

KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.

SUMNER SQUARE  
1615 M STREET, N.W.  
SUITE 400  
WASHINGTON, D.C. 20036-3215

(202) 326-7900

FACSIMILE:

(202) 326-7999

January 8, 2018

*via ECF*

Molly C. Dwyer, Clerk of the Court  
U.S. Court of Appeals for the Ninth Circuit  
James R. Browning U.S. Courthouse  
95 Seventh Street  
San Francisco, CA 94103

Re: *FTC v. AT&T Mobility LLC*, No. 15-16585 (reheard *en banc* Sept. 19, 2017)

Dear Ms. Dwyer:

We write to make three points in response to the FTC’s letter of January 5, 2018 (ECF No. 114) concerning the recent FCC order reclassifying broadband internet under Title I of the Communications Act.

First, the new order is irrelevant to the two statutory arguments made in AT&T’s brief at 25-43 and 43-49, respectively (ECF No. 7). Even with regard to the third argument (Br. 50-59), the fact that the FTC, on its own reading of the statute, concededly lost jurisdiction during the pendency of this litigation still requires dismissal because agency “proceedings cannot validly be continued beyond the point at which jurisdiction ceases.” *Pentheny, Ltd. v. Government of the Virgin Islands*, 360 F.2d 786, 790 (3d Cir. 1966).

Second, the FTC’s renewed concern of a “regulatory gap” under the order (Letter, 1) is baseless. As AT&T explained (Br. 43-49), *the very disclosures at issue in this case* were – and remain – “subject to” FCC regulation. Indeed, the FCC investigated those disclosures and proposed a \$100 million penalty under the agency’s transparency rule – a rule the order upholds. *See* ¶¶ 215-238.<sup>1</sup>

---

<sup>1</sup> Moreover, however the FCC regulates broadband today, the D.C. Circuit has held the FCC is statutorily *authorized* to regulate broadband as common carriage. *See U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 702 (D.C. Cir. 2016), *petitions for cert. pending*, Nos. 17-498 *et seq.* (U.S.). FTC authority does not wax and wane based on how the FCC deploys that power.

KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.

Molly C. Dwyer  
January 8, 201  
Page 2

Third, the FTC argues that the FCC could not order structural separation to preserve FTC authority over non-common carrier activities. But pursuant to its authority to ensure that license transfers are in the public interest as well as its authority over interstate communications by common carriers, the FCC has previously required structural separation of certain common carrier and non-common carrier services. *See, e.g., Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (authority to require non-common-carrier activities to be done through separate subsidiary “beyond peradventure”). Of course, this does not mean separation is appropriate or necessary in any particular context going forward.

Respectfully submitted,

*s/ Michael K. Kellogg*

Michael K. Kellogg

cc: Counsel of Record (via CM/ECF)

9th Circuit Case Number(s)

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

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)  .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When Not All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)  .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)