

FHH Telecom Law
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Choose Wisely When Suing a Competitor
Court holds CLEC lawsuit is barred
because plaintiff had earlier filed complaint with FCC

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A recently decided case from Texas reminds anyone with matters before the FCC that it is of the utmost importance to choose the proper forum for filing a complaint. In the most recent case, a federal court of appeals kicked a competitive local exchange carrier (CLEC) out of court for, as the Court phrased it, trying to take several bites at the apple.

In May of 2002, a CLEC was concerned that an incumbent local exchange carrier was mistreating it in providing access to 555 services. The federal statute controlling this matter provides that a complaint against a common carrier can be filed either as a complaint to the FCC *or* as a suit in a federal court. The statute prohibits a complainant from pursuing both of these remedies.

The CLEC in this case chose the FCC path and filed a complaint against the incumbent using FCC procedures. The complaint alleged that the incumbent was engaging in discriminatory and anti-competitive practices. Shortly thereafter, the CLEC stated that it was optimistic that the parties could resolve their difference in some other way. The CLEC asked the FCC to dismiss the complaint that it had earlier filed. A little more than a year after the initial complaint was filed, the FCC dismissed the matter. The FCC also told the CLEC that if it came back, it would have to provide an analysis showing how the new complaint was different from the one it was dismissing.

Five months after the FCC dismissed the complaint, the CLEC marched into federal court in Texas and filed suit against the same incumbent. This time, rather than just complaining about discriminatory and anti-competitive practices – as it had limited itself at the FCC – the CLEC listed nine different claims including state law claims such as breach of contract, tortious interference and fraud.

Both the federal district court and the appeals court which reviewed the case agreed that the law was clear. If a complaint is filed with the FCC, the federal district courts no longer have any jurisdiction. There are numerous cases which address this matter of jurisdiction. However, the CLEC felt that it had a loophole. The complaint was never actually ruled upon by, nor was it currently pending before, the FCC. The CLEC told the court that because the FCC dismissed the case it could be brought to the courts. In fact, the court had to agree with the CLEC that they could find no earlier cases where a case was kicked out of court because the FCC proceeding had been dismissed.

The court decided to make this the first case so that others would be able to reference it in the future. The mere *filing* of a complaint with the FCC – not what the FCC does with it – controls where the case will be heard. The court did not accept the CLEC’s argument that the FCC reset the jurisdiction when it dismissed the case. The determinative factor was the filing of the complaint with the FCC in the first place. Because the CLEC initially chose to file with the FCC, it was stuck with that choice, regardless of whether it later dismissed the complaint without a resolution on the merits. Allowing the CLEC to file at the FCC, seek dismissal, and then walk over to the court house defeats the clear election of remedies that is built into the law.

Any clients who are planning to file a complaint with the FCC , whether it is a formal or informal complaint, must bear this case in mind. A hasty decision to send off a letter to the FCC could be deemed an informal complaint that could then significantly limit the party’s later options. Before any decision is made, clients must carefully consider the precedents for their facts at both the FCC and in the courts. Because the choice of forum is a strict “either/or” proposition, both options should be carefully reviewed prior to proceeding down either path.

For more information regarding this case and complaints against common carriers, please contact the attorney at our firm with whom you regularly work or the author.