NO. 15-16585

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

PLAINTIFF-APPELLEE,

V.

AT&T MOBILITY LLC,

DEFENDANT-APPELLANT.

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.*

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[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

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Signature s/ Jacob M. Lewis

Attorney for Federal Communications Commission

Date 10/24/2016

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.

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[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
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Date: 11-16-15

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
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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

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[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,

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9th Circuit Case Number(s) 15-16585

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