



Net Neutrality: Will the FTC Have Authority Over Broadband Service Providers?

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The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), sitting en banc, recently [decided](#) *FTC v. AT&T Mobility*, which may affect the ability of the Federal Trade Commission (FTC) to police certain [broadband Internet access service](#) (BIAS) providers in the near future. Specifically, the court held that although common carrier services (e.g., landline and wireless telephone services) are generally exempted from FTC oversight, if an entity provides *both* common carrier and non-common-carrier services, the FTC is not precluded from regulating that entity's non-common-carrier services.

The ruling has ramifications in light of the recent [decision](#) by the Federal Communications Commission (FCC) repealing so-called “net neutrality” rules. The new FCC rule would classify BIAS as an [“information service”](#) largely unregulated by the FCC. If the Ninth Circuit had held that the FTC lacks jurisdiction over an entity that provides common carrier services, it would have resulted in the FTC having jurisdiction over some BIAS providers (those that do not provide common carrier services), but lacking jurisdiction over others (those that also provide common carrier services). The Ninth Circuit's decision clarifies that, when the FCC's order goes into effect later this year, the FTC will have jurisdiction over BIAS providers that also provide common carrier services.

Background

The FCC has [robust authority](#) to regulate telecommunications services, which are [“common carrier”](#) services under the Communications Act of 1934, as amended (Communications Act). The FCC's authority to regulate information services (e.g., email, search engines, or video streaming services) is more [limited](#). The FCC's [“Restoring Internet Freedom” Order \(2017 Order\)](#) would change the classification of BIAS from telecommunications services to information services, effectively narrowing the FCC's authority over BIAS.

The FTC, on the other hand, has [broad authority](#) to oversee the trade practices of entities across numerous market sectors under [Section 5 of the Federal Trade Commission Act](#) (FTC Act). However, certain entities and activities are exempted from Section 5's coverage. These exemptions include one for common carriers regulated either under the Communications Act, such as landline or wireless telephone services, or the Interstate Commerce Act (ICA), which addresses railroads.

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The dispute in *AT&T Mobility* centered on whether Section 5's exemption for "common carriers" is *status-based*, meaning it applies to all the activities of entities that are common carriers under the Communications Act and the ICA, or *activity-based*, meaning the exemption applies only insofar as those entities are engaged in the common carrier services covered by those laws. This question is particularly relevant to the regulation of broadband services once the FCC's 2017 Order takes effect because many BIAS providers, like AT&T and Verizon, also provide common carrier services, such as landline and wireless telephone service. [Some observed](#) that, if the FTC could not enforce Section 5 against the non-common carrier activities of entities that also provide common carrier services, the FCC decision to classify BIAS as a non-common carrier service could open a "regulatory gap," where neither the FTC nor the FCC would police the behavior of BIAS providers that are also common carriers. The Ninth Circuit's [decision](#), if it is not appealed, opens the door to FTC enforcement of Section 5 against BIAS providers for non-common-carrier services that they provide.

FTC v. AT&T Mobility

In reaching its decision that Section 5's common carrier exemption is activity-based, the Ninth Circuit relied primarily on the text of the statute, but also found support in the legislative history of the FTC Act, historical judicial interpretations of common carriers, and the opinions of the FCC and FTC on the matter.

Beginning with the text of the statute, the court [noted](#) that certain types of institutions (e.g., banks, federal credit unions) are exempted under Section 5 if they are "described" in a specified provision of federal law. The court construed this language to mean that such institutions are wholly exempted from Section 5, regardless of the particular activities in which they are engaged. On the other hand, Section 5 exempts common carriers when they are "subject" to the Communications Act or the ICA. The Ninth Circuit believed this difference in phraseology was significant, in that Section 5 was not intended to provide a blanket exemption for entities that are common carriers, but only for those activities of common carriers that are "subject" to regulation under the Communications Act or ICA.

To support its conclusion, the court also examined the [legislative history](#) of Section 5, which the court described as indicating that the FTC Act is a remedial statute, deliberately designed to confer broad enforcement powers on the FTC. Additionally, the court found that statements made by some Members of Congress when debating the FTC Act illuminated the intended scope of the common carrier exemption. In particular, the [court pointed to](#) a statement by the floor manager of the House bill that eventually became the FTC Act, which claimed that "where a railroad company engages in work outside that of a [common] carrier[,] ... such work ought to come within the scope of [the FTC] for investigation."

The court also [examined](#) previous [judicial interpretations](#) of the term common carrier and concluded it buttressed the court's interpretation of Section 5's common carrier exemption as activity-based. Although the FTC Act does not define the term, according to the [common-law understanding](#), common carriers are entities compelled to offer their services on a non-discriminatory basis and at reasonable prices, among other requirements. Prior courts had ruled that [entities](#) offering services subject to common carrier obligations could be common carriers for some purposes, but not others. "In other words, being a common carrier entity was [not a unitary status](#) for regulatory purposes."

Finally, the court acknowledged the [long-standing interpretations of both the FTC and the FCC, in accordance with judicial precedent](#), that Section 5's common carrier exemption is activity-based. The court further declared that construing the common carrier exemption as activity-based "[accords with common sense](#)," because such a construction would not create a regulatory gap where certain communications entities are regulated by neither the FCC nor the FTC. Under [an activity-based interpretation](#), the FCC maintains full authority over entities' common carrier communications services, while the FTC may police the non-common carrier activities of those entities. Furthermore, to the extent that the agencies' authorities over non-common carrier services might overlap, the agencies had reached a

[Memorandum of Understanding](#) outlining the contours of their concurrent jurisdiction. “Ultimately,” the court [summarized](#), “the structure of the statute and its contemporaneous legislative history, coupled with more than a century of judicial interpretation, align with the preferred reading and expertise of the two most important regulators with an interest in” the case.

Potential Considerations for Congress

As noted earlier, *FTC v. AT&T Mobility* could have important ramifications for broadband services after the FCC’s order repealing its net neutrality rules becomes effective. The Ninth Circuit’s ruling endorses the FTC’s ability to regulate BIAS providers via Section 5 of the FTC Act, notwithstanding those providers may also engage in common carrier services that are regulated by the FCC. While the decision means there will be no “regulatory gap” between the FTC and FCC’s authorities over BIAS providers that also provide common carrier services, Congress may consider legislation addressing the respective roles and authorities of the two agencies.

As the recent repeal of the FCC’s net neutrality rule illustrates, the FTC and FCC have some degree of discretion in how they choose to exercise and coordinate their respective authorities. Indeed, if the FCC’s 2017 Order goes into effect, the regulatory status of BIAS under the Communications Act will have changed twice in three years. Considering these recent changes, and the potential for future changes in the status of BIAS, some Members [have advocated](#) for statutory clarification as to how BIAS providers should be regulated, though disagreement may exist as to which federal agency should have primary oversight responsibilities. In the wake of the FCC’s 2017 Order, Representative Marsha Blackburn, Chairwoman of the House Energy and Commerce Committee, introduced a [bill](#) which would statutorily define the scope of the FCC’s authority over BIAS. The bill would not alter the FTC’s jurisdiction or authority. [Commentators](#) noted that the bill may open the door to legislative negotiations. Senator John Kennedy has [introduced](#) a companion to the House bill in the Senate.

Additionally, a number of Members of the House and Senate are co-sponsoring [joint resolutions under the Congressional Review Act](#) that would disapprove of the FCC’s 2017 Order classifying BIAS as a non-common carrier service. If enacted, broadband services would remain common carrier services subject to the Communications Act and exempt from FTC jurisdiction.

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