
No. _____

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Respondent,

v.

AT&T MOBILITY LLC, a limited liability company,

Defendant-Petitioner.

On Petition for Permission To Appeal from the
United States District Court for the Northern District of California
The Honorable Edward M. Chen, Case No. 14-CV-04785-EMC

**AT&T MOBILITY LLC'S UNOPPOSED PETITION FOR
INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**

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May 26, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Petitioner AT&T Mobility LLC submits the following corporate disclosure statement:

AT&T Mobility LLC is a direct or indirect wholly owned subsidiary of AT&T Inc. No publicly held corporation owns 10% or more of AT&T Inc.'s stock.

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INTRODUCTION

“Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit.”

United States v. Woodbury, 263 F.2d 784, 787 (9th Cir. 1959). That description fits this case to a T.

In October 2014, the Federal Trade Commission (“FTC”) sued AT&T Mobility LLC (“AT&T”) in the Northern District of California alleging that one of AT&T’s network management practices in its wireless network violated Section 5 of the FTC Act, 15 U.S.C. § 45. AT&T moved to dismiss the complaint under Section 5’s exception to the FTC’s authority for “common carriers subject to” the Communications Act. Specifically, AT&T argued that (1) AT&T’s status as a common carrier subject to the Communications Act triggers the exemption, and (2) under any reading of Section 5, the Federal Communications Commission’s (“FCC”) recent classification of mobile broadband as common carriage deprives the FTC of any authority to maintain its action in the district court. While the district court acknowledged conflicting views on the proper interpretation of Section 5, it nevertheless denied AT&T’s motion to dismiss. *FTC v. AT&T Mobility LLC*, --- F. Supp. 3d ---, 2015 WL 1452470 (N.D. Cal. Mar. 31, 2015) (“Denial Order”), attached hereto as Exhibit A. The district court subsequently

certified its Denial Order for immediate appeal pursuant to 28 U.S.C. § 1292(b). Order Granting Def.’s Mot. To Certify, *FTC v. AT&T Mobility LLC*, No. 14-cv-04785-EMC, ECF No. 68 (N.D. Cal. May 15, 2015) (“Certification Order”), attached hereto as Exhibit B.¹

In its Denial Order, the district court decided two controlling questions of law. In its Certification Order, the court concluded that reversal by this Court on either question would require dismissal of the case, thus sparing the parties from wasting resources on lengthy, expensive, and potentially unnecessary litigation. The court further explained that both questions present substantial grounds for difference of opinion. “As to the first legal issue, there is, in effect, a dispute between other circuit courts on the question and the Ninth Circuit has not addressed the issue” Certification Order at 2 (citing conflicting decisions) (footnote omitted). As to the second, the court explained that it “raises novel and difficult questions” about which reasonable jurists might disagree. *Id.*

The district court was correct in its Certification Order. Given the posture of this case, the scope of discovery and trial, and the difficulty of the questions presented, there is, in the district court’s words, “a potentially huge benefit of getting a definitive ruling” from this Court. Tr. of Hearing on § 1292(b) Mot. at 11, *FTC v. AT&T Mobility LLC*, ECF No. 71 (filed May 16, 2015) (“Hearing

¹ Throughout this brief, page references to the Denial and Certification Orders refer to the page numbers of the attached slip copies.

Tr.”). This Court should accept this appeal and clarify the scope of the FTC’s authority under Section 5 of the FTC Act. In addition, AT&T is authorized to state that the FTC does not oppose this petition for interlocutory appeal.

BACKGROUND

A. Starting in 2007, technological changes, including the introduction of the iPhone, led to extraordinary increases in the consumption of data on mobile phones. Between 2007 and 2011, data usage on AT&T’s network increased 20,000 percent. This skyrocketing increase in data consumption stretched the capacity of AT&T’s wireless network beyond its limits, causing dropped calls, unavailable cell sites, and frustration for AT&T’s customers.

AT&T took a number of steps to address the resource constraints it faced, including discontinuing the sale to new customers of its “unlimited” data plans, under which customers pay a single monthly price no matter what volume of data they use. AT&T, however, made the customer-friendly decision to allow existing unlimited-plan subscribers to retain and renew their plans, subject to terms of service that reserved to AT&T the right to implement reasonable network management programs. For users that retained the unlimited plan, in 2011, AT&T also implemented a program that reduced the data speed at which a small portion of its highest-volume unlimited-plan users could consume mobile data on AT&T’s wireless network (the “maximum bit rate” or “MBR” program). After those

high-volume customers reached certain usage thresholds during the monthly billing periods, their speeds were reduced for the remainder of the period and were then restored in the next monthly billing period.

B. In October 2014, the FTC filed a complaint in the district court alleging that AT&T's MBR program violates Section 5 of the FTC Act. AT&T filed a motion to dismiss, arguing that the FTC lacked the authority to bring suit under Section 5's "common carrier" exception. Section 5 of the FTC Act provides:

The [FTC] is hereby empowered and directed to prevent persons, partnerships, or corporations, *except* banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, *common carriers subject to the Acts to regulate commerce*,^[2] air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S.C. § 45(a)(2) (emphases, first set of brackets, and bracketed footnote added).

Although mobile data was not classified as a common-carriage service at the time MBR was first implemented, AT&T is and always has been a "common carrier" by virtue of its mobile voice service, *see* Denial Order at 6. Moreover, its

² The "Acts to regulate commerce" mentioned in Section 5 include the Communications Act. 15 U.S.C. § 44.

entire mobile phone business, *including* its mobile data services, has at all relevant times been “subject to” FCC regulation under the Communications Act.

C. In addition to its authority over common carriers, the FCC has had broad authority to regulate mobile data providers under Title III of the Communications Act. *See Verizon v. FCC*, 740 F.3d 623, 636-42 (D.C. Cir. 2014). Hence, in 2010, the FCC adopted rules specifically regulating mobile data and network management practices. Report and Order, *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010), *vacated in part*, *Verizon v. FCC*, 740 F.3d 623. These rules imposed, *inter alia*, transparency and disclosure regulations, *id.* ¶ 97, and made specific allowances for “reasonable network management,” including “provid[ing] more bandwidth to subscribers that have used the network less over some preceding period of time,” *id.* ¶ 73.

Pursuant to its authority as the government agency in charge of regulating mobile data, the FCC has been investigating whether AT&T’s MBR program complied with the FCC’s 2010 rules. AT&T has recently learned that the FCC expects to issue, as early as next week, a Notice of Apparent Liability against, and seeking statutory forfeitures from, AT&T.

D. Furthermore, as a result of an FCC decision earlier this year, as of June 12, 2015, AT&T’s data services will be regulated by that agency, along with its voice services, as common-carriage services under Title II of the

Communications Act. *See* Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24, 2015 WL 1120110 (rel. Mar. 12, 2015) (“*Reclassification Order*”); 80 Fed. Reg. 19,738 (Apr. 13, 2015) (announcing the reclassification of mobile broadband effective June 12, 2015). Under the *Reclassification Order*, AT&T’s mobile data services will be subject to enhanced FCC regulations grounded in the traditional obligations of a common carrier. Moreover, AT&T will be – by virtue of its status *and* with respect to the mobile data services at issue in this case – a common carrier subject to common-carrier regulation under the Communications Act.

E. AT&T made two primary arguments supporting dismissal. *First*, AT&T argued that the common-carrier exemption in Section 5 is triggered by an entity’s *status* as a common carrier, not whether the specific activities that entity undertakes in a particular case are common carriage.

The text, structure, history, and purpose of the FTC Act indicate that all but one of Section 5’s exceptions operate on the basis of status. Section 5’s text and structure define the FTC’s jurisdiction by reference to specific entities – namely, “persons, partnerships, or corporations, *except*” for certain specific entities, including “common carriers subject to the [Communications Act].” 15 U.S.C. § 45(a)(2) (emphasis added). And Section 5’s legislative history reveals that Congress considered and *rejected* an activity-based exception, showing its

selection of a status-based exception to be deliberate.³ Indeed, the one time Congress wanted to create an activity-based exception, it did so clearly and specifically, by amending the Packers and Stockyards Act exemption – itself formerly cast in terms of status – to exempt companies only “*insofar as they are subject to the Packers and Stockyards Act.*”⁴

Several cases have confirmed that Section 5’s exceptions are status-based. *See, e.g., FTC v. Miller*, 549 F.2d 452, 455 (7th Cir. 1977); *National Fed’n of Blind v. FTC*, 303 F. Supp. 2d 707, 714-15 (D. Md. 2004), *aff’d*, 420 F.3d 331 (4th Cir. 2005); *FTC v. CompuCredit Corp.*, No. 1:08-cv-1976, 2008 WL 8762850, at *4 (N.D. Ga. Oct. 8, 2008). Because AT&T has the status of a common carrier, and because AT&T has at all times been subject to active (indeed, intense) regulation under the Communications Act, AT&T argued that the exemption bars the FTC’s suit.

Second, AT&T argued that, even if the common-carrier exception is activities-based (as the FTC urged), dismissal would be required under the *Reclassification Order*. Congress “empowered” the FTC to “prevent” “persons,

³ *See To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate and Foreign Commerce, 75th Cong. 23, 25 (1937) (contemplating statutory language excepting common carriers “only in respect of their common-carrier operations”) (emphasis added).*

⁴ Amendments to Packers and Stockyards Act of 1921, Pub. L. No. 85-909, § 3, 72 Stat. 1749, 1750 (1958).

partnerships, or corporations, *except . . . common carriers,*” from violating Section 5. 15 U.S.C. § 45(a)(2) (emphasis added). As of June 12, when AT&T is unquestionably a common carrier under Section 5, the FTC will not be “empowered” to do anything with respect to AT&T, including maintain the current lawsuit.

F. The district court denied the motion to dismiss on two grounds. First, the court held “that [Section 5] can be applied to an entity that has the status of a common carrier.” Denial Order at 19. The court acknowledged the contrary decision in *FTC v. Miller*, 549 F.2d 452, which held that Section 5’s exceptions are status-based, but found *Miller*’s analysis “not binding” and “not persuasive.” Denial Order at 15. Instead, it found “more persuasive the reasoning of” *FTC v. Verity International*, 194 F. Supp. 2d 270 (S.D.N.Y. 2002), and an additional “observation” by the Second Circuit in *Verity* on appeal, that Section 5’s exemptions are activities-based. Denial Order at 16.

The district court decided the second issue – whether the FCC’s *Reclassification Order*, once effective, will deprive the FTC of power to pursue this litigation – under principles of retroactivity, as urged by the FTC. The court held that the FTC’s “substantive rights” would be impaired if the *Reclassification Order* were interpreted to divest the FTC of its authority to litigate this case. *Id.* at 21. The court did not address AT&T’s argument that a retroactivity analysis

was not necessary because, as a matter of administrative law, the *Reclassification Order* renders mobile data subject to the common-carrier exception and thus terminates the FTC's *present* authority over AT&T.

On May 15, 2015, the court certified its Denial Order for immediate appeal. The court explained that “there is no real dispute that the two issues identified by AT&T are controlling questions of law and that an immediate appeal may materially advance the ultimate termination of the litigation.” Certification Order at 2. The court further explained, citing *Miller* and *Verity*, that courts disagree over the proper interpretation of Section 5, “which is sufficient to establish a substantial ground for difference of opinion.” *Id.* As to the effect of the *Reclassification Order*, the court acknowledged that it raises “novel and difficult questions of first impression.” *Id.* AT&T now respectfully presents this Unopposed Petition for Interlocutory Appeal.

QUESTIONS PRESENTED

1. Whether the exception to the FTC's authority for “common carriers subject to the Acts to regulate commerce,” 15 U.S.C. § 45(a)(2), is triggered by the status of the entity in question; and
2. Whether, in light of the *Reclassification Order*, the FTC is no longer “empowered,” 15 U.S.C. § 45(a)(2), to maintain a lawsuit against AT&T.

RELIEF SOUGHT

AT&T seeks appellate review of the district court's Denial Order and a decision from this Court holding that 15 U.S.C. § 45(a)(2) bars the FTC's action in the district court and thus requires the district court to dismiss the case.⁵

ARGUMENT

A permissive interlocutory appeal may be granted if an order (1) “involves a controlling question of law” (2) “as to which there is substantial ground for difference of opinion,” and if (3) “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). The Denial Order meets all three criteria. Indeed, this case is a textbook candidate for immediate appeal. This Court should grant this petition and clarify these two important questions of law.

I. ALL AGREE THAT THE DENIAL ORDER DECIDED CONTROLLING ISSUES OF LAW

Both the FTC and the district court agree that the Denial Order decided controlling questions of law because reversal by this Court on either question would terminate the litigation. Certification Order at 2; *In re Cement Antitrust*

⁵ The district court declined to stay proceedings, reasoning that a decision from this Court would likely provide guidance before expert discovery or trial would commence. Hearing Tr. at 8, 11. If this Court grants the petition, AT&T intends to move this Court for an expedited briefing and argument schedule to maximize the benefit of this appeal. The FTC has indicated that it will not oppose expedition.

Litig., 673 F.2d 1020, 1026 (9th Cir. 1982); *see also Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) (“Although the resolution of an issue need not necessarily terminate an action in order to be ‘controlling,’ it is clear that a question of law is ‘controlling’ if reversal of the district court’s order would terminate the action.”) (citations omitted); *accord* 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3930 (3d ed. 2014) [hereinafter “Wright & Miller”].

II. THE DENIAL ORDER DECIDED TWO QUESTIONS ON WHICH THERE EXIST SUBSTANTIAL GROUNDS FOR DISAGREEMENT

“A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue’s resolution” *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). The Denial Order decided two questions that satisfy that standard. Indeed, because reasonable jurists *already disagree* on one question, the standard is necessarily satisfied.

A. Courts Are Divided over the Proper Interpretation of Section 5

As the district court acknowledged, the Seventh Circuit in *FTC v. Miller* considered “the exact issue” presented in AT&T’s motion to dismiss and reached AT&T’s conclusion. Denial Order at 15 & n.7. *Miller* held that the common-carrier exemption “is in terms of status as a common carrier . . . , not activities subject to regulation,” and found the defendant not to be subject to FTC authority.

549 F.2d at 455. The district court, by contrast, rejected the “contention that the common carrier exemption in § 45(a) is predicated on status alone” and held that “§ 45(a) can be applied to an entity that has the status of a common carrier” in order to regulate that entity’s non-common-carriage activities. Denial Order at 19. That decision is sufficient to establish a substantial ground for difference of opinion. As this Court held in *Reese*, a substantial ground for difference of opinion exists “where reasonable jurists *might* disagree on an issue’s resolution”; it clearly exists “*where they have already disagreed.*” 643 F.3d at 688 (emphases added).

Moreover, the contrast between *Miller* and the Denial Order extends beyond the mere outcomes of the cases. In analyzing the text of Section 5, the *Miller* panel contrasted that status-based language of the common-carrier exception with the activity-based language in Section 5’s Packers and Stockyards Act exemption. 549 F.2d at 455-56. By contrast, the district court here found the Packers and Stockyards Act language “not consequential.” Denial Order at 14. *Miller* also rejected the FTC’s argument that the court’s reading would create “a gap in regulation” and “frustrate the legislative purpose,” 549 F.2d at 458, while the district court rejected AT&T’s status-based interpretation in part because “there would be regulatory gaps in many instances,” Denial Order at 11.

Although *Miller* alone satisfies the “substantial ground” prong, the split in authority is in fact broader than that. Having rejected *Miller*, the district court

elected to follow the reasoning of the district court (and the “observation” of the Second Circuit on appeal) in *FTC v. Verity International*, 194 F. Supp. 2d 270 (S.D.N.Y. 2002), *aff’d on other grounds*, 443 F.3d 48 (2d Cir. 2006). Denial Order at 16. The *Verity* district court, like the lower court here, openly disagreed with *Miller*’s analysis of Section 5. 194 F. Supp. 2d at 275.

Other courts, meanwhile, have cited *Miller* with approval in holding that “an entity’s exemption from FTC jurisdiction is based on that entity’s *status*, not its activity.” *National Fed’n of Blind v. FTC*, 303 F. Supp. 2d 707, 714-15 (D. Md. 2004), *aff’d*, 420 F.3d 331 (4th Cir. 2005); *accord, e.g., Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980); *FTC v. CompuCredit Corp.*, No. 1:08-cv-1976, 2008 WL 8762850, at *4 (N.D. Ga. Oct. 8, 2008). The reasoning of those decisions and their analyses of Section 5 cannot be reconciled with the Denial Order.

B. The *Reclassification* Question Is a Novel and Difficult Question of First Impression in the Ninth Circuit

The district court correctly acknowledged that the *Reclassification* question also gives rise to a substantial ground for difference of opinion. Although a split of authority is the clearest sign of grounds for disagreement, “[a] substantial ground for difference of opinion exists where reasonable jurists *might* disagree on an issue’s resolution, not merely where they have already disagreed.” *Reese*, 643 F.3d at 688 (emphasis added). Hence, “novel and difficult questions of first

impression” are appropriate for immediate review. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (internal quotation marks omitted). The question whether the *Reclassification Order* divests the FTC of jurisdiction clears that bar.⁶

While the district court (and the FTC) view the question as governed by retroactivity principles, a sounder approach would examine the FTC’s *current* authority. It is not retroactive to hold that a federal agency lacks the authority *right now* to maintain an action in district court. Whether retroactivity analysis is warranted at all in this context is a complex issue that the Ninth Circuit has not had occasion to decide. It is thus an apt candidate for immediate review.

Additionally, the district court concluded (as part of its retroactivity analysis) that, if the FTC were to lose jurisdiction *in medias res*, it would suffer prejudice at the hands of the FCC. Denial Order at 21. Reasonable jurists might disagree that the retroactivity doctrine – which exists to protect “private rights” from capricious government interference, *see generally Landgraf v. USI Film Prods.*, 511 U.S. 244, 266-73 (1994) – can be contorted to protect one government agency’s power over another government agency’s power to enforce its will on private actors.

⁶ Given the substantial expense this litigation presents, it is worth noting that “[t]he level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case. If proceedings that threaten to endure for several years depend on an initial question of jurisdiction, limitations, or the like, certification may be justified at a relatively low threshold of doubt.” 16 Wright & Miller § 3930.

If this Court elects to hear this appeal on the basis of *either* certified question, it will have jurisdiction over the entire Denial Order and “may address any issue fairly included within” it. *Lee v. American Nat’l Ins. Co.*, 260 F.3d 997, 1000 (9th Cir. 2001).

III. IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

As the district court explained at the hearing, “there’s no doubt” that a reversal on appeal “may materially advance the ultimate termination of this case.” Hearing Tr. at 3. Indeed, the gains from an immediate appeal are “potentially huge.” *Id.* at 11; *cf.* 16 Wright & Miller § 3930 (§ 1292(b) countenances weighing “the probable gains and losses of immediate appeal”).

First and foremost, reversal on either certified question would require dismissal of the FTC’s case, halting discovery and trial entirely. By contrast, if this Court waits to review until after a trial, the parties could waste enormous amounts of time and money litigating this case to completion. In light of that consideration, this Court has often invoked § 1292(b) to review threshold issues that control whether litigation may proceed. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (threshold issue whether arbitration was required in lieu of district court suit); *Acron Invs., Inc. v. Federal Sav. & Loan Ins. Corp.*, 363 F.2d 236, 237 (9th Cir. 1966) (threshold issue of jurisdiction); Order, *Wellons, Inc. v. Sia Energoremonts Riga Ltd.*, No. 13-80226, ECF No. 3 (9th Cir.

Jan. 14, 2014) (granting § 1292(b) petition to review threshold issues of personal jurisdiction and *forum non conveniens*).

Immediate review is especially warranted here because reversal would cut short litigation that is certain to be “protracted and expensive.” *Cement Antitrust Litig.*, 673 F.2d at 1026. The conduct at issue in this case involves corporate decision-making stretching back half a decade, and the parties’ initial disclosures listed scores of stakeholders in several corporate offices spread across the country. Accordingly, the parties have agreed that fact discovery will contain at least 60 depositions, and the court has scheduled more than a year for fact discovery alone. Further Joint Case Management Conference Statement ¶ 8(a), *FTC v. AT&T Mobility LLC*, ECF No. 65 (filed May 7, 2015); Civil Minutes, *FTC v. AT&T Mobility LLC*, ECF No. 69 (filed May 15, 2015). Furthermore, fact-intensive and technologically complex issues in the case will require in-depth investigation by multiple experts and months of expert discovery continuing late into 2016. *See* Civil Minutes, *supra*. At the earliest, trial will not take place until well into 2017.

The benefits of an immediate appeal are further enhanced by the fact that both the FCC (the agency actually charged by Congress with regulating the telecommunications industry) and the FTC (whose authority explicitly does *not* extend to “common carriers subject to the [Communications Act]”) are simultaneously asserting jurisdiction over the same conduct. This is precisely the

sort of regulatory overlap that Congress intended to prevent in Section 5. The fact that AT&T is defending the same conduct on two fronts intensifies the need to determine at the outset whether this litigation is fit to proceed.

Next to these massive potential savings, the costs of immediate appeal are justified – particularly where, as here, the questions presented are well suited for efficient appellate review. Both are purely legal questions of statutory interpretation that the “court of appeals could decide quickly and cleanly without having to study the record.” *Ahrenholz v. Board of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (Posner, C.J.); *see id.* at 676 (“meaning of a statutory or constitutional provision” is a “question of law” under § 1292(b)); *United States ex rel. Huangyan Imp. & Exp. Corp. v. Nature’s Farm Prods., Inc.*, 370 F. Supp. 2d 993, 995 (N.D. Cal. 2005) (certifying for § 1292(b) appeal “pure questions of statutory interpretation”).

These facts not only decrease the burden on this Court’s resources, but also allow for faster resolution of the appeal. Given the litigation schedule in the district court, there is little question that appellate review could significantly shorten this otherwise protracted litigation.⁷

⁷ Although the district court has not stayed the case, fact discovery is scheduled to take more than a year, and the court indicated that it may stay the proceedings before expert discovery, dispositive motions, and trial. Hearing Tr. at 10-11. Thus, a decision in the next year could limit fact discovery, and any decision could allow the parties to preserve the significant time and resources that

In sum, the Denial Order is the type of order for which § 1292(b) was designed. It presents two “highly debatable” questions that are “easily separated from the rest of the case, that offer[] an opportunity to terminate the litigation completely, and that may spare the parties the burden of a trial that is expensive for them even if not for the judicial system.” 16 Wright & Miller § 3930.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for interlocutory appeal.

Respectfully submitted,

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May 26, 2015

would be expended in expert discovery, on summary judgment, and during a three-week trial.

Exhibit A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

No. C-14-4785 EMC

Plaintiff,

v.

**ORDER DENYING DEFENDANT’S
MOTION TO DISMISS**

AT&T MOBILITY LLC,

(Docket No. 29)

Defendant.

The Federal Trade Commission (“FTC”) has filed suit against Defendant AT&T Mobility LLC (“AT&T”), asserting that AT&T has engaged in acts or practices, in connection with the marketing of mobile data services,¹ that violate 15 U.S.C. § 45(a). Section 45(a), which is part of the Federal Trade Commission Act of 1914 (“FTC Act”), provides in relevant part: “The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except . . . common carriers subject to the Acts to regulate commerce . . . , from using . . . unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2).

Currently pending before the Court is AT&T’s motion to dismiss. AT&T argues that it cannot be held liable for a violation of § 45(a) because it enjoys an exemption under the statute as a “common carrier[] subject to the Acts to regulate commerce.” *Id.* Having considered the parties’ briefs and accompanying submissions, the Court hereby **DENIES** AT&T’s motion.

¹ As indicated below, AT&T provides both mobile *voice* services and mobile *data* services. The FTC’s complaint concerns only the provision of mobile data services.

I. FACTUAL & PROCEDURAL BACKGROUND

In its complaint, the FTC alleges as follows.

“[AT&T] is a major retailer of smartphones and provider of wireless broadband internet access service for smartphones (‘mobile data’).” Compl. ¶ 9. In 2007, AT&T was the exclusive mobile data provider for the Apple iPhone. Initially, AT&T offered iPhone customers an “unlimited” mobile data plan. See Compl. ¶ 10.

In 2010, AT&T stopped offering the unlimited mobile data plan to new smartphone customers and instead has required such customers to purchase one of its “tiered” mobile data plans (where customers who exceed the stated data allowance are charged for the additional data at the rate set forth in the tiered mobile data plan). See Compl. ¶ 11. Old customers, however, were grandfathered – in essence, to ensure that they would not switch mobile data providers. See Compl. ¶¶ 12-13.

In July 2011, AT&T

decided to begin reducing the data speed for unlimited mobile data plan customers, a practice commonly known as “data throttling.” Under [the] throttling program, if an unlimited mobile data plan customer exceeds the limit set by [AT&T] during a billing cycle, [AT&T] substantially reduces the speed at which the customer’s device receives data for the rest of that customer’s billing cycle.

Compl. ¶ 15.

The speed reductions and service restrictions in effect under [the] throttling program are not determined by real-time network congestion at a particular cell tower. Throttled customers are subject to this reduced speed even if they use their smartphone at a time when [AT&T’s] network has ample capacity to carry the customers’ data, or the use occurs in an area where the network is not congested.

Compl. ¶ 26. Moreover, “[AT&T] does not throttle its tiered mobile data plan customers, regardless of the amount of data that a tiered mobile data plan customer uses.” Compl. ¶ 29.

According to the FTC,

[AT&T] has numerous alternative ways to reduce data usage on its network that does not involve violating its promise to customers. One alternative would involve [AT&T] requiring existing unlimited data customers to switch to a tiered data plan at renewal. . . . Another alternative would involve [AT&T] introducing its throttling program

1 at renewal, with disclosures at point of sale. . . . Yet other alternatives
2 might include limited, narrowly tailored throttling programs that are
3 consistent with Defendants’ contracts, advertising, and other public
disclosures.

4 Compl. ¶ 28.

5 But “[AT&T’s] wireless customer agreements do not state that an unlimited mobile data plan
6 customer’s use of more than a specified amount of data is prohibited activity.” Compl. ¶ 32. Also,
7 at the time of renewal, AT&T does not tell its unlimited mobile data plan customers about the
8 throttling program. *See* Compl. ¶ 34. Disclosures about the throttling program have been limited –
9 *e.g.*, in a monthly bill sent prior to renewal, in a text message, and/or in an e-mail. *See* Compl. ¶¶
10 33-37 (noting that only a minority of customers were sent a text message and/or e-mail). These
11 disclosures, however, were not adequate. For example, the monthly

12 statement failed to disclose the degree to which the customers’ data
13 speed would be reduced, and the impact that the reduced speed would
14 have on customers’ ability to use their device. It also failed to
15 adequately disclose that the speed reduction was due to a limit
intentionally imposed by [AT&T], as opposed to general network
congestion.

16 Compl. ¶ 35.

17 Based on, *inter alia*, the above allegations, the FTC has brought two claims pursuant to 15
18 U.S.C. § 45(a) which prohibits, *inter alia*, “unfair or deceptive acts or practices in or affecting
19 commerce.” 15 U.S.C. § 45(a)(2). In Count I, the FTC asserts that AT&T’s throttling program is
20 *unfair* because AT&T “entered into numerous mobile data contracts that were advertised as
21 providing access to unlimited mobile data, and that do not provide that [AT&T] may modify,
22 diminish, or impair the service of customers who use more than a specified amount of data for
23 permissible activities.” Compl. ¶ 45. In Count II, the FTC maintains that AT&T has engaged in
24 *deceptive* conduct because it does not disclose or fails to adequately disclose that “it imposes
25 significant and material data speed restrictions on unlimited mobile data plan customers who use
26 more than a fixed amount of data in a given billing cycle.” Compl. ¶ 49. In short, the gravamen of
27 the FTC’s complaint is not AT&T’s practice of throttling per se, but AT&T’s deceptive conduct in
28 failing to disclose its throttling to certain customers.

1 II. DISCUSSION

2 A. Legal Standard

3 AT&T has moved to dismiss on the basis that it is exempt from § 45(a) as a “common
4 carrier[] subject to the Acts to regulate commerce.” 15 U.S.C. § 45(a)(2). In its opening brief,
5 AT&T styled its motion as one made pursuant to Federal Rule of Civil Procedure 12(b)(1), *i.e.*, for
6 lack of subject matter jurisdiction. In its opposition, the FTC counters that the motion is
7 appropriately brought under Rule 12(b)(6), not 12(b)(1), because AT&T is challenging only “the
8 scope of the FTC’s statutory authority.” *Opp’n* at 2 n.1.

9 Whether the pending motion to dismiss is technically predicated on Rule 12(b)(1) or on
10 12(b)(6) is not material in this instance. Neither party has asserted that the choice of rule affects the
11 disposition of the motion. Nor can the Court divine a difference in result here. Even assuming that
12 Rule 12(b)(1) were to govern, AT&T is making a facial challenge to jurisdiction, and not a factual
13 one. *See Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014) (indicating that a
14 jurisdictional attack can be facial or factual; in the former circumstance, all of the factual allegations
15 in the complaint are taken as true and extrinsic evidence such as documents attached to a complaint
16 may be considered). Given such a challenge, the standard is governed essentially by a Rule
17 12(b)(6)-type inquiry.

18 While the exact procedural posture is not dispositive, the Court acknowledges that recent
19 action taken by another administrative agency, namely, the Federal Communications Commission,
20 may impact this case. More specifically, the Federal Communications Commission recently made
21 the decision to reclassify mobile data service from a non-common carriage service to a common
22 carriage service. Because this “Reclassification Order” has not yet taken effect, the Court addresses
23 first the merits of the issues raised in the parties’ initial briefs. Only after assessing the merits of
24 these issues does the Court turn to the effect of the Reclassification Order on this action.

25 B. Statutory Construction

26 As stated above, AT&T argues that it cannot be held liable for a violation of § 45(a) because
27 of an exception in the statute for “common carriers subject to the Acts to regulate commerce.” 15
28 U.S.C. § 45(a)(2). The full text of § 45(a) is as follows:

1 The Commission is hereby empowered and directed to prevent
2 persons, partnerships, or corporations, *except* banks, savings and loan
3 institutions described in section 18(f)(3) [15 U.S.C. § 57a(f)(3)],
4 Federal credit unions described in section 18(f)(4) [15 U.S.C. §
5 57a(f)(4)], *common carriers subject to the Acts to regulate commerce*,
6 air carriers and foreign air carriers subject to the Federal Aviation Act
7 of 1958 [49 U.S.C. § 40101 *et seq.*], and persons, partnerships, or
8 corporations insofar as they are subject to the Packers and Stockyards
9 Act, 1921, as amended [7 U.S.C. § 181 *et seq.*], except as provided in
10 section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair
11 methods of competition in or affecting commerce and unfair or
12 deceptive acts or practices in or affecting commerce.

13 15 U.S.C. § 45(a)(2) (emphasis added). The term “Acts to regulate commerce” is defined as the
14 Interstate Commerce Act of 1887 and the Communications Act of 1934, as well as all amendments
15 and supplements thereto. *See id.* § 44. When § 45(a) was first enacted as part of the FTC Act in
16 1914, “Acts to regulate commerce” meant only the Interstate Commerce Act because the
17 Communications Act had not yet been passed.

18 The Interstate Commerce Act was “[t]he first federal regulation to impose duties on common
19 carriers” and “applied to ‘any common carrier or carriers’ engaged in the railroad transportation of
20 people or property interstate.” *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 57 (2d Cir. 2006). “In 1910,
21 Congress passed the Mann-Elkins Act, which amended the [Interstate Commerce Act] to apply to
22 interstate telephone companies and to deem such companies common carriers.” *Id.* “Regulation of
23 telephone common carriers continued to rest with the [Interstate Commerce Commission] until
24 1934, when Congress passed the Communications Act of 1934.” *Id.*; *see also Verizon Comms., Inc.*
25 *v. FCC*, 535 U.S. 467, 478 n.3 (2002) (noting that “[f]ederal regulation in the area had previously
26 been undertaken incidentally to general interstate carrier regulation under the Interstate Commerce
27 Act”). When § 45(a) was amended in 1938, one of the amendments made was to re-define “Acts to
28 regulate commerce” to include the Communications Act.

 The basic dispute between the parties is over the scope of the common carrier exception.
According to AT&T, it falls within the scope of the exception because the exception applies so long
as an entity has the “status” of a common carrier. In other words, under AT&T’s position, if an
entity has the status of a common carrier, it cannot be regulated under § 45(a) at all, even when it is
providing services *other* than common carriage services. The FTC disagrees with this interpretation

1 of § 45(a). According to the FTC, it is not just status that matters, but also the “activity” in question.
2 That is, the common carrier exception applies only if an entity has the status of a common carrier
3 *and* is actually engaging in common carriage services. Thus, under the FTC’s view, an entity can be
4 regulated under § 45(a) even if the entity is a common carrier so long as it is the entity’s non-
5 common carriage services that are being regulated.

6 The basic issue for the Court is one of statutory construction. Statutory construction begins,
7 of course, with the language of the statute. *See, e.g., Caraco Pharm. Labs., Ltd. v. Novo Nordisk*
8 *A/S*, 132 S. Ct. 1670, 1680 (2012) (noting that statutory construction begins “with the language of
9 the statute itself”); *United States v. Byun*, 539 F.3d 982, 991 (9th Cir. 2008) (indicating that
10 ordinary tools of statutory construction include the language of the statute, the statute’s legislative
11 history, and the “practical effects to the extent necessary to illuminate the meaning of the plain
12 language”). Here, § 45(a) carves out an exception for “common carriers subject to the Acts to
13 regulate commerce,” which includes the Communications Act. 15 U.S.C. § 45(a)(2). AT&T argues
14 that this language, on its face, weighs in its favor because: (1) AT&T is a common carrier – *i.e.*, for
15 mobile voice services – even if it does also provide non-common carriage services such as mobile
16 data; and (2) AT&T is subject to the Communications Act, being regulated in fact not just for its
17 common carriage services (mobile voice) under Title II of the act but also for its non-common
18 carriage services (mobile data) under Title III of the act.

19 The problem with AT&T’s argument is it glosses over what is meant by “common carrier” in
20 the first place. Nowhere in the FTC Act is the term “common carrier” defined. Given that fact, the
21 Court deems it appropriate to consider what the term “common carrier” meant at the time the FTC
22 Act was enacted in 1914. Notably, that is the approach that the Second Circuit took in a decision
23 addressing the common carrier exception in § 45(a). *See Verity*, 443 F.3d at 57-58 (“decid[ing] to
24 give meaning to ‘common carrier’ in the FTC Act according to the ordinary sense of the word when
25 Congress used it to create the exemption”).

26 As the FTC points out, prior to the enactment of the FTC Act, an entity was deemed a
27 common carrier and regulated as such under the common law only where it was actually engaged in
28 common carriage services. For example, in *Santa Fe, Prescott & Phoenix Railway Co. v. Grant*

1 *Brothers Construction Co.*, 228 U.S. 177 (1913), the Supreme Court noted that “[t]he great object of
 2 the law governing common carriers was to secure the utmost care in the rendering of a service of the
 3 highest importance to the community” and, therefore, a “common carrier *in the prosecution of its*
 4 *business as such* is not permitted to drop its character and transmute itself by contract into a mere
 5 bailee with right to stipulate against the consequences of its negligence.” *Id.* at 184-85 (emphasis
 6 added). The Supreme Court added that “this rule has no application when a railroad company is
 7 acting *outside the performance of its duty* as a common carrier.” *Id.* at 184-85 (emphasis added); *see*
 8 *also R.R. Co. v. Lockwood*, 84 U.S. 357, 377 (1873) (stating that “[a] common carrier may,
 9 undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or
 10 special engagement, he undertakes to carry something which it is not his business to carry”).²

11 Prior to the enactment of the FTC Act, common carriers were viewed in a similar way for
 12 purposes of the Interstate Commerce Act.³ For instance, in *Interstate Commerce Commission v.*
 13 *Goodrich Transit Co.*, the Supreme Court concluded that the Interstate Commerce Commission had
 14 authority to require a system of accounting for a common carrier, even though “the accounts
 15 required to be kept are general in their nature and embrace business *other* than such as is necessary
 16 to the discharge of the duties in carrying passengers in freight in interstate commerce [*e.g.*,
 17 amusement parks]”; but the Supreme Court also indicated that those non-common carriage “affairs
 18 [were otherwise] not within [the Commission’s] jurisdiction.” *Goodrich Transit*, 224 U.S. at 211-12

20 ² At the hearing, AT&T argued that, when the FTC Act was enacted, times were “simpler” in
 21 that common carriers (such as railroads) were single purpose entities that engaged in common
 22 carriage activity only. But the cases cited above show that that was not the case. For instance, a
 23 common carrier could engage in private transportation. *See R.R. Co.*, 84 U.S. at 377 (“For example,
 24 if a carrier of produce, running a truck boat between New York City and Norfolk, should be
 25 requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to
 26 take, such agreement might be made in reference to this taking and carrying the same as the parties
 chose to make . . .”). Also, a common carrier might be involved in a completely different line of
 business. *See, e.g., Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194, 205
 (1912) (noting that a common carrier also operated two amusement parks “and in connection
 therewith owns, operates and derives revenue from lunch stands, merry-go-rounds, bowling alleys,
 bath houses, etc., and collects admission fees from people entering the parks”).

27 ³ It is appropriate to consider the Interstate Commerce Act here for at least two reasons.
 28 First, the Interstate Commerce Act was “[t]he first federal regulation to impose duties on common
 carriers.” *Verity*, 443 F.3d at 57. Second, the Interstate Commerce Act was expressly referenced in
 § 45(a) at the time it was enacted.

1 (emphasis added); *see also Kansas City S. R. Co. v. United States*, 282 U.S. 760, 764 (1931) (citing
 2 *Santa Fe* in support of the statement that “[t]here is no doubt that common carriers subject to the
 3 Interstate Commerce Act may have activities which lie outside the performance of their duties as
 4 common carriers and are not subject to the provisions of the Act”).

5 Thus, as the FTC argues, at the time the FTC Act was enacted, the term “common carrier”
 6 encompassed not only a “status” but also an “activity” component: An entity was deemed a common
 7 carrier when it had the status of common carrier *and* was actually engaging in common carriage
 8 services.

9 Moreover, even if there were some doubt that “common carrier” was to be so understood, the
 10 broader phrase used in § 45(a) for the common carrier exception must be taken into account.
 11 Section 45(a) refers to an exemption for “common carriers *subject to the Acts to regulate*
 12 *commerce.*” 15 U.S.C. § 45(a)(2) (emphasis added). This language can fairly be read to mean that
 13 the exemption applies only when the common carrier is subject to regulation as such. *Cf. Verity*,
 14 443 F.3d at 57 (stating that Congress created the common carrier exemption because it “did not
 15 intend the FTC to enforce unfair-competition law against common carriers because the ICC already
 16 regulated common carriers under the Interstate Commere Act”). As indicated by the case law
 17 discussed above, an entity was subject to regulation as a common carrier only when it was actually
 18 engaging in common carriage activity. AT&T’s interpretation to the contrary is not convincing
 19 because in essence, AT&T asks that § 45(a) be broken into two separate inquiries: (1) Is an entity a
 20 common carrier (for any purpose)? and (2) if so, is the entity subject to the Acts to regulate
 21 commerce? *See* Reply at 4. AT&T does not explain why the Court should apply this two-part
 22 disjunctive construction rather than evaluate the exemption holistically.⁴

23
 24 ⁴ Because of its analysis above, the Court need not entertain the FTC’s additional argument
 25 that “common carriers subject to the Acts to regulate commerce” necessarily incorporates by
 26 reference the totality of the Communications Act, which defines common carriers as turning on
 27 whether the entity is actually engaging in common carriage services. *See* 47 U.S.C. § 332(c)(1)-(2)
 28 (providing that “[a] person engaged in the provision of a service that is a commercial mobile service
 shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act”
 and further that “[a] person engaged in the provision of a service that is a private mobile service
 shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under
 this Act”); *see also* 47 U.S.C. § 153(51) (defining the term “telecommunications carrier” as “any
 provider of telecommunication services” and further providing that “[a] telecommunications carrier

1 Furthermore, a holistic interpretation of the common carrier exception is more consistent
2 with the legislative history for the FTC Act. As the FTC notes, during the 1914 congressional
3 debate over the bill that would later become the FTC Act, Representative Stevens, a manager of the
4 House bill, discussed what entities would be covered by the proposed act. Mr. Stevens stated, *inter*
5 *alia*, that every corporation engaged in commerce would come within the scope of the act:

6 They ought to be under the jurisdiction of this commission in order to
7 protect the public, in order that all of their public operations should be
8 supervised, *just the same as where a railroad company engages in*
work outside of that of a public carrier. In that case such work ought
to come within the scope of this commission for investigation.

9

10 [E]very corporation engaged in commerce except common carriers,
11 and even as to them I do not know but that *we include their operations*
outside of public carriage regulated by the interstate-commerce acts.

12 51 Cong. Rec. 8996 (1914) (emphasis added).

13 Although AT&T argues the purpose of the common carrier exception is to ensure that there
14 is no agency overlap in terms of regulation, it appears that the more precise purpose was to prevent
15 overlap between *common carrier regulations*. As the Second Circuit observed in *Verity*, Congress
16 created the common carrier exemption because it “did not intend the FTC to enforce unfair-
17 competition law against common carriers because the *ICC already regulated common carriers* under
18 the Interstate Commerce Act.” *Verity*, 443 F.3d at 57 (emphasis added). AT&T points to nothing in
19 the legislative history suggesting that Congress intended to prevent any and all regulatory overlap
20 (as opposed to focusing on the Interstate Commerce Commission’s regulation of common carriers as

21 _____
22 shall be treated as a common carrier under this Act only to the extent that it is engaged in providing
23 telecommunications services, except that the [Federal Communications] Commission shall
24 determine whether the provision of fixed and mobile satellite service shall be treated as common
25 carriage”).

26 Prior to March 12, 2015, the Federal Communications Commission deemed mobile data
27 service a private mobile service, *i.e.*, non-common carriage. *See Verizon v. FCC*, 740 F.3d 623, 650
28 (D.C. Cir. 2014) (noting that the Federal Communications “Commission has classified mobile
broadband service as a ‘private’ mobile service” and therefore mobile broadband providers are not
common carriers). On March 12, 2015, the Federal Communications Commission issued its
Reclassification Order in which it essentially reclassified mobile data service as common carriage in
nature. The Court addresses the impact of the Reclassification Order *infra*.

1 such). Indeed, it is not uncommon for any particular activity of a business to be subject to multiple
 2 sets of regulations.

3 That the common carrier exception in § 45(a) requires consideration of both status and
 4 activity, and not just status alone, is also supported by the tool of statutory construction which
 5 counsels a court to consider a statute’s “practical effects to the extent necessary to illuminate the
 6 meaning of the plain language.” *Byun*, 539 F.3d at 991. AT&T’s interpretation of the common
 7 carrier exception would result in significant regulatory gaps. For example, as the FTC points out in
 8 its brief,

9 AT&T’s reading of the common carrier exemption would open a giant
 10 loophole that would threaten to swallow the FTC Act. Companies
 11 engaging in *de minimus* common carrier activity could immunize all of
 12 their operations from FTC scrutiny. For example, internet giants that
 13 introduce a small measure of common carrier business would be
 shielded from the FTC’s active privacy and data security enforcement
 because of their “status” as a common carrier. Indeed, such a move
 into common carrier activities is not merely hypothetical; Google
 recently announced its intention to become a virtual wireless carrier.

14 Opp’n at 16; *cf. Crosse & Blackwell Co. v. Fed. Trade Comm’n*, 262 F.2d 600, 604-05 (4th Cir.
 15 1959) (in discussing the scope of entities exempt from § 45(a) because they are subject to the
 16 Packers and Stockyards Act, noting that “Congress did not anticipate that a giant steel company
 17 might attempt to escape the restraint of the antitrust laws by operating a small packing plant” and
 18 thus be subject to the exemption).

19 In response, AT&T contends that any such gap has not caused an adverse effect: “If the
 20 FTC’s inability to regulate in these gaps were such a problem, one would imagine that Congress
 21 would have stepped in at some point in the past century to address this.” Reply at 6. But this
 22 argument misses the point. Congress would not need to step in if the common carrier exemption
 23 were always understood to apply only when an entity is a common carrier and is engaging in
 24 common carrier activity. As discussed above, that indeed appears to have been Congress’s
 25 understanding at the time of the FTC Act’s enactment. In fact, that seems to have been the general
 26 understanding of the common carrier exemption even years later, as noted by AT&T’s predecessor
 27 during a 1937 congressional hearing. *See To Amend the Federal Trade Comm’n Act*, House
 28 Committee on Interstate and Foreign Commerce Hearing, 75th Cong., 1st Sess. on H.R. 3143 (Feb.

1 18-19, 1937) (AT&T’s predecessor company proposing to Congress that § 45(a) be amended to
 2 include the following proviso: “provided that common carriers under the latter act are excepted as
 3 common carriers under this act only in respect of their common-carrier operations”; stating that
 4 “[a]ll this does is to make clear that so far as the fair trade practice provisions of the Federal Trade
 5 Commission Act are concerned, the exception which has always been in the act shall be preserved,
 6 and by my amendment, . . . it will make clear one thing, . . . namely, that where common carriers
 7 engage in activities that are not in the common carrier field, beyond the field that the Government is
 8 regulating, then and in that case, they are subject to the jurisdiction of the Federal Trade
 9 Commission . . .”).⁵

10 To the extent AT&T points out that there is no actual regulatory gap here because the
 11 Federal Communications Commission happens to regulate mobile data services under the
 12 Communications Act – albeit as non-common carriage activity (for conduct prior to the effective
 13 date of the Reclassification Order) – that is not dispositive. The point is that, under AT&T’s broad
 14 interpretation of the statute, there would be regulatory gaps in many instances; AT&T has not made
 15 any showing that most or even many gaps would be filled. Moreover, that there may be some
 16 overlap between agency regulation is not damning in and of itself, particularly in the absence of any
 17 apparent conflict with respect to agency regulation.

21 ⁵ AT&T has argued that Congress’s decision not to adopt its predecessor’s proposed
 22 amendment weighs in its favor. The Court does not agree. Admittedly, the Supreme Court has
 23 stated that, “[w]here Congress includes limiting language in an earlier version of a bill but deletes it
 24 prior to enactment, it may be presumed that the limitation was not intended.” *Russello v. United*
 25 *States*, 464 U.S. 16, 23-24 (1983). But that is hardly the situation here. Here, there was a proposed
 26 amendment that was never adopted into any version of the bill. Moreover, “[a]s a general rule,
 27 Congress’[s] rejection of a proposed amendment is not a significant aid in interpreting a statute
 28 passed years earlier.” *United States v. Capital Blue Cross*, 992 F.2d 1270, 1277 (3d Cir. 1993)
 (citing 21 N. Singer, *Sutherland on Statutory Construction* § 48.18 (5th ed. 1992)); see also *Tahoe*
Regional Planning Agency v. McKay, 769 F.2d 534, 538 (9th Cir. 1985) (stating that “caution must
 be exercised in using the rejection by a legislature of proposed amendments as an aid in interpreting
 measures actually adopted”). There are numerous reasons why legislation may not be enacted; in
 addition to the realities of the political process wherein legislation may not be enacted for a
 multitude of disparate reasons, Congress could have made a coherent choice to not enact new
 legislation because it believed it was already covered by law and thus not needed.

1 AT&T contends that there would be a conflict if both the FTC and the Federal
2 Communications Commission were to assert jurisdiction over mobile data service (as a non-common
3 carriage service) because, in Count I,

4 the FTC believes that slowing throughput speeds to customers on
5 unlimited plans is an “unfair” practice that has “caused substantial
6 injury” to consumers. By contrast, as long ago as 2008, the FCC
7 affirmatively endorsed the use of such reduced speeds where, as here,
8 a provider offering unlimited plans (Comcast) needed to manage
9 traffic network: “Comcast has several available options it would use to
10 manage network traffic without discriminating as it does. . . . Comcast
11 could throttle back the connection speeds of high-capacity users
12 (rather than any user who relies on peer-to-peer technology, no matter
13 how infrequently).” The 2010 *Open Internet Order* likewise approved
14 of practices involving the provision of “more bandwidth to subscribers
15 that have used the network less over some preceding period of time
16 than to heavier users” to reduce congestion. That order was not
17 vacated in any respect until January 2014 (and, even then, it was
18 vacated in part on other grounds). AT&T thus had every reason to
19 believe during the period at issue here that conduct that the FCC
20 preemptively approved would not later be the subject of an FTC
21 enforcement action.

22 Reply at 14-15.

23 The problem with AT&T’s position is that, even though the FTC has characterized Count I
24 as implicating an unfair practice, the gravamen of the FTC’s complaint is based on AT&T’s failure
25 to *disclose* its throttling practice to certain customers. More specifically, in Count I, the FTC asserts
26 that AT&T’s throttling program is unfair because AT&T “entered into numerous mobile data
27 contracts that were *advertised* as providing access to unlimited mobile data, and that do not provide
28 that [AT&T] may modify, diminish, or impair the service of customers who use more than a
specified amount of data for permissible activities.” Compl. ¶ 45 (emphasis added). Thus, the FTC
is not arguing in the case at bar that the throttling program is unfair *per se*; instead it challenges
AT&T’s failure to disclose the practice to certain customers and afford them alternative options.

To the extent AT&T suggests that there could also be a conflict (either with respect to Court
I or even Count II, which is the claim that characterizes AT&T’s conduct as deceptive, not just as
unfair) because the Federal Communications Commission has also passed its own “transparency
rule, 47 C.F.R. § 8.3, which itself requires an ‘accurate’ disclosure,” Reply at 15, the Court sees no
obvious conflict between 47 U.S.C. § 8.3 and § 45(a). AT&T has pointed to no instance where a

1 Federal Communications Commission regulation requires conduct which would violate a FTC
2 regulation or vice-versa. *See, e.g.*, Federal Communications Commission, *In re Preserving the Open*
3 *Internet*, 25 FCC Rcd 17905, at ¶¶ 56, 57 (stating that “[w]e believe that at this time the best
4 approach is to allow flexibility in implementation of the transparency rule” and “[w]e agree that
5 broadband providers must, at a minimum, prominently display or provide links to disclosures on a
6 publicly available, easily accessible website that is available to current and prospective end users
7 and edge providers as well as to the Commission, and must disclose relevant information at the point
8 of sale”).

9 AT&T protests still that “common carrier” must be viewed solely in terms of status because:
10 (1) § 45(a) repeatedly uses status-based terms, such as “persons,” “partnerships,” “corporations,”
11 “banks,” “savings and loan institutions,” “credit unions,” “air carriers,” and “common carrier” (as
12 opposed to common carriage) in its text; (2) § 45(a) does contain one activity-based exemption
13 which uses markedly different language, thus demonstrating that the lack of activity-based language
14 with respect to the common carrier exemption is telling; and (3) there is case law to support its
15 position. But ultimately, none of these arguments is availing.

16 AT&T’s first argument has facial appeal but is problematic based on the understanding of
17 the term “common carrier” at the time of the FTC Act’s enactment in 1914 and Congress’s intent to
18 encompass that understanding.

19 AT&T’s second argument is based on the 1958 amendment to § 45(a). Prior to the 1958
20 amendment, § 45(a) included an exemption related to the Packers and Stockyards Act. More
21 specifically, that exemption existed for “persons, partnerships, or corporations subject to the Packers
22 and Stockyards Act, 1921.” 52 Stat. 111 (1938). In 1958, that exemption was amended to read
23 “persons, partnerships, or corporations *insofar as they are* subject to the Packers and Stockyards
24 Act, 1921.” 27 Stat. 1749 (1958) (emphasis added). AT&T argues that this is evidence that the
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1 Packers/Stockyards exemption used to be a status-based exemption but then, in 1958, was changed
2 into an activity-based exemption.⁶

3 The Fourth Circuit, however, has explained that this change to the Packers/Stockyards
4 exemption was not consequential. More specifically, in *Crosse & Blackwell*, the Fourth Circuit
5 noted that, pre-amendment, it was

6 clear that the substance of what was intended to be withdrawn from
7 the controls of the Federal Trade Commission and subjected to
8 regulation by the Secretary of Agriculture were the businesses of the
9 stockyards and packers *as those industries were known and*
10 *understood at the time.* Doubtless the Congress did not anticipate that
11 a great steel company might attempt to escape the restraints of the
12 antitrust laws by operating a small packing plant, taking the position
13 that it was engaged in the business of a packer and was thus subject, in
14 its steel business, to regulation only by the Secretary of Agriculture
15 under the Packers and Stockyards Act, or that a canner of
16 miscellaneous food items might avoid compliance with the general
17 antitrust laws solely by reason of the fact that it used a relatively small
18 quantity of meat as an ingredient in some of its products, for it did not
19 expressly provide in 1921 that one engaged in parallel business, or in
20 peripheral activity, would be subject to regulation as a packer under
21 the Packers and Stockyards Act to the extent that he was engaged in
22 that business and subject to regulation under the general antitrust laws
23 to the extent he was engaged in other businesses. *Whatever doubt*
24 *there may have been on that scope has been removed by the [1958*
25 *amendment]. But if we look to the language of the Act prior to the*
26 *1958 amendment, in the light of the purposes the Congress in 1921*
27 *clearly intended to serve, there seems no doubt that it was never*
28 *intended that relatively inconsequential activity which might be*
classified as meat packing should insulate all of the other activities of
a corporation from the reach of the Federal Trade Commission.

19 The language of the Act is susceptible to the construction that
20 one engaged in the business of processing meats for sale is subject to
21 regulation in that business as a packer under the Packers and
22 Stockyards Act, while any other business in which he may be engaged

22 ⁶ AT&T asserts that the legislative history for the Packers and Stockyards Act shows that,
23 before the 1958 amendment, § 45(a)'s Packers/Stockyards exemption was status based. While the
24 legislative history for the act does use the terms "status" and "activity," that terminology must be
25 viewed in context. The critical point in the legislative history was that the Packers and Stockyards
26 Act was being amended to limit application to certain kinds of packers. *See* H.R. Rep. No. 85-1048,
27 at 6 (1957) (noting that the amendment to § 45(a) of the FTC Act was to reflect the amendment
28 made in the Packers and Stockyards Act; for the amendment to the latter, "jurisdiction is predicated
not upon the mere fact that a person may fall within the definition of a packer but upon the type of
activity carried on by such person[;] [t]he bill limits the jurisdiction of the act and, therefore, of the
Secretary of Agriculture to those commodities specifically listed in paragraph (1): 'livestock, meats,
meat food products, livestock products in unmanufactured form, poultry, or poultry products'" and
"[a]ctivities of packers with respect to all other products will fall under the jurisdiction of the
Federal Trade Commission").

1 is subject to the general restraints of that antitrust laws, and that
2 jurisdiction to enforce the antitrust laws was left in the Federal Trade
3 Commission, except insofar as the businesses of the stockyard and
packing industry, as such, were removed from the jurisdiction of the
Federal Trade Commission.

4 *Crosse & Blackwell*, 262 F.2d at 604-05 (emphasis added). “A literal interpretation of the
5 exemption . . . must be laid aside for it is ‘plainly at variance with the policy of the legislation as a
6 whole,’ and if held to grant a more extensive exemption than the [Agriculture] Secretary’s
7 regulatory power would produce an absurd result.” *Id.* at 606; *see also Foxgord v. Hischemoeller*,
8 820 F.2d 1030, 1034 (9th Cir. 1987) (noting that “‘departure from the literal construction of a statute
9 is justified when such a construction . . . would clearly be inconsistent with the purposes and policies
10 of the act in question’”). Hence, if anything, the legislative history of the Packers and Stockyards
11 exemption as explained in *Crosse & Blackwell* supports the FTC’s argument. According to the
12 Fourth Circuit, the pre-amendment language – which like the common carrier exemption contained
13 no activity-based language (merely covering businesses “subject to” the 1921 Packers and
14 Stockyards Act) – nonetheless encompassed activity, not just status.

15 As for the third argument that case law supports its status argument, AT&T relies primarily
16 on *Federal Trade Commission v. Miller*, 549 F.2d 452 (7th Cir. 1977).⁷ *Miller*, however, is not
17 binding authority on this Court, and the basic reasoning of *Miller* is not persuasive. The Seventh
18 Circuit stated in *Miller* that it

19 need not decide whether the FTC is correct in its statement that the
20 non-carrier activities of a common carrier do not fall within the scope
21 of the § [46] exemption.⁸ Assuming that to be correct, it does not
22 follow that a corporation engaged solely in carrier activities steps
outside the exemption whenever those activities are not of a type
ordinarily regulated by the [Interstate Commerce Commission]. The

23 ⁷ To the extent AT&T cites other cases, those cases do not, as *Miller* did, address the exact
24 issue of whether the term “common carrier” should be understood to include *both* a status and
25 activities component. *See, e.g., Nat’l Fed’n of the Blind v. Fed. Trade Comm’n*, 303 F. Supp. 2d
26 707, 710-11, 714-15(D. Md. 2004) (noting that the FTCA applies only to corporations, not nonprofit
27 organizations, such that there is effectively a nonprofit exemption under the act; concluding that a
for-profit professional telemarketer that solicits charitable contributions for a nonprofit could be held
liable under the FTCA because “an entity’s exemption from FTC jurisdiction is based on that
entity’s status, not its activity”) (emphasis omitted; citing *Miller*).

28 ⁸ Section 46 is another provision in the FTC Act. It gives the FTC authority to investigate
but, like § 45(a), also includes an exemption for common carriers.

1 regulatory approach articulated by [the FTC], while it may be a
 2 desirable one, is not the one Congress appears to have adopted.
 3 Before the Wheeler-Lea Amendment [in 1938], [§ 45(a)(1)] of the Act
 4 had declared unlawful and [§ 45(a)(6)] of the Act had empowered the
 5 Commission to prohibit, only “unfair methods of competition in
 6 commerce.” The Amendment inserted in both those subsections the
 7 *additional* words “and unfair or deceptive acts or practices in
 8 commerce.” It did not, however, alter in any way the exemption
 9 provisions of the latter subsection or of [§ 46]. Thus, as amended [§
 10 45] declares unlawful both anticompetitive practices and unfair or
 11 deceptive acts or practices and, further, empowers the Commission to
 12 prevent persons, except regulated common carriers (and certain
 13 others), from engaging in the conduct declared unlawful. There is no
 14 conceivable basis for holding that the exception applies to one type of
 15 forbidden conduct but not the other. The Commission’s argument
 16 must therefore fail, and, having failed with respect to [§ 45(a)(6)], it
 17 necessarily fails with respect to [§ 46(a)] as well.

18 *Id.* at 458 (emphasis added).⁹

19 Instead, the Court finds more persuasive the reasoning of the district court in *Federal Trade*
 20 *Commission v. Verity International*, 194 F. Supp. 2d 270 (S.D.N.Y. 2002), and the Second Circuit’s
 21 observation on appeal. There, the FTC sued the defendant with regard to its billing practices. The
 22 defendant argued that it was a common carrier – indeed, had a license from the Federal
 23 Communications Commission to be a facilities- or retail-based international common carrier – and
 24 therefore exempt from the reach of § 45(a). The court rejected the defendant’s contention,
 25 explaining that

26 its argument presupposes that once the FCC licenses an entity as a
 27 common carrier, it is a common carrier for all purposes and thus
 28 entirely beyond the reach of the FTC. But that premise is
 fundamentally erroneous. An entity that is a common carrier may
 engage in a broad range of activities, some integral to its functions as a
 common carrier and some entirely extraneous to them. Even where
 Congress commits regulation of common carrier activities to a
 particular agency, it would make little sense to exempt a carrier’s
 extraneous activities from laws of general application affecting the
 broad sweep of American business.

⁹ The *Miller* court also questioned the FTC’s contention that “Congress contemplated and intended a perfect correlation between the end sought (avoidance of inter-agency conflict) and the means adopted (the exemption) so that there would be no gap in the regulatory framework.” *Miller*, 549 F.2d at 458. According to the court, “[s]ubsequent legislative history [in particular, on banks] tends to refute that assumption.” *Id.* But even if Congress did not intend a perfect correlation, it is unlikely that Congress intended for there to be significant gaps.

1 *Id.* at 274; *see also Computer & Comms. Industry Ass’n v. FCC*, 693 F.2d 198, 210 n.59 (D.C. Cir.
2 1982) (stating that “[i]t is clear that an entity can be a common carrier with respect to only some of
3 its activities[;] [i]n this opinion the term ‘common carrier’ will be used to indicate not an entity but
4 rather an activity as to which an entity is a common carrier”). The *Verity* district court
5 acknowledged *Miller* but found it to be “inconsistent with [the] common sense proposition that the
6 carrier exemption to the FTC Act should be construed no more broadly than its purpose – to avoid
7 interfering with the regulation of carriers by agencies to which their regulation is committed.” *Id.* at
8 275.

9 On appeal, the Second Circuit disagreed with the district court’s analysis in part, concluding
10 that “common carrier” as used in the FTCA had to be “defined by reference to the common law of
11 carriers and not to the Communications Act, even though the common law definition does not
12 meaningfully differ from the Communications Act definition for purposes of this appeal.” *Verity*,
13 443 F.3d at 57. However, the Second Circuit went on to indicate that it agreed with the district court
14 that “common carrier” was predicated on both an entity’s status and its activity, and not just status
15 alone. More specifically, the court noted that

16 [t]he notion of some indelible common carrier “status” under the
17 Communications Act is highly questionable. *See Southwestern Bell*
18 *Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (explaining that
19 “whether an entity in a given case is to be considered a common
20 carrier or a private carrier turns on the particular practice under
21 surveillance” and that the FCC “is not at liberty to subject [an] entity
22 to regulation as a common carrier” if the entity is acting as a private
23 carrier for a particular service”); *see also NARUC II*, 533 F.2d at 608
24 (“It is at least logical to conclude that one can be a common carrier
25 with regard to some activities but not others.”); *In re Audio*
26 *Comm’ns, Inc.*, 8 F.C.C.R. 8697, 8698-99, P12 (1993) (“[A] single
27 firm that is a common carrier in some roles need not be a common
28 carrier in other roles.”).

23 *Id.* at 60 n.4; *cf. Crosse & Blackwell*, 262 F.2d at 604-05 (interpreting pre-1958 version of Packers
24 and Stockyards Act exemption as activity based).

25 As a final point, the Court notes that two other considerations counsel in favor of the FTC’s
26 interpretation over AT&T’s. First, because the FTC Act is a remedial statute, it should be read
27 broadly and its exemptions narrowly. *See, e.g., United States v. An Article*, 409 F.2d 734, 741 n.8
28 (2d Cir. 1969) (stating that the FTCA has a remedial purpose – *i.e.*, to protect the public, “that vast

1 multitude which includes the ignorant, the unthinking and the credulous”); *In re Smith*, 866 F.2d
 2 576, 581 (3d Cir. 1989) (noting that “[s]tatutes prohibiting unfair trade practices and acts have
 3 routinely been interpreted to be flexible and adaptable to respond to human inventiveness[;] [i]n
 4 construing section 5 of the Federal Trade Commission Act relating to unfair trade practices, for
 5 example, the Supreme Court determined that the Act was to be both broad in sweep and flexible in
 6 application”); *cf. City of Edmonds v. Wash. St. Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. 1994)
 7 (stating that “[c]ourts generously construe the Fair Housing Act” and, “[a]s a broad remedial statute,
 8 its exemptions must be read narrowly”).

9 Second, the FTC’s interpretation – although not necessarily entitled to *Chevron* deference
 10 (which the FTC disavowed at the hearing) – should still be afforded some deference pursuant to
 11 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that a non-controlling agency opinion
 12 may carry persuasive weight, depending on “the thoroughness evident in its consideration, the
 13 validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors
 14 which give it power to persuade, if lacking power to control”); *see also United States v. Mead Corp.*,
 15 533 U.S. 218, 234 (2001) (stating that “an agency’s interpretation may merit some deference
 16 whatever its form”). In this regard, the Court notes that, contrary to what AT&T argues, the FTC
 17 has seemed to consistently take the position that the common carrier exemption should be viewed
 18 both in terms of status and activity, and not just status alone. *See, e.g., FTC Reauthorization*,
 19 Hearing Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, S. Hrg.
 20 107-1147, at 28 (July 17, 2002) (statement of Hon. Sheila F. Anthony, FTC) (noting that
 21 “Defendants often argue that the exemption protects every action of a company that enjoys common
 22 carrier status” and that “[t]he Commission firmly believes that only the common carrier activities of
 23 such companies are exempted, but litigating this issue, as the Commission has been repeatedly
 24 forced to do, raises the cost of pursuing enforcement actions”), *available at*
 25 <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg91729/pdf/CHRG-107shrg91729.pdf>; *Prepared*
 26 *Statement of the Fed. Trade Comm’n*, 2003 WL 21353573, at *19 (June 11, 2003) (statement before
 27 the Subcommittee on Commerce, Trade and Consumer Protection to support the FTC’s
 28 reauthorization request for fiscal years 2004 to 2006) (stating that, “[w]hile common carriage has

1 been outside the FTC’s authority, the agency believes that the FTC Act applies to non-common-
 2 carrier services of telecommunications firms, even if the firms also provide common carrier
 3 services”); *see also FTC Amendments of 1977 and Oversight*, Hearings before the Subcommittee on
 4 Consumer Protection and Finance, 95th Cong., 1st Session on H.R. 3816, 1767, and 2483 (1977)
 5 (letter from FTC to Rep. Eckhardt) (asking for an amendment to the FTC Act, not “to extend the
 6 Commission’s jurisdiction into those areas that are subject to regulation by other federal agencies,
 7 but rather, as we explained in our formal statement, . . . intend[ing] to close a ‘regulatory gap’ under
 8 exceptions in Sections 5 and 6 of the FTC Act *as interpreted in a recent court decision [i.e.,*
 9 *Miller]*”) (emphasis added). To the extent AT&T argues that the FTC has taken a different position
 10 in other lawsuits, *see* Mot. at 13, the Court does not agree. In those cases, the FTC argued that an
 11 entity did not meet the status requirement of common carrier but it did not disavow that there was an
 12 activity component as well.

13 Accordingly, for all of the reasons stated above, the Court rejects AT&T’s contention that
 14 the common carrier exemption in § 45(a) is predicated on status alone, and rather agrees with the
 15 FTC that § 45(a) can be applied to an entity that has the status of a common carrier so long as what
 16 is being regulated is the entity’s non-common carriage services.

17 C. Reclassification Order

18 After initial briefing was completed in this case, the parties notified the Court that the
 19 Federal Communications Commission had made the decision to reclassify mobile data service from
 20 a non-common carriage service to a common carriage service. The Reclassification Order was
 21 released on March 12, 2015, but apparently will not go into effect until it is published in the Federal
 22 Register. *See* Docket No. 45, at 1 n.2 (FTC’s sur-reply). The Reclassification Order expressly states
 23 that reclassification will “apply only on a prospective basis.” Reclassification Order at 134 n.792.

24 The FTC argues that the Reclassification Order will have minimal impact on this case
 25 because it will apply only prospectively. In other words, the FTC focuses on the fact that, through
 26 this case, the Court can still address AT&T’s *past* misconduct which allegedly violates § 45(a). In
 27 response, AT&T contends that the FTC is missing the point – *i.e.*, once the Reclassification Order
 28 goes into effect, then the FTC will no longer have *jurisdiction* to pursue this case, even if limited to

1 past conduct by AT&T. *See, e.g.*, Docket No. 46, at 1 (AT&T sur-reply) (stating that “[t]he issue is
2 whether a change to an agency’s *jurisdiction* takes effect immediately and divests the agency of
3 authority to prosecute past conduct that is the subject of pending litigation”) (emphasis in original).

4 The FTC disputes that § 45(a) is a jurisdictional statute. But, even assuming that it is, the
5 Court is not persuaded by AT&T’s argument. *Hughes Aircraft Co. v. United States*, 520 U.S. 939
6 (1997), provides guidance as to how this issue should be resolved.

7 In *Hughes*, the plaintiff-whistleblower brought a qui tam action against a company for
8 violation of the False Claims Act (“FCA”). Before 1986, qui tam suits were barred if the
9 information on which they were based was already within the government’s possession. In 1986,
10 there was an amendment to the FCA which partially removed that bar. The question for the
11 Supreme Court was whether that amendment applied retroactively to the plaintiff’s suit. The
12 Supreme Court held that the 1986 amendment was not retroactive and therefore the plaintiff’s action
13 was barred. *See id.* at 941-42.

14 One of the arguments made by the plaintiff in favor of retroactivity was that the 1986
15 amendment was “jurisdictional, and hence . . . an exception to the general *Landgraf* presumption
16 against retroactivity.” *Id.* at 950. The Supreme Court noted first that “[t]he fact . . . courts often
17 apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain
18 limited circumstances failing to meet the conditions for our generally applicable presumption against
19 retroactivity, not an exception to the rule itself.” *Id.* at 951. The Court then went on to note that

20 [a]pplication of a new jurisdictional rule usually ‘takes away no
21 substantive right but simply *changes* the tribunal that is to hear the
22 case.’ Present law normally governs in such situations because
23 jurisdictional statutes ‘speak to the power of the court rather than to
24 the rights or obligations of the parties.’”

25 Statutes merely addressing *which* court shall have jurisdiction
26 to entertain a particular cause of action can fairly be said merely to
27 regulate the secondary conduct of litigation and not the underlying
28 primary conduct of the parties. Such statutes affect only *where* a suit
may be brought, not *whether* it may be brought at all.

The 1986 amendment, however, does not merely allocate
jurisdiction among fora. Rather, it *creates* jurisdiction where none
previously existed; it thus speaks not just to the power of a particular
court but to the substantive rights of the parties as well. Such a

1 statute, even though phrased in “jurisdictional” terms, is as much
2 subject to our presumption against retroactivity as any other.

3 *Id.* (emphasis in original).

4 Here, even if the change to the common carrier exception, resulting from the Reclassification
5 Order, could be deemed a change in tribunal (*i.e.*, because enforcement with respect to mobile data
6 would be delegated to the Federal Communications Commission instead of the FTC and this Court
7 would have jurisdiction only in the former instance), the fact remains that substantive rights are
8 affected by that change as well. As the FTC explains out in its sur-reply:

9 According to AT&T, the FCC is poised to sanction AT&T for its
10 throttling program. FCC action is not, however, a substitute for the
11 relief sought by the FTC. *The FCC is not authorized to seek refunds*
12 *for injured consumers, and its enforcement authority is limited to*
13 *conduct going back one year.* 47 U.S.C. § 503(b)(6). AT&T’s
14 throttling program has been in effect for more than three years, and
15 has, over the course of that time, inflicted economic harm on millions
16 of customers.

17 FTC Sur-Reply at 5 n.5 (emphasis added). This impairment of substantive rights (and AT&T’s
18 liability) is comparable to that in cases such as *Matthews v. Kidder, Peabody & Co.*, 161 F.3d 156,
19 157, 166 & n.17 (3d Cir. 1998) (holding that amendment to Private Securities Litigation Reform
20 Act, which eliminated securities fraud-based RICO claims, was not retroactive; also indicating that
21 there be no retroactivity for, *e.g.*, an amendment that reduced the statute of limitations under RICO
22 or that eliminated treble damages under RICO), and *Mabary v. Home Town Bank, N.A.*, 771 F.3d
23 820, 826 (5th Cir. 2014) (stating, that before the amendment to the Electronic Funds Transfer Act,
24 the plaintiff “had a cause of action based upon [the defendant’s] alleged actions, but afterward she
25 would not” and “the amendment thus ‘may be seen as destroying a cause of action and impairing a
26 party’s rights’”). As in *Matthews*, the applicable limitation period would effectively be shortened
27 given the Communications Act’s one-year limitations period. Moreover, as in *Mabary*, the remedy
28 of refunds to injured consumers sought by the FTC (but not available to the Federal
Communications Commission) would be impaired.

The authority that AT&T cited in its papers and at the hearing is unavailing. For example, in
Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996), the Ninth Circuit simply indicated that deprivation of

1 judicial review in the immigration context (more specifically, judicial review of deportation orders
2 involving aliens convicted of firearms offenses) merely affected the power of the court and not the
3 rights or obligations of the parties. *See id.* at 398-99 (noting that, “[a]s a general rule, we presume
4 that statutes affecting substantive rights or obligations apply prospectively only” and that “[t]his
5 presumption applies when a new statute impairs rights a party possessed when he acted, increases a
6 party’s liability for past conduct, or imposes new duties with respect to transactions already
7 completed”; adding that “[a] jurisdictional statute usually takes away no substantive right but simply
8 changes the tribunal that is to hear the case” – such statutes “*speak to the power of the court* rather
9 than to the rights or obligations of the parties”) (emphasis added; internal quotation marks omitted).

10 As for *Southwest Center for Biological Diversity v. United States Department of Agriculture*,
11 314 F.3d 1060 (9th Cir. 2002), there, the plaintiff brought suit after failing to get a response to a
12 request for information pursuant to the Freedom of Information Act (“FOIA”). While the action was
13 pending, Congress enacted the 1998 Parks Act, which included a provision allowing for a
14 withholding of information in response to a FOIA request. The district court applied that provision,
15 which led the plaintiff to argue on appeal that the district court had given impermissible retroactive
16 effect to the Parks Act provision. The Ninth Circuit disagreed, rejecting the plaintiff’s contention
17 that the Parks Act provision impaired a right it possessed when it acted because it had a right to the
18 information when it filed its suit and then lost that right by application of the exemption. *See id.* at
19 1062. The court explained: “[T]he ‘action’ of the [plaintiff] was merely to request or sue for
20 information; it was not to take a position in reliance upon existing law that would prejudice the
21 [plaintiff] when that law was changed.” *Id.* The Ninth Circuit also noted that “application of the
22 exemption furthers Congress’s intent to protect information regarding threatened or rare resources of
23 the National Parks” and thus “[t]his case . . . presents one of the many situations in which courts
24 appropriately apply the law in existence at the time of their decision.” *Id.* Here, the action taken by
25 the FTC is not comparable to a mere FOIA request; what is at stake is not simply a request for
26 information, but substantive rights directly affecting financial interest. In this case, the FTC took a
27 substantive position in reliance upon existing law that would prejudice it, as well as the public on
28

1 whose behalf it acted, when that law was changed – and notably, not by Congress directly but rather
2 by a sister agency.

3 **III. CONCLUSION**

4 For the foregoing reasons, the Court denies AT&T’s motion to dismiss. Contrary to what
5 AT&T argues, the common carrier exception applies only where the entity has the status of common
6 carrier and is actually engaging in common carrier activity. When this suit was filed, AT&T’s
7 mobile data service was not regulated as common carrier activity by the Federal Communications
8 Commission. Once the Reclassification Order of the Federal Communications Commission (which
9 now treats mobile data serve as common carrier activity) goes into effect, that will not deprive the
10 FTC of any jurisdiction over *past* alleged misconduct as asserted in this pending action.

11 This order disposes of Docket No. 29.

12
13 IT IS SO ORDERED.

14
15 Dated: March 31, 2015

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17 
EDWARD M. CHEN
United States District Judge

United States District Court
For the Northern District of California

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Exhibit B

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

No. C-14-4785 EMC

Plaintiff,

v.

**ORDER GRANTING DEFENDANT’S
MOTION TO CERTIFY**

AT&T MOBILITY LLC,

(Docket No. 57)

Defendant.

Plaintiff the Federal Trade Commission (“FTC”) has filed suit against Defendant AT&T Mobility LLC, asserting that AT&T has engaged in acts or practices “in connection with the marketing of wireless broadband internet access service for smartphones,” Compl. at 1-2, that violate 15 U.S.C. § 45(a). AT&T moved to dismiss the action, arguing that (1) the common carrier exception in § 45(a) applied to AT&T and that (2) the Federal Communications Commission’s recent “Reclassification Order” stripped the FTC of jurisdiction to pursue this case, even if limited to the past misconduct of AT&T. This Court denied AT&T’s motion to dismiss, ruling in the FTC’s favor on both issues. AT&T now moves the Court to certify its order denying dismissal for immediate appeal. *See* 28 U.S.C. § 1292(b).

Section 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action

1 may thereupon, in its discretion, permit an appeal to be taken from
 2 such order, if application is made to it within ten days after the entry
 3 of the order: *Provided, however*, That application for an appeal
 hereunder shall not stay proceedings in the district court unless the
 district judge or the Court of Appeals or a judge thereof shall so order.

4 *Id.*

5 “[T]he party pursuing the interlocutory appeal bears the burden of . . . demonstrating” that
 6 the district court order at issue involves a controlling question of law; that there is substantial ground
 7 for difference of opinion on that legal question; and that an immediate appeal on that legal question
 8 may materially advance the ultimate termination of the litigation. *See Couch v. Telescope Inc.*, 611
 9 F.3d 629, 633 (9th Cir. 2010). All three requirements must be met for there to be certification under
 10 § 1292(b). *See id.*

11 In the case at bar, there is no real dispute that the two issues identified by AT&T are
 12 controlling questions of law and that an immediate appeal may materially advance the ultimate
 13 termination of the litigation. As to whether there is a substantial ground for difference of opinion on
 14 the legal issues, the Court also finds that this factor weighs in favor of AT&T. As to the first legal
 15 issue, there is, in effect, a dispute between other circuit courts on the question¹ and the Ninth Circuit
 16 has not addressed the issue, which is sufficient to establish a substantial ground for difference of
 17 opinion. Furthermore, the scope of the common carrier exception raises novel and difficult
 18 questions of first impression. *See id.* (stating that “[c]ourts traditionally will find that a substantial
 19 ground for difference of opinion exists where ‘the circuits are in dispute on the question and the
 20 court of appeals of the circuit has not spoken on the point, if complicated questions arise under
 21 foreign law, or if novel and difficult questions of first impression are presented’”). As for the
 22 second legal issue, it also raises novel and difficult questions. Moreover, it is intimately related to
 23 the first legal issue and, therefore, if only as a practical matter, it makes no sense to carve it out of
 24 the Court’s certification order.

27 ¹ *Compare Federal Trade Commission v. Miller*, 549 F.2d 452 (7th Cir. 1977), with *FTC v.*
 28 *Verity Int’l, Ltd.*, 443 F.3d 48 (2d Cir. 2006); see also *Federal Trade Commission v. Verity*
 International, 194 F. Supp. 2d 270 (S.D.N.Y. 2002) (lower court opinion which was appealed to the
 Second Circuit).

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of May 2015, I caused the foregoing **Unopposed Petition for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)** to be submitted electronically with the Clerk of the Court through the Court's appellate ECF system.

I further certify that, on this date, by agreement of counsel, the foregoing petition was served by electronic mail upon the following:

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