

Ninth Circuit Removes FTC From The Beat: Agency Lacks Authority To Police Common Carriers Engaged In Non-Common Carrier Activities

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Friday, September 9, 2016

The Federal Communications Commission (“FCC”) asserted broad regulatory authority over the Internet and broadband Internet service providers when it reclassified Internet access service as a “common carrier” service under Title II of the Communications Act of 1934 in its 2015 Net Neutrality Order. One of the many important questions left unanswered by the FCC’s reclassification decision was whether and to what extent the Federal Trade Commission (“FTC”) retained authority under Section 5 of the FTC Act to prohibit deceptive or unfair acts and practices by Internet service providers, in light of Section 5’s exemption of “common carriers” subject to the Communications Act.

In the 15 months since the FCC’s Net Neutrality rules took effect, the FCC and FTC have publicly jockeyed for enforcement authority in the communications industry, including by [bringing parallel investigations and enforcement actions](#). Both agencies, for example, brought enforcement actions against a mobile phone company related to its practice of “throttling” the mobile data service of its customers with unlimited mobile data plans if they used more than a certain amount of data in a given billing cycle. The FTC brought its action in [federal court in California](#), while the FCC’s Enforcement Bureau issued a [notice of apparent liability](#) charging that the

company's practice violated the agency's 2010 Open Internet Transparency Rule and seeking a forfeiture of \$100 million.

The agencies ultimately reached a [Memorandum of Understanding](#) ("MOU") in late 2015, under which the FCC acknowledged the FTC's long-standing assertion of authority under Section 5 to address "non-common carrier activities engaged in by common carriers." The agencies further agreed to work cooperatively to protect consumers and the public interest.

The U.S. Court of Appeals for the Ninth Circuit undermined this dual cooperative role last week, however, when it issued an [Opinion](#) rejecting the FTC's "activity-based" interpretation of Section 5 and effectively ordering the FTC off the beat of regulating common carriers. In the underlying suit, the FTC alleged that the mobile phone company's practice of throttling mobile data from 2011-2014 violated Section 5 of the FTC Act. From 2011-2014, the company's mobile data service was a non-common carrier "information" service under the Communications Act. The company moved to dismiss the FTC's suit, arguing that it was barred by Section 5's common carrier exception, based on the company's status as a common carrier with respect to its mobile voice services.

The U.S. District Court for the Northern District of California denied the company's motion to dismiss, agreeing with the FTC that Section 5's common carrier exemption applied only "where the entity has the status of a common carrier and is actually engaging in common carrier activity." Because the company's mobile data service was not a common carrier service from 2011-2014, and the company was not engaged in a common carrier activity when it throttled mobile data services during that period, the District Court allowed the FTC to press forward with its claims under Section 5.

Reversing the District Court, the Ninth Circuit held that Section 5's common carrier exemption is status-based, not activity-based. The Ninth Circuit grounded its holding in the plain language of Section 5. The statutory language exempts, among other entities, "common carriers subject to the Acts to regulate commerce," without "any language suggesting that the activities" of these entities affects the exemption's application. If an entity acquires the "status" of a common carrier or some other exempt business under Section 5, then the FTC is without jurisdiction to enforce the FTC Act's consumer protection provisions under Section 5—even if the entity engages in extensive non-common carrier activities.

The Ninth Circuit's ruling has significant and potentially far-reaching implications for the FTC's efforts to police communications companies, particularly in light of the FCC's reclassification of broadband Internet access service as a common carrier service. Many communications companies provide a mix of common carrier services (e.g., mobile voice or broadband Internet access) and non-common carrier services (e.g., video programming, email hosting, interconnected voice over Internet Protocol, home security/monitoring, "smart" home services, etc.). Prior to the Ninth Circuit's ruling, the FTC had long invoked authority under Section 5 to police the non-common carrier practices of communications companies, focusing especially on high-profile and cutting-edge issues related to privacy and data security. Now, at least in the Ninth Circuit, the FTC must either stand down, or locate other authority for its enforcement actions. Given the implications of this decision, the FTC likely

will seek further review by the entire Ninth Circuit and/or the United States Supreme Court.

The decision also bolsters the FCC's assertion of primary authority over the common carrier and non-common carrier practices of communications companies. It may harden the agency's efforts to police all aspects of broadband Internet service providers' conduct, particularly with respect to privacy and cybersecurity (discussed [here](#)). And it may embolden the agency's Enforcement Bureau to continue pursuing actions related to the non-common carrier practices of communications companies, to the extent those practices implicate areas over which the Commission has jurisdiction. Common carriers providing non-common carrier services could potentially be held to different (and likely stricter and less predictable) standards by the FCC than their non-common carrier competitors subject to the FTC's jurisdiction. For example, the FCC, in jumping into the cybersecurity enforcement pond in the last couple of years, has imposed substantially stricter penalties and fines than the FTC has imposed in similar situations.

The Ninth Circuit's ruling may have important implications for how communications companies offer services to the public.

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