Communications Law: Annual Review

The Judicial Practice Committee of the FCBA

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T-MOBILE SOUTH, LLC v. CITY OF ROSWELL, GEORGIA

No. 13-975 (U.S. Jan. 14, 2015)

In *T-Mobile South, LLC v. City of Roswell*,[1] the Supreme Court held that the Telecommunications Act of 1996 requires localities denying a cell-phone tower construction permit to provide or make available their reasons for doing so. The needn't, however, include those reasons in the formal denial letter; rather, "the locality's reasons may appear in some other written record so long as the reasons are sufficiently clear and are provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice."

Under the Telecommunications Act of 1996, "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."[2] In *T-Mobile*, the Court addressed "whether, and in what form, localities must provide reasons when they deny" such a request.[3]

This case arose from T-Mobile's application to build a new cell-phone tower in a residential area of Roswell, Georgia.[4] To build a cell-phone tower in a residential area, Roswell requires companies to use an "alternative tower structure," meaning "an artificial tree, clock tower, steeple, or light pole," which is "compatible with the natural setting and surrounding structures" and effectively camouflages the tower, as judged by the City Council.[5] In accord with this requirement, T-Mobile proposed to build a 108-foot-tall tower in the form of an artificial tree, termed a "monopine."[6]

Roswell's Planning and Zoning Division considered the application first and, finding it complied with the city's ordinances, recommended its approval.[7] The City Council, the ultimate arbiters of the issue, then scheduled a 2-hour public hearing during which it heard from the Planning and Zoning Division, T-Mobile, and local

1. T-Mobile South, LLC v. City of Roswell, No. 13-975 (U.S. Jan. 14, 2015).
2. Telecommunications Act of 1996,110 Stat. 151, 47 U. S. C. §332(c)(7)(B)(iii).
3. *T-Mobile*, slip op. at 1.
4. *See id.* at 1-2.
5. *See id.*
6. *See id.*
7. *See id.*

residents.[8] After each council member shared his thoughts on the tower issue, the Council unanimously rejected the application.[9]

Two days after the hearing, the Planning and Zoning Division issued a brief rejection letter, which provided no explanation of the decision but referred T-Mobile to the formal meeting minutes.[10] The meeting minutes, which contained the Councilmembers' remarks, were not available for another twenty-six days. Three days later, T-Mobile filed suit in federal court, alleging that the city violated the Telecommunications Act of 1996 when denying its application without the support of substantial evidence in the record.[11]

On cross-motions for summary judgment, the District Court held that Roswell, when denying T-Mobile's application, violated the Telecommunications Act, which the court interpreted to require a written notice explaining the reasons for denial in a manner sufficient to evaluate them against the written record.[12] The Eleventh Circuit reversed, holding that ""to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to."[13]

With the circuits split on whether and in what form a localities must provide its reasons for denial, the Supreme Court granted cert. In an opinion written by Justice Sotomayor, the Court answered the former in the affirmative and crafted a permissive standard for the latter.

First, the Court held that the Telecommunications Act "requires localities to provide reasons when they deny applications to build cell phone towers." [14] The Court explained that the Act "preserves 'the traditional authority of state and local governments to regulate the location, construction, and modification" of . . . cell phone towers, but imposes 'specific limitations' on that authority."[15] Among these limits is the requirement that denials must be in writing and supported by substantial evidence in the written record and that a denied applicant may seek judicial review. To give effect to these limits and others, "courts must be able to identify the reason or reasons

8. *See id.* at 2-3.
9. *See id.* at 13.
10. *See id.* at 4.
11. *See id.* at 4.
12. *See id.* at 5.
13. *See id.*
14. *See id.* at 6.
15. *Id.* (quoting Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005)).

why the locality denied the application."[16] This conclusion is buttressed by Congress's use of "substantial evidence," a term of art that incorporates an existing body of administrative law requiring "that the grounds upon which the administrative agency acted to be clearly disclosed."[17] From this, the Court concludes that "localities must provide reasons when they deny cell phone tower siting applications . . . these reasons need not be elaborate or even sophisticated, but rather . . . simply clear enough to enable judicial review."[18]

Next, the Court held that these reasons need not "appear in the same writing that conveys the locality's denial of an application."[19] The text of the Act imposes several limitations on localities' power to turn down cell phone tower applications and its savings clause reserves the balance of power to state and local governments.[20] These factors suggest that the Act's enumerated limitations should be read as an exhaustive list.[21] Because the text of the Act does not proscribe a particular form in which the reasons must appear, it should not be read to impose one. Thus, "Congress imposed no specific requirement . . . but instead permitted localities to comply with their obligation to give written reasons so long as the locality's reasons are stated clearly enough to enable judicial review."[22] The Court did advise localities that, although detailed minutes are sufficient under the Act, providing a separate statement of reasons for the denial can help avoid prolonged litigation over the permissibility of its reasons.

Finally, the Court noted that "a locality cannot stymie or burden the judicial review contemplated by the statute by delaying the release of its reasons for a substantial time after it conveys its written denial."[23] Because aggrieved parties have only 30 days from the denial to seek judicial review and need time to make a reasoned decision, which they cannot do without knowing the reasons, the locality "must provide . . . its written reasons at essentially the same time as it communicates its denial."[24] "If a locality is not in a position to provide its reasons promptly, the locality can delay the issuance of its denial within this 90- or 150-day window, and instead release it along with its reasons once those reasons are ready to be provided. Only once the

16. *Id.*
17. *Id.* at 7-8.
18. *Id.* at 8.
19. *Id.* at 8-9.
20. *See id.* at 9.
21. *See id.*
22. *See id.*
23. *See id.* at 10
24. *See id.*

denial is issued would the 30-day commencement-of-suit clock begin."[25]

Thus, the Court held that "localities [must] provide reasons when they deny cell phone tower siting applications, but that the Act does not require localities to provide those reasons in written denial letters or notices themselves. A locality may satisfy its statutory obligations if it states its reasons with sufficient clarity in some other written record issued essentially contemporaneously with the denial."[26] Here, Roswell provided its reasons to T-Mobile for denying its application, and it did so in a permissible form – detailed minutes of the City Council meeting.[27] It did not, however, provide its reasons "essentially contemporaneously" with the written denial because the minutes were not available until 26 days after its issuance.[28] Because the 26-day delay rendered Roswell non-compliant with its statutory obligations, the Court reversed the judgment of the Eleventh Circuit and remanded the case for consideration of questions of harmless error or remedy.[29]

25. *See id.* at 11.
26. *See id.* at 14.
27. *See id.*
28. *See id.*
29. *See id.*

CBS CORPORATION V. FCC

785 F.3d 699 (D.C. Cir. 2015)

In *CBS Corporation v. FCC*,[1] the District of Columbia Circuit vacated an FCC order expediting disclosure of commercially-sensitive program-pricing information and documents to third parties in the course of a pre-merger review.[2] The Court held that the FCC failed to make the showing required by its own regulations to justify disclosure and failed to provide a reasoned explanation for changing its policy governing pre-disclosure judicial review.[3]

I. BACKGROUND

The Communications Act of 1934, requires the FCC to review cable company mergers and determine whether they serve "the public interest, convenience, and necessity."[4] This pre-merger review requires parties to submit information to the FCC, some of which is of a sensitive and proprietary nature.[5] To enhance its understanding of these materials, the FCC sometimes shares them with knowledgeable third parties.[6] When doing so, the FCC's Media Bureau ordinarily issues a protective order limiting, *inter alia*, access by merger-applicants' competitors and allowing merger applicants to challenge its disclosure decisions.[7]

The instant dispute arose during FCC review of the proposed AT&T/DirecTV and Comcast/Time Warner mergers, the latter of which has since been abandoned.[8] Because it was simultaneously reviewing merger proposals involving five[9] out of the world's seven largest video-programming distributors, the FCC requested sensitive documents, some relating to program-pricing negotiations and

1. CBS Corp. v. FCC, 785 F.3d 699 (D.C. Cir. 2015).
2. *See id.* at 710.
3. *See id.* at 700-702.
4. *See id.* at 700 (citing & quoting 47 U.S.C. § 310).
5. *See id.*
6. *See id.*
7. *See id.* at 701-02.
8. *See id.* at 700-01.
9. The fifth participant was Charter Communications, which was then involved in the Comcast/Time Warner proposal through a partial divestiture agreement. *See id.* at 701. The Comast/Time Warner merger has since been abandoned. *See id.* at 700-01 (citing Shalini Ramachandran, *Comcast Kills Time Warner Cable Deal*, WALL ST. J. (Apr. 24, 2015), http://goo.gl/vPG1hh).

agreements, which "it believed would help it evaluate these important corporate marriages."[10]

These merging parties, however, did not object to the required disclosures; rather, the instant case was brought by content producers—CBS, Viacom, Disney, *et al.*—who have program-distribution contracts with the merging entities, the terms of which they would like to keep confidential.[11] These content-producer Petitioners, seek to protect their Video Programming Confidential Information (VPCI), which includes negotiations, agreements, and pricing terms between the cable companies and content providers.[12]

At the Commission level, the Petitioners opposed allowing any third-party access to VPCI, contending the agency should review the materials itself, in secret.[13] In response, the Media Bureau maintained third-party access to VPCI but augmented its traditional protective order by expanding the disclosure restrictions to include content producers' competitors and empowering content producers to lodge pre-disclosure objections.[14] With these new rights in hand, Petitioners broadly objected to all VPCI access requests, concerned that many filers were their direct competitors.[15]

The Media Bureau, worrying that objections' pre-disclosure resolution would substantially delay merger review, issued the *November Bureau Order*,[16] truncating review of Media Bureau disclosure determinations.[17] The Order allowed disclosure to "individuals seeking to view VPCI . . . just five days after the Bureau—not the [FCC] or a court—rejects any objections."[18] Over the Petitioners' objections, the FCC affirmed the *November Bureau Order* and adopted its reasoning in the *November Commission Order*.[19] The FCC did, however, delay access, allowing Petitioners to seek judicial

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10. *See id.* at 701.

11. *See id.*

12. *See id.*

13. *See id.* at 702.

14. *See id.* (citing Applications of Comcast Corp. et al. for Consent to Assign or Transfer Control of Licenses and Authorizations, Bureau Order, DA 14-1463, paras. 2, 7–8, 10 (MB October 7, 2014)).

15. *See id.*

16. Applications of Comcast Corp. et al. for Consent to Assign or Transfer Control of Licenses and Authorizations, Order, Order on Reconsideration, DA 14-1605 (MB Nov. 4, 2014). *See also* Applications of Comcast Corp. et al. for Consent to Assign or Transfer Control of Licenses and Authorizations, Amended Modified Joint Protective Order, DA 14-1602, 14-1604 (MB Nov. 4, 2014).

17. *See CBS*, 785 F.3d at 703.

18. *Id.*

19. *See id.* (citing Applications of Comcast Corp. et al. for Consent to Assign or Transfer Control of Licenses and Authorizations, Order, 29 FCC Rcd ___, FCC 14-202 (Nov. 10, 2014)).

review, upon which the a special panel of the District of Columbia Circuit stayed disclosure of the VPCI.[20] On review, Petitioners argued that the FCC's determination violated the Trade Secrets Act[21] and the FCC's own Confidential Information Policy[22] and that it departed from past practice without explanation.[23]

II. ANALYSIS

In *CBS v. FCC*, the Court considered whether the FCC may "disclose petitioners' confidential information to third parties and may it do so on a timeline so swift as to effectively preclude judicial review?"[24] Answering this question entailed two inquiries: whether the confidential information disclosures were consistent with the FCC's own requirements and whether its policy change was arbitrary and capricious.

A. *Substantive Challenge to the FCC's Decision to Disclose the Trade Secrets in the Course of Its Pre-Merger Review.*

The Court first considered whether disclosure was proper, under FCC regulations and policy.[25] FCC regulations require a party seeking disclosure of private information to make a "persuasive showing."[26] Assuming without deciding that, under the circumstances, the FCC is required to make the requisite showing, the Court faced two questions: "what exactly does that persuasive showing entail, and has the [FCC] made its case?"[27] After grappling with substantial confusion over the meaning of the FCC's disclosure policies,[28] the Court ultimately concluding that the FCC had impermissibly ignored part of its own requirements.[29]

To determine what a "persuasive showing" entails, the Court turned to the FCC's *Confidential Information Policy*.[30] Paragraph 8 of

20. *See id.*

21. 18 U.S.C § 1905 (2014). The Court did not reach the issue of consistency with § 1905.

22. 47 C.F.R. § 0.457 (2015)). *See also* Examination of Current Policy Concerning the Treatment of Confidential Information, 13 FCC Rcd 24816 (1998) [hereinafter *Confidential Information Policy*].

23. *CBS*, 785 F.3d at 703.

24. *Id.*

25. *See id.*

26. *See id.* at 704.

27. *Id.*

28. *See id.* at 703-05.

29. *See id.* at 708.

30. *See id.* at 704.

the *Policy* sets forth a clear test, balancing the interests of disclosure and nondisclosure and requiring the contested information be a "necessary link" to resolution of an issue.[31] But later, in Paragraph 17, the *Policy* explains that "'[b]ecause [the FCC] believe[s] that a case-by-case determination is most appropriate . . . [it] decline[d] to adopt a blanket rule requiring the requester to demonstrate that access is 'vital' to the conduct of a proceeding [or] necessary to the 'fundamental integrity' of the Commission process at issue.'"[32] As the Court explained, these provisions are contradictory—the former requiring a "necessary link" and the latter disavowing any necessity requirement.[33] Ultimately, the Court found that Paragraph 17's ambiguity did not negate the clear requirements of Paragraph 8 and held that "to make the persuasive showing necessary to disclose petitioners' confidential documents, [the proponent] must explain (1) why disclosure is in the public interest, (2) why it is a good idea on balance, and (3) why the information serves as a ''necessary link in a chain of evidence.'"[34]

Next, the Court applied this standard, finding that the *November Bureau Order* adequately explained why disclosure was in the public interest and a good idea on balance, but failed to show it was a necessary link in its pre-merger review.[35] First, it accepted that obtaining "different perspective on materials that the [FCC] is considering" in the course of its pre-merger review responsibilities "facilitates informed decision making," which is in the public interest.[36] Second, it accepted that, in light of the governing protective orders' limits on access to and use of VPCI, the benefits of disclosure outweigh the potential competitive harms feared by Petitioners.[37]

But, finally, the Court found insufficient the Bureau's finding that VPCI is "'highly relevant . . . to the pending transactions'—even 'central'" because neither rises to the level of "necessary."[38] Although the documents "'provide what is likely the best evidence available to test the validity of allegations'" about how the proposed mergers would change the market and the FCC "would . . . be derelict if it *failed* to consider VPCI as it evaluates the proposed mergers," disclosure was

31. *See id.*
32. *Id.* at 705 (quoting *Confidential Information Policy*, para. 17) (some alterations in original).
33. *See id.* at 704-05.
34. *See id.* at 705.
35. *See id.* at 705-06.
36. *Id.* at 705.
37. *See id.*
38. *Id.* at 706 (quoting *November Bureau Order*, para. 23).

still prohibited without a showing of necessity.[39] In sum, the Court explained: "Are the documents relevant? Absolutely. Important? Sure. Central? Probably. . . But to justify disclosure, the information must be 'necessary,'" and here they were not.[40]

B. *Procedural Challenge to the FCC's Departure from Prior Agency Practice*

Next, the Court considered whether the FCC's action was procedurally invalid because it failed to explain its change of policy on pre-disclosure review of Bureau determinations.[41] Under prior FCC policy, disputed information remained confidential until objectors' concerns were resolved by the Commission and/or judiciary,[42] while the new policy effectively eliminated this pre-disclosure review by allowing disclosure five days after a Bureau determination.[43]

The Court found that this "amounts to a substantive and important departure from prior [FCC] policy," which Petitioners argued the FCC "failed entirely to acknowledge . . . much less to explain."[44] Under the APA, "[w]hen an agency departs from past practice, it 'must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'"[45] The Court found that while the Bureau had acknowledged it was modifying the protective order "nowhere [did it acknowledge] that the new rule departs from longstanding practice," and the mere addition of the five-day rule to the protective order (the departure from past practice itself) is "completely insufficient" to serve as acknowledgement.[46]

Next, the Court considered whether, by acknowledging alteration of the protective orders, the Bureau recognized a larger policy shift.[47] The Court held that "admitting to a technical change in the *governing documents* is a far cry from acknowledging a fundamental departure from longstanding *policy*. Instead, it seems like the old policy is being casually ignored."[48] It further found the FCC's

39. *Id.* at 707.
40. *Id.*
41. *See id.* at 708.
42. *See id.*
43. *See id.*
44. *See id.*
45. *Id.* at 708 (quoting Ramaprakash v. Federal Aviation Administration, 346 F.3d 1121, 1124 (D.C. Cir. 2003)).
46. *Id.* at 709.
47. *See id.*
48. *See id.* (internal quotation marks omitted).

rationales for the departure “exceedingly thin.”[49] First, it was unclear whether or how pre-disclosure review of a Bureau determination actually slowed down pre-merger review because the FCC could still review the VPCI internally. Second, concerns over abuse of the objection process “rest[ed] on a flawed premise” because, although Petitioners challenged all of the 266 access requests, most were challenges to VPCI disclosure generally and “the objection process represented the only administrative avenue open to petitioners to protect their right to meaningful pre-disclosure review.”[50]

Finally, in *dicta* the Court offered a “cautionary observation,” without pre-judging the issue, that “should [the FCC] choose to retain the five-day rule, it must not only come forward with a ‘reasoned analysis’ for this dramatic break from the past, but also explain why speed is so important as to justify limiting one of the fundamental principles of administrative law—judicial review.”[51]

II. CONCLUSION

In sum, the Court vacated the *November Commission Order* for both substantive and procedural infirmity.[52] Substantively, the FCC’s non-compliance with its own disclosure requirements rendered its action unlawful.[53] Procedurally, the FCC failed to acknowledge or explain its departure from past practice.[54]

49. *Id.*
50. *Id.* at 709-710.
51. *Id.* at 710
52. *See id.* at 710.
53. *See id.* at 707.
54. *See id.* at 709.

Sorenson Communications v. FCC (Sorenson II)

765 F.3d 37 (D.C. Cir. 2014)

In *Sorenson Communications Inc. v. FCC* (*Sorenson II*),[1] the District of Columbia Circuit largely upheld the FCC's *2013 VRS Rate Order*[2] against a service provider's challenge that it was arbitrary and capricious.[3] The Court upheld the *Order*'s set rates and tiered rate structure but vacated and remanded the agency's enhanced speed-of-answer requirements for further consideration.[4]

I. Background

The Americans with Disabilities Act of 1990 requires the FCC to make available telecommunications relay services (TRS), providing hearing or speech impaired individuals with service 'functionally equivalent" to non-disabled Americans.[5] Costs of these services are covered by the TRS Fund, which is funded by communications industry contributions and pays TRS providers a per-minute rate, which reflects the provider's costs.[6]

One such resource is video relay service (VRS), which "works much like a video call that any caller might make using a digital platform such as Skype or Apple FaceTime."[7] In the course of VRS, "[t]he video call is placed to an American Sign Language interpreter, employed by the VRS provider, who then makes a standard voice call to the video caller's hearing recipient. The interpreter signs with the caller via the visual connection and speaks with the recipient via the voice connection, translating messages back and forth."[8]

With respect to VRS, although, "[t]he per-minute rate is supposed to approximate the cost incurred to provide VRS, . . . for much of the past decade the rate has generated revenues well in excess of that cost."[9] The FCC sought to remedy that imbalance and "more

1. Sorenson Comm'ns, Inc. v. FCC (*Sorenson II*), 765 F.3d 37 (D.C. Cir. 2014)

2. *In re* Structure & Practices of the Video Relay Serv. Program, Telecomms. Relay Servs. & Speech–to–Speech Servs. for Individuals with Hearing & Speech Disabilities, Report & Order & Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, 8661, ¶ 107, 8706–07, ¶ 217 (2013) [hereinafter *VRS Rate Order*].

3. *See Sorenson II*, 765 F.3d at 40 (citing 5 U.S.C. § 706(2)(a)).

4. *See id.* at 52.

5. *See id.* at 41.

6. *See id.*

7. *Id.* at 40.

8. *See id.*

9. *See id.* at 40.

accurately to reflect cost[s] until it could develop a new approach to reimbursement," by "lower[ing] the per-minute rates first in its *2010 Rate Order* and again in its *2013 Rate Order*."[10]

Petitioner Sorenson Communications, Inc., the leading provider of VRS, incurred voluntary costs under the pre-2010 reimbursement rates which are unsustainable at the current rate.[11] Unhappy with the new regime, Sorenson brought suit under the Administrative Procedure Act (APA), arguing that the *2013 Rate Order* was arbitrary and capricious.[12]

II. ANALYSIS

In *Sorenson II*, the Court addressed whether Sorenson was precluded, by prior litigation, from challenging the *2013 Rate Order* before considering whether the *Order*'s rate-of-return methodology, overall impact on TRS providers' finances, speed-of-answer requirement, and tiered rate structure are arbitrary and capricious.

The Court precluded Sorenson from re-litigating the FCC's compensable expense list because the Tenth Circuit had already ruled on the issue and nothing had changed since that time.[13] It was not, however, precluded from challenging "features unique to the 2013 Rate Order [which] therefore could not have been resolved in the Tenth Circuit case," including the end result of the *2013 VRS Rate Order*, its newly-imposed requirements, its alterations to the rate structure, and whether it adequately considered changed circumstances.[14]

A. *The Rate-of-Return Methodology Was Not Arbitrary or Capricious Because It Covered the Reasonable Costs of Providing VRS*

The Court considered whether the FCC acted arbitrarily and capriciously by applying a rate-of-return scheme that was designed for traditional telephone companies to the substantially different VRS industry.[15] When the FCC crafts rate-setting methodology for TRS fund reimbursements, the Communications Act entitles VRS providers to compensation "only for the reasonable costs of providing

10. *See id.*
11. *Id.* at 40.
12. *See id.* (citing 5 U.S.C. § 706(2)(a)).
13. *See id.* at 44-45 (citing Sorenson Commc'ns Inc. v. FCC, 659 F.3d 1035 (10th Cir. 2011).
14. *See id.* at 46.
15. *See id.*

VRS."[16] First, the Court held that, when denying a return on labor costs, the FCC "act[ed] directly in accord with its statutory mandate by setting rates to compensate providers for their actual labor costs," not in excess of the reasonable costs of VRS provision.[17]

The Court further held that maintaining the 11.25% capital rate of return, which was borrowed twenty years ago from monopoly telephone regulations, was not itself arbitrary and capricious because, although perhaps a "misstep," petitioners bear the burden of demonstrating a decision's unreasonableness.[18] Still considering the capital rate-of-return's reasonableness, the Court held that the gross profit margin yielded by the rate, here less than 2%, is irrelevant because VRS providers are only entitled to reasonable reimbursement for costs, not profit.[19]

The Court explained, however, that the capital rate of return would be unreasonable and unlawful if it were too low to attract the capital necessary to operate a VRS business.[20] On this issue, the Court acknowledged that that the VRS industry has a "significantly different risk profile to the capital markets" than a traditional phone company, which "suggest[s] a Telephone Company's rate of return is not an obvious proxy for reimbursing a provider of VRS."[21] "[T]he [FCC's] admittedly flawed basis for selecting a rate," however, does not "lead[] to an arbitrary and capricious result because there is no evidence in the record to suggest Sorenson or any other provider actually has had trouble raising the necessary capital under the long-standing 11.25% rate regime."[22]

B. *Allowing VRS Providers Incurring Unnecessary Expenses to Go Bankrupt Is Not Arbitrary and Capricious*

Next, the Court considered Sorenson's "end result" challenge, which asks whether, even if all components of an agency's decision were individually reasonable, "they . . . *together* produce arbitrary or unreasonable *consequences*."[23] Here, the contested end result was Sorenson's contention that the rates were set so low as to drive VRS providers into bankruptcy.[24] First, the Court rejected Sorenson's

16. *Id.* at 46-47 (citing 47 U.S.C. § 225(d)(3)(B)).
17. *Id.*
18. *Id.* at 47.
19. *See id.*
20. *See id.*
21. *Id.* at 48.
22. *Id.* (footnote omitted).
23. *Id.*
24. *Id.*

contention that "every" provider would be driven to bankruptcy, because the FCC had already upwardly adjusted rates in response to several industry comments to that effect.[25]

Considering the prospect of *some* providers going bankrupt, the Court explained it is not unreasonable "to allow a provider to go bankrupt if that provider has incurred costs far in excess of what is necessary."[26] The Court also found that the FCC adequately addressed these contentions by explaining that "it would not cover all of a provider's actual costs even if the result were to bankrupt the company" because "it would be 'irresponsible and contrary to . . . the efficient provision of TRS to simply reimburse VRS providers for all capital costs they have chosen to incur—such as high levels of debt—where there is no reason to believe that those costs are necessary to the provision of reimbursable services.'"[27] Because VRS providers are not entitled to reimbursement in excess of costs and allowing some providers to go bankrupt based on voluntarily-incurred obligations was not unreasonable, the Court held it was not an arbitrary or capricious consequence.[28]

C. Enhancing Speed of Answer Requirements Its Effect on Costs Was Arbitrary and Capricious

The Court next considered whether the FCC acted arbitrarily and capriciously by failing to consider whether an enhanced speed-of-answer requirement would increase provider costs.[29] In the *VRS Rate Order*, the FCC required providers to answer more calls at a faster rate and changed the frequency of measurement from monthly to daily.[30] Despite Sorenson's comments to the contrary the FCC made the unsupported determination that this would not increase provider costs.[31] The Court held that the FCC acted arbitrarily and capriciously both by adopting the requirement without evidence of its impact on costs and by failing to exercise reasoned decision-making when disregarding the only record evidence of costs—Sorenson's comments.[32] The Court, however, declined to remedy the error by vacating the *Order*'s new VRS rates and instead vacated only the speed of answer requirement, remanding it to the agency for further

25. *See id.* at 48-49.
26. *Id.* at 48.
27. *Id.* at 49 (quoting *VRS Rate Order*, para. 195).
28. *See id.*
29. *See id.* at 49-50.
30. *See id.*
31. *See id.*
32. *See id.* at 50.

consideration.[33]

D. Retention of Inefficient Tiered Rate Structure During Transition to New Rate-Setting Scheme Was Not Arbitrary and Capricious

Finally, the Court considered whether the *Order*'s tiered rate structure is arbitrary and capricious because it is inefficient and ill-suited to its goal of supporting small providers.[34] The Court upheld the tiered rates over these challenges because some transitional inefficiency was acceptable as the FCC worked to implement its new competitive-bidding scheme and because the methodology "is explicitly aimed at achieving efficiency in the long run."[35]

III. CONCLUSION

In *Sorenson II*, the Court upheld the reduction of VRS rates because the FCC had considered costs necessary to the provision of VRS service when setting the rate and was not required to consider unnecessary voluntarily-incurred costs, even if ruinous for a provider.[36] The Court vacated the speed-of-answer requirement, remanding it to the FCC for further consideration, because the FCC acted arbitrary and capriciously when failing to consider compliance costs when setting the rate.[37] Finally it held that the FCC adequately justified the *Order*'s adjusted tiered-rate structure because, as a transitional measure, it was reasonable although inefficient.[38]

33. *See id.* at 51.
34. *See id.*
35. *Id.*
36. *See id.* at 40-41.
37. *See id.* at 41.
38. *See id.*

SORENSON COMMUNICATIONS, INC. V. FCC (SORENSON I)

755 F.3d 702 (D.C. Cir. 2014)

In *Sorenson Communications, Inc. v. FCC* (*Sorenson I*),[1] the District of Columbia Circuit struck down the FCC's *Misuse of Internet Protocol (IP) Captioned Telephone Service Interim Order*, and *Misuse of Internet Protocol (IP) Captioned Telephone Service Order*. First, the Court held that agency invocations of good cause to forgo notice-and-comment rulemaking procedures are reviewed de novo and that the FCC violated the APA by improperly invoking the good cause exception for impracticability. Next, the Court held that the agency acted

I. BACKGROUND

The Americans with Disabilities Act of 1990 require the FCC "to arrange for telecommunications relay services (TRS) that are 'functionally equivalent to the ability of a hearing individual who does not have a speech disability.'"[2] To cover the costs of these services the FCC created the TRS Fund, which is funded by communications industry contributions and pays TRS providers between $1.2855 and $6.2390 per minute, depending on the service provided.[3]

"One type of TRS service is the Internet Protocol Captioned Telephone Service (IP CTS), which uses the Internet to transmit phone conversations and captioned messages between hearing-impaired users, third-party callers, and relay operators."[4] IP CTS providers are reimbursed $1.7877 per minute for their services.[5]

One provider of IP CTS services, Sorenson Communications, began furnishing its caption-displaying phones to customers for free—unlike its competitors.[6] This lead to concern that Sorenson's method would strain the TRS Fund, far exceeding the projected disbursements.[7] Because of this concern the FCC promulgated several interim rules in an *Interim Order*, which "cited the potential for Fund depletion caused by IP CTS misuse as 'good cause' for bypassing the

1. Sorenson Comm'ns Inc. v. FCC (*Sorenson I*), 755 F.3d 702 (D.C. Cir. 2014).
2. *Id.* at 704 (quoting 47 U.S.C. § 225(a)).
3. *See id.*
4. *See id.*
5. *See id.* at 705.
6. *See id.*
7. *See id.*

notice-and-comment requirements of the Administrative Procedure Act (APA)."[8] The *Interim Order* instituted two new requirements: (1) a certification of hearing impairment for all new IP CTS users, those who purchase equipment for $75 or more could self-certify but below that threshold a professional certification was required; and (2) IP CTS phones must be distributed with captions defaulted to off.[9]

After notice and comment the FCC released a revised final rule, which revised the interim rules and, in their place, required: (1) most IP CTS phones were to cost $75 or more to be eligible for TRS reimbursement (the $75 Rule), and (2) captions must be off by default unless a medical professional certifies an individual is too disabled to turn on the captions manually (the Default-Off Rule).[10] Sorenson, dissatisfied with the Rule, petitioned for review.

II. ANALYSIS

Sorenson challenged the FCC's finding of good cause to waive the APA's notice and comment procedures.[11] Under the APA, an agency may "bypass the notice-and-comment requirement of the APA when it 'for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'"[12]

A. *Courts Review an Agency's Invocation of Good Cause De Novo*

The Court noted it had never "expressly articulated" the standard of its review of an agency's invocation of good cause, and the FCC urged that it should be afforded some measure of deference.[13] The Court rejected this argument, explaining that agencies lack interpretive authority over the APA and because affording deference "would conflict with this court's deliberate and careful treatment of the exception in the past."[14] Rather, the Court held that it reviews an agency's invocation of good cause *de novo*, while deferring "to an

8. *See id.* (citing Misuse of Internet Protocol (IP) Captioned Telephone Service, Interim Order, 28 FCC Rcd 703 (2013)).

9. *See id.*

10. *See id.* (citing Misuse of Internet Protocol (IP) Captioned Telephone Svc., Order, 28 FCC Rcd 13420 (2013)).

11. *See id.* at 706.

12. *See id.* (citing 5 U.S.C. § 553(b)(3)(B)).

13. *See id.*

14. *See id.*

agency's factual findings and expert judgments therefrom," unless arbitrary and capricious.[15]

B. *Notice-and-Comment Procedures Were Not Impracticable for the Interim Order*

The FCC justified its invocation of good cause on impracticability grounds, citing "the threat of impending fiscal peril" to the TRS Fund.[16] "Impracticability is an 'inevitably fact-or-context dependent' inquiry,"[17] which the Court has applied to "an agency's decision to bypass notice and comment where delay would imminently threaten life or physical property."[18] The Court noted that, although relying on the threat of fiscal peril as its good cause, the FCC offered no factual findings to support this speculative assertion.[19] Rejecting the FCC's argument, the Court held that "[t]hough we do not exclude the possibility that a fiscal calamity could conceivably justify bypassing the notice-and-comment requirement, this case does not provide evidence of such an exigency."[20] It explained that the FCC's record was "too scant" to show a fiscal emergency,[21] and "[t]hough no particular catechism is necessary to establish good cause, something more than an unsupported assertion is required."[22] Accordingly, the FCC's invocation of impracticability as good cause to waive notice-and-comment procedures was unlawful because it "[l]ack[ed] record support proving the emergency."

15. *See id.* at 706 & n.3.

16. *See id.* at 706.

17. *Id.* (quoting Mid–Tex Elec. Coop. v. FERC, 822 F.2d 1123, 1132 (D.C.Cir.1987)).

18. *Id.* (citing Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004) ("imminent hazard to air- craft, persons, and property"); Council of the S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981) (mine explosion)).

19. *See id.* In his partial dissent, however, Commissioner Pai provided some figures indicating that the TRS Fund's unsupportable payout rate would have saddled it with obligations between $108 and $159 million for the second half of the 2012-2013 fiscal year. *See id.* The Court noted that, while this might be cause for concern, it is "hardly a crisis." *Id.* at 707.

20. *Id.* at 707.

21. For example, the *Interim Order* "does not reveal when the Fund was expected to run out of money, whether the Fund would have run out of money before a notice-and-comment period could elapse, or whether there were reasonable alternatives available to the Commission, such as temporarily raising Fund contribution amounts or borrowing in anticipation of future collections." *See id.*

22. *Sorenson I*, at 707.

C. *The Final $75 Rule and Default-Off Rule Were Arbitrary and Capricious*

The Court then turned to Sorenson's assertions that the Final Order's $75 and Default-Off Rules are arbitrary and capricious, in violation of the APA.[23] The Supreme Court has explained that "[u]nder the arbitrary-and-capricious standard, an agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[24] An agency contravenes this standard when it:

> [R]elie[s] on factors which Congress has not intended it to consider, entirely faile[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[25]

Applying this standard, the Court first considered whether the FCC offered a satisfactory explanation for the $75 Rule, which it justifies as a way to "deter fraudulent acquisition and use of IP CTS equipment."[26] Characterizing the rule as "mystifying," the Court took issue with the dearth of record evidence indicating IP CTS fraud occurs, suggesting a causal relationship between hypothetical fraud and equipment pricing, or justifying why $75 is the appropriate price floor.[27] The FCC countered that its "predictive judgments" about the probable effect of the $75 are entitled to deference, but the Court explained that to warrant such deference "judgement[s] must be based on some logic and evidence not sheer speculation."[28] The Court, accordingly, determined that the FCC acted arbitrary and capriciously when promulgating the $75 Rule.

The Court then turned to the FCC's justifications for promulgating the Default-Off Rule to address fraudulent use of IP CTS technology.[29] But the Court concluded not only was fraudulent use of IP CTS a "boogeyman," but, moreover, the efficacy of the FCC's chosen means of addressing it was undercut by contrary

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23. *See id.* Sorenson also argued that the FCC's action violated the ADA, but the Court did not reach that issue.

24. *Id.* (quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983)).

25. *See id.* (quoting *State Farm*, 463 U.S. at 43).

26. *See id.*

27. *See id.* at 707-708.

28. *See id.* at 708.

29. *See id.* at 709.

evidence.[30] Because the contrary evidence cast doubt on the efficacy and necessity of the Default-Off Rule and the FCC "left these serious concerns unaddressed," its promulgation was arbitrary and capricious.

III. CONCLUSION

In sum, the Court reviewed the FCC's invocation of good cause to bypass APA rulemaking procedures *de novo*, vacating the Interim Rule because the commission failed to show that notice and comment would be impractical because the FCC's record was "too scant" to show a fiscal emergency, and "something more than an unsupported assertion is required" to establish good cause.[31].[32] The Court, moreover, vacated the FCC's final $75 and Default-Off Rules as arbitrary and capricious because the record supported neither its factual predicate nor reasoning and the agency failed to show its exercise of "predictive judgment" was based on anything more than "sheer speculation."[33]

30. *See id.* at 710.
31. *See id.* at 707, 710.
32. *See id.*
33. *See id.* at 708.

SPECTRUM FIVE LLC v. FCC

758 F.3d 254 (D.C. Cir. 2014)

In *Spectrum Five LLC v. FCC,*[1] the District of Columbia Circuit held that that a satellite operator, working in partnership with the Netherlands, lacked Article III standing to challenge the FCC's decision to grant a competitor's satellite-relocation request because vacating the *Order* was insufficiently likely to redress its injury.[2] The Court so concluded because redress would require an international orbital-location regulatory body, not subject the Court's jurisdiction, to reverse its prior determination that Bermuda had acquired the rights to the contested orbital location.[3]

I. BACKGROUND

Overlapping international and domestic authorities regulate broadcast satellites; internationally, the International Telecommunication Union (ITU) administers a treaty-based regulatory framework and, in America, the FCC regulates all satellites that transmit or receive signals within our territorial jurisdiction.[4]

A multi-national treaty, administered by the ITU, apportions orbital locations and spectrum among treaty-member nations (called "administrations" in ITU parlance).[5] The treaty's allocations, however, are not set in stone—an administration can seek to modify its apportionment by filing a request with the ITU.[6] To gain the rights to the requested location, the administration must then (1) "bring into use" the requested assignment, by operating a satellite at that location, within 8 years of filing the request and (2) reach an agreement with any affected administrations.[7]

1. Spectrum Five LLC v. FCC, 758 F.3d 254 (D.C. Cir. 2014).
2. *See id.*, at 261
3. See id.
4. *See id.*, at 256
5. *See id.*
6. *See id.*, at 257.
7. *See id.*

Bermuda[8] sought to gain the rights to a particular new orbital location[9] by modifying its apportionment under the treaty.[10] In 2005, it began the process by filing a request with the ITU, in accord with the international regulatory scheme.[11] Seeking to bring the orbital location into use, Bermuda then arranged to have a satellite, the FCC-licensed Echostar6, moved to the requested location.[12] Meanwhile, the Netherlands,[13] seeking the rights to essentially the same orbital location,[14] filed its own request with the ITU in 2011.[15] This filing, however, was subordinate to Bermuda's earlier-filed one and the location would be unavailable if Bermuda timely completed the steps to obtain the orbital rights.[16]

As an FCC-licensed satellite, FCC approval was required to move EchoStar6 and, accordingly, bring Bermuda's requested orbital location "into use."[17] To get FCC approval, a satellite operator must submit an application, which is then subject to a 30-day notice-and-comment period, after which the agency either grants or denies the application.[18]

But in early 2013, with only months remaining on the 8-year deadline for Bermuda to bring the orbital location into use, EchoStar, the satellite's owner, had yet to file an application to move it.[19] "Scrambling," the satellite owner filed an application with the FCC's International Bureau for special temporary authority (STA) to move EchoStar6.[20] Under FCC regulations, STA applications are granted "only upon a finding that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of these temporary operations would seriously prejudice the public interest."[21] The Netherlands' partner, Spectrum Five, filed an objection to the STA application because of the nation's interest in obtaining the orbital location at issue.[22]

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8. Bermuda partnered with EchoStar Satellite Operating Corporation, whose satellite was subject to the United States' jurisdiction.

9. Bermuda sought to secure the orbital location 96.2º W.L.

10. *See Spectrum Five*, 785 F.3d at 257.

11. *See id.*

12. *See id.*

13. The Netherlands partnered with Spectrum Five, the Petitioner in this suit.

14. The Netherlands sought 95.15º W.L.

15. *See Spectrum Five*, 785 F.3d at 258.

16. *See id.*, at 256

17. *See id.*, 257-58.

18. *See id.*

19. *See id.*

20. *See id.*, at 258.

21. *See id.* (citing 47 C.F.R. § 25.120(b)(1)).

22. *See id.*

The International Bureau granted the STA request and the Netherlands' partner sought Commission-level review of the Bureau's determination, but the FCC upheld the Bureau's determination in its *STA Order*.[23] A few months later, the ITU determined that Bermuda had secured the rights to the orbital location at issue and recorded the new assignment in its Frequency Register.[24]

Spectrum Five then petitioned the Court for review of the FCC's decision; arguing that it was arbitrary and capricious.[25] They sought to have the Court vacate the *STA Order* and compel the FCC to take steps that Petitioner believes would lead the ITU to reverse its determination that Bermuda had secured the rights to the contested orbital location.[26]

II. ANALYSIS

In *Spectrum Five*, the Court considered a "redressability" challenge to Petitioner's Article III standing to obtain judicial review of the FCC's *STA Order*.[27] The specific question was whether, under the circumstances, Spectrum Five could demonstrate that vacating the *STA Order* would likely cause the ITU to reverse course and determine that Bermuda had not obtained a particular orbital location's rights.[28]

As the Court explained, Article III standing is an "irreducible constitutional minimum" fulfillment of which requires a party to show (1) an injury in fact, (2) that the challenged conduct caused that injury, and (3) "that a favorable decision on the merits will likely redress the injury.''[29] When that redress depends on the choices and actions of a third party, the burden is on the proponent "'to adduce facts showing that those choices have been or will be made in such manner as to . . . permit redressability of injury.'''[30] The Court noted that "[h]ere, the asserted injury is even one step further removed from the typical case in which redress depends on the independent

23. *See id.*, at 259 (citing EchoStar Satellite Operating Co. Application for Special Temporary Authority Related to Moving the EchoStar6 Satellite from the 77º W.L. Orbital Location to the 96.2º W.L. Orbital Location, and to Operate at the 96.2º W.L. Orbital Location, Memorandum Opinion & Order, FCC 13-93, 28 FCC Rcd 10412, para. 1 (2013)).

24. *See id.*, at 256, 259.

25. *See id.*, at 260.

26. *See id.*

27. *See id.*, at 256.

28. *See id.*, at 260.

29. *See id.* (citing U.S. Ecology, Inc. v. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000); Klamath Water Users Ass'n v. FERC, 543 F.3d 735, 738 (D.C. Cir. 2008)).

30. *See id.*, at 260-61 (citing *U.S. Ecology*, 231 F.3d at 24-25).

action of a third party not before the court, because the ITU is an international organization that is not regulated by our government and therefore not bound by this Court or the FCC."[31]

In response to the standing challenge, Petitioner argued that vacating the *STA Order* would revoke both the United States' consent to bring EchoStar6 into use at the contested orbital location and the domestic authority under which it operates, thereby "significantly" increasing the likelihood that the ITU will find that Bermuda never brought the orbital location into use.[32]

Petitioner first pointed to ITU space-station frequency-assignment regulations,[33] which provide that such assignments are "brought into use," when they have the "capability" of transmitting or receiving the assignment, and argued that the requisite "capability," requires "lawful domestic authority to operate."[34] But, as the Court explained, this reading: (a) is contrary to the ordinary meaning of "capability," which means "power or ability" and not "legal authority";[35] (b) "makes little sense," in the context of the ITU's regulatory framework;[36] and (c) finds no support in the ITU's published guidance on how to demonstrate a satellite's "capability."[37] Thus, Petitioners failed to establish that for a satellite to be "brought into use," the ITU requires the satellite to have domestic legal authority to transmit and receive signals.[38] Accordingly, the Court found it uncertain "at best" whether vacating the order, thereby revoking the satellite's domestic authority, would mean that the orbital location had never been brought into use.[39]

The Court explains, moreover, that "even if this [domestic-authority] uncertainty . . . does not, standing alone, render [Petitioner's] claim insufficiently likely of redress, it clearly does when considered in combination with other aspects of the ITU's decision making process."[40] First, the ITU appears to give administrations only 90 days to object when another nation uses a satellite licensed under its laws to bring an assignment into use, which, in this case, lapsed in 2013.[41]

31. *See id.*, at 261.
32. *See id.*, at 260.
33. *See id.*, at 261 (citing ITU Radio Regs., Art. 11.44 B).
34. *See id.* (quoting Petitioner's Brief at 33-34, 2013 WL 6139922 (Nov. 21, 2013)).
35. *See id.*
36. *See id.*, at 261-62.
37. *See id.*, at 262
38. *See id.*
39. *See id.*
40. *Id.*
41. *See id.*, at 263.

Even assuming, *arguendo*, that the ITU would not apply the 90-day rule under the circumstances, redress would still hinge on discretionary acts of two regulatory bodies.[42] A letter from the ITU indicates it would only: (a) upon receiving an objection from the FCC (b) initiate an investigation into Bermuda's filing.[43] First, vacating the *STA Order* would not require the FCC to file a *post hoc* objection with the ITU.[44] Second, even if the FCC *did* object, that would only trigger an investigation, after which the ITU "may reaffirm its initial determination, or it 'could' reach a different conclusion."[45] This would merely "put Spectrum Five back to square one: the ITU would reconsider its determination," which is insufficient to meet the burden of showing a "significantly increased likelihood" of redress.[46]

The Court also distinguished cases finding redress dependent on a third-party agency's action sufficiently likely by pointing to ITU's statement that "its decision will depend on its independent assessment, 'irrespective' of [the Court's] views."[47] Unlike those cases, in which "the ultimate decision by the third party (*domestic* agency) not before the court depended significantly—if not solely—upon [its] ruling," in this case the "Court would not have any impact on the ITU's reconsideration."[48]

The Court concluded its analysis by briefly explaining that four further steps Petitioner urged it to take would not cure its redressability problem.[49] The first three, essentially, would entail the Court "directing the FCC to inform the ITU that the [contested] filing was not brought into use," which would only lead to reconsideration of the filing, not an ITU reversal.[50] The remaining request, that the Court order the FCC to revoke its ratification of a coordination agreement essential to the assignment also fails, because nothing indicates that an "an out-of-time, post-hoc 'objection' by the FCC is likely to cause the ITU to" suppress the filing.[51] Thus, none of the proposed measures would make redress sufficiently likely to satisfy the requirements of Article III standing.

42. *See id.*, at 263-64.
43. *See id.*, at 263.
44. *See id.*
45. *Id.*
46. *Id.*, at 263-64.
47. *See id.*, at 264.
48. *Id.* (citing Ams. for Safe Access v. DEA, 706 F.3d 438, 440 (D.C. Cir. 2013); Town of Barnstable v. FAA, 659 F.3d 28, 31-32 (D.C. Cir. 2011)).
49. *See id.*, at 264-65.
50. *Id.*, at 265.
51. *See id.*

III. CONCLUSION

In sum, the Court held that Petitioners failed to show vacating the FCC's *STA Order* would significantly increase the likelihood that the ITU, a third-party not subject to the Court's jurisdiction, would suppress the contested filing.[52] The Court, accordingly, dismissed the *Spectrum Five* petition for want of Article III standing.[53]

52. *See id.*
53. *See id.*

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION V. FCC

752 F.3d 1018 (D.C. Cir. 2014)

In *Illinois Public Telecommunications Association v. FCC*,[1] the District of Columbia Circuit held that the FCC has congressionally-granted discretion to determine the remedies available for violations of the prohibition on Bell Operating Companies charging discriminatory rates to competitor payphone operators, and that the Commission reasonably exercised that discretion when leaving individual remedial determinations up to the states.[2]

I. BACKGROUND

With the Telecommunications Act of 1996, Congress amended the Communications Act of 1934 to add new Section 276, which "prohibit[s] Bell Operating Companies from subsidizing their own payphones or charging discriminatory rates to competitor payphone providers."[3] Congress intended the provision "to ensure fair competition in the payphone market" by prohibiting "Bell Operating Companies from exploiting their control over the local phone lines to discriminate against other payphone providers in the upstream payphone market."[4] Congress then delegated the duty of implementing the statute to the FCC and provided that the FCC's regulations would preempt any inconsistent state laws.[5]

Five years after the statute took effect, the FCC issued further guidance on the pricing standard that state regulatory commissions, tasked with applying Section 276 and the FCC's regulations, should use to determine the appropriate rate.[6] Subsequently, a number of states determined that the Bell Companies had been charging excessive rates, which must be reduced.[7] The Bell Companies did so, effectively granting prospective relief to affected competitors, but a

1. Ill. Pub. Telecomms. Ass'n v. FCC, 752 F.3d 1018 (D.C. Cir. 2014).
2. *Id.* at 1020.
3. *See id.* (citing 47 U.S.C. § 276 (2012)).
4. *See id.*
5. *See id.*
6. *See id.* at 1021.
7. *See id.*

group of independent payphone operators also sought refunds for overpayments dating back to the requirement's 1997 effective date.[8]

In response, states took different tacks.[9] The Illinois commission and courts found that the field-rate doctrine, prohibiting retroactive revisions to regulator-approved rates, barred the refunds.[10] In New York, the commission and courts had resisted awarding refunds, but left the question open pending the outcome of the instant case.[11] In Ohio the outcome was split, with the state commission granting partial refunds and state courts citing the field-rate doctrine and procedural grounds to deny them.[12] Dissatisfied, the independent payphone operators in these three states took their case to the FCC, asking it to clarify that Section 276 created an absolute entitlement to the requested refunds.[13] In response, the FCC issued a 2013 declaratory ruling (the *Refund Order*),[14] interpreting Section 276 to permit but not require states to issue refunds for periods of overpayment dating back to 1997.[15]

Still dissatisfied with this outcome, the Illinois Public Telecommunications Association, a trade association representing independent payphone operators in New York, Ohio, and Illinois, filed a petition for review in the District of Columbia Circuit.[16] The Petitioners asked the Court to decide "whether independent payphone providers who were charged excessive rates by Bell Operating Companies are entitled to refunds or instead are entitled only to prospective relief in the form of lower rates."[17]

8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.* at 1021-22.
12. *See id.* at 1022.
13. *See id.*
14. *See id.* (citing Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecomm. Act of 1996, Declaratory Ruling and Order, 28 FCC Rcd 2615, 2621 (2013)).
15. *See id.*
16. *See id.*
17. *Id.* at 1020.

II. ANALYSIS

Mounting an Administrative Procedure Act (APA) challenge to the *Refund Order*, the independent payphone operators challenge the *Refund Order* as ‘‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’’[18] They advanced three grounds for overturning it, the Court rejected each in turn.[19]

A. Consistency with Language of Section 276(a)

The independent payphone operators first contend that the *Refund Order* is contrary to the language of the Section 276(a), which they read as unambiguously creating an absolute entitlement to refunds for the overpayments.[20] The Court, however, explained that “Section 276(a) does not say that refunds are required, or that refunds are not required, or anything at all about refunds”; in fact, it is silent as to a mechanism for enforcing its prohibitions.[21] Congress’s silence on the issue of remedy is more meaningful in light of its proscription of remedies in other roughly contemporaneous amendments to the Communications Act of 1934 and the usual discretion afforded agencies to fashion remedies.[22] The Court, accordingly, held that Section 276(a) does not unambiguously proscribe any remedy for its violation concluded that it must uphold any reasonable FCC interpretation.[23]

B. Consistency with Language of Section 276(c)

Next, the independent payphone operators argued that the Refund Order is contrary to the text of Section 276(c), which provides that, where conflict exists, the FCC’s payphone pricing regulations preempt state law.[24] First, the Court explained that this argument rests on a misreading of the *Refund Order*, which provides that states *may* order refunds but does not require them to do so.[25] Thus, denying a refund is not inconsistent with the regulations and would not be preempted under Section 276(c).[26]

18. *Id.* at 1022 (quoting 5 U.S.C. § 706(2)(A)).
19. *See id.* at 1020.
20. *See id.* (citing 47 U.S.C. § 276(a)).
21. *See id.* 1022-23.
22. *See id.*
23. *See id.*
24. *See id.* at 1023-24 (citing 47 U.S.C. § 276(c)).
25. *See id.* at 1024.
26. *See id.*

As a corollary of this argument, the independent payphone operators contend that relying on state's refund determinations constitutes an unlawful subdelegation.[27] The Court began by noting that "states do not require any subdelegation of authority from the FCC to adjudicate federal statutory claims," because our federal system already assigns them this power.[28] Moreover, the petitioner's true complaint is not about the state's ability to adjudicate these disputes at all but rather the FCC's refusal to overrule the states in specific instances. Finally, the Court distinguished this case from *United States Telecom Association v. FCC*,[29] the leading unlawful subdelegation case, explaining that Section 276 lacks mandatory language expressly directing that the FCC be the arbiter of specific refund disputes.[30]

Thus, the Court concluded, leaving the question of remedy for overpayment under Section 276 up to the states neither violated Section 276(c)'s preemption provision nor constituted an unlawful subdelegation of federal power.[31]

C. Reasonableness of the FCC's Interpretation

Having already determined that, because Section 276(a) is silent on the question of remedy, any reasonable FCC interpretation must be upheld, the Court turned to "whether the [FCC's] was arbitrary or capricious."[32] When resolving such questions, ''[a]lthough [an] enforcement regime chosen by the [FCC] may not be the only one possible, we must uphold it as long as it is a reasonable means of implementing the statutory requirements.''[33]

The Court first considered "[t]he independent payphone provider['s contention] that the FCC's approach is arbitrary and capricious because it leads to refund determinations that vary from state to state."[34] After considering general principles of federalism, the Court concluded that "there is nothing inherently arbitrary or capricious about state-to-state variation . . . [or] the FCC's decision not to further exercise its preemptive power to dictate a uniform

27. *See id.*
28. *See id.*
29. U.S. Telecom Ass'n v. FCC, 359 F.3d 554 (D.C.Cir.2004).
30. *See Ill. Pub. Telecom. Ass'n*, 752 F.3d at 1024.
31. *See id.* at 1024.
32. *Id.*
33. *Id.* at 1024 (quoting Global Crossing Telecom., Inc. v. FCC, 259 F.3d 259, 745 (D.C. Cir. 2001)).
34. *Id.* at 1025.

national answer to the refund question," especially given the "cooperative federalism" used in parts of the Communications Act.[35]

Next the Court considered the independent payphone operators' particular objection to states' use of the field-rate doctrine.[36] The Court was unmoved, explaining that it could hardly be unreasonable or arbitrary to allow the use of a doctrine that "has long been 'a central tenet of telecommunications law.'"[37] Further, the doctrine is not an "insuperable barrier to refunds or otherwise negate the FCC's position that refunds are permitted in individual cases," pointing out that two states have granted refunds notwithstanding the field-rate doctrine.[38]

The Court concluded that neither the state-to-state variation in refund decisions nor states' application of the field-rate doctrine rendered the Refund Order arbitrary and capricious and that there is "nothing unreasonable about how the FCC filled the statutory gap and exercised its discretion."[39]

III. CONCLUSION

In sum, the Court first held that Section 276(a) does not unambiguously proscribe any remedy for its violation and that it must uphold any reasonable FCC interpretation.[40] Next, the Court concluded that the FCC's decision to leave remedial determinations for overpayment under Section 276 up to the states neither violated Section 276(c)'s preemption provision nor constituted an unlawful subdelegation of federal power.[41] Finally, the Court held that neither the state-to-state variation in refund decisions nor states' application of the field-rate doctrine rendered the *Refund Order* arbitrary and capricious and that there is "nothing unreasonable about how the FCC filled the statutory gap and exercised its discretion."[42]

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35. *Id.*
36. *See id.*
37. *Id.* (quoting TON Services, Inc. v. Qwest Corp., 493 F.3d 1225, 1236 (10th Cir. 2007)).
38. *Id.* at 1025-26.
39. *Id.* at 1026.
40. *See id.* at 1023.
41. *See id.* at 1024.
42. *Id.* at 1026.