

Citizens Telecomms. Co. of Minn., LLC v. FCC

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901 F.3D 991 (8TH CIR. 2018)

I. INTRODUCTION

In an opinion written by Judge L. Steven Grasiz, the U.S. Court of Appeals for the Eighth Circuit vacated a portion of a 2017 Order from the FCC regarding a new regulation of time division multiplex services for the telecommunications industry.¹ Though a variety of Petitioners advanced numerous technical arguments, the Order was sent back to the FCC for further proceedings consistent with the Court's opinion regarding a singular issue.²

II. BACKGROUND

Two different groups challenged a 2017 FCC Order³ that changed the regulations concerning business data services.⁴ The Incumbent Local Exchange Carriers (ILECs) challenged the new price cap rates specifically, while the Competitive Local Exchange Carriers (CLECs) challenged the rest of the changes in the Order on grounds of inadequate notice and on the merits.⁵

The FCC Order under review is *Business Data Services in an Internet Protocol Environment (2017 Order)*.⁶ Among other things, the *2017 Order* created a Competitive Market Test under which lower bandwidth time division multiplex (TDM) channel termination services were to be scrutinized.⁷ The *2017 Order* resulted from a Further Notice of Proposed Rulemaking published by the FCC in 2016 (*2016 FNPRM*).⁸

1. Citizens Telecomms. Co. of Minn., LLC v. FCC, 901 F.3d 991, 1006 (8th Cir. 2018).

2. *Id.*

3. Business Data Services in an Internet Protocol Environment, 32 FCC Rcd. 3459 (2017).

4. Citizens Telecomms. Co. of Minn., LLC, 901 F.3d at 996.

5. *Id.* at 996-98.

6. See Business Data Services in an Internet Protocol Environment, 32 FCC Rcd. 3459 (2017).

7. *Id.*

8. See Business Data Services in an Internet Protocol Environment, 31 FCC Rcd. 4723 (2016).

III. ANALYSIS

The CLEC Petitioners advanced five arguments regarding “(1) the adequacy of the notice, (2) the ending of *ex ante* regulations for transport services, (3) the Competitive Market Test, (4) the rules regarding Ethernet services, and (5) the Interim Wholesale Access Rule.”⁹ The argument regarding adequate notice was the only successful argument in the case.¹⁰

First, regarding notice, the CLEC Petitioners began by arguing that the 2016 FNPRM and 2017 Order were not compatible because the FNPRM sought comment on a “*heightened* regulatory scheme while the 2017 Order was broadly *deregulatory*.”¹¹ The Court rejected this argument and stated that the CLEC Petitioners were incorrect in their reading of the 2016 FNPRM and that the plain language provided readers “adequate notice of large scale deregulation.”¹² The CLEC Petitioners next argued that the specific standards that the FCC adopted in the Competitive Market Test differed from, and in fact were not proposed in, the 2016 FNPRM.¹³ The Court rejected this assertion as well, stating that the 2016 FNPRM used broad terminology that encompassed the results of the 2017 Order.¹⁴ However, the CLEC Petitioners did prevail on their argument that they had “no notice of the complete deregulation of transport services.”¹⁵ The 2016 FNPRM did not give adequate notice that the 2017 Order would completely deregulate transport services and this violated the requirements of the Administrative Procedure Act.¹⁶ Specifically, the Court held that “[b]ecause the FCC did not propose completely ending *ex ante* regulation of transport services, it did not allow for informed participation by interested parties in that portion of the rulemaking, and its notice was insufficient.”¹⁷ Further, even though the FCC issued a draft of the 2017 Order a few weeks prior to the final release, that action did not “cure the harm from inadequate notice.”¹⁸ In sum, the Court denied all of the CLEC Petitioners’ requests aside from one.¹⁹ The Court vacated the section of the final rule in the 2017 Order regarding transport services and required the FCC to conduct further proceedings.²⁰

Second, while the CLEC Petitioners also argued against the merits of the 2017 Order specifically regarding transport services, the Court held that since the notice for transport services was deemed inadequate, they need not discuss the argument.²¹ Third, the Court did walk through the CLEC Petitioners’ claim taking issue with the new Competitive Market Test.²² The

9. Citizens Telecomms. Co. of Minn., LLC, 901 F.3d at 1001.

10. See *id.* at 1015.

11. *Id.* at 1001 (emphasis in original).

12. *Id.* at 1002.

13. *Id.*

14. *Id.* at 1003-04.

15. *Id.* at 1004.

16. *Id.* at 1005.

17. *Id.*

18. *Id.* at 1006.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1006-07.

Test was challenged on three different grounds: (1) economic theory with a merits-based analysis, (3) the reasonableness of the criteria, and (3) the adequacy of the “cost benefit analysis in the test.”²³ But since the Court determined that even though the FCC’s final order incorporated “competing evidence,” it did not violate the Administrative Procedure Act because it was neither arbitrary nor capricious.²⁴ Fourth, the CLECs argued that the “FCC unreasonably excluded low bandwidth Ethernet BDS from price caps.”²⁵ However, the Court determined that this argument was without basis since there was no evidence the FCC acted “arbitrarily and capriciously in its choice of whether to exclude Ethernet services from price caps.”²⁶ Fifth and finally for the CLEC Petitioners, regarding the extension of the Interim Wholesale Access Rule, the court immediately and succinctly declined “the CLEC Petitioners’ invitation to adopt their characterization of the relevant ‘community’ in 47 U.S.C § 214(a) because the argument invites proxy review of an order not before us.”²⁷

Though the ILEC Petitioners also advanced a single argument, the Court quickly refuted it by agreeing with the FCC that they neither acted arbitrarily nor capriciously.²⁸

IV. CONCLUSION

The Eighth Circuit Court of Appeals vacated the section of the final rule in the *2017 Order* regarding TDM transport services specifically.²⁹ The Court remanded that portion of the rule to the FCC for further proceedings.³⁰

23. *Id.*

24. *Id.* at 1011.

25. *Id.*

26. *Id.* at 1012-13.

27. *Id.* at 1013.

28. *Id.* at 1010.

29. *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1006 (8th Cir. 2018).

30. *Id.*