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Ameren Corp. v. FCC

No. 16-1683, 2017 WL 3224187 (8th Cir. July 31, 2017)

Ryan Farrell *

In *Ameren Corp. v. FCC*,[1] the United States Court of Appeals for the Eighth Circuit. denied a petition for review by utility companies of a November 2015 FCC order that governed the rates utility companies may charge telecommunications providers for attaching their networks to utility-owned poles.[2] The FCC's order equitized the rates utility companies could charge telecommunications and cable providers.[3] The Eighth Circuit panel held that the 2015 order was a permissible construction of the Pole Attachments Act.[4]

The debate over rates for pole attachments has gone on for several decades. Congress first addressed this issue by enacting the Pole Attachments Act .[5] This legislation gave the FCC the authority to determine whether pole attachment rates by providers of cable and telecommunications providers are "just and reasonable."[6] The statute also set forth a lower and an upper bound for "just and reasonable" rates.[7] The lower bound rate "assures a utility the recovery of not less than the additional cost of providing pole attachments."[8] The upper bound rate was "determined by multiplying the percentage of the total usable space…which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole."[9] The FCC set the upper bound rate, known as the Cable Rate, by multiplying the space factor (the space occupied by an attachment divided by the total useable space on the pole), the net cost of a bare pole, and a carrying charge rate.[10]

Initially, Section 224 applied to only cable providers.[11] However, Congress amended Section 224 as part of the Communications Act rewrite in 1996, expanding the FCC's authority to cover pole attachments by telecommunication providers.[12] Until 2011, the FCC determined the "cost"

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1. Ameren Corp. v. FCC, No. 16-1683, 2017 WL 3224187 (8th Cir. July 31, 2017).
2. *Id.* at *1
3. *See Id.* at *2
4. *Id.* at *4
5. *See* 47 U.S.C. 224 (2012).
6. *See Ameren Corp.* at *2. (citing 47 U.S.C. 224(b)(1)
7. *Id.*
8. *Id.*
9. *Id.* (citing 47 U.S.C. 224(d)(1)
10. *Id.*
11. *Id.*
12. *Id.*

for the Telecom Rate the same as for the Cable Rate. The FCC also calculated the space factor differently by apportioning two-thirds of the costs of the unusable space. This resulted in the Telecom Rate often being higher than the Cable Rate. Industry stakeholders began to voice concern that the risk of having to pay the Telecom Rate possibly deterred cable providers from expanding their services.[13]

The FCC attempted to implement equalization between the two rates in an April 2011 order.[14] The order reinterpreted the word "cost" in the underlying statute and defined it as 66 percent of the pole's fully allocated cost for an urban area, and 44 percent of a non-urban area. Under this order, the Telecom Rate approximated the Cable Rate.

Electric utility companies challenged this rule in court, alleging it was inconsistent with Section 224.[15] Specifically, the utilities' argued that "cost" in Sec. 224(e) must mean the fully allocated costs of a pole, and not 66 or 44 percent of the pole's fully allocated costs as set forth in the April 2011 order.[16] The D.C. Circuit upheld the April 2011 rule and rejected the utilities' petition for review.[17] The D.C. Circuit, applying *Chevron* analysis, held that the term "cost" in Sec. 224(e) is ambiguous, and the FCC's interpretation of the statute was reasonable in attempting to pursue equalization between the Cable Rate and the Telecom Rate.[18]

Despite the April 2011 order, the FCC found in 2015 that the order had failed to equalize the Telecom and Cable rates.[19] In another effort to achieve equalization, the FCC adopted another order in November 2015.[20] The November 2015 order was a response to utilities rebutting the presumptions of 5 attachers in an urban area, and 3 attachers in a non-urban area, increasing the Telecom rate.[21] The November 2015 order eliminated the distinction between urban and non-urban areas, and adopted one universal definition of "cost" – basing it on the average number of attachers to a pole within an area. The utilities brought a legal challenge to the November 2015 order, seeking a petition for review by the Eighth Circuit.

Like the D.C. Circuit when reviewing the FCC's April 2011 analysis, the Eighth Circuit court applied Chevron analysis to the November 2015 order. [22] Also like the D.C. Circuit in 2011, the Eighth Circuit found the word "cost" in Section 224 as ambiguous, and found that the FCC's order was a

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13. *Id.* at *2

14. Implementation of Section 224 of the Communications Act, A National Broadband Plan for Our Future, *Report and Order and Order on Reconsideration*, 26 FCC Rcd. 5240 (2011) [hereinafter *2011 Broadband Order*]

15. *See* *2 (citing Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183 (D.C. Cir.), *cert. denied* 134 S.Ct. 118, 187 (2013)).

16. *Id.*

17. *Id.* *2

18. *Am. Elec. Power*, 708 F.3d at 186, 189–90.

19. In the Matter of Implementation of Section 224 of the Act, *Order on Reconsideration*, 30 FCC Rcd. 13731 (2015) (hereinafter *November 2015 Order*]

20. *Id.*

21. *Id.* at 13738, ¶ 18

22. *See Ameren Corp,* at *2–3

reasonable interpretation of the ambiguity.[23] The court contrasted the definition of "cost" in 224(d) and 224(e).[24] In 224(d), Congress used "cost" to set forth the lower and upper bounds. By contrast, Congress did not specify what type of cost should be used to calculate the Telecom rate.[25]

The Utilities had argued that Congress had intended to establish two different rates in Sec. 224(d)(1) and 224(e), and that the November 2015 order went against Congress' intention.[26] The court rejected this argument, and noted that because "cost" in Sec. 224 is ambiguous, the same "cost" definition need not be used to determine the upper bound cable rates, and the Telecom rate.[27]

The Court ultimately found that the interpretation was reasonable and deferred to the FCC's approach.[28] This represents the second time a legal challenge to the FCC's order by utility companies opposing the equalization of the Cable and Telecom rates was defeated by Federal Courts.

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23. *Id.*
24. *See Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id*. at 1014.

Bais Yaakov of Spring Valley v. FCC

852 F.3d 1078 (D.C. Cir. 2017)

Kristin Capes *

In *Bais Yaakov of Spring Valley v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit vacated an FCC Order which interpreted the FCC's 2006 Solicited Fax Rule to be lawful.[2] The Court held that a provision of the 2006 Solicited Fax Rule, which required businesses to include an opt-out notice in their solicited fax advertisements, was unlawful.[3]

BACKGROUND

When the Junk Fax Prevention Act was enacted in 2005, it placed strict limitations on who companies could send unsolicited fax advertisements to, and required that all unsolicited fax advertisements include an opt-out notice.[4] Under the Junk Fax Prevention Act, the FCC was given the authority to make regulations to implement the act.[5] In 2006, the FCC issued the Solicited Fax Rule, which included a provision requiring businesses who send out solicited fax advertisements to include opt-out notices.[6]

In 2010, Petitioner Anda requested a declaratory judgment from the FCC establishing that they were not required to include opt-out notices in their fax advertisements to entities who had given them permission to send the facsimiles.[7] Petitioner Anda requested the declaratory judgment in response to earlier litigation they had been defendants in.[8] The earlier litigation was a class action suit, in which the plaintiffs sought $150 million in damages from Petitioner Anda because their fax advertisements did not meet the requirements of the FCC's Solicited Fax Rule.[9] Many of plaintiffs who sought damages for the lack of opt-out notices on Petitioner Anda's fax advertisements were businesses who had given Petitioner Anda express permission to send fax advertisements.[10]

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1. Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078 (D.C. Cir. 2017).
2. *See Id.*
3. *Id.* at 1083.
4. *Id.* at 1080.
5. *Id.*
6. *Id.* at 1079.
7. *Id.* at 1081.
8. *Id.*
9. *Id.*
10. *Id.*

In response to Petitioner Anda's declaratory judgment request, the FCC stated that it did have the authority under the Junk Fax Prevention Act to require companies to include opt-out notices in their solicited fax advertisements, but that they would give a waiver out for any faxes sent without notices prior to April 30, 2015.[11] In response to the FCC's ruling, Petitioner Anda and the other companies who had joined onto the declaratory judgment request sought a review of the decision from the United States Court of Appeals for the District of Columbia Circuit.[12]

ANALYSIS

The United States Court of Appeals for the District of Columbia Circuit held that the Junk Fax Prevention Act did not give the FCC authority to require businesses to include opt-out notices in their solicited fax advertisements.[13] The Court held the act included a distinct line between unsolicited fax advertisements and solicited fax advertisements.[14] While the FCC argued that the language within the act does not prohibit such a rule and therefore they were within their authority to make such a regulation, the Court disagreed. The Court stated that "the FCC may only take action that Congress has *authorized*." Accordingly, the FCC could not reach beyond the plain language of the Act as they had when they created the Solicited Fax Rule.[15]

CONCLUSION

The United States Court of Appeals for the District Court Circuit found the provision in the FCC's Solicited Fax Rule that required solicited fax advertisements to include an opt-out notice unlawful, and vacated the FCC's Order.[16]

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11. *Id.*
12. *Id.*
13. *Id.* at 1082.
14. *Id.*
15. *Id.*
16. *Id*. at 1083.

Chelmowski v. FCC

No. 15-1425, 2016 U.S. App. LEXIS 7000 (D.C. Cir. Apr. 18, 2016) (per curiam)

Ryan Farrell *

In Chelmowski v. FCC,[1] the Court of Appeals for the District of Columbia dismissed a motion for production of documents, as well as a separate motion for a *Vaughn* index containing certain FCC documents. The order signifies the finality of certain agency decisions made by the FCC.[2]

The petitioner, James Chelmowski, had been engaged with the FCC.[3] Chelmowski filed a formal complaint against AT&T Mobility LLC, which was dismissed by the FCC on July 10, 2015.[4] In October 2015, the FCC's Enforcement Bureau issued an Order on Reconsideration denying the petition for reconsideration of the July 2015 dismissal.[5] One month later, Chelmowski filed a petition review of the staff-level Order on Reconsideration in the D.C. Circuit Court of Appeals.[6]

On September 11, 2015, Chelmowski filed two FOIA requests with the FCC, seeking documents related to informal complaints he made to the FCC.[7] The FCC responded on September 17, claiming the documents had been withheld without explanation.[8] Chelmowski appealed the FCC's FOIA decision to withhold to the Office of General Counsel.[9] The FCC supplied additional documents to Chelmowski.[10] Chelmowski subsequently filed motions in the appeal to the D.C. Circuit seeking release of records the FCC withheld from disclosure under VOIA, as well as a *Vaughn index of the documents and portions* withheld by the FCC.[11] The FCC subsequently

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1. Chelmowski v. FCC, No. 15-1425, 2016 U.S. App. LEXIS 7000 (D.C. Cir. Apr. 18, 2016) (per curiam)
2. *Id.*
3. *See* Brief for Respondent, Opposition to Motion for Request for Documents & Motion For a Vaughn Index, at *2, Chelmowski v. FCC, No. 15-1425, 2016 U.S. App. LEXIS 7000 (D.C. Cir. Apr. 18, 2016) [hereinafter *FCC Motion*] Chelmowski subsequently filed requests for records containing internal FCC information in the Northern District of Illinois. *See also Chelmowski v. FCC*, No. 16-5587, 2017 WL 736893 (N.D. Ill. Feb. 24, 2017) (Coleman, J.)
4. *Id.*
5. James Chelmowski v. AT&T Mobility, *Order on Reconsideration*, DA 15-1175 (EB Oct. 16, 2015)
6. *FCC's motion*, *supra* note 3, at *2
7. *Id.*
8. *Id.* at *2-3.
9. *Id.* at *3.
10. *Id.*
11. *Id.* at *4

moved to dismiss the claims, claiming that Chelmowski did not properly seek judicial review, and that the D.C. Circuit lacked jurisdiction to address his claims.[12]

The two questions for the Court were as follows. First, are orders from the Chief of the FCC's Enforcement Bureau final reviewable orders? Second, does the D.C. Circuit have jurisdiction to address the claims? The D.C. Circuit court answered no to both questions dismissed both motions.

In addressing the first question, the FCC noted that "The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action taken to a delegation under paragraph (1) of this subsection."[13] In addressing the second question, the FCC found Chelmowski did not follow proper judicial review in this case, noting that original jurisdiction to review an agency's final disposition regarding a FOIA request lies in the District Court, and not in the D.C. Circuit.[14] As such, the FCC's motion to dismiss on both counts was granted.

12. *Id.* at *4–5

13. Richman Brothers Records, Inc. v. FCC, 124 F.3d 1302, 1303 (D.C. Cir. 1997).

14. *FCC Motion* at *1

FTC v. AT&T Mobility LLC

835 F.3d 993 (9th Cir. 2016)

Rosie Brinckerhoff *

In *FTC v. AT&T Mobility*, the United States Court of Appeals for the Ninth Circuit dismissed an action brought by the Federal Trade Commission (FTC) against AT&T under Section 5 of the FTC Act, for failing to disclose to its customers its practice of throttling data speeds for consumers with unlimited mobile data plans. In interpreting the Section 5 common carrier exemption to be status-based, the Court held that AT&T is immune from Section 5 liability due to its status as a common carrier. Convoluting the jurisdictional boundaries between the FTC and the Federal Communications Commission (FCC), the Court's analysis in *FTC v. AT&T Mobility LLC* exposes the possibility that even engaging in a negligible amount of common carrier service may be enough to qualify all of an entity's activities for the common carrier exemption.

BACKGROUND

Pursuant to Section 5 of the FTC Act, the FTC is authorized to "prevent persons, partnerships, or corporations, *except . . . common carriers subject to the Acts to regulate commerce* . . . from using . . . unfair or deceptive acts or practices in or affecting commerce."[1] Section 5(a)(2) contains a list of industries that enjoy a jurisdictional carve-out from FTC authority. This list includes banks, airlines, federal credit unions, and of particular relevance in the instant case, common carriers.[2]

The FTC Act contains no explicit definition of "common carrier."[3] However, "common carrier" is defined in the Communications Act of 1934 as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy."[4] Pursuant to the Communications Act of 1934, the FCC enjoys regulation and enforcement capabilities of common carriers.[5]

Giving rise to a jurisdictional overlap between the FTC and the FCC, "[a]cts to regulate commerce" is defined in the FTC Act as including the

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1. 15 U.S.C. § 45(a)(2) (emphasis added).
2. *Id.*
3. 15 U.S.C. § 44.
4. 47 U.S.C. § 153(11).
5. 47 U.S.C. § 151.

Interstate Commerce Act of 1887,[6] the Communications Act of 1934, and "all Acts amendatory thereof and supplementary thereto."[7]

In the instant case, the FTC filed suit against AT&T in 2014 under its Section 5 enforcement authority asserting that, despite AT&T's unequivocal marketing promises of unlimited data, the company began throttling data speeds for its customers with unlimited mobile data plans.[8] At the core of the FTC's claim was that AT&T was promising unlimited mobile data to its customers that it failed in fact to provide. The FTC's initial complaint did not challenge the overall fairness of AT&T's data throttling practices per se; rather, the FTC's primary grievance was that AT&T acted deceptively in failing to adequately disclose to its customers the extent of its data throttling program.[9]

The central dispute in the initial 2014 litigation between the FTC and AT&T was the scope of the common carrier exemption. AT&T argued that the exemption was status-based, meaning that entities enjoying the common carrier status cannot be regulated by the FTC under Section 5, even when "providing services other than common carri[er] services."[10] The FTC argued that the common carrier exemption was activity-based, meaning "the common carrier ex[emption] applies only if an entity has the status of a common carrier and is actually engaging in common carrier specific-services."[11]AT&T subsequently filed a motion to dismiss in the United States District Court for the Northern District of California arguing that the company is immune from Section 5 liability due to its exemption under the statute as a "common carrier[] subject to the Acts to regulate commerce."[12]

Injecting a new layer of complexity to the case, while AT&T's motion to dismiss was pending before the District Court, the FCC issued an order reclassifying mobile data service from its existing status as a non-common carrier service to a common-carrier service.[13] Although the order explicitly stated that reclassification would not apply retroactively,[14] AT&T argued to the District Court that the Reclassification Order would in effect strip the FTC's Section 5 enforcement authority for any past or future conduct by AT&T.[15]

The District Court denied AT&T's motion to dismiss, agreeing with the FTC's interpretation of Section 5 as constituting an activity-based exemption for common carriers, rather than a status-based exemption.[16] AT&T

6. 49 U.S.C. Subtitle IV.
7. 15 U.S.C. § 44.
8. FTC v. AT&T Mobility LLC, 835 F.3d 993, 995 (9th Cir. 2016).
9. *Id.* at 996.
10. FTC v. AT&T Mobility LLC, 87 F. Supp. 3d 1087, 1091 (N.D. Cal. 2015).
11. *Id.*
12. 15 U.S.C. § 45(a)(2).
13. FTC v. AT&T Mobility LLC, 835 F.3d 993, 996 (9th Cir. 2016).
14. *Id.*
15. *Id.*
16. *Id.*

subsequently appealed the District Court's decision to the United State Court of Appeals for the Ninth Circuit.[17]

ANALYSIS

The central issue on review by the Ninth Circuit was "whether the common carrier exemption in section 5 is status-based, such that an entity is exempt from regulation as long as it has the status of a common carrier under the 'Acts to regulate commerce,' or is activity-based, such that an entity with the status of a common carrier is exempt only when the activity the FTC is attempting to regulate is a common carrier activity."[18] In essence, the issue before the Ninth Circuit boiled down to whether Section 5's common carrier exemption applied to AT&T as a total entity, or whether only those AT&T activities duly classified as common carrier activities should be exempt from FTC jurisdiction.

By way of textbook-style statutory interpretation, the Ninth Circuit court split from the District Court's finding, ultimately finding the FTC Act's common carrier exemption to be status-based.[19] Pursuant to this interpretation, the Ninth Circuit concluded that the FTC was precluded from bringing a Section 5 enforcement action against AT&T due to the company's established status as a common carrier.[20]

In reaching its conclusion, the Ninth Circuit court focused on the plain language of Section 5 of the FTC Act.[21] The Court compared the statute's common carrier exemption to the other exemptions enumerated in Section 5.[22] In particular, the Court discussed the exemptions for banks, federal credit unions, savings and loan institutions, and air carriers and foreign air carriers, all of which the FTC acknowledged as status-based exemptions.[23] Due to the striking similarities between the statute's common carrier language and that of the other Section 5 exemptions, the Court reasoned that the "common carrier" exemption should be read similarly as a status-based exemption.[24]

Additionally, the Court looked to both the legislative history and the congressional intent behind the various Section 5 exemptions, specifically focusing on the statute's exemption for "entities 'subject to' the Packers and Stockyards Act."[25] Although the Packers and Stockyards Act exemption was originally status-based, the Court explained that Congress amended the statute's language to "exempt entities 'insofar as they are subject' to the Packers and Stockyards Act," essentially making the exemption activity-

17. *Id*. at 997–98.
18. *Id*.
19. *Id*. at 998.
20. *Id*.
21. *Id*. at 999.
22. *Id*. at 998.
23. *Id*.
24. *Id*.
25. *Id*. at 1002.

based.[26] The Court found this to be highly significant because Congress only amended the Packers and Stockyards Act exemption, leaving all of the other Section 5 exemptions unchanged. According to the Court, if Congress had so intended to, it could have amended or altered the common carrier exemption to explicitly clarify that the exemption is activity-based.[27] Because Congress amended one part of the Section 5 exemptions and left all of the other exemptions unchanged, the Ninth Circuit split from the District Court by ultimately concluding that Congress must not have intended to effectuate a transfer from a status-based to an activity-based exemption for common carriers under Section 5 of the FTC Act.[28]

CONCLUSION

The Ninth Circuit ultimately reversed the District Court's holding, concluding that AT&T enjoyed a status-based common carrier exemption and is therefore not within the FTC's jurisdiction. The Court declined to consider the issue of whether the FCC's Reclassification Order could be applied to AT&T retroactively.[29] The Court further declined to address the effect of overlapping regulations and oversight between the FTC and FCC common carrier regulation, refraining from comment on how to reset and rectify the boundaries between the agencies' respective jurisdictions.[30] The Ninth Circuit's analysis leaves open the possibility that so long as any segment of a company's business is classified as a common carrier, then all of a company's business activities fall outside of the scope of FTC jurisdiction. As of May 9, 2017, the U.S. Court of Appeals for the Ninth Circuit issued an order granting the FTC's request for rehearing *en banc* of the court's decision for dismissal.[31] The rehearing is currently pending before the Ninth Circuit.

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26. *Id.* at 1002.
27. *Id.* at 998.
28. *Id.* at 1002.
29. *Id.* at 1003.
30. *Id.*
31. FTC v. AT&T Mobility LLC, No. 15-16585, 2017 U.S. App. LEXIS 8236 (9th Cir. Cal. May 9, 2017).

Global Tel*Link v. FCC

859 F.3d 39 (D.C. Cir. 2017)

Negheen Sanjar *

In *Global Tel*Link v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit granted in part and denied in part petitions for review of the FCC's order regulating inmate calling services ("ICS") by setting permanent rate caps and ancillary fee caps for interstate and intrastate ICS calls.[2]

I. BACKGROUND

The Communications Act of 1934 ("1934 Act") granted the FCC regulatory authority over interstate telephone services, but left the regulation of intrastate telephone services primarily to the states.[3] This authority over interstate telephone services includes the authority to ensure all charges related to interstate calls are "just and reasonable."[4] The 1934 Act includes a presumption against the FCC's assertion of regulatory authority over intrastate communications.[5] However, the Telecommunications Act of 1996 ("1996 Act") gave the FCC some authority regarding intrastate activities.[6] The 1934 Act's presumption against FCC authority over intrastate communications is still in effect where Congress has remained silent, meaning that the FCC cannot regulate an aspect of intrastate communications that is not governed by the 1996 Act on the grounds that it has an ancillary effect on matters within the Commission's primary jurisdiction.[7]

In an effort to promote competition among payphone service providers, Congress enacted § 276 of the 1996 Act, which grants the FCC the authority to regulate, "inmate telephone services in correctional institutions, and any ancillary services."[8] This section further authorizes the FCC to act in a manner that promotes competition in the market.[9] Section 276 also preempts any state

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1. Global Tel*Link v. FCC, 859 F.3d 39 (D.C. Cir. 2017).
2. *See id.* at 44–45.
3. The Communications Act of 1934, 47 U.S.C. § 152(b).
4. 47 U.S.C. § 201(b).
5. 47 U.S.C. § 152(b).
6. *See* 859 F.3d at 45.
7. *See id.* at 45–46.
8. 859 F.3d at 46; *see also* 47 U.S.C. § 276(d)
9. *See* 859 F.3d at 46.

requirements that are inconsistent with FCC regulations pursuant to that section.[10]

Correctional facilities obtain telephone services through long-term exclusive contracts, for which payphone providers submit bids.[11] Site commissions, which usually consist of 20% to 63% of the provider's profits, are given considerable weight in a correctional facility's decision to award an ICS contract.[12] Once these contracts are awarded, competition ceases for the duration of the contract and any subsequent contract renewals, granting the ICS provider a locational monopoly.[13] The cost of the site commission is passed on to the inmates and their families.[14]

Concerned with what the FCC viewed as a "prime example of market failure" and ICS fees, the FCC set permanent rate caps for interstate and intrastate ICS calls and imposed other restrictions on ICS providers.[15] The FCC set the rate caps using a ratemaking method based on industry-averaged cost data, which excluded site commissions.[16] Later, the FCC raised the rate caps to account for a portion of the site commissions.[17]

In the instant case, various ICS providers filed separate petitions challenging the FCC's rate caps and ancillary fee caps for intrastate ICS.[18] Numerous state and local correctional authorities, governments, and correctional facility organizations also filed petitions and intervened on behalf of the Petitioners.[19] A putative class in a separate case regarding ICS fees as well as multiple inmate advocacy groups intervened on behalf of the Commission.[20]

ANALYSIS

Before delving into the Petitioners' complaints, the Court first decided whether the issue was moot.[21] Prior to oral argument, counsel for the FCC filed a letter advising the Court of changes in the agency's composition and informed the Court that as a result of those changes, counsel for the FCC would abandon the argument that the FCC has the authority to cap intrastate rates, and that the FCC lawfully considered industry-wide averages in setting rate caps.[22] The Court found that there was no basis for dismissing these

10. *See id.*
11. *See id.* at 46–47.
12. *See id.*
13. *See id.*
14. *See id.*
15. *Rates for Interstate Inmate Calling Services ("Order")*, 30 FCC Rcd. 12763, 12775-76, 12838-62 (2015).
16. *See id.* at 12818–38.
17. *Rates for Interstate Inmate Calling Services ("Reconsideration Order")*, 31 FCC Rcd. 9300 (2016).
18. *See* 859 F.3d at 48.
19. *See id.*
20. *See id.*
21. *See id.* at 49.
22. *See id.* at 48–49.

claims as moot because the FCC has not acted to revoke the Order, signifying that there has been no voluntary cessation.[23] Furthermore, neither the FCC, the Petitioners, nor the Intervenors urged for a declaration of mootness.[24]

The Court also addressed the question regarding the application of the *Chevron* framework when an agency no longer seeks deference.[25] Because the FCC abandoned its position regarding intrastate rate caps and the application of industry-wide averages in setting the rate caps, it would be nonsensical for the Court to determine whether the abandoned positions warrant *Chevron* deference.[26] Although *Chevron* deference does not apply to the abandoned issues, the Court still maintains jurisdiction to address those issues using the best reading of the statutory provisions at issue, and the rules of statutory construction.[27]

After determining *Chevron* inapplicable, the Court assessed the merits of the Petitioners' challenges to the Order.[28] The Petitioners challenged the FCC's authority to set permanent rate caps and ancillary fee caps for intrastate ICS calls.[29] Petitioners asserted that the FCC's § 276 mandate to ensure ICS providers are fairly compensated did not override the § 152(b) prohibition from regulating intrastate, "charges, classifications, practices, services, facilities, or regulations".[30] Petitioners also argued that § 276 did not give the FCC ratemaking authority over intrastate rates comparable to that of § 201.[31] Finally, Petitioners contended that the intrastate rate caps were nonsensical in light of the evidence demonstrating that ICS providers have higher costs than the rate caps.[32] The Court agreed with the Petitioners because the Order based its imposition of intrastate rate caps on a "just, reasonable and fair" test which is not articulated in the relevant portion of the statute, the Order conflated the FCC's grant of authority under § 276 and § 201, and misconstrued judicial precedent as well as FCC precedent in support of imposing intrastate rate caps to ensure providers are "fairly compensated".[33]

Next, the Petitioners argued that the exclusion of site commission payments from the costs the FCC used to set ICS rate caps was unlawful because ICS providers are required by state and local governments to pay site commissions, making site commissions a cost of providing service much like a tax or fee, which the FCC recognizes as recoverable costs.[34] Furthermore, the FCC acknowledged that rate caps were below providers' costs once site commission are taken into account, which violates the "fair compensation"

23. *See id.* at 49–50.
24. *See id.* at 49.
25. *See id.* at 50.
26. *See id.*
27. *See id.* at 50–51.
28. *See generally id.* at 51–59.
29. *See id.* at 51.
30. *Id.*
31. *See id.*
32. *See id.*
33. *See id.* at 51–55.
34. *See id.* at 55.

requirement under § 276, the "just and reasonable" requirement under § 201, and the Constitution's Takings Clause.[35] The Court found that the use of the average industry-wide cost in calculating rate caps was arbitrary and capricious because the site commissions are clearly a cost of doing business seeing as they are either mandated by state statute, or by state correctional facilities.[36]

Petitioners argued further that even if the site commissions were excluded, the rate caps were set too low to ensure compensation for each completed call because the FCC's rate caps are below average costs and would deny cost recovery for a significant portion of inmate calls.[37] Petitioners further contended that the FCC relied on data from outlier ICS providers who represent 0.1 percent of the market, and ignored evidence demonstrating the cost of ICS varies depending on the region services are provided in.[38] The Court found that the FCC did not engage in reasoned decision-making when it set rate caps for the reasons stated by the Petitioners, and because the averaging calculations are unreasonable seeing as they make above-average costs unprofitable, which violates the mandate for fair compensation contained in § 276.[39] Similarly, the Petitioners argued that the imposition of ancillary fees caps for interstate calls is impermissible.[40] The Court remanded the issue to the FCC because the Court could not determine from the record whether ancillary fee caps could be segregated between intrastate and interstate calls.[41]

In addressing the Petitioners' challenge of the video visitation requirements, the FCC asserted that regardless of whether video visitation services are a form of ICS, they are nonetheless under the agency's jurisdiction.[42] The Court disagreed finding that the FCC must first explain how its statutory authority extends to video visitation services under either § 201(b) for interstate calls, or § 276(d) as an inmate telephone service for interstate or intrastate calls.[43] In addition, the Petitioners challenged the site commission payment reporting requirement under 47 C.F.R. § 64.6060(a)(3). The FCC agreed with the Petitioners that the definition of site commission payments should be read as incentive payments designed to influence the selection of a monopoly service provider as opposed to an ordinary tax.[44] In light of this agreement, the Court found that there is no merit to the Petitioners' challenge.[45]

Finally, Petitioner Pay Tel separately challenged the FCC's refusal to preempt state ICS rate caps that are lower than those the Commission set in

35. *See id.* at 55.
36. *See id.* at 55–57.
37. *See id.* at 57.
38. *See id.*
39. *See id.* at 57–58.
40. *See id.* at 58.
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*

the Order.[46] Petitioner Pay Tel also argued that its due process rights were infringed upon when the FCC denied Pay Tel timely access to key cost data that the FCC used in setting rate caps.[47] The Court held the preemption and due process claims moot because the Court vacated the portion of the Order imposing intrastate rate caps.[48]

CONCLUSION

In sum, the Court vacated the provisions of the Order regarding the imposition of intrastate rate caps, the use of averaged industry-wide cost data in the calculation of the Order's rate caps, the provision instituting video visitation reporting requirements, and the Order's exclusion of site commission from the FCC's cost calculus.[49] The Court also denied the petitions for review of the site commission reporting requirements and dismissed the preemption and due process claims as moot.[50] Finally, the Court remanded the Petitioners' challenge of the ancillary fee caps to the FCC for consideration as to whether the proposed fee caps can be segregated between the permissible caps on interstate calls and the impermissible proposed caps on intrastate calls.[51]

46. *See id.* at 59.
47. *See id.*
48. *See id.*
49. *See id.* at 45.
50. *See id.*
51. *See id.*

Montgomery County v. FCC

Nos. 08-3023/15-3578, 2017 U.S. App. LEXIS 12431 (6th Cir. July 12, 2017)

Lindsey Bergholz *

I. INTRODUCTION

In *Montgomery County v. FCC*,[1] the United States Court of Appeals for the Sixth Circuit held that while the FCC's "mixed-use" rule and interpretation of the term "franchise fee" were arbitrary and capricious, the FCC was not required to invalidate "most-favored-nation" clauses. The Court also held that the FCC made a good faith effort to comply with the Regulatory Flexibility Act ("RFA"). Though local franchising authorities have objected to these FCC's regulations for the past decade, this case marks the first time the Court has granted in part a local government's petition for review.[2]

BACKGROUND

In the 1950's, the American public began to have widespread access to cable television.[3] The Communications Act of 1934 ("the Act") gave the FCC the ability to regulate state and local franchising authorities in regards to cable franchises, and, in 1968, the Supreme Court "affirmed the FCC's regulatory authority over cable television[.]"[4] In 1984, Congress passed the Cable Act,[5] which preserved a role for local franchising authorities ("LFAs") by giving franchising discretion to states and localities.[6] Under the Cable Act, the FCC shared regulatory authority over cable with LFAs, who had "retained discretion to decide whether to grant cable franchises to applicants in their communities."[7]

* J.D. candidate, The George Washington University, May 2018. Associate, Federal *Communications Law Journal*, 2017–18.

1. Montgomery Cty. v. FCC, Nos. 08-3023/15-3578, 2017 U.S. App. LEXIS 12431 (6th Cir. July 12, 2017).
2. *See id.* at *2.
3. *See* All. for Cmty. Media v. FCC, 529 F.3d 763, 767 (6th Cir. 2008).
4. *Id.* at 767 (citing United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968)).
5. Cable Communications Policy Act of 1984, Pub. L. 98-549 (to be codified at 47 U.S.C. §§ 601–639).
6. *See* 47 U.S.C. § 541(f) (2012); *see also* Union CATV v. City of Sturgis, 107 F.3d 434, 441 (6th Cir. 1997) (quoting H.R. REP. NO. 98-934, at 19) ("It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.").
7. All. for Cmty. Media, 529 F.3d at 767.

Section 621 of the Cable Act requires cable companies to receive a franchise prior to offering service and gives LFAs the ability to dole out these franchises.[8] In 1992, Section 621 was amended[9] by Congress to prevent LFAs from monopolizing jurisdictions.[10] In 2006, the FCC implemented the "First Order," which set out the FCC's statutory interpretations of Section 621 and procedural compliance guidelines.[11] In the First Order, the FCC declined to preempt state regulations, and only addressed "decisions made by county- or municipal-level franchising authorities."[12] However, the First Order did lay out "reasonableness" guidelines for I-Nets[13] and Public Educational and Governmental ("PEG") facilities, and calculation guidelines for franchise fees.[14] The First Order also preempted "most-favored-nation clauses"[15] which LFAs used to require new cable providers to meet expectations that incumbent providers were exempt from, and limited "LFAs' jurisdiction . . . only to the provision of cable services over cable systems[,]" so that mixed-use networks no longer fell under LFAs' control.[16]

In 2007, the FCC released the Second Order, and then a Reconsideration Order clarifying the Second Order. Together, these new orders expanded the First Order's regulations on new entrants to incumbent cable operators. The Second Order touched upon LFAs, PEG facilities,[17] I-Nets,[18] franchise fees,[19] most-favored-nation clauses,[20] and mixed-use networks[21]—and in several of these areas, the LFAs' authority and jurisdictional reach shrunk.

ANALYSIS

Petitioners are local governments that argue the Second Order and Reconsideration Order are arbitrary and capricious and could not pass a *Chevron* analysis, because the orders deprive "local governments of their jurisdiction under the Cable Act, apply[] franchise fee caps where they do not

8. *See* 47 U.S.C. § 541(b), (e)–(f) (2012).

9. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

10. *See* All. for Cmty. Media, 529 F.3d at 768.

11. *See* Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 72 Fed. Reg. 13230-01 (proposed Mar. 21, 2007) (to be codified at 47 C.F.R. pt. 76) [hereinafter "First Order"].

12. First Order, *supra* note 11, at n.2.

13. Montgomery Cty., 2017 U.S. App. LEXIS 12431, at *16 ("Institutional networks provide various services to non-residential subscribers, rather than just video services to residential subscribers (which is all that the mixed-use rule seems to allow local franchising authorities to regulate).").

14. *See* First Order, *supra* note 11, at para. 5.

15. *Id.* at para. 140.

16. *Id.* at para. 121.

17. Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 22 FCC Rcd 19633, para. 14 (2007) [hereinafter "Second Order"].

18. *Second Order*, *supra* note 17, at para. 14.

19. *Id.* at para. 11.

20. *Id.* at para. 20.

21. *Id.* at para. 16–17.

apply such that they constrain franchises . . . and fail[] to recognize the instances where LFA's have authority over cable systems[.]"[22] Ultimately, the Court vacated the FCC's interpretation of "franchise fee" for in-kind, cable-related noncash exactions and vacated the mixed-use rule as applied to incumbent cable operators for being arbitrary and capricious.[23] However, the Court upheld the FCC's decision not to invalidate most-favored-nation clauses, and found the FCC did make a reasonable, good faith effort to comply with the Regulatory Flexibility Act ("RFA").[24]

In regards to franchise fees, the Court found that the Reconsideration Order's categorizations of Section 622 to include "in-kind payments" expressly went against the FCC's First Order, and constituted a total reversal with "no explanation" of the statutory support for such reversal.[25] Citing *Encino Motocars*,[26] the Court reminded the FCC that "if an agency wants the federal courts to adopt (much less defer to) its interpretation of a statute, the agency must do the work of actually interpreting it."[27]

The Court similarly found the Second Order had insufficient reasoning to support the FCC's new mixed-use rule. The FCC's statutory basis for the mixed-use rule in the First Order "does not by its terms support the FCC's extension of the mixed-use rule to incumbent cable operators in the Second Order."[28] The Court determined that the FCC's mixed-use rule was arbitrary and capricious because the FCC failed to cite any other statutory explanation for their decision, despite the lack of statutory support for the Second Order's mixed-use restrictions.[29] However, the Court explicitly rejected Petitioners' challenges to the "most-favored-nation" clauses.[30] The Court rejected this challenge because Petitioners failed to provide "any evidence, as opposed to speculation, that the FCC's decisions in this area will somehow thwart Congress's intent as expressed by the Act's plain terms."[31]

The Court also disagreed with the argument that the FCC's Reconsideration Order fell short of meeting the Regulatory Flexibility Act's ("RFA") statutory requirements.[32] Petitioners argued that the FCC had "failed to meet the 'purely procedural' requirements of the Regulatory Flexibility Act."[33] The Court disagreed with Petitioners' emphasis procedures, and instead sided with the FCC, finding "the agency made a 'reasonable, good faith effort' to comply with the [RFA's] requirements."[34] Ultimately, much of

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22. Brief of Petitioner at 3–4, Montgomery Cty. v. FCC., No. 08-3023 (6th Cir. Feb. 26, 2016).
23. *See* Montgomery Cty., 2017 U.S. App. LEXIS 12431, at *14, *18–19.
24. *See id.* at *19–25.
25. *See id.* at *13, *14.
26. *Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S.Ct. 2117, 2125 (2016).
27. Montgomery Cty., 2017 U.S. App. LEXIS 12431, at *13, *14.
28. *Id.* at *17.
29. *See id.* at *18.
30. *See id.* at *19–21.
31. *Id.* at *21.
32. *See id.* at *23–24.
33. *Id.* at *23.
34. *Id.* at *24.

the FCC's Second Order and Reconsideration Order will remain unchanged. The Court left the majority of the FCC's franchise fee additions untouched, and the Court did not change the PEG requirements, incidental exclusions, or the five-percent fee caps set out in the Second Order.[35]

CONCLUSION

The FCC's mixed-use rule and franchise fee interpretations as outlined in the Second Order and Reconsideration Order have been remanded back to the FCC so the agency can give a timely and sufficient explanation for the vacated orders.[36] Until then, the FCC cannot "treat 'in-kind' cable-related exactions as 'franchise fees[,]'" or apply "the mixed-use rule to incumbent cable providers that are not common carriers[.]"[37]

35. *See id.*
36. *See id.* at *14, *19.
37. *Id.* at *14, *18.

National Association of Regulatory Utility Commissioners v. FCC

851 F.3d 1324 (D.C. Cir. 2017)

Kristin Capes *

In *National Association of Regulatory Utility Commissioners v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit denied a petition for review of an FCC Order which changed the way Voice-over-Internet-Protocol service providers obtain North American Numbering Plan telephone numbers.[2]

I. BACKGROUND

Under the Communications Act, communication services are classified in two groups: telecommunications services and information services.[3] One important distinction between the two types is that, unlike information services, telecommunications services are treated as "common carriers" as defined by Title II of the Communications Act.[4] Prior to the challenged Order, in order for an I-VoIP service provider to be issued telephone numbers, the I-VoIP had to: (1) "produce evidence of either a state certificate of public convenience and necessity [ ] or a Commission license," (2) "partner with a carrier…and pay that carrier a Primary Rate Interface service fee," or (3) get a waiver from the FCC allowing the I-VoIP service provide to "obtain numbers directly from the Numbering Administrators." [5] The challenged Order revised the process by which I-VoIPs could obtain telephone numbers, allowing the I-VoIPs direct access to obtaining telephone numbers "without regard to whether they are [common] carriers."[6] However, the challenged Order did not establish I-VoIPs as telecommunications services or information services; rather, the FCC mentioned in the Order that they had not yet classified I-VoIPs into a specific communication service category.[7]

The National Association of Regulatory Utility Commissioners challenged the Order on two grounds: (1) the Order incorrectly classified I-

* J.D. candidate, The George Washington University Law School, May 2017. Production Editor, *Federal Communications Law Journal*, 2017–18.

1. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 851 F.3d 1324 (D.C. Cir. 2017).
2. *See Id.*
3. *Id.* at 1326.
4. *Id.*
5. *Id.*
6. *Id. (quoting* Order App. C.)
7. *Id.*

VoIP service providers as Title II telecommunications services, or (2) the Order gave Title II telecommunications services rights to I-VoIP service providers without those providers being classified as Title II providers.[8] The FCC claimed that the National Association of Regulatory Utility Commissioners (NARUC) lacked standing to challenge the Order because they had no proof of injury-in-fact to their members.[9] Vontage Holdings Corporation, who acted as an intervenor in the case, claimed that NARUC lacked standing to challenge the Order because the Order did not "change the rights or responsibilities" of NARUC's members.[10]

ANALYSIS

In NARUC's Opening Brief, they claimed that standing was self-evident on the basis of their claims against the FCC. The court rejected that argument, holding that standing was not self-evident.[11] Additionally, the court noted that if standing is not self-evident, then the moving party must provide evidence supporting each element of standing.[12] For NARUC to meet the requirements of standing as defined by Article III of the Constitution, NARUC had to show that: "(1) at least one of its members was injured in fact…; (2) the injury was caused by the Order; and (3) the court can redress the injury."[13] In their Reply Brief, NARUC introduced two theories of standing.[14]

NARUC's first theory of standing was that by not classifying I-VoIPs as telecommunication services the FCC is impeded on the states' ability to regulate I-VoIPs in the same manner they regulate common carriers while giving I-VoIPs Title II benefits.[15] The court held that NARUC's first theory of standing failed because it linked the perceived injury to the FCC's refusal to classify I-VoIPs rather than the actual holding of the Order.[16] Additionally, the NARUC failed to provide evidence supporting their assertion that they have been injured by the FCC's refusal to classify I-VoIPs in the Order.[17]

NARUC's second theory of standing was that its members were harmed by the holding of the Order by permitting "I-VoIP providers the option to bypass either becoming State-certified or dealing with a State-certified carrier."[18] NARUC claimed their members were harmed by the changes instituted by the Order because of the burden it places on the states.[19] The

8. *Id.* at 1325.
9. *Id.* at 1327.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Id. At 1328.
16. *Id.* at 1328.
17. *Id.*
18. *Id.*
19. *Id.*

court held that NARUC's second theory of standing failed because the NARUC failed to provide any evidence to support their assertion that the state commission procedures have become more burdensome due to the new regulations instated by the Order.[20]

CONCLUSION

The United States Court of Appeals for the District of Columbia Circuit dismissed the petition on the grounds that the Court lacked jurisdiction to decide the issue because the National Association of Regulatory Utility Commissioners' failed "to show that it [had] standing to challenge the Order."[21]

20. *Id.* at 1329.
21. *Id.* at 1325.

National Association of Telecommunications Officers & Advisors v. FCC

862 F.3d 18 (D.C. Cir. 2017)

Lindsey Bergholz *

I. INTRODUCTION

In *National Association of Telecommunications Officers & Advisors v. FCC*[1] the Court of Appeals for the District of Columbia Circuit upheld the FCC's reversal of "a decades-old, rebuttable presumption that determined whether state and local franchising authorities may regulate cable rates."[2] The D.C. Circuit held that the FCC's rule, shifting the presumption to favor cable providers over local franchising authorities, was neither arbitrary nor capricious, and was a permissible interpretation of the statutory language.[3]

BACKGROUND

The Cable Act[4] gives the FCC the ability to decide whether a franchising authority can regulate cable rates.[5] If the FCC "finds that a cable system is subject to effective competition," then neither the FCC nor "a State or franchising authority" will have the ability to regulate rates.[6] However, if the FCC "finds that a cable system is not subject to effective competition," the FCC can regulate the rates for cable programming services or delegate rate regulations to the franchising authorities.[7]

Soon after Congress passed the Cable Act, the FCC clarified that the cable providers carry the burden of proving they are not "subject to effective competition" if they wish to rebut the presumption that their rates can be

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1. Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC, 862 F.3d 18 (D.C. Cir. 2017).
2. *Id.* at 21.
3. *See id.* at 25.
4. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 [hereinafter "the Cable Act"].
5. *See* 47 U.S.C. §§ 543(a)(2), (l)(1) (2012).
6. *Id.* § 543(a)(2).
7. *Id.*

regulated.[8] This presumption, outlined in the 1993 Rate Order, required cable systems to prevent rate regulation by proving that a competitor not only offered services in that community, but that those services were "actually available" to consumers.[9] When the 1993 Rate Order's presumption was adopted the "vast majority" of regulated regions only had one cable service.[10] The presumption has played an important role in rate regulation authority because, practically speaking, "given the sheer number of franchise areas….[the FCC could not] make an affirmative finding…as to the presence or absence of effective competition" in each area without excessive and unreasonable delay in issuing approvals.[11]

In 2015, the FCC publicly recognized the role multichannel video programming distributors ("MVPDs") and direct broadcast satellites ("DBS") have come to play in the cable landscape; the FCC concluded this rise in competition justified flipping the presumption from assuming no competition, to assuming competition.[12] The FCC's original presumption of no competition was adopted before MVPD and DBS service had "enter[ed] the market…in any significant way."[13] After the 2015 adjustment that recognized the mass availability of DBS and MVPDs, local franchising authorities could no longer regulate cable rates unless they provide evidence that the cable system exists without competition.[14]

ANALYSIS

The petitioners in this case are broadcasters and franchising authorities. The petitioners challenged the FCC's statutory authority to revise the 1993 Rate Order, and also argued the FCC's new presumption of effective competition is arbitrary and capricious.[15] In the end, the Court ruled the FCC did have the authority to bar franchising authorities from regulating cable rates under Section 543 until those authorities have proven that their franchise region has effective competition.[16] The Court also ruled that the FCC's

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8. Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation, 8 FCC Rcd 5631, para. 39 (1993), *on reconsideration*, 9 FCC Rcd 4316 (1994), *rev'd in part on other grounds*, Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151 (D.C. Cir. 1995) (the FCC "stated that since the Act makes the absence of effective competition a prerequisite to regulators' legal authority over basic cable rates, it would be reasonable to require local franchising authorities to provide evidence of the lack of effective competition as a threshold matter of jurisdiction") [hereinafter "1993 Rate Order"].

9. *Id.* at para. 29 (clarifying 47 U.S.C. § 543(l)(1)(B)(i)).

10. Amendment to the Commission's Rules Concerning Effective Competition, 30 FCC Rcd 6574, para. 3 (2015) [hereinafter "Amended Rules 2015"].

11. 1993 Rate Order, *supra* note 8, at para. 41.

12. *See* Amended Rules 2015, *supra* note 10, at para. 6–12.

13. Amended Rules 2015, *supra* note 10, at para. 3.

14. *See* Amended Rules 2015, *supra* note 10, at para. 13.

15. *See* Nat'l Ass'n of Telecomms. Officers & Advisors, 862 F.3d at 6.

16. *See id.* at 13–14.

rebuttable presumption of effective cable operator competition was reasonable.[17]

Petitioners specifically argued that the FCC's "termination of previously issued certifications violate the Communications Act for three reasons."[18] First, petitioners argued the FCC did not follow proper procedures under Sections 543(a)(2) and (l)(1)(B).[19] In response to petitioners' argument that the FCC was procedurally deficient, the Court cited *National Cable & Telecommunications Association v. Brand X Internet Services*,[20] which held that "whether the Order implements 'a lawful construction of the …. Act [must be decided] under Chevron.'"[21] The Court concluded the FCC acted within its delegated authority because the FCC "provided ample evidence" to support its determination, and was therefore reasonable.[22]

Second, petitioners "challenge[d] the [FCC's] authority to revoke a previous certification" under Section 543(a)(5) of the Communications Act.[23] Relying on the plain text of Section 543(a)(5), the Court held the FCC would actually have defied "a clear congressional directive if it continued to regulate rates after finding effective competition," and, therefore, was acting in accordance with the "overall statutory scheme."[24] Third, petitioners argued that the FCC's rule violated the STELAR Act, which requires the FCC "to establish a streamlined process for filing of an effective competition petition."[25] The Court determined the FCC did not eliminate the filing process, it only changed the filing process, and because the language at issue in this case was ambiguous with respect to "the procedures the [FCC] must use in a new 'streamlined process,'… the [FCC's] chosen procedures are a reasonable interpretation" under Chevron step two.[26]

The Court also addressed petitioners' claims that the FCC's rule was arbitrary and capricious. Citing *Chemical Manufacturers. Association v. Department of Transportation*,[27] the Court ruled that the FCC did have "a sound and rational connection between the proved and inferred facts" when establishing its presumption.[28] The Court agreed that the FCC's evidence on MVPD availability "combined with the 'ubiquitous' national presence of DBS providers[] supports a rebuttable presumption" that the FCC's statutory requirements have been met.[29] Finally, the Court rejected the argument that

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17. *See id.* at 11, 18.
18. *Id.* at 7.
19. *See id.* at 7.
20. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
21. Nat'l Ass'n of Telecomms. Officers & Advisofrs, 862 F.3d at 7 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).
22. Nat'l Ass'n of Telecomms. Officers & Advisors, 862 F.3d at 9.
23. *Id.* at 7.
24. *Id.* at 15.
25. *Id.* at 7, 15.
26. *Id.* at 18.
27. Chem. Mfrs. Ass'n v. Dep't of Transp., 105 F.3d 702, 705 (D.C. Cir. 1997).
28. Nat'l Ass'n of Telecomms. Officers & Advisors, 862 F.3d at 20 (citing Chem. Mfrs. Ass'n. 105 F.3d at 705) (internal citations omitted).
29. Nat'l Ass'n of Telecomms. Officers & Advisors, 862 F.3d at 22.

the FCC's "selection bias" poisoned the FCC's statistical evidence, noting the FCC provided "reasonable assurance the effect of any selection bias is quite modest and does not make the [FCC's] inference unreliable, let alone irrational."[30]

CONCLUSION

The FCC has successfully defended its new order, lifting the burden of proving effective cable competition exists off of cable providers, and placing the burden of proving a lack of effective competition exists onto local regulating authorities. It remains to be seen whether this case paves the way for other deregulatory presumption flips, or stands alone as a response to changing cable market realities.

30. *Id.* at 24.

Neustar, Inc. v. FCC

857 F.3d 886 (D.C. Cir. 2017)

Jane Lee *

In *Neustar, Inc. v. FCC*, [1] the United States Court of Appeals for the District of Columbia Circuit denied petitions for review of FCC's orders naming another telecommunications provider, Telcordia, to replace Neustar as the local number portability administrator ("LNPA").

The Telecommunications Act of 1996 requires telecommunications providers to provide "portability" of telephone numbers, permitting customers to keep their current phone numbers when they switch carriers.[2] In its 1996 First Report and Further Notice of Proposed Rulemaking, the FCC concluded that it is in the public interest for the number portability databases to be administered by one or more neutral third parties, and thus the LNPA was created.[3]

In 2009, upon the petition of Telcordia to "institute a competitive bid process for the LNPA contract," the FCC began a collaborative public process and released bid documents.[4] After reviewing the bids, the North American Numbering Council recommended Telcordia as the LNPA, which Neustar objected to on procedural grounds concerning the selection process and on substantive grounds regarding costs and bidders' qualifications.[5] Reasoning that the LNPA selection does not require notice-and-comment rulemaking, and that the proceeding is properly viewed as an informal adjudication in its March 2015 Order, the FCC approved the recommendation of Telcordia as the LNPA.[6]

Neustar argued, however, that the selection must be accomplished by a rulemaking to amend the existing rules, mainly to be in accordance with the Administrative Procedure Act ("APA")'s definition of a "rule."[7] A "rule" is defined "broadly to include 'statements of general or particular applicability and future effect' that are designed to 'implement, interpret, or prescribe law or policy," and the Court held that this case does not qualify under the statutory definition of a "rule," so rulemaking procedures are not required.[8]

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* J.D. candidate, The George Washington University, May 2018. Editor-In-Chief, *Federal Communications Law Journal*, 2017–18.

1. *Neustar v. FCC*, 857 F.3d 886 (D.C. Cir. 2017)
2. 47 U.S.C. § 251(b)(2).
3. 11 FCC Rcd. 8352, 8399 (1996).
4. 30 FCC Rcd. 3082, 3086 (2015).
5. *See, id.* at 3092-3115.
6. *Id.* at 3093.
7. *Id.* at 3092.
8. *See Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1199, 1203 (2015).

Neustar argues that the FCC's selection of Telcordia was contrary to law or arbitrary and capricious, based on an improper understanding and application of the neutrality regulations.[9] The FCC responded that although both Neustar and Telcordia are both qualified to serve as the LNPA, a legitimate cost analysis warranted recommendation of Telcordia as the next LNPA.[10]

Neustar argued that Telcordia cannot be neutral because Telcordia's parent company is Ericsson, which is an equipment manufacturer and service provider.[11] Rejecting this argument, the FCC supported its neutrality determination by emphasizing that such telecommunications sector connections were with Ericsson, not Telcordia.[12] Upon the analysis of the relationship between Ericsson and Telcordia, which is a wholly owned subsidiary of Ericsson, the FCC looked at the corporate structure and related business arrangements to confirm Telcordia's neutrality.[13] Finding that Telcordia is a "separate company with a separate independent board of directors, each of whom owes fiduciary duties to Telcordia," the FCC argued that even if Ericsson is aligned with the wireless industry, it does not necessarily follow that Telcordia is likewise aligned.[14]

In this case, it is important to distinguish what *must* be achieved through rulemaking under the statute and what *may* be achieved through informal adjudication.[15] The decision of this case largely relies on the fact that the FCC has "very broad discretion to decide whether to proceed by adjudication or rulemaking."[16] In fact, the Court rules that the text of Section 251 is broad enough to encompass process to implement the statutory requirements through rulemaking, even if the outcomes are achieved through informal adjudication.[17] The Court also held the FCC's hand in that since the FCC has not incorporated a specific LNPA by rule, the selection of a new LNPA also would not need to follow rulemaking procedures.[18]

Under the APA, a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[19] Courts will defer to the Commission's reading of its own regulations unless that reading is plainly erroneous or inconsistent with the regulations.[20] Therefore, the

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9. *Neustar* at 891.
10. *Id.* at 901.
11. *Id.* at 890.
12. *Id.*
13. *Neustar* at 898.
14. *Id.* at 890.
15. *Id.* at 892–93.
16. *Conference Grp., L.L.C. v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013).
17. *Neustar* at 892.
18. *Id.*
19. 5 U.S.C. § 706(2)(A).
20. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989).

FCC's determination that Telcordia satisfied the Act's requirements and the FCC's regulations was decided not to be arbitrary and capricious.[21]

Significantly, although the FCC briefly referenced *Chevron*'s deferential standard in its standard of review, it did not invoke this standard with respect to rulemaking. Accordingly, the Court held that the FCC's interpretation of the statutory mandate would not be entitled to deference in this case.[22]

Analyzing the overall context and benefits of the bids led the FCC to conclude that the benefits "outweigh the costs and potential adjustments associated with the transition to a new LNPA."[23] The FCC reiterated that Telcordia's bid had merit that "outweigh[ed] the costs and potential adjustments associated with the transition to a new LNPA," and thus Court could not conclude that the cost analysis was arbitrary and capricious.[24]

21. *Neustar* at 891.
22. *Id.* at 893.
23. *Id.* at 902.
24. *Id.*

Tennessee v. FCC

832 F.3d 597 (8th Cir. 2016).

Ryan Farrell *

In *Tennessee v. FCC*,[1] the Sixth Circuit Court of Appeals invalidated the FCC's 2015 order preempting laws in Tennessee and North Carolina restricting the expansion of municipal broadband.[2] The court found that Section 706 of Telecommunications Act of 1996 fell short of the clear statement that is required to preempt the allocation of power between the states and its subdivisions.[3]

I. BACKGROUND

This case concerns municipal broadband—specifically, whether, contrary to state law, municipalities that provide broadband internet service can expand to cover underserved areas that lie outside of their coverage area.[4] The state legislatures of Tennessee and North Carolina thought statute answered this question when they enacted laws that restricted the expansion of municipal broadband to these underserved areas.[5]

Tennessee enacted a law in 1999 which authorized municipalities operating an electric plant to offer internet services.[6] Sec. 601 of the law limited the area in which municipalities may provide internet services to only "within its service area."[7] This prevented a municipality from offering broadband services to surrounding areas not within its service area.[8] At the time, there was no FCC rule or regulation that required municipalities to offer broadband services outside of its coverage area.[9]

Eventually, developments in technology led to municipalities providing high speed, reliable broadband service.[10] The city of Chattanooga, Tennessee began offering high-speed broadband internet services through its' municipal electric provider.[11] Chattanooga developed a fiber-optic communication

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1. *Tennessee v. FCC*, 832 F.3d 597 (8th Cir. 2016).
2. *Id.* at 614
3. *Id* at 600.
4. *See Id.*
5. *Id.* at 600–01.
6. *Id.* at 600 (citing Tenn. Code Ann. 7-52-601).
7. *Id.*
8. *See Id.*
9. *See Id.*
10. *Id.*
11. *Id.*

infrastructure, and became the first broadband provider in the nation to offer Gigabit services to all of its customers.[12] According to the FCC's findings, Chattanooga's municipal broadband service is a success, providing added revenue to the city, leading to job growth, and lowering rates and increasing services among broadband providers.[13] Despite this, Sec. 601 of Tennessee's municipal broadband law prevented Chattanooga from expanding the service beyond its service area to underserved areas.[14]

North Carolina enacted its own municipal broadband restrictions in 2011, limiting city-owned communications service providers to provide service only within their municipal boundaries.[15] The law also places additional restrictions on municipal broadband providers by forcing them to make payments in lieu of taxes and opening their facilities up to private actors.[16] The law also contained three provisions that exempted municipalities from the restrictions, including "grandfather" exemptions which exempt municipalities "providing communications services as of January 1, 2011" from the restrictions, so long as they abide by limitations.[17] Like the Tennessee law, the North Carolina law did not conflict with any FCC rules or regulations at the time of enactment.[18]

Like Chattanooga, Tennessee, Wilson, North Carolina constructed a highly rated municipal broadband service named "Greenlight".[19] Also like Chattanooga, Wilson faced demand from surrounding communities.[20] However, if Wilson attempted to expand into these surrounding communities, they would no longer be grandfathered from North Carolina's municipal broadband restrictions.[21] As a result, Wilson had been unable to expand beyond its municipal borders.[22]

Chattanooga and Wilson separately petitioned the FCC to preempt the restrictions that prevented them from expanding beyond their borders.[23] The FCC responded by finding that preempting the two laws would increase competition and broadband investment.[24] The FCC found that both the Tennessee and North Carolina laws constituted barriers to broadband investment and competition.[25] The FCC issued an order preempting both statutes.[26]

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12. City of Wilson, North Carolina Petition for Preemption of North Carolina eneral Statute Sections 160A-340 Et Seq., *Memorandum Opinion and Order*, 30 FCC Rcd 2408 (2015) at *10 [hereinafter *2015 Wilson Order*].
13. *Id.* at *7–8.
14. *Id.* at *9.
15. N.C. Gen. Stat. Ann Sec. 160A-340.1(a)(3).
16. *Tennessee*, 832 F.3d at 601.
17. *See id.* at 601–02.
18. *Id.* at 602.
19. *2015 Wilson Order*.
20. *Tennessee*, 832 F.3d at 602.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 602–03.
25. *Id.* at 603–04.
26. *Id.* at 605.

The FCC found that Congress granted the FCC the authority to preempt the laws through Sections 706(a)-(b) of the Telecommunications Act of 1996.[27] The FCC cited the preamble of the law, which stated the express goal of promoting competition in the marketplace, and noted Section 706 is the part of the law that gives the FCC the authorization to achieve this goal.[28] Addressing criticism that focused on the point that only Congress can grant the FCC power to preempt state law through explicit statutory language, the FCC argued the statutory language of Section 706 is not exhaustive and includes "the rule common throughout communications law"—that the FCC may preempt state laws.[29]

The FCC proceeded to preempt several parts of both the Tennessee and North Carolina laws.[30] In his dissent, Commissioner Ajit Pai, citing *Nixon v. Missouri Municipal League*, argued that the FCC could not preempt the state laws without an express statement from Congress.[31] Indeed, Commissioner Pai argued that Section 706 did not grant FCC any preemptive power at all.[32]

DISCUSSION

The Court began its analysis by noting that in its order the FCC was attempting to insert its authority into matters between a State and its municipal subdivisions.[33] The court also noted that the FCC could not do this absent a clear directive from Congress granting this authority.[34] As stated before, at the time these state laws were enacted no FCC rules or regulations, or directive from Congress, existed preventing states from placing restrictions on municipal broadband providers.

The Sixth Circuit Court rejected the FCC's arguments that Section 706 of the Communications Act gave them the authority to preempt the Tennessee and North Carolina laws. The FCC had attempted to distinguish their preemption here from the holding in *Nixon*, which struck down a Missouri state statute that forbade municipalities from entering the Telecommunications market.[35] The FCC argued that there is a difference between pre-empting a state ban on telecommunications providers and pre-empting state laws regulating an industry that the state has already authorized.[36] The FCC also argued that pre-empting state laws on municipal broadband did not implicate the core state sovereignty that was at stake in *Nixon*. The Sixth Circuit Court disagreed, noting that the issues invoked in this case are similar to those in

27. *Id.*
28. *See Id.* at 606.
29. *Id.* at 607.
30. *Id.* at 608.
31. *Id.* at 609 (citing *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004)).
32. *Id.*
33. *Id.* at 610.
34. *See id.* (citing *Nixon*).
35. *Nixon*, 541 U.S. at 129/
36. *Tennessee*, 832 F.3d at 611.

Nixon in that they involve state sovereignty *and* the regulation of interstate communications services.[37]

The Court also further held that Section 706 lacks a clear statement from Congress authorizing the FCC to engage in pre-empting the state laws.[38] The court noted that although Section 706 authorizes the FCC to achieve the goal of promoting competition, it does not authorize it to do so by preempting state law.[39]

The Court declined to address the assertion advanced by Commissioner Pai of whether or not Section 706 provides the FCC preemptive power at all.[40] The court also declined to say whether or not Congress could actually give the FCC the power to preempt as it did here.[41]

Judge Helene N. White wrote concurring in part and dissenting in part. Judge White agreed that the holding in *Nixon* compelled the reversal of the FCC's order.[42] Judge White, however, articulated a more relaxed view of the Clear Statement rule, stating that it should not require a clear statement whenever the regulation or statute preempted affects local government.[43]

CONCLUSION

The 6th Circuit's decision was a blow to the FCC's efforts to advance its municipal broadband effort. The 6th Circuit handed down a clear message: if the FCC wishes to promote marketplace competition as they see it, they cannot do it by interfering with a state's regulation of municipal affairs absent a clear direction from Congress.

37. *Id.*
38. *Id.* at 613.
39. *See Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 614
43. *Id.* at 615