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**After Court Loss on Enforcement Powers, FCC Should Rescind Proposed
Telnyx Forfeiture**

by

Seth L. Cooper *

On April 17, the U.S. Court of Appeals for the Fifth Circuit held that the FCC’s enforcement process for imposing fines as civil penalties violates the Seventh Amendment right to a jury trial. The decision in [AT&T v. FCC](#) precludes the Commission from imposing civil monetary penalties in pending or future enforcement proceedings. The court’s ruling provides another key reason why the FCC should rescind its already dubious proposed fine in its proceeding against Telnyx.

The Commission issued a [Notice of Apparent Liability for Forfeiture](#) (NAL) of \$4.5 million against voice provider Telnyx on February 4. A bad actor called “MarioCop” made 1,800 illegal calls over a 17-hour period using Telnyx’s one-way VoIP service. Although MarioCop engaged in deliberate malicious conduct – which Telnyx immediately took action to terminate as soon as it became aware of it – the Commission proposed to fine Telnyx for failure to satisfy the agency’s “Effective Measures” rule for blocking illegal calls.

The Effective Measures rule requires a voice service provider to: “[t]ake affirmative, effective measures to prevent new and renewing customers from using its network to originate illegal calls, including knowing its customers and exercising due diligence in ensuring that its services are not used to originate illegal traffic.” When the rule was established in a 2020 order, the

agency stated that it incorporates “flexibility” by voice providers in preventing high volumes of illegal calls. The order stated: “We make clear that we do not expect perfection; particularly clever bad actors may, for a time, evade detection” and “[i]f the voice service provider takes [contractual remedy or additional mitigation] steps and does not originate a significant amount of illegal traffic, it satisfies the rules we adopt today.”

As detailed in a March 2025 *Perspectives from FSF Scholars*, “[The FCC's Enforcement Action Against Telnyx Raises Rule of Law Concerns](#)” regarding fundamental Fifth Amendment due process and fair notice requirements. The NAL transformed the Effective Measures rule from a flexibility-based standard into a strict liability standard. The result is an unfair surprise and lack of fair notice because Telnyx could not have known in advance of the new requirements that it is charged with violating. The NAL epitomizes what has been called “regulation by enforcement” – an agency's imposition of new requirements in an enforcement proceeding rather than in a general rulemaking.

Lack of notice and unfair surprise constitute compelling reasons why the Commission should rescind its Telnyx NAL. Now the Fifth Circuit’s decision in [AT&T v. FCC](#) provides another key reason to rescind the Telnyx NAL: The agency lacks constitutional authority to impose the fine.

As issue in *AT&T v. FCC* was the constitutionality of the Commission’s April 2024 forfeiture of \$57 million fine levied against AT&T for alleged failure to protect customer location data that the agency designated as “customer proprietary network information” (CPNI) under Section 222 of the Communications Act.

Article III vests the judicial power in the federal courts and extends that power to all cases in law and equity arising under the Constitution and laws of the United States. The Seventh Amendment states: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” The Fifth Circuit held that the FCC’s forfeiture enforcement proceeding against AT&T qualified as a “suit at common law.”

The Fifth Circuit agreed with AT&T that the enforcement action for failure to take reasonable measures to protect customers’ personal data is analogous to common law negligence. Relying on the Supreme Court’s decision in [SEC v. Jarkesy](#) (2024), the court explained that “the statutory action need not be ‘identical’ to a common law analogue” and that “what matters,” for Article III purposes “is the substance of the suit, not where it was brought, who brings it, or how it is labeled.” In other words, “[a]ll that is needed is a close relationship... and section 222 satisfied that requirement.” The court added that any ambiguity about whether a Section 222 claim was analogous to a negligence claim was definitively settled by the nature of the prescribed remedy.

The Fifth Circuit followed the Supreme Court’s decision in *Granfinanciera, S. A. v. Nordberg* (1989), in holding that the remedy is the “more important” consideration” about whether a claim is substantively analogous to a common law claim. According to the court, the FCC’s civil penalties “are the prototypical common law remedy” because they are “money damages designed to ‘punish or deter’ violators of Section 222.” The court concluded that the common law basis for such remedy was evident from Section 503(b)(2)(E)’s factors that instruct the Commission to set penalties based on “the nature, circumstances, extent, and gravity of the violation” and the

“degree of culpability” involved. The court also referenced the Commission’s considerations of whether AT&T acted “willfully” and “repeatedly” and whether the violations were “serious.” And the court found that the common law character of the penalties was reinforced by their non-remedial nature, as the fine did not restore the status quo or compensate victims.

Notably, the Fifth Circuit rejected the FCC’s defense of its enforcement proceeding under the “public rights” exception to the requirement that common law suits be adjudicated by Article III courts. The court quoted *Jarkesy* that “[t]his narrow exception to Article III applies only to matters that ‘historically could have been determined exclusively by [the executive and legislative] branches.’” Known examples of “public rights” include revenue collection, foreign commerce, immigration, tariffs, tribal relations, public lands, and public benefits.

Importantly, the Fifth Circuit rejected the Commission’s position that its enforcement action falls within the public rights exception because it involves common carriers. Congress’s power to regulate common carriers is broad, and its grant of authority to the FCC to regulate common carriers is similarly broad. Applying the public rights exception to common carriers generally would result in a huge bypass of Article III, at odds with the narrowness of the exception and the presumption that suits at common law are private rights for adjudication by Article III courts. Indeed, the court cited Supreme Court precedent recognizing that “the common carrier doctrine is deeply rooted in the common law,” and it noted a history of negligence claims against common carriers in federal and state courts. Also, the court concluded that no Supreme Court cases support applying the public rights exception generally to common carriers.

Finally, the Fifth Circuit flatly rejected the FCC’s arguments that the Seventh Amendment and Article III were satisfied by the possibility that AT&T could have tried to defend itself before a jury in a collections’ lawsuit – in a “504 trial.” The court wrote: “The Commission cites no authority supporting the proposition that the constitutional guarantee of a jury trial is honored by a trial occurring after an agency has already found the facts, interpreted the law, adjudged guilt, and levied punishment.” Additionally, the court pointed out that in a 504 trial, a defendant cannot challenge a forfeiture order’s legal conclusions. In a 504 trial, the court is limited to considering the factual basis for the agency action, but not the legal basis. As the court concluded: “[E]ven assuming an after-the-fact jury trial could potentially satisfy the demands of the Constitution, the one provided here amputates the carrier’s ability to challenge the legality of the forfeiture order.”

Instead of risking a 504 trial, AT&T instead chose to pay the fine and challenge the legal basis for the forfeiture order and fine, losing the benefit of a jury trial. The court implicitly disapproved of the dilemma facing regulated parties under the FCC’s enforcement regime. It concluded that either option – refusing to pay a fine and face a 504 trial *or* paying the fine while challenging it on appeal – constitutes a denial of Seventh Amendment rights to trial by jury.

When the FCC issued the Telnyx NAL, Commissioner Nathan Simington dissented: “I continue to believe that the Supreme Court’s decision in *Jarkesy* prevents me from voting, at this time, to approve this or any item purporting to impose a fine.” Commissioner Simington’s position regarding the Telnyx NAL has been vindicated by the Fifth Circuit’s decision in *AT&T v. FCC*. The court’s holding that the Commission’s forfeiture enforcement regime violates the Seventh Amendment and Article III precludes the agency from imposing its proposed fine against Telnyx

NAL, or for that matter, any others confronting forfeitures that may be similarly situated. Responding to the ruling, Commissioner Simington [posted](#) on X: “The 5th Circuit’s decision to vacate the FCC’s forfeiture order is a wake-up call. Our enforcement framework needs reform—fast.”

The Fifth Circuit’s reasoning in *AT&T v. FCC* is fully applicable to the Telnix NAL. The claim that Telnix failed to satisfy the Effective Measures rule is analogous to a common law negligence claim for failure to satisfy a duty of reasonable care. More importantly, the proposed fine against Telnix is a common law remedy because it consists of a monetary penalty intended to punish or deter violations, not restore the status quo or compensate victims. Indeed, the proposed fine in the Telnix NAL is based on the same civil financial penalty provisions in Section 503(b) that the court found “are the prototypical common law remedy.” Moreover, agency defenses of its enforcement regime based on the public rights exception and possible 504 trials met their doom in *AT&T v. FCC*. The Commission therefore lacks any conceivable legal basis for imposing a fine against Telnix.

Echoing the Supreme Court’s decision in *FCC v. Fox Television Stations Inc.* (2012), the Fifth Circuit observed that forfeiture orders “have real-world impacts on carriers” because they “cause reputational harm to carriers because they can be widely publicized and reported.” Unfortunately, Telnix likely will suffer undeserved harm to its reputation until the Commission rescinds the NAL. Facing an inevitable legal dead end, the Commission should rescind the Telnix NAL. And the agency should focus on reviewing its enforcement rules and assisting Congress in reforming them to be consistent with what the Constitution requires.

* Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Potomac, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

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