

# “Throttled” Motion to Dismiss; FTC Case Against AT&T for “Unlimited” Data Promises Continues

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On March 31<sup>st</sup>, a federal judge in California District Court issued an [Order](#) denying AT&T's motion to dismiss the Federal Trade Commission's (FTC's) lawsuit against the company concerning its advertising and business practices for its mobile wireless data plans. This case presented an increasingly common question concerning the dividing line between jurisdiction of the FTC and the Federal Communications Commission ("FCC") over activities of telecommunications companies. With the order, the FTC's case against AT&T will now move forward on the merits.

The [FTC initiated the suit in October 2014](#), accusing AT&T of misleading millions of its customers by marketing and selling “unlimited” data plans, while reducing data speeds for certain unlimited plan customers by up to 90 percent through a practice known as “throttling.” The FTC alleged that AT&T failed to adequately disclose to its customers who purchased unlimited data plans that, once a customer uses a certain amount of data (two gigabytes, in some cases) in a given billing cycle, AT&T reduces, or “throttles,” the customer's data speeds so that popular smartphone applications such as GPS navigation and streaming video fail to function as intended. The FTC asserts that AT&T has been throttling data speeds for unlimited data customers since 2011, and has throttled at least 3.5 million customers a total of more than 25 million times.

The FTC further alleged that AT&T's practices were unfair under Section 5 of the FTC Act because AT&T changed the terms of customers' unlimited data plans while customers were still under contract, and then charged early termination fees (ETFs) to customers who attempted to cancel their unlimited plan as a result of the reduced data speeds.

AT&T denied the allegations, arguing its practices are not uncommon for the industry and it has been transparent with customers from the beginning. It filed a motion to dismiss the case, claiming that AT&T's business is regulated as a common carrier under the Communications Act and therefore is exempt from FTC jurisdiction.

Unfortunately for AT&T, Judge Edward Chen disagreed. The Order denying AT&T's motion stated, “Contrary to what AT&T argues, the common carrier exception applies only where the entity has the status of common carrier and is actually engaging in common carrier activity.” The court sided with the FTC's “activity-based” view of its jurisdiction over common carriers. (AT&T had argued for an “entity-based” test of jurisdiction).

This case is further complicated by the FCC's March 12 [Open Internet Order](#), released the same day as AT&T and FTC's oral arguments on the motion, which classifies mobile broadband internet access service as common carriage service under Title II of the Communications Act. AT&T argued that once the Title II reclassification takes effect, the FTC will no longer have jurisdiction. Again, the California court disagreed, finding that the FCC's Order does not prevent the FTC from pursuing past actions that were under its jurisdiction before the Title II reclassification.

This, of course, is not the end of the throttling issue. AT&T has vowed to appeal the district court's ruling. Moreover, AT&T claims that the FCC is investigating the same activity and may proceed with its own case. But for now, the FTC claim will proceed to the merits of AT&T's activities.