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ACA Int'l v. FCC

Ali Kingston

885 F.3D 687 (D.C. CIR. 2018)

In *ACA Int'l v. FCC*[1], the United States Court of Appeals for the District of Columbia Circuit, granted in part and denied in part the petition for review by a number of regulated entities of a 2015 FCC order in which the FCC sought to clarify aspects of the Telephone Consumer Protection Act of 1991 (TCPA).[2] The FCC's order concerned the TCPA's general bar against using automated dialing devices to make uninvited calls.[3] This suit encompassed four issues regarding the FFC's order: (1) what automatic telephone dialing systems (ATDS) are subject to TCPA's restrictions, (2) whether the caller violates the act if the consenting party's wireless number has been reassigned to a party that has not provided consent, (3) procedures for a consenting party to revoke said consent, and (4) the TCPA's consent requirement for certain healthcare-related calls.[4] The D.C. Circuit upheld the FCC's approach on the last two issues and vacated the FCC's approach on the first two issues.[5]

Consumers have been subject to automated telemarketing calls and text messages that they have not wanted to receive for years.[6] Congress addressed this issue with the TCPA, which prohibits the use of certain ATDS absent consent from the party receiving the call.[7] The FCC issued a Declaratory Ruling and Order in 2015, which was at issue here, that addressed several petitions for rulemaking or requests for clarification on the TCPA.[8] The petitioners challenged the FCC's interpretation and implementation of the TCPA regarding ATDS.[9]

The FCC attempted to clarify that devices qualify as ATDS if the device's "capacity" includes the potential to function as an ATDS with a software modification.[10] If the FCC were to regulate every device with the potential to be an ATDS, any smartphone with the addition of certain software would qualify.[11] Under this approach, any uninvited text message or phone call from a smartphone would violate the statute.[12] The court

1. ACA Int'l v. FCC, 885 F.3d 687 (D.C. Cir. 2018).
2. *Id*. at 691.
3. *Id*.
4. *Id*. at 691-92.
5. *Id*. at 692.
6. *Id*. at 690.
7. *Id*. at 690-91.
8. *Id*. at 693.
9. *Id*. at 692.
10. *Id*. at 693-94 (citing *2015 Declaratory Ruling,* 30 FCC Rcd. at 7974 ¶ 16).
11. *Id.* at 696.
12. *Id*. at 697.

found it unreasonable for the TCPA to render every smartphone an ATDS and therefore subject to the TCPA's restrictions.[13] Even if the FCC's ruling does not conclude that smartphones are ATDS, the reasoning does not satisfy APA arbitrary and capricious review.[14]

The TCPA allows for ATDS calls "made with the prior express consent of the called party."[15] The FCC allowed for one liability-free call after a number was reassigned under the concept that the caller had a reasonable basis to believe they had consent because of a lack of knowledge that the number had been reassigned.[16] The FCC defined the "called party" as the individual who was actually reached by the caller.[17] The court found that the FCC could have adopted the Seventh Circuit's approach that instead deems the "called party" to actually be the "intended recipient" of the call.[18] The FCC's allowance for one liability-free call did not support the notion of reasonable reliance as the time period was indefinite, and the court explained—reasonable reliance could be better achieved by allowing numerous calls during a defined period of time.[19]

Under the TCPA, the FCC allows a consenting party to revoke consent at any time by any reasonable means.[20] Despite the Petitioners' objection that the FCC's approach is arbitrary and capricious, the FCC's ruling does not require the callers to adopt a system that would cause an undue burden.[21] The called party may revoke consent at any time orally or in writing as long as it makes the desire to no longer receive calls clear.[22] The court held that this interpretation is acceptable.[23]

The FCC exempts calls that have a healthcare treatment purpose from requiring consent.[24] For the public interest, the FCC does not apply the TCPA to healthcare-related calls such as: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.[25] This exemption for wireless lines does not apply to healthcare-related solicitations, advertisements, or debt-collections.[26] Rite Aid asserted that the exemption violated the Health Insurance Portability and Accountability Act (HIPAA), but the court rejected this argument.[27]

13. *Id*. at 697-98.
14. *Id*. at 700.
15. *Id*. at 694 (citing 47 U.S.C. § 227(b)(1)(A)).
16. *Id*. at 694.
17. *Id*. at 705.
18. *Id*. at 706 (citing Soppet v. Enhanced Recovery Co., 679 F.3d 637 (7th Cir. 2012)).
19. *Id*. at 707-08.
20. *Id*. at 694.
21. *Id*. at 709.
22. *Id*. at 709.
23. *Id*. at 709-10.
24. *Id*. at 694.
25. *Id*. at 710-11.
26. *Id*. at 711.
27. *Id*.

The Court decided that the FCC was empowered to adopt the approach regarding consenting parties revoking consent and the healthcare exemption, and it adequately explained are subject to TCPA regulation and whether a caller violates the act if the consenting party's wireless number has been reassigned to a party that has not provided.

Alexander v. Verizon Wireless Servs. LLC

Laura Nowell

875 F.3D 243 (5TH CIR. 2017)

In *Alexander v. Verizon Wireless Servs. LLC*, the Fifth Circuit Court of Appeals affirmed the district court's judgement dismissing the plaintiff's complaint for failing to state a claim against the defendant, Verizon Wireless, under the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 – 2712.[28] The Fifth Circuit applied an objective standard to the good faith requirements found in the SCA, sections 2702(c)(4) and 2707(e)(1). The Court held that Verizon acted in an objectively reasonable manner after construing the facts in the light most favorable to the plaintiff.[29]

I. BACKGROUND

In 1986, Congress passed the Stored Communications Act, a part of the Electronic Communications Privacy Act, to regulate the privacy of stored communications within the United States and to control the disclosure of stored electronic communications by service providers.[30] The general purposes of the SCA include: 1) prohibiting unauthorized access to certain electronic communications, 2) restricting service providers from voluntarily disclosing the contents of customer records to certain entities and individuals, and 3) permitting a governmental entity to compel a service provider to disclose customer communications or records in certain circumstances.[31] Section 2707(c)(4) of the SCA, referred to as the "emergency exception" states, "a service provider may divulge a record or other information pertaining to a subscriber to or customer of such service…to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency…"[32]

In 2014, Verizon released subscriber records to a detective pursuant to the "emergency exception" of the SCA, which in part provided the basis for the plaintiff's arrest and the charge of aggravated arson and two counts of

28. Alexander v. Verizon Wireless Servs. LLC, 875 F.3d 243, 246 (5th Cir. 2017).
29. *See id.* at 254.
30. *See id.* at 249-50.
31. *See id.* at 250.
32. *See id.* at 251.

attempted second degree murder.[33] The detective provided Verizon with a form indicating that the information requested pertained to an arson, where a house was set on fire with two individuals inside, and the detective certified that the request potentially involved "the danger of death or serious physical injury to a person, necessitating the immediate release of information relating to the emergency."[34] Verizon subsequently provided the detective with the requested information, which included the identity of the subscriber, location information, incoming and outgoing call details, and SMS details.[35] The District Court held that Verizon is entitled to statutory immunity and a complete defense because it relied in "good faith" on an officer's representations regarding the existence of an emergency.[36] The plaintiff challenged the District Court's decision that Verizon is protected from liability under section 2703(e) and 2707(e), the "emergency exception" because the detective's request to Verizon to disclose information lacked the necessary specificity about the alleged emergency for Verizon's reliance to be in good faith.[37] Further, the plaintiff argued that Verizon failed to take additional steps to challenge the detective's assessment of the situation as an "emergency."[38]

The case did not pertain to whether the information obtained by the detective could be used against the plaintiff in any criminal proceeding brought against him, but the Court answered the following question: Could the plaintiff recover damages against Verizon through a civil lawsuit under the SCA?[39]

II. ANALYSIS

The court analyzed whether Verizon violated the SCA when it To determine if the plaintiff can recover damages against Verizon, the Court analyzed if Verizon violated the SCA by failing to act in "good faith" in its reliance on the detective's provided information to determine that the "emergency exception" allowed for Verizon to divulge certain information.[40] The Court analyzed the meaning of "good faith" under the SCA in section 2702(c)(4) and 2707(e)(1) to determine what the statute requires to constitute an act of "good faith."[41] First, pursuant to 2702(c)(4), for a provider to qualify under the emergency exception, the provider must in "good faith, believe that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of

33. *See id.* at 246-47.
34. *See id.* at 247.
35. *See id*.
36. *See id.* at 246.
37. *See id.* at 251.
38. *See id.*
39. *See id.* at 249.
40. *See id.* at 251.
41. *See id.*

information relating to the emergency."[42] Second, 2707(e)(1) requires a "good faith reliance" to trigger a complete defense.[43]

The Fifth Circuit relied on the decisions of the Seventh and Tenth Circuits to apply an objective standard of "good faith" in both contexts of the statute.[44] The Court maintained that the "objective standard" approach strikes the right "balance between providing a recourse for subscribers whose rights under the SCA have been violated and minimizing social costs."[45]

The Court concluded that Verizon relied acted in an objectively reasonable manner because Verizon only divulged non-content information and did not provide any information until the detective provided a signed and certified form which indicated that the request included the following: 1) "the danger of death or serious physical injury to a person, necessitating the immediate release of information relating to that emergency, 2) an alleged arson, and 3) victims who were within the home when it was set on fire."[46] Because the form given to Verizon included these three elements and the detective's title of senior investigator, the court found that Verizon acted reasonably.[47] In addition, the Court found that the statute does not require an element of "bad faith" nor requires Verizon to show why it had a motive to violate the statute because the plain language of the statute requires that the violation be "knowing and intentional."[48]

III. CONCLUSION

The Fifth Circuit Court of Appeals held that Verizon is entitled to statutory immunity, pursuant to the Stored Communications Act (SCA), 18. U.S.C. §§ 2701 – 2712, and is entitled to a complete defense because it relied in "good faith" on an officer's representations regarding the existence of an emergency.[49]

42. *See id.* (quoting 18 U.S.C. § 2702(c)(4) (2018)).
43. *See id.*(quoting 18 U.S.C. § 2707(e)).
44. *See id.* at 252-53.
45. *See id.* at 254.
46. *See id.*
47. *See id.*
48. *See id.* at 255 (quoting 18 U.S.C. § 2707(a)).
49. *See id.* at 246.

All American Telephone Company, Inc. v. FCC

Senrui Du

867 F.3D 81 (D.C. CIR. 2017)

I. INTRODUCTION

In *All American Telephone Company, Inc. v. FCC*,[50] the Court of Appeals for the District of Columbia Circuit granted in part and denied in part petitions for review of the FCC's order awarding damages and treading on the merits of the companies' state law claims.[51]

II. BACKGROUND

The FCC regulates common-carrier providers of wired telephone services, including the fees for "exchange access services" rendered for long distance telephone calls.[52] Those fees are often referred to as "access charges."[53] When a person places a long-distance call, a local exchange carrier operating in the caller's geographic area will route the call to an interexchange carrier.[54] That exchange carrier will connect the call to the recipient's local exchange carrier and pay an access charge to the local carrier for the connection service.[55]

Some local exchange carriers sought to artificially inflate the number of local calls they could connect, thereby increasing both the call volume and the rates that they could charge; this scheme is known as "traffic pumping."[56] Specifically, a local exchange carrier would enter into a relationship with a company that generates a high volume of telephone calls.[57] The local carrier would forgo charging its partner for the phone calls that came in, and would even pay the partner share of long-distance access rates it charged the interexchange carriers.[58] Though the local carrier and its phone-call-generating partner benefited from traffic pumping, the public and the interchange carriers bore the loss by paying significant amounts to the local exchange carriers in the form of artificially inflated access charges to

50. All Am. Tel. Co., Inc. v. FCC, 867 F.3d 81 (D.C. Cir. 2017).
51. *Id.* at 84.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 85.
57. *Id.*
58. *Id.*

complete the long-distance calls.[59] In 2010, the FCC issued a series of orders concluding that such traffic-pumping schemes were unlawful under Section 201(b) and 203(c) of the Communications Act, 47 U.S.C. §§ 201(b), 203(c).[60] The Commission ruled in particular that carriers could not charge interexchange carriers to connect long-distance calls to a non-paying end user.[61]

In the early 2000s, Beehive Telephone Company, Inc. (Beehive) created competitive local exchanges—All American Telephone Co., e-Pinnacle Communications, Inc. and Chasecom (collectively, "the Companies").[62] then had the Companies engage in a traffic-pumping scheme.[63] The Companies have only served conference-calling companies, and have never charged them for their services.[64] Beehive not only was paid by the Companies, but also could charge interexchange carriers other types of fees associated with the inflated traffic.[65]

In 2007, the Companies filed a civil suit against AT&T Corporation, seeking recovery of those access fees under a tariff collection action and a state-law *quantum meruit* claim.[66] In response, AT&T filed a counterclaim alleging that the Companies existed for the sole purpose of executing traffic-pumping schemes, which was a violation of Section 201 and Section 203 of the Communications Act.[67] The district court referred AT&T's counterclaims arising under the Communications Act to the FCC.[68]

To effectuate the referral, AT&T filed a complaint with the FCC, alleging the Companies engaged in traffic-pumping as sham entities designed to unlawfully inflate the rate of access charges billed to AT&T.[69] The FCC ruled that the Companies violated Section 201(b) of the Communications Act and had no authority to charge AT&T for services.[70] The FCC further ordered the Companies to refund the $252,496.37 that AT&T had previously paid them in access charges.[71] The Companies filed a petition for review.[72]

III. ANALYSIS

The Companies first contended that, because FCC found them to be sham entities rather than genuine common carriers, the Commission's

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 86.
63. *Id.*
64. *Id.*
65. *Id.* at 86-87.
66. *Id.* at 87.
67. *Id.*
68. *Id.*
69. *Id.* at 88.
70. *Id.* at 88-89.
71. *Id.* at 89.
72. *Id.*

jurisdiction over them evaporated, leaving it powerless to award damages.[73] The Court found that FCC has jurisdiction over complaints alleging anything done or omitted to be done by any common carrier in contravention of the provisions of the Communications Act.[74] A "common carrier" includes entities providing services pursuant to an agreement filed with FCC, even if the agreements are subsequently determined to be invalid.[75] In addition, the Court recognized that one may be a common carrier under common law by holding oneself out as such.[76] Having held themselves out as common carriers and having charged AT&T for services under a common-carrier tariff, the Companies were engaged as a common carrier for hire, and thus were subject to the Commission's jurisdiction.[77]

Next, the Companies argued that the proper measure of damages should have been AT&T's actual pecuniary loss, not the rate they paid.[78] The Companies contended specifically that AT&T failed to prove that it suffered an actual pecuniary loss.[79] The Court held that AT&T met the burden of proof.[80] AT&T presented expert declarations evidencing the amount of money it paid for no actual access services authorized by the Communications Act.[81] AT&T also causally linked its damages to the Companies' traffic-pumping scheme, showing that they were sham entities that rendered no chargeable access services to AT&T.[82] The Court held that the FCC permissibly held the Companies financially responsible for the payments they received as a result of their own conduct.[83]

After determining the measure of damages, the Court assessed its ability to decide whether the Commission's analysis of the Companies' state-law *quantum meruit* claims was proper.[84] The Commission argued that the Companies lacked standing to raise authority arguments, because the Commission's statements did not injure them.[85] To establish standing, the Companies must demonstrate a substantial risk that the district court will credit the Commission's determinations in resolving their common law claims.[86] Since the Hobbs Act[87] vests exclusive jurisdiction to review final decisions of FCC in the federal court of appeals, not the district courts, the district court would be without authority to review the merits of FCC's decision.[88] Therefore, a substantial risk of injury to the companies existed

73. *Id.*
74. *Id.* at 90.
75. *Id.*
76. *Id.*
77. *Id.* at 91.
78. *Id.*
79. *Id.*
80. *Id.* at 92.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 92-93.
85. *Id.* at 93.
86. *Id.*
87. 28 U.S.C. § 2342(1) (2018).
88. *All Am. Tel. Co., Inc*, 867 F.3d at 93.

because, once the referral was completed, the Companies would have been powerless to challenge the merits of FCC's decision before the district court.[89]

The FCC further argued that the Companies' argument was foreclosed because they failed to file a petition for review raising their objection to the FCC addressing their common law claims.[90] The Court stated that a judicial review is permitted as long as the issue is "necessarily implicated by the argument made" to the FCC.[91] In the instant case, the Companies repeatedly argued to the FCC that it "lacked the authority to address the state-law claims."[92] Therefore, the Court held that it had the ability to decide the merits of the Companies' challenge to the FCC's decision.[93]

The Court then ruled that the FCC lacked the legal authority to discuss the merits of the Companies' state-law claims.[94] Congress vested the FCC only with the authority to address allegations of actions taken in contravention of the Communications Act.[95] A state common law claim did not arise under a violation of the Communications Act, and thus fell outside the scope of the FCC's jurisdiction.[96] Moreover, for over fifty years, the FCC has held that it lacks jurisdiction to determine "the carrier's rights against a subscriber."[97] Accordingly, FCC's decision that the Companies "did not provide any service to AT&T" was improper.[98]

IV. CONCLUSION

In sum, the Court affirmed the Commission's jurisdiction over the Companies and its award of damages. The Court also vacated the Commission's decision of the Companies state-law *quantum meruit* claims.[99]

89. *Id.*
90. *Id.*
91. *Id.* (quoting *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 996 (D.C. Cir. 2013)).
92. *Id.* at 94.
93. *See id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* (quoting *Thornell Barnes Co. v. Illinois Bell Tel. Co.*, 1 FCC.2d 1247, 1275 (1965)).
98. *Id.* at 95 (quoting 30 FCC Rcd at 8966 cd.).
99. *Id.*

FTC v. AT&T Mobility LLC

Millicent Usoro[100]

883 F.3D 848 (9TH CIR. 2018)

I. BACKGROUND

In *FTC v. AT&T Mobility*, the Ninth Circuit, sitting en banc, affirmed the district court's denial of AT&T's motion to dismiss an action brought by the Federal Trade Commission (FTC) under Section 5 of the FTC Act (Act), alleging that AT&T's data-throttling plan was unfair and deceptive.[101] Data throttling is a practice by which a company intentionally reduces customers' data speeds for exceeding the threshold usage of the customer's data plan, regardless of network congestion.[102] The court initially reversed the district court's denial of the motion to dismiss, but conducted a rehearing on the issue.

AT&T argued that it is exempt from Section 5 because it fell under the common carrier exemption of the Act.[103] In its view, AT&T is an entity that has the "status" of a common carrier and therefore, all of its acts are immune from FTC authority under Section 5, "regardless of whether the entity provides both common-carriage and non-common-carriage services."[104] Furthermore, while AT&T's motion to dismiss was pending, the FCC issued an order that would prospectively classify mobile data as a common-carriage service instead of a non-common-carriage service.[105] AT&T subsequently argued that the FTC no longer had the authority to bring suit against it because of this order.[106]

The FTC argued that the common-carrier exception only applies to the common-carrier activities of an entity – thus, an entity is still subject FTC regulation for its non-common carriage activities.[107] Additionally, the agency argued that because the FCC order only applies prospectively,

100. The author was previously employed at the Federal Trade Commission; however, the author's views are her own, she does not speak on behalf of the FTC, and she did not use any non-public information to prepare this article.

101. *See* 15 U.S.C. § 45(a)(2) (2018).

102. Fed. Trade Comm'n v. AT&T Mobility LLC, 883 F.3d 848, 851 (9th Cir. 2018).

103. *Id.* Section 5(a)(2) enumerates a list of industries that are exempt from FTC authority, such as airlines, banks, and federal credit unions, and of significance to this case, common carriers. 15 U.S.C. § 45(a)(2).

104. *AT&T Mobility*, 883 F.3d at 851-52.

105. *Id.* at 852 (citing In the Matter of Protecting and Promoting the Open Internet, 30 FCC Rdc. 5601, 5734 n.792, 2015 FCC LEXIS 731 (2015)).

106. *Id.*

107. *Id.*

mobile data was not considered a common carrier service when the FTC filed its suit against AT&T.[108]

II. ANALYSIS

As a threshold issue, the court held that the district court had federal question jurisdiction because the "dispute was one arising under federal law."[109] The court then began its statutory interpretation analysis by reviewing the text and history of FTC Act and the definition of "common carrier." The court concluded that the text and history of the Act gave limited guidance, but did point to an activity-based definition of a common carrier. The court noted that Congress intentionally gave the FTC broad enforcement powers through the Act when it was enacted in 1914, and that Congress established the common-carrier exemption to avoid "interagency conflict" with Interstate Commerce Commission, an agency established in 1887 that regulated common carriers.[110] While the court noted that Congress has never defined the term "common carrier," the Communications Act defined it 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."[111] The definition was extended to telecommunications carriers in the Telecommunications Act of 1996.[112]

The court rejected AT&T's argument that Section 6 of the Act, which was enacted in 1973 and governs the FTC's investigative authority, illuminates on the scope of the FTC's enforcement capabilities because the amendment was passed "almost six decades after the FTC Act" and "does not modify Section 5."[113] The court also rejected AT&T's arguments that failed amendments of the FTC Act and a revision of another exempt entity of Section 5 authority shed light on the Act's meaning.

The court then turned to the judicial interpretation of "common carrier" and concluded that case law strongly suggests an activity-based interpretation of the exemption.[114] The court noted that "common carrier had a well-understood meaning by 1914" because of various Supreme Court cases that illuminated its view that "common carrier entit[ies] [were] not a unitary status for regulatory purposes."[115] The court also analyzed its own interpretations of "common carriers," noting cases where it held that an entity can be a common carrier "in some instances but not in others,

108. *Id.*

109. *Id.* at 853 (internal quotations and citations omitted).

110. *Id.* at 854-55. The ICC regulated telephone common carriers until Congress passed the Communications Act of 1934, which created the FCC with regulatory authority over telephone common carriers. *Id.* at 855.

111. *Id.* at 855 (citing 47 U.S.C. § 153(11) (2018)).

112. *Id.* at 856 (citing 47 U.S.C. § 153(51) (2018)).

113. *Id.* at 856-57.

114. *Id.* at 858.

115. *Id.* at 863 ("we afford the agencies some deference under *Skidmore* [].").

depending on the nature of the activity which is subject to scrutiny."[116] The court also noted cases involving common carriers in the D.C., Eleventh, and Second Circuits that suggested that the term "common carrier" is an activity-based status.[117]

Finally, the court gave weight to the FCC and FTC's interpretations of "common carrier."[118] The FCC in its amicus brief argued "the Communications Act and the FTC Act fit hand-in-glove to ensure there is no gap in the federal regulation of telecommunications companies" and a status-based interpretation could potentially "open a … substantial regulatory gap and greatly disrupt the federal regulatory scheme."[119] Because the FCC regulates common-carriage activities, the FTC Act fills in the regulatory gap of the Communication Act through its enforcement authority over telecommunications providers when they are not engaged in common-carriage activities, such as data-throttling at the time the FTC filed its action against AT&T.[120] The court recognized that agencies often have concurrent jurisdiction and share regulatory authority over entities, "as different federal agencies bring to the table discrete forms of expertise and specific enforcement powers."[121] The court also noted past activity-based interpretations by both agencies.[122] The court rejected AT&T's argument that the FCC order reclassifying mobile data service to common carriage service because the order explicitly stated a presumption against retroactivity, and the FTC brought the authority to pursue the case before the order was issued.[123]

III. CONCLUSION

The Ninth Circuit affirmed the denial of AT&T's motion to dismiss and adopted an activity-status based definition of the common carrier exemption after reviewing the legislative history of the FTC Act, judicial interpretations of the term "common carrier," and the FTC and FCC's own interpretations of and expertise on common carriers. The court concluded that the FTC did have enforcement authority over mobile data because

116. *Id.* at 860 (quoting McDonnell Douglas Corp. v. Gen. Tel. Co., 594 F.2d 720, 724-25 n.3 (9th Cir. 1979)).

117. *Id.* (citing Fed. Trade Comm'n v. Verity Int'l, Ltd., 443 F.3d 48, 58 (2d Cir. 2006) ("courts must examine the actual conduct of an entity to determine if it is a common carrier for purposes of the FTC Act exemption"); Eagleview Techs., Inc. v. MDS Ass'n, 190 F.3d 1195, 1197 (11th Cir. 1999) ("an entity is not considered a common carrier unless it is 'engaged' in rendering services"); Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Commc'n Comm'n, 533 F.2d 601, 608 (D.C. Cir. 1976) ("one can be a common carrier with regard to some activities but not others.").

118. *Id.* at 861-62.

119. *Id.* at 862.

120. *See id.*

121. *Id.*

122. *Id.* at 862-63.

123. *Id.* at 864.

mobile data was not a common carrier service at the time the suit was filed.[124]

124. *Id.* at 850.

Latner v. Mount Sinai Health System, Inc.

Kimberly Hong

879 F.3D 52 (2D CIR. JAN. 10, 2018)

The Telephone Consumer Protection Act ("TCPA") states that the act of sending automated calls or text messages to cell phones is unlawful, except when certain exemptions are present or when the individual consented.[125] In *Latner v. Mount Sinai Health System*, the United States Court of Appeals for the Second Circuit reviewed and affirmed the United States District Court of the Southern District of New York's dismissal of the case, holding that automated text messages sent were part of the exceptions and the Plaintiff-Appellant consented to the automated messages.[2]

I. BACKGROUND

In 2003, Daniel Latner ("Plaintiff–Appellant") visited Mount Sinai Health Systems ("Defendants–Appellees") for a health examination.[3] During his visit, the Plaintiff–Appellant completed new patient forms.[4] As part of the new patient forms, the Plaintiff–Appellant signed the "New Patient health form containing his contact information" and the "Ambulatory Patient Notification Record" that allows the Defendants–Appellees to "use [the Plaintiff–Appellant's] health information 'for payment, treatment and hospital operations purposes.'"[5]

In June 2011, the Defendants–Appellees hired PromptALERT, Inc. to send phone and/or text messages such as flu shot reminders to clients.[6] During the month of November 2011, the Plaintiff–Appellant visited the Defendants–Appellees office and "declined any immunizations."[7] Then, on September 19, 2014, the Plaintiff–Appellant received an automated text message from the Defendants–Appellees stating to schedule a flu shot appointment along with a number to call.[8] The Plaintiff–Appellant claims

125. *See* Telephone Consumer Protection Act, 47 U.S.C. § 227 (2015).

[2] *See* Latner v. Mount Sinai Health Sys., 879 F.3d 52, 55 (2d Cir. 2018).

[3] *See id.* at 53.

[4] *See id.*

[5] *Id.*

[6] *See id.*

[7] *Id.* at 54.

[8] *See id.* ("Its flu season again. Your PCP at WPMG is thinking of you! Please call us at 212–247–8100 to schedule an appointment for a flu shot. (212– 247–8100, WPMG).").

that the Defendants–Appellees violated Section 227(b)(1)(A)(iii) of the TCPA by sending the automated flu shot reminder.[9]

The United States District Court for the Southern District of New York granted the Defendants–Appellees' motion for judgment on the pleadings and dismissed the case.[10] The Plaintiff–Appellant timely appealed the decision to the United States Court of Appeals for the Second Circuit.[11] The Second Circuit reviewed the District Court's holding to grant the Defendants–Appellees' motion for judgment on the pleadings *de novo*.[12]

II. ANALYSIS

The central issue presented before the court was whether the act of sending out an automated text message that reminded individuals to obtain a flu shot violated the TCPA.[13] The TCPA "makes it unlawful to send texts or place calls to cell phones through automated telephone dialing systems, except under certain exemptions or with consent."[14]

The court first began looking at the legislative history.[15] First, the court explained that "Congress delegated authority to issue regulations under the TCPA to the Federal Communications Commission ("FCC")."[16] Second, in a 1992 Order, the FCC construed the "TCPA's prior-express consent provision" to mean that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."[17] Third, in 2008, the FCC extended the interpretation to cellular devices.[18] Fourth, in 2012, the FCC created a "Telemarketing Rule" that required "prior *written* consent for autodialed or prerecorded telemarketing calls."[19] Under the "Telemarketing Rule," the FCC also stated that one is exempt from the requirement of written consent for calls to cellular devices if the message "delivers a 'health care' message made by, or on behalf of, a 'covered entity' or its 'business associate,' as those are defined in the HIPPA Privacy Rule.'"[20] The HIPPA Privacy Rule laid out the meaning of

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[9] *See id.*; *see also id.* at n. 1 (stating "47 U.S.C. § 227 (b)(1)(A)(iii) provides that, '[i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or prerecorded voice... to any telephone number assigned to a . . . cellular telephone service.'").

[10] *See id.* at 54.

[11] *See id.*

[12] *See id.*

[13] *See id.* at 53.

[14] *Id.* at 54 (citing 47 U.S.C. § 227 (b)(1)(A)(iii) (2018)).

[15] *See id.*

[16] *Id.* (citing 47 U.S.C. § 227(b)(2) (2018)).

[17] *Id.* at 54.

[18] *See id.*

[19] *Id.* (quoting In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd. 1830, 1838, ¶ 28 (2012)) (internal quotations omitted).

[20] *Id.* at 54–55 (quoting 47 C.F.R. § 64.1200(a)(2) (2018)).

health care "to include 'care, services, or supplies related to the health of an individual' . . . [and] exempts from its definition of marketing all communications made '[f]or treatment of an individual by a health care provider . . . or to direct or recommend alternative treatments' to the individual."[21]

The District Court held that the text message sent to the Plaintiff–Appellant by PromptALERT, Inc. on behalf of the Defendants–Appellees was an exception under the HIPPA Privacy Rule.[22] The Second Circuit held that although the District Court correctly determined this matter, the District Court's analysis was incomplete, as it did not determine whether the Plaintiff–Appellant gave prior express consent.[23] The Second Circuit affirmed the District Court's holding "on the grounds that, considering 'the facts of the situation,' the text message did indeed fall within 'the scope of [Plaintiff–Appellant's prior express] consent.'"[24] The court reached this conclusion because the Plaintiff–Appellant (1) gave his cell phone number to the Defendants–Appellees and (2) he signed a form acknowledging receipt of "various privacy notices."[25] The court held that when the Plaintiff–Appellant provided his signature on the form, he "agreed that [the Defendants–Appellees] could share his information for 'treatment' purposes."[26] The privacy notices that the Plaintiff–Appellant signed also stated that the Defendants–Appellees could use the Plaintiff–Appellant's "information 'to recommend possible treatment alternatives or health-related benefits and services.'"[27]

III. CONCLUSION

The United States Court of Appeals for the Second Circuit affirmed the United States District Court of the Southern District of New York's decision granting the Defendants–Appellees' motion for judgment on the pleadings and dismissal of the case because the Plaintiff–Appellant provided prior express consent to be sent an automated text message "about a 'health-related benefit[ ]' that might have been of interest to him and the message was covered by an exemption under the TCPA."[28]

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[21] *Id.* at 55 (citing Public Welfare Act, 45 C.F.R. §§ 160.103, 164.501 (2014)).
[22] *See id*.
[23] *See id.*
[24] *Id.* (citing 29 FCC Rcd. at 3446, ¶ 11).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

Nueva Esperanza, Inc. v. FCC

Brooke Thompson

863 F.3D 854 (D.C. CIR. 2017)

I. INTRODUCTION

In *Nueva Esperanza, Inc. v. FCC*,[126] the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision to dismiss the Appellant's application to construct and operate a LPFM radio station in Philadelphia, PA. The Court held the Appellant forfeited its argument regarding fair notice because it incorrectly interpreted a blog post authored by the Chief of the Media Bureau, which was intended to provide guidance to applicants,.

II. BACKGROUND

In 2000, the Federal Communications Commission introduced the Low Power FM Radio (LPFM) service designed "to create opportunities for new voices on the air waves and to allow local groups, including schools, churches and other community-based organizations, to provide programming responsive to local community needs and interests."[127] Licenses for LPFM stations are limited to "noncommercial, educational entities and public safety entities."[128]

To resolve "mutually exclusive" LPFM applications by commercial applicants, the Commission is required to use a competitive bidding system.[129] However, the Commission instead uses a noncommercial method of resolving mutually exclusive LPFM applications through a point system.[130] Under that system, the Commission awards an applicant one point for each of six characteristics, such as having an "established community presence of at least two years."[131]

During the October 2013 filing period, several community organizations applied to construct an LPFM station in Philadelphia, PA.[132] Among these organizations was the Appellant, Nueva Esperanza, Inc., a

126. Nueva Esperanza, Inc. v. FCC, 863 F.3d 854 (D.C. Cir. 2017).

127. *Id.* at 856 (citing Creation of Low Power Radio Service, 15 FCC Rcd. 2205, 2213 (2000)).

128. *Id.* (quoting 15 FCC Rcd. at 2209)

129. *Id.* (citing 15 FCC Rcd. at 2213).

130. *Id.* (citing 15 FCC Rcd. at 2258).

131. *Id.* (quoting *Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window*, 29 FCC Rcd. 10847, 10848 (2014)).

132. *Id.* (citing *Media Bureau Identifies Mutually Exclusive Applications*, 28 FCC Rcd. 16713, 16715 (2013)). (case name should not be in italics)

nonprofit organization based in Philadelphia.[133] Eleven of those applications, including the Appellant's, were deemed mutually exclusive.[134] The Appellant, along with six other applicants were awarded five points each, thus creating a seven-way tie. To break the tie, two or more of the tied applicants may propose to share use of the LPFM station by filing a time-share proposal.[135] The point totals of those applicants will be aggregated if they submit an acceptable time-share proposal.[136]

Four of the tied applicants, not including the Appellant, received twenty points by filing a joint timeshare application.[137] This group was comprised of G-Town Radio, Germantown United Community Development Corp., Germantown Life Enrichment Center, and South Philadelphia Rainbow Committee Community Center, Inc. ("Timeshare Applicants").[138] The Appellant received a total of ten points by filing a timeshare application with just one other applicant, the Social Justice Law Project of the Philadelphia NAACP, Inc.[139] Because they had a higher point total, the Timeshare Applicants were awarded the LPFM station license.[140]

Just two months before the Timeshare Applicants filed their joint agreement, the Appellant petitioned the Commission to deny several applications for violating the Commission's rule prohibiting multiple applications by or on behalf of the same applicant.[141] Among those applications the Appellant petitioned the Commission to deny were three of the Timeshare Applicants and another Germantown applicant: G-Town Radio, Germantown United Community Development Corp., Germantown Life Enrichment Center, and Historic Germantown. The Appellant alleged the parties were acting on behalf of G-Town Radio. However, the parties filed an opposition, claiming they were all independent entities with the intention of operating the LPFM station on their own. They recognized that "their best chance at operating a station dedicated to Germantown was by working together at the outset with plans to potentially aggregate points during the mutually exclusive. . .stage so that they might share time on a single station."[142]

The Appellant replied by arguing that the pre-application collaboration by the parties was prohibited according to a blog post, authored by William T. Lake, the Chief of the Media Bureau, which was released to give applicants guidance concerning the application process for

133. *Id.*
134. *Id.*
135. *Id.* (citing 29 FCC Rcd. at 10852).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 856–57.
142. *Id.* at 857.

the then-upcoming October 15, 2013 to November 14, 2013 application window.[143] Mr. Lake noted in paragraphs three and four of the blog post:

> Third, we will permit organizations in a community to work together to file a single. . . application. Alternatively, organizations in a community could apply separately — for the same or different frequency — knowing that they may decide later to aggregate points so they can negotiate a time-share agreement if the Commission determines that they are tied with the highest point total in the same mutually exclusive group . . .[144]
>
> Fourth, please bear in mind that it is the *specified* applicant on the application who must intend to carry out the station construction and operation described in the application. Therefore, multiple groups should not attempt to maximize the chances of receiving an LPFM construction permit by submitting multiple applications under the different groups' names with a prior understanding that the groups will later share time or ownership with each other if just one applicant succeeds in getting a construction permit. If this prior understanding does exist, then all the applicants must be listed as parties to the application, and only one application can be filed (our rules only allow for one application per organization). The FCC requires applicants to be truthful when listing all the parties that have control over the applicant entity and, in the event the application is granted, would have control over the future LPFM station.[145]

The Media Bureau responded by denying the Appellant's petition to deny the applications of the four Germantown parties.[146] The Bureau concluded that the Appellant failed to demonstrate that the Germantown parties violated any of the Commission's rules in conjoining their applications with the intent of filing a joint time-share or that the applications were filed for the benefit of just G-town.[147]

First, the Bureau found no evidence of common control among the Germantown parties, as each functioned independently.[148] Second, the Bureau noted the benefit of the final time-share group could not have been for the sole benefit of Germantown because of the inclusion of a non-

143. *Id.* (citing *Updated: The Low Power FM Application Window Is Fast Approaching*, FCC BLOG (Oct. 21, 2013, 3:13 PM), https://www.fcc.gov/news-events/blog/2013/10/21/updated-low-power-fm-application-window-fast-approaching).

144. *Id.* at 857 (citing *Updated: The Low Power FM Application Window Is Fast Approaching*, *supra* note 19).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

Germantown Applicant as well as the exclusion of Historic Germantown.[149] Furthermore, the Bureau noted the third paragraph of the Blog Post specifically approved of agreements to collaborate: "there is no rule prohibiting LPFM applicants from filing separate applications with the goal of arriving at a timeshare agreement, provided that each applicant remains under *separate control* and intends to construct and operate the proposed station if its application is granted."[150]

The Appellant petitioned the Media Bureau for reconsideration, opposed by the Timeshare Applicants, which the Bureau denied.[151] The Bureau stated that the Appellant misinterpreted the blog post.[152] The Appellant then sought review from the Commission, which the Commission denied for the same reasons given by the Bureau.[153]

III. ANALYSIS

A. Commission's Interpretation of the Blog

The Appellant argued the blog post stated that entering into time-sharing arrangements by applicants was prohibited before the applicants filed their applications and until the Commission announced the points awarded to each applicant.[154] The Appellant relied on the fourth paragraph of the post, that stated:

> [M]ultiple groups should not attempt to maximize the chances of receiving an LPFM construction permit by submitting multiple applications under the groups' names with a prior understanding that the groups will later share time or ownership with each other if just one applicant succeeds in getting a construction permit.[155]

The Commission argued, however, that this interpretation was inconsistent with the third paragraph of the blog post, which stated:

149. *Id.*
150. *Id.* at 858 (emphasis added).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 858–59.

> [O]rganizations in a community could apply separately – for the same or different frequency – knowing that they may decide later to aggregate points so they can negotiate a time-share agreement if the Commission determines that they are tied with the highest point total in the same mutually exclusive group.[156]

The Appellant then contended that the third paragraph merely explained that parties are "obviously allowed to *know*" that aggregation of points upon the awarding of tied point totals to multiple applicants was allowed.[157] However, the Appellant argued that the fourth paragraph prohibited applicants from entering into a "preexisting agreement to share points."[158] In other words, the Appellant claimed that "'know[ledge] that [the applicants] may decide later to aggregate points, as permitted by the Third Paragraph,' [wa]s different from a 'prior understanding that the groups will later share time,' as prohibited by the Fourth Paragraph."[159] However, because the record did not show the Germantown applicants entered into any sort of binding agreement, the court held that this distinction by the Appellant was irrelevant.[160]

Furthermore, the Appellant argued that its understanding of the blog post was more sensible than the Commission's. The Appellant contended that the Germantown applicants essentially "stack[ed] the deck in their favor. . .virtually ensur[ing] they would win the license from the outset."[161] They argued that while the Commission's reading of the blog post allowing agreements to aggregate points before selectees were announced would invite "gamesmanship," the Appellant's reading would level the playing field for applicants acting in good faith.[162] The Commission, however, accepted the risk of some gamesmanship because it proved to be one of "the most efficient and effective means of resolving mutual exclusivity among tied LPFM applicants."[163]

Finally, the Appellant petitioned the Bureau for reconsideration, arguing the blog post established a Commission policy prohibiting LPFM applicants from filing individual applications with the goal of aggregating points.[164] The Bureau contended that the blog post constituted only the "informal writings of [an] individual[], not [a] formal statement[] of agency policy," and therefore "would be non-authoritative even had it expressed the proposition [Esperanza] allege[s]."[165] The Bureau rejected the Appellant's argument that Mr. Lake's blog post should have been deemed authoritative simply because he served as the Chief of the Media Bureau, explaining that

156. *Id.* at 859.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 860.
162. *Id.*
163. *Id.* (citing 27 FCC Rcd. 15402, 15474 (2012).
164. Nueva Esperanza, Inc. v. FCC, USCA Case #15-1500 at 15 (filed June 13, 2016) (appellee's brief).
165. *Id.*

the "[a]dvice of a Bureau Chief, while that of a high level staffer, remains that of a staffer," and nothing more.[166]

B. Fair Notice

The Appellant argued it did not have fair notice of the Commission's interpretation of the blog post.[167] To preserve its argument for appellate review, the Appellant was required to present it to the Commission in its application for review of the Media Bureau's decision. The appellant argued that made the argument when it said it would have tried to make a similar time-sharing agreement "[h]ad the policy on pre-application and pre-mutually exclusive phase agreements to aggregate points and agree to timeshare agreements been clear."[168] However, the court ruled the Appellant forfeited its fair notice argument and did not provide a valid objection to the Commission's decision.[169]

IV. CONCLUSION

Because the Appellant's interpretation of the Blog Post was incorrect and the Appellant forfeited its fair notice argument, the decision of the Commission was affirmed.

166. *Id.* at 15-16.
167. *Id.* at 860.
168. *Id.* at 860-61.
169. *Id.* at 861.

Press Communications, LLC v. FCC

Kimberly Hong

875 F.3D 1117 (D.C. CIR. 2017)

In *Press Commc'ns, LLC v. FCC*, the United States Court of Appeals for the District of Columbia Circuit declined to review an FCC Order that rejected a radio station's request to swap channels with another radio station because it violated the FCC's channel spacing requirements.[170]

I. BACKGROUND

Section 301 of the Communications Act of 1934 ("Act") "confers on the United States control 'over all the channels of radio transmission,'"[171] and Section 303 of the Act gives the Federal Communications Commissions ("FCC") the power to "implement[] a licensing scheme pursuant to the Act . . . and sets 'public convenience, interest, or necessity as the [FCC's] guiding principles."[172] Furthermore, every radio station requires a license provided by the FCC,[173] and a license term cannot last for more than eight years.[174] However, a license can be renewed and must follow the FCC's regulations.[175] Under Section 73.3539, a renewal application must be sent "at least four months before the expiration of their current license term."[176]

The FCC must also authorize any modification of a radio station's license.[177] Modification of a radio station includes a "'major change' such as new ownership" or a "'minor change' such as change to adjacent channel."[178] In order to comply with the FCC rules and regulations, each application for modification must be "accompanied by an appropriate request for waiver."[179] A license modification is handled on a "'first come/first serve' processing sequence"[180] Under this processing sequence, "the first acceptable application cut[s] off the filing rights of subsequent applicants."[181]

170. *See* Press Commc'ns, LLC v. FCC, 875 F.3d 1117, 1118 (D.C. Cir. 2017).
171. *Id.* at 1118 (citing Communications Act of 1934, 47 U.S.C. § 301 *et seq.* (1934)).
172. *Id.* at 1118 (citing 47 U.S.C. § 303 (2018)).
173. *Id.* at 1118 (citing 47 U.S.C. §§ 301, 307(a)–(d)).
174. *See id.* at 1119.
175. *See id.*
176. *See id*. (citing Federal Communications Commission Regulations, 47 C.F.R. § 73.3539 (2012)).
177. *See id.* at 1118 (citing 47 C.F.R. § 73.3573 (2018)).
178. *Id.* (citing 47 C.F.R. § 73.3573).
179. *Id.* (citing 47 C.F.R. § 73.3566).
180. *Id.* at 1119 (citing 47 C.F.R § 73.3573(f)(1)).
181. *Id.* (citing 47 C.F.R. § 73.3573(f)(1)).

Additionally, each radio station must meet the "minimum separation requirements for FM radio stations" provided under Section 73.207 of the FCC's regulations.[182] Every radio station has a "home on the ground (its transmitter), and on the dial (its frequency)."[183] There needs to be sufficient spacing between each station's home and dial in order to avoid any interference between stations.[184] The distance needed between a station's "transmitters on the ground corresponds inversely to the distance between their frequencies on the dial."[185] However, exemptions to Section 73.207 is provided in Section 73.213, which states that "stations operating at locations authorized prior to 1964 or 1989 are thereby 'grandfathered.'"[186] These "grandfathered" spaces "may be modified or relocated," but even a "minor modification such as a change in channel 'must' satisfy 'the minimum spacing requirements of § 73.207.'"[187]

A radio station, WBHX, ran by Press Communications ("Press") submitted an application for a minor modification on August 27, 2010.[188] Press wanted to move the transmitter for WBHX to a new location and to avoid the issue of WBHX being short spaced with another station, Press requested to switch their frequency with that of Equity's Station ("Equity"), WZBZ. Under Press's request, Press would move frequencies from 99.7 to 99.3 and Equity would move from 99.3 to 99.7.[189] Equity would keep its transmitters at the same spot, while Press would be able to "move its physical transmitters inland without short spacing itself to stations adjacent to 99.7."[190]

The FCC responded to Press's application illustrating two short spacing issues. First, if Equity's station were to move their frequency, it would create a short space with Atlantic City Board of Education station's ("Board of Education"), WAJM, frequency at 88.9.[191] In their application, Press recognized the issue of short space between Equity and the Board of Education stations.[192] However, Press argued that this issue was "moot," as the Board of Education's license expired in June 2006 and it "failed to renew its broadcast license . . . until three weeks *after* Press submitted its minor application."[193] Although the Board of Education's broadcasting license expired, "the Media Bureau recognized WAJM as an operational

182. *Id.* at 1119-20 (citing 47 C.F.R. § 73.207).

183. *Id.* at 1120.

184. *See id.*

185. *Id.* ("For example, for our purposes, the transmitters of 'first-adjacent' channels, such as 99.3 and 99.5 or 100.7 and 100.9, must be at least 113 kilometers apart; transmitters for 'second-adjacent' channels, such as 99.3 and 99.7 or 100.7 and 101.1, must have at least 69 kilometers between them. As a general matter, an application that fails to meet these spacing requirements, both on the ground and between frequencies, is said to create short spacing and is therefore defective.") (citing 47 C.F.R. § 73.207(b)(1)).

186. *Id.* (citing 47 C.F.R. § 73.213(a), (b)).

187. *Id.* at 1119 (citing 47 C.F.R. § 73.203).

188. *Id.* at 1119.

189. *See id.* at 1120.

190. *Id.*

191. *See id.*

192. *See id.*

193. *Id.* (emphasis added).

station (albeit broadcasting unlawfully) and disagreed with Press's contention that the minimum distance requirement between WZBZ and WAJM was 'moot' or otherwise immaterial."[194]

Second, Equity's frequency switch would cause the station to be short spaced to a Delaware station, WJBR, located at 99.5.[195] Currently, Equity is short spaced to WJBR, but was grandfathered in and therefore exempted from the FCC's spacing requirements.[196] Equity's frequency switch with Press would not change the spacing distance between Equity and the Delaware station nor would it change the physical location between the stations.[197] However, the Media Bureau stated that "the conventional spacing rules of Section 73.207 applied to Equity's move" causing "Equity . . . [to] not meet those minimum spacing requirements with respect to WJBR at its new location."[198] The Media Bureau also stated the failure of Press "to cite any precedent for proposing an *involuntary* channel substitution to a grandfathered short-spaced station."[199]

The Media Bureau provided Press with thirty days to correct the two short spacing issues that accompanied their application and explained that any failure to complete the changes would result in a dismissal of their application.[200] Press did not make any corrective changes "insisting that its initial application was not defective because it 'would not result in any unacceptable channel separations'" nor did Press request a "waiver of the spacing rules."[201] Therefore, in an FCC order that granted the Board of Education's license renewal, the Media Bureau dismissed Press's modification application.[202] In response to the dismissal, Press submitted to the full Commission an application for review of the Media Bureau decision.[203] The Commission "denied the application" and Press followed with an appeal to the District of Columbia Circuit Court.[204]

II. ANALYSIS

In a request to reverse the FCC's decision to dismiss Press's minor modification application, Press provided two arguments and Press had to prevail on both arguments for the court to set aside the Commission's order.[205]

194. *Id.*
195. *See id.*
196. *See id.*
197. *See id.*
198. *Id.*
199. *Id.*
200. *See id.*
201. *Id.*
202. *See id.*
203. *See id.* at 1121.
204. *See id.* (citing In re Applications of Atl. City Bd. of Educ. & Press Commc'ns, LLC, 30 FCC Rcd. 10583 (2015)).
205. *See id.*

The first issue presented before the Court was whether the spacing between Equity and the Delaware station remained "grandfathered" in.[206] Press stated that under 47 C.F.R. § 73.213, a "transfer of a grandfathered short spaced station is permitted" making the short spacing between Equity and the Delaware station acceptable.[207] Press relied on Section 73.213(b), which states that modifications may be made to "[s]tations at locations authorized prior to May 17, 1989, that did not meet the . . . separation distances required by § 73.207 and have remained short-spaced since that time"[208] However, the FCC's regulation does not mandate an issuance of a modification application that places an "involuntary relocation on a third party, nor does it grandfather that third party's short spacing in the absence of a request to waive the short spacing prohibition."[209] Furthermore, the Court relied on the plain language of Section 73.203 that expressed "that a short spaced station grandfathered under the rule is not necessarily permitted to rely on its prior grandfathering when it transfers channels."[210] In addition, the Court found that the FCC followed customary practices when enforcing short spacing rules on Press's application.

Second, Press argued that since the Board of Education applied for a renewal after their license had already expired, "the FCC was required to give Press the benefit of the cut-off rule and deny WAJM's subsequent, late-filed renewal application."[211] Due to the Court's holding that a short spacing issue between Equity and the Delaware station existed, the Court does not go into detail regarding this second argument. The Court did provide that "the Media Bureau . . . adopted a new policy for processing license renewal applications that makes lapses like the Board of Education's less likely to recur."[212]

III. CONCLUSION

The United States Court of Appeals for the District of Columbia affirmed the FCC's order dismissing Press's minor modification application because the channel switch with Equity violated the spacing requirements.

206. *See id.*
207. *Id.*
208. *Id.* at 1122 (citing 47 C.F.R. § 73.213(b)).
209. *Id.* (citing 47 C.F.R. § 73.213(b)).
210. *Id.* (citing 47 C.F.R. § 73.203).
211. *Id.* at 1124.
212. *Id.* (citing 31 FCC Rcd. at 9384 n.30)

SNR Wireless License Co, LLC v. Federal Communications Commission

Tess Macapinlac

868 F.3D 1021 (D.C. CIR. 2017)

In *SNR Wireless LicenseCo, LLC v. FCC*[213], the District of Columbia Circuit Court of Appeals held that the FCC had reasonably applied precedent when considering whether or not DISH had a disqualifying degree of *de facto* control over SNR Wireless LicenseCo (SNR) and Northstar Wireless, LLC (Northstar).[214] However, the Court also held that the Commission did not give SNR and Northstar sufficient notice regarding the possibility that if their relationships with DISH cost them their bidding credits, the FCC would also deny them the opportunity to get discounted [?].[215] The Court then remanded the case to the FCC in order to give SNR and Northstar the chance negotiate a cure for the control that DISH has over them.[216]

I. BACKGROUND

Under the Communications Act of 1934 (the Act), the Federal Communications Commission (FCC) has the ability to grant licenses to private companies for the use of the electromagnetic spectrum.[217] This spectrum consists of "the electromagnetic radio frequencies used to transmit sound, data, and video across the country"[218] and can be used by private companies to provide television, cellphone, and wireless internet services to consumers.[219] In 1993, Congress gave the FCC the power to award licenses through auctions.[220] FCC regulations allow the Commission to give "bidding credits," or discounts, to designated entities, including small businesses, to cover part of the cost of licenses that these entities may win.[221]

213. 868 F.3d 1021 (D.C. Cir. 2017).
214. *Id.* at 1025.
215. *Id.*
216. *Id.*
217. *Id.* (citing 47 U.S.C. §§ 307, 309 (2004)).
218. *Id.* (quoting FCC, *About the Spectrum Dashboard*, http://reboot.fcc.gov/reform/systems/spectrum-dashboard/about (*About the Spectrum*)).
219. *Id.*
220. *Id.* at 1025-26 (citing Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312).
221. *Id.* at 1026 (citing 47 C.F.R. § 1.2110(a), (f) (2012)).

This case began with Auction 97, announced by the FCC on May 19, 2014 and held on July 23, 2014.[222] The Notice for the Auction (Notice) explained that small businesses were eligible for bidding credits in this auction, with the size of the bidding credits depending on the entities' "attributable" revenue over the preceding three years.[223] Entities that had less than $40 million in attributable revenue got a fifteen percent discount on the license price, while entities with less than $15 million in attributable revenue got a twenty-five percent discount.[224]

Notably, attributable revenue of an entity included the revenues of both the small business itself and any other entity with *de facto* control over the small business. While the FCC does not set a clear line between acceptable influence and *de facto* control, in the past, the FCC has considered factors such as the authority of someone other than the small business to determine the nature, types, or prices of services offered, as well as control over appointments to the board, and general involvement in management decisions.[225] In the Notice in question, the FCC directed entities to examine the Commission's earlier decisions regarding the definition of designated entities, and pointed to the context dependent definition of *de facto* control on which the Commission had long relied.[226]

To verify the entities' qualifications for bidding credits, prior to the auction, each entity filled out a short form listing its attributable revenue, under punishment of perjury.[227] After the auction concluded, each entity that successfully obtained a license filled out a long, more comprehensive form that would be reviewed by the FCC to ensure eligibility for bidding credits.

SNR Wireless LicenseCo, LLC ("SNR") was formed two weeks before the application deadline for this auction, while Northstar Wireless, LLC ("Northstar") was formed eight days before the application deadline.[228] Neither company had officers, directors, or revenue, and both claimed they qualified for the twenty-five percent discount on licenses.[229] Both companies also disclosed on their short applications that their capital for the auction came from DISH, in exchange for an indirect eighty-five percent ownership interest of each company, a position as operations manager at both entities, and adopted various joint bidding protocols and agreements with each entity.[230]

Both SNR and Northstar had successful bids at the auction, gaining 43.5% of the licenses available.[231] With the designated twenty-five percent discount, SNR and Northstar together would save a little over $3 billion

222. *Id.*

223. *Id.* (citing Auction of Advanced Wireless Servs. (Aws-3) Licenses Scheduled for Nov. 13, 2014, 29 FCC Rcd. 8386, 8411-12 (2014)).

224. *Id.* (citing 29 FCC Rcd. 8386, 8411-12 (2014)).

225. *Id.* (citing 47 C.F.R. § 1.2110(c)(2) (2018)).

226. *Id.* at 1026-27 (citing 29 FCC Rcd. at 8411).

227. *Id.* at 1027 (citing 29 FCC Rcd. at 8407).

228. *Id.*

229. *Id.* (In re Northstar Wireless, LLC, 30 FCC Rcd. 8887, 8893 (2015)).

230. *Id.*

231. *Id.* at 1027-28.

dollars.[232] SNR and Northstar then filled out the longer, more thorough applications required by the FCC.[233] Once these applications became public, eight parties, including less successful auction competitors and other parties, petitioned the FCC to deny the bidding credits to SNR and Northstar, since both were essentially controlled by DISH, a large business.[234]

The FCC dismissed six petitions and considered the two petitions from a.235The FCC held that DISH revenue was attributable to both SNR and Northstar, so neither SNR nor Northstar were eligible to keep the bidding credits.236concluded that both SNR and Northstar could keep the licenses if they were able to pay full price for them.237SNR and Northstar chose to pay for some licenses at full price and defaulted on others.238 bids and the eventual price of the license after re-auction.239The companies also had to pay fifteen percent of either the original bid or the eventual price of the license, whichever was lower.240

II. ANALYSIS

The petitioners, SNR and Northstar, claimed that the FCC departed from precedent without reasoning regarding *de facto* control, and that even if the FCC had kept with precedent, the Commission did not provide fair notice that the petitioner's relationship with DISH could cost them bidding credits and implement a penalty.[241] The court started with the claim that the FCC had departed from precedent without reasoning.[242] The court noted that their review was narrow and only meant to ensure that the FCC had a "satisfactory explanation" for its action.[243]

The court first focused on the six-factor *de facto* control test presented in *Intermountain Microwave*,[244] which discusses factors that examine whether one entity has control over another entity.[245] The factors are "(1) who controls the daily operations of the business, (2) who employs, supervises, and dismisses the small business's employees; (3) whether the small business has "unfettered" use of all its facilities and equipment; (4) who covers the small business's expenses, including its operating costs; (5) who receives the small business's revenues and profits; and (6) who makes

232. *Id.* at 1028.
233. *Id.*
234. *Id.*
235. *Id.* (30 FCC Rcd. at 8904-05).
236. *Id.* (citing 30 FCC Rcd. at 8940-48).
237. *Id.*
238. *Id.*
239. *Id.* at 1029 (citing 30 FCC Rcd. at 8950-51).
240. *Id.* (citing 30 FCC Rcd. at 8950-51; 47 C.F.R. § 1.2104(g)(2)(ii
241. *Id.*
242. *Id.*
243. *Id.* (citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotations omitted).
244. Nonbroadcast and General Action Report No. 1142, 12 FCC 2d 559 (1963) [hereinafter *Intermountain Microwave*].
245. 868 F.3d 1021 at 1030.

and carries out the policy decisions of the small business."[246] The FCC found that DISH, through "the substance of the terms of DISH's control,"[247] had *de facto* control over both SNR and Northstar.[248] The Court found that the FCC had applied the test in similar ways in other FCC cases, and so the Commission's conclusion that DISH had *de facto* control over the petitioners was appropriate and consistent with earlier law.[249]

The FCC also considered the case of the petitioners under the *Fifth Memorandum Opinion & Order* ("Fifth MO&O")[250], which sought to ensure that only small businesses that participate in the wireless industry receive benefits, rather than small businesses that are proxies for or will soon become subsidiaries of larger businesses.[251] *Fifth MO&O* explained that when an investor uses finances to force a small company into a sale, then the investor effectively takes control of the small company.[252] The FCC found that DISH placed severe restrictions on SNR and Northstar, leaving the two companies with few options to avoid financial failure, and the Commission used *Fifth MO&O* as further evidence to support the conclusion of DISH's *de facto* control over the petitioners.[253] The Court found the FCC properly applied *Fifth MO&O* to strongly support the FCC's conclusion that DISH had *de facto* control over the petitioners.[254]

The petitioners pointed to two auction bids authorized by the Wireless Bureau as precedent that the FCC departed from without reason.[255] Over ten years ago, the Wireless Bureau granted a small company called Denali Spectrum bidding credits without opinion.[256] However, Cricket Communications and its affiliates provided Denali Spectrum with the capital needed to participate in the auction, in exchange for an eighty-five percent interest in Denali Spectrum and a position as Denali Spectrum's manager.[257] Similarly, the Wireless Bureau granted another small company, Salmon PCS, bidding credits without explanation, though Cingular Wireless had an eighty-five percent interest in Salmon and the ability to weigh in on Salmon's business decisions.[258] The petitioners claimed their agreements with DISH mirrored many agreements that were present in the Denali and Salmon agreements, and so the FCC departed from existing precedent when it determined that DISH had *de facto* control over the petitioners.[259]

246. *Id.* at 1031 (citing 12 FCC. 2d at 560).
247. *Id.* at 1033.
248. *See id.* at 1031-33.
249. *Id.* at 1033
250. Fifth Memorandum Opinion & Order, 30 FCC Rcd. 403 (1994) [hereinafter *Fifth MO&O*].
251. 868 F.3d at 1034.
252. *Id.*
253. *Id.*
254. *Id.* at 1035.
255. *Id.*
256. *Id.* at 1036.
257. *Id.*
258. *Id.*
259. *Id.* at 1036-37.

The Court noted that the FCC is not bound to treat the Denali and Salmon agreements as binding precedent from which the FCC cannot deviate without reasonable explanation.[260] Additionally, the Court held in *Comcast v. FCC*[261] that a "lower component of a government agency"[262] does not bind the agency as a whole, unless the agency has endorsed those actions.[263] Thus, the Wireless Bureau's approval of the Denali and Salmon bidding credits does not force the Commission to follow in a similar way, and the Commission does not have to explain deviations from those decisions.[264]

Petitioners argued that because the Wireless Bureau exercises powers delegated by the Commission, and those powers have the same effect as actions coming from the Commission, the Bureau's decisions should be considered the Commission's decisions.[265] However, the court held that this similarity does not mean that rules implied from case-specific actions can be interpreted as the position of the Commission.[266] The petitioners then pointed to 47 C.F.R. § 0.445 (2012), which provides that when staff, using powers delegated by the FCC, does not publish opinions or orders, those opinions or orders can be used as precedent against the Commission.[267] By this reasoning, the petitioners claimed that the unpublished orders by the Wireless Bureau can be used as precedent against the Commission.[268] The Court did not agree with this point of reasoning, noting that the purpose of Section 0.445 was to prevent parties from using documents against another party, such as the Commission, when the latter party has no notice of the document.[269]

The petitioners then differentiated their case from the *Comcast* case, stating that while *Comcast* referenced "sporadic action" by the Media Bureau that the FCC did not review or endorse, the case at hand dealt with the Wireless Bureau, which the FCC has referred to in order to state the Commission's position.[270] The Court did not find this persuasive, as the Denali and Salmon decisions were "sporadic" actions that were not reviewed or endorsed by the FCC.[271] The petitioners next claimed that the FCC had an obligation to follow Wireless Bureau precedent because the Auction Notice pointed participants to Bureau precedent for guidance on the issue of control.[272] The Court pointed out no reasonable participant could

260. *Id.* at 1037.
261. Comcast Corp. v. FCC, 526 F.3d 763 (D.C. Cir. 2008).
262. *Id.* at 769.
263. 868 F.3d at 1037.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* (quoting 47 C.F.R. § 0.445(a) (2018)).
268. *Id.* at 1038.
269. *Id.*
270. *Id.* at 1037-38.
271. *Id.*
272. *Id.*

read those references to mean that the every principle from a past Wireless Bureau action represented the position of the Commission.[273]

Next, the petitioners pointed to a footnote in their case where the FCC disavowed the actions of the Wireless Bureau staff, claiming that this footnote implies that without that disavowal, the actions would be considered full Commission acts.[274] However, the Court notes that the disavowal was meant to foreclose inconsistencies that could be implied from past actions, and did not carry the implication that the petitioners claimed.[275] The petitioners also claimed that since *Intermountain Microwave* and *Fifth MO&O* do not provide clear guidance regarding *de facto* control, the FCC intended for auction participants to look at specific application forms and successful agreements, like the Denali and Salmon agreements, for clear guidance.[276] The court noted that the petitioners did not cite to a case where such a situation has occurred, and held that the Commission was free to determine qualifications for bidding credits based on the facts at hand.[277]

The Court also held that even if the Denali and Salmon agreements were held as precedent, the two agreements are materially different from the cases of SNR and Northstar.[278] The Court noted that both SNR and Northstar would be forced to sell to DISH, rather than scramble to build a nationwide network over the course of five years in order to repay their multibillion dollar loans.[279] Denali and Salmon's agreements with their respective investors differed from that of the petitioners in that Denali and Salmon had more control and ability to build their networks and collect revenue before payments on the loans were due.[280]

Additionally, the court observed that during the auction, SNR and Northstar seemed to coordinate bids in a way that was detrimental to each company individually, but when examined as though the companies were "acting as two arms of DISH," the bid coordination made economic sense.[281] The petitioners argued that this did not violate any FCC bidding rules.[282] The Court instead pointed to this as another indicator of DISH's *de facto* control over the petitioners.[283] The Court held that the FCC had acted reasonably and consistently with Wireless Bureau decisions when deciding the issue of DISH's *de facto* control over the petitioners.[284]

The petitioners lastly argued that the Chairman of the FCC told Congress that in resolving this case, the FCC applied new rules developed after Auction 97, and claimed that it was unfair that they would be held to

273. *Id.* at 1038.
274. *Id.*
275. *Id.* at 1039.
276. *Id.*
277. *Id.*
278. *Id.* at 1040.
279. *Id.*
280. *Id.* at 1040-41.
281. *Id.* at 1041-42.
282. *Id.* at 1042.
283. *Id.*
284. *Id.*

rules that did not exist at the time of the auction.[285] However, the court found that the Chairman's statement was not an admission that the Commission was applying new rules to the petitioners, and points out that all rules and precedent from the FCC's order pre-dated the auction. [286]

However, the court noted that the petitioners could only be sanctioned by the FCC if they had fair notice, or notice that allowed the petitioners to "identify, with reasonable certainty, the standards with which the agency expect[ed] [them] to conform."[287] The court agreed with the FCC that there was sufficient notice regarding the possibility that DISH may have had *de facto* control, and that that control would prevent petitioners from qualifying for bidding credits.[288] However, the court also held that the FCC did not give sufficient notice that this degree of *de facto* control would prevent petitioners from the chance to seek to negotiate a cure with the FCC.[289]

The FCC argued that the *Intermountain Microwave* test should have shown the petitioners that their understanding was far from compliant with FCC rules.[290] However, the court noted that this was not enough to show that petitioners were given fair notice that they would not have the chance to cure.[291] The court noted that in *In re Application of ClearComm, L.P.,*[292] the FCC allowed a petition for consideration regarding a company's *de facto* control over an entity with questionable designated-entity status.[293] The court analogized the petitioners' case to *ClearComm*, where the companies in question wanted to be eligible for bidding credits, and all companies failed, making the petitioners' case for the chance to cure even stronger.[294]

While the FCC expressed concerns that offering the chance to cure would stop companies from attempting to comply with designated-entity rules before the auction, the court pointed out that there is no requirement for the FCC to cure.[295] The court held that the Commission, however, must give reasonable notice that an entity may not have an opportunity to cure.[296]

III. CONCLUSION

The Court remanded the case back to the FCC in order give petitioners the chance to renegotiate their agreements with DISH. [297]

285. *Id.*
286. *Id.* at 1043.
287. *Id.* (quoting Trinity Broad., Inc. v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000)).
288. *Id.*
289. *Id.*
290. *Id.* at 1045.
291. *Id.*
292. In re Application of ClearComm, L.P., 16 FCC Rcd. 18627 (2001).
293. 868 F.3d 1021 at 1045.
294. *Id.* at 1046.
295. *Id.*
296. *Id.*
297. *Id.*

United States v. Thompson

Senrui Du

866 F.3D 1149 (10TH CIR. 2017)

In *United States v. Thompson*,[298] the United States Court of Appeals for the Tenth Circuit affirmed the District Court's decision to grant the government's application for orders requesting Thompson's historical cell-service location information (CSLI) and admitting some of that CSLI evidence at a pretrial proceeding.[299] The Court held that cell phone users lacked a reasonable expectation of privacy in their historical CSLI, which users voluntarily conveyed to third-party cell-service providers.[300]

I. BACKGROUND

Thompson was arrested after an investigation into a drug-trafficking operation.[301] Agents gathered evidence through a confidential informant; monitoring telephones used by certain of the co-conspirators; and conducting searches of Thompson's residence.[302] Before trial in the district court, Judge Platt, a state court judge sitting in the Eighth Judicial District of Kansas, had issued wiretap orders for target phones used by Thompson and his co-conspirators.[303] Based in part on information derived from intercepts conducted pursuant to the wiretap orders, law enforcement applied for search warrants of Thompson's residence.[304] Officers seized cell phones, cash, miscellaneous documents, drug paraphernalia, and credit cards at Thompson's residence.[305]

Thompson filed a motion to suppress the intercepted calls, "arguing law enforcement had intercepted his communications outside the territorial jurisdiction of the Eighth Judicial District."[306] The government filed an application for orders pursuant to § 2703(d) of the Stored Communications Act (SCA), asking the court to require the electronic service providers for Thompson and his co-conspirators to disclose historical CSLI for their phones.[307] The District Court granted the government's application.[308]

298. United States v. Thompson, 886 F.3d 1149 (10th Cir. 2017).
299. *Id.* at 1160.
300. *Id.*
301. *Id.* at 1151.
302. *Id.*
303. *Id.* at 1152.
304. *Id.*
305. *Id.* at 1152-53.
306. *Id.* at 1153.
307. *Id.*
308. *Id.*

"After obtaining the CSLI, the government sought to establish the location of the intercepted phone calls by showing that a call had 'pinged' certain cell towers in and around the Junction City area within the Eighth Judicial District."[309] "At a pretrial evidentiary hearing, the government presented the CSLI and testimony from two experts who agreed that if the CSLI showed a phone connected to one of the Junction City towers, then it was highly likely the phone was physically located in the Eighth Judicial District."[310] The District Court found the government's evidence sufficient.[311] The court, therefore, admitted calls that had pinged on one of the towers.[312]

In the instant case, Thompson contended that § 2703(d) was unconstitutional, because cell phone users had a reasonable expectation of privacy in their historical CSLI.[313] And because collecting CSLI constituted a search, Thompson argued, the Fourth Amendment required the government to procure a warrant before obtaining a cell phone user's historical CSLI.[314]

II. ANALYSIS

The Court first reviewed Thompson's challenge to the constitutionality of § 2703(d).[315] Since 1967, the Supreme Court has recognized a privacy-based approach to the Fourth Amendment.[316] Under that approach, a court asks: "(1) whether the individual asserting an expectation of privacy exhibited an actual (subjective) expectation of privacy; and (2) whether that expectation 'is one that society is prepared to recognize as reasonable.'"[317] Where an expectation of privacy satisfies both requirements, government invasion of that expectation is generally a search.[318]

The Supreme Court analyzed the constitutionality of § 2703(d) in a pair of cases dealing with business records created by a third party.[319] In *United States v. Miller*,[320] the Supreme Court held the defendant did not have a legitimate expectation of privacy in the subpoenaed bank records, reasoning the records were business records of the banks and related to transactions to which the bank was a party.[321] The Supreme Court explained that the Fourth Amendment does not forbid "the obtaining of information revealed to a third party and conveyed by [that third party] to Government authorities, even if the information is revealed on the assumption that it will

309. *Id.*
310. *Id.*
311. *See id.*
312. *Id.*
313. *Id.* at 1152.
314. *Id.*
315. *Id.* at 1154.
316. *Id.*
317. *Id.* (quoting Katz v. United States, 389 U.S. 347, 361 (1967)).
318. *Id.*
319. *Id.* at 1155.
320. 425 U.S. 435 (1976).
321. 886 F.3d at 1156 (citing *Miller*, 425 U.S. at 440-41).

be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[322]

Several years later, in *Smith v. Maryland*,[323] the Supreme Court held the third-party doctrine applied to the warrantless installation of a pen register used to record telephone numbers dialed from the defendant's home.[324] The Court reasoned that telephone users typically know that they must convey numerical information to the phone company; that the phone company had facilities for recording this information; and that the phone company did in fact record this information for a variety of legitimate business purposes.[325] Because the defendant voluntarily turned over his numerical information to a third-party phone company, he lacked a legitimate expectation of privacy in that information.[326]

Here, the court noted that it was third-party cell service providers who created CSLI records for their own business purposes.[327] Under the same rationale the Supreme Court articulated in *Miller* and *Smith*, cell phone users voluntarily turned over their CSLI to service providers, thus relinquishing any reasonable expectation of privacy.[328] Any cell phone user must know that her phone exposed its location to the nearest cell tower by seeing the phone's strength fluctuate.[329] The court held that "[e]ven if this cell phone-to-tower transmission was not common knowledge, cell phone service providers' and subscribers' contractual terms of service and providers' privacy policies expressly state[d] that a provider uses a subscriber's location information to route his cell phone calls."[330] These documents also informed subscribers that the providers not only used the information, but collected it and would turn over these records to government officials if served with a court order.[331]

Thompson contended that the third-party doctrine has no application here, because that doctrine presumed a voluntary relinquishment of information and individuals did not voluntarily disclose their CSLI to service providers.[332] The court disagreed, stating that users voluntarily entered arrangements with service providers knowing that they "'must maintain proximity to the provider's cell towers' in order for their phones to function."[333] Furthermore, the court held that "like the phone numbers recorded by the pen register in *Smith*, CSLI [wa]s not a record of conversations between individuals, but rather a record of the transmission of

322. *Id.* (quoting *Miller*, 425 U.S. at 443) (internal quotations omitted).
323. 442 U.S. 735 (1979).
324. 886 F.3d at 1156 (citing *Smith*, 442 U.S. at 743-46).
325. *Id.* (citing *Smith*, 442 U.S. at 743).
326. *Id.* (citing *Smith*, 442 U.S. at 743-44).
327. *Id.*
328. *Id.* at 1157.
329. *Id.* (citing United States v. Carpenter, 819 F.3d 880, 888 (6th Cir. 2016)).
330. *Id.* (citing In re Application of the United States for Historical Cell Site Data, 724 F.3d 600, 613 (5th Cir. 2013) (internal quotations omitted).
331. *Id.* (citing *In re Application of the United States for Historical Cell Site Data,* 724 F.3d at 613).
332. *Id.*
333. *Id.* (quoting United States v. Graham, 824 F.3d 421, 430 (4th Cir. 2016) (en banc)).

data that occur[red] to facilitate those conversations."[334] Thus, the court found, CSLI was not protected by the Fourth Amendment.[335]

Finally, Thompson relied on Justice Sotomayor's concurrence in *United States v. Jones* to argue that societal expectations of privacy have changed.[336] Thompson cited Justice Sotomayor's statement that an individual should have reasonable expectation of privacy in information voluntarily disclosed to third parties.[337] The court rejected Thompson's argument, explaining that Justice Sotomayor's concurrence was not the opinion of the Supreme Court.[338] The court held that until a majority of justices on the Supreme Court decides otherwise, courts are "still bound by the third-party doctrine."[339]

III. CONCLUSION

The United States Court of Appeals for the Tenth Circuit concluded that cell phone users lack a reasonable expectation of privacy in their historical CSLI, because users voluntarily convey their CSLI information to third-party cell-service providers.[340]

334. *Id.* at 1158.
335. *Id.*
336. *Id.*
337. *See id.*
338. *Id.* at 1159.
339. *Id.*
340. *Id.* at 1160.