

# Communications Daily

## 'Bad Policy'

### Reversal of 9th Circuit Decision Could Be Game Changer for FCC, FTC

TOP NEWS | 11 May 2017 | Ref: 1705100063

The 9th U.S. Circuit Court of Appeals Tuesday decision to review en banc the FTC's appeal ruling that threw out the commission's case alleging AT&T Mobility inadequately informed customers of its data-throttling program is potentially a game changer for the FCC and the FTC, industry officials said Wednesday. The agencies won't have clarity before the fall. The court said Wednesday the en banc hearing will be the week of Sept. 18. FCC Chairman Ajit Pai hailed the importance of the decision to rehear the case (see 1705090068). Industry lawyers said usually when a court grants en banc rehearing, it's more likely than not to overturn the initial decision.

TechFreedom President Berin Szoka said the rehearing is potentially significant as the FCC reviews whether to reverse the 2015 reclassification of broadband under Title II of the Communications Act: "Granting rehearing vacates the panel decision, so if the FCC undid reclassification today, the FTC would resume jurisdiction without any question about its authority." If the 9th Circuit agrees with the FTC, "we'll be back to where we were before the panel decision: Ajit Pai's job will become a lot easier, because declaring broadband isn't subject to Title II will immediately restore the FTC's jurisdiction over broadband," Szoka said. "Then, we have a serious discussion of how an FTC-led approach would work, instead of getting stuck on the arcane issue of the common carrier exemption." One possibility is the 9th Circuit will find "middle ground," he said. "I'd certainly give the FTC better than even odds of winning." Szoka warned that rehearing in the case could delay FCC work on net neutrality, especially if the court orders new briefing and new oral arguments.

The en banc review is important beyond the telecom world, said Daniel Lyons, associate professor at Boston College Law School. "The court had previously held that the FTC lacked jurisdiction to exercise its Section 5 authority against common carriers, even with regard to non-common-carriage activities," Lyons said. "Even if Chairman Pai is successful in his attempt to repeal the common-carriage designation for internet access, the 9th Circuit's decision would still limit the FTC's authority over companies like AT&T that maintain a traditional telephone business."

Gigi Sohn, who was an aide to former FCC Chairman Tom Wheeler, said the case is important only if the original decision is reversed, and she thinks it should be overturned. "The 9th Circuit decision is not only poorly reasoned, it's just bad policy," she said. "I want the FCC to be able to oversee the non-common carrier activities of common carriers." Conservatives will argue that if the FTC wins, it will be able to oversee the broadband industry on privacy and other issues if the FCC reverses the 2015 reclassification of broadband as a common-carrier service, Sohn said. She

disagreed. "The FCC's rulemaking ability is important to protect consumers before they're harmed," she said. "The FCC's expertise as an agency that knows how networks are managed and knows how networks work can't be replicated by the FTC."

### Reversal?

Ferras Vinh, Center for Democracy & Technology policy counsel-Open Internet Project, said the action appeared to be a positive step since the judges on the full bench might be more liberal and consumer friendly than the three-judge panel that sided with AT&T. "It suggests that a majority of the judges of the 9th Circuit believe this issue merits a closer look. It gives the FTC another chance," he said.

That ruling called into question FTC ability to regulate any practice by ISPs. "With the increasing amount of non-common carrier related activity the telecoms are engaged in I think that was a significant concern," said John Breyault, National Consumers League vice president-public policy. "I doubt that the court would have granted the en banc review if they thought the FTC didn't have a chance."

Richard Newman, an FTC compliance and defense lawyer with Hinch Newman, said if the prior ruling that the FTC doesn't have authority over ISPs stands, current efforts to repeal FCC net neutrality rules could be defeated: "If the 9th Circuit decision is upheld, the [FTC] will likely not recapture jurisdiction over broadband companies via repealing the net neutrality rules, alone. In that instance, a legislative amendment to the FTC Act would be required."

Vinh said Pai statement's that the court action would "strengthen" the FCC's case to reverse the 2015 order and restore FTC oversight of ISP privacy and data security "simplifies" the issue. It's not just a legal or jurisdictional issue but a "real" policy matter, he added. The NPRM, Vinh noted, said in paragraph 67 it would give complete oversight to the FTC, which isn't necessarily designed to handle telecom interconnection and network engineering issues -- deep expertise in the FCC. "While it is still proposed rulemaking and subject to change, it appears that Chairman Pai does not foresee a role in the oversight of consumer privacy for the FCC and is willing to cede the field to the FTC," said Vinh. From a legal and policy view, Breyault said, Title II designation of common carriers is entirely consistent with the FTC's ability to regulate non-common carrier services, and public interest favors two cops on the beat.

### Complexities

"This case provides complexities regardless of the outcome of the en banc decision," said former FCC Commissioner Robert McDowell, now at Cooley and Mobile Future. "The FCC and FTC will have to continue to work together to articulate how consumer privacy is protected consistently across all platforms and business models under existing law despite the regulatory confusion created over the past few years."

Morrison Foerster privacy and consumer protection lawyer Julie O'Neill, a former FTC attorney, said the court action bodes well for that agency. She said the court's

statement that the three-judge panel's decision "will not serve as precedent in this or other 9th Circuit cases ... might hint that the 9th Circuit is not inclined to follow it." She added that Pai's statement about the court action indicates "he likely sees" the possibility of that panel decision being rolled back and consistent with his plan to reverse the 2015 order, giving the FTC authority over broadband providers. Augustino said Pai's argument is a "bit of a stretch" and the chairman is conflating the separate issues of broadband classification and scope of FTC jurisdiction "to build support for his preferred path. He may be right that reversing the 2015 order is the right path, but it's not because the 9th Circuit decided to consider the case."

Most expect any decision likely to be appealed to the Supreme Court. "We're talking about identifying the dividing line between the jurisdictions of two prominent federal agencies impacting significant portions of today's economy," said Augustino. "If the issue gets that far, I would not be surprised if the Supreme Court might be interested in taking a look." O'Neill said any decision likely will be appealed and, in the meantime, the FTC may lobby Congress to repeal the common-carrier exception from the FTC Act.

"It pays to be cautious and not assume that a grant of rehearing will lead to a reversal on the merits of the panel's decision," said Randolph May, president of the Free State Foundation and former FCC associate general counsel. "But, as a general rule, it does make it somewhat more likely that the panel's decision will be permanently vacated. That result, the restoration of the FTC's jurisdiction over ISPs, bolsters the argument in support of the FCC stepping back with respect to regulation of privacy matters and internet practices more broadly. Ultimately, that is the direction in which sound policy should move."

The Communications Act clearly limits common-carrier regulation to companies insofar as they are engaged in common carriage, said Doug Brake, senior telecom policy analyst at the Information Technology and Innovation Foundation. The Communications Act draws the common carrier line as activity-based, but the FTC panel drew the FTC's exemption line as status-based, he said. "Long-term implications of this case were overstated, and not a reason to slow down the process of returning broadband privacy to the FTC. The panel opinion itself contains language limiting its impact, plus legislation fixing any real problems would be non-controversial."

*written by Dibya Sarkar and Howard Buskirk*

---

Copyright© 2017 by Warren Communications News, Inc. Reproduction or retransmission in any form, without written permission, is a violation of Federal Statute (17 USC101 et seq.).