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October 27, 2016

Via ECFS

Gigi Sohn, Counselor to the Chairman
Jessica Almond, Legal Advisor to the Chairman
David Grossman, Chief of Staff to Commissioner Clyburn
Matthew Berry, Chief of Staff to Commissioner Pai
Robin Colwell, Chief of Staff to Commissioner O'Reilly
Marlene Dortch, Secretary,
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Written *Ex Parte* Presentation

Expanding Consumers' Video Navigation Choices
MB Docket 16-42

Commercial Availability of Navigation Devices
CS Docket 97-80

Proposed Transfer of Control of Time Warner Cable, Inc.
and Charter Communications Inc. and Proposed Transfer of
Control of Bright House Networks from Advance/New-
house Partnership to Charter Communications Inc.
Docket 15-149

Proposed Assignment or Transfer of Control of Licenses
and Authorizations from Cablevision Service Corporation
to Altice N.V.
Docket 15-257

Dear Ms. Sohn, Ms. Almond, Mr. Grossman, Mr. Berry, Ms. Colwell and Ms. Dortch:

Zoom Telephonics, Inc. ("Zoom") wishes to address arguments made in four *ex parte* meetings with Commission staff and NTCA- The Rural Broadband Association on October 25, 2016.¹

NTCA took the position that Section 629(a) of the Communications Act does not

¹Although this presentation is addressed to Docket 16-42, out of an abundance of caution, this notice is also being filed in Dockets 15-149 and 15-257.

“provide authority to regulate the facilities of an Internet Service Provider (“ISP”) used in the provision of BIAS that is subject to the common carrier provisions of Title II of the Communications Act.”

NTCA’s argument mirrors the view that Charter Communications, Inc. took in an *ex parte* meeting with the General Counsel on September 8, 2016. Zoom thoroughly debunked these arguments in a written *ex parte* presentation submitted on September 22, 2016. For your convenience, a copy of that submission is provided as Attachment A hereto.

The principle that common carrier status under the Communications Act does not exempt a party from regulation of other activities is hardly new or a controversial. Indeed, as recently as this week, the Commission filed a brief which quoted a another brief filed in 2002, stating that “the fact that a defendant was regulated by the FCC as a Title II common carrier “[w]as not determinative of the question of whether [it] acted as a common carrier in connection with the practices at issue.” Brief of the Federal Communications Commission filed in *FTC v. AT&T Mobility LLC*, No. 15-16585 (filed October 24, 2016) at 3 (*quoting* Brief of the Federal Communications Commission in *FTC v. Verity Int’l, Ltd.*, No. 00-Civ-7422 (March 11, 2002) at 2). For your convenience, a copy of that submission is provided as Attachment B hereto.

Please contact me if you wish discuss this further.

Sincerely,



Andrew Jay Schwartzman
Counsel to Zoom Telephonics, Inc.

ATTACHMENT A

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September 22, 2016

Via ECFS

Marlene Dortch
Secretary,
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Written *Ex Parte* Presentation

Expanding Consumers' Video Navigation Choices
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to Altice N.V.
Docket 15-257

Dear Ms. Dortch:

This presentation is submitted to respond to arguments that counsel for Charter Communications, Inc. ("Charter") presented in an oral *ex parte* communication to General Counsel Howard Symons on September 8, 2016 and a written notice pertaining to that presentation filed on September 12, 2016 ("Charter *Ex Parte*").¹

¹Although this presentation is addressed to Docket 16-42, out of an abundance of caution, this notice is also being filed in Dockets 15-149 and 15-257.

Charter has attempted to argue that

in the wake of the reclassification of broadband Internet access service (“BIAS”) as a common carrier service under Title II of the Communications Act (“the Act”), the Commission lacks the authority to regulate broadband equipment such as cable modems under Section 629 of the Act.²

This assertion is not only wrong, but it is a flat repudiation of what Charter has previously acknowledged in countless pleadings and presentations to the Commission since the Commission reclassified BIAS in March, 2015.³ Indeed, more than a year later, on April 25, 2016, the Media Bureau issued an Order adopting a Consent Decree to resolve an “investigation into whether Charter violated 629 of the Act, as amended, and Sections 76.1201 and 76.1202 of the Commission’s rules...”⁴ The Consent Decree stated that “navigation devices” under the purview of Section 629 “include cable modems which are used to access ‘other services’ (namely, broadband Internet access) offered over a cable system.”⁵ The decree recited that “The Bureau and Charter agree to the following terms and conditions...,” including this term:

8. Jurisdiction. Charter agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.⁶

Notwithstanding Charter’s acceptance of the Commission’s authority under Section 629 less than four months ago, including the finding that cable modems are used “to access ‘other services’ (namely, broadband Internet access) offered over cable system...,” Charter has now attempted to argue the opposite position. It claims that

²Charter *Ex Parte* at 1.

³See *Protecting and Promoting the Open Internet*, 30 FCCRcd 5601 (2015), *aff’d. sub nom. U.S. Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). Charter’s last minute reversal raises procedural questions. When parties take one position in comments, reply comments and numerous ex parte presentations and then, after an item has been placed on the Commission’s Open Meeting agenda, reverse course, it deprives others of an the time to conduct legal and factual research and thus impairs their ability to fully address the new arguments. The Commission may conclude that Charter’s new presentation has come too late to be considered in this phase of the proceeding and, if necessary and permissible, should instead be included in a petition for reconsideration subsequent to any Commission action in this docket.

⁴Charter *Communications, Inc.*, 31 FCCRcd 4591, 4593 (2016).

⁵*Id.*, 31 FCCRcd at 4594.

⁶*Id.*, 31 FCCRcd at 4595.

Post-reclassification, a cable modem is not “equipment used by consumers to access...services offered over” a cable television system” or any other “distribution system that makes available for purchase...multiple channels of video programming.”⁷

This argument entirely ignores the clear words of Section 629. The second sentence of Section 629(a) actually states that

Such regulations [with respect to assuring commercial availability of equipment] shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming ***and other services offered over multichannel video programming systems***, to consumers, if the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.

(Emphasis added.) Charter dances around the plain meaning of Section 629 by discussing the definitions of “multichannel video programming system” and “cable systems,” but it does not even attempt to explain why BIAS is not a “service[] offered over multichannel video programming systems,” regardless of whether it is a Title II or Title VI service. It does not matter whether BIAS is a Title I, Title II or Title VI service; under any of those titles of the Act, the fact is that it travels through the cables of what is also a “multichannel video service.” Since Internet service is not “multichannel video programming,” cable modem service has always been an “other service[] offered over multichannel video programming systems,...”

Express statutory language aside, there is also a fundamental flaw in Charter’s assertion that the Commission’s reclassification of BIAS under Title II somehow removes the Commission’s Section 629 authority over the equipment used to deliver BIAS. The argument is based on the presumptions that the Title II classification and coverage of Section 629 are mutually exclusive, and that the regulatory status of BIAS had been static at all times from 1996 through 2014. This overlooks the reality that the Commission has always treated cable modems as subject to Section 629 from the adoption of Section 629 in 1996 until the present date. Under Charter’s theory, the Commission had no Section 629 jurisdiction until 2002, when the Commission’s declared that it would regulate BIAS as an information service. However, from 1996 through 2002, the Commission had expressly “declined to determine a regulatory classification” for BIAS delivered over cable modems.”⁸ Notably, during that entire period and

⁷Charter *Ex Parte* at 2.

⁸*Inquiry Concerning High-speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4801 (2003), *aff’d. sub nom. National Cable Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2007).

for some time thereafter, BIAS provided by telephone companies was a Title II service.⁹ When the Commission ultimately decided to regulate BIAS over cable modems as an “information service,” parties variously argued that BIAS was one of

several different legal classifications for cable modem service, including “cable service,” “information service,” both cable service and information service, a combination of “telecommunications service” and information service, and “advanced telecommunications capability.”¹⁰

It is of particular significance in this regard that, when the Commission adopted its rules implementing Section 629 in 1998, the uncertainty of the regulatory classification, including the possibility that cable modem service was a Title II “telecommunications service,” was not raised by any party as an obstacle to covering cable modems under the new rules and did not affect the Commission’s determination to do so.

Charter argues that since a “cable system” within the meaning of Title VI cannot be regulated as a common carrier, the Commission cannot use Title VI to regulate equipment offered by a cable system which is used to deliver a common carrier service. This not only ignores the “other services” language in Section 629 discussed above, but also conflicts with case law making it clear that the Commission can regulate services and activities which may involve multiple provisions of the Communications Act. Although much more can be said about this, Zoom will limit this discussion to just a few of the many applicable precedents.

In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 376 n.4 (1986), the Supreme Court authorized FCC jurisdiction over intrastate communications when the communications also have interstate components and where it is “not possible to separate the interstate and the intrastate components of the asserted FCC regulation.”¹¹

In a highly relevant case, this principle was applied to pole attachments as well. In *National Cable Television Association v. Gulf Power Co.*, 534 U.S. 327 (2002), the Supreme Court sided with the cable industry in rejecting utility company arguments that pole attachments used for carrying commingled BIAS and cable television services were outside the scope of the Pole Attachment Act because “an attachment is only an attachment by a cable television system

⁹See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCCRcd 14853 (2005), *aff’d. sub nom. Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007).

¹⁰*Id.*, 17 FCCRcd at 4819 (footnotes omitted).

¹¹See *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (affirming FCC regulation of jurisdictionally mixed communications when unbundling it is not feasible). See also *Policies and Rules Concerning Interstate 900 Telecommunications Services*, 6 FCCRcd 6166, 6180 (1991) (“neither the local exchange carriers, interexchange carriers, nor information providers will know whether the call is intrastate and thus within the state’s jurisdiction”), *aff’d. on reconsideration*, 8 FCCRcd 2343 (1993).

to the extent it is used to provide cable television.”¹² In response to the utilities’ assertion, similar to the one made by Charter, that common carrier status removed the Commission’s authority over pole attachments, the Court held that “[c]able television systems that also provide Internet services are still covered...”¹³ As noted above, the Commission had not determined how it would classify BIAS delivered over cable as of that time (2002). The Court acknowledged that the utilities were “frustrated by the FCC’s refusal to categorize Internet services,” but said that this did not matter, because “even if commingled services are not ‘cable service,’” they “still warrant” coverage by the Pole Attachment Act.¹⁴

Yet a third example of addressing the FCC’s powers where more than one element of the Act is implicated arose when the Commission’s asserted authority over wireless operators’ data roaming. In *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012), the D.C. Circuit explained that the Communications Act imposes a “bifurcated regulatory scheme.”¹⁵ It held that, although wireless voice service is a common carrier service, the exclusion of mobile data services from Title II does not preclude regulating them under Title III and that the Commission “has significant latitude to determine the bounds of common carriage in particular cases.”¹⁶

Evidently aware of the limitations of its jurisdictional argument, Charter also advances a fallback position that, even if Section 629 does confer authority to regulate cable modem billing, the Commission’s effort to do so violates the APA. It says that the Commission lacks “substantial evidence on the record on which to base the proposed rule.”¹⁷ It says that modems are readily available in the retail market and there is no evidence of anticompetitive pricing and no indication of actual consumer harm.

These arguments are multiply flawed. Most importantly, when the Commission is implementing a Congressional directive - in this case, to insure that “the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service” - it does not need to make evidentiary findings to justify regulation. Second, even if that were not so, there is no basis for Charter’s assertion that the Commission can regulate only after “identifying market failure or consumer harm...” To the contrary, there are scores of cases confirming that the Commission has broad latitude to use its expertise to make predictive judgments to adopt rules to designed preclude the development of anticompetitive conditions. For example, in *Rural Cellular Association v FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009), the Court explained that

In circumstances involving agency predictions of uncertain future events,
““complete factual support in the record for the Commission's judgment or

¹²*Id.*, 534 U.S. at 333.

¹³*Id.*, 534 U.S. at 336.

¹⁴*Id.*, 534 U.S. at 338.

¹⁵*Id.*, 700 F.3d at 538.

¹⁶*Id.*, 700 F.3d at 547.

¹⁷Charter *Ex Parte* at 3.

prediction is not possible or required” since “‘a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.’” *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C.Cir.1998) (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29, (1961)).

Similarly, in response to an argument that the Commission was trying to “solve a problem that does not exist,” the D.C. Circuit said that

While it is true that the FCC must “do more than ‘simply posit the existence of the disease sought to be cured,’ ” the Commission is entitled to “appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency.” *Time Warner Entm't Co.*, 240 F.3d at 1133 (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994)).

Consumer Electronics Association v. FCC, 347 F.3d 291 (D.C. Cir. 2003). So, too, in *Earthlink v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006), the Court declined

to second-guess the FCC's predictions. “[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable,” [In re Core Commc'ns, Inc., 455 F.3d 267,] 282 [(D.C.Cir.2006).] (emphasis added) (internal quotation marks and citation omitted), and need not rest on “pure factual determinations,” *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981). See *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (“Substantial evidence does not require a complete factual record—we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency.”).

Most recently, in affirming the FCC’s Open Internet Order, Judge Tatel quoted the preceding passage in stressing that courts review agency predictions under a “highly deferential standard.”¹⁸ Judge Tatel also rejected the notion that the agency must find market failure or consumer harm to justify imposition of regulation. He said, with respect to reclassifying BIAS under Title II,

[N]othing in the statute requires the Commission to make such a finding. Under the Act, a service qualifies as a “telecommunications service” as long as it constitutes an “offering of telecommunications for a fee directly to the public.” 47 U.S.C. § 153(53). ***** Nothing in *Brand X* suggests that an examination of market power or competition in the market is a prerequisite to classifying broadband.¹⁹

Even if it were necessary to demonstrate harm, and leaving aside the fact that the Media

¹⁸*U.S. Telecom Association v. FCC*, 825 F.3d 674, 707 (D.C. Cir. 2016).

¹⁹*Id.*, 825 U.S. at 708.

Bureau had found that actual harm from Charter's non-compliance with Section 629 to be sufficient to justify entry of a Consent Decree, Zoom's experience unequivocally demonstrates that bundled pricing of cable modems and Internet service is anticompetitive. While there is, indeed, a robust retail market for cable modems outside of Charter territory, Zoom's experience confirms Charter customers buy far fewer cable modems at retail than non-Charter customers. For example, Zoom recently analyzed sales of a major national storefront retailer and a major online retailer. For the major national storefront retailer, Zoom compared sales in stores in Comcast territories to sales in stores in Charter territories from May 28, 2016 through June 25, 2016, for a Zoom model that was Comcast and Charter certified. Sales per store were over 4 times higher for Comcast areas than for Charter areas. For the major online retailer, Zoom looked at sales of a Motorola branded Zoom cable modem that was Comcast and Charter certified, comparing sales in Charter zip codes to sales in all zip codes. Sales in the Charter zip codes were only 12% of what would be expected based on the national figures. Thus in both instances, Charter customers were far less likely to buy a cable modem than customers of other cable service providers.

Finally, Zoom must briefly address Charter's suggestion that the Commission violated the APA by failing to provide adequate notice of its intention to apply Section 629 to cable modem billing. Actually, it is Charter that is engaged in a surprise attack by adopting a new position which is the exact opposite of what it previously had taken.²⁰ In the NPRM in this docket, the Commission asked for comment on its "tentative[] conclu[sion] that" it should require all MVPDs to state separately a charge for leased navigation devices and to reduce their charges by that amount to customers who provide their own devices,..."²¹ It specifically asked if it "should adopt such a requirement with respect to all navigation devices, including modems, routers, and set top boxes,..."²² Since the NPRM was adopted almost a year after the Commission reclassified BIAS under Title II, this surely constituted notice that the Commission intended to rely upon Section 629 to regulate billing for cable modems notwithstanding the earlier reclassification of BIAS. At the least, such a finding would be a "logical outgrowth" of the questions the Commission asked,²³ especially since the comments filed on this issue, including Charter's, discussed Section 629 in the context of cable modems.²⁴ Nor could Charter claim that this was unexpected, since in granting consent for the Charter to acquire Time Warner Cable and Bright House Networks, the Commission discussed Zoom's assertions that Section 629 applied to cable modems,²⁵ and expressly stated that the issues Zoom had raised would be

²⁰The same can be said for Charter's unfounded assertion that the Commission has somehow changed course without explanation. Charter *Ex Parte* at 3-4.

²¹*Expanding Consumers' Video Navigation Choices*, 31 FCCRcd 1544, 1585 (2016)

²²*Id.*

²³*See South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974).

²⁴*National Mining Association v. Mine Safety and Health Administration*, 512 F.3d 696, 699 (D.C. Cir. 2008) (citing cases).

²⁵*Charter Communications, Inc.*, 31 FCCRcd 6327, 6443 (2016) (footnote omitted) ("Zoom argues that Section 629 of the Communications Act requires a cable operator to separately itemize and not subsidize the charges for cable modems provided by the cable

addressed in this docket.²⁶

Respectfully submitted,



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Counsel for Zoom Telephonics, Inc.

cc. Howard Symons
Gigi Sohn
Jessica Almond
John Williams

David Grossman
Marc Paul
Robin Colwell
Nicholas Degani

operator to customers.”)

²⁶*Id.*, 31 FCCRcd at 6447.

ATTACHMENT B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

—————
FEDERAL TRADE COMMISSION,

PLAINTIFF-APPELLEE,

v.

AT&T MOBILITY LLC,

DEFENDANT-APPELLANT.

—————
On Appeal from the United States District Court
for the Northern District of California
No. 3:14-cv-04785-EMC
Hon. Edward M. Chen
—————

AMICUS CURIAE BRIEF OF THE FEDERAL
COMMUNICATIONS COMMISSION IN SUPPORT OF
THE FEDERAL TRADE COMMISSION'S
PETITION FOR REHEARING *EN BANC*

—————
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**AMICUS CURIAE BRIEF OF THE FEDERAL COMMUNICATIONS
COMMISSION IN SUPPORT OF THE FEDERAL TRADE
COMMISSION'S PETITION FOR REHEARING *EN BANC***

The Federal Communications Commission submits this brief, pursuant to 9th Circuit Rule 29-2, as amicus curiae in support of the Federal Trade Commission's petition for rehearing *en banc*.

In its petition, the FTC has laid out a compelling case for rehearing *en banc*. Rather than repeat the FTC's arguments, we submit this *amicus* brief to make a few brief points regarding the complementary roles that the FCC and the FTC have long played in consumer protection, and the ways in which the panel's decision, if allowed to stand, would undermine the agencies' successful partnership and harm consumers.

1. The FCC and the FTC have long worked closely under their respective statutory charters to protect consumers. The panel's decision injects substantial uncertainty into the authority underlying that longstanding cooperative relationship.

The FCC's consumer-protection mandate is found in multiple provisions of the Communications Act. Most importantly for present purposes, the FCC, pursuant to its regulatory responsibilities regarding common carriers under Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq.*, has authority to ensure that “[a]ll charges, practices, classifications, and regulations for and in

connection with [common carrier] communications service, shall be just and reasonable.” 47 U.S.C. § 201(b). The FCC also has broad authority to bring enforcement actions for violations of “any rule, regulation, or order issued by the Commission” under the Communications Act. 47 U.S.C. § 503(b)(1)(B); *see also id.* §§ 401(a), 401(b), 503(b)(1)(A), (C), (D).

The FTC’s consumer-protection authority derives primarily from Section 5 of the FTC Act, which “declare[s] unlawful” all “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). Section 5 generally “empower[s] and direct[s]” the FTC “to prevent persons, partnerships, or corporations ... from using ... unfair or deceptive acts or practices in or affecting commerce,” although it exempts, among other things, “common carriers subject to” the Communications Act. *Id.* § 45(a)(2).

The agencies have long operated in a cooperative and complementary fashion under their respective authorities to the benefit of consumers. *See, e.g., FCC-FTC Consumer Protection Memorandum of Understanding*, at 1 & n.1 (Nov. 16, 2015) (FCC-FTC MOU) (attached) (discussing efforts including an earlier 2003 MOU). As the agencies explained in this 2015 MOU, they seek to “ensure that their activities efficiently protect consumers and serve the public interest,” and to “avoid duplicative, redundant, or inconsistent oversight ..., building upon their long history of cooperation on matters of overlapping authority.” To help facilitate

complementary enforcement actions, the MOU ensures the sharing of data regarding consumer complaints, provides for coordination of agency initiatives and enforcement actions, and provides for joint enforcement actions where appropriate.

Id. at 1–2.¹

In these coordinated efforts to protect American consumers, the agencies have historically understood the FTC to have jurisdiction over non-common-carrier services of entities that also engage in common carriage services within the exclusive jurisdiction of the FCC and have concentrated their consumer protection efforts accordingly. *See, e.g.*, FCC-FTC MOU, at 2 (“the scope of the common carrier exemption in the FTC Act does not preclude the FTC from addressing non-common carrier activities engaged in by common carriers”)²; *Brief of FCC as Amicus Curiae*, at 2, *FTC v. Verity Int’l, Ltd.*, No. 00-Civ-7422 (Mar. 11, 2002) (attached) (fact that the defendant was regulated by the FCC as a Title II common carrier “[was] not determinative of the question of whether [it] acted as a common

¹ The agencies also fulfill their consumer protection missions in complementary ways. For instance, although the FTC relies primarily on enforcement actions, the FCC not only may bring enforcement actions, but also has and regularly relies upon the authority to adopt rules under the standard Administrative Procedure Act framework, *see*, 47 U.S.C. § 154(i).

² The panel adverts to the FCC-FTC MOU in its opinion (at 20), but only for the proposition that “the FTC has in recent years interpreted the common carrier exemption as activity-based.” *Op.* at 20. As explained above, the significance of the MOU is much broader.

carrier in connection with the practices at issue”). As the FTC demonstrates in its petition (at 13–18), this is the only plausible interpretation of the common carrier exemption in Section 5.

2. The literalist approach taken by the panel to the common carrier exemption in Section 5 is also at odds with the realities of the marketplace, in which entities that provide communications common carrier services have expanded their lines of business to include non-common-carrier offerings (or vice versa). As the FTC notes (at 8–10), in recent years AT&T, Comcast, Dish, Google, and Verizon—among others—have started to offer both common carrier and non-common-carrier services. By restricting the FTC’s authority over non-common-carrier offerings of entities that also provide common carrier services, the panel’s decision creates uncertainty regarding the agencies’ collaborative efforts to protect the public interest, and potentially undermines those efforts.

The potential impact on consumer privacy policy provides an illustration of this problem. Pursuant to its broad authority under the Communications Act, the FCC has long had rules governing how telephone companies may use their

customers' private information.³ In light of the FCC's *Open Internet Order*⁴—which designated broadband internet access service as a Title II common carriage service—the Commission is now considering new rules governing how broadband providers may use and share their customers' private information. See Tom Wheeler, *Protecting Privacy for Broadband Customers* (Oct. 6, 2016), available at <https://www.fcc.gov/news-events/blog/2016/10/06/protecting-privacy-broadband-consumers>.

The FTC, too, has long been focused on protecting the privacy of consumers. Its “principal tool” has been “to bring enforcement actions to stop law violations and require companies to take affirmative steps to remediate the unlawful behavior.” See FTC, *Privacy & Data Security Update* (2015), available at <https://www.ftc.gov/reports/privacy-data-security-update-2015>. The FTC has thus brought numerous enforcement actions to address privacy violations—“over 130 spam and spyware cases,” “more than 50 general privacy lawsuits,” and “almost 60” data security cases as of January 2016. *Id.*

³ See, e.g., *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, 22 FCC Rcd 6927 (2007).

⁴ *Protecting and Promoting the Open Internet (Open Internet Order)*, 30 FCC Rcd 5601 (2015), *pets. for rev. denied*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016), *pets. for reh'g pending*.

Recognizing the FCC's collaborative relationship with the FTC, the FCC's proposed new broadband privacy rule "would not," FCC Chairman Wheeler has explained, "apply to the privacy practices of websites or apps, over which the Federal Trade Commission has authority"—"even when [the] website or app is owned by a broadband provider." Wheeler, *Protecting Privacy, supra*. The panel decision calls into question this division of responsibility.

3. By shrinking the boundaries of the FTC's authority to guard against unfair and deceptive practices where a common carrier is involved in non-common carrier services, the panel's decision injects unnecessary uncertainty into the ability of the FTC to continue to team with the FCC to protect American consumers. That partnership has long benefited the public interest; it should not be disrupted by a decision that rests on legal error. The panel's decision should be reheard *en banc*.

Respectfully submitted,

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October 24, 2016

**Form 6. Certificate of Compliance With Type-Volume Limitation,
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Signature

Attorney for

Date

ATTACHMENT

FCC-FTC Consumer Protection Memorandum of Understanding

FCC-FTC Consumer Protection Memorandum of Understanding

Whereas the Federal Communications Commission (FCC) implements and enforces the Communications Act of 1934, as amended, which, among other things, requires all common carrier charges, practices, classifications, and regulations for and in connection with communication service by wire or radio to be just and reasonable; requires cable operators, satellite carriers, telecommunications carriers, and providers of interconnected Voice over Internet Protocol (VoIP) services to protect their subscribers' privacy; and creates and empowers the Commission to create other protections for consumers of broadband, broadcasting, cable, information, satellite, and wireless and wireline telecommunications services;

Whereas Congress has directed the Federal Trade Commission (FTC) to, among other things, prevent unfair or deceptive acts or practices in commerce and has charged the FTC with enforcing a number of other specific consumer protection rules and statutes;

Whereas, the FCC recognizes the importance of the FTC's expertise and leadership on matters of consumer protection and the FTC recognizes the importance of the FCC's expertise and leadership with regard to consumer protection as applied to telecommunications services; and

Whereas the FCC and FTC wish to continue working together to protect consumers and the public interest and, in so doing, avoid duplicative, redundant, or inconsistent oversight in these areas, building upon their long history of cooperation on matters of overlapping authority, including, for example, telemarketing enforcement where the agencies have implemented and followed an effective Memorandum of Understanding since 2003:¹

Therefore, it is hereby agreed that:

The FCC and the FTC will continue to work together to protect consumers from acts and practices that are deceptive, unfair, unjust and/or unreasonable including through:

- Coordination on agency initiatives where one agency's action will have a significant effect on the other agency's authority or programs,
- Consultation on investigations or actions that implicate the jurisdiction of the other agency,
- Regular coordination meetings to review current marketplace practices and each agency's work on matters of common interest that impact consumers,
- Regular meetings at which the agencies will exchange their respective learning about the evolution of communications markets,

¹ The 2003 Memorandum of Understanding (MOU) regarding Telemarketing Enforcement remains in effect and nothing in this Memorandum should be construed as altering, amending, or invalidating that MOU.

- Sharing of relevant investigative techniques and tools, intelligence, technical and legal expertise, and best practices in response to reasonable requests for such assistance, and
- Collaboration on consumer and industry outreach and education efforts, as appropriate.

The agencies express their belief that the scope of the common carrier exemption in the FTC Act does not preclude the FTC from addressing non-common carrier activities engaged in by common carriers.² Further, no exercise of enforcement authority by the FTC should be taken to be a limitation on authority otherwise available to the FCC, including FCC authority over activities engaged in by common carriers and by non-common carriers for and in connection with common carrier services; likewise, no exercise of enforcement authority by the FCC should be taken to be a limitation on authority otherwise available to the FTC. To the extent that existing law permits both the FCC and the FTC to address the same conduct, the agencies agree to follow the processes set out in this Memorandum of Understanding in order to ensure that their activities efficiently protect consumers and serve the public interest.

The agencies will engage in joint enforcement actions, when appropriate and consistent with their respective jurisdiction. With respect to such joint enforcement activities, the agencies will commit to coordinating press statements and other public statements.

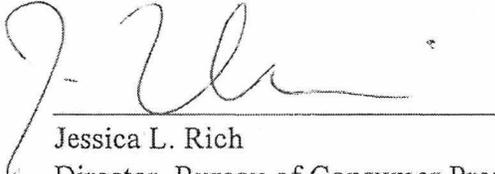
The FCC and FTC will share data regarding consumer complaints to the extent feasible. In particular, the FTC will continue to provide qualified FCC staff access to the Consumer Sentinel Network, a secure online database that provides law enforcement members access to millions of consumer complaints submitted directly to the FTC, as well as complaints shared by over 40 other data contributors; and the FCC agrees to work to become a Consumer Sentinel Network data contributor, sharing relevant consumer complaints with the Consumer Sentinel membership.

In order to provide for more effective exchange of information so that both agencies will be able to operate to the maximum effectiveness in the public interest, the persons signing below and their successors shall be deemed Designated Liaison Officers to serve as the primary sources of contact for each agency. Formal liaison meetings between appropriate senior officials of both agencies to exchange views on matters of common interest and responsibility shall be held from time to time, as determined by such liaison officers to be necessary.

² Further, the common carrier exception in the FTC Act does not preclude the FTC from enforcing certain other statutes and rules that expressly provide the FTC with jurisdiction over common carrier services, such as the Fair Credit Reporting Act and the Telephone Disclosure and Dispute Resolution Act of 1992.

The Memorandum of Understanding shall take effect upon execution by both parties and may be modified by mutual consent of both parties or terminated by either party upon thirty (30) days advance written notice.

For the Federal Trade Commission:



Jessica L. Rich
Director, Bureau of Consumer Protection

Date: 11-13-15

For the Federal Communications Commission:



Travis LeBlanc
Chief, Enforcement Bureau

Date: 11-16-15

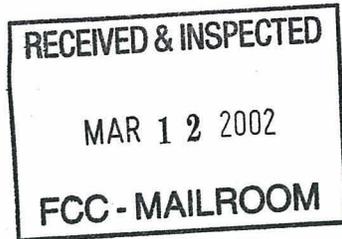


Alison Kutler
Acting Chief, Consumer & Governmental Affairs Bureau

Date: 11-12-15

ATTACHMENT

Brief of FCC as Amicus Curiae
FTC v. Verity Int'l, Ltd.,
No. 00-Civ-7422
(Mar. 11, 2002)



U.S. Department of Justice

United States Attorney
Southern District of New York

100 Church Street
New York, New York 10007

March 11, 2002

BY HAND

Honorable Lewis A. Kaplan
United States District Court
Southern District of New York
United States Courthouse
500 Pearl Street Room 1310
New York, New York 10007

Re: Federal Trade Commission v. Verity Int'l Ltd et al
00 Civ. 7422 (LAK)

Dear Judge Kaplan:

On behalf of the Federal Communications Commission ("FCC"), we respectfully submit this letter brief *amicus curiae* in response to the Court's January 18, 2002 Order. In that Order, the Court asked the FCC to address four issues that have arisen in connection with the allegations by plaintiff Federal Trade Commission against defendant Automatic Communications Ltd. ("ACL"). For purposes of answering the Court's questions, the FCC has accepted as true ACL's descriptions of its own business activities. The questions are answered in the order in which they were presented.

1. Is ACL a common carrier within the meaning of the Communications Act of 1934, as amended?

Under the Communications Act of 1934 (the "Communications Act"), the FCC has regulatory responsibilities regarding common carriers under Title II. 47 U.S.C. §§ 201-227. The Communications Act does not define "common carrier" other than as "any person engaged as a common carrier for hire." 47 U.S.C. § 153(10). The FCC's regulations provide that a communication common carrier is "any person engaged in rendering communication service for hire to the public." 47 C.F.R. § 21.2

(2000). Courts interpreting these provisions have set out a two-part test to determine whether an entity is a common carrier. First, the "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently." National Association of Regulatory Utility Commissioners v. FCC ("NARUC II"), 533 F.2d 601, 608 (D.C. Cir. 1976); Southwestern Bell Telephone Company v. FCC, 19 F.3d 1475, 1480 (D.C. Cir. 1994). The second prerequisite is "that the system be such that customers transmit intelligence of their own design and choosing." NARUC II, 533 F.2d at 609 (citation omitted).

An entity may be a common carrier for some activities but not others. NARUC II, 533 F.2d at 608. "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." Southwestern Bell, 19 F.3d at 1481. Thus, for example, a company may offer certain telecommunications services on a common carrier basis (basic telephone service), but may offer other services on a limited, customer-specific, non-common carrier basis (dark fiber-optic communication). See id. Consequently, the fact that ACL obtained a license pursuant to section 214 of the Communications Act and filed a tariff with the FCC is not determinative of the question of whether ACL acted as a common carrier in connection with the practices at issue here.

Accordingly, to determine whether ACL is a common carrier, an analysis of ACL's specific business activities is the necessary first step. According to a director of ACL, ACL's business consists of three activities:

(a) it obtains the right to certain telephone numbers in various countries; (b) it licenses the use of those numbers to companies that market billing software to website operators; and (c) it agrees with long distance carriers to terminate calls from the long distance company's home country to the numbers from the other countries.

Reply Declaration of Mark Blanchard, dated April 24, 2001, ¶ 3. Specifically with respect to the activities at issue here, ACL entered into three agreements. First, ACL entered into an agreement with Telecom Malagasy, the Madagascar telephone company, to be its agent for certain specified telephone numbers. Id. ¶ 5 & Ex. 1. Second, ACL licensed the Madagascar numbers to various Information Providers to use in their billing products marketed to website operators. Id. ¶ 6. Third, ACL entered into an agreement with AT&T, and a transit carrier, to terminate calls

from the United States to the Madagascar numbers.¹ Id. ¶ 10 & Ex. 3. According to ACL, during the AT&T period, ACL did not operate any adult website, contract with website operators, provide dialer software for any website, communicate with consumers in the United States, set prices for videotext services for United States customers, prepare, send or collect bills for such services to or from United States consumers. Id. ¶ 4.

The FCC does not believe that ACL's activities constitute an offering of common carrier service to the public. They do not satisfy the two-part test set forth above. As the FCC has previously stated, "[t]he ultimate test is the nature of the offering to the public." Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities ("Resale and Shared Use Order"), 60 F.C.C.2d 261, ¶ 101 (1976), aff'd on reconsideration, 62 F.C.C.2d 588 (1977), aff'd sub nom AT&T v. F.C.C., 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978). ACL did not hold itself out to the public as an indifferent provider of telecommunications services. It was AT&T, not ACL, that provided long distance service to the public as a common carrier. ACL did not set the rates, or terms and conditions for long distance service. Nor did it bill customers for its services or take payment from them. In the Matter of Philippine Long Distance Telephone Company v. USA Link, 12 F.C.C.R. 12,010, at ¶ 17, 1997 WL 458228 (1997) provides an instructive contrast. In that case, the FCC found that Global Link, a company providing call-back international long distance service to Philippine customers, was holding itself out as a common carrier. The Commission relied on various factors, including the use of Global Link's name and logo in promotional material, the fact that Global Link set the rates, terms and condition for its services, the fact that Global Link's name appeared on the invoices sent to customers, and that customers were instructed to make payment directly to Global Link. Id. at ¶¶ 18-21. Thus, Global Link, unlike ACL, held itself out "prominently to its Philippine customers and agents as the provider of international services using call-back." Id. ¶ 21.

It also appears that to the extent ACL may have provided transmission services on a common carrier basis, those services were outside the jurisdiction of the FCC. Of ACL's

¹ ACL subsequently entered into a similar agreement with Sprint. For purposes of this response, however, the FCC has focused on the AT&T period, which was the subject of the preliminary injunction hearing held by the Court on June 5, 2001, and for which the record is most fully developed.

three activities, only its conduct as a terminating carrier as agent for Telecom Malagasy is even arguably common carrier activity. As such, ACL accepted transmission of calls originating in the United States from a transit carrier in the United Kingdom and terminated the calls overseas. AT&T was the United States carrier and AT&T's tariff rates applied. See Blanchard Dec. ¶ 11; Affidavit of James H. Bolin, Jr., dated October 11, 2000, ¶¶ 3-4; Transcript of Hearing, June 5, 2001 at 53 (testimony of John Ault). ACL, in contrast, did not provide transmission service in the United States. ACL stood in the shoes of Telecom Malagasy - a foreign terminating carrier, not a common carrier subject to the FCC's jurisdiction. See 47 U.S.C. § 152(a) (the Communications Act applies "to all interstate and foreign communications by wire or radio . . . which originates and/or is received within the United States); Cable & Wireless P.L.C. v. FCC, 166 F.3d 1224, 1229-30 (D.C. Cir. 1999) (noting that FCC "claims no authority to directly regulate foreign carriers" and holding that because order does not regulate foreign carriers or foreign telecommunications, it does not violate the Communications Act).

ACL has suggested that it is a reseller and, as such, a common carrier. The FCC does not believe that ACL was acting as a reseller with respect to the activities at issue in this matter. Resale has been defined as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without 'adding value') for profit." Resale and Shared Use Order, 60 F.C.C.2d at ¶ 17; See also National Communications Assoc., Inc. v. AT&T, 46 F.3d 220, 221 (2d Cir. 1995) (reseller is "one who engages in the business of purchasing long-distance telecommunications services at large-volume rates from a supplier, such as AT&T, and resells those services to others whose volume of use individually would not qualify them to purchase directly from the supplier").

It does not appear from the description of ACL's business activities that ACL ever subscribed to long distance service and then resold that service to third parties. The only thing ACL resold was the right to terminate calls to certain Madagascar numbers. See Transcript of Hearing, June 5, 2001 at 134-35 (testimony of Mark Blanchard) ("ACL basically was a seller of the 2617 termination"); Blanchard Dec. Ex. 3 (co-carrier interconnection agreement, not a contract to purchase bulk AT&T services). ACL did not offer this service to the general public indifferently. Rather, ACL offered the service only to a limited group of Information Providers to whom ACL licensed the Madagascar numbers it obtained through its agreement with Telecom

Malagasy. Accordingly, ACL's business activities do not appear to constitute common carrier activities under the Communications Act.

2. **Assuming that it is, are its alleged activities with respect to which the Federal Trade Commission seeks relief in this action exempt from the Federal Trade Commission Act (the "Act") by virtue of the common carrier exemption in Section 5(a)(2) of the Act?**

The Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), exempts "common carriers subject to the Acts to regulate commerce." 15 U.S.C. § 44 defines "Acts to regulate commerce" to include the Communications Act. As set forth above, the FCC does not believe that ACL acted as a common carrier under the Communications Act in connection with the activities with respect to which the Federal Trade Commission seeks relief. The FCC takes no position with respect to the interpretation of Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2).

3. **Should the Court dismiss or stay all or any part of the action in favor of the FCC under the doctrine of primary jurisdiction?**

The FCC does not believe the Court should dismiss or stay this action under the doctrine of primary jurisdiction. The doctrine of primary jurisdiction "allows a federal court to refer a matter extending beyond the 'conventional experiences of judges' or 'falling within the realm of administrative discretion' to an administrative agency with more specialized experience, expertise, and insight." National Communications Ass'n, Inc. v. AT&T, 46 F.3d 220, 222-23 (2d Cir. 1995) (quoting Far East Conference v. United States, 342 U.S. 570, 574 (1952)). Although there is "no fixed formula" to determine whether an agency has primary jurisdiction, National Communications Ass'n, 46 F.3d at 223, courts will generally consider four factors:

(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.

Id. at 222.

The FCC does not believe that the case requires the FCC's specialized experience and expertise. At issue in this matter is whether ACL's role in a billing scheme constituted a deceptive trade practice within the meaning of the Federal Trade Commission Act. This issue neither falls within the FCC's expertise, implicates any technical or policy considerations within the FCC's unique expertise, nor raises any question particularly within the FCC's discretion, that would warrant a dismissal or stay under the doctrine of primary jurisdiction. See National Communications Ass'n, 46 F.3d at 223-24. Compare LO/AD Communications v. MCI Worldcom, 2001 WL 64741 (S.D.N.Y. Jan. 24, 2001) (staying case under doctrine of primary jurisdiction in favor of proceeding before the FCC on issue of whether common carrier had violated provisions of the Communications Act).

4. Does the filed rate doctrine bar all or any part of this action?

The FCC does not believe that the filed rate doctrine bars all or any part of this action. Under the filed rate doctrine, no one may bring a judicial challenge to the validity of a filed tariff. Brown v. MCI Worldcom Network Services, Inc., 277 F.3d 1166, 1170 (9th Cir. 2002). Here, however, as in Brown, the validity of the tariffs applied is not in issue, either directly or indirectly. The purpose of the doctrine is "to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff." Id. at 1166 (citations omitted). In this case, as discussed above, ACL does not appear to be a common carrier, and therefore, the filed rate doctrine would not insulate the company from challenges to its alleged role in a deceptive billing scheme.

Thank you for your consideration of this submission.

Respectfully,

JAMES B. COMEY
United States Attorney

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9th Circuit Case Number(s)

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