IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Federal Trade Commission, Plaintiff-Appellee	)	
v.	)	No. 15-16585
AT&T Mobility LLC Defendant-Appellant	)	

MOTION OF FEDERAL COMMUNICATIONS COMMISSION FOR LEAVE TO FILE POST-ARGUMENT SUBMISSION

The Federal Communications Commission respectfully asks the Court's leave to file the accompanying post-argument submission. During the September 19, 2017 oral argument before the *en banc* court in the above-referenced case, respondent AT&T Mobility LLC (AT&T) contended for the first time that the Federal Communications Commission's (FCC) authority to impose structural separation on common carriers would mitigate any concerns about a "regulatory gap" resulting from AT&T's status-based interpretation of the Federal Trade Commission Act's common carrier exception. That contention, which we believe to be incorrect, received considerable attention at the oral argument. The FCC respectfully urges the Court to accept and consider the accompanying submission

to correct the record on this issue.

Respectfully submitted,

s/ Nicholas Degani

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October 20, 2017

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VIA ECF

Molly C. Dwyer, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

RE: *Federal Trade Commission v. AT&T Mobility LLC*, No. 15-16585 (reheard *en banc* on September 19, 2017)

Dear Ms. Dwyer:

During the *en banc* rehearing in the above-referenced case, respondent AT&T Mobility LLC (AT&T) contended that the Federal Communications Commission's (FCC) authority to impose structural separation on common carriers would mitigate any concerns about a "regulatory gap" resulting from AT&T's status-based interpretation of the Federal Trade Commission (FTC) Act's common carrier exception. We submit this letter to correct the record regarding AT&T's contention.

AT&T argued for the first time in the rehearing *en banc* oral argument that the FCC "can and would" require carriers to form separate subsidiaries for their non-carrier activities to close the gap and thereby enable the FTC to exercise authority over such activities.[1] As discussed below, the FCC's authority to require separation for the unprecedented purpose of facilitating FTC regulatory authority is doubtful. And the FCC has *never* required separation except to prevent abusive conduct by carriers with market power.

[1] Video recording for *FTC v. AT&T*, No. 15-16585, at time-stamp 13:10 (https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012180).

The FCC's authority for separation requirements was addressed in several colloquies during the oral argument. For example, Judge Fletcher asked counsel for AT&T whether, "as a practical consequence of the position for which you're arguing," Proctor & Gamble could escape FTC jurisdiction by purchasing a common carrier. Mr. Kellogg responded that "[i]t's up to the FCC . . . The FCC can say, 'no, these activities . . . , they're too far outside the ordinary activities covered under the Communications Act, and you're going to have to provide those in a separate subsidiary.' And that separate subsidiary would not be exempt [from FTC jurisdiction] because it would not be a common carrier."[2]

Similarly, Judge Kozinski asked: "what happens if AT&T tomorrow acquires Mercedes or General Motors . . . and decides to run it out of the same corporation? Are you telling us that the FCC at that point could say, 'you've got to take that business and put it in a different corporation?'" AT&T's counsel responded that the FCC "can and would" impose separation requirements. Asked to identify the FCC's authority to do so, he referred to "the *Computer Inquiry* cases, [in which] the FCC was dealing with how to regulate enhanced services . . . And what the FCC said at first is, 'we're not going to let you do that at all because that's outside common carriage,' and later they said, 'okay, we're going to let you do it, but you have to do it in a separate subsidiary.' And they have that authority."[3]

1. AT&T's argument that the FCC has the legal authority to require structural separation in order to facilitate FTC regulatory authority is baseless.

At the outset, imposing across-the-board structural separation on all companies with both common-carrier and non-common carrier activities is inconsistent with the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat 56 (codified as 47 U.S.C. § 153(51)). There, Congress expressly contemplated that a single company would undertake both common-carrier and non-common-carrier activities, providing that "[a] telecommunications carrier shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services." The FCC may not exercise its authority "in a manner that contravenes any specific prohibition contained in the Communications Act." *Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014); *see Echostar Satellite LLC v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013) ("It is one thing for the FCC to invoke its ancillary authority in furtherance of express congressional directives.

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[2] *Id.* at 8:25 to 10:23.

[3] *Id.* at 12:39 to 13:52.

But it is quite another when the FCC invokes its ancillary jurisdiction to override Congress's clearly expressed will."). In other words, Congress contemplated that companies would generally have the freedom to structure their carrier and non-carrier activities as they see fit. Preventing all companies from doing so to prevent a regulatory gap would appear to be inconsistent with that freedom.

More generally, "[t]he FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power upon it." *American Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005), quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Requiring separation would be an exercise of the FCC's ancillary jurisdiction. *See Computer and Commc'ns Ind. Ass'n v. FCC*, 693 F.2d 198, 211-14 (D.C. Cir. 1982) (*CCIA*) (affirming *Computer II* separation requirements as an exercise of ancillary jurisdiction). To exercise that authority, the FCC has always been required to demonstrate that a regulation is reasonably ancillary to the effective performance of the FCC's statutorily mandated responsibilities to exercise such jurisdiction. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968). Imposing separation to promote FTC authority would fail this test, since there would be no nexus between the separation requirement and any of the *FCC's* statutory responsibilities. A regulation intended to promote *FTC* jurisdiction over non-common carrier activities lacks the required connection to the *FCC*'s Title II authority over common carriers. *See Comcast Corp. v. FCC*, 600 F.3d 642, 656 (D.C. Cir. 2010) ("The crux of our decision in *CCIA* was that in its *Computer II Order* the Commission had linked its exercise of ancillary authority to its Title II responsibility over common carrier rates."). That the FCC's action might serve the public interest by closing a gap in the FTC's authority under AT&T's "status-based" interpretation of the FTC Act is irrelevant to the jurisdictional analysis: "The FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue." *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).[4]

2. Even assuming it has the necessary authority, FCC imposition of structural separation requirements to allow the FTC to exercise jurisdiction over a carrier's non-carrier activities would be unprecedented. The FCC has imposed separation requirements for one purpose only: to prevent abuses by carriers with market power. For example, the *Computer Inquiry* rules originally required

[4] An additional problem is that recent judicial decisions have raised questions as to the continued scope of the FCC's ancillary jurisdiction. *See, e.g.*, *Comcast*, 600 F.3d 642.

separation of every common carrier's communications activities from its unregulated data processing services. This requirement, imposed at a time when carriers had monopoly power, "was designed to prevent common carriers from unfairly burdening their regulated communications services with costs properly attributable to unregulated data processing services." *Computer and Commc'ns Ind. Ass'n v. FCC*, 693 F.2d at 203 n.8. The FCC later relieved carriers of this rule, with the exception of AT&T and the Bell Operating Companies (BOCs) due to their "pervasive market power." *Id.* at 205 n.22. The essential condition for imposing separation, the FCC found, was "market power to engage in effective anti-competitive activity . . ." *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384, ¶ 222 (1980) (*Computer II*). "The FCC . . . stressed the importance of a carrier's monopoly control of local bottleneck facilities and the ability to abuse that control either by providing inferior access to competitors or by cross-subsidizing its own enhanced services with monopoly revenues derived from captive ratepayers." *State of California v. FCC*, 905 F.2d 1217, 1225 (9th Cir. 1990) (*California I*).[5]

The FCC has imposed separation requirements on carriers on other occasions as well, but again always to prevent market power abuses. *See, e.g.*, *GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 345 (6th Cir. 2000) (affirming separation requirements for local telephone companies (LECs) providing commercial mobile radio services "given the monopoly power of the LECs that stems from their bottleneck control over local landline infrastructure"); *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 473 (7th Cir. 1984) (affirming a rule that forbade the BOCs to sell or lease telecommunications equipment except through separate subsidiaries because of concerns they "might use their monopoly of access to the telecommunications network to subvert competition in the equipment market."); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, ¶ 257 (1997) ("We find it necessary to require as a dominant carrier safeguard a minimum level of structural separation").

Moreover, the FCC has historically turned to structural separation as a last resort, recognizing the steep costs it imposes "in terms of the unavailability of certain services, lost economies and efficiencies, and the inability of customers to obtain complete telecommunications and data processing solutions from a single

[5] The FCC ultimately relieved the BOCs of the requirement to separate enhanced services as well, concluding that the costs exceeded the benefits, and proposing "to replace the structural separation requirements with nonstructural regulations." *State of California v. FCC*, 4 F.3d 1505, 1508 (9th Cir. 1993).

vendor." *California I*, 905 F.2d at 1229; *see Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 22 FCC Rcd 16440, ¶ 82 (2007) (separation requirements "not only impose additional costs, but also prevent the BOCs from taking advantage of the economies of scope and scale associated with integrated operation that their competitors are able to realize."); *id.* at n.238 ("The Commission has previously found that structural separation may sacrifice innovation, efficiency, and economies of scale and scope.") (citing cases).

Finally, AT&T's reliance on the *Computer Inquiry* decisions is particularly misplaced in light of the 1996 Act, which has since changed the communications landscape. AT&T's suggestion that the FCC has blanket power to require separation does not jibe with Congress's mandate that an entity "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services," 47 U.S.C. § 153(51), for the reasons discussed above. *See supra*, pg. 2-3. Further, the 1996 Act "introduced a mandate that the [FCC] promote competition, deregulation and innovation wherever possible in the communications market." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 ¶ 35 (2002). Given the 1996 Act's mandate, the FCC has not imposed new separation rules since the late 1990s and has allowed existing ones to sunset or forborne from applying them. *See, e.g.*, 47 C.F.R. § 20.20(f) (January 1, 2002 sunset of separation requirement for LECs providing commercial mobile radio services); *Petition of USTelecom for Forbearance from Enforcement of Certain Legacy Telecommunications Regulations*, 28 FCC Rcd 7627, ¶¶ 139-42 (2013) (forbearing from separation rule for price cap-regulated LECs to provide long distance services); *Section 272(f)(1) Sunset*, 22 FCC Rcd 16440, ¶¶ 79-86 (declining to extend separation rule for BOCs to provide long distance services); *Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, 15 FCC Rcd 3267 (2000) (declining to extend separation requirement for BOC information services).

In sum, the FCC's authority to require separation under the circumstances envisioned by AT&T's counsel is doubtful because the requirement would not serve the effective performance of the FCC's statutory responsibilities and contravenes Congress's expectation that companies would engage in both common-carrier and non-common-carrier activities. Moreover, AT&T's argument that the FCC would impose separation as a matter of regulatory housekeeping ignores not only the foregoing history but also the FCC's historical practice of

resorting to separation only to prevent abuses by carriers with competitive power. It would be unprecedented for the FCC to require separation simply to close a gap between FCC and FTC regulatory authority.

Sincerely,

s/ Nicholas Degani

Nicholas Degani
Acting General Counsel

9th Circuit Case Number(s) 15-16585

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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Signature (use "s/" format) s/ Nicholas Degani

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