

Communications Daily

Status- vs. Activity-Based?

9th Circuit Tosses FTC Suit in AT&T Data Throttling Case With Possible Ramifications

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The 9th U.S. Circuit Court of Appeals tossed an FTC lawsuit against AT&T Mobility, saying the agency had no jurisdiction over the telco in a data throttling case -- a decision that observers said could have more ramifications for the FTC's authority. The three-judge panel Monday unanimously granted AT&T's motion to dismiss, reversing a decision by Judge Edward Chen with the U.S. District Court for the Northern District of California. The unanimous decision said Section 5 of the FTC Act doesn't let the agency take enforcement actions against common carriers. Last year's FCC net neutrality order deemed broadband to be an information service, activating the FTC common-carrier exemption.

The FTC is "disappointed with the ruling" and is "considering our options for moving forward," said a spokesman. AT&T "is pleased with the decision," said a spokesman.

"The central issue before us is whether AT&T is covered by section 5, which exempts, among others, 'common carriers subject to the Acts to regulate commerce,'" wrote Circuit Judge Richard Clifton in the opinion (in Pacer). "We conclude that AT&T is excluded from the coverage of section 5, and that the FTC's claims cannot be maintained." Circuit Judge Sandra Ikuta and District Judge William Hayes with U.S. District Court for the Southern District of California also heard the case.

The FTC brought the complaint against AT&T in October 2014, saying the carrier didn't properly tell smartphone customers it was reducing their data speeds while charging them for "unlimited" data plans. The commission said AT&T violated Section 5 for unfair and deceptive practices. AT&T filed a motion to dismiss the complaint, saying its status as a common carrier exempted it from liability under Section 5. The FTC said the company wasn't exempt because its mobile data service is a non-common carrier service, the opinion said.

During this time, the FCC reclassified mobile data service from a noncommon carrier service to a common-carrier service, the court noted. The 9th Circuit said AT&T argued to the District Court that the prospective FCC reclassification order "stripped the FTC of authority to maintain its claim against AT&T, even as to past violations." The opinion said it's "undisputed" that AT&T is a common carrier, and the FCC didn't identify and

regulate the company's mobile data service as a common-carrier service before reclassification.

Section 5 doesn't contain an exemption for common carriers, but Clifton said the question is whether it's "status-based," meaning is an entity exempt from regulation as long as it is a common carrier (which is what AT&T argued), or "activity-based," meaning an entity with a common carrier status is exempt when its activity that the FTC wants to regulate is a common carrier activity (the commission's argument). Clifton sided with AT&T's argument because the "plain language ... casts the exemption in terms of status, contrary to the FTC's position." He said "a literal reading of the words Congress selected simply does not comport with an activity-based approach." He also wrote Congress "would have been more precise in its language if it intended the FTC to retain regulatory authority over a common carrier's non-common carrier activity" given the past judicial interpretations.

Perkins Coie attorney Janis Kestenbaum, former aide to Chairwoman Edith Ramirez at the FTC, said the ruling is a "very significant loss" for the commission with "potentially ... far reaching ramifications" for its authority. When the FCC reclassified broadband service as a common-carrier activity, it divested the FTC of authority over internet service, she said. "But this decision takes that a step further and says, 'If you are an entity providing internet service, broadband service, you are a common carrier, you are simply outside the realm of the FTC,'" said Kestenbaum. "In all your activities no matter what you're doing whether it is a provision of common carrier service or something else, you fall outside the FTC's jurisdiction."

For example, if the FTC wants to allege AT&T is making deceptive statements about some of its items for sale at its store, "under the logic of this ruling, the FTC does not have the ability to sue AT&T," said Kestenbaum. "That's how I read this ruling." If companies currently under FTC jurisdiction offer some common-carrier service as a piece of what they do in the future, she said, the ruling raises the question of whether they would fall outside the trade commission's jurisdiction, she said.

"Today's decision may create a significant gap in federal consumer protection law," said TechFreedom President Berin Szoka in an emailed statement. "This is just another unintended consequence of the FCC's 2015 reclassification of broadband." The FCC made assurances it would coordinate with the FTC that would continue to police broadband providers' non-common carrier activities, but Szoka said the decision "proves the FCC wrong. Reclassifying broadband means the FTC can't police any practices of common carriers -- because the exemption in the FTC Act hinges on a company's legal status, not the nature of its activities." He said the "best solution" is to repeal the common-carrier exemption, which the FTC has long sought. "We'd support that, and the idea has had bipartisan support for a decade, but there's no way it's going

to pass on its own," he added, meaning it would need to be part of a broader legislative package.

Cowen & Co. analyst Paul Gallant wrote in a note that AT&T still can throttle regardless of future FCC action. "Both the FTC and FCC's claims were based on failure to adequately inform consumers of throttling practices," he wrote. "There is no claim that the throttling itself violates the core of the FCC's Open Internet rules relating to unreasonable favoring or disfavoring of specific types of traffic. So even if the FCC does take final action in this case, we believe AT&T can cure any defective notice and continue throttling unlimited data users who exceed a certain usage level in a given month."

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