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# [***FTC v. AT&T Mobility LLC***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=)

United States District Court for the Northern District of California

March 31, 2015, Decided; March 31, 2015, Filed

No. C-14-4785 EMC

**Reporter**

87 F. Supp. 3d 1087 \*; 2015 U.S. Dist. LEXIS 43272 \*\*; 2015 Trade Cas. (CCH) P79,132

FEDERAL TRADE COMMISSION, Plaintiff, v. AT&T MOBILITY LLC, Defendant.

**Subsequent History:** Certificate of appealability granted [*FTC v. AT&T Mobility LLC, 2015 U.S. Dist. LEXIS 64086 (N.D. Cal., May 15, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G0J-8JC1-F04C-T3MC-00000-00&context=)

Reversed by, Remanded by [*FTC v. AT&T Mobility LLC, 835 F.3d 993, 2016 U.S. App. LEXIS 15913 (9th Cir. Cal., Aug. 29, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KK5-FMS1-F04K-V3M1-00000-00&context=)

**Core Terms**

common carrier, exemption, mobile, ***regulation***, entity, customers, carriage, Packers, Stockyards, throttling, carrier, services, activities, Commerce, unfair, Reclassification, interstate commerce, ***regulate*** commerce, unlimited, parties, Interstate, practices, provider, speed, data services, non-common, engaging, argues, retroactivity, gaps

**Case Summary**

**Overview**

HOLDINGS: [1]-Defendant unsuccessfully argued that it fell within the common carrier exception in [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) because the exception applied so long as an entity has the status of a common carrier; [2]-That argument glossed over what was meant by common carrier in the first place; [3]-At the time the Federal Trade Commission Act of 1914 was enacted, the term common carrier encompassed not only a status but also an activity component; [4]-Defendant's interpretation of the common carrier exception would result in significant ***regulatory*** gaps; [5]-The FTC's interpretation, although not necessarily entitled to Chevron deference, should still be afforded some deference pursuant to the Skidmore decision.

**Outcome**

Motion denied.

**LexisNexis® Headnotes**

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc1)[] **Trade Practices & Unfair Competition, Federal Trade Commission Act**



[*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=), which is part of the Federal Trade Commission Act of 1914 (Act), provides in part that the Federal Trade 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.S. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=).

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc2)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



[*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) prohibits, inter alia, unfair or deceptive acts or practices in or affecting commerce. [*15 U.S.C.S. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

[***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc3)[] **Motions to Dismiss, Failure to State Claim**



A jurisdictional attack can be facial or factual; in the former circumstance, all of the factual allegations in the complaint are taken as true and extrinsic evidence such as documents attached to a complaint may be considered. Given such a challenge, the standard is governed essentially by a [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=)-type inquiry.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc4)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



See [*15 U.S.C.S. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=).

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Federal Communications Act

Business & Corporate Compliance > ... > Interstate Commerce > Transportation Law > Interstate Commerce

[***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc5)[] **Antitrust & Trade Law, Federal Trade Commission Act**



The term Acts to ***regulate*** commerce in the Federal Trade Commission Act of 1914 (Act) is defined as the Interstate Commerce Act of 1887 and the Communications Act of 1934, as well as all amendments and supplements thereto. [*15 U.S.C.S. § 44*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMB1-NRF4-43D5-00000-00&context=). When [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) was first enacted as part of the Act in 1914, Acts to ***regulate*** commerce meant only the Interstate Commerce Act of 1887 because the Communications Act of 1934 had not yet been passed.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Federal Communications Act

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Railroads

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc6)[] **Transportation, Common Carriers**



The Interstate Commerce Act of 1887 was the first federal ***regulation*** to impose duties on common carriers and applied to any common carrier or carriers engaged in the railroad transportation of people or property interstate. In 1910, Congress passed the Mann-Elkins Act, which amended the Interstate Commerce Act of 1887 to apply to interstate telephone companies and to deem such companies common carriers. ***Regulation*** of telephone common carriers continued to rest with the Interstate Commerce Commission until 1934, when Congress passed the Communications Act of 1934. Federal ***regulation*** in the area had previously been undertaken incidentally to general interstate carrier ***regulation*** under the Interstate Commerce Act of 1887. When [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) was amended in 1938, one of the amendments made was to re-define Acts to ***regulate*** commerce to include the Communications Act of 1934.

Governments > Legislation > Interpretation

[***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc7)[] **Legislation, Interpretation**



Statutory construction begins, of course, with the language of the statute. The ordinary tools of statutory construction include the language of the statute, the statute's legislative history, and the practical effects to the extent necessary to illuminate the meaning of the plain language.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Federal Communications Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc8)[] **Transportation, Common Carriers**



[*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) carves out an exception for common carriers subject to the Acts to ***regulate*** commerce, which includes the Communications Act of 1934. [*15 U.S.C. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=).

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Governments > Legislation > Interpretation

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc9)[] **Transportation, Common Carriers**



Nowhere in the Federal Trade Commission Act of 1914 (Act) is the term common carrier defined. Given that fact, it is appropriate to consider what the term common carrier meant at the time the Act was enacted in 1914. Notably, that is the approach that the United States Court of Appeals for the Second Circuit took in a decision addressing the common carrier exception in [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). In the Verity decision, the Second Circuit decided to give meaning to common carrier in the Act according to the ordinary sense of the word when Congress used it to create the exemption.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

***Antitrust*** & Trade Law > Federal Trade Commission Act

[***HN10***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc10)[] **Transportation, Common Carriers**



Prior to the enactment of the Federal Trade Commission Act of 1914, an entity was deemed a common carrier and ***regulated*** as such under the common law only where it was actually engaged in common carriage services. In the Santa Fe decision, the United States Supreme Court noted that the great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community and, therefore, a common carrier in the prosecution of its business as such is not permitted to drop its character and transmute itself by contract into a mere bailee with right to stipulate against the consequences of its negligence. The Supreme Court added that the rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

***Antitrust*** & Trade Law > Federal Trade Commission Act

[***HN11***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc11)[] **Transportation, Common Carriers**



Prior to the enactment of the Federal Trade Commission Act of 1914, common carriers were viewed in a similar way for purposes of the Interstate Commerce Act. For instance, in the Goodrich Transit Co. decision, the United States Supreme Court concluded that the Interstate Commerce Commission had authority to require a system of accounting for a common carrier, even though the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties in carrying passengers in freight in interstate commerce, e.g., amusement parks; but the Supreme Court also indicated that those non-common carriage affairs were otherwise not within the Commission's jurisdiction.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

[***HN12***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc12)[] **Transportation, Common Carriers**



At the time the Federal Trade Commission Act of 1914 was enacted, the term common carrier encompassed not only a status but also an activity component. An entity was deemed a common carrier when it had the status of common carrier and was actually engaging in common carriage services.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN13***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc13)[] **Transportation, Common Carriers**



[*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) refers to an exemption for common carriers subject to the Acts to ***regulate*** commerce. [*15 U.S.C.S. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). That language can fairly be read to mean that the exemption applies only when the common carrier is subject to ***regulation*** as such. Congress created the common carrier exemption because it did not intend the Federal Trade Commission to enforce unfair-competition law against common carriers because the Interstate Commerce Commission already ***regulated*** common carriers under the Interstate Commerce Act of 1887. An entity was subject to ***regulation*** as a common carrier only when it was actually engaging in common carriage activity.

Business & Corporate Compliance > ... > Communications Law > ***Regulators*** > US Federal Communications Commission

Communications Law > ... > ***Regulated*** Entities > Telephone Services > Mobile Communications Services

[***HN14***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc14)[] **Regulators, US Federal Communications Commission**



Prior to March 12, 2015, the Federal Communications Commission deemed mobile data service a private mobile service, i.e., non-common carriage. 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.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

[***HN15***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc15)[] **Transportation, Common Carriers**



A holistic interpretation of the common carrier exception is more consistent with the legislative history for the Federal Trade Commission Act of 1914 (Act). As the Act notes, during the 1914 congressional debate over the bill that would later become the Act, Representative Stevens, a manager of the House bill, discussed what entities would be covered by the proposed act. Mr. Stevens stated, inter alia, that every corporation engaged in commerce would come within the scope of the act. They ought to be under the jurisdiction of this commission in order to protect the public, in order that all of their public operations should be 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. Every corporation engaged in commerce except common carriers, 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. 51 Cong. Rec. 8996 (1914).

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

[***HN16***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc16)[] **Transportation, Common Carriers**



Congress created the common carrier exemption because it did not intend the Federal Trade Commission to enforce unfair-competition law against common carriers because the Interstate Commerce Commission already ***regulated*** common carriers under the Interstate Commerce Act of 1887.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Governments > Legislation > Interpretation

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

[***HN17***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc17)[] **Transportation, Common Carriers**



That the common carrier exception in [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) requires consideration of both status and activity, and not just status alone, is supported by the tool of statutory construction which counsels a court to consider a statute's practical effects to the extent necessary to illuminate the meaning of the plain language.

Governments > Legislation > Interpretation

[***HN18***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc18)[] **Legislation, Interpretation**



The United States Supreme Court has stated that, where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Business & Corporate Compliance > ... > Communications Law > ***Regulators*** > US Federal Communications Commission

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

[***HN19***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc19)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



There is no obvious conflict between [*47 C.F.R. § 8.3*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SBS-V370-008H-03GV-00000-00&context=) and [*15*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5S69-F790-008H-054C-00000-00&context=) U.S.C.S. [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=).

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

[***HN20***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc20)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



While the legislative history for the Packers and Stockyards Act of 1921 does use the terms status and activity, that terminology must be viewed in context. The critical point in the legislative history was that the Packers and Stockyards Act of 1921 was being amended to limit application to certain kinds of packers. H.R. Rep. No. 85-1048, at 6 (1957) notes that the amendment to [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) was to reflect the amendment made in the Packers and Stockyards Act of 1921; 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; The 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 activities of packers with respect to all other products will fall under the jurisdiction of the Federal Trade Commission. The United States Court of Appeals for the Fourth Circuit has explained that the change to the Packers/Stockyards exemption was not consequential.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

[***HN21***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc21)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



In the Crosse & Blackwell decision, the United States Court of Appeals for the Fourth Circuit noted that, pre-1958 amendment to [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=), it was clear that the substance of what was intended to be withdrawn from the controls of the Federal Trade Commission and subjected to ***regulation*** by the Secretary of Agriculture were the businesses of the stockyards and packers as those industries were known and understood at the time. Doubtless the Congress did not anticipate that a great steel company might attempt to escape the restraints of the ***antitrust*** laws by operating a small packing plant, taking the position that it was engaged in the business of a packer and was thus subject, in its steel business, to ***regulation*** only by the Secretary of Agriculture under the Packers and Stockyards Act of 1921 that a canner of miscellaneous food items might avoid compliance with the general ***antitrust*** laws solely by reason of the fact that it used a relatively small quantity of meat as an ingredient in some of its products, for it did not expressly provide in 1921 that one engaged in parallel business, or in peripheral activity, would be subject to ***regulation*** as a packer under the Packers and Stockyards Act of 1921 to the extent that he was engaged in that business and subject to ***regulation*** under the general ***antitrust*** laws to the extent he was engaged in other businesses.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN22***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc22)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



Whatever doubt there may have been on that scope has been removed by the 1958 amendment to [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). But if a court looks to the language of the Federal Trade Commission Act of 1914 prior to the 1958 amendment, in the light of the purposes the Congress in 1921 clearly intended to serve, there seems no doubt that it was never 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.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN23***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc23)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



The language of the Federal Trade Commission Act of 1914 is susceptible to the construction that one engaged in the business of processing meats for sale is subject to ***regulation*** in that business as a packer under the Packers and Stockyards Act of 1921, while any other business in which he may be engaged is subject to the general restraints of that ***antitrust*** laws, and that jurisdiction to enforce the ***antitrust*** laws was left in the Federal Trade Commission, except insofar as the businesses of the stockyard and packing industry, as such, were removed from the jurisdiction of the Federal Trade Commission. A literal interpretation of the [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) exemption must be laid aside for it is plainly at variance with the policy of the legislation as a whole, and if held to grant a more extensive exemption than the Agriculture Secretary's ***regulatory*** power would produce an absurd result.

Governments > Legislation > Interpretation

[***HN24***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc24)[] **Legislation, Interpretation**



Departure from the literal construction of a statute is justified when such a construction would clearly be inconsistent with the purposes and policies of the act in question.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Packers & Stockyards Act

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

[***HN25***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc25)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



According to the United States Court of Appeals for the Fourth Circuit, the pre-amendment language of [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=), which like the common carrier exemption contained no activity-based language merely covering businesses subject to the Packers and Stockyards Act of 1921, nonetheless encompassed activity, not just status.

Governments > Courts > Judicial Precedent

[***HN26***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc26)[] **Courts, Judicial Precedent**



The Miller decision by the United States Court of Appeals for the Seventh Circuit is not binding on the United States District Court for the Northern District of California, and the basic reasoning of the Miller decision is not persuasive.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Communications Law > ***Regulators*** > US Federal Communications Commission

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

[***HN27***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc27)[] **Transportation, Common Carriers**



In the Verity decision, the Federal Trade Commission (FTC) sued the defendant with regard to its billing practices. The defendant argued that it was a common carrier--indeed, had a license from the Federal Communications Commission (FCC) to be a facilities-or retail-based international common carrier--and therefore exempt from the reach of [*15 U.S.C.S. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). The United States District Court for the Southern District of New York rejected the defendant's contention, explaining that its argument presupposes that once the FCC licensed an entity as a common carrier, it is a common carrier for all purposes and thus entirely beyond the reach of the FTC. But that premise was fundamentally erroneous. An entity that was 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.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

[***HN28***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc28)[] **Transportation, Common Carriers**



In the Computer & Comms. Industry Ass'n decision, the United States Court of Appeals for the District of Columbia stated that it is clear that an entity can be a common carrier with respect to only some of its activities; in this opinion the term common carrier will be used to indicate not an entity but rather an activity as to which an entity is a common carrier.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Federal Communications Act

Communications Law > ***Regulators*** > US Federal Communications Commission > Authorities & Powers

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

[***HN29***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc29)[] **Transportation, Common Carriers**



On appeal in the Verity decision, the United States Court of Appeals for the Second Circuit disagreed with the district court's analysis in part, concluding that common carrier as used in the Federal Trade Commission Act of 1914 had to be defined by reference to the common law of carriers and not to the Communications Act of 1934, even though the common law definition does not meaningfully differ from the Communications Act of 1934 definition for purposes of this appeal. However, the Second Circuit went on to indicate that it agreed with the district court that common carrier was predicated on both an entity's status and its activity, and not just status alone. More specifically, it noted that the notion of some indelible common carrier status under the Communications Act of 1934 is highly questionable. Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance and that the Federal Communications Commission is not at liberty to subject an entity to ***regulation*** as a common carrier if the entity is acting as a private carrier for a particular service. It is at least logical to conclude that one can be a common carrier with regard to some activities but not others. A single firm that is a common carrier in some roles need not be a common carrier in other roles.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Governments > Legislation > Interpretation

***Antitrust*** & Trade Law > Federal Trade Commission Act > Scope

***Antitrust*** & Trade Law > ***Regulated*** Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

[***HN30***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc30)[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**



Because the Federal Trade Commission Act of 1914 (Act) is a remedial statute, it should be read broadly and its exemptions narrowly. The Act has a remedial purpose, i.e., to protect the public, that vast multitude which includes the ignorant, the unthinking and the credulous. Statutes prohibiting unfair trade practices and acts have routinely been interpreted to be flexible and adaptable to respond to human inventiveness. In construing section 5 of the Act relating to unfair trade practices, for example, the United States Supreme Court determined that the Act was to be both broad in sweep and flexible in application.

Administrative Law > Judicial Review > Standards of Review

[***HN31***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc31)[] **Judicial Review, Standards of Review**



The Skidmore decision holds that a non-controlling agency opinion may carry persuasive weight, depending on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

***Antitrust*** & Trade Law > ***Regulated*** Industries > Transportation > Common Carriers

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

[***HN32***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc32)[] **Transportation, Common Carriers**



The Federal Trade Commission (FTC) has seemed to consistently take the position that the common carrier exemption should be viewed both in terms of status and activity, and not just status alone. FTC Reauthorization, Hearing Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, S. Hrg. 107-1147, at 28 (2002) (statement of Hon. Sheila F. Anthony, FTC) noting that defendants often argue that the exemption protects every action of a company that enjoys common carrier status and that the FTC firmly believes that only the common carrier activities of such companies are exempted, but litigating this issue, as the FTC has been repeatedly forced to do, raises the cost of pursuing enforcement actions. http://www.gpo.gov/fdsys/pkg/CHRG-107shrg91729/pdf/CHRG-107shrg91729.pdf.

Business & Corporate Compliance > ... > Communications Law > ***Regulators*** > US Federal Communications Commission

Governments > Legislation > Effect & Operation > Retrospective Operation

[***HN33***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc33)[] **Regulators, US Federal Communications Commission**



The Federal Communications Commission's Reclassification Order was released on March 12, 2015, but apparently will not go into effect until it is published in the Federal Register. The Reclassification Order expressly states that reclassification of mobile broadband service as a private mobile service will apply only on a prospective basis. Reclassification Order at 134 n. 792.

Civil Procedure > Preliminary Considerations > Jurisdiction

Governments > Federal Government > Claims By & Against

Governments > Legislation > Effect & Operation > Retrospective Operation

[***HN34***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc34)[] **Preliminary Considerations, Jurisdiction**



In the Hughes decision, the plaintiff-whistleblower brought a qui tam action against a company for violation of the False Claims Act (FCA). Before 1986, qui tam suits were barred if the information on which they were based was already within the government's possession. In 1986, there was an amendment to the FCA which partially removed that bar. The question for the United States Supreme Court was whether that amendment applied retroactively to the plaintiff's suit. The Court held that the 1986 amendment was not retroactive and therefore the plaintiff's action was barred. The Supreme Court noted that the fact courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself.

Civil Procedure > Preliminary Considerations > Jurisdiction

Governments > Federal Government > Claims By & Against

Governments > Legislation > Effect & Operation > Retrospective Operation

[***HN35***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc35)[] **Preliminary Considerations, Jurisdiction**



In the Hughes decision, the United States Supreme Court noted that application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties. Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to ***regulate*** the secondary conduct of litigation and not the underlying 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 to the False Claims Act, 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 statute, even though phrased in jurisdictional terms, is as much subject to the presumption against retroactivity as any other.

***Antitrust*** & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Federal Communications Act

Communications Law > ***Regulators*** > US Federal Communications Commission > Jurisdiction

[***HN36***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc36)[] **Federal Trade Commission Act, US Federal Trade Commission**



Even if the change to the common carrier exception, resulting from the Federal Communications Commission's (FCC) Reclassification Order, could be deemed a change in tribunal, i.e., because enforcement with respect to mobile data would be delegated to the FCC instead of the Federal Communications Commission (FTC) and a court would have jurisdiction only in the former instance, the fact remains that substantive rights are affected by that change as well. The impairment of substantive rights was comparable to that in cases such as the Mathews decision and the Mabary decision. As in the Matthews decision, the applicable limitation period would effectively be shortened given the Communications Act of 1934's one-year limitations period. Moreover, as in the Mabary, the remedy of refunds to injured consumers sought by the FTC, but not available to the FCC, would be impaired.

Civil Procedure > Preliminary Considerations > Jurisdiction

Governments > Legislation > Effect & Operation > Prospective Operation

[***HN37***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=LNHNREFclscc37)[] **Preliminary Considerations, Jurisdiction**



As a general rule, a court presumes that statutes affecting substantive rights or obligations apply prospectively only and that presumption applies when a new statute impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed. A jurisdictional statute usually takes away no substantive right but simply changes the tribunal that is to hear the case--such statutes speak to the power of the court rather than to the rights or obligations of the parties.

**Counsel:** **[\*\*1]**For Federal Trade Commission, Plaintiff: David Michael Newman, Eric David Edmondson, Kerry O'Brien, Matthew David Gold, Federal Trade Commission, San Francisco, CA; Laura Fremont, Federal Trade Commision, San Francisco, CA; Linda Katherine Badger, Federal Trade Commission, Western Region-San Francisco, San Francisco, CA; Evan Rose, Federal Trade Commission, Western Region - San Francisco, San Francisco, CA.

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**Judges:** EDWARD M. CHEN, United States District Judge.

**Opinion by:** EDWARD M. CHEN

**Opinion**

**[\*1088]** **ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

**(Docket No. 29)**

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]](#footnote-0)1 that violate [*15 U.S.C. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). [***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc1)[] [*Section 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=), which is part**[\*\*2]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=).



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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) 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.

**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 **[\*1089]** offered iPhone customers an**[\*\*3]** "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**[\*\*4]** 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 at renewal, with disclosures at point of sale. . . . Yet other alternatives might include limited, narrowly tailored throttling programs that are consistent with Defendants' contracts, advertising, and other public disclosures.

Compl. ¶ 28.

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

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

Compl. ¶ 35.

Based on, *inter alia*, the above allegations, the FTC has brought two claims pursuant to [***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc2)[] [*15 U.S.C. § 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) which prohibits, *inter alia*, "unfair or deceptive acts **[\*1090]** or practices in or affecting commerce." [*15 U.S.C. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). In Count I, the FTC asserts that AT&T's throttling program is *unfair* because AT&T "entered into numerous mobile data contracts that were advertised as providing access to unlimited mobile data, and that do not provide that [AT&T] may modify, diminish, or impair the service of customers who use more**[\*\*6]** than a specified amount of data for permissible activities." Compl. ¶ 45. In Count II, the FTC maintains that AT&T has engaged in *deceptive* conduct because it does not disclose or fails to adequately disclose that "it imposes significant and material data speed restrictions on unlimited mobile data plan customers who use more than a fixed amount of data in a given billing cycle." Compl. ¶ 49. In short, the gravamen of the FTC's complaint is not AT&T's practice of throttling per se, but AT&T's deceptive conduct in failing to disclose its throttling to certain customers.



**II. DISCUSSION**

A. Legal Standard

AT&T has moved to dismiss on the basis that it is exempt from [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) as a "common carrier[] subject to the Acts to ***regulate*** commerce." [*15 U.S.C. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). In its opening brief, AT&T styled its motion as one made pursuant to [*Federal Rule of Civil Procedure 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), *i.e.*, for lack of subject matter jurisdiction. In its opposition, the FTC counters that the motion is appropriately brought under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), not [*12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), because AT&T is challenging only "the scope of the FTC's statutory authority." Opp'n at 2 n.1.

Whether the pending motion to dismiss is technically predicated on [*Rule 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) or on [*12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) is not material in this instance. Neither party has asserted that the**[\*\*7]** choice of rule affects the disposition of the motion. Nor can the Court divine a difference in result here. Even assuming that [*Rule 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) were to govern, AT&T is making a facial challenge to jurisdiction, and not a factual one. *See* [*Lacano Invs., LLC v. Balash, 765 F.3d 1068, 1071 (9th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D12-SX01-F04K-V0GH-00000-00&context=) (indicating that [***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc3)[] a jurisdictional attack can be facial or factual; in the former circumstance, all of the factual allegations in the complaint are taken as true and extrinsic evidence such as documents attached to a complaint may be considered). Given such a challenge, the standard is governed essentially by a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=)-type inquiry.



While the exact procedural posture is not dispositive, the Court acknowledges that recent action taken by another administrative agency, namely, the Federal Communications Commission, may impact this case. More specifically, the Federal Communications Commission recently made the decision to reclassify mobile data service from a non-common carriage service to a common carriage service. Because this "Reclassification Order" has not yet taken effect, the Court addresses first the merits of the issues raised in the parties' initial briefs. Only after assessing the merits of these issues does the Court turn to the effect of the Reclassification Order**[\*\*8]** on this action.

B. Statutory Construction

As stated above, AT&T argues that it cannot be held liable for a violation of [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) because of an exception in the statute for "common carriers subject to the Acts to ***regulate*** commerce." [*15 U.S.C. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). The full text of [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) is as follows:

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc4)[] The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, *except* banks, savings and loan institutions described in section 18(f)(3) [[*15 U.S.C. § 57a(f)(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPK1-NRF4-455K-00000-00&context=)], Federal credit unions described **[\*1091]** in section 18(f)(4) [[*15 U.S.C. § 57a(f)(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPK1-NRF4-455K-00000-00&context=)], *common carriers subject to the Acts to* ***regulate*** *commerce*, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [[*49 U.S.C. § 40101 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSD1-NRF4-422C-00000-00&context=)], 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.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVS1-NRF4-44S9-00000-00&context=)], except as provided in section 406(b) of said Act [[*7 U.S.C. § 227(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GP51-NRF4-40GX-00000-00&context=)], 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) (emphasis added). [***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc5)[] The term "Acts to ***regulate*** commerce" is defined as the Interstate Commerce Act of 1887 and the Communications Act of 1934, as well as all amendments and supplements thereto. *See id.* [*§ 44*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMB1-NRF4-43D5-00000-00&context=). When [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) was first enacted as part of the FTC Act in 1914, "Acts to ***regulate*** commerce"**[\*\*9]** meant only the Interstate Commerce Act because the Communications Act had not yet been passed.



[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc6)[] The Interstate Commerce Act was "[t]he first federal ***regulation*** to impose duties on common carriers" and "applied to 'any common carrier or carriers' engaged in the railroad transportation of people or property interstate." [*FTC v. Verity Int'l, Ltd., 443 F.3d 48, 57 (2d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN3-53H0-0038-X2WB-00000-00&context=). "In 1910, Congress passed the Mann-Elkins Act, which amended the [Interstate Commerce Act] to apply to interstate telephone companies and to deem such companies common carriers." *Id.* "***Regulation*** of telephone common carriers continued to rest with the [Interstate Commerce Commission] until 1934, when Congress passed the Communications Act of 1934." *Id.*; *see also* [*Verizon Comms., Inc. v. FCC, 535 U.S. 467, 478 n.3, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45TK-1JB0-004C-2001-00000-00&context=) (noting that "[f]ederal ***regulation*** in the area had previously been undertaken incidentally to general interstate carrier ***regulation*** under the Interstate Commerce Act"). When [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) was amended in 1938, one of the amendments made was to re-define "Acts to ***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**[\*\*10]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) at all, even when it is providing services *other* than common carriage services. The FTC disagrees with this interpretation of [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). According to the FTC, it is not just status that matters, but also the "activity" in question. That is, the common carrier exception applies only if an entity has the status of a common carrier *and* is actually engaging in common carriage services. Thus, under the FTC's view, an entity can be ***regulated*** under [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) even if the entity is a common carrier so long as it is the entity's noncommon carriage services that are being ***regulated***.

The basic issue for the Court is one of statutory construction. [***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc7)[] Statutory construction begins, of course, with the language of the statute. *See, e.g.,* [*Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 132 S. Ct. 1670, 1680, 182 L. Ed. 2d 678 (2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55F1-P3B1-F04K-F0G8-00000-00&context=) (noting that statutory construction begins "'with the language of the statute itself'"); *United States v. Mi Kyung Byun, 539 F.3d 982, 991 (9th Cir. 2008)* (indicating that ordinary tools of statutory construction include the language of the statute, the statute's legislative history, and the "practical effects to the extent necessary to illuminate the meaning of the plain language"). Here, [***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc8)[] [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) carves out **[\*1092]** an exception for "common**[\*\*11]** carriers subject to the Acts to ***regulate*** commerce," which includes the Communications Act. [*15 U.S.C. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). AT&T argues that this language, on its face, weighs in its favor because: (1) AT&T is a common carrier — *i.e.*, for mobile voice services — even if it does also provide non-common carriage services such as mobile data; and (2) AT&T is subject to the Communications Act, being ***regulated*** in fact not just for its common carriage services (mobile voice) under Title II of the act but also for its non-common carriage services (mobile data) under Title III of the act.



The problem with AT&T's argument is it glosses over what is meant by "common carrier" in the first place. [***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc9)[] Nowhere in the FTC Act is the term "common carrier" defined. Given that fact, the Court deems it appropriate to consider what the term "common carrier" meant at the time the FTC Act was enacted in 1914. Notably, that is the approach that the Second Circuit took in a decision addressing the common carrier exception in [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). *See* [*Verity, 443 F.3d at 57-58*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN3-53H0-0038-X2WB-00000-00&context=) ("decid[ing] to give meaning to 'common carrier' in the FTC Act according to the ordinary sense of the word when Congress used it to create the exemption").



As the FTC points out, [***HN10***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc10)[] prior to the enactment of the FTC Act, an entity**[\*\*12]** was deemed a common carrier and ***regulated*** as such under the common law only where it was actually engaged in common carriage services. For example, in [*Santa Fe, Prescott & Phoenix Railway Co. v. Grant Brothers Construction Co., 228 U.S. 177, 33 S. Ct. 474, 57 L. Ed. 787 (1913)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8BJ0-003B-H4GG-00000-00&context=), the Supreme Court noted that "[t]he great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community" and, therefore, a "common carrier *in the prosecution of its business as such* is not permitted to drop its character and transmute itself by contract into a mere bailee with right to stipulate against the consequences of its negligence." [*Id. at 184-85*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8BJ0-003B-H4GG-00000-00&context=) (emphasis added). The Supreme Court added that "this rule has no application when a railroad company is acting *outside the performance of its duty* as a common carrier." [*Id. at 184-85*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8BJ0-003B-H4GG-00000-00&context=) (emphasis added); *see also* [*R.R. Co. v. Lockwood, 84 U.S. 357, 377, 21 L. Ed. 627 (1873)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JK60-003B-H0WG-00000-00&context=) (stating that "[a] common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry").[[2]](#footnote-1)2



[***HN11***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc11)[] Prior to the enactment of the FTC Act, common carriers were viewed in a similar way for purposes of the Interstate Commerce **[\*1093]** Act.[[3]](#footnote-2)3 For instance, in *Interstate Commerce Commission v. Goodrich Transit Co.*, the Supreme Court concluded that the Interstate Commerce Commission had authority to require a system of accounting for a common carrier, even though "the accounts**[\*\*14]** required to be kept are general in their nature and embrace business *other* than such as is necessary to the discharge of the duties in carrying passengers in freight in interstate commerce [*e.g.*, amusement parks]"; but the Supreme Court also indicated that those non-common carriage "affairs [were otherwise] not within [the Commission's] jurisdiction." [*Goodrich Transit, 224 U.S. at 211-12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8P50-003B-H53J-00000-00&context=) (emphasis added); *see also* [*Kansas City S. R. Co. v. United States, 282 U.S. 760, 764, 51 S. Ct. 304, 75 L. Ed. 684 (1931)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DH30-003B-755J-00000-00&context=) (citing *Santa Fe* in support of the statement that "[t]here is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act").



Thus, as the FTC argues, [***HN12***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc12)[] at the time the FTC Act was enacted, the term "common carrier" encompassed not only a "status" but also an "activity" component: An entity was deemed a common carrier when it had the status of common carrier *and* was actually engaging in common**[\*\*15]** carriage services.



Moreover, even if there were some doubt that "common carrier" was to be so understood, the broader phrase used in [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) for the common carrier exception must be taken into account. [***HN13***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc13)[] [*Section 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) refers to an exemption for "common carriers *subject to the Acts to* ***regulate*** *commerce*." [*15 U.S.C. § 45(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) (emphasis added). This language can fairly be read to mean that the exemption applies only when the common carrier is subject to ***regulation*** as such. *Cf.* [*Verity, 443 F.3d at 57*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN3-53H0-0038-X2WB-00000-00&context=) (stating that Congress created the common carrier exemption because it "did not intend the FTC to enforce unfair-competition law against common carriers because the ICC already ***regulated*** common carriers under the Interstate Commere Act"). As indicated by the case law discussed above, an entity was subject to ***regulation*** as a common carrier only when it was actually engaging in common carriage activity. AT&T's interpretation to the contrary is not convincing because in essence, AT&T asks that [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) be broken into two separate inquiries: (1) Is an entity a common carrier (for any purpose)? and (2) if so, is the entity subject to the Acts to ***regulate*** commerce? *See* Reply at 4. AT&T does not explain why the Court should apply this two-part disjunctive construction**[\*\*16]** rather than evaluate the exemption holistically.[[4]](#footnote-3)4



**[\*1094]** Furthermore, [***HN15***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc15)[] a holistic interpretation of the common carrier exception is more consistent with the legislative history for the FTC Act. As the FTC notes, during the 1914 congressional debate over the bill that would later become the FTC Act, Representative Stevens, a manager of the House bill, discussed what entities would be covered by the proposed act. Mr. Stevens stated, *inter alia*, that every corporation engaged in commerce would come within the scope of the act:



They ought to be under the jurisdiction of this commission in order to**[\*\*18]** protect the public, in order that all of their public operations should be 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*.

. . . .

[E]very corporation engaged in commerce except common carriers, 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*.

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

Although AT&T argues the purpose of the common carrier exception is to ensure that there is no agency overlap in terms of ***regulation***, it appears that the more precise purpose was to prevent overlap between *common carrier* ***regulations***. As the Second Circuit observed in *Verity*, [***HN16***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc16)[] Congress created the common carrier exemption because it "did not intend the FTC to enforce unfair-competition law against common carriers because the *ICC already* ***regulated*** *common carriers* under the Interstate Commere Act." [*Verity, 443 F.3d at 57*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN3-53H0-0038-X2WB-00000-00&context=) (emphasis added). AT&T points to nothing in the legislative history suggesting that Congress intended to prevent any and all ***regulatory*** overlap (as opposed to focusing on the Interstate**[\*\*19]** Commerce Commission's ***regulation*** of common carriers as such). Indeed, it is not uncommon for any particular activity of a business to be subject to multiple sets of ***regulations***.



[***HN17***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc17)[] That the common carrier exception in [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) requires consideration of both status and activity, and not just status alone, is also supported by the tool of statutory construction which counsels a court to consider a statute's "practical effects to the extent necessary to illuminate the meaning of the plain language." *Byun, 539 F.3d at 991*. AT&T's interpretation of the common carrier exception would result in significant ***regulatory*** gaps. For example, as the FTC points out in its brief,



AT&T's reading of the common carrier exemption would open a giant loophole that would threaten to swallow the FTC Act. Companies engaging in *de minimis* **[\*1095]** common carrier activity could immunize all of their operations from FTC scrutiny. For example, internet giants that 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**[\*\*20]** to become a virtual wireless carrier.

Opp'n at 16; *cf.* [*Crosse & Blackwell Co. v. Fed. Trade Comm'n, 262 F.2d 600, 604-05 (4th Cir. 1959)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-T1F0-003B-03W2-00000-00&context=) (in discussing the scope of entities exempt from [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) because they are subject to the Packers and Stockyards Act, noting that "Congress did not anticipate that a giant steel company might attempt to escape the restraint of the ***antitrust*** laws by operating a small packing plant" and thus be subject to the exemption).

In response, AT&T contends that any such gap has not caused an adverse effect: "If the FTC's inability to ***regulate*** in these gaps were such a problem, one would imagine that Congress would have stepped in at some point in the past century to address this." Reply at 6. But this argument misses the point. Congress would not need to step in if the common carrier exemption were always understood to apply only when an entity is a common carrier and is engaging in common carrier activity. As discussed above, that indeed appears to have been Congress's understanding at the time of the FTC Act's enactment. In fact, that seems to have been the general understanding of the common carrier exemption even years later, as noted by AT&T's predecessor during a 1937 congressional hearing. *See To Amend the Federal Trade Comm'n Act*, House Committee**[\*\*21]** on Interstate and Foreign Commerce Hearing, 75th Cong., 1st Sess. on H.R. 3143 (Feb. 18-19, 1937) (AT&T's predecessor company proposing to Congress that [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) be amended to include the following proviso: "provided that common carriers under the latter act are excepted as common carriers under this act only in respect of their common-carrier operations"; stating that "[a]ll this does is to make clear that so far as the fair trade practice provisions of the Federal Trade Commission Act are concerned, the exception which has always been in the act shall be preserved, and by my amendment, . . . it will make clear one thing, . . . namely, that where common carriers engage in activities that are not in the common carrier field, beyond the field that the Government is ***regulating***, then and in that case, they are subject to the jurisdiction of the Federal Trade Commission . . . .").[[5]](#footnote-4)5

**[\*1096]** To the extent AT&T points out that there is no actual ***regulatory*** gap here because the Federal Communications Commission happens to ***regulate*** mobile data services under the Communications Act — albeit as non-common carriage activity (for conduct prior to the effective date of the Reclassification Order) — that is not dispositive.**[\*\*23]** The point is that, under AT&T's broad interpretation of the statute, there would be ***regulatory*** gaps in many instances; AT&T has not made any showing that most or even many gaps would be filled. Moreover, that there may be some overlap between agency ***regulation*** is not damning in and of itself, particularly in the absence of any apparent conflict with respect to agency ***regulation***.

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

the FTC believes that slowing throughput speeds to customers on unlimited plans is an "unfair" practice that has "caused substantial injury" to consumers. By contrast, as long ago as 2008, the FCC affirmatively endorsed the use of such reduced speeds where, as here, a provider offering unlimited plans (Comcast) needed to manage traffic network: "Comcast has several available options it would use to manage network traffic without discriminating as it does. . . . Comcast could throttle back the connection speeds of high-capacity users (rather than any user who relies on peer-to-peer technology, no matter**[\*\*24]** how infrequently)." The 2010 *Open Internet Order* likewise approved of practices involving the provision of "more bandwidth to subscribers that have used the network less over some preceding period of time than to heavier users" to reduce congestion. That order was not vacated in any respect until January 2014 (and, even then, it was vacated in part on other grounds). AT&T thus had every reason to believe during the period at issue here that conduct that the FCC preemptively approved would not later be the subject of an FTC enforcement action.

Reply at 14-15.

The problem with AT&T's position is that, even though the FTC has characterized Count I as implicating an unfair practice, the gravamen of the FTC's complaint is based on AT&T's failure to *disclose* its throttling practice to certain customers. More specifically, in Count I, the FTC asserts that AT&T's throttling program is unfair because AT&T "entered into numerous mobile data contracts that were *advertised* as providing access to unlimited mobile data, and that do not provide 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**[\*\*25]** 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*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SBS-V370-008H-03GV-00000-00&context=), which itself requires an 'accurate' disclosure," Reply at 15, the Court sees [***HN19***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc19)[] no obvious conflict between [*47 C.F.R. § 8.3*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SBS-V370-008H-03GV-00000-00&context=) and **[\*1097]** [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). AT&T has pointed to no instance where a Federal Communications Commission ***regulation*** requires conduct which would violate a FTC ***regulation*** or vice-versa. *See, e.g.*, [*Federal Communications Commission, In re Preserving the Open Internet, 25 FCC Rcd 17905*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:51V3-JTK0-01KR-90CC-00000-00&context=), at ¶¶ 56, 57 (stating that "[w]e believe that at this time the best approach is to allow flexibility in implementation of the transparency rule" and "[w]e agree that broadband providers must, at a minimum, prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users and edge providers as well as to the Commission, and**[\*\*26]** must disclose relevant information at the point of sale").



AT&T protests still that "common carrier" must be viewed solely in terms of status because: (1) [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) repeatedly uses status-based terms, such as "persons," "partnerships," "corporations," "banks," "savings and loan institutions," "credit unions," "air carriers," and "common carrier" (as opposed to common carriage) in its text; (2) [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) does contain one activity-based exemption which uses markedly different language, thus demonstrating that the lack of activity-based language with respect to the common carrier exemption is telling; and (3) there is case law to support its position. But ultimately, none of these arguments is availing.

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

AT&T's second argument is based on the 1958 amendment to [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). Prior to the 1958 amendment, [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) included an exemption related to the Packers and Stockyards Act. More specifically, that exemption existed for "persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921." 52 Stat. 111 (1938). In**[\*\*27]** 1958, that exemption was amended to read "persons, partnerships, or corporations *insofar as they are* subject to the Packers and Stockyards Act, 1921." 27 Stat. 1749 (1958) (emphasis added). AT&T argues that this is evidence that the Packers/Stockyards exemption used to be a status-based exemption but then, in 1958, was changed into an activity-based exemption.[[6]](#footnote-5)6

The Fourth Circuit, however, has explained that this change to the Packers/Stockyards exemption was not consequential. More specifically, [***HN21***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc21)[] in *Crosse & Blackwell*, the Fourth Circuit noted that, pre-amendment, it was



clear that the substance of what was intended to be withdrawn from the controls of the Federal Trade Commission **[\*1098]** and subjected to ***regulation*** by the Secretary of Agriculture were the businesses of the stockyards and packers *as those industries were known and understood at the time*. Doubtless the Congress did not anticipate that a great steel company might attempt to escape the restraints of the ***antitrust*** laws by operating a small packing plant, taking the position that it was engaged in the business of a packer and was thus subject, in its steel business, to ***regulation*** only by the Secretary of Agriculture under the Packers and Stockyards Act, or that a canner of miscellaneous food items**[\*\*29]** might avoid compliance with the general ***antitrust*** laws solely by reason of the fact that it used a relatively small quantity of meat as an ingredient in some of its products, for it did not expressly provide in 1921 that one engaged in parallel business, or in peripheral activity, would be subject to ***regulation*** as a packer under the Packers and Stockyards Act to the extent that he was engaged in that business and subject to ***regulation*** under the general ***antitrust*** laws to the extent he was engaged in other businesses. [***HN22***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc22)*[] Whatever doubt there may have been on that scope has been removed by the [1958 amendment].* *But if we look to the language of the Act prior to the 1958 amendment, in the light of the purposes the Congress in 1921 clearly intended to serve, there seems no doubt that it was never 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*.



[***HN23***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc23)[] The language of the Act is susceptible to the construction that one engaged in the business of processing meats for sale is subject to ***regulation*** in that business as a packer under the Packers and Stockyards**[\*\*30]** Act, while any other business in which he may be engaged is subject to the general restraints of that ***antitrust*** laws, and that jurisdiction to enforce the ***antitrust*** laws was left in the Federal Trade Commission, except insofar as the businesses of the stockyard and packing industry, as such, were removed from the jurisdiction of the Federal Trade Commission.



[*Crosse & Blackwell, 262 F.2d at 604-05*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-T1F0-003B-03W2-00000-00&context=) (emphasis added). "A literal interpretation of the exemption . . . must be laid aside for it is 'plainly at variance with the policy of the legislation as a whole,' and if held to grant a more extensive exemption than the [Agriculture] Secretary's ***regulatory*** power would produce an absurd result." [*Id. at 606*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-T1F0-003B-03W2-00000-00&context=); *see also* [*Foxgord v. Hischemoeller, 820 F.2d 1030, 1034 (9th Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-99J0-001B-K304-00000-00&context=) (noting that [***HN24***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc24)[] "'departure from the literal construction of a statute is justified when such a construction . . . would clearly be inconsistent with the purposes and policies of the act in question'"). Hence, if anything, the legislative history of the Packers and Stockyards exemption as explained in *Crosse & Blackwell* supports the FTC's argument. [***HN25***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc25)[] According to the Fourth Circuit, the pre-amendment language — which like the common carrier exemption contained no activity-based language (merely covering businesses "subject to"**[\*\*31]** the 1921 Packers and Stockyards Act) — nonetheless encompassed activity, not just status.



As for the third argument that case law supports its status argument, AT&T relies primarily on [*Federal Trade Commission v. Miller, 549 F.2d 452 (7th Cir. 1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-17H0-0039-M55X-00000-00&context=).[[7]](#footnote-6)7 [***HN26***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc26)[] *Miller*, however, is not binding **[\*1099]** authority on this Court, and the basic reasoning of Miller is not persuasive. The Seventh Circuit stated in *Miller* that it



need not decide whether the FTC is correct in its statement that the non-carrier activities of a common carrier do not fall within the scope of the § [46] exemption.[[8]](#footnote-7)8 Assuming that to be correct, it does not 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 ***regulatory*** approach articulated by [the FTC], while it may be a desirable one, is not the one Congress appears to have adopted. Before the Wheeler-Lea Amendment [in 1938], [*[§ 45(a)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=)] of the Act had declared unlawful and [*[§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=)] of the Act had empowered the Commission to prohibit, only "unfair methods of competition in commerce." The Amendment inserted in both those subsections the *additional* words "and unfair or deceptive acts or practices in commerce." It did not, however, alter in any way the exemption provisions**[\*\*32]** of the latter subsection or of [*[§ 46*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJ21-NRF4-41JV-00000-00&context=)]. Thus, as amended [*[§ 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=)] declares unlawful both anticompetitive practices and unfair or deceptive acts or practices and, further, empowers the Commission to prevent persons, except ***regulated*** common carriers (and certain others), from engaging in the conduct declared unlawful. There is no conceivable basis for holding that the exception applies to one type of forbidden conduct but not the other. The Commission's argument must therefore fail, and, having failed with respect to [*[§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=)], it necessarily fails with respect to [*[§ 46(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJ21-NRF4-41JV-00000-00&context=)] as well.

[*Id. at 458*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-17H0-0039-M55X-00000-00&context=) (emphasis added).[[9]](#footnote-8)9

Instead, the Court finds more persuasive the reasoning of the district court in [*Federal Trade Commission v. Verity International, 194 F. Supp. 2d 270 (S.D.N.Y. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45H7-GJ00-0038-Y041-00000-00&context=), and the Second Circuit's observation on appeal. [***HN27***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc27)[] There, the FTC sued the defendant with regard to its billing practices. The defendant argued that it was a common carrier — indeed, had a license from the Federal Communications Commission to be a facilities- or retail-based international common carrier — and therefore exempt from the reach of [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). The court rejected the defendant's contention, explaining that



its argument presupposes that once**[\*\*34]** the FCC licenses an entity as a common carrier, it is a common carrier for all purposes and thus entirely beyond the reach of the FTC. But that premise is **[\*1100]** 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.

[*Id. at 274*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45H7-GJ00-0038-Y041-00000-00&context=); *see also* [***HN28***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc28)[] [*Computer & Comms. Industry Ass'n v. FCC, 693 F.2d 198, 210 n.59, 224 U.S. App. D.C. 83 (D.C. Cir. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RTS-KGF0-003B-G02B-00000-00&context=) (stating that "[i]t is clear that an entity can be a common carrier with respect to only some of its activities[;] [i]n this opinion the term 'common carrier' will be used to indicate not an entity but rather an activity as to which an entity is a common carrier"). The *Verity* district court acknowledged *Miller* but found it to be "inconsistent with [the] common sense proposition that the carrier exemption to the FTC Act should be construed no more broadly than its purpose — to avoid interfering with the ***regulation*** of carriers by agencies to which their ***regulation*** is committed." [*Id. at 275*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45H7-GJ00-0038-Y041-00000-00&context=).



[***HN29***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc29)[] On appeal, the**[\*\*35]** Second Circuit disagreed with the district court's analysis in part, concluding that "common carrier" as used in the FTCA had to be "defined by reference to the common law of carriers and not to the Communications Act, even though the common law definition does not meaningfully differ from the Communications Act definition for purposes of this appeal." [*Verity, 443 F.3d at 57*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN3-53H0-0038-X2WB-00000-00&context=). However, the Second Circuit went on to indicate that it agreed with the district court that "common carrier" was predicated on both an entity's status and its activity, and not just status alone. More specifically, the court noted that



[t]he notion of some indelible common carrier "status" under the Communications Act is highly questionable. *See* [*Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481, 305 U.S. App. D.C. 272 (D.C. Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RTX-FFY0-003B-P04B-00000-00&context=) (explaining that "whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance" and that the FCC "is not at liberty to subject [an] entity to ***regulation*** as a common carrier" if the entity is acting as a private carrier for a particular service"); *see also* [*NARUC II, 533 F.2d at 608*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RTP-FYX0-0039-M048-00000-00&context=) ("It is at least logical to conclude that one can be a common carrier with regard to some activities but not others."); [*In re Audio Commc'ns, Inc., 8 F.C.C.R. 8697, 8698-99, P12 (1993)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:3T1N-SJH0-000K-51NV-00000-00&context=) ("[A] single firm that is a common carrier**[\*\*36]** in some roles need not be a common carrier in other roles.").

[*Id. at 60 n.4*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN3-53H0-0038-X2WB-00000-00&context=); *cf.* [*Crosse & Blackwell, 262 F.2d at 604-05*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-T1F0-003B-03W2-00000-00&context=) (interpreting pre-1958 version of Packers and Stockyards Act exemption as activity based).

As a final point, the Court notes that two other considerations counsel in favor of the FTC's interpretation over AT&T's. First, [***HN30***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc30)[] because the FTC Act is a remedial statute, it should be read broadly and its exemptions narrowly. *See, e.g.,* [*United States v. An Article, 409 F.2d 734, 741 n.8 (2d Cir. 1969)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TF10-0039-Y02K-00000-00&context=) (stating that the FTCA has a remedial purpose — *i.e.*, to protect the public, "'that vast multitude which includes the ignorant, the unthinking and the credulous'"); [*In re Smith, 866 F.2d 576, 581 (3d Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DG00-003B-520Y-00000-00&context=) (noting that "[s]tatutes prohibiting unfair trade practices and acts have routinely been interpreted to be flexible and adaptable to respond to human inventiveness[;] [i]n construing section 5 of the Federal Trade **[\*1101]** Commission Act relating to unfair trade practices, for example, the Supreme Court determined that the Act was to be both broad in sweep and flexible in application"); *cf.* [*City of Edmonds v. Wash. St. Bldg. Code Council, 18 F.3d 802, 804 (9th Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7MW0-003B-P28B-00000-00&context=) (stating that "[c]ourts generously construe the Fair Housing Act" and, "[a]s a broad remedial statute, its exemptions must be read narrowly").



Second, the FTC's interpretation — although not necessarily entitled to *Chevron* deference (which the FTC disavowed at the hearing) — should still**[\*\*37]** be afforded some deference pursuant to [***HN31***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc31)[] [*Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2RX0-003B-703S-00000-00&context=) (holding that a non-controlling agency opinion may carry persuasive weight, depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *see also* [*United States v. Mead Corp., 533 U.S. 218, 234, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:439D-5G40-004B-Y04Y-00000-00&context=) (stating that "an agency's interpretation may merit some deference whatever its form"). In this regard, the Court notes that, contrary to what AT&T argues, [***HN32***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc32)[] the FTC has seemed to consistently take the position that the common carrier exemption should be viewed both in terms of status and activity, and not just status alone. *See, e.g., FTC Reauthorization*, Hearing Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, S. Hrg. 107-1147, at 28, [*2002 FTC LEXIS 37*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:46D2-F060-0000-F00K-00000-00&context=) (July 17, 2002) (statement of Hon. Sheila F. Anthony, FTC) (noting that "Defendants often argue that the exemption protects every action of a company that enjoys common carrier status" and that "[t]he Commission firmly believes that only the common carrier activities of such companies are exempted, but litigating this issue, as the Commission has been repeatedly forced to do, raises**[\*\*38]** the cost of pursuing enforcement actions"), *available at* [*http://www.gpo.gov/fdsys/pkg/CHRG-107shrg91729/pdf/CHRG-107shrg91729.pdf;*](http://www.gpo.gov/fdsys/pkg/CHRG-107shrg91729/pdf/CHRG-107shrg91729.pdf;) *Prepared Statement of the Fed. Trade Comm'n*, 2003 WL 21353573, at \*19 (June 11, 2003) (statement before the Subcommittee on Commerce, Trade and Consumer Protection to support the FTC's reauthorization request for fiscal years 2004 to 2006) (stating that, "[w]hile common carriage has been outside the FTC's authority, the agency believes that the FTC Act applies to non-common-carrier services of telecommunications firms, even if the firms also provide common carrier services"); *see also FTC Amendments of 1977 and Oversight*, Hearings before the Subcommittee on Consumer Protection and Finance, 95th Cong., 1st Session on H.R. 3816, 1767, and 2483 (1977) (letter from FTC to Rep. Eckhardt) (asking for an amendment to the FTC Act, not "to extend the Commission's jurisdiction into those areas that are subject to ***regulation*** by other federal agencies, but rather, as we explained in our formal statement, . . . intend[ing] to close a '***regulatory*** gap' under exceptions in Sections 5 and 6 of the FTC Act *as interpreted in a recent court decision* [*i.e., Miller*]") (emphasis added). To the extent AT&T argues that the FTC has taken a different position in other lawsuits, *see* Mot. at 13, the Court does not agree. In those cases, the FTC argued that an entity did not meet the status requirement of common**[\*\*39]** carrier but it did not disavow that there was an activity component as well.



Accordingly, for all of the reasons stated above, the Court rejects AT&T's contention that the common carrier exemption in [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) is predicated on status alone, and rather agrees with the FTC that [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) can be applied to an entity that has the status of a common carrier so long as what **[\*1102]** is being ***regulated*** is the entity's non-common carriage services.

C. Reclassification Order

After initial briefing was completed in this case, the parties notified the Court that the Federal Communications Commission had made the decision to reclassify mobile data service from a non-common carriage service to a common carriage service. [***HN33***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc33)[] The Reclassification Order was released on March 12, 2015, but apparently will not go into effect until it is published in the Federal Register. *See* Docket No. 45, at 1 n.2 (FTC's sur-reply). The Reclassification Order expressly states that reclassification will "apply only on a prospective basis." Reclassification Order at 134 n.792.



The FTC argues that the Reclassification Order will have minimal impact on this case because it will apply only prospectively. In other words, the FTC focuses on the fact that,**[\*\*40]** through this case, the Court can still address AT&T's *past* misconduct which allegedly violates [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=). In response, AT&T contends that the FTC is missing the point — *i.e.*, once the Reclassification Order goes into effect, then the FTC will no longer have *jurisdiction* to pursue this case, even if limited to past conduct by AT&T. *See, e.g.*, Docket No. 46, at 1 (AT&T sur-reply) (stating that "[t]he issue is whether a change to an agency's *jurisdiction* takes effect immediately and divests the agency of authority to prosecute past conduct that is the subject of pending litigation") (emphasis in original).

The FTC disputes that [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) is a jurisdictional statute. But, even assuming that it is, the Court is not persuaded by AT&T's argument. [*Hughes Aircraft Co. v. United States, 520 U.fS. 939, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RKY-WPB0-003B-R20C-00000-00&context=), provides guidance as to how this issue should be resolved.

[***HN34***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc34)[] In *Hughes*, the plaintiff-whistleblower brought a qui tam action against a company for violation of the False Claims Act ("FCA"). Before 1986, qui tam suits were barred if the information on which they were based was already within the government's possession. In 1986, there was an amendment to the FCA which partially removed that bar. The question for the Supreme Court was whether that amendment applied retroactively**[\*\*41]** to the plaintiff's suit. The Supreme Court held that the 1986 amendment was not retroactive and therefore the plaintiff's action was barred. *See* [*id. at 941-42*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RKY-WPB0-003B-R20C-00000-00&context=).



One of the arguments made by the plaintiff in favor of retroactivity was that the 1986 amendment was "jurisdictional, and hence . . . an exception to the general *Landgraf* presumption against retroactivity." [*Id. at 950*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RKY-WPB0-003B-R20C-00000-00&context=). The Supreme Court noted first that "[t]he fact . . . courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself." [*Id. at 951*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RKY-WPB0-003B-R20C-00000-00&context=). [***HN35***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc35)[] The Court then went on to note that



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

Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to ***regulate*** the secondary conduct of litigation and not**[\*\*42]** the underlying primary conduct of the parties. **[\*1103]** 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 statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

*Id.* (emphasis in original).

Here, [***HN36***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc36)[] even if the change to the common carrier exception, resulting from the Reclassification Order, could be deemed a change in tribunal (*i.e.*, because enforcement with respect to mobile data would be delegated to the Federal Communications Commission instead of the FTC and this Court would have jurisdiction only in the former instance), the fact remains that substantive rights are affected by that change as well. As the FTC explains out in its sur-reply:



According to AT&T, the FCC is poised to sanction AT&T for its throttling program. FCC action is not, however, a substitute for the relief sought by the FTC. *The FCC is not authorized****[\*\*43]*** *to seek refunds for injured consumers, and its enforcement authority is limited to conduct going back one year*. [*47 U.S.C. § 503(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GHN1-NRF4-437B-00000-00&context=). AT&T's throttling program has been in effect for more than three years, and has, over the course of that time, inflicted economic harm on millions of customers.

FTC Sur-Reply at 5 n.5 (emphasis added). This impairment of substantive rights (and AT&T's liability) is comparable to that in cases such as [*Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 157, 166 & n.17 (3d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3V49-S7J0-0038-X055-00000-00&context=) (holding that amendment to Private Securities Litigation Reform Act, which eliminated securities fraud-based RICO claims, was not retroactive; also indicating that there be no retroactivity for, *e.g.*, an amendment that reduced the statute of limitations under RICO or that eliminated treble damages under RICO), and *Mabary v. Home Town Bank, N.A., 771 F.3d 820, 826 (5th Cir. 2014)* (stating, that before the amendment to the Electronic Funds Transfer Act, the plaintiff "had a cause of action based upon [the defendant's] alleged actions, but afterward she would not" and "the amendment thus 'may be seen as destroying a cause of action and impairing a party's rights'"). As in *Matthews*, the applicable limitation period would effectively be shortened given the Communications Act's one-year limitations period. Moreover, as in**[\*\*44]** Mabary, the remedy 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 judicial review in the immigration context (more specifically, judicial review of deportation orders involving aliens convicted of firearms offenses) merely affected the power of the court and not the rights or obligations of the parties. *See* *id. at 398-99* (noting that, [***HN37***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc37)[] "[a]s a general rule, we presume that statutes affecting substantive rights or obligations apply prospectively only" and that "[t]his presumption applies when a new statute impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed"; adding that "[a] jurisdictional statute usually takes away no substantive right but simply changes the **[\*1104]** tribunal that is to hear the case" — such statutes "*speak to the power of the court* rather than to the rights or obligations of the parties") (emphasis added; internal quotation marks omitted).



As for [*Southwest Center for Biological Diversity v. United States Department of Agriculture, 314 F.3d 1060 (9th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47HC-4WD0-0038-X2W7-00000-00&context=), there,**[\*\*45]** the plaintiff brought suit after failing to get a response to a request for information pursuant to the Freedom of Information Act ("FOIA"). While the action was pending, Congress enacted the 1998 Parks Act, which included a provision allowing for a withholding of information in response to a FOIA request. The district court applied that provision, which led the plaintiff to argue on appeal that the district court had given impermissible retroactive effect to the Parks Act provision. The Ninth Circuit disagreed, rejecting the plaintiff's contention that the Parks Act provision impaired a right it possessed when it acted because it had a right to the information when it filed its suit and then lost that right by application of the exemption. *See* [*id. at 1062*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47HC-4WD0-0038-X2W7-00000-00&context=). The court explained: "[T]he 'action' of the [plaintiff] was merely to request or sue for information; it was not to take a position in reliance upon existing law that would prejudice the [plaintiff] when that law was changed." *Id.* The Ninth Circuit also noted that "application of the exemption furthers Congress's intent to protect information regarding threatened or rare resources of the National Parks" and thus "[t]his case . . . presents one of**[\*\*46]** the many situations in which courts appropriately apply the law in existence at the time of their decision." *Id.* Here, the action taken by the FTC is not comparable to a mere FOIA request; what is at stake is not simply a request for information, but substantive rights directly affecting financial interest. In this case, the FTC took a substantive position in reliance upon existing law that would prejudice it, as well as the public on whose behalf it acted, when that law was changed — and notably, not by Congress directly but rather by a sister agency.

**III. CONCLUSION**

For the foregoing reasons, the Court denies AT&T's motion to dismiss. Contrary to what AT&T argues, the common carrier exception applies only where the entity has the status of common carrier and is actually engaging in common carrier activity. When this suit was filed, AT&T's mobile data service was not ***regulated*** as common carrier activity by the Federal Communications Commission. Once the Reclassification Order of the Federal Communications Commission (which now treats mobile data serve as common carrier activity) goes into effect, that will not deprive the FTC of any jurisdiction over *past* alleged misconduct as asserted**[\*\*47]** in this pending action.

This order disposes of Docket No. 29.

IT IS SO ORDERED.

Dated: March 31, 2015

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

**End of Document**

1. 1As 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. [↑](#footnote-ref-0)
2. 2At the hearing, AT&T argued that, when the FTC Act was enacted, times were "simpler" in that common carriers (such as railroads) were single purpose entities that engaged in common carriage**[\*\*13]** activity only. But the cases cited above show that that was not the case. For instance, a common carrier could engage in private transportation. *See* [*R.R. Co., 84 U.S. at 377*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JK60-003B-H0WG-00000-00&context=) ("For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to 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, 32 S. Ct. 436, 56 L. Ed. 729 (1912)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8P50-003B-H53J-00000-00&context=) (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"). [↑](#footnote-ref-1)
3. 3It is appropriate to consider the Interstate Commerce Act here for at least two reasons. First, the Interstate Commerce Act was "[t]he first federal ***regulation*** to impose duties on common carriers." [*Verity, 443 F.3d at 57*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN3-53H0-0038-X2WB-00000-00&context=). Second, the Interstate Commerce Act was expressly referenced in [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) at the time it was enacted. [↑](#footnote-ref-2)
4. 4Because of its analysis above, the Court need not entertain the FTC's additional argument that "common carriers subject to the Acts to ***regulate*** commerce" necessarily incorporates by reference the totality of the Communications Act, which defines common carriers as turning on whether the entity is actually engaging in common carriage services. *See* [*47 U.S.C. § 332(c)(1)-(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN31-NRF4-40G9-00000-00&context=) (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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPD1-NRF4-439T-00000-00&context=) (defining the term "telecommunications carrier" as "any provider of telecommunication services" and further providing that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the [Federal Communications] Commission shall determine whether the provision**[\*\*17]** of fixed and mobile satellite service shall be treated as common carriage").

   [***HN14***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc14)[] Prior to March 12, 2015, the Federal Communications Commission deemed mobile data service a private mobile service, *i.e.*, non-common carriage. *See* [*Verizon v. FCC, 740 F.3d 623, 650, 408 U.S. App. D.C. 92 (D.C. Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B8W-43T1-F04K-Y0YC-00000-00&context=) (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*.

   

   [↑](#footnote-ref-3)
5. 5AT&T has argued that Congress's decision not to adopt its predecessor's proposed amendment weighs in its favor. The Court does not agree. Admittedly, [***HN18***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc18)[] the Supreme Court has stated that, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation**[\*\*22]** was not intended." [*Russello v. United States, 464 U.S. 16, 23-24, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-40C0-003B-S1ST-00000-00&context=). But that is hardly the situation here. Here, there was a proposed amendment that was never adopted into any version of the bill. Moreover, "[a]s a general rule, Congress'[s] rejection of a proposed amendment is not a significant aid in interpreting a statute passed years earlier." [*United States v. Capital Blue Cross, 992 F.2d 1270, 1277 (3d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GWY0-003B-P08Y-00000-00&context=) (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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FHG0-0039-P175-00000-00&context=) (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.

   

   [↑](#footnote-ref-4)
6. 6AT&T asserts that the legislative history for the Packers and Stockyards Act shows that, before the 1958 amendment, [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=)'s Packers/Stockyards exemption was status based. [***HN20***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FN2-D1R1-F04C-T0VW-00000-00&context=&link=clscc20)[] While the legislative history for the act does use the terms "status" and "activity," that terminology must be viewed in context. The critical point in the legislative history was that the Packers and Stockyards Act was being amended to limit application to certain kinds of packers. *See* H.R. Rep. No. 85-1048, at 6 (1957) (noting that the amendment to [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) of the FTC Act was to reflect the amendment 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**[\*\*28]** 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").

   

   [↑](#footnote-ref-5)
7. 7To the extent AT&T cites other cases, those cases do not, as *Miller* did, address the exact issue of whether the term "common carrier" should be understood to include *both* a status and activities component. *See, e.g.,* [*Nat'l Fed'n of the Blind v. Fed. Trade Comm'n, 303 F. Supp. 2d 707, 710-11, 714-15(D. Md. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BT8-80H0-0038-Y0BY-00000-00&context=) (noting that the FTCA applies only to corporations, not nonprofit 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**[\*\*33]** omitted; citing *Miller*). [↑](#footnote-ref-6)
8. 8[*Section 46*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJ21-NRF4-41JV-00000-00&context=) is another provision in the FTC Act. It gives the FTC authority to investigate but, like [*§ 45(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=), also includes an exemption for common carriers. [↑](#footnote-ref-7)
9. 9The *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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-17H0-0039-M55X-00000-00&context=). 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. [↑](#footnote-ref-8)