No. 15-16585

In the

United States Court of Appeals for the Ninth Circuit

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

AT&T MOBILITY LLC,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California

BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Public Knowledge states that it has no parent corporation or publicly held corporation that holds 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Public Knowledge[1] is a Washington, DC based public interest group working to defend citizens' rights in the emerging digital culture. Through legislative, administrative, legal, and grass-roots efforts, Public Knowledge seeks to guard these rights at all layers of our communications systems.

SUMMARY OF ARGUMENT

In addition to the reasons identified by the Federal Trade Commission and other *amici*, en banc rehearing should be granted because the panel decision did not properly account for the role of the Communications Act of 1934 and the Federal Communications Commission in construing the common carrier exception to the FTC's agency authority.

As brief background, the FTC has general consumer protection authority except over certain enumerated classes, including an exception for "common carriers" subject to the Communications Act. The panel rejected an "activity-based" construction in which a firm might be exempt from FTC authority only for common-carrier activities but not for others it undertakes, adopting instead a

[1]This brief is being tendered with a motion for leave to file this brief. Pursuant to Rule 29(c)(5), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

"status-based" construction in which a firm may be exempt if it enjoys the status of being a common carrier, regardless of the firm's other activities.

Any construction of the FTC common-carrier exception must account for the FCC for at least two reasons, both of which are of sufficient importance to warrant review of this decision en banc.

First, the FTC Act's common-carrier exception language directly imports the Communications Act by statutory text, meaning that the latter statute bears greatly on the proper reading of the former. The Communications Act has consistently been understood as activity-based. Case law and FCC practice have, for decades, reflected this activity-based interpretation, and Congress reinforced this long-established understanding in enacting the Telecommunications Act of 1996. The joint work between the FCC and FTC further underscore how the two agencies' regulatory powers are complementary. It is as important as ever to ensure that the FTC Act's common carrier exception is considered in the context of the Communications Act and the scope of FCC jurisdiction.

Second, the panel's failure to appreciate this interrelationship between the statutes threatens to create a substantial jurisdictional gap and to undermine fundamental consumer protections envisioned by Congress. In an age of increasing consolidation in the communications and media industries, it is critical that agencies provide vital consumer protections against deceptive and unfair practices,

privacy violations, and cybersecurity threats. Major communications companies like AT&T and Verizon provide both common carrier services and non-common-carrier services. To render the FTC potentially unable to reach such conglomerates because of purported common-carrier status could leave those companies in a regulatory vacuum, to the detriment of consumer protection and public policy. En banc review is necessary to ensure that the panel decision does not unduly harm consumers and upend decades of established case law and statutory interpretation.

ARGUMENT

I. The Panel's Status-Based Holding Incorrectly Ignores the Longstanding Scheme of Common Carrier Regulation Under the Communications Act

In construing the term "common carrier" to assess the extent of the statutory exception to the FTC's jurisdiction, the panel opinion ignored a central consideration: the jurisdictional ambit of the Federal Communications Commission.

A. The FTC Act Must Be Construed in Light of the Communications Act and the FCC

The jurisdiction of the FCC is critically important here because the FTC's common carrier exception is defined with reference to the the Communications Act of 1934.

The two agencies' authorities interlock. The FTC's jurisdictional exception reads, in full, "common carriers subject to the Acts to regulate commerce." Federal Trade Commission Act (FTC Act) § 5(a)(2), 15 U.S.C. § 45. "Acts to regulate commerce," in turn, is defined in part as "the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto"—that is, the statutes authorizing the FCC. § 4, 15 U.S.C. § 44 (citing Communications Act of 1934, ch. 652, 48 Stat. 1064).

Indeed, the Second Circuit previously recognized that the Communications Act affects the reading of the section 5 common carrier exception when, in assessing the bounds of that exception, the court considered (and found "highly questionable") a status-based reading of the Communications Act. *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 59 & n.4 (2nd Cir. 2006).

"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850). Here, the panel overlooked this basic rule of statutory construction when it disregarded the Communications Act despite its direct reference in the FTC Act. And this error was significant, because the consistent activity-based reading of the Communications Act renders the status-based reading of the FTC Act all but implausible.

B. The Courts and the FCC Have Long Established an Activity-Based Definition of Common Carriers

The FCC's regulatory authority has long been understood as activity-based, such that a firm is regulated as a common carrier only with respect to its common carriage activities.[2]

1. Title II of the Communications Act gives the FCC authority over "every common carrier engaged in interstate or foreign communication by wire or radio," 47 U.S.C. § 201(a), where "common carrier" is defined generally as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio," § 153(11). "Person," in turn, is defined as "an individual, partnership, association, joint-stock company, trust, or corporation." § 153(39).

While that definition might appear to suggest that "common carrier" is a status-based per-firm designation, courts have uniformly rejected that view. "A cable system," for example, "may operate as a common carrier with respect to a portion of its services only." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700–01 n.9 (1979) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC* ("*NARUC*"), 533 F.2d 601, 608 (D.C. Cir. 1976)); *see also McDonnell Douglas Corp. v. Gen. Tel. Co. of Cal.*, 594 F.2d 720, 724 n.3 (9th Cir. 1979) ("A carrier may be an interstate 'common carrier' . . . in some instances but not in others, depending on the nature of

[2]The FCC also has authority over different activities such as radio broadcasting, *see* 47 U.S.C. § 303, but those are not relevant to the present case.

the activity which is subject to scrutiny"); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

Consistent with the courts' view, the FCC has long recognized activity-based limitations on its regulatory authority, such that the agency distinguishes activities not within the scope of common carriage even when the actor is a common carrier in other respects. *See In re Fed.-State Joint Bd. on Universal Serv.*, 16 F.C.C. Rcd. 571, 574 (2000) (finding that "whether an entity in a given case is a common carrier . . . depends on the particular practice under surveillance"); *see also In re Detariffing the Installation & Maint. of Internal Wiring*, 1 F.C.C. Rcd. 1190, 1192 (1986) (finding limitations on their regulatory reach based on the particular activity being engaged in); *In re Detariffing the Installation & Maint. of Internal Wiring*, 3 F.C.C. Rcd. 1719, 1719 (1988).

That courts would treat the FCC's jurisdiction as activity-based is unsurprising: Many earlier cases held that common carriers of a different sort—railroad companies—were not protected by common carrier immunity in contractual obligations when acting outside of their duties as a common carrier. *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 185 (1916); *see also Kan. City S. Ry. Co. v. United States*, 282 U.S. 760, 764 (1931) (finding that common carriers ordinarily subject to the Interstate Commerce Act are not subject to its reach when acting outside of their duties as a common carrier). And the common

law understanding was that an entity's common carrier treatment depended on activities, not status. *See* Joseph Story, *Commentaries on the Law of Bailments* § 499 (8th ed. 1870) (observing that stagecoaches were not common carriers for purposes of carrying people, but were common carriers for purposes of baggage).

2. The Telecommunications Act of 1996 confirms the activity-based reading of the FCC's authority over common carriers. That act introduces the term "telecommunications carrier," which "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services"—an explicitly activity-based definition. Pub. L. No. 104-104, sec. 3(a), § 3(49), 110 Stat. 56, 60, *codified at* 47 U.S.C. § 153(51). This definition signals Congress's intent to codify the longstanding notion that common carrier regulations will apply only to an entity's activities as a common carrier, regardless of what other activities that entity may undertake. *See United States Telecom Ass'n v. FCC*, 825 F.3d 674, 691 (D.C. Cir. 2016).

3. An activity-based definition of the FCC's common carrier jurisdiction was not a mere accident of law, but rather necessary to comport with a world of increasing conglomeration of diverse lines of business.

At the creation of the FCC in the 1930s telephone companies largely stayed in the telephone (or telegraph) business. But the subsequent influx of new technologies and changes in legal practice rendered many firms as providers of more

than one type of service. Innovation and deregulation allowed a cable provider to provide internet services to its customers, and internet providers could provide audiovisual content to their customers. Companies more often engaged in both common-carrier and non-common-carrier businesses.

The D.C. Circuit, for example, contemplated the FCC's authority over "two-way, point-to-point, non-video communications" operated over cable systems. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC* ("*NARUC*"), 533 F.2d 601, 605 (D.C. Cir. 1976). Cable systems were understood not to be common carriers, *see, e.g., United States v. Sw. Cable Co.*, 392 U.S. 157, 169 n.29 (1968), but the court found this to be no barrier to treating the point-to-point service as common carriage:

> [I]t has long been held that "a common carrier is such by virtue of his occupation," that is by the actual activities he carries on. Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.

NARUC, 533 F.2d at 608 (citations omitted) (quoting *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211–12 (1927)).

Similarly, in *Computer & Communications Industry Ass'n v. FCC*, the FCC and D.C. Circuit agreed that "basic transmission services" were distinguishable from "enhanced services" (those involving additional computer processing or providing additional information), finding that the latter did "not constitute common carrier communications activities" and thus were not subject to Title II regula-

tion. 693 F.2d 198, 210, 205 n.18 (D.C. Cir. 1982). As technologies continued to merge, a single service provider could now offer a "great variety" of services, requiring consideration of each particular activity in determining the breadth of the FCC's regulatory control. *See id.* at 210 (citing *NARUC*, 533 F.2d at 608).

The activity-based construction of "common carrier" with respect to the FCC must certainly inform the parallel construction of the term with respect to the FTC, insofar as the FTC Act directly references the FCC's authorizing statute. En banc review is required to give due consideration to the relationship between those two statutes.

C. A Status-Based Reading of the FTC Act Is at Odds with the Collaborative Relationship Between the FCC and the FTC

The FCC and the FTC have an established history of using their authorities to complement one another's enforcement jurisdiction to ensure consumer protection reaches as far as possible. As recently as a year ago, the agencies committed themselves to continuing their collaborative framework and ensuring they did not leave a jurisdictional gap in enforcement. In signing a Memorandum of Understanding, the agencies made it clear that they "wish to continue working together to protect consumers and the public interest" and intend to so by "building upon their long history of cooperation on matters of overlapping au-

thority." Memorandum of Understanding from Fed. Commc'ns Comm'n & Fed. Trade Comm'n 1 (Nov. 16, 2015), URL *supra* p. v.

Most importantly, the agencies make it clear that "the scope of the common carrier exception in the FTC Act does not preclude the FTC from addressing non-common carrier activities engaged in by common carriers." *Id.* at 2. It was upon this premise that the FTC, in joint efforts with the FCC, successfully brought enforcement actions against both AT&T and T-Mobile for deceptive and unfair business practices with regards to mobile cramming. *See* Press Release, *AT&T to Pay $80 Million to FTC for Consumer Refunds in Mobile Cramming Case* (Oct. 8, 2014), *available at* URL *supra* p. v; Press Release, *T-Mobile to Pay At Least $90 Million, Including Full Consumer Refunds To Settle FTC Mobile Cramming Case* (Dec. 19, 2014), *available at* URL *supra* p. v.

The relationship between the two agencies shows their expectation that they share abutting authority: where the FTC's ability to regulate ends with the common carrier exception, the FCC's authority begins. The agencies arrive at that view because it is what the FTC Act commands: The FTC's exception is defined with specific reference to the FCC's authorizing law. This further confirms the importance of construing the FTC Act in light of the Communications Act, and highlights the importance of correcting the panel opinion to account for the FCC's role.

II. The Panel's Decision Potentially Opens Gaps in Regulatory Authority and Leaves Major Business Activities Unregulated by Either the FCC or FTC

Besides conflicting with the plain statutory language, the panel decision as a practical matter creates a possible jurisdictional gap not explainable by congressional intent or statutory construction: Certain lines of business of some companies could escape regulation by either the FCC or the FTC. That gap is problematic in view of the increasing consolidation among telecommunications companies, who now regularly offer both common carrier and non-common-carrier services. Such consolidation practices indicate a greater need for en banc review to determine whether it is correct to interpret the FTC Act to create such a gap.

A. The FCC Lacks the Authority to Serve as a Complete Consumer Protection Substitute for the FTC

The FCC does not have the authority to address the breadth of consumer harms and unfair or deceptive practices that the FTC can address. As explained above, the FCC's regulatory oversight in relevant part is defined with respect to common carriage activities. *See* Section I.A *supra* p. 3. For example, if a communications company also owns a media business and engages in unfair or deceptive advertising with regard to the media business, then the FCC would likely lack power over that advertising practice. If the common carrier exception to

section 5 of the FTC Act is status-based, as the panel held, then the FTC may also lack jurisdiction over the deceptive advertising practice of the hypothetical communications company. The end result may be that neither agency would have oversight over the company's non-communications activities.

It is difficult to believe that Congress would have intended to leave such a large gap in the regulatory consumer protection scheme. No statutory text or legislative history suggests intent to leave this gap, and one would expect at least some explanation for such a result. Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). The better interpretation is that the common carrier exception of section 5 complements the Communications Act, such that the FTC's common carrier exception is at most coextensive with the FCC's relevant authority.

B. Companies Increasingly Offer Both Common-Carrier and Non-Common-Carrier Services, Potentially Allowing Them to Escape Agency Oversight

This jurisdictional gap is not merely speculative, because companies regularly engage in activities both inside and outside the communications sphere.

For example, AT&T recently finished acquiring DirecTV. Many of AT&T's activities are classified as common carriers subject to FCC oversight, but that is not exclusively the case. In some markets, AT&T bundles common-carrier voice and data services with non-common-carrier DirecTV video service, home alarm,

and automation services. *See, e.g.,* Roger Cheng, *AT&T Will Let You Pay for TV, Wireless Service Under One Discounted Bill*, CNet (Aug. 2, 2016), URL *supra* p. iv. While the common carrier activities of this bundle would be within the FCC's purview, the advertising surrounding the offering and particularly relating to non-common-carrier elements of the offering may lie outside the FCC's authority. Consumer protection for improper advertising practices of DirecTV, for example, has been traditionally carried out by the FTC, in accordance with statutory language and Congressional intent. Press Release, *FTC Charges DIRECTV with Deceptively Advertising the Cost of Its Satellite Television Service* (Mar. 11, 2015), *available at* URL *supra* p. v.

AT&T is not the only company expanding beyond its roots as a company which conducts primarily common carrier activities. Communications company Verizon recently acquired AOL, whose current lines of business relate primarily to advertising and media content. *See* Kevin Fitchard, *The Real Reason Verizon Bought AOL*, Fortune (June 24, 2015), URL *supra* p. v. The FCC may have limited ability to oversee these business lines once integrated into Verizon. Should the panel decision stand, and the FTC also lack authority due to Verizon's overall common carrier status, there would be an open question of who would protect consumers from improper business practices on the AOL side of the merger.

To its credit, the panel decision (at 17) attempts to distinguish situations involving "acquisition of some minor [common carrier] division unrelated to the company's core activities that generates a tiny fraction of its revenues." But the examples above do not fit this distinction. The carrier-media mergers of late have had valuations far too high to be considered "a tiny fraction" of revenues. *See, e.g.,* Michael J. de la Merced, *AT&T Agrees to Buy Time Warner for $85.4 Billion*, N.Y. Times, Oct. 23, 2016, at A1; Mike Shields & Thomas Gryta, *Verizon Agrees to Buy AOL for $4.4 Billion*, Wall St. J., May 12, 2015, URL *supra* p. v; Cristina Alesci et al., *Verizon Is Buying Yahoo for $4.8 Billion*, CNNMoney, URL *supra* p. iv. And the integration of common carrier services with others has often been central rather than "unrelated to the company's core activities." Communications companies have found it necessary to leverage advertising and content revenue to increase profits: CEO Lowell McAdam explained that for Verizon to ensure growth and avoid the death spiral, "part of the answer is Hollywood and Silicon Valley." Ryan Knutson et al., *Inside Verizon's Gamble on Digital Media*, Wall St. J., Aug. 2, 2016, URL *supra* p. v. Integration of common carriers with other services today is rarely an "acquisition of some minor division," meaning that the panel's treatment of the common carrier exception of section 5 potentially opens a wide unregulated chasm between the FCC and the FTC's consumer protection abilities.

These examples of mergers and diversification on both sides of the common-carrier divide should give this Court pause when it comes to the present case. To open a regulatory loophole through which these companies may avoid administrative enforcement would be not only remarkable as a matter of law, but troubling as a matter of consumer protection. A broad-ranging result such as this warrants careful scrutiny, of the sort this Court should offer with en banc review.

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

Respectfully submitted,

Dated: October 24, 2016

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(2) because this brief contains **3,294** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the *xelatex* typesetting system, version 3.14159265-2.6-0.99991, in the typeface Linux Libertine.

Dated: October 24, 2016

s/Charles Duan
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Brief of Public Knowledge as *Amicus Curiae* in Support of the Petition for Rehearing *En Banc*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **October 24, 2016**.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 24, 2016

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