UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

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

I. FACTUAL & PROCEDURAL BACKGROUND

In its complaint, the FTC alleges as follows.

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

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

In July 2011, AT&T

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

Compl. ¶ 15.

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

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

According to the FTC,

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

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of § 45(a). 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 -.0.u82ef590.64n comm

Brothers Construction Co.

[2] At 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 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 ("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 (1912) (noting that a common carrier also operated two amusement parks "and in connection therewith owns, operates and derives revenue from lunch stands, merry-go-rounds, bowling alleys, bath houses, etc., and collects admission fees from people entering the parks").

[3] It 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. Second, the Interstate Commerce Act was expressly referenced in § 45(a) at the time it was enacted.

Furthermore, 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 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*.
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> . . . .
>
> [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*, 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 (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 Commerce Commission's regulation of common carriers as

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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 of fixed and mobile satellite service shall be treated as common carriage").

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 (D.C. Cir. 2014) (noting that the Federal Communications "Commission has classified mobile broadband service as a 'private' mobile service" and therefore mobile broadband providers are not common carriers). On March 12, 2015, the Federal Communications Commission issued its Reclassification Order in which it essentially reclassified mobile data service as common carriage in nature. The Court addresses the impact of the Reclassification Order *infra*.

18-19, 1937) (AT&T's predecessor company proposing to Congress that § 45(a) 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]

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 (fbile ce9oSesiwurejev the

[5] AT&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, 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 was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983). 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) (citing 21 N. Singer, *Sutherland on Statutory Construction* § 48.18 (5th ed. 1992)); *see also Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 538 (9th Cir. 1985) (stating that "caution must be exercised in using the rejection by a legislature of proposed amendments as an aid in interpreting measures actually adopted"). There are numerous reasons why legislation may not be enacted; in addition to the realities of the political process wherein legislation may not be enacted for a multitude of disparate reasons, Congress could have made a coherent choice to not enact new legislation because it believed it was already covered by law and thus not needed.

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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, 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 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) 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) 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). Prior to the 1958 amendment, § 45(a) 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 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]

The Fourth Circuit, however, has explained that this change to the Packers/Stockyards exemption was not consequential. More specifically, 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 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 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. *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.*
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> 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 Act, while any other business in which he may be engaged

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[6] AT&T asserts that the legislative history for the Packers and Stockyards Act shows that, before the 1958 amendment, § 45(a)'s Packers/Stockyards exemption was status based. 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) 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 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").

> 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 (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; *see also Foxgord v. Hischemoeller*, 820 F.2d 1030, 1034 (9th Cir. 1987) (noting that "'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. 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" 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).[7] *Miller*, however, is not binding authority on this Court, and the basic reasoning of *Miller* is not persuasive. The Seventh Circuit stated in *Miller* that it

[7] To 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) (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 omitted; citing *Miller*).

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

> 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)] of the Act had declared unlawful and [§ 45(a)(6)] 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 of the latter subsection or of [§ 46]. Thus, as amended [§ 45] 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)(6)], it necessarily fails with respect to [§ 46(a)] as well.

Id. at 458 (emphasis added).[9]

Instead, the Court finds more persuasive the reasoning of the district court in *Federal Trade Commission v. Verity International*onlcepivbit, ccor.5(y bthe)]T1ent

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

Id. at 274; *see also Computer & Comms. Industry Ass'n v. FCC*, 693 F.2d 198, 210 n.59 (D.C. Cir. 1982) (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.

On appeal, the 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. 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 (D.C. Cir. 1994) (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 ("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) ("[A] single firm that is a common carrier in some roles need not be a common carrier in other roles.").

Id. at 60 n.4; *cf. Crosse & Blackwell*, 262 F.2d at 604-05 (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, 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) (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) (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 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) (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 be afforded some deference pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (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 (2001) (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, 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 (July 17, 2002) (statement of Hon. Sheila F. Anthony, FTC) (noting that "Defendants often argue that the exemption protects every action of aismy mt 28 estateutdnjoye1–(e)-.8(nt

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 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

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, "[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 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), there, 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. 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

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 in this pending action.

This order disposes of Docket No. 29.

IT IS SO ORDERED.

Dated: March 31, 2015

EDWARD M. CHEN
United States District Judge