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Ninth Circuit Rescues FTC Authority Over Common Carriers’ Non-Carrier Services

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The US Court of Appeals for the Ninth Circuit this week issued an en banc decision reversing an earlier Ninth Circuit panel order that had found the Federal Trade Commission has no authority over "common carriers," including telecom companies providing standard telephone and wireless voice services, even when offering non-common carrier services.

The 11-judge en banc court, in *FTC v. AT&T Mobility*, concluded that the FTC has jurisdiction – and so can enforce antitrust and consumer protection law – against non-common carrier activities of common carriers.

This decision has significant implications for enforcement against telephone, wireless and internet businesses and for the potential fate of the FCC's recent Restoring Internet Freedom order on its "network neutrality" regime.

The three-judge Ninth Circuit panel that originally heard the case held the provision of the FTC Act that exempts common carriers from the FTC's jurisdiction is based on a company's status as a common carrier, not based on the specific services provided. The en banc panel disagreed, stating the FTC Act and the history of the relevant provisions of the act, demonstrate the common carrier exemption is activity, not status, based.

The en banc court also relied on earlier court decisions holding that an entity can be a common carrier for some purposes and not for others.

The *AT&T Mobility* case began in 2007 when the FTC accused AT&T of arbitrarily throttling data to hurt cellphone customers with unlimited plans, conduct AT&T argued the FTC had no authority over because of its status as a common carrier. The issue before the Ninth Circuit quickly evolved into whether the FTC or the Federal Communications Commission has regulatory authority over telecommunications companies.

This decision clarifies that both the FTC and the FCC have a role in regulating common carriers and ensures that non-carrier activities don't escape scrutiny, which could have been the case under the Ninth Circuit's original panel decision.

The panel decision could have left the FCC as the sole watchdog over common carriers and left the non-common carrier activities of telecom providers, such as website operation, video distribution, interactive entertainment services and devices, home security and the like, subject to neither the FTC's nor FCC's authority.

The en banc panel reasoned, "New technologies have spawned new regulatory challenges. A phone company is no longer just a phone company … reaffirming FTC jurisdiction over activities that fall outside of common-carrier services avoids regulatory gaps and provides consistency and predictability in regulatory enforcement."

While there still may be questions about what counts as common carrier activity and so where the FCC's authority ends and the FTC's authority begins, this decision affirms that at least one of the two agencies has authority over all of a common carrier's business.

"I welcome the Ninth Circuit's ruling as good news for consumers," Acting FTC Chairman Maureen K. Ohlhausen said after the Ninth Circuit decision was announced. "It ensures that the FTC can and will continue to play its vital role in safeguarding consumer interests including privacy protection, as well as stopping anticompetitive market behavior."

This decision also may have an impact on the review of the FCC's Restoring Internet Freedom order, which will eliminate most of the FCC's network neutrality rules. The FCC's order relied on the FTC's authority to act against unfair and deceptive trade practices to support its conclusion that there would be no harm to eliminating existing

rules and delegated enforcement of the requirements of its new rules to the FTC. If the Ninth Circuit had concluded that the FTC had no authority over common carriers, the FCC could have faced a more difficult task in defending its decision to cede power to the FTC.

It is possible that AT&T Mobility could appeal this decision to the Supreme Court, but it is far from certain that the court would hear the case.

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