Worldcall Interconnect, Inc. v. FCC

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907 F.3D 810 (5TH CIR. 2018)

I. INTRODUCTION

In *Worldcall Interconnect, Inc. v FCC*, the United States Court of Appeals for the Fifth Circuit denied Worldcall Interconnect, Inc.'s (WCX) petition for review of an FCC Order.[1] The court held that (1) even if the FCC erred when deciding that the automatic roaming rule didn't apply, that error was harmless and, therefore, 47 C.F.R. § 20.12(e) should be applied;[2] (2) "[t]he FCC's interpretation of 47 C.F.R. § 20.12, that it was the service being supplied by the host carrier, rather than the home carrier, that determined whether the automatic roaming rule applied"[3] was permissible; and (3) because a competitor has no obligation to tie their roaming rates to that of an inferior, the commercial reasonableness decision is affirmed.[4]

II. BACKGROUND

A. Roaming

Roaming services are regulated by the FCC.[5] These transactions concern three different entities: the cellphone user, the home service provider, and the host service provider.[6] The cell phone user pays for cell service through a home provider.[7] If said cellphone user leaves the home provider's territory, they are connected with a host provider's service.[8] In order for this to work, the "home provider and host provider must enter into an agreement granting the home provider's subscribers use of the host provider's network."[9]

One of the major FCC orders affecting regulation of roaming transactions is the Automatic Roaming Order, in which automatic roaming was defined as "[a service with which] a roaming subscriber is able to originate or terminate a call in the host carrier's service area without taking any special actions."[10] In contrast, manual roaming requires the user to take a

1. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810 (5th Cir. 2018).
2. *Id*. at 819.
3. *Id.* at 821.
4. *Id*. at 825.
5. *Id*. at 814.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* (citing Reexamination of Roaming Obligations of Commerical Mobile Radio Serv. Providers, 22 FCC Rcd. 15817, 15818 (2007)).

specific action—usually manually turning over a credit card number to the host provider.[11] This new Order required automatic roaming from carriers "upon reasonable request" and "on reasonable and nondiscriminatory terms and conditions."[12] These specifications are narrowed though to (1) "commercial mobile radio service [or CMRS] carriers" who "offer real-time, two-way switched voice or data service that is interconnected with the public switched network" and (2) "the provision of push-to-talk and text-messaging service by CMRS carriers."[13] CMRS is defined as "a mobile service that is: (a)(1) Provided for profit, i.e. with the intent of receiving compensation or monetary gain; (2) An interconnected service; and (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) the functional equivalent of a mobile service."[14]

The Automatic Roaming Order did not extend to data roaming services.[15] Instead, these services are covered under the 2011 Data Roaming Order.[16] This is applied to "all facilities-based providers of commercial data services [CMDS]," which is defined as "any mobile data service that is not interconnected with the public switched network and is: (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public."[17] This Order requires CMDS providers to "offer roaming arrangements to other such providers on commercially reasonable terms and conditions . . . ."[18] Importantly, under these rules "providers may negotiate the terms of their roaming arrangements on an individualized basis."[19] The FCC looks at cases involving these types of provisions on a "case-by-case" basis, considering the totality of the circumstances.[20]

The major difference between the Automatic Roaming Rule and Data Roaming Rule is the ability for CMDS providers to individually negotiate under the latter rule.[21] The Automatic Roaming Rule makes discriminatory terms impermissible, whereas the Data Roaming Rule does not.[22]

B. Procedural History

Worldcall Interconnect is a cell phone service provider that operates in a relatively rural area in Texas.[23] They sought out AT&T in an attempt to enter

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11. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 814 (5th Cir. 2018).
12. *Id.* (quoting Reexamination of Roaming Obligations of Commerical Mobile Radio Serv. Providers, 22 FCC Rcd. 15817, 15818 (2007)).
13. *Id.* (quoting Reexamination of Roaming Obligations of Commerical Mobile Radio Serv. Providers, 22 FCC Rcd. 15817, 15818 (2007)).
14. *Id.* at 814-15 (5th Cir. 2018) (citing to 47 C.F.R. § 20.3).
15. *Id.* at 815.
16. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 815 (5th Cir. 2018).
17. *Id.* (citing 26 FCC Rcd. 5411, 5416 (2011).
18. *Id.* (citing 26 FCC Rcd. 5411, 5416 (2011).
19. *Id.* (citing 26 FCC Rcd. 5411, 5416 (2011).
20. *Id.* at 815.
21. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 815 (5th Cir. 2018).
22. *Id.*
23. *Id.* at 816.

into a data roaming agreement in 2011.[24] The parties could not reach a mutual agreement after multiple unsuccessful negotiations and subsequently went to the FCC for assistance.[25] A few years later, the parties again attempted negotiations, but to no avail.[26] After this failure, WCX filed a complaint with the FCC.[27] Amongst many allegations in the complaint, WCX claimed AT&T's rates were discriminatory and commercially unreasonable, and sought application of the Automatic Roaming Rule.[28] The Enforcement Bureau issued an interim order denying the complaint, and WCX entered into an agreement with AT&T shortly thereafter that "resolve[d] the remaining issues consistent with the Interim Order[,]"[29] with the understanding they would challenge the denial.[30] WCX then sought and was denied review by the FCC, because the FCC agreed with the Bureau that 47 C.F.R. § 20.12(d), the Automatic Roaming Rule, does not apply to the dispute, but instead 47 C.F.R. § 20.12(e), the Data Roaming Rule, does.[31]

III. ANALYSIS

A. Standard of Review

Agency actions are reviewed under an arbitrary and capricious standard, which asks "whether [the] agency articulated a rational connection between the facts found and the decision made."[32] This involves "more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[33] When deciding questions of law, the court gave deference to an agency's own interpretation of their regulation, striking only interpretations that are "plainly erroneous or inconsistent with the regulation[,]"[34] and this deference is "even greater" than what is required under *Chevron*.[35]

The court must take "due account . . . of the rule of prejudicial error"[36] when deciding cases under arbitrary and capricious review standards (also known as harmless error).[37] This allows the reviewing court to refuse to reverse an action, even if there was a clear mistake made, as long as that mistake "clearly had no bearing on the procedure used or the substance of

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24. *Id.*
25. *Id.*
26. *Id.* at 817.
27. *Id.*
28. *Id.* at 817.
29. *Id.* at 817.
30. *Id.*
31. *Id.*
32. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 817 (5th Cir. 2018) (citing *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp.*, 867 F.3d 564, 571 (5th Cir. 2017)).
33. *Id.* at 818 (citing *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 495 (5th Cir. 2013)).
34. *Id.* at 821 (citing *Auer*).
35. *Id.* at 818 (citing *Elgin Nursing*, 718 F.3d at 493).
36. Administrative Procedure Act, 5 U.S.C. § 706 (2018).
37. *Id.*

decision reached."[38] Although there are several factors that contribute to the harmless error analysis, the only relevant issue here is "an estimation of the likelihood that the result would have been different."[39]

B. WCX Contends Order Should be Vacated Under Harmless Error Standard

To make the argument that the Automatic Roaming Rule (47 C.F.R. § 20.12(d)) should apply, WCX contended that the FCC erred when deciding that WCX requested "Mobile Broadband Internet Access Service" (MBIAS) instead of a roaming agreement.[40] In response, AT&T argued that, in their complaint, WCX alleged a violation of 47 C.F.R. § 20.12(e), conceding that it was indeed a MBIAS request because the rule applies to those transactions.[41]

WCX did not point to any facts sufficient to prove its request of a "roaming agreement"—no terms of an agreement with AT&T or any negotiation offers from either party.[42] On the other side, the FCC failed to show any representations besides WCX's own contentions to substantiate their finding that "WCX requests only a mobile broadband internet access service from AT&T."[43] While the FCC's contention that WCX alleged a violation of Section 20.12(e) in their complaint is true, WCX also alleged a violation of Section 20.12(d), stating they sought both services.[44] The court stated that the facts are insufficient to support WCX's claims. [45]

WCX alleged that the FCC's factual findings, including WCX's MBIAS request, "was the foundation for [its] legal conclusion that only Rule 20.12(e) applies[,]" stating that the FCC referenced this specific fact "four times" in their decision.[46] The court found that the FCC applied 20.12(e), instead of 20.12(d), because the FCC interpreted 20.12(d) to only apply to CMRS.[47] The FCC stated that "[t]hese, and these alone . . . are the services covered by Section 20.12(d)[,]" and that "WCX requests only mobile broadband Internet access service from AT&T."[48] Therefore, it makes no difference if WCX had requested MBIAS or solely a roaming agreement, because these are both non-interconnected services.[49] As long as AT&T

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38. *Id.* (citing *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001).
39. *Id.* at 819 (quoting *Shinseki*, 556 U.S. at 411).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* (quoting WCX's reply brief).
44. *Id.*
45. *Id.*
46. *Id.* at 819 (quoting WCX's reply brief).
47. *Id.*
48. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 819 (5th Cir. 2018) (quoting FCC decision) (internal citation omitted).
49. *Id.*

interconnected service was not involved, 47 C.F.R. § 20.12(d) did not apply.[50] The court found that Section 20.12(e) does apply because WCX is requesting a data service of some kind, and all non-interconnected services are covered under this rule.[51] Under the harmless error argument, the court held any error that may have been made by the FCC was harmless and therefore does not warrant vacatur, stating that WCX requested MBIAS instead of a roaming agreement.

C. WCX's Proposed Interpretation of Section 20.12

WCX contended that 47 C.F.R. § 20.12(d), the Automatic Roaming Rule, should apply to this transaction.[52] To make this argument, WCX used what is known as a "who-what" interpretation.[53] 47 C.F.R. § 20.12(a)(2)-(3) supplies the "who" that the regulation should apply to in terms of the automatic and data roaming obligations, and 47 C.F.R. § 20.12(d)-(e) addresses the "what" – which are the requirements by which these parties must abide.[54] Under this reading, AT&T is 47 C.F.R. § 20.12(a)(2)'s "who" because they are a company that supplies interconnected services to customers, which makes them liable to 47 C.F.R. § 20.12(d)'s "what."[55] This means they must provide automatic roaming upon reasonable request.[56]

In response, the FCC first argued that the "who-what" interpretation of 47 C.F.R. § 20.12 was not properly preserved and raised for the first time on appeal.[57]

The Communications Act states that a party seeking reconsideration can only "[rely] on questions of fact or law upon which the [FCC] . . . has been afforded no opportunity to pass."[58] However, the Act does not "require an argument to be brought up with specificity but only reasonably 'flagged' for the agency's consideration."[59] Therefore, the issue under this argument was "whether a reasonable [FCC] necessarily would have seen the question raised before us as part of the case presented to it."[60]

When WCX was originally in front of the FCC, they argued that, because their customers use their interconnected network while roaming on AT&T's network, 47 C.F.R. § 20.12(d) is applicable.[61] On appeal, WCX argued that it is not their customer's roaming on AT&T's network that allows this case to fall under 47 C.F.R. § 20.12(d). Rather it is what AT&T offers, specifically interconnected services, that allows Section 20.12(d) to apply.[62]

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 820.
54. *Id.*
55. *Id.* at 820.
56. *Id.*
57. *Id.*
58. *Id.* at 820 (citing 407 U.S.C. § 405(a)).
59. *Id.* (citing *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016)).
60. *Id.* (citing *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016)).
61. *Id.*
62. *Id.*

The court found that although WCX did not specifically raise the "who-what" interpretation originally, the proposed interpretation of 47 C.F.R. § 20.12 is "adequately preserved . . . ."[63] WCX stated in their original brief "AT&T offers interconnected voice and data service to its own customers, so it is subject to 47 C.F.R. § 20.12(d)."[64] Although it was not raised directly, this implication is enough to "tee up" this argument before the FCC, so they should have been aware that the interpretation of 47 C.F.R. § 20.12 was at issue in this dispute.[65] Therefore, the FCC had the opportunity to confront this question about the interpretation of 47 C.F.R. § 20.12 originally and again on appeal.[66] The court held that WCX's arguments involving the proper interpretation of 47 C.F.R. § 20.12 have not been waived.[67]

Because this issue was not waived, the court then looked to the merits of the 47 C.F.R. § 20.12 argument.[68] WCX argued that 47 C.F.R. § 20.12 is "clear and unambiguous and cannot yield to the [FCC's] reading[,]" meaning that the court, under their standard of review, can strike.[69]

The court found that 47 C.F.R. § 20.12 is ambiguous on its face.[70] Subsection (a)(2) states "automatic roaming obligations apply to CMRS carriers if such carriers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hands-off subscriber calls" and "the provision of push-to-talk and text-messaging service by CMRS carriers."[71] Assuming this provides the "who" and 47 C.F.R. § 20.12(d) provides the "what," there is still no other information given regarding when these obligations take place.[72] This is important because of the word "offer" used in subsection (a)(2).[73] Do the obligations of the Automatic Roaming Rule begin when the provider "offers" services to its own customers, or only when it "offers" services to roaming customers?[74] Because the regulation does not adequately answer this question, the court found it is not "clear and unambiguous," and therefore heavy deference to the agency's interpretation of the regulation applies.[75]

Keeping in mind that the FCC's interpretation was not "plainly erroneous or inconsistent with" 47 C.F.R. § 20.12, the court held that the FCC's interpretation—that the service provided by the host carrier, not by the home carrier, is what determines whether the Automatic Roaming Rule applies—is permissible.[76] Importantly, this distinction is also supported by

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *See id*.
69. *Id.*
70. *Id.*
71. *Id.* (citing 47 C.F.R. §20.12(a)(2)).
72. *Id.*
73. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 821 (5th Cir. 2018).
74. *Id.*
75. *Id.*
76. *Id.* (citing *Auer v Robinson*, 519 U.S. 452, 461 (1997)).

the Automatic Roaming Rule itself: "[l]ike any other common carrier service offering, if a CMRS provider offers automatic roaming, it triggers its common carrier obligations with respect to the provisioning of that service."[77] The court held this is how 47 C.F.R. § 20.12 should be interpreted.[78]

Lastly, under this interpretation, the court considered whether AT&T is providing CMDS in this transaction.[79] The court mainly looked at the timing of the agreement to decide this.[80] In front of the Enforcement Bureau, the parties acknowledged that WCX sought a "data roaming agreement . . . shortly after the Data Roaming Order was released."[81] This made it clear that WCX requested CMDS services and AT&T provided them.[82] This finding showed that the FCC did not act arbitrarily in concluding that the Data Roaming Rule should be applied.[83]

77. *See id.* at 821 (quoting Automated Roaming Rule, 22 FCC Rcd. At 15827-28 (emphasis added)).
78. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 822 (5th Cir. 2018).
79. *Id.* at 822.
80. *Id.* at 822.
81. *Id.* (citing joint statement of the parties before the Bureau).
82. *Id.* at 822.
83. *Id.* at 822.