the court's analysis leaves open the possibility that even providing only a small amount of common carrier service may be enough to qualify all of a company's activities for the common carrier exemption.

On the FCC side, there are equally broad questions raised by the decision. The FCC recently has [broadly construed its own authority under Section 201\(b\)](#), to a fair degree of controversy, to address practices of common carriers "for or in connection with" their services, such as advertising and billing. Presumably, these efforts will continue after the Ninth Circuit's ruling. The Ninth Circuit's ruling, however, may encourage the FCC to fill any potential gap in coverage by taking a broader view of its own authority to regulate non-common carrier services that common carriers offer to consumers. This could have significant implications for a number of ongoing FCC proceedings, including a proceeding to overhaul the [FCC's privacy rules](#) after the Open Internet Order and requests to classify [SMS messaging](#) and interconnected voice-over-Internet-Protocol (VoIP) service as telecommunications services subject to common carrier regulation. This also might color the FCC's approach to regulation of over-the-top services provided by non-carrier entities using

telecommunications or Internet services.

Time will tell how this plays out, but for now, the Ninth Circuit appears to have significantly reset the boundaries between the agencies' jurisdictions. AT&T is not off the hook yet, however, as it faces a [parallel action from the FCC](#), which has issued a Notice of Apparent Liability to AT&T, alleging that its disclosures in connection with its unlimited data plans violated the FCC's "transparency" rules. The FCC proposed \$100 million in forfeitures for the violation, which sparked vigorous dissent by the two Republican commissioners and was opposed by AT&T in a strongly-worded response. The FCC forfeiture proceeding remains pending.