No. 15-16585

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

AT&T MOBILITY LLC, a limited liability company,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of California in Case No. 3:14-cv-04785 (Chen, J.)

BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

Pursuant to Ninth Circuit Rule 29-2(a), the Federal Communications Commission submits this amicus brief in support of plaintiff-appellee Federal Trade Commission.

INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

This appeal concerns the division of authority between the Federal Trade Commission and the Federal Communications Commission. For decades, the FCC and the FTC have worked cooperatively to respect federal law's careful delineation of authority between the two agencies,

seeking to ensure that businesses providing communications services will neither be subject to conflicting demands from two regulators nor fall into a regulatory gap. Because the prior panel decision gravely upset this careful balance, potentially creating a regulatory no man's land that is exempt from *both* FTC and FCC jurisdiction, the Federal Communications Commission has a significant interest in the outcome of this case.

INTRODUCTION AND BACKGROUND

Section 5 of the FTC Act gives the Federal Trade Commission authority to take action against unfair or deceptive acts or practices in or affecting commerce, subject to certain exceptions—including an exception for "common carriers subject to" the Communications Act. 15 U.S.C. § 45(a)(2); *see also id.* § 44 (cross-referencing the Communications Act). The Communications Act gives the Federal Communications Commission authority over communications by wire or radio, and it further provides that any service classified as a telecommunications service shall be treated as a common carrier and subject to comprehensive utility-style regulation under Title II of the Act. Communications Act of 1934, *as amended*, 47 U.S.C. §§ 151 *et seq.* The FCC's classification of services under the Communications Act thereby works in conjunction with the FTC Act's

common-carrier exception to mark the boundary between the two agencies' respective jurisdiction over telecommunications companies.

Until early 2015, broadband internet access service was for many years classified as a non-common-carrier "information service" under the Communications Act. *See Nat'l Cable & Telecomm. Ass'n v. Brand X*, 545 U.S. 967 (2005). Under this regime, the FTC and FCC engaged in complementary regulation of that service. During this period, the FTC in October 2014 brought this suit alleging that AT&T committed an unfair and deceptive practice in marketing its wireless broadband internet access service, in violation of Section 5 of the FTC Act, by not adequately disclosing the terms of its "unlimited" mobile data plans. *See* FTC Br. 3–5.[1]

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[1] In June 2015, the FCC issued a Notice of Apparent Liability (NAL) finding that AT&T's conduct apparently violated FCC disclosure requirements. *In re AT&T Mobility, LLC*, 30 FCC Rcd. 6613 (2015). An NAL is not an actual adjudication of liability, but instead is akin to a bill of particulars that advises a party of how it appears to have violated the law and offers an opportunity to respond. A majority of the FCC's current commissioners dissented from the decision to issue the NAL, *see id.* at 6629–43, and no further action has been taken on it. Notably, the FCC rule underlying the NAL was not adopted pursuant to Title II's pervasive common-carrier regime, so the congressional concern that gave rise to the common-carrier exception was not at issue.

In February 2015, while this suit was pending in the district court, the FCC adopted the *Open Internet Order*, which reclassified both fixed and wireless broadband internet access as common-carrier "telecommunications services" subject to comprehensive utility-style regulation under Title II of the Communications Act.[2] For any conduct occurring after that order took effect, the FCC's reclassification exempts broadband internet access service from FTC oversight and authority by operation of the FTC Act's common-carrier exception. This case, however, concerns conduct that occurred before the FCC's reclassification. *See* FTC Br. 56–64. Earlier this month, the FCC adopted a Notice of Proposed Rulemaking proposing to reverse the FCC's common-carrier reclassification and return to treating broadband internet access service as a non-common-carrier information service—and in the process, seeking to restore the FTC's power to oversee such services. *See Restoring Internet Freedom*, 32 FCC Rcd. ---, 2017 WL 2292181, ¶¶ 66–67 (2017).

The FCC's proposed regulatory changes, if adopted, would not resolve the issue in this appeal, because in addition to the broadband services at

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[2] *Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015), *pets. for review denied*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pets. for reh'g denied*, 855 F.3d 381 (D.C. Cir. 2017).

issue in the FCC's proceeding, AT&T also provides traditional wireline and wireless voice telephone service, which are (and always have been) Title II common-carrier services. The issue here therefore must be addressed even if the FCC returns broadband service to the regulatory status that applied when the FTC brought this case.

If the *en banc* Court were to adopt AT&T's position that the FTC Act's common-carrier exception is "status-based" rather than "activity-based," contrary to the reasoned analysis of the district court below, the fact that AT&T provides traditional common-carrier voice telephone service could potentially immunize the company from any FTC oversight of its non-common-carrier offerings, even when the FCC lacks authority over those offerings—creating a potentially substantial regulatory gap where neither the FTC nor the FCC has regulatory authority. That approach is contrary to a common-sense reading of the relevant statutes and could weaken or eliminate important consumer protections. While AT&T may prefer to offer services in a regulatory no man's land, the law does not dance to AT&T's whims. The Court should reject that unsound approach and instead affirm the decision below.

SUMMARY OF THE ARGUMENT

The FTC Act's common-carrier exception expressly depends on whether an entity is a common carrier "subject to" the Communications Act. The Communications Act, in turn, specifies that telecommunications providers may be treated as common carriers, and thereby subject to common-carriage regulation by the FCC, only when they are engaged in common-carrier activities. The relevant provisions of the Communications Act, as cross-referenced by the FTC Act's common-carrier exception, thus turn on the activity in which a carrier is engaged rather than its status as a common carrier in other respects. Therefore, the FTC Act's common-carrier exception, which is expressly intertwined with the Communications Act, likewise is activity-based.

On this reading, the Communications Act and the FTC Act fit hand-in-glove to ensure there is no gap in the federal regulation of telecommunications companies, while also conferring the FCC with exclusive jurisdiction over common-carrier services. By contrast, AT&T's contention that the FTC Act's common-carrier exception is status-based, even though common-carriage regulation under the Communications Act is activity-based, would open a potentially substantial regulatory gap and greatly disrupt the federal regulatory scheme.

This reading is confirmed by the history of the amendment incorporating the Communications Act into the FTC Act's common-carrier exception. The amendment was proposed in 1936 by E.S. Wilson, vice president of AT&T, who expressed concern that a telecommunications company could be subject to conflicting regulatory obligations if the FCC's view of just and reasonable rates for common-carrier services diverged from the FTC's views on unfair competition and unfair practices. Wilson's rationale for his proposed amendment demonstrates that the amendment was designed as an activity-based exception, not a status-based immunity. AT&T's alternative reading of the legislative history is at odds with the AT&T vice president's lobbying on this precise issue in 1936, and its newfound position (which misattributes the amendment to a different source) misunderstands the origin and meaning of the amended language.

The text, context, and history of the common-carrier exception thus all indicate that the exception was designed simply to avoid duplicative regulation under Section 5 of the FTC Act when a given service is already subject to comprehensive utility-style regulation by the FCC under Title II of the Communications Act, including the FCC's authority under 47 U.S.C. § 201(b) to prescribe just and reasonable rates and practices for common-carrier services. It does not, as AT&T would have it, create an unexplained

regulatory gap that deprives the FTC of its Section 5 authority even when the FCC has no commensurate authority, or in some cases no authority at all.

ARGUMENT

A. The FTC Act's Common-Carrier Exception Must Be Read In Conjunction With The Communications Act, Which Demonstrates That The Exception Is Activity-Based.

Section 5 of the FTC Act provides the FTC with broad power to "prevent persons, partnerships, or corporations * * * from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). At the same time, the statute exempts from FTC oversight "common carriers subject to the Acts to regulate commerce." *Ibid.*

AT&T urges that this language unambiguously establishes that the common-carrier exception is "status-based," rather than "activity-based," so that if a company has the status of a common carrier as to *any* particular aspect of its business, it can completely escape the FTC's Section 5 jurisdiction even with respect to services that are *not* covered by any sort of common-carriage requirements. AT&T Br. 24–43. To reach that conclusion, AT&T not only ignores that common carriage has always been understood as an activity-based concept, *see* FTC Br. 15–22; FTC

Reh'g Pet. 5–6, 12–16, but also overlooks the crucial interplay between the FTC Act and the Communications Act, upon which the FTC Act's common-carrier exception expressly relies.

Section 4 of the FTC Act, reprinted in modified form at 15 U.S.C. § 44, defines "Acts to regulate commerce" as "the Act entitled 'An Act to regulate commerce,' approved February 14, 1887"—better known as the Interstate Commerce Act—"and the Communications Act of 1934 [including all subsequent amendments]." Wheeler–Lea Act of 1938, Pub. L. No. 75-447, § 2, 52 Stat. 111, 111. The Communications Act, in turn, authorizes comprehensive common-carriage regulation of telecommunications providers only when they are engaged in common-carrier activities. *See*, *e.g.*, 47 U.S.C. §§ 153(51), 332(c)(1). In other words, the provisions of the Communications Act cross-referenced by the FTC Act's common-carrier exception are activity-based, not status-based—and so the common-carrier exception is activity-based as well.

1. The FTC Act's common-carrier exception depends on, and indeed expressly cross-references, the corresponding provisions of the Communications Act. The Communications Act and the FTC Act thus fit hand-in-glove to ensure there is no regulatory gap in the oversight of telecommunications companies. When a telecommunications company is

subject under the Communications Act to comprehensive common-carriage requirements overseen by the FCC—including the duty to charge just and reasonable rates and the prohibition on unjust and unreasonable practices, 47 U.S.C. § 201(b)—it falls within the FTC Act's common-carrier exception, and regulatory oversight is left to the FCC. But when there is no such comprehensive FCC authority, routine regulatory authority remains in the hands of the FTC. Otherwise, if a service were exempt from FTC authority without being subject to commensurate FCC authority, there would be an open gap in the federal regulatory scheme—an exceedingly odd result that cannot be squared with the text of these provisions.[3]

2. Under the Communications Act, whether a telecommunications company like AT&T is treated as a common carrier depends (and has always been understood to depend) on the activity at issue. As the D.C.

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[3] For non-common-carrier services, or when the FTC exercises authority under other sections of the FTC Act that are not subject to the common-carrier exception, the FCC and the FTC may possess complementary authority. Recognizing this, the two agencies have entered into a formal memorandum of understanding in which they commit to several measures to "avoid duplicative, redundant, or inconsistent oversight." FCC–FTC Consumer Protection Memorandum of Understanding (Nov. 16, 2015), *available at* 2015 WL 7261839; *see also* Joint Statement of FCC Chairman Ajit Pai and Acting FTC Chairman Maureen K. Ohlhausen on Protecting Americans' Online Privacy (Mar. 1, 2017), *available at* 2017 WL 823586 (pledging to harmonize the agencies' privacy rules to ensure a comprehensive and consistent framework).

Circuit explained decades ago, "[i]t is clear that an entity can be a common carrier with respect to only some of its activities" under the Communications Act, so "the term 'common carrier' will be used to indicate not an entity but rather an activity as to which an entity is a common carrier." *Comput. & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 209 n.59 (D.C. Cir. 1982) (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC*)). This Court has agreed, recognizing that "[a] carrier may be an interstate 'common carrier' within the meaning of [the Communications Act] in some instances but not others, depending on the nature of the activity which is subject to scrutiny." *McDonnell Douglas Corp. v. Gen. Tel. Co. of Cal.*, 594 F.2d 720, 724 n.3 (9th Cir. 1979) (citing *NARUC*).

Congress has incorporated this activity-based approach into the plain text of the Communications Act. Under Section 3(51) of the Act, "[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[.]" 47 U.S.C. § 153(51) (emphasis added). Similarly, under Section 332(c)(1) of the Communications Act, "[a] person *engaged in* the provision of a service that is a commercial mobile service shall, *insofar as such person is so engaged*, be treated as a common carrier

for purposes of" the Act. *Id.* § 332(c)(1) (emphases added).[4] Applying these provisions, the FCC has explained (and the D.C. Circuit has recognized) that a telecommunications company "is to be treated as a common carrier for the telecommunications services it provides, but it cannot be treated as a common carrier with respect to other, non-telecommunications services it may offer." *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (quoting FCC orders). A telecommunications company is thus "subject to" the Communications Act as a "common carrier," 15 U.S.C. § 45(a)(2), only when it is engaged in common-carrier activities.

3. Applying longstanding principles of statutory interpretation, it is evident from the text of the FTC Act and its explicit cross-reference to the Communications Act that the common-carrier exception is activity-based. In particular, as a leading treatise explained at the time when the FTC Act and its common-carrier exception were enacted, "where one statute refers to another for the power given by the former, the statute referred to is to be considered as incorporated in the one making the reference." Henry Campbell Black, *Handbook on the Construction and Interpretation of the*

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[4] *Cf.* 47 U.S.C. § 332(c)(2) ("A person engaged in the provision of the service that is a private mobile service"—as opposed to a commercial mobile service—"shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under" this Act.).

Laws § 104, at 339 (2d ed. 1911). Or as another court put it more recently, where "two sections were intended to work together (as evidenced by the cross references [between them])," a court should reject "divergent interpretations [that] would create a gap in an otherwise complete scheme." *In re Consol. Land Disposal Reg. Litig.*, 938 F.2d 1386, 1389 (D.C. Cir. 1991). So too here, the common-carrier exception's explicit cross-reference to the Communications Act incorporates that Act's activity-based approach and counsels against creating an unexplained gap between the two statutes.

More generally, the Supreme Court recognized nearly 140 years ago that "[i]n the exposition of statutes," the "established rule" is that "where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions[.]" *Kohlsaat v. Murphy*, 96 U.S. 153, 159–60 (1877). "[W]here there is more than one [statute] *in pari materia*," the Court explained, "[r]esort may be had * * * to the whole system[] for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent." *Ibid.*; *see also* Black, *supra*, § 104, at 333 ("Whatever is ambiguous or obscure in a given statute will be best explained by a consideration of analogous provisions in other acts relating to the same subject, or by a study of the

general policy which pervades the whole system of legislation.").

These time-honored principles of statutory interpretation remain in full force today. *See*, *e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 39, at 252–53 (2012) (discussing the related-statutes canon); 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* ch. 51 (7th ed. 2007). Under these principles, the fact that common-carrier treatment under the Communications Act applies only when companies are engaged in common-carrier activities means that the FTC Act's common-carrier exception, which is expressly intertwined with the Communications Act, likewise is activity-based.[5]

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[5] Even the panel, which at one point suggested that the common-carrier exception is unambiguous when viewed in isolation, Op. 9–12, appears to have recognized that related provisions may inform the meaning of that exception, since it proceeded to examine the common-carrier exception in light of a separate exception for activities subject to the Packers and Stockyards Act, *see* Op. 12–18. As the FTC notes, the panel erred in relying on language from a 1958 amendment to the packers-and-stockyards exception to inform the meaning of the common-carrier exception, which was enacted in 1914 and last amended in 1938. *See* FTC Reh'g Pet. 14–15. But in any event, there is no reason why the Court should consider the separate packers-and-stockyards exception yet ignore the parallel provisions of the Communications Act, which is expressly cross-referenced by the common-carrier exception itself. *See* Black, *supra*, § 104, at 333 ("[T]he same principle which requires us to study the context for the meaning of a particular phrase or provision, and which directs us to compare all the several parts of the same statute, only takes on a broader scope when it bids us read together, and with reference to each other, all statutes *in pari materia*.").

Consistent with these principles, moreover, the Supreme Court has instructed more broadly that courts must construe statutes to "contain that permissible meaning which fits most logically and comfortably into the body of * * * law," because "it is our role to make sense rather than nonsense out of the *corpus juris*." *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100–01 (1991); *see also* Scalia & Garner, *supra*, at 252–53, 330–31. It would make little sense here to treat the FTC Act's common-carrier exception for telecommunications companies as status-based when common-carriage regulation of telecommunications companies under the Communications Act is activity-based. As the Supreme Court has admonished, "[n]o construction should be adopted, if another equally admissible can be given, which would result in what might be called a judicial chasm." *Pickett v. United States*, 216 U.S. 456, 460 (1910). And just as "Congress did not anticipate that a great steel company might attempt to escape the restraint of the antitrust laws by operating a small packing plant," *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600, 604–05 (4th Cir. 1959), so too there is no reason to allow a large conglomerate to exempt *all* of its operations from FTC oversight simply because *some* other (perhaps entirely unrelated) portion of its activities is subject to common-carriage requirements under the Communications Act. *Cf.* FTC Reh'g Pet.

11 (explaining that the panel decision "creates a roadmap for companies to attempt to immunize themselves against FTC enforcement by acquiring a common carrier or offering common-carrier service"); Consumers Union et al. Amicus Br. in Supp. of Reh'g 7–14.

4. In a recent filing, AT&T urged the Court to ignore these interlocking statutory provisions—and the time-honored interpretive principles that apply to this statutory text—because, it argued, "Congress expressly limited the applicability of the [Communications Act] provisions cited by the FCC to the context of the Communications Act." Letter from Michael K. Kellogg, Counsel for AT&T, to Molly C. Dwyer, Clerk of Court (Apr. 24, 2017) (Dkt. Entry 72). That argument misses the point: Our submission is not that these provisions purport to alter or override the meaning of any terms in the FTC Act, but rather that, by the FTC Act's own terms, determining when an entity qualifies as a "common carrier[] subject to" the Communications Act, 15 U.S.C. § 45(a)(2), in turn depends on how common carriage operates under the Communications Act.

The panel's observation that "[t]he common carrier exemption is surrounded by exemptions for 'banks,' 'savings and loan institutions,' and 'Federal credit unions,'" which the panel perceived as status-based exceptions, Op. 10, instead supports an activity-based approach to the

common-carrier exception. As the FTC suggests, financial institutions are pervasively regulated and subject to extensive supervision from federal financial regulators in a way that telecommunications companies are not, so it makes sense that Congress exempted heavily regulated financial institutions *generally*, without qualification. *See* FTC Reh'g Pet. 16–17. Yet the Communications Act subjects telecommunications companies to comprehensive common-carriage regulation only when they are engaged in common-carrier activities. *See* 47 U.S.C. §§ 153(51), 332(c)(1). By the same logic, therefore, the common-carrier exception should (and does) exempt telecommunications companies from FTC oversight only when providing those services and not when they are providing other, non-common-carrier services. Congress thus exempted telecommunications common carriers "*subject to*" the Communications Act. 15 U.S.C. § 45(a)(2) (emphasis added); *see* FTC Br. 18–19 ("Congress's use of the phrase 'subject to' for common carriers—but not for banks—shows that the bank exemption was categorical but the common carrier exception was not.").

Despite the clear textual difference between the unqualified language used to create a status-based exception for financial institutions and the more qualified "subject to" language used for the common-carrier exception, AT&T insists that if Congress had really wanted the common-carrier

exception to be activity-based, it could have used the more extended phrase "insofar as they are subject to," as is used in the current version of the packers-and-stockyards exception. *See* AT&T Br. 25–28. That argument fails for three reasons.

First, there was no need for Congress to use activity-based language such as "insofar as" (or "to the extent that") in the common-carrier exception because the term "common carrier" itself has always been understood, both in general and under the Communications Act specifically, to refer to particular activities rather than some abstract status. *See* FTC Br. 15–18, 21–22; FTC Reh'g Pet. 5–6, 12–15. Indeed, Congress has embraced the view that common carriage under the Communications Act is status-based by placing the very language AT&T seeks in the Communications Act itself, *see* 47 U.S.C. § 153(51) ("to the extent that"); *id.* § 332(c)(1) ("insofar as"), which the FTC Act's common-carrier exception incorporates by reference.

Second, the "insofar as" language that AT&T points to comes from a 1958 amendment and was not part of the statute when the common-carrier exception was adopted in 1914 or when it was extended to incorporate the Communications Act in 1938, so the fact that a later Congress acting with the benefit of hindsight was able to formulate even more precise language

tells us nothing about what Congress had in mind when it enacted the common-carrier exception. *See* FTC Br. 27–28; FTC Reh'g Pet. 15–16. Nor does "the mere possibility of clearer phrasing," even when used elsewhere within the same statute, mean that the language Congress originally used was not clear enough. *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012).

Third, as the FTC explains, the 1958 addition of the "insofar as" language was not meant to change the meaning of the packers-and-stockyards exception, but instead to make explicit that the original "subject to" language was designed to be activity-based. *See* FTC Br. 30–33. That history therefore supports rather than undercuts the view that the "subject to" language in the common-carrier exception is activity-based.

B. The History Of The Addition Of The Communications Act To The Common-Carrier Exception Supports This Reading.

1. An activities-based approach to the FTC Act's common-carrier exception is supported by the history of the amendment incorporating the Communications Act into that exception. The amendment was first proposed in 1936 in testimony and an accompanying memorandum from E.S. Wilson, vice president of AT&T (the corporate predecessor to appellant AT&T here). *See* Wilson Testimony, attached as Addendum

A.[6] Concerned that the passage of the Communications Act and creation of the FCC in 1934 could in some circumstances subject a telecommunications company to conflicting FCC and FTC obligations, Wilson proposed two versions of an amendment to exempt telecommunications companies from FTC requirements when their charges and practices are already comprehensively regulated by the FCC. Wilson's principal proposal was a very short, 18-word amendment to expand the definition of "Acts to regulate commerce," as that term is used in the common-carrier exception, to include the Communications Act of 1934 (and all subsequent amendments) in addition to the Interstate Commerce Act. *Id.* at 62, 64. In the alternative, Wilson offered a slightly longer version of the same amendment "to make it perfectly clear" that the exception is limited to those activities regulated by the FCC, via an express proviso: "*Provided*, That a common carrier under the [Communications Act] is excepted as a common carrier under this act only in respect of matters to which the Federal Communications Commission is by law authorized to act." *Id.* at 62–63, 64. Wilson did not suggest that

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[6] Statement of E.S. Wilson, *in Federal Trade Commission Act Amendments: Hearing on S. 3744 Before the H. Comm. on Interstate & Foreign Commerce* 61 (74th Cong. 1936).

there was any material difference between the two proposals, and indeed from his testimony he appears to have been entirely indifferent between the two formulations. *See*, *e.g.*, *id.* at 63 ("I suggest either one of these amendments, which to my mind would carry out the intention of Congress" to avoid conflicting regulatory mandates).

Wilson explained that the purpose of his amendment was "to clear up a situation which presents the possibility of a conflict of jurisdiction between" the FTC and the FCC and "to avoid the possibility of a conflict of jurisdiction." *Id.* at 65. He pointed specifically to Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), part of the common-carriage requirements in Title II of the Act, giving the FCC authority to prescribe just and reasonable rates and practices. Wilson Test. 64, 65. If the FCC's view of just and reasonable rates and practices diverged from the FTC's view of what constitutes unfair competition or unfair practices, then common-carrier telecommunications services could be subject to conflicting regulatory mandates under Title II of the Communications Act and Section 5 of the FTC Act.

Under this stated rationale, interpreting the common-carrier exception to be status-based, rather than activity-based, would make no

sense. Interpreting the common-carrier exception to preclude FTC authority over activities that are *not* subject to commensurate oversight (or even any regulatory authority) by the FCC would not avoid any conflict of jurisdiction, but instead would create an unexplained gap in the regulatory scheme. Wilson himself made clear that his amendment would not and should not create any such gap, affirming that "all of the power" that the FTC would lose under the common-carrier exception "is now within the provisions of the Federal Communications Act." Wilson Test. 63.[7]

In response to a concern about jurisdiction over radio stations, Wilson submitted a written reply and asked for it to be entered into the record. *See* Wilson Test. 66. Wilson explained that the amendment would

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[7] Later in the hearing, FTC Commissioner Davis was asked to respond to Wilson's proposals. Commissioner Davis stated that because the FTC has no jurisdiction to enforce the Communications Act and the FCC has no jurisdiction to enforce the FTC Act, he saw no potential for conflict between the agencies and no need for an amendment. But his testimony confirms that he shared the then-accepted understanding that the common-carrier carve-out is activity-based: "[T]he major part of the communication companies' services are not common carriers. With some of them it is very difficult to determine whether they are or not; but if they"—that is, the parts of a company's services at issue—"are common carriers, we have no jurisdiction." Statement of Hon. Ewin L. Davis, *in Federal Trade Commission Act Amendments: Hearing on S. 3744 Before the H. Comm. on Interstate & Foreign Commerce* 75, 82 (74th Cong. 1936).

not exempt radio stations from FTC oversight because radio stations fall under Title III of the Communications Act, whereas the common-carriage requirements that govern telephone and telegraph service are found in Title II. *Ibid.*; *see also id.* at 63 (explain that "the second [title] is common carriers; the third is radio provisions"). But under a status-based approach, this could no longer be true. For example, Cox Enterprises operates a group of radio stations (through Cox Media Group) and also separately offers certain common-carrier telecommunications services (through Cox Communications). Similarly, Comcast owns and operates a number of broadcast television stations (which operate under the same regulatory regime as radio stations) through its acquisition of NBC Universal, and it also recently began offering wireless voice telephone service, which, like AT&T's same service, is a common-carrier service under the Communications Act. *Cf.* FTC Reh'g Pet. 1–2, 8–11; Public Knowledge Amicus Br. in Supp. of Reh'g 12–15. Consistent with AT&T vice president Wilson's testimony that his proposals would not exempt such non-common-carrier services from FTC oversight, it is clear that Wilson's amendment was understood to adopt an activity-based approach—an understanding that appears to have been lost on AT&T through the course of its corporate

evolution.[8]

2. In its brief, AT&T points (at 33–35) to testimony by a different AT&T representative, Harvey Hoshour, who presented an amendment that resembled Wilson's alternative proposal. *See* Hoshour Testimony, attached as Addendum B.[9] Like Wilson's alternative proposal, Hoshour's proposal contained a proviso stating that "common carriers under the [Communications Act] are excepted as common carriers under this act only in respect of their common-carrier operations." *Id.* at 23, 25, 27. Hoshour acknowledged that AT&T "might engage in manufacturing, or we might

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[8] Wilson's reply further stated that he was seeking the "same exemption [that had] existed for 20 years[] [for] railroads as common carriers," Wilson Test. 66—an exemption that was understood to be activity-based, *see* FTC Br. 14–21; FTC Reh'g Pet. 4–5, 13–15. As the House floor manager of the FTC Act bill explained, "where a railroad company engages in work outside of that of a public carrier * * * such work ought to come within the scope of this [Federal Trade] [C]ommission for investigation." 51 Cong. Rec. 8996 (May 21, 1914); *accord ibid.* ("[E]ven as to [common carriers], I do not know but that we include their operations outside of public carriage regulated by the interstate commerce acts."); *see also* S*anta Fe, Prescott & Phoenix Ry. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 185 (1913) (railroads treated as common carriers only when performing common-carrier activities); *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 211 (1912) (Interstate Commerce Commission did not have jurisdiction over railroads' non-common-carrier activities).

[9] Statement of Harvey Hoshour, *in To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate Trade & Foreign Commerce* 23 (75th Cong. 1937).

possibly go into the manufacturing business, have activities other than our common-carrier activities," and he then explained that "if the communications companies should go into that kind of thing, into the kind of business in which the Federal Trade Commission has been interested, if they should go into the manufacturing business * * * then this exemption would not apply." *Id.* at 25–26. "[W]here common carriers engage in activities that are not in the common carrier field, beyond the field that the [g]overnment is regulating," Hoshour reiterated, "in that case, they are subject to the jurisdiction of the Federal Trade Commission, which * * * is a sound position to take from the viewpoint of the public interest." *Id.* at 26. And when asked whether the amendment "would still leave [AT&T] within the jurisdiction of the Federal Trade Commission if you engaged in activities outside of the field of communications," Hoshour replied, "Undoubtedly so." *Id.* at 27.

Hoshour further testified that he believed that the FTC Act *already* incorporated an activity-based approach to common carriers, even without any explicit proviso—"I have no doubt our manufacturing subsidiary is now subject to the Federal Trade Commission Act"—but stated that he included the proviso merely because "[i]f there is any question about it, this amendment will make it clear." Hoshour Test. 27.

AT&T nevertheless contends that Hoshour's proposal supports *its* view that the common-carrier exception is status-based. According to AT&T, Congress took Hoshour's proposal and affirmatively "broadened" it by deleting the proviso confirming that the exception is activity-based. AT&T Br. 34. Thus, AT&T's argument goes, Congress affirmatively "rejected" Hoshour's activity-based approach and instead must have preferred a status-based approach. *Ibid.* (emphasis omitted).

But AT&T's understanding of the legislative history is incorrect: Congress did not adopt a modified form of Hoshour's proposal; rather, it adopted Wilson's principal proposal, and it did so without alteration. Two features make this clear. First, the amendment was added by the *Senate* Committee on Interstate Commerce, *see* 81 Cong. Rec. 2805–06 (Mar. 29, 1937), but Hoshour testified before only the *House* committee. *Cf.* FTC Br. 38 (Hoshour's proposal "was never formally introduced by a member of Congress nor voted on by any committee in either House, but was merely suggested by a witness at a committee hearing and then barely noted"). By contrast, Wilson reported that he had "talked with the chairman of the Senate committee, and * * * submitted the amendment to the chairman of that committee," Wilson Test. 62, and he also submitted a written memorandum detailing his proposals so that legislators could consult them

later, *see id.* at 64–65. Second, and just as noteworthy, is a telltale difference in language. Under Hoshour's proposal, the definition of "Acts to regulate commerce" would have been amended to add "and *the Act entitled* the 'Communications Act of 1934,'" Hoshour Test. 23 (emphasis added), paralleling the existing reference to "the Act entitled 'An Act to regulate commerce,' approved February [14, 1887]." Wilson's principal proposal, however, lacked the italicized words, breaking the parallelism. *See* Wilson Test. 62, 64. The language adopted by Congress corresponds to Wilson's formulation, rather than Hoshour's proposal: "'Acts to regulate commerce' means the Act entitled 'An Act to regulate commerce,' approved February 14, 1887, * * * and the Communications Act of 1934[.]" Wheeler–Lea Act § 2, 52 Stat. at 111.

AT&T's description of the incorporation of the Communications Act into the FTC Act's common-carrier exemption—that Congress began with Hoshour's language making expressly clear that the common-carrier exception should be activity-based, that it then made a conscious decision to delete that language, and that this alleged deletion demonstrates that Congress affirmatively rejected an activity-based approach—is not borne out by the facts. In fact, Congress appears to have given little attention to Hoshour's proposal. Instead, the amendment incorporating the

Communications Act into the common-carrier exception came from Congress's straightforward adoption of Wilson's principal proposal. And all available evidence indicates that Wilson's proposal was understood to exempt only those activities subject to comprehensive regulation under the Communications Act's common-carriage requirements, not any separate non-common-carrier activities.

In sum, the legislative history, as well as the text of the governing statutes, shows that the FTC Act exempts common carriers from the FTC's jurisdiction only when they are "subject to" the Communications Act as such, 15 U.S.C. § 45(a)(2)—*i.e.*, only insofar as, or to the extent that, they are engaged in common-carrier activities, 47 U.S.C. §§ 153(51), 332(c)(1).

CONCLUSION

The Court should hold that the FTC Act's common-carrier exception is activity-based, in accordance with the parallel provisions of the Communications Act, and the district court's order should be affirmed.

Dated: May 30, 2017

Respectfully submitted,

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/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Amicus Curiae
Federal Communications Commission

CERTIFICATE OF FILING AND SERVICE

I, Scott M. Noveck, hereby certify that on May 30, 2017, I filed the foregoing Brief of the Federal Communications Commission as Amicus Curiae in Support of Plaintiff-Appellee with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Amicus Curiae
Federal Communications Commission

ADDENDUM A:
Wilson Testimony

Statement of E.S. Wilson, *in Federal Trade Commission Act Amendments: Hearing on S. 3744 Before the H. Comm. on Interstate & Foreign Commerce* 61 (74th Cong. 1936).

FEDERAL TRADE COMMISSION ACT AMENDMENTS

HEARING

BEFORE

THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

SEVENTY-FOURTH CONGRESS

SECOND SESSION

ON

S. 3744

TO AMEND THE ACT CREATING THE FEDERAL TRADE COMMISSION, TO DEFINE ITS POWERS AND DUTIES, AND FOR OTHER PURPOSES

MAY 27, 28, AND 29, 1936

UNITED STATES
GOVERNMENT PRINTING OFFICE
73060 WASHINGTON : 1936

where a proceeding has been brought under the criminal statutes, either Federal or State, against any person, partnership, or corporation alleging the use of unfair methods of competition or deceptive practices in commerce, no proceeding directed against the same person, partnership, or corporation involving the same unfair methods of competition or deceptive practices shall be instituted by the Commission.

"Evidence adduced against any party in a proceeding instituted by the Commission under this section shall not be used against such party in any other proceeding instituted by any other agency of the Government: *Provided*, That no natural person testifying in a proceeding before the Commission under this section shall be exempt from prosecution and punishment for perjury committed in so testifying."

Amend line 13 of page 15 by striking out "SEC. 5" and substituting therefor "SEC. 3."

Mr. CROSSER. Is that all, Mr. Hanson?

Mr. HANSON. Yes; thank you.

Mr. CROSSER. Then we will hear Mr. Wilson.

STATEMENT OF E. S. WILSON, NEW YORK, N. Y., REPRESENTING THE AMERICAN TELEPHONE & TELEGRAPH CO.

Mr. CROSSER. Mr. Wilson, how much time will you take?

Mr. WILSON. Five minutes, if I will be permitted to file a statement in support of my remarks.

My name is E. S. Wilson. I am employed by the American Telephone & Telegraph Co., 195 Broadway, New York, N. Y.

I am not appearing in opposition to the bill. The only point I wish to raise is whether or not it is the intention of Congress to submit one industry to the jurisdiction of two Federal commissions. If the committee will turn to page 3 of the bill, lines 17 to 19 excepts from the powers of the Commission "banks and common carriers subject to the acts to regulate commerce."

On page 2, lines 21 to 23, inclusive:

"Acts to regulate commerce" means the act entitled "An act to regulate commerce" approved February 14, 1887, and all acts amendatory thereof and supplementary thereto.

That is the Interstate Commerce Act.

Now, for 20 years the telephone companies and telegraph companies were common carriers under the Interstate Commerce Act and were exempt.

It occurred to me that the draftsmen merely followed the language of the Federal Trade Commission Act and neglected to take into consideration the fact that the Federal Communications Commission Act was passed in 1934 and therefore unless it is the intention of the Congress to submit or subject the telephone and telegraph companies to the powers of two commissions, there should be an amendment which will be embodied in the bill doing that, adding the Communications Act of 1934.

The railroads, of course, are out, because they are under the Interstate Commerce Commission. The telephone companies were out, under the old Interstate Commerce Act, because they were under the Interstate Commerce Commission, and if the Congress is to be consistent, it would seem to me that the communication companies now under the Communications Act should be exempted.

Mr. WOLVERTON. Did you present your thoughts to the Senate committee?

Mr. WILSON. I will tell you what happened in connection with that. When I read the bill in February, I talked with the chairman of the Senate committee, and it seemed to me so evident that it could not be the intention of Congress to subject one industry to two regulatory bodies, I submitted the amendment to the chairman of that committee, assuming, of course, that the Congress did not intend to have us under two regulatory bodies. When the bill came out the amendment had either been lost or forgotten. I do not wish to have it lost or forgotten before his committee.

Mr. WOLVERTON. Has there been any expression of opinion either for or against your proposed amendment?

Mr. WILSON. At that time, the chairman of the committee did not raise any objection to it and I assumed that, of course, it would be taken care of; but there may be some objections raised later. I neglected to appear before that committee because it seemed so plain to me.

Mr. WOLVERTON. Have you made any effort to ascertain the reason that it was not included in the bill?

Mr. WILSON. After the bill came out, Mr. Wolverton, I took up with the Federal Trade Commission the possibility of agreeing on an amendment and we were unable to arrive at an agreement, although they were very courteous in granting me an interview, and granted me an interview at that time.

Mr. WOLVERTON. What reasons did they give as to why they would not agree?

Mr. WILSON. They thought that it might raise a question of conflict of jurisdiction.

Mr. WOLVERTON. Did they point out any distinction between your company under the Federal Communications Act and a railroad company under the Interstate Commerce Act, as to why one should be excepted and the other not excepted.

Mr. WILSON. That point was not raised.

Mr. WOLVERTON. I merely put it in that illustrative way to ascertain whether there was any distinctive difference between your company and others which are excepted.

Mr. WILSON. That thought was not discussed. I submitted to them two amendments which I have here.

Mr. MAPES. What are your amendments?

Mr. WILSON. I would strike out the period at the end of line 23 after the word "thereto."

Mr. CROSSER. What page?

Mr. WILSON. Page 2, line 23. That is the definition, which defines acts to regulate commerce.

After the word "thereto" I would change the period to a comma and insert the following:

and the "Communications Act of 1934" approved June 19, 1934, and all acts amendatory thereto and supplementary thereto.

That would remove the question of conflict of jurisdiction absolutely.

The other amendment which in the alternative is as follows:

At the same point, line 23, change the period at the end of line 23 on page 2 to a comma and insert the following:

and the act entitled the "Communications Act of 1934", approved June 19, 1934, and all acts amendatory thereof and supplementary thereto, provided

the general provision; the second is common carriers; the third is the radio provisions; and the fourth are the administrative provisions of the Communications Act and to make it perfectly clear that there cannot be any conflict of jurisdiction, I suggest either one of these amendments, which to my mind would carry out the intent of Congress, unless you want us to be under two regulatory bodies.

Mr. WOLVERTON. Is it your opinion that all of the power to be granted by this act with relation to the regulation of your company is now within the provisions of the Federal Communications Act?

Mr. WILSON. Yes, sir; it is; and insubstantiation of that I could state that under order no. 12 of the Federal Communications Commission there were 10 weeks' hearings on methods of competition between telegraph companies as to whether or not the practices were fair or unfair. There has been no decision on that. There have been briefs filed by all of the companies, including the Western Union, Postal Telegraph Co. and the telephone company.

Mr. WOLVERTON. Are you aware of any opinion having been expressed by the Federal Communications Commission with respect to the divided authority which you refer to?

Mr. WILSON. Only their statement to me, that they thought that it raised a conflict of jurisdiction; but I understand that they are given the privilege of reply, and I do not care to speak for them.

It seems to me that the law ought to be clear and not have one industry subjected to two regulatory bodies.

Mr. COLE. An investigation is being conducted of your company?

Mr. WILSON. Yes, sir; $750,000 was appropriated in 1935, and the House approved another $400,000 for the Federal Communications Commission. The Senate Subcommittee on Appropriations yesterday approved that $400,000, and they are proceeding to spend over $1,000,000 in investigating the telephone company. The hearings are continuing. I am requested to appear as a witness next Tuesday.

Mr. WOLVERTON. To what agency or department of the Government was that money appropriated?

Mr. WILSON. To the Federal Communications Commission. That is under Resolution No. 8. That is not under the Communications Act. That is under Resolution No. 8, to conduct a general investigation of the telephone companies.

Mr. KENNEY. Have you submitted your amendments to the Federal Trade Commission?

Mr. WILSON. Yes.

Mr. KENNEY. Have you had an expression of opinion from them?

Mr. WILSON. Yes, sir; they said that they were sorry that they could not agree to them.

Mr. KENNEY. I beg your pardon.

Mr. WILSON. They said that they were sorry that they could not agree to them.

Mr. PETTENGILL. Mr. Chairman, may I ask a question?

Mr. CROSSER. Mr. Pettengill.

Mr. PETTENGILL. Mr. Wilson, the same philosophy applies to trucks and bus carriers? We passed new legislation placing them under the Interstate Commerce Commission and they would not be exempt from the operation of this act under the act of February 14, 1887.

Mr. WILSON. I think, Mr. Pettengill, that they would come in under the acts amendatory to the Interstate Commerce Act.

Mr. PETTENGILL. No; I do not consider that the truck and bus bill is amendatory. It is new or additional legislation.

Mr. WILSON. Of course, that is out of my field. I was volunteering an opinion. It seems to me that they might come under the language "all acts amendatory thereof or supplementary thereto."

Mr. PETTENGILL. Possibly so.

Mr. WILSON. One or the other, maybe.

Mr. CROSSER. Will you require much additional time? I was requested by Chairman Lea to call up two other bills in executive session before the committee adjourns today.

Mr. WILSON. It will only take me a minute.

On section 6 the same language is used, except that the act is in the singular, instead of the plural. That may be a typographical error. You will note on page 9, line 22 "excepting banks, and common carriers subject to the act to regulate commerce." And, on page 3, which I invite your attention to, it is in the plural, acts to regulate common carriers.

I thank you very much.

Mr. COOPER. Will you pass those amendments to the clerk so we may have them?

Mr. WILSON. Yes, sir; I will give one to the reporter, and I will give another to the clerk.

(The amendments referred to follow:)

MEMORANDUM IN SUPPORT OF AMENDMENTS OFFERED BY WITNESS E. S. WILSON FOR THE AMERICAN TELEPHONE & TELEGRAPH CO.

The point involved is whether or not it is the intention of Congress to subject one industry to the jurisdiction of two Federal Commissions. The following amendments A and B were offered at the hearing.

A

On page 2, line 23, change the period at the end of the line to a comma and insert the following: "and the 'Communications Act of 1934', approved June 19, 1934, and all acts amendatory thereof and supplementary thereto."

B

Change the period at the end of line 23 on page 2 to a comma, and insert the following: "and the act entitled the 'Communications Act of 1934' approved June 19, 1934, and all acts amendatory thereof and supplementary thereto: *Provided*, That a common carrier under the latter act is excepted as a common carrier under this act only in respect of matters as to which the Federal Communications Commission is by law authorized to act."

S. 3744 proposes to enlarge the scope of the Federal Trade Commission Act, section 5 of which makes unlawful unfair methods of competition in commerce so as to make the act applicable to unfair or deceptive acts or practices in commerce. Section 6 of the act gives the Commission authority to investigate corporations engaged in commerce and requires such corporations to make reports and to file answers to questions by the Commission.

Section 201 (B) of the Federal Communications Act makes unlawful any charge, practice, classification or regulation made by a telephone or telegraph company which is unjust or unreasonable.

Section 403 of the Federal Communications Act gives the Federal Communications Commission broad authority to investigate telephone and telegraph companies and section 205 (A) thereof authorizes the Commission, after investigation and hearing, if it finds any practice of such a company to be in violation of the act, to determine what practice will be just, fair, and reasonable to be thereafter followed.

Public Resolution No. 8 of the Seventy-fourth Congress, approved March 15, 1935, directed the Federal Communications Commission to investigate and report on telephone companies engaged in interstate commerce and appropriated $750,000 to be used for the purpose.

The House of Representatives has recently approved of the appropriation of $400,000 to continue the investigation by the Federal Trade Commission under Public Resolution No. 8 of the Seventy-fourth Congress. On May 27, the Subcommittee on Appropriations of the Senate reported favorably and undoubtedly the full committee and the Senate will approve the appropriation of this additional fund.

When the Federal Trade Commission Act was placed upon the statute books on September 26, 1914, telephone and telegraph companies were exempted under the following sentence: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce." (Sec. 5 of "An act to create a Federal Trade Commission to define its powers and duties, and for other purposes", approved Sept. 26, 1914, 38 Stat. 719.)

In section 4 of said act, the phrase, "acts to regulate commerce", is defined to mean the act entitled, "an act to regulate commerce", approved February 14, 1887, which is the Interstate Commerce Act. Telephone and telegraph companies were on September 26, 1914, subject to the Interstate Commerce Act and made common carriers under it. They had been so since 1910. (Act of June 18, 1910, 36 Stats. 544.)

This exemption continued for nearly 20 years and until the Communications Act of 1934 was approved on June 19, 1934. Apparently no attention was paid to the fact that the repeal of the Interstate Commerce Commission Act might extend the power of the Federal Trade Commission to investigate and regulate communication companies over which the Federal Communications Commission had broader powers than that which were given to the Interstate Commerce Commission. Section 602 of the Communications Act repealed the provisions of the Interstate Commerce Act insofar as they related to communication by wire or wireless or to telegraph, telephone, or cable companies operating by wireless, with two immaterial exceptions.

In amending the Federal Trade Commission Act as now proposed, Congress now has an opportunity to clear up a situation which presents the possibility of a conflict of jurisdiction between the Federal Trade Commission and the Federal Communications Commission.

Acting under the authority given in section 201 (B) of the Federal Communications Act, the Federal Communications Commission on October 31, 1934, directed that a hearing be held to determine, among other things, the justness and reasonableness of the practices and regulations under which telegraph communications are being handled. In this proceeding hearings were held covering a period of 10 weeks, and much of the record and argument have to do with the fairness and reasonableness of competitive practices. No decision has as yet been made by the Commission.

Under Public Resolution No. 8, referred to above, the Federal Communications Commission has been conducting the investigation directed by Congress since last July and is still engaged in the work. Hearings were begun on March 16, 1936, and are being continued. June 2, 1936, is the next hearing date before the Federal Communications Commission.

In order to avoid the possibility of conflict of jurisdiction between the Federal Trade Commission and the Federal Communications Commission, it is submitted that an amendment along the lines suggested above should be made to S. 3744.

In section 6, page 9, line 22, add the letter "s" to the word "act."

On page 10, line 3, add the letter "s" to the word "act." This change is suggested to make the language consistent with line 18, page 3, of section 5.

Mr. CROSSER. There is another witness who desires to be heard, but we cannot stop to hear him today. Mr. Daley, I understand,

wants to be heard. I suppose that it is the intention of the chairman that we go on tomorrow, although I have no specific information to that effect. In such case, I suppose that the Commission will desire to reply. I think that some time has been reserved for such reply.

Commissioner DAVIS. Mr. Chairman and gentlemen of the committee, the Commission would like to have the privilege of making a reply to certain statements that have been made here today.

Mr. CROSSER. Then we shall adjourn until 10 o'clock tomorrow morning.

(Thereupon, at 11:35 a. m., the committee proceeded to the consideration of other business, after which it adjourned to meet the following morning, Friday, May 29, 1936, at 10 a. m.)

(The following was submitted for the record:)

[Telegram]

BALTIMORE, MD., *May 29, 1936.*

E. J. LAYTON,
Clerk, House Interstate and Foreign Commerce Committee,
Washington, D. C.:

Would like this reply printed in the record, if permissible: "At the conclusion of the argument of Judge Davis, Mr. Martin asked the position of the Federal Trade Commission in regard to the amendments proposed by the Telephone Co. Judge Davis referred the committee to sections 311 and 313 of the Communications Act. Those sections are under title 3, entitled 'Special provisions relating to radio and not to common carriers.' The exemption requested by the Telephone Co. is the same exemption given railroad companies, and the second suggested amendment is limited to common carriers. Common carriers under the Communications Act are defined in section 2, sub. 2. In that section radio broadcasting is not a common carrier. The same exemption now asked existed for 20 years, and if railroads as common carriers are exempted, the telephone and telegraph companies should also be exempted as common carriers.

E. S. WILSON.

ADDENDUM B:
Hoshour Testimony

Statement of Harvey Hoshour, *in To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate Trade & Foreign Commerce* 23 (75th Cong. 1937).

TO AMEND THE FEDERAL TRADE COMMISSION ACT

HEARING

BEFORE

THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

SEVENTY-FIFTH CONGRESS

FIRST SESSION

ON

H. R. 3143

TO AMEND THE ACT CREATING THE FEDERAL TRADE COMMISSION, TO DEFINE ITS POWERS AND DUTIES, AND FOR OTHER PURPOSES

FEBRUARY 18 AND 19, 1937

UNITED STATES
GOVERNMENT PRINTING OFFICE
127065 WASHINGTON : 1937

STATEMENT OF MR. HARVEY HOSHOUR, GENERAL SOLICITOR, AMERICAN TELEPHONE & TELEGRAPH CO., BRONXVILLE, N. Y.

The CHAIRMAN. We will hear Mr. Hoshour.

Mr. HOSHOUR. My name is Harvey Hoshour. My address is Bronxville, N. Y., and my job is general solicitor for the American Telephone & Telegraph Co. I am appearing here for that company, and for the so-called Bell system associate companies, which as you know offer a telephone service throughout the United States.

Our companies own and operate something like 85 percent of the telephones in the United States, the other phones being operated by the so-called independent companies, who will be represented before this committee by their general attorney, I believe, to follow me.

We have no objection whatever, or disagreement, with any of the comments that Judge Davis made with reference to the pending bill.

We have an amendment which we would like to urge upon the committee, and I shall undertake to state the reasons why we are urging that amendment upon the committee.

The amendment referred to is as follows:

On page 1, line 3, after the word "that" insert the following: "the definition of 'acts to regulate commerce' in section 4 and that."

Page 1, line 8, change "is" to "are."

Page 1, between lines 8 and 9, add the following: " 'Acts to regulate commerce' " means the act entitled 'An act to regulate commerce', approved February 14, 1887, and all acts amendatory thereof and supplementary thereto, and the act entitled the 'Communications Act of 1934', approved June 19, 1934, and all acts amendatory thereof and supplementary thereto, provided that common carriers under the latter act are excepted as common carriers under this act only in respect of their common-carrier operations."

Preliminarily to referring to our amendment, I would like to call the attention of the committee to lines 1 to 5 on page 2 of the pending bill, which is exactly the same language as was contained in the original Federal Trade Commission Act, except, as Judge Davis pointed out, the words "and unfair or deceptive acts and practices in commerce" are added at the end of those five lines.

On the addition which Judge Davis has very properly said is the only amendment of substance which is being proposed in the pending bill, we have no comment whatever to make.

Our difficulty, and the reason we offer this amendment to the committee, is that, in spite of the fact that it is apparent that the Commission, and I take it Chairman Lea, in introducing this bill, did not have in mind that this section or that part of section 5 that I have read would constitute any other change in the law other than that stated by Judge Davis, there is, it seems to us, some possibility that it might have that effect.

In connection with that I would call the committee's attention to the words in line 3 on page 2—lines 2 and 3:

except banks and common carriers subject to the acts to regulate commerce.

Now, in section 4 of the old act, which will remain the same, if pending bill is adopted, acts to regulate commerce is defined as follows:

Acts to regulate commerce means the act entitled "An act to regulate commerce approved February 14, 1887, and all acts amendatory thereof and supplementary thereto."

Obviously that in so many words refers to the Interstate Commerce Act.

And, it is apparent from my reading, and referring back to section 4 from section 5, that that exception clearly exempts the railroads and those carriers that are subject to the Interstate Commerce Act, and also I think, without any question, discloses an intention on the part of the framers of the act to avoid duplication between two Federal commissions regulating the same activities.

Now, the difficulty we are in comes about because of this fact: At the time the original Trade Commission Act was passed in 1914 and for 20 years thereafter, until 1934, communications companies, telephone, and telegraph companies, were subject to the jurisdiction of the Interstate Commerce Commission.

In 1934 section 602 (b) of the Communications Act repealed the Interstate Commerce Act so far as communications carriers were concerned, and granted not only the jurisdiction, that is, the Communications Act gave not only the jurisdiction that the Interstate Commerce Commission had had with reference to communications carriers, to the Federal Communications Commission, but a very much larger jurisdiction.

Now, our difficulty comes from the fact that, if you amend the Federal Trade Commission Act, there is a possibility that it might be interpreted as not now excluding telephone and telegraph carriers, and thereby as accomplishing the overlapping of jurisdiction which I think very clearly all of us would agree it was the intention of the Congress to avoid.

May I refer before coming to our amendment in so many words, to the policy of avoiding overlapping jurisdiction which has been referred to by one of the members of the committee? In the first place, the railroads are exempted from the provisions of the Federal Trade Commission Act, very clearly. There is no essential difference so far as the principle of avoiding overlapping jurisdiction is concerned, it is apparent, I think, or that could possibly be urged, so far as this matter is concerned, between communications carriers and the railroad carriers.

In the second place I would like, without reading them, because of limitation of time, to refer to the Communications Act, and to point out that in section 201 (b) of the Communications Act it is expressly provided that all charges, practices, classifications, regulations for or in connection with communication service shall be just and reasonable, and in section 205 (a), without quoting it, it is provided that where there are unreasonable regulations, practices, or rates, or classifications, the Communications Commission has the power to correct them.

I would also call the committee's attention to the fact that section 215 of the Communications Act gives the Federal Communications Commission wide and broad powers with reference to service, equipment, and a number of other matters which I must not take your time now to enumerate.

Section 218 of the Communications Act gives the Communications Commission authority to inquire into management, which authority I might state, as is common knowledge, is very actively being exercised by the Commission.

Section 403 of the Communications Act also has to do with inquiries as to any matters or things concerning which the Commission is

interested and having any relation to any part of the Communications Act.

There are a number of other sections which I might also refer to here, particularly section 214 of the Communications Act, which has to do with interstate line facilities, under which we go to the Federal Communications Commission with reference to matters of that kind.

These things indicate the broad and plenary power that is given to the Federal Communications Commission, and in addition, as the committee doubtless knows, under a resolution of Congress, for something like 2 years the Federal Communications Commission has been going into and taking evidence and testimony on all of our activities in every manner, shape and form. Testimony of that sort is being taken today, as it has been from time to time ever since last March, before the Federal Communications Commission.

May I also comment upon one more thing in the Communications Act? Section 602 (d) of the Communications Act has in it a very interesting point in connection with the matter I am presenting to the committee. The enforcement of certain sections, the tieing sections and the others that have been referred to by Judge Davis, of the Clayton Act, were originally vested in the Interstate Commerce Commission as to carriers subject to the Interstate Commerce Act. The same policy of avoiding overlapping is followed in the Communications Act in the section that I have referred to in amending the Clayton Act, and it is expressly provided as follows:

That authority to enforce compliance with sections 2, 3, 7, and 8 of this act—that is the Clayton Act—by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communications or radio transmission; and in the Federal Reserve Board as to banks.

I had in mind also to comment on the policy of nonoverlapping to which the President in his recent message to the Congress indicated is the policy of the administration and policy of the Government, but time forbids.

Now, our proposal, if the committee please, is to clear up this possible difficulty I have commented on, and it is drawn in a way that may seem a bit curious to the committee, and I would like, if I may, to explain the reasons why we have drawn it as we have.

I think its contents, if compared with the bill, will be clear beyond question, but I do want to refer to the proviso we put in our recommendation which reads:

Provided, That common carriers under the latter act are excepted as common carriers under this act only in respect of their common carrier operations.

That change in the proposal which we originally had in mind to submit to this committee, came about because of a conference that I had with Chief Counsel Kelley of the Federal Trade Commission yesterday afternoon, and one of his associates, in which it was brought out to me, that the objection that Judge Davis had here last year to our proposed amendment, and that Mr. Kelley seemed to have, was this: We either might engage in manufacturing, or we might possibly go into the manufacturing business, have activities other than our

common-carrier activities. And, of course, our common-carrier activities are subject to the Federal Communications Commission.

Well, my answer to that was that the point seemed to me to be well taken, and so as to avoid any possible difficulty in that respect we added the proviso referred to so that if the communications companies should go into that kind of thing, into the kind of business in which the Federal Trade Commission has been interested, if they should go into the manufacturing business, which is the thing that we particularly discussed, then this exemption would not apply.

Mr. COLE. Mr. Chairman——

The CHAIRMAN. Mr. COLE.

Mr. COLE. May I ask a question?

Mr. HOSHOUR. Yes, indeed; so far as I am concerned.

Mr. COLE. During the hearings last year the Federal Trade Commission opposed this amendment submitted by the company you represent.

In view of the conference you had with them yesterday, do they now take the same position?

Mr. HOSHOUR. I am not able to speak for Mr. Kelley. I believe and hope that they will not take the same position, but my conference was late yesterday afternoon, and I have not got their final decision. I think this amendment meets the objections they made, and I hope Mr. Kelley will agree with me.

Mr. COLE. In the Communications Act the Federal Trade Commission is specifically referred to as having certain jurisdiction.

Mr. HOSHOUR. Yes.

Mr. COLE. Does this disturb that?

Mr. HOSHOUR. Not in any manner, shape or form. All this does is to make it clear that so far as the fair trade practice provisions of the Federal Trade Commission Act are concerned, the exception which has always been in the act shall be preserved, and by my amendment, if the committee approves of the amendment, it will make clear one thing, which I think the Federal Trade Commission is entitled to have clear, namely, that where common carriers engage in activities that are not in the common carrier field, beyond the field that the Government is regulating, then and in that case, they are subject to the jurisdiction of the Federal Trade Commission, which in my judgment is a sound position to take from the viewpoint of the public interest.

Mr. KENNEY. How would you read that amendment now?

Mr. HOSHOUR. The amendment, sir, would be——

Mr. KENNEY. Will you read it verbatim, following the bill.

Mr. O'CONNELL. Read it with the bill.

Mr. KENNEY. Follow the bill.

Mr. HOSHOUR. The bill reads as follows, referring to page 1, line 3, there would have to be an addition, because the clarifying amendment we are proposing has to do with section 4, so that after the word "that" in line 3 the words "the definition of 'Acts to regulate commerce' in section 4 and that" should be added—that part, only so as to make it clear that this clarifying amendment is to be a part of the proposed amendment to the act.

Then in line 8, the word "is" would have to be changed to "are", and, after line 8, the amendment would be as follows—and the first

part of it is exactly the same, of course, as the old act in this respect—"'Acts to regulate commerce' means the act entitled 'An act to regulate commerce', approved February 14, 1887, and all acts amendatory thereof and supplementary thereto,"—up to that point there is no change—"and the act entitled the 'Communications Act of 1934', approved June 19, 1934, and all acts amendatory thereof and supplementary thereto,"—and here is the proviso I commented on: "*Provided*, that common carriers under the latter act"—I would think, if I rightly interpret the point Mr. Kelley made, it would also be applicable to railroads, but we are not interested in the railroad situation.

Provided, That common carriers under the latter act are excepted as common carriers under this act only in respect of their common carrier operations.

That, if the chairman please, would, I think without peradventure of doubt, continue on the same policy of avoiding overlapping that we have had in the past, and carry forward the policy that, so far as this point is concerned, has always been in the old Trade Commission Act.

We may, if this amendment should be denied, argue—and that has been suggested, I think I may state without a breach of confidence by counsel for the Trade Commission—that the Communications Act is an amendment or a supplement to the Interstate Commerce Act and therefore we are already exempted. That argument is possibly tenable.

One might argue also, if you do approve this amendment, that the old act does not affect us, but my point is this, that it ought to be clear, and we should not, I submit, be asked to rely upon matters of that kind when the policy of avoiding overlapping jurisdiction is clear, and therefore we ask, if the chairman please, that the committee give consideration to the amendment which we believe will meet the Federal Trade Commission's objection and will avoid a type of overlapping that, if I had time, I could show has been the policy of not only this act but a number of other acts to avoid.

Mr. EICHER. This amendment would still leave you within the jurisdiction of the Federal Trade Commission if you engaged in activities outside of the field of communications?

Mr. HOSHOUR. Undoubtedly so, and I think we should be so, but as a matter of fact, sir, we are not engaged in that kind of activities, except through a subsidiary. I have no doubt our manufacturing subsidiary is now subject to the Federal Trade Commission Act. If there is any question about it, this amendment will make it clear. We do not contend that as to the fields that are subject to the Federal Trade Commission's jurisdiction, we should not be subject to it, as to our manufacturing activities if we have such activities, whether we perform them through a subsidiary or whether we do them directly. That is the reason why I went along with this suggestion making the proviso read as it does, but in the common carrier field, as to which I think the Commission and all will agree, we are pretty much regulated by an act which is very inclusive and very properly so. We think we should not be subject to overlapping jurisdictions.

The CHAIRMAN. It is time for the committee to adjourn, and if you are through, we thank you.

Mr. HOSHOUR. Thank you.