# Communications Law: Annual Review

## Staff of the Federal Communications Law Journal

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# COMPTEL v. Federal Communications Commission

**Veronica Lark**

978 F.3D 1325 (D.C. CIR. 2020)

Petitioners brought two petitions for review of a FCC forbearance order (the "Order") challenging (1) the reasonableness of the forbearance of wholesale requirements and (2) the FCC's failure to address public safety concerns about the forbearance of unbundling requirements, per its statutory obligations.[1] The D.C. Circuit denied petitions, holding that the FCC acted within the scope of its rulemaking authority and that neither component of the order was arbitrary or capricious.[2]

## I. BACKGROUND

Under the Telecommunications Act ("the Act"), the FCC has statutory authority to forbear enforcement of a regulation or provision when the following conditions are met: (1) a regulation is no longer necessary to ensure that "charges, practices, classifications, or regulations" in relation with a telecommunications carrier or service "are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."[3]

The case here arose when USTelecom, in representing Local Exchange Carriers ("incumbents"), petitioned the FCC to forbear two requirements imposed upon their legacy telecommunications networks. The two requirements derived from an order Congress included the Act to discourage the monopoly that incumbents had over the market.[4] The first requirement was a wholesale rate requirement, which required Local Exchange Carriers to offer a special rate—the difference between retail cost of service and marketing, billing, and collection costs—to Competitive Local Exchange Carriers ("insurgents").[5] The rate was in connection with Time-Division Multiplexing ("TDM") voice services—a mechanism allowing copper wires

1. COMPTEL v. FCC, 978 F.3d 1325, 1330–31 (D.C. Cir. 2020).
2. *See id.* at 1335–36.
3. *Id.* at 1328; *see also* 47 U.S.C. § 160(a); 47 U.S.C. § 160(b) (clarifying the public interest component with relation to the importance of enhancing competition); 47 U.S.C. § 1302 (delineating the FCC's statutory forbearance authority).
4. *See COMPTEL*, 978 F.3d at 1327–29.
5. *Id.* at 1327–28.

to transmit or receive signals.[6] The second requirement was the unbundling requirement to lease copper wire network elements known as the "Analog Loop" to allow for transmissions to be sent from service provider to consumer.[7]

The requests at issue did not pertain to newer next-generation services like Voice Over Internet Protocol (VoIP) which operate using the internet and do not implicate the services and elements at issue with copper wires.[8] USTelecom argued that the anticompetitive purpose of the 1996 requirements is no longer relevant because next-generation providers offering competitive prices have supplanted incumbents in the market.[9] Additionally, they argued, the requirements disincentivized insurgents from transitioning to next-generation services by subsidizing their use of legacy systems.[10]

The FCC assessed the issue pursuant their forbearance authority under 47 U.S.C. § 160(a).[11] The first prong of § 160(a) asks whether the regulation is no longer necessary "to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory." [12] The FCC found that if prices went up for insurgents' purchasing services, it is unlikely that such an increase would be unreasonable for consumers because "intermodal competition will discipline prices."[13] Under the second prong of § 160(a) —concerning whether the regulation is not necessary to protect consumers—the FCC determined that consumers did not need the protection of these requirements due to the competition that currently exists between providers.[14] And finally, under the third prong of § 160(a)—concerning whether the public interest benefits from forbearance—the FCC determined that the public would benefit because insurgents and incumbents would shift to next-generation offerings.[15]

The resulting Order found for incumbents because they face competition from a myriad of telecommunications offerings, and, as a result, no longer have the same level of control over the market.[16] Incumbents now have "just 12% of all voice connections . . . and 37% of all wireline telephone connections."[17]

Commentators opposed the forbearance Order for numerous reasons, many of which were assessed in the petitions for review before the D.C. Circuit.[18]

6. *See id.* at 1328.
7. *Id.*
8. *COMPTEL*, 978 F.3d at 1329.
9. *Id.*
10. *Id.*
11. *Id.* at 1328.
12. *Id.*
13. *Id.* at 1328, 1330.
14. *COMPTEL*, 978 F.3d at 1328, 1330.
15. *Id.*
16. *See id.* at 1329–30.
17. *Id.* at 1330.
18. *Id.* at 1329.

## II. ANALYSIS

In response to the FCC's forbearance Order, two parties petitioned for review, challenging the provisions at issue.[19] Incompas challenged the wholesale requirement and California Public Utilities Commission ("CPUC") challenged the unbundling provision.[20] The court consolidated the two cases due to their similarity and USTelecom intervened for the FCC.[21]

The court assessed the contentions raised concerning the wholesale requirement.[22] Specifically, Incompas asserted that the FCC used the wrong market assessment by looking at the national market competition.[23] However, the court agreed with the FCC's scope and assessment, specifically because the agency is engaged in national telecommunications policy-making.[24] The court similarly assessed Incompas' contention that the FCC did not consider the effect on rural markets in the Order.[25] The court agreed with the FCC's scope because the rural market is not comprised of the price-cap incumbents who are affected by the Order.[26] The court agreed that this scope of the Order in relation to the national market and in disregard of rural markets specifically fit within the FCC's authority and did not violate *SEC v. Chenery Corp.* as petitioners urged.[27] When considering CPUC's argument concerning the forbearance of unbundling, the D.C. Circuit similarly agreed with the FCC because its analysis mirrored the analysis for the wholesale requirement.[28]

The court found two separate instances that may have provided grounds for remanding the case, although the court did not ultimately do so.[29] In the Order, the FCC claimed that incumbents were "trapped" by the requirements; however, the court noted a clarifying footnote explaining how "incumbents can relieve themselves of unbundling requirements by retiring copper," allowing the court to find this to be just "careless wording," and not "essential to the FCC's rule," thereby mitigating the need for remand.[30] The FCC also failed to address California's concern with public safety, which is a mandate that the FCC is required to consider; however, the court said that this situation was one of "exceptional circumstances."[31]

19. *COMPTEL*, 978 F.3d at 1330–31.
20. *Id.*
21. *Id.* at 1331.
22. *See id.* at 1331–33.
23. *See id.* at 1331–32.
24. *COMPTEL*, 978 F.3d at 1331–32.
25. *Id.* at 1332.
26. *Id.*
27. *See id.* (citing SEC v. Chenery Corp., 318 U.S. 80, 87–88 (1943)).
28. *See COMPTEL*, 978 F.3d at 1333.
29. *See id.* at 1333–34.
30. *Id.* at 1333.
31. *Id.* at 1334.

## III. CONCLUSION

The FCC's forbearance authority was affirmed.[32] Accordingly, the court denied Incompas' and CPUC's petitions for review.[33]

32. *Id.* at 1335.
33. *COMPTEL*, 978 F.3d at 1336.

# Competitive Enterprise Institute v. Federal Communications Commission

**Brittany Gault**

970 F.3D 372 (D.C. CIR. 2020)

In *Competitive Enterprise Institute v. Federal Communications Commission*, the D.C. Circuit partially vacated the FCC's New Charter Order.[1] The court found that consumers had proper standing to challenge the first and third conditions[2] imposed on the merger, and subsequently vacated these conditions considering the FCC's refusal to defend on the merits.[3] The court dismissed the remainder of the appeal for lack of standing.[4]

## I. BACKGROUND

This case involved the Competitive Enterprise Institute's (CEI) challenge of merger conditions imposed by the FCC in its New Charter Order.[5] The New Charter Order approved the merger of Charter Communications Inc, Time Warner Cable, and Bright House Networks, which created New Charter, subject to specified conditions.[6] CEI, along with a handful of New Charter customers, challenged four of the conditions on New Charter in this case.[7]

## II. ANALYSIS

### A. Jurisdiction

Per the Communications Act, any individuals "aggrieved" or "adversely affected" are permitted to appeal an FCC order to the D.C. Circuit.[8] Under the Communications Act, a petition for reconsideration is only required for judicial review in cases where the party seeking review 1) was not party to the proceedings or 2) "relies on law which the commission has

1. Competitive Enter. Inst. v. FCC, 970 F.3d 372, 388–89 (D.C. Cir. 2020); Applications of Charter Commc'ns, Inc., Time Warner Cable, Inc., and Advance/Newhouse P'ship, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327 (2016) [hereinafter *New Charter Order*].
2. The FCC imposed six total conditions on the New Charter merger. Four of the six were challenged in this appeal by CEI. *Competitive Enter. Inst.,* 970 F.3d at 387.
3. *Competitive Enter. Inst.,* 970 F.3d at 388.
4. *Id.*
5. *Id.* at 376; *New Charter Order*, 31 FCC Rcd. 6327.
6. *Competitive Enter. Inst.*, 970 F.3d at 378.
7. *Id.* at 376.
8. *Id.* at 380.

been afforded no opportunity to pass."[9] The FCC argued that appellants forfeited rights to seek reconsideration when they failed to file comments earlier in the proceeding.[10] Still, the court has held that the FCC may have such "opportunity to pass" even if a party seeking review never raised the issue. Here, the court found that the FCC had sufficient "opportunity to pass," citing CEI's initial filings of comments and objections made by dissenters to the New Charter Order.[11]

### *B. Constitutional Standing: Causation and Redressability*

To establish constitutional standing necessary for Article III's case or controversy requirement, a party must demonstrate both causation and redressability.[12] This is more difficult to establish in cases concerning the conduct of a third party not before the court.[13] In these cases, a third party must act in a manner to produce causation and permit redressability."[14] Permissible theories of standing for third parties must demonstrate that they are not based on "mere speculation."[15] The nature of the relationship between causation and redressability was also a particular point of contention between the majority and the dissent.[16] The majority relied on economic arguments suggesting that market incentives will induce New Charter to adjust business practices in a manner beneficial to the appellant-consumers once FCC-imposed conditions are removed.[17] In contrast, the dissent remained unconvinced that economic theory will translate to business reality, making redressability unlikely for four contested conditions.[18]

#### 1. The First Condition: Network "Interconnection"

The first contested condition concerns the agreements made between New Charter and "edge providers."[19] These agreements allow broadband providers to collect payment in exchange for allowing edge providers to reach their subscribers.[20] The New Charter Order prohibited these agreements, causing New Charter to forego revenue.[21] The court found that this prohibition harmed New Charter consumers by increasing broadband prices.[22] Plaintiffs also offered related claims alleging harm to broadband quality.[23] Although the court deemed the quality-based claims too speculative, plaintiffs

9. *Id.*
10. *Id.*
11. *Competitive Enter. Inst.*, 970 F.3d at 381.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Competitive Enter. Inst.*, 970 F.3d at 381–82, *id.* at 389 (Sentell, J., dissenting).
17. *Competitive Enter. Inst.*, 970 F.3d at 382–85.
18. *Id.* at 389 (Sentell, J., dissenting).
19. *Id.* at 382–85.
20. *Id.* at 382.
21. *Competitive Enter. Inst.*, 970 F.3d at 382–83.
22. *Id.*
23. *Id.*

prevailed upon their theory of price harm.[24] Evidence demonstrated that the loss of these agreements resulted in lost revenue, and that consumer bills increased following the merger.[25] Expert witnesses connected the increased prices to the merger condition.[26] The court also considered the unique pricing dynamics of two-sided markets–accepting New Charter's assertion that it operates in a two-sided market, citing *Ohio v. American Express* as persuasive support for consideration of indirect network effects on consumer pricing.[27] The court held that the same evidence proved redressability. Per economic principles, the removal of the interconnection prohibition would allow New Charter to reenter contracts with edge providers, re-balancing the two-sided market to result in a price decrease.[28]

### 2. The Third Condition: Discounted Service

The third condition required New Charter to provide discounted Internet services to a set number of low-income individuals.[29] Specifically, the plan required New Charter to offer 30 mbps broadband service at the cost of $14.99 per month.[30] Given the lack of similar programs at each company prior to the merger, the court concluded that this policy would not have existed but for the mandatory merger condition.[31] In light of the theoretical economic impact coupled with the actual higher cost to consumers post-merger, the court held that petitioners sufficiently demonstrated causation.[32] The court also held that this harm was redressable–finding that New Charter was "unlikely to retain the program voluntarily."[33] The majority opined that there was a "substantial likelihood" that if permitted, New Charter would restrict the low-income assistance program, and that after doing so, firms would have ability and motive to reduce pricing for other consumers.[34]

### 3. The Second Condition: User Based Pricing

The second New Charter condition prohibited usage-based pricing.[35] The arguments made by the consumers articulated how this policy effectually used some low-frequency users to subsidize the costs of providing service for others.[36] However, presented with a dearth of evidence that any of the three merged entities offered usage-based pricing plans before merging, the court was uninclined to see how the lack thereof was directly tied to the merger.[37]

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24. *Id.* at 382–83.
25. *Id.*
26. *Competitive Enter. Inst.*, 970 F.3d at 382–83.
27. *Id.* at 383 (citing Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018)).
28. *Id.*
29. *Id.* at 385–86.
30. *Id.* at 386.
31. *Competitive Enter. Inst.*, 970 F.3d at 385–86.
32. *Id.* at 386–87.
33. *Id.* at 387.
34. *Id.*
35. *Id.* at 385–87.
36. *Competitive Enter. Inst.*, 970 F.3d at 385–87.
37. *Id.*

The court held that petitioners lacked standing to challenge this condition having failed to show causation or redressability.[38]

#### 4. The Fourth Condition: Infrastructure Buildout

The court rejected standing for the consumers challenging the infrastructure provision of the New Charter Order on the grounds that the issue lacked redressability. Since the merged entity already took substantial steps in enacting this program, the court did not believe that the removal of the condition would change the course of action already set in motion. Without the guaranteed abolition of the program or the revenue regained from it, the petitioners failed to articulate how they could directly benefit from removal of the provision.

#### 5. Dissent

Judge Sentelle dissented and concurred in part–dissenting from the majority holding as to the first and third conditions and concurring with the majority finding that CEI did not have standing to challenge the second and fourth conditions.[39] The dissent would find that CEI lacked standing to challenge all of the proposed conditions in dispute.[40] Having opined that CEI lacks standing to challenge any of the contested conditions, the dissent offered no further thoughts on the merits of the case,[41] discussed hereafter.

### *C. Merits*

Subsequent discussion of the merits of the case was comparatively brief.[42] The court declined to offer a full substantive review on the merits in light of the fact that the FCC argued only the issue of standing and made no arguments in the alternative.[43] Objections raised by appellants included: concerns over whether statutory authority to consider the public interest implications of granting "individual licenses" extends to mergers in their entirety; whether conditions could be imposed on *all* licenses, including wireless licenses, although broadband Internet provision is not (directly) covered by Title II; and the imposition of merger conditions that advance consumer benefits that are non-specific to the transaction under review.[44] Although the court declined to resolve these "troubling" questions, its discussion suggests the court found them to be compelling.[45] This approach invites future challenges to FCC-imposed merger conditions and suggests that there may be potential for such a claim to succeed on the grounds that they extend beyond the statutory authority of the FCC. Furthermore, although

38. *Id.*
39. *Id.* at 389 (Sentell, J., dissenting).
40. *Id.* (Sentell, J., dissenting).
41. *Competitive Enter. Inst.*, 970 F.3d at 389 (Sentell, J., dissenting).
42. *See id.* at 388.
43. *Id.*
44. *Id.*
45. *Id.*

based purely upon standing, the resolution adopted by the court, in effect, struck the provisions with the strongest connection to the merit-based objections.

# Barr v. American Association of Political Consultants

**Bethel Etta**

140 S. CT. 2335 (2020)

In *Barr v. American Association of Political Consultants*,[1] the U.S. Supreme Court affirmed the Fourth Circuit's decision to invalidate a 2015 amendment to the Telephone Consumer Protection Act (TCPA), which created an exception to the prohibition against robocalls for calls made to collect a debt owed to the federal government.[2] The Court affirmed that the government-debt exception to the restriction against robocalls was an unconstitutional content-based restriction on speech that failed strict scrutiny.[3] The Court incorporated traditional severability principles to invalidate and sever the government-debt exception amendment of the TCPA.[4]

## I. BACKGROUND

In response to several million consumer complaints submitted to the federal government, Congress enacted the Telephone Consumer Protection Act of 1991 to prohibit robocalls to cell and home phones.[5] Congress justified its prohibition against robocalls as "the only effective means of protecting telephone consumers"[6] from the nuisance and invasion of privacy caused by incessant phone calls from automated telemarketers.[7] In 2015, an amendment to the TCPA created an exception to allow robocalls for the purpose of "collect[ing] a debt owed to or guaranteed by the United States."[8]

Plaintiffs are the American Association of Political Consultants and other political organizations that engage in political telemarketing.[9] Plaintiffs operate their organizations by making calls to citizens to "discuss candidates and issues, solicit donations, conduct polls, and get out the vote."[10] Plaintiffs claimed that the prohibition against robocalls to cell phones hindered their outreach; they sought a declaratory judgment in the lower courts against the U.S. Attorney General and the FCC, citing First Amendment violations.[11]

1. Barr v. Am. Ass'n. of Pol. Consultants, 140 S. Ct. 2335 (2020).
2. *Id.* at 2343–44.
3. *Id.* at 2343–45.
4. *Id.* at 2352.
5. *Id.* at 2344.
6. 47 U.S.C. § 227 (2020).
7. *Barr*, 140 S. Ct. at 2344.
8. 47 U.S.C. § 227(b).
9. *Barr*, 140 S. Ct. at 2345.
10. *Id.*
11. *Id.*

The U.S. District Court for the Eastern District of North Carolina ruled that the government-debt exception to robocall restrictions was a content-based restriction, but that it could survive strict scrutiny because of a compelling government interest to collect debt.[12] The U.S. Court of Appeals for the Fourth Circuit vacated the district court and ruled that the government-debt exception was unconstitutional and could not survive strict scrutiny.[13] Following traditional severability principles, the Fourth Circuit further ruled that the government-debt exception is severable from the underlying robocall restriction of the TCPA.[14]

Because the ruling invalidated a part of a federally enacted statute, the Government petitioned for writ of certiorari and plaintiffs supported the petition, believing the Court of Appeals did not provide sufficient relief and the court should have invalidated the entire robocall restriction.[15]

## II. ANALYSIS

### *A. TCPA's Government-Debt Exception is an Unconstitutional Content-Based Restriction*

The initial First Amendment question presented is whether the TCPA's robocall restriction, with the government-debt exception, is a content-based restriction.[16] The Court held that it was.[17] A law regulating speech is a content-based restriction if it "on its face draws distinctions based on the message the speaker conveys" and "singles out specific subject matter for differential treatment."[18] The Court noted that § 227(b)(1)(A)(iii), the provision outlining the government-debt exception for robocalls, conditions the legality of robocalls on whether they are made to collect debts owed to the federal government and stated that such preference for the type of permissible robocalls was a clear example of a content-based restriction.[19]

The Government advanced three arguments that the government-debt exception of the TCPA was content-neutral, all of which the Court found unpersuasive.[20] First, the Government suggested that § 227(b)(1)(A)(iii) differentiated speech based on speakers, i.e., authorized debt collectors, not based on the content of the speech.[21] The Court rejected this argument, citing that the text of the statute singles out robocalls "made solely to collect a debt owed to or guaranteed by the United States," not *all* robocalls made from authorized debt collectors.[22] The Court additionally noted that even if the statute's distinction was based on the speaker, it does not "automatically

12. *Id.*
13. *Id.* at 2345.
14. *Id.*
15. *Barr*, 140 S. Ct. at 2346.
16. *See id.*
17. *Id.*
18. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)).
19. *Id.* at 2347.
20. *See id.* at 2346–47.
21. *Barr*, 140 S. Ct. at 2346–47.
22. *Id.* at 2347 (emphasis added).

render the distinction content neutral."[23] Second, the Government argued that the legality of a robocall does not depend on the content of the speech, but instead on whether the caller engages in a particular economic activity.[24] The Court, again, was unpersuaded because the statute in this case focuses on whether the caller *speaks* about a particular topic.[25] Lastly, the Court rejected the Government's claim that deeming the government-debt exception as an unconstitutional content-based restriction would lead to a slippery slope invalidating most forms of economic regulation.[26] The Court dismissed this concern stating that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."[27] And the Court assured that the judiciary can distinguish between impermissible content based restrictions and ordinary regulations of commercial activity that impose only incidental burdens on speech.[28]

The Court concluded that the government-debt exception was content-based and therefore subject to strict scrutiny review.[29] The Government itself conceded that it could not satisfy strict scrutiny because it could not fully justify the distinction between government debt collection speech and other modes of robocall speech.[30] The Court, therefore, held that the government-debt was an unconstitutional content-based restriction on speech.[31]

### *B. Severability*

Next, the Court turned to the question of whether to strike down the entirety of the 1991 robocall restriction or to only sever the government-debt exception instead. The Court recognized that Congress's competing interests in debt collection as well as consumer privacy can concurrently exist: "Congress's addition of the government-debt exception in 2015 does not cause [the Court] to doubt the credibility of Congress's continuing interest in protecting consumer privacy."[32] So the Court applied traditional principles of severability and only struck the unconstitutional 2015 amendment.[33]

Where a federal statute contains an express severability or non-severability clause, the Court will adhere to the text of the clause.[34] Where Congress does not include such clauses, courts may often presume that an unconstitutional provision is severable from the remainder of the statute.[35] The Court's preference for partial invalidation in its tendency to presume severability stems from its efforts to avoid "judicial policy making or de facto

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23. *Id.* (quoting *Reed*, 576 U.S. at 170).
24. *Id.*
25. *Id.* at 2347.
26. *Id.*
27. *Barr*, 140 S. Ct. at 2347 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011)).
28. *Id.*
29. *Id.* (quoting *Reed*, 576 U.S. at 165).
30. *Id.*
31. *Id.* at 2347.
32. *Id.* at 2348.
33. *See Barr*, 140 S. Ct. at 2349.
34. *Id.* at 2349.
35. *Id.* at 2350.

judicial legislation in determining just how much of the remainder of a statute should be invalidated."[36] In this case, however, the presumption of severability was unnecessary because the severability clause in the Communications Act covered the TCPA's robocall restriction and its subsequent government-debt exception.[37]

The Court also considered the equal protection principles implicated by the First Amendment violations—in this case, Congress favoring government-debt collection robocalls and discriminating against other robocalls.[38] The Court weighed the possible cures for this unequal treatment and considered either "extending the benefits or burdens to the exempted class" or "nullifying the benefits or burdens for all."[39] The Court chose the latter and severed the government-debt exception to cure unequal treatment and left the longstanding general robocall restriction in place.[40]

## III. CONCLUSION

The Court upheld the Fourth Circuit's judgment that the government-debt exception to the TCPA's restrictions against robocalls was unconstitutional and cured the violation by invalidating and severing it from the remainder of the statute.[41]

36. *Id.* at 2352.
37. *Id.*
38. *Barr*, 140 S. Ct. at 2354.
39. *Id.*
40. *Id.* at 2355.
41. *Id.* at 2356.